CIVIL TRIALS GUIDEBOOK

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FOREWORD

I congratulate the Contributors and the Editors of this Civil Trials Guidebook. They have produced an excellent reference book despite their heavy schedules. They must have also spent many weekends to pen them thus depriving their families of their time.

There are many books on Civil Procedure available in the bookstores. They are all equally excellent in forms and contents. However, for quick reference during court trial this Civil Trials Guidebook will prove to be handy. Its contents are trial-focused and can be updated if necessary. With this Book next to a Judge or Judicial Officer or counsel during trial adjournment to consider a point raised by any party is avoided.

The approach adopted in this Book should make research work on the finer details in civil procedure almost effortless. Time will be saved. Law students who are learning civil trial procedure should also find this Book of great help in understanding the intricacies of civil trial procedure.

The idea of having Bench reference books for the courts in Sabah and Sarawak was inspired by the Judicial Commission of New South Wales Australia and in particular the strong encouragement by its Chief Executive Officer Mr. Ernest Schmatt. To them we acknowledge and appreciate their kind assistances and valuable contributions.

Finally, I applaud the Kelab-Kelab Sukan dan Rekreasi Mahkamah-Mahkamah Sabah dan Sarawak for undertaking the publication of this Civil Trials Guidebook.

TAN SRI DATUK SERI PANGLIMA RICHARD MALANJUM
Chief Judge of Sabah and Sarawak
20th January 2009

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PREFACE

The trials of civil cases and the law on civil procedure have seen tremendous developments. Mediation has become a norm before a dispute goes for a full blown trial. The numerous civil cases reported in the law journals have increased, touching almost all aspects of civil trials and this reflects the complexity of civil procedure.

As the title of the book, “Civil Trials Guidebook”, suggests, it is intended to serve as a quick guide and reference on the various complex procedures to the parties handling a civil trial. It is meant for the legal and judicial officers, legal practitioners and those involved in civil litigation. It is written in a simple manner thus making it readable to law students and laymen.

This book comprises of 40 chapters and has addressed most of the areas in civil procedure. Nevertheless the information contained in this book is not exhaustive. Where possible, attempts have been made to address both the Rules of High Court and the Subordinate Court Rules. There will certainly be ongoing improvements to this book. It must however be emphasized that the information in this book does not necessarily reflect the official position.

This book is the result of a joint concerted effort of the contributors of the chapters. We express our appreciation to all the contributors.

Ravinthran Paramaguru

Jagjit Singh a/l Bant Singh

Azreena Aziz

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1

Civil Courts: Structure and Jurisdiction

Jagjit Singh a/l Bant Singh

Chapter 1

Civil Courts: Structure and Jurisdiction

[1] Structure and the jurisdiction:

(a) Magistrates Court
(b) Sessions Court
(c) High Court
(d) Court of Appeal
(e) Federal Court

[2] Transfer of cases

[1] Structure and the jurisdiction:

(a) Magistrates Court

(i) Except for matters listed under section 93 of the Subordinate Courts Act 1948 (Act 92) a First Class Magistrate has the power to try all matters where the amount in dispute or value of the subject matter does not exceed twenty-five thousand ringgit.

See: Section 90 of the Subordinate Courts Act 1948.

(ii) The jurisdiction of a Second Class Magistrate or also known as the Small Claims Court is found in section 92 of the Subordinate Courts Act 1948 and Order 54 of the Subordinate Court Rules 1980 (SCR). More is discussed on the Small Claims Procedure in Chapter 2.

(iii) Magistrates' Courts are precluded from hearing actions involving specific performance of contract or injunctions.

See: Section 69 of the Subordinate Courts Act 1948.

(iv) The local jurisdiction of Magistrates' Courts can be found in section 76 of the Subordinate Courts Act 1948 which provides that the Yang di-Pertuan Agong has the power to assign local limits of a jurisdiction, or if no local limis have been assigned, the Magistrates' Courts have jurisdiction arising from the local jurisdiction of the respective High Court.

(v) The parties may consent to the Magistrates Court having jurisdiction over a suit even where the claim exceeds the value of the limits prescribed by the Subordinate Courts Act 1948. This agreement must be in writing and must be filed in the Magistrates Court.

See: Section 93(1) of the Subordinate Courts Act 1948.

(vi) A plaintiff may relinquish part of his claim so as to enable the action to be brought within the jurisdiction of the Magistrates Court. However claims cannot be split particularly for this purpose.

See: Sections 93(1) and 68 of the Subordinate Courts Act 1948.

(vii) The jurisdiction of the Magistrates Court on adjudicating immovable property matters is stated in section 93(1) of the Subordinate Courts Act 1948.

(b) Sessions Court

(i) Except for matters listed under section 69 of the Subordinate Courts Act 1948 the Sessions Court has the jurisdiction to hear all actions and suits where the amount in dispute or value of the subject matter does not exceed RM250,000.00.

See: *Bank Negara Malaysia v G. Glesphy* [1992] 1 MLJ 151;
Foo Sey Koh & Ors v Chua Seng Seng & Ors. [1986] 1 MLJ 501.

(ii) The Sessions Courts have unlimited jurisdiction in respect of motor vehicle accidents, landlord and tenant and distress matters.

See: Section 65(1)(a) of the Subordinate Courts Act 1948;
BNM v G. Glesphy [1992] 1 MLJ 151.

(iii) Section 69 of the Subordinate Courts Act 1948 precludes Sessions Courts from hearing actions involving specific performance of contract or for an injunction.

(iv) The local jurisdiction of Sessions Courts can be found in section 59 of the Subordinate Courts Act 1948 which provides that the Yang di-Pertuan Agong has the power to assign local limits of a jurisdiction or if no local limis have been assigned, the Sessions Courts have jurisdiction arising from the local jurisdiction of the respective High Court.

(v) The parties may consent to the Sessions Court having jurisdiction over a suit even where the claim exceeds the value of the limits prescribed by the Subordinate Courts Act 1948. This consent must be in writing and filed in the Sessions Court.

See: Sections 65(3) and (4) of the Subordinate Courts Act 1948.

(vi) Similar to the procedure in the Magistrates Courts, a plaintiff may relinquish part of his claim in the Sessions Court so as to enable the action to be brought within the jurisdiction of the Sessions Court. Similarly claims cannot be split merely for this purpose.

See: Sections 93(1) and 68 of the Subordinate Courts Act 1948.

(vii) Generally under section 69 of the Subordinate Courts Act 1948 the Sessions Courts have no jurisdiction to hear matters involving immovable property. However there are exceptions. The Sessions Court has jurisdiction to hear actions or suits for the recovery of immovable property, claim for rent, mesne profits or damages arising from the Defendant holding over or resisting the Plaintiff's right of possession provided there is no *bona fide* question of title involved.

See: Sections 70 and 71 of the Subordinate Courts Act 1948;
Hiew Kim Swee v G.C. Gomez [1955] MLJ 170.

(viii) The Sessions Courts also have supervisory power to call for the records of a Magistrates Court within the local limits, for the purpose of ensuring the correctness, legality or propriety of any decision passed. If the judge feels that the decision was illegal or improper, he must forward the record with remarks to the High Court.

See: Section 54 of the Subordinate Courts Act 1948.

(c) High Court

(i) There are two High Courts of coordinate jurisdiction, namely the High Court in Malaya and the High Court in Sabah and Sarawak.

See: Article 121(1) of the Federal Constitution.

(ii) Section 23(1) of the Courts of Judicature Act 1964 (Act 91) list out the civil jurisdiction of the High Courts as follows:

"Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where—

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or alleged to have occurred; or

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other court.".

(iii) The High Court has unlimited jurisdiction to hear all civil matters, subject to Article 128 of the Federal Constitution which concerns the validity of written law made by Parliament or State or any dispute between federation and states and between one state and another and Article 130 of the Federal Constitution which relates to the interpretation of the Constitution.

(iv) The High Court in Malaya and the High Court in Sabah and Sarawak has local jurisdiction or territorial jurisdication of all states in Malaya and Sabah and Sarawak respectively, including territorial waters and air space above the states. Each branch of the High Court has full and concurrent civil jurisdiction and sections 23 and 24 of the Courts of Judicature Act 1964 provides the civil jurisdiction where an action is to be filed.

See: Sections 3 and 23 of the Courts of Judicature Act 1964;
Syarikat Nip etc Contractor v Safety and General Insurance Co Sdn. Bhd. [1975] 2 MLJ 115;
Sova Sdn Bhd v Kasih Sayang Realty Sdn. Bhd. [1988] 2 MLJ 268;
Lam Kok Trading v Yorkshire Swithchgear [1976] 1 MLJ 239.

(v) Article 126 of the Federal Constitution empowers the High Court to punish any contempt of itself.

(vi) The High Court has jurisdiction to hear appeals from subordinate courts. It is important to note that no appeal however can be made if the value is RM10,000.00 or less, except on a question of law. However there is a right of appeal irrespective of amount of subordinate court decisions in proceedings related to the maintenance of wives or children.

See: Sections 27 and 28 of the Courts of Judicature Act 1964.

(d) Court of Appeal

(i) The jurisdiction of the Court of Appeal can be found in Article 121(1B) of the Federal Constitution, which states *inter alia* that the court has the jurisdiction to determine appeals from the High Court decisions.

(ii) The civil jurisdiction of the Court of Appeal is stated in section 67(1) of the Courts of Judicature Act 1964 which provides—

> "*The Court shall have the jurisdiction to hear and determine appeals, from any judgement or order of any High court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.*"

(iii) The Court of Appeal has no original jurisdiction and is merely appellate in nature. Appeals to this court are by way of rehearing, and the court may draw inferences of fact, give any judgement or make any order as the case requires. A new trial may be ordered but only in limited circumstances, not based on improper admission or rejection of evidence unless the court is of the view that a miscarriage of justice or a substantial wrong has occurred.

(iv) Article 126 of the Federal Constitution states that the Court of Appeal has the power to punish any contempt of it.

(e) Federal Court

(i) The jurisdiction of the Federal Court can be found in Article 121(1) of the Federal Constitution which stipulates that this court has the jurisdiction—

- to determine appeals from decisions of the Court of Appeal, the High Court or a High Court Judge;

- to hear matters specified in Articles 128 and 130 of the Federal Constitution;

- to determine such other matters as may be conferred by or under federal law.

(ii) Unlike the Court of Appeal, the Federal Court is vested with original, appellate and advisory jurisdiction. Unlike criminal appeals, civil appeals from the Court of Appeal to the Federal Court are not as a matter of right. One must obtain leave of appeal from the Federal Court.

See: Articles 128 and 130 of the Federal Constitution;
Section 97 of the Courts of Judicature Act 1964.

(iii) Similar to the Court of Appeal the Federal Court too possesses the power to punish any contempt of it.

See: Article 126 of the Federal Constitution.

[2] Transfer of cases

(i) With the tremendous improvements in the communications and transportation systems courts are often face with applications to transfer proceedings from one court to another court. For example in the case of *Tung Lian Enterprise v Poly Trading Company* [1993] 4 CLJ 189 the defendant's application to transfer the case from the Sessions Court Taiping, Perak, to the Sessions Court Kuala Lumpur was dismissed by the Sessions Court Taiping but on appeal the case was allowed to be transferred to the Sessions Court Kuala Lumpur.

(ii) The relevant provisions for the transfer of cases in the subordinate courts are found in section 99A of the Subordinate Courts Act 1948 and section 2 of the Third Schedule. Section 99A reads as follows:

> "99A. In amplication and not in derogation of the powers conferred by this Act or inherent in any Court, and without prejudice to the generality of any such powers, every Sessions Court and Magistrates' Court shall have the further powers and jurisdiction set out in the Third Schedule".

Section 2 of the Third Schedule read as follows:

> 2. Power to stay proceedings unless they have been instituted in the District in which –

(a) the cause of action arose, or
(b) the defendant resides or has his place of business, or
(c) one of several defendants resides or has his place of business, or
(d) the facts on which the proceedings are based exist or are alleged to have occurred, or
(e) for other reasons it is desirable in the interests of justice that the proceedings should be had.

(iii) The relevant provision for the transfer of proceedings in the High Court is section 23(1) of the Courts of Judicature Act 1964.

(iv) A liberal approach should be adopted in construing section 2 of the Third Schedule. The Court should lean in favour of the applicant when applying section 2 of the Third Schedule and not resort to a strict, rigid and dogmatic approach.

See: *Tung Lian Enterprise v Poly Trading Company* [1993] 4 CLJ 189;
Khor Seow Kee v Boon Hock Sawmill Sdn. Bhd. [1993] 4 CLJ 365.

(v) The conditions in section 2(1)(a) to (e) of the Third Schedule to the Subordinate Courts Act 1948 and section 23(1)(a) to (d) of the Courts of Judicature Act 1964 should be read disjunctively. The word "or" was stated immediately after every condition stipulated therein.

See: *Yap Thiam Choy v Sykt Pembenaan Fajar Baru (Rembau) Sdn. Bhd.* [2000] 4 CLJ 296.

(vi) The critical issue for determination for transfer of proceedings is which court is the *forum conveniens* to hear the dispute notwithstanding the fact that it has jurisdiction to do so.

See: *Malacca Securities Sdn. Bhd. v Loke Yu* [1998] 3 CLJ 22.

(vii) For all practical purposes the branch High Courts can be considered as having their own jurisdiction. It would therefore be oppressive and vexatious to commence proceedings in a particular branch of the High Court in Malaya when it could have been more suitably or appropriately commenced in another branch as it would defeat the very object for which the branch High Court were set up. It would amount to a defendant being improperly vexed by legal procedure if a plaintiff is to be allowed to choose a branch High Court of his choice by virtue of the local jurisdiction of the High Court in Malaya.

It is part of the general jurisdiction of the court to prevent such abuse. The corollary is that an action should be filed and heard in the proper branch of the High Court in Malaya.

See: *Malacca Securities Sdn. Bhd. v Loke Yu* [1998] 3 CLJ 22.

(viii) The word 'any' in phase "power to transfer any proceeding to any other court…" in para 12 of the Schedule to the Courts of Judicature Act 1964 is clear indication that the word 'court' therein goes beyond the High Court in Malaya and the High Court in Sabah and Sarawak. If the intention of the legislature was to confine the operation of para 12 to just the two High Courts then it would have used the word "the" instead of "any" as in s. 23(1) of the Courts of Judicature Act 1964. Hence, the word 'court' in the said para 12 must extend to and include as well the branch High Courts.

See: *Malacca Securities Sdn. Bhd. v Loke Yu* [1998] 3 CLJ 22.

(ix) Paragraph 12 of the Schedule to the Courts of Judicature Act 1964 also makes it clear that the power given to transfer proceedings is only from a High Court "to" any other High Court and not "from" any other High Court to itself. A High Court is therefore only empowered to transfer an action pending before it "to" any other High Court and not "from" any other High Court unto itself.

See: *Malacca Securities Sdn. Bhd. v Loke Yu* [1998] 3 CLJ 22.

(x) One of the conditions to determine *forum conveniens* is to consider where the cause of action arose. In a contact for the payment of money of breach occurs when there is a failure to pay the sum promised. That breach will have to be at the place where the payment is to be made and the cause of action will therefore accrue in that place.

See: *Bumiputra Malaysia Berhad v Melewar Holdings Sdn. Bhd. & 4 Ors* [1990] 1 CLJ 1246.

(xi) Where there is no agreement as to the place where payment should be made then the payment should be made at the place where the plaintiff lives. In *Northey Stone Company v Gidney* [1894] 1 QB 99 Charles J said at p. 100:

> "The action is brought to recover the balance of the price of goods sold and delivered. According to the law applicable to contracts, there being no special stipulation as to the

place of payment, the defendant must pay at Bath, where his creditors, the plaintiffs, live."

(xii) Whether a court has the jurisdiction to transfer a case say from a High Court in Malaya or a Sessions Court in West Malaysia to the High Court or Sessions Court in Sabah and Sarawak or *vice versa* was discussed in the case of *Tong Ah Leek & Anor v Hup Seng Hin Machinery Trading Co* [1998] 4 AMR 3964 where it was held that such transfer has to be approved by both the Chief Judges of Malaya and Sabah and Sarawak.

See: *Tong Ah Leek & Anor v Hup Seng Machinery Trading Co* [1998] 4 AMR 3964;
Taman Rimba (Mentakab) Sdn. Bhd. v Sin Yew Poh Tractor Works [2002] 2 CLJ.

(xiii) However in *Dayasar Corp Sdn. Bhd. v CP Ng & Co Sdn. Bhd.* [1990] 1 MLJ 191 the Court of Appeal decided as follows:

"And which High Court again is determined by s 3 of the Courts of Judicature Act 1964 which is either Malaya or Borneo. It is quite clear to me that the respondent company, residing in Kuching, would come under s 23(1)(b) of the Courts of Judicature Act 1964. In *Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn. Bhd.* [1975] 2 MLJ 115, Hashim Yeop A Sani J (as he then was) held that the definition of local jurisdiction (in s 3 of the Courts of Judicature Act 1964) sets out the territorial jurisdiction of the High Court in Malaya and the High Court in Borneo as given in art 121 of the Constitution. While matters can be heard in any court of the courts in Malaya, I am of the view it was certainly not the intention of the legislature for any court in Malaya to assume jurisdiction of a matter arising in or which should be filed in a Borneo court. With respect I agree and adopt what is stated by Hashim J (as he then was) in *Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn. Bhd.* [1975] 2 MLJ 115 that the definition of local jurisdiction sets out and determines the territorial jurisdiction of either of the High Courts. By this I rule that since the defendant/respondent company is residing in Kuching, the matter should really be filed in the Borneo High Court, in particular Kuching.

Considered from the point of view of convenience, I also held that Kuching would be more convenient with the defendant residing there and the witnesses being there.

On the ground that the matter is in the High Court Borneo's jurisdiction to deal with and also alternatively on the ground of *forum convenience* being Kuching, I struck out the petition with liberty for the petitioner to have it filed in Kuching. I did consider whether a transfer to Kuching

was appropriate. I held that it was not as it was in the jurisdiction of the Borneo High Court. In the event I am wrong, the High Court of Borneo has a separate registry to administer and monitor their own cases in Kuching. The petition for winding up is under a special law and requires close supervision and that can only be done by the Kuching registry. I was of the view it was better that the petition be refiled at the proper registry. I duly struck out the matter.".

(xiv) This rule applied in *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413 was stated as follows:

"First, it is crystal clear from art 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court in Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory. As presently advised, there is absent in any Federal legislation that confers power upon the one High Court to transfer proceedings to the other.

This bifurcation of territorial jurisdiction was dealt with by Hashim Yeop A Sani J (later Chief Justice, Malaya) in *Sykt Nip Kui Cheong Timber Contractor v Safety Life & General Insurance Co Sdn. Bhd.* [1975] 2 MLJ 115. His Lordship observed that:

[I]t is all too clear that both the High Court in Malaya and thc High Court in Borneo have separate and distinctive territorial jurisdiction. Article 121(1) of the Constitution speaks of the two High Courts having 'co-ordinate jurisdiction' and the definition of 'local jurisdiction' in the Courts of Judicature Act 1964 speaks of the territorial jurisdiction of each of the two High Courts. Section 7(2) of the 1964 Act should not be misconstrued for what that subsection does is simply to get around the provision of O 11 Rule 1 of the Rules of the Supreme Court 1957 for convenience for otherwise unnecessary difficulties will arise in the process of the courts within Malaysia. The enactment of s 7(2) of the 1964 Act itself would strengthen the argument that the framers of the 1964 Act recognised the distinctive territorial jurisdiction of the two High Courts in Malaysia.

Second, the cases referred to by the learned judge in his judgment deal with petitions presented at one or more of the branches of the High Court in Malaya. There is no reported case — indeed counsel on both sides conceded this — where bankruptcy proceedings were transferred from the High Court in Malaya to the High Court in Sabah and Sarawak or *vice versa*.

The expression ‘State’ appearing in the Bankruptcy Act 1967 must be interpreted in the light of the Federal Constitution and the Courts of Judicature Act 1964. We are satisfied that there is nothing in the Act of 1967 or the Rules of 1969 that demonstrates an intention on the part of Parliament to create an exception in bankruptcy cases.

It follows, accordingly, that when s 93(7) speaks of transferring proceedings from one State to another, it refers to a State within the territorial jurisdiction of the respective High Courts.”.

(xv) In short that there can be no transfer of cases from West Malaysia to Sabah and Sarawak or *vice versa*. Accordingly where a case has been filed in the wrong territorial jurisdiction the proper prosedure would be to apply for the case to be striked out. Transfer of cases within West Malaysia and Sabah and Sarawak may be done with the approval of the Chief Judge of Malaya and the Chief Judge of Sabah and Sarawak respectively.

2

Small Claims Procedure

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Chapter 2

Small Claims Procedure

[1] Introduction

(a) A claim where the amount in dispute or the value of the subject matter of the claim does not exceed RM5,000.00 between parties who are individuals is referred to as a small claim. Small claims are required to be prosecuted in small claims court and the small claims procedure is set out in Order 54 of the SCR. Where the amount of claim exceeds RM5,000.00 then the claim is considered as an ordinary claim and may to be filed in the Magistrates Court, Sessions Court or the High Court, depending on the amount in dispute and the jurisdiction of the court.

(b) The object of the small claims procedure is to serve as an inexpensive, simplified and speedy mode of prosecuting a claim which is small, without legal representation. The advantages of small claims procedure are that the procedure is less formal and less expensive compared to that in the ordinary courts and more importantly the presiding judicial officer is allowed to mediate or conciliate the dispute to facilitate the disputing parties to reach an amicable settlement. The underlying purpose of the small claims procedure is to ensure that there is a balance between a claim made and the expense incurred in pursuing that claim.

See: *Tan Ah Chai v Loke Jee Yah* [1998] 4 CLJ 73.

(c) Order 54 of the SCR was originally named the "Proceedings in Second Class Magistrates' Courts" and was amended as the "Small Claims Procedure" in 1990.

See: Subordinate Courts (Amendment) (No 3) Rules 1990 (PU(A) 460/90);
Arahan Amalan No 4 Tahun 1990;
Arahan Amalan No 3 Tahun 1991.

[2] Parties in the small claims procedure

(a) Plaintiff must be an individual person.

(b) A body corporate such as a partnership, a society or a company cannot be a Plaintiff in the small claims procedure. Order 54 r. (2) expressly provides that an agent or assignee of a debt of another person cannot file proceedings in the small claims court.

See: Order 54 r. (1) and (2) of the SCR.

(c) Unlike the plaintiff there is no requirement for a defendant to be an individual person. The defendant may therefore also be a company or an agent.

See: Order 54 r. (1) of the SCR.

[3] Procedure in small claims

The specific procedure for small claims is provided in Order 54 of the SCR which includes the following:

(i) each claim must be in Form 164 in 4 copies [Order 54 r. 3(1) of the SCR];

(ii) the Plaintiff must state the amount and particulars of the claim and the Form 164 must be signed or thumbprinted by the Plaintiff personally [Order 54 r.4 of the SCR];

(iii) service of Form 164 may be effected by—

(i) personal service; or

(ii) prepaid registered post,

to the defendant's last known address [See Order 54 r. 5 (2) of the SCR];

(iv) if the defendant disputes the claim the defendant is required to deliver the defence in Form 165 in four copies within 14 days after service of claim [See Order 54 6(1) of the SCR];

(v) where the defendant wish to counterclaim against the plaintiff the amount and particulars of the counterclaim are required to be pleaded specifically in Form 165;

(vi) where there is a counterclaim the plaintiff either can admit to the defendant's counterclaim or dispute the said counterclaim in Form 166 [See Order 54 r. 6 of the SCR];

(vii) where a counterclaim together with any interest at the date of filing exceeds the sum of RM5,000.00, the court shall proceed to hear the case as if the claim had been begun by a summons under Order 5 of the SCR [See Order 54 r. 12 of the SCR];

(viii) the parties shall not be represented by an advocate and solicitor (except where the defendant is required by law) [See Order 54 r.7 of the SCR];

(ix) the court shall assist towards effecting a settlement of the case by consent [See Order 54 r. 12(1) of the SCR];

(x) judgement shall be entered in Form 173 and consent judgement in Form 172 [See Order 54 r. 13(2) of the SCR]; and

(xi) the award for costs shall not exceed RM100.00 to any party [See Order 54 r. 15 of the SCR].

See: *Tan Ah Chai v Loke Jee Yah* [1998] 4 CLJ 73; *Pushpaneela a/p VN Suppiah v Ong Yen Chong & Anor* [1999] 4 AMR 3867.

[4] Whether small claims procedure under Order 54 of the SCR is mandatory when the claim does not exceed RM5,000.00

The small claims procedure under Order 54 of the SCR has been held to be mandatory as Order 54 of the SCR is couched in mandatory terms by the use of the word "shall". The word "shall" is

prima facie to be construed as giving a mandatory effect. An enactment regulating procedure is usually imperative and not merely directory.

See: *Tan Ah Chai v Loke Jee Yah* [1998] 4 CLJ 73;
Pushpaneela a/p VN Suppiah v Ong Yen Chong & Anor [1999] 4 AMR 3867.

[5] Whether representation by a solicitor is prohibited under small claims procedure

Order 4 r. 6 of the SCR which is a general provision permits a person to begin and carry on proceedings in a court by a solicitor. On the other hand Order 54 r. 7 which applies specifically to small claims procedure and which is a later provision prohibits the representation by a solicitor in the use of the small claims procedure except where the defendant is required by law to be represented by an advocate. It has been decided that where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the genaral provision, in so far as it is inconsistent with the specific provision, must be deemed not to apply. In other words Order 54 r. 7 must be read as a proviso to Order 4 r. 6 resulting in both the provisions to operate harmoniously. An example of where a defendant is required to be legally represented is where the defendant is a company.

See: *Tan Ah Chai v Loke Jee Yah* [1998] 4 CLJ 73;
Goodwill v Phillips [1908] 7 CLR 1;
Registrar's Circular No. 4 of 1991.

[6] Whether non compliance of Order 54 of the SCR can be cured under Order 2 of the SCR

Under Order 2 of the SCR the courts are given wide powers to remedy non-compliance with the rules. However it has been held that where there is a failure or non-compliance with the rules which is so fundamental or serious the court ought not to exercise its discretion to remedy it. It is trite that a procedural irregularity which is fundamental and serious is not curable. It has been held that a failure to adhere to the specific and mandatory provisions of Order 54 of the SCR amounts to a fundamental breach and is therefore not curable.

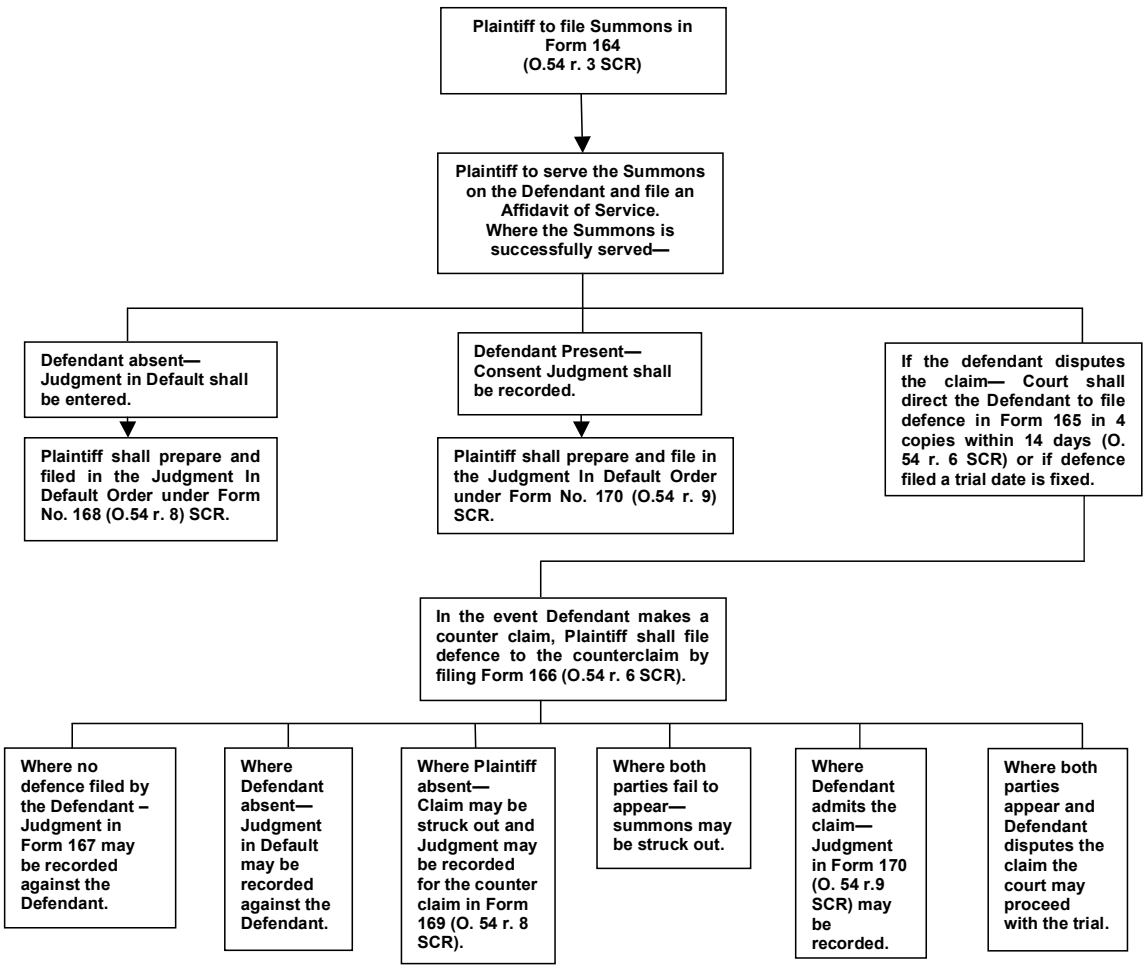
See: *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte)* [1991] 2 MLJ 129;
Tan Ah Chai v Loke Jee Yah [1998] 4 CLJ 73.

[7] Effect of non compliance of Order 54 of the SCR

Failure to comply with Order 54 has been held to be a fundamentally defective breach and such breach has been classified as a nullity. Where the proceedings are a nullity the High Court may intervene at any stage of the proceedings and the court may set aside wholly or in part the proceedings in which the failure occurred.

See: *Pushpaneela a/p VN Suppiah v Ong Yen Chong & Anor* [1999] 4 AMR 3867.

Flow Chart of Small Claims Procedure (Simplified)



3

Mediation

Eugusra Ali
Edward Paul

Chapter 3

Mediation

[1] What is mediation?

(a) According to Folberg & Taylor, Commercial Mediation, 1994, mediation is the process by which the participants together with the assistance of a neutral person or persons systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs. It is a voluntary, flexible and informal process. It is non adversarial in nature. Mediation is not a recent or modern discovery. It is as a matter of fact one of the oldest forms of peaceful dispute resolution process. Mediation is a device aimed at resolving disputes between parties expeditiously and economically. The utmost objective of mediation is to arrive at an amicable resolution of a dispute and also to save time and cost. A sample of Dispute Resolution by Court Assisted guidelines is attached to this chapter.

(b) In this modern era, mediation is widely used in Singapore, Britain, the United States, Australia Canada and New Zealand. In some of these countries, the mediation process is an automatic first step towards resolving disputes between parties.

(c) This process requires the assistance of a third party to facilitate the settlement process. The mediator/conciliator cannot issue a binding award and simply assists all parties to come to a negotiated settlement which is acceptable to the disputing parties. Both have the characteristics of a voluntary and confidential conference in which the participants are encouraged to cooperate in good faith to resolve the dispute between them. The party who is responsible to assist the parties to discuss their dispute openly and to put aside their strict legal rights is called the mediator.

(d) The disputants are encouraged to find common ground and from there to negotiate and achieve a solution. It is an impartial process where an impartial third party helps the parties in dispute to find mutually satisfactory solutions to their differences.

(e) All negotiations during mediation are confidential and non-binding. All parties including the mediator are not allowed to divulge anything that takes place during the mediation process without the consent of the parties involved. The confidentiality aspect of mediation is an important part in this process.

(f) Mediators are not judges. Their role is to decide how the conflict is to be resolved. This is done through assuring the fairness of the process, facilitating communication and maintaining the balance of power between parties. Parties may not always get what they want but the end result is to get them all agree with something they can live with. A successful mediation always results in a binding agreement between the parties to fully and finally settle the dispute. If all or any of the issues in dispute cannot be settled, then parties may still pursue all legal remedies available to them.

[2] Advantages of mediation

(a) Mediation is much cheaper compared to arbitration and litigation. It is also much faster. There is no winning party and neither there is a loser. It provides a result where both parties agree to their own satisfaction. All parties are free to come up with their own solutions and therefore do not necessarily adhere to the remedies available in court. Furthermore, mediation preserves the relationship of the aggrieved parties.

(b) Mediation is informal and has a commendable success rate. For example, in Singapore many cases are settled before they reach the court through mediation. Even in a situation where parties fail to resolve their dispute, they at least will be able to narrow down the issues and in turn this would reduce time and cost at the hearing.

(c) Mediation is private and communications made during the mediation process are confidential. The disputants regulate and control the mediation process and more often than not the relationship between the disputants are restored and rebuild. In short the parties strive for a win-win situation.

[3] What is required for a successful mediation?

(a) An impartial third party facilitator

The cardinal virtue of the mediation process is that parties will have an impartial mediator to ensure that the interests of all the disputants are protected.

(b) Confidentiality

The mediator must protect the confidentiality of the proceedings. Hence, not only should the mediator not be bias against any party in the mediation, the mediator does not usurp the rights of the parties to disclose, or not to disclose information. The mediator must preserve the integrity of the proceedings in all ways.

(c) Presence of the parties

Those with full authority to act for the parties must attend so that the parties can work towards a resolution. All parties involved must interact with the mediator. It is the parties who are being resolved as much as it is the problem that is being settled.

(d) An appropriate site or venue

This means a neutral site that is conducive to the process. It must be a place where neutrality, confidentiality and inclusiveness may be obtained. Of course, in the case of judge assisted mediation, the chambers of a judge would be the best venue.

[4] The Role of a mediator

The mediator is an impartial person. He does not make a decision for or give any legal advice to the parties. A mediator gives an overview of the mediation process. This will generally include the following three stages:

(i) the identification of all disputed matters;

(ii) facilitation of direct communication between the parties with a view to resolve the matter;

(iii) to arrive at an agreement that all parties can accept.

[5] The Process of Mediation

(a) This process is normally divided into two sessions. Firstly, joint mediation sessions and the private sessions between the parties individually and the mediator. The mediator would normally hold a

preliminary meeting with the parties either jointly or separately for the purpose of explaining the process, to sign the mediation agreement and to determine the steps to be taken before the process begins.

(b) At the commencement of the mediation process, both parties are given the opportunity to present their opening statement regarding the issues at hand. The mediator then comes into the picture to summarise and spot the concerns of the parties. The discussion of these issues one by one will then commence. The direct communication between the parties enables the parties to clarify their position with the opposing party and to get the feedback from the other side. The mediator at some stage of the process may see each party separately in private as this encourages parties to be more open to the mediator. The confidentiality in this private and separate meeting is safeguarded as the mediator is not allowed to disclose anything discussed in the meeting without the permission of the party.

(c) The chances of settlement will then increase as the parties will steadily reach an understanding. If successful, the mediator's next step is to assist the parties to document their agreement formally.

DISPUTE RESOLUTION BY COURT ASSISTED

What is mediation?

Mediation is an informal, voluntary and confidential way to resolve a legal dispute without going through a formal court proceeding. It is one form of Alternative Dispute Resolution (ADR).

A neutral person, which in court assisted mediation would be a Judge/magistrate who is not assigned to hear the case in question, would assist the parties to:

- understand the issues in the case;
- understand their interests;
- clear up misunderstandings;
- explore options; and
- reach a mutually acceptable settlement.

No party is told of what to do or any judgment made of who is right or wrong. Decision-making stays with you.

Why use mediation?

- less confrontational than normal court proceedings
- More privacy and confidentiality in settling a dispute,
- Saves time and money. Court proceedings take a long time. Legal fees for full trials are expensive.
- The parties have control over the process; the mediator merely assists and facilitates the parties to reach a settlement.
- Relationships of parties, business or personal remain intact.
- Winner takes all situation can be avoided.

Significantly shorter waiting (4-8 weeks) period to settle case compared to full trials (12-18 months or longer). At request, court may mediate on an urgent basis in some cases.

The Process of Mediation

1. Preliminary meeting with the parties.

- Joint mediation sessions.
- Individual sessions between the parties and the mediator.

2. At commencement of the mediation process parties will present their opening statement regarding the issues at hand.

3. Mediator will summarize, clarify the facts of the dispute and spot the concerns of the parties. During individual sessions, mediator will encourage parties be more open but confidentiality is assured.

All parties are free to come up with their own solutions.

As mediation is less hostile than normal court proceedings, the chances of an amicable settlement may increase as parties explore various options.

If the mediation is successful, the mediator in his role as Judge/ Magistrate will record a consent order or judgment.

What happens in mediation if one or both of you have lawyers?

Parties are free to bring their lawyers to the mediation proceedings. If they are not legally represented they can bring any trusted person as this is an informal proceeding

Legal advice before or after a mediation session can be very helpful and valuable to help you understand your legal rights and responsibilities and to develop options for settling.

What happens when we reach an agreement through mediation?

The mediator will clarify and confirm with the parties the exact terms of the proposed settlement with the parties and their lawyers. Once the parties understand the terms of the settlement, the mediator will assume his role as a Judge/Magistrate and enter a consent judgment according to the terms agreed.

What happens if we don't reach an agreement?

The case will be subjected to normal court proceedings such as interlocutory applications or a full trial.

IF YOU ARE INTERESTED TO SETTLE YOUR DISPUTE BY MEDIATION KINDLY FILL IN THE CONSENT SLIP AND DROP IT IN THE BOX ALLOCATED OR HAND IT OVER TO THE DEPUTY/ SENIOR ASSISTANT REGISTRAR OF HIGH COURT/REGISTRAR OF SUBORDINATE COURTS AT THE COURT REGISTRY CONCERNED.

IMPORTANT NOTES

Please note that should you agree to go for mediation, this process **DOES NOT** operate as a stay of the Court proceedings. You must still comply with all the requirements of the Court process as provided in the Rules of the High Court, 1980 and the Rules of the Subordinate Court, 1980. **Thus the Defendant is still required to file his Memorandum of Appearance and/ or Defence within the period prescribed by the applicable Rules.**

Issued by:

The High Court of

Sabah & Sarawak

NOTICE ON OPTION

FOR MEDIATION

1. This notice serves to inform you that you have an OPTION and is encouraged to have your legal dispute resolved by way of mediation to be conducted by a mediator of YOUR CHOICE. However, there is no compulsion for you to go through the process. It is wholly VOLUNTARY.
2. If you so wish it can also be conducted by a Judge or a Judicial Officer of this Court who will NOT be assigned to hear your case should the mediation fail.
3. The Court does NOT impose any charges or costs for the service.
4. You will be notified of the date for the mediation should you choose this option.
5. Please tick in the appropriate box below together with your signature or your solicitor's signature especially if there is more than one Plaintiff or Defendant to indicate your consent.

DELIVER CONSENT SLIP TO:

THE DEPUTY REGISTRAR/SENIOR ASSISTANT REGISTRAR, HIGH COURT,.....
OR THE REGISTRAR, SUBORDINATE COURTS

,.....

CONSENT SLIP

CASE NO. : _____

☐ I/We agree

.....

(Plaintiff's signature/
Solicitor's signature)

Plaintiff's Name

_____

ContactDetails:

_____

Date: _____

☐ I/We agree

.....

(Defendant's signature/
Solicitor's signature)

Defendant's Name

ContactDetails:

_____

Date: _____

4

Mode of Beginning Civil Proceedings

Jagjit Singh a/l Bant Singh

Chapter 4

Mode of Beginning Civil Proceedings

[1] Introduction

(a) At the outset it must be pointed out that the cause of action determines the mode of beginning in civil proceedings. There are four modes of originating process in the High Court namely Writ of Summons, Originating Summons, Originating Motions and Petitions.

See: Order 5 r. 1 of the RHC.

(b) There are three modes of originating process in the subordinate courts namely Summons, Originating Applications and Petitions.

See: Order 4 r. 1 of the SCR.

[2] High Court

Writ of Summons

(a) The following proceedings must be begun by writ:

(i) for any relief remedy in tort, except trespass to land;

(ii) action based on an allegation of fraud;

(iii) for damages for breach of duty (whether for breach of contractual or statutory duty or otherwise) where the damages claimed consist of or include damages for personal injuries or to property or in respect of the death of any person;

(iv) for damages for breach of promise to marry;

(v) action in respect of infringement of a patent.

See: Order 5 r. 2 of the RHC;
Seah Choon Chye v Saraswathy Devi [1971] 1 MLJ 112.

(b) It is trite that if the plaintiff's claim involves substantial dispute as to fact it must be commenced by way of writ.

(c) When proceedings may be begun by writ or by originating summons? Order 5 r. 4(1) of the RHC provides that unless provided by the RHC or any written law for the mode of commencing an action, the plaintiff has a choice of commencing his action either by a writ or an originating summons. The following are some guidelines on whether an action is to be commenced by writ or an originating summons:

(i) where the issue is solely on the construction of a statue, statutory instrument, deed, will, contract or other document or some other question of law, the mode of proceedings should be originating summons;

(ii) where there is unlikely to be any substantial dispute as to the facts the mode should be by originating summons;

(iii) any statutory application for which no method of making the application is prescribed and there is no substantial dispute as to the facts the mode must be by originating summons;

(iv) where the plaintiff intends to apply for summary judgement the appropriate mode should be by writ.

See: *Pesuruhjaya Ibu Kota, Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30;
Lim Cho Hock v Speaker, Perak State Legislative Assembly [1979] 2 MLJ 85.

(d) Order 5 r. 4(2) of the RHC provides which proceedings are appropriate to be begun by writ.

See: Order 5 r. 4(2) of the RHC.

Originating Summons

(e) Proceedings by originating summons may be commenced in the following cases:

(i) where required or authorized by statute;

(ii) where required or authorized by the RHC.

See: Order 5 r. 3 of the RHC.

(f) Pursuant to Order 5 r. 3 of the RHC originating summons is required to be used to commence proceedings in the following cases:

(i) Interpleader summons (Order 17 r.3 of the RHC);

(ii) Registration of foreign judgement (Order 67 r. 2 of the RHC);

(iii) Admiralty action in personam (Order 71 r. 33 of the RHC);

(iv) Writ of Distress (0rder 75 r. 2 of the RHC);

(v) Administration and similar action (Order 80 r. 1);

(vi) Charge action (see RHC O.83);

(vii) Proceeding relating to infants (see RHC Order 84 r. 1 of the RHC);

(viii) Bills of Sale Ordinance (Order 85 of the RHC);

(ix) Companies Act 1965 (Order 88 r.2 of the RHC).

(g) Originating summons should not be used to commence proceedings when it is known that there is going to be conflict of testimony and a necessity for taking parol evidence. In such a situation the proceedings should be commenced by a writ and not by originating summons. Generally an action founded on trespass to land can be conveniently

disposed of by originating summons. However if the claim involves substantial dispute as to facts then it may be appropriate to proceed by writ. In short when a question of fact is at issue action must be by way of writ and not by originating summons. This is because the facts have to be established by examination and cross-examination of witnesses.

See: *Pesuruhjaya Ibu Kota, Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30;
Abdul Majid v Haji Abdul Razak [1971] 2 MLJ. 228;
Ng Wan Siew v Teoh Sin [1963] MLJ 103;
Re National Union of Commercial Workers [1974] 1 MLJ 172.

(h) Every originating summons must be in Form 6, 7 or 8 and shall state in its intitulement the particular rule of court and provisions of written law under which the application is made.

See: Order 7 r. 2 (1A) of the RHC;
Cheow Chew Khoon @ Teoh Chew Khoon v Abdul Johari b. Abdul Rahman [1995] AMR 761.

Originating Motion

(i) Order 5 r. 5 of the RHC states that it is only mandatory to use petition or originating motion to commence proceedings if such modes are required or authorized by statutes or rules of the court.

See: Order 5 r. 5 of the RHC;
Orders 53 r. 2, 69 r. 2, 87 r. 2, 87 r. 3 and 88 r. 4 of the RHC;
Seah Soon Chye v Saraswathi Devi [1971] 1 MLJ 112;
Lee Phet Boon v Hock Thai Finance Corp. Bhd. [1994] 2 MLJ 448.

(j) Originating motion is required to be used to commence proceedings under the RHC in the following cases:

(i) Order for mandamus, prohibition or certiorari (see Order 53 r. 2);

(ii) Companies Act 1965 (see RHC Order 88 r. 3 and r. 4).

See: *Haji Ismail Bin Che Chik v State Commissioner, Penang* [1975] 1 MLJ 271.

Petition

(k) A petition may be used to commence proceedings when required by the RHC or any written law.

See: Orders 5 r. 5, 71 r. 5 and 88 r, 5 of the RHC;
Election Offences Act 1954;
Bankruptcy Act 1967;
Gula Perak Bhd v Agri Projects (M) Sdn. Bhd. [1989] 1 MLJ 422.

[3] Subordinate Courts

Summons

(a) Order 4 r. 2 of the SCR spells out the proceedings that are required to be commenced by way of summons. Order 4 r. 4 of the SCR states the proceedings which may be commenced by way of summons.

(b) All contentious civil proceedings which under the rules or written law are not specifically to be begun by originating application or petition must be commenced by summons. Contentious refers to proceedings where disputes of fact are expected.

See: Order 4 r. 2 of the SCR;
Abdul Halim Bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors [1996] 4 MLJ 54.

(c) Summons must strictly be in Form 1. An omission to include the whole title of 'summons' is a very serious breach' and, in the absence of any justification, cannot be cured. The parties names must be correctly spelt out correctly as an order judgement subsequently drawn up in the wrong party names will not be enforceable against the actual defendant.

See: Order 5 r. 1 of the SCR;
Soda KL Plaza Sdn Bhd v Noble Circle (M) Sdn. Bhd. [2002] 2 MLJ 367;
Assistant Commissioner for Labour v Cargo Handling Corp Ltd [1953] MLJ 137;
Trustee of Chettiar Temple v Kehar Singh [1954] MLJ 18.

(d) Every summons, other than the original or sealed copy, must have a notice of appearance in duplicate attached to it. Failure to append a notice of appearance in duplicate attached may result in the summons

being null and void.

See: Order 5 r. 2 of the SCR;
Soda KL Plaza Sdn bhd. v Noble Circle (M) Sdn. Bhd. [2002] 2 MLJ 367.

(e) The summons after it is filed will contain an endorsement of the 'return day' that is date on which the defendant is to appear in court to answer the claim against him.

(f) An admission of the claim may be made by the Defendant vide the Notice of Appearance. The notice may be used by the Defendant to admit the claim or to dispute it. If the Defendant admits the claim and returns the notice within the prescribed time period and the Plaintiff accepts the Defendant's offer of payment, the court may enter judgment in the absence of either party. If the Plaintiff does not accept the offer than the defendant or his counsel must attend court on the return day.

(g) A summons is valid in the first instance for 12 months beginning with the date of its issue.

See: Order 5 r. 8 of the SCR.

(h) Where a summons has not been served on a defendant, the court may by order extend the validity of the summons from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire.

See: *Trow v Ind Coope (West Midlands) Ltd & Anor* [1972] 2 All ER 900.

(i) An application to extend may be made even after the expiry of 12 months. However, the discretion of the court to allow the extension should be exercised with care and only where there are good reasons to excuse the delay.

See: Order 5 r. 8 of the SCR;
Arab Malaysian Credit Bhd v Tan Seang Meng [1995] 1 MLJ 525;
Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn. Bhd. [1978] 2 MLJ 27;
Ching Kee v Lim Ser Hock [1975] 2 MLJ 183.

(j) The discretion of the court has to be exercised very carefully where the action is time barred. This is because allowing an extension where the limitation period has set in deprives the defendant of the defence that the action is time barred.

See: *Kun Kay Hong v Tan Teo Huat* [1985] 1 MLJ 404;
Lim Wan Hooi v Ismail bin Hassan [1965] 2 MLJ 101;
Lee Kah Kong & Anor v Teoh Tiang Guan & Anor [1971] 2 MLJ 223.

Originating Application

(a) Order 4 r. 3 of the SCR states the proceedings which must be commenced by way of an originating application. Order 4 r. 4 and 5 of the SCR provides when originating applications may be used.

(b) Proceedings by which an application is to be made to a court or a judge under any written law must be begun by originating application except where the rules or by or under any written law the application in question is expressly required to be made by some other means.

See: Order 4 r. 3 of the SCR.

(c) The term "originating" means that the proceedings are taken otherwise than in a pending cause or matter. "Pending proceeding" refers to a proceeding which has been commenced and which has not been completed.

See: Order 1 r. 6 of the SCR;
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1;
Goh Teng Hoon & Ors v Choi Hon Ching [1987] 1 MLJ 95.

(d) Order 4 r. 4 of the SCR provides that except in the case of proceedings which by the SCR or by or under any written law are required to be begun by summons or originating application or are required or authorized to be begun by petition, proceedings may be begun either by summons or by originating application where—

(i) the sole or principal question at issue is or is like to be one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or some other question of law; or

(ii) in which there is unlikely to be any substantial dispute of fact.

See: *National Land Finance Co-operative Society Ltd v Sharidal Sdn. Bhd.* [1983] 2 MLJ 220;
Happy Shopping Plaza Sdn. Bhd. v Sun Properties Sdn. Bhd. & Ors [1987] 1 MLJ 319;
Pesuruhjaya Ibu Kota Kuala Lumpur v Public Trustee &

ors [1971] 2 MLJ 30;
Ng Wan Siew v Teoh Sin [1963] MLJ 103.

(e) Example where an application for relief which must be made by way of originating application is applications for relief under Order 13 of the SCR relating to interpleader proceedings, Order 38 of the SCR (1) for writ of distress and Order 46 of the SCR for applications under certain sections of the Hire-Purchase Act 1967 (Act 212).

(f) It must be pointed out that some laws prohibit the use of the originating application such as an application under section 7 of the Defamation Act 1957 (Act 286).

(g) Every originating application must be in Form 6 with such modifications as the circumstances of the case may require. Sometimes strict adherence to the forms may impede the administration of justice, but they should not be disregarded since they embody the experience of the court.

See: Order 6 r. 2 of the SCR;
Yu Oi Yong & Anor v Ho Toong Peng & Ors [1977] 1 MLJ 120;
TR Hamzah & Yeang Sdn. Bhd. v Lazar Sdn. Bhd. [1985] 2 MLJ 45;
SA Andavan v Registrar of Title, Negeri Sembilan & Ors [1977] 2 MLJ 220.

(h) Every originating application must include a statement of the questions on which the plaintiff seeks the determination or direction of the court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating application with sufficient particulars to identify the cause or causes of action or matter in respect of which the plaintiff claims that relief or remedy.

See: Order 6 r. 3 of the SCR.

(i) Order 5 r. 8 of the SCR states the duration and renewal of summons apply in relation to an originating application as it applies in relation to a summons.

Petition

(a) Proceedings may be commenced by petition only if the SCR or any written law requires or authorises the proceedings to be so begun.

See: Order 4 r. 5 of the SCR.

[4] Where the wrong process is used to commence proceedings

(a) Where a wrong mode to commence proceedings is used the action may not be a nullity but may amount to an irregularity. The court has a wide discretion whether to allow a proceeding irregularly commenced to continue or to be quashed.

See: Order 2 of the SCR.2; Orders 2 r. 1(3) and 28 r. 8 of the RHC;
Ting Ling Kiew v Tang Eng Iron Works [1992] 2 MLJ 217;
Lee Phet Boon v Hock Thai Finance Corp. Bhd [1994] 2 MLJ 448;
Cheow Chew Khoon v Abdul Johafi [1995] 1 MLJ 457;
Hartecon JV Sdn Bhd v Hartela Contractors Ltd [1996] 2 MLJ 57.
Harkness v Bells Asbestos & Engineering Ltd [1967] 2 QB 729;
Leal v Dunlop [1984] 2 All E.R. 207;
Syarikat Joo Seng v Habib Bank [1986] 2 MLJ 129.

(b) Where it appears that the proceedings had been commenced by way of an Originating Summons but because it involves substantial disputes of fact must the Originating Summons be set aside? In such a situation the Originating Summons need not be set aside but the court may order the proceedings to continue as if begun by a writ.

See: Order 28 r. 8 and Order 2 r. 1(3) of the RHC;
Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217.

5

Parties

Jagjit Singh a/l Bant Singh

Chapter 5

Parties

[1] Introduction

At the outset it is pertinent to determine that the parties named in a civil suit have been correctly named and have the capacity to sue and be sued. For example where it involves an individual person the person is of the age of majority and is in his right mind.

[2] The right to sue in person

The general principle is that any person has the right to sue in person.

This applies with equal force whether or not he sues as a trustee or personal representative or in any other representative capacity.

See: Order 4 r. 6(1) of the SCR; 0rder 5 r. 6(1) of the RHC.

[3] Body Corporate

(a) Except where any written law expressly permits, a body corporate must be represented by solicitor.

See: Order 4 r. 6(2) of the SCR; Order 5 r. 6(2) of the RHC;
Section 16(5) of the Companies Act 1965;
Section 3(2) of the Public Trustee Act 1950.

(b) In other words a body corporate cannot be represented by its directors or officers unless a specific written law allows it. However the court may use its discretion in exceptional cases to allow a director to act as advocate for the company.

See: *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd & Ors* [1991] 1 All ER 591.

[4] Partnership

Two or more persons acting in a partnership may sue or be sued in the name of the firm of which they were partners at the time when the cause of action accrued.

See: Order 10 SCR; Order 77 of the RHC;
Sections 3 and 4 of the Partnership Act 1961;
Krishnan v Abdul Razak & Anor [1969] 1 MLJ 43;
Alagappa Chettiar v Coliseum Cafe [1962] MLJ 111.

[5] Individual carrying on a business

(a) Any individual carrying out a sole proprietorship trading may be sued in his business name but can only sue in his name.

See: Order 10 r. 9 of the SCR; 0rder 77 r. 9 of the RHC;
Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors [1989] 1 MLJ 252;
Bumi Sarawak Enterprise & Anor v Sibu Rural District Council [1999] 5 CLJ 99.

(b) When the sole proprietor dies no action can be brought against him or the firm.

See: *Mohamed Mustafa v Shaik Ahmad* [1972] 2 MLJ 241.

[6] Societies or Youth Societies

(a) Section 9(c) of the Societies Act 1966 (Act 335) allows a society to sue or be sued in the name of such one of its members as shall be declared to the registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society.

See: *Mohd Latiff v Tengku Abdullah & Ors* [1995] 2 MLJ 1;
Lee Thye (as President and office bearer of the Selangor Yan Keng Benevolent Dramatic Association) v Tan Sri Ngan Ching Wen (as President and office bearer of the Selangor Chinese Assembly Hall) [1999] 6 MLJ 390.

(b) A similar provision is found in section 11(c) of the Youth Societies and Youth Development Act 2007 (Act 668).

[7] Trade Unions

A trade union may sue and be sued under the name by which it was registered.

See: Section 25 of the Trade Unions Act 1959 (Act 262).

[8] Persons under Disability

(a) Person under disability means a person who is an infant, that is a minor who has not attained the age of 18 years, or mentally disordered person.

See: Order 9(1) of the SCR; 0rder 76(1) of the RHC;
Section 4 of the Age of Majority Act 1971 (Act 21).

(b) A person under disability must sue by a next friend.

See: Orders 9(2) and (3) of the SCR; 0rders 76(2) and (3) of the RHC.

(c) A person under disability must be defended, make a counter claim, intervene or appear in any proceedings by guardian *ad litem.*

See: Order 9(2) of the SCR; 0rder 76(2) of the RHC.

(d) A next friend or guardian *ad litem* must act by a solicitor.

See: Order 9(3) of the SCR; 0rder 76(3) of the RHC.

[9] Government

The Government may sue and be sued.

See: Sections 3, 4 and 5 of the Government Proceedings Act 1956 (Act 359);
Order 43 of the SCR; 0rder 73 of the RHC.

[10] Yang Di Pertuan Agong or a Ruler of a State

(a) Article 32 of the Federal Constitution states that the Yang Di Pertuan Agong shall not be liable to any civil proceedings whatsoever in any court except in the Special Court established under Part XV of the Constitution.

(b) No proceedings shall be brought in any court against the Ruler of a State in his personal capacity except in the Special Court established under Part XV of the Constitution.

See: Articles 160, 181(2) and 183 of the Federal Constitution;
Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64;
Daeng Baha Ismail [1987] 1 MLJ vi;
Stephen Kalong Ningkan v Tun Hj Openg [1967] 1 MLJ 46.

(c) No action shall be instituted against the Yang Di Pertuan Agong and the Rulers in their personal capacity unless the Attorney General personally gives consent.

See: Article 183 of the Federal Constitution.

[11] Deceased Persons

(a) Section 8(1) of the Civil Law Act 1956 provides that all actions except for causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery on the death shall survive against or for the benefit of the estate of the party to the action who has died.

(b) Where the cause of action survives, the executor or administrator of a plaintiff may obtain an order to carry on the proceedings.

See: Order 8 r. 7(2) of the SCR;
Chua Soo Lee & Anor v City Council of Singapore [1967] 2 MLJ 121.

(c) An executor can proceed with the cause of action even if the grant of probate has not been extracted. This is because he derives his title and authority from the will of his testator and not from any grant of probate and therefore the personal property of the testator, including all rights of action, vests in him upon the testator's death.

See: *Meyappa Chetty v Subramaniam Chetty* [1916] 1 AC 603.

(d) However, an administrator cannot sue or be sued before extraction of the letters of administration.

See: *Comptroller of Income Tax v Yan Tai Min* [1965] 31 MLJ 225;
Ingall v Moran [1944] 1 All ER 97;
Ang Hoi Yin v Sim Sie Hau [1969] 2 MLJ 3;
Ruhani bt Mohiat v Abdul Karim bin Mat Ali [1993] 3 CLJ 524.

(e) In a joint action involving several plaintiffs and the action survives, the surviving plaintiffs may continue the action without the personal representatives of the deceased plaintiff. Where it is not a joint action the personal representative of the deceased may apply for an order to carry on the proceedings.

(f) Where the plaintiff dies and the personal representatives do not apply for an order making them a party the defendant may apply for the action to be struck out.

See: Order 8 r. 9(1) of the SCR.

(g) Where the plaintiff dies in the course of proceedings and the cause of action survives the executor or administrator may obtain an order to continue with the action. Where the death occurs after the finding of issues of fact the court may proceed to deliver judgment.

See: *Government of Malaysia v Taib bin Abdul Rahman* [1991] 2 MLJ 174;
Order 7(2) of the SCR; Order 28 r. 20 of the RHC.

(h) No proceedings is maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action either—

(a) were pending at the date of his death; or

(b) are taken not later than six months after his personal representative took out representation."

See: Section 8(3) of the Civil Law Act 1956;
Lee Lee Cheng v Seow Peng Kwang [1960] 26 MLJ 1.

(i) Where a sole defendant dies and the cause of action survives, an executor or administrator can only be sued after a grant of probate or letters of administration are extracted.

See: *Comptroller of Income Tax v Yan Tai Min* [1965] 1 MLJ 255;
Mohamidu Mohideen Hadjiar v Pitchey [1894] AC 437.

(j) Section 39(1) of the Probate and Administration Act 1959 (Act 97) states that where a person dies intestate his moveable and immoveable property until administration is granted will vest in the official administrator. However the mere vesting of the property in the official administrator does not mean that he can be sued as representative of a deceased under this provision.

See: *Selvarajah v Official Administrator* [1978] 2 MLJ 108.

(k) Order 15 r. 6A of the RHC provides that the court has the power to appoint the official administrator to represent the estate of the deceased and may be limited to certain acts. Where the official administrator's appointment is limited to accepting service of writ or originating summons, judgment in default of appearance cannot be entered.

See: *Re Amirteymour* [1979] 1 WLR 63.

[12] Foreign sovereigns and missions

(a) A foreign sovereign or mission cannot be sued unless there has been submission to the jurisdiction.

(b) The fact that a foreign sovereign has been residing within the jurisdiction does not automatically amount to submission to the jurisdiction.

See: *Mighell v Sultan of Johore* [1894] 1 QB 149;
Duff Development Co v Govt of Kelantan [1924] A.C. 797;
Village Holdings etc v Her Majesty the Queen in Right of Canada [1988] 2 MLJ 656;
Diplomatic Privileges (Vienna Convention) Act 1966 (Act 636);
Foreign Representatives (Privileges and Immunities) Act 1967 (Act 541);
International Organisations (Privileges and Immunities) Act 1992 (Act 485).

[13] Representative Actions

(a) Where numerous persons have the same interest in proceedings, the proceedings may be begun and continued by or against any one or more of them as representing all or as representing all except one or more of them. The justification of this principle is to avoid multiplicity of proceedings involving numerous persons having the same cause of action.

See: Order 8 r. 12 of the SCR; Order 15 r. 12 of the RHC.

(b) Where there is a common interest and a common grievance, a representative suit is appropriate if the relief sought is in its nature beneficial to all whom the plaintiffs propose to represent.

See: *Duke of Bedford v Ellis* [1901] AC 1;
Atip bin Ali v Josephine Doris Nunis & Anor [1987] 1 MLJ 82;
Palmco Holdings Bhd v Sakapp Commodities (M) Sdn. Bhd. & Ors [1988] 2 MLJ 624;
Voon Keng v Syarikat Muzwita Development Sdn. Bhd. [1990] 3 MLJ 61;
Mohd Latiff v Tengku Abdullah & Ors [1995] 2 MLJ 1;
K. Muthulagu (on behalf of himself and 91 Ors) v Lembaga Pelabuhan Klang [1996] 1 CLJ 198;
Selvam Holdings (M) Son Bhd v Grant Kenyon & Eckhardt Sdn. Bhd. (BSN Commercial Bank (M) Bhd &

Onti Interveners) [2000] 3 MLJ 201.

(c) In *Palmco Holdings Bhd v Sakapp Commodities (M) Sdn. Bhd. & Ors* the court held that in order to suceed a representative action the plaintiff must satisfy three requirements namely—

(i) the plaintiff and those represented by him are members of a class and that these members have a common interest;

(ii) the plaintiff and those they represent have a common grievance;

(iii) the relief sought is in its nature beneficial to all.

[14] Joinder, Misjoinder and Nonjoinder of Parties

(a) Two or more persons may be joined together in an action as plaintiffs or as defendants where—

(i) if separate actions were brought, a common question of law or fact would arise in all the actions; and

(ii) the claims arise out of the same transaction or series of transactions.

See: Order 8 r. 4(1) of the SCR; Order 15 r. 4(1) of the RHC; *S. Constantine v Social Security Organisation (Socso) & Anor* [1998] 1 CLJ 433.

(b) Where it appears to the court that any joinder of parties may embarrass or delay the trial of the action or is otherwise inconvenient, the court may order separate trials.

See: Order 8 r. 5 of the SCR; Order 15 r. 5 of the RHC;
Tan Guan Seng v Sibuti Yon Seng Quarry Sdn Bhd & Ors [1973] 2 MLJ 116;
Kok Wee Kiat v KL Stock Exchange Bhd & Ors [1977] 1 MLJ 109.

(c) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

See: Order 8 r. 6(1) of the SCR; Order 15 r. 6(1) of the RHC.

(d) The Court may at any stage—

(i) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(ii) order any of the following persons to be added as a party:

- any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

- any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between the parties to the cause or matter;

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

See: Order 8 r. 6(2) of the SCR; Order 15 r. 6(2) of the RHC.

(e) In short this Order allows the Court to add, substitute or strike out parties and allows intervention. It enables the court to bring all parties to disputes relating to one subject matter before the Court at the same time so that the dispute may be determined without the delay, inconvienience and expense of separate actions and trials. It also ensures that an action is not defeated merely by the misjoinder or nonjoinder of parties.

[15] Defendant adding a Co-defendant

(a) A person who is not a party to an action may at any stage of the proceedings be added as a co-defendant against the wishes of the plaintiff on the application of the defendant or by the Court.

See: Order 8 r. 6(2)(b) of the SCR; Order 15 r. 6(2)(b)(ii) of the RHC;
Hee Awa & Ors v Syed Muhamad & Anor [1988] 1 MLJ 300;
Read article on *Hee Awa & Ors v Syed Muhamad Sazalay Bin Syed Ali Wara & Anor: A Pragmatic Critique*

[1989] 1 MLJ lxxxiii;
Tajjul Ariffin Bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143;
Abidin bin Umar v Doraisamy & Anor [1994] 1 MLJ 617;
Yamamori (Hong Kong) Ltd v Davidson & Ors [1992] 2 MLJ 410.

(b) Plaintiff cannot object to the joinder.

See: *Chan Yee v Chan Yoke Fong* [1990] 3 MLJ 297.

(c) In *Tajjul Ariffin Bin Mustafa v Heng Cheng Hong* it was stated that *Hee Awa* does not lay down any firm rule or fetter the court's discretion.

[16] Striking out parties

The court may at any stage of the proceedings order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party.

See: Order 8 r. 6(2)(a) of the SCR; Order 15 r. 6(2)(a) of the RHC.

[17] Intervener

A person who is not a party to an action may be added as an intervener against the wishes of the plaintiff either on his own application or the application of the defendant or by the Court.

See: Order 8 r. 6(2)(b) of the SCR; Order 15 r. 6(2)(b)(ii) of the RHC;
Pegang Mining v Choong Sam [1969] 2 MLJ 52;
Arab Malaysian Merchant Bank Bhd v Jamaludin bin Mohd Jarjis [1991] 1 MLJ 27;
Hong Leong Finance Bhd v Staghorn Bhd [1995] 2 MLJ 847;
Tai Choi Yu v Syarikat Tingan Lumber Sdn. Bhd. [1998] 4 MLJ 275.

6

Proceedings By and Against the Government

Amir Shah Bin Amir Hasan

Chapter 6

Proceedings By and Against the Government

[1] Introduction

(a) Civil proceedings by and against the Federal Government and the Government of the states in Malaysia are governed mainly by the Government Proceedings Act 1956 (Act 359). This Act is applicable throughout Malaysia.

See: Section 2 of the Government Proceedings Act 1956.

(b) "Civil proceedings" is defined as any proceeding whatsoever of a civil nature before a court and includes proceedings for recovery of fines and penalties and an application at any stage of a proceeding, but does not include proceedings under Chapter VIII of the Specific Relief Act 1950 (Act 137), or such proceedings as would in England be brought on the Crown side of the Queen's Bench Division.

[2] Proceedings by and against the Government: Generally

(a) Civil proceedings by or against the Federal Government shall be instituted by or against, as the case may be, the Government of Malaysia. This is in pursuant to section 21(1) of the Government Proceedings Act 1956. When any civil proceedings against the Federal Government are instituted, an application may be made by or

on behalf of the Attorney General at any stage of the proceedings to have the Government of the relevant state as may be specified in the application to substitute for or joined with the Federal Government as the defendant to the proceedings.

(b) This provision is also applicable in the case of civil proceedings by or against the Government of a State, whereby it may apply to the Court at any stage of the proceedings to have the Federal Government be substituted for or joined as the defendant to the proceedings.

[3] Proceedings by the Government

(a) Section 3 of the Government Proceedings Act 1956 provides as follows:

> "Subject to this Act and of any written law where the Government has a claim against any person which would, if such claim had arisen between subject and subject, afford ground for civil proceedings, the claim may be enforced by proceedings taken by or on behalf of the Government for that purpose in accordance with this Act.".

(b) This provision empowers government to take civil proceedings against any person which would afford ground for civil proceedings and the claim may be enforced by proceedings taken by or on behalf of the government for that purpose in line with the Government Proceedings Act 1956.

(c) In certain revenue matters, section 19 of the Government Proceedings Act 1956 provides that the Government may apply in a summary manner to the High Court for the payment of any duty, penalty or other sum payable under the written law, or for the delivery of any accounts required to be delivered, or the furnishing of any information required to be furnished, by any written law. The rules of courts also provide that judgment may be given upon an affidavit by a duly authorized officer if the facts and the application are not being disputed.

(d) The Government also may obtain relief by way of interpleader proceedings and may be made a party to such proceedings in the same manner in which a subject may obtain relief by way of such proceedings or be made a party to such proceedings thereto and all rules of Court relating to interpleader proceedings shall have effect accordingly.

See: Section 20 of the Government Proceedings Act 1956.

(e) In the case of persons owing money to the Government, all sureties for

persons owing money to the Government may be sued as principals. If the liability is several as well as joint, they may be sued either severally or be sued together, and either separately or together with the principal debtors.

See: Section 11 of the Government Proceedings Act 1956.

[4] Proceedings against the Government

(a) The type of proceedings that may be brought against the government include claims in tort, public nuisance etc.

(b) Section 5 of the Government Proceedings Act 1956, provides that the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

See: Section 5 of the Government Proceedings Act 1956.

(c) It must be noted that the Government's liability in tort is limited as follows:

(i) Unless proceedings for damages in respect of any act, neglect or default of any public officer which would have lain against such officer personally, there shall be no proceedings against the Government by virtue of section 5 in respect of such act, neglect or default.

(ii) See: *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 CLJ 663.

(iii) No proceedings shall be brought against the Government by virtue of section 5 in respect of anything done or omitted to be done by any person (note that this section does not specifically mention "officer") while discharging or purporting to discharge any responsibilities of a judicial nature vested in him or any responsibilities which he has in connection with the execution of judicial process.

(iv) No proceedings shall lie against the government by virtue of section 5 in respect of any act, neglect or default of any public officer unless at that material time employed by the government

and paid in respect of his duties as an officer of the government wholly out of the revenues of the Government.

(d) Section 7 of the Government Proceedings Act 1956 further provides that no proceedings, other than for breach of contract shall lie against the government on account of anything done or omitted to be done or even refused to be done by the Government or any public officer in exercise of public duties of the government, which include the construction, maintenance, diversion and abandonment of railways, roads, bridle-paths or bridges, schools, hospitals or other public buildings, drainage, flood prevention and reclamation works and also the channels of rivers and waterways.

(e) Section 8 of the Government Proceedings Act 1956 provides that in a case of public nuisance, the Attorney General, or two or more persons having obtained the consent in writing of the Attorney General, may institute a suit for a declaration and injunction or for other relief as may be appropriate to the circumstances of the case even though no special damage has been caused.

(f) Proceedings may be directly brought against the Government if the claim is one relating to use or occupation or right to use or occupation of land, revenue matters, contractual, claims (other than tort) for damages or compensation lawfully enforced by civil proceedings as between subject and subject.

See: Section 4 of the Government Proceedings Act 1956; *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 CLJ 663.

(g) In the case of any breach of any express or constructive trust for public, religious, social or charitable purposes, the Attorney General or two or more persons having an interest in the trust may institute a suit or be joined as a party in any existing suit on behalf of the Government after having obtained a consent in writing of the Attorney General.

See: Section 9 of the Government Proceedings Act 1956.

[5] Who may appear for the Government

In civil proceedings by or against the Federal Government as well as the Government of a State, a law officer, the Parliamentary Draftsman or a Federal Counsel or in the case of States of Sabah and Sarawak, a legally qualified member of the Federal or State Attorney General's Chambers authorized by the Attorney General may appear as advocate on behalf of the Federal Government and may make and do

all appearances, acts and applications in respect of such proceedings of the said Government.

See: Section 24 of the Government Proceedings Act 1956.

[6] Procedures

Procedures for proceedings by and against the Government, law officer, legal officer and officers as defined in section 2 of the Government Proceedings Act 1956 are found in Order 73 of the Rules of High Court 1980 which briefly are as follows:

(i) a writ in civil proceedings against the Government, indorsement of claim shall include statement of the circumstances in which the Government's liability is alleged have arisen and as to the Government department and its officers concerned.

See: Order 73 r. 2 of the RHC 1980.

(ii) As for service on the Government, service out of jurisdiction shall not apply in relation to any process by which civil proceedings against the Government have begun. Personal service of any document required to be served on the Government is not a requisite, but where the proceedings are by or against the Government, service must be effected on the Attorney General or such officer as may be designated on behalf in case the proceedings by or against the Federal Government, and in the case of proceedings by or against the State Government, must be effected on the State Secretary of such State.

See: Order 73 r. 3 of the RHC 1980,

(iii) there shall be no application for summary judgment against the Government in any proceedings.

See: Order 73 r. 5 of RHC 1980.

(iv) The Government on the other hand may make summary judgment application which must be supported by an affidavit deposed by the solicitor of the Government or an officer authorized by the solicitor or the department concerned. The affidavit supporting the application shall be sufficient if it states that in the deponent's belief the applicant is entitled to the relief claimed and there is no defence to the claim or part of it or no defence except to the amount of damages claimed.

See: Order 73 r. 5 of RHC 1980.

(v) No judgment in default of appearance or of pleading shall be entered against the Government or in third party proceedings against the Government, except with the leave of Court. An application for leave must be made by way of summons and it must be served not less than 7 days before the return day of the summons.

See: Order 73 r. 7 of the RHC 1980.

(vi) In a third party proceedings, a third party notice including a notice issued under Order 16 r 9 of the RHC 1980 for service on the Government shall not be issued without the leave of Court, and application for leave must be made by summons and it must be served on the plaintiff and the Government.

(vii) In a case of interpleader application for an order against the Government, no order shall be made by the Court except upon an application by summons served not less than 7 days before the return day.

See: Order 73 r. 9 of the RHC 1980.

(viii) No application for interim payments shall be made under Order 22A r. 2 in any proceedings against the Government.

See: Order 73 r. 9A and Order 22 r. 11 of the RHC 1980.

(ix) Provision for discoveries under Order 24 r. 1 and 2 shall not apply in civil proceedings to which the Government is party. Government is exempted from discovery in any civil proceedings where the disclosure is injurious to public interest. When an order or when the Court directs that a list of documents is provided in answering to an order for discovery against the Government, it shall be verified by affidavit that was made by the officer of the Government.

See: Order 73 r. 10 of the RHC 1980;
Section 36 of the Government Proceedings Act 1956.

(x) Any powers exercisable by the court in regard to the taking of evidence are exercisable in proceedings by or against the Government as they are exercisable in proceedings between subjects.

See: Order 73 r. 11 of the RHC 1980.

[6] Costs

The following are some relevant provisions on costs in relation to the Government:

(i) Court has power to order costs for or against the Government or public officer in any civil proceedings or arbitration to which such government or public officer is a party to such proceedings.

See: Section 31 of the Government Proceedings Act 1956.

(ii) In any proceedings which by reason of any written law or otherwise the Attorney General or any officer of Government authorized or required to be a party, the Court shall take into account the nature of proceedings and the circumstances in which such officer appears and in exercise of its discretion may order any other party to the proceedings to pay the costs of the Attorney General or such officer whatever may be the result of the proceedings. This proviso does not affect the power of Court to order the payment of costs out of any particular fund or property or any provision of any written law expressly relieving liability for costs on the Attorney General or such officer of the Government.

(iii) In any civil proceedings which a legal officer appears as an advocate ("and solicitor" for Sabah and Sarawak) under the Government Proceedings Act 1956, and costs are awarded to or against the Attorney General, or to or against the party on whose behalf such legal officer appears, such costs shall include fees for drawing, getting up the case and attendances, as would be included within the meaning of the word "costs" in any written law if an advocate and solicitor of the High Court appeared.

(iv) Such costs shall be in accordance with any scale of fees prescribed from time to time to be chargeable by advocates and solicitors and may be taxed in accordance with any written law for taxation of fees and costs of such advocates and solicitors. In any such proceedings which two legal officers appear as advocates and the Court certifies for two counsels, costs shall be payable in respect of the services of both such legal officers.

(v) It is to be noted that a legal officer shall not be personally liable for costs in any proceedings under the Government Proceedings Act 1956 and any costs awarded to a party whom

any legal officers appeared as advocate shall, however, when recovered, be paid into the Treasury.

(vi) Section 44(2) of the Government Proceedings Act 1956 also provides that any sums payable to the Government by reason of the passing of this Act shall be paid into the appropriate Treasury.

[7] Enforcement of Judgments

(a) Any order made in favour of the Government against any person in any civil proceedings to which the Government is a party, may be enforced in the same manner as an order made in an action between subjects, and not otherwise.

See: Section 34 of the Government Proceedings Act 1956.

(b) This provision provides that modes of enforcement of judgment on any order made in favour of the Government against any person may be used against that person as if the action was between subjects. However, in case of an order made against the Government, the modes of enforcement of judgment must be in accordance to the Government Proceedings Act 1956.

(c) Order 73 r. 12 of the RHC 1980 provides that Order 45 to Order 52 of the RHC shall not apply in respect of any order against the Government. These include enforcement of judgments and orders, writs of execution, writs of seizure and sale, examination of judgment debtor, Garnishee proceedings, charging orders, stop orders, equitable execution and rateable distribution and order of committal. An application pursuant to Order 73 r. 12(2) and section 33 of the Government Proceedings Act 1956 can be made by *ex parte* summons to the Court for a direction, that a certificate be issued stating the costs be ordered to be paid to the applicant. Any such certificate must be in Form 177.

(d) Section 33 of the Government Proceedings Act 1956 provides that in any civil proceedings in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government or against an officer of the Government, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of 21 days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order (the certificate must be in Form 177 of the RHC 1980). and if the court so directs, a separate certificate shall

be issued with respect to the costs (if any) ordered to be paid to the applicant.

(e) As for the attachment of debts, no order for attachment of debts or for appointment of a receiver may be made against the Government. However, in every application to the court for an order under section 35(1) of the Government Proceedings Act 1956, restraining any person from receiving money payable to him by the Government and directing payment of the money to the applicant or some other person must be made by summons served at least 4 days before the return day on the Government, and, unless the Court otherwise orders, on the person to be retained or his solicitor; and the application must be supported by an affidavit setting out the facts giving rise to it, and particular identifying affidavit setting out the facts giving rise to it, and in particular identifying the particular debt from the Government in respect of which it is made.

7

Limitation

Jessie Wong
Ayuni Izzaty Binti Sulaiman

Chapter 7

Limitation

[1] Introduction

(a) The law of limitation deals with the time limit within which an action must be brought. If the action is not instituted within the time limit, the cause of action is said to be time barred or statute barred and the plaintiff is left without a remedy. The importance of the law of limitation was emphasised in the case of *Khor Cheng Wah v Sungai Way Leasing Sdn. Bhd* [1996] 1 MLJ 223, where the Court of Appeal held that the law only helps those who are vigilant, not the indolent. In delivering the judgment Gopal Sri Ram JCA said—

> "It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.".

(b) Why there is a need for the law of limitations is explained by Hashim Yeop A Sani CJ in the case of *Fong Tak Sing v Credit Corporation (M) Bhd*. [1991] 1 MLJ 409 as follows:

"The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

The limitation law is promulgated for the primary object of discouraging plaintiff's from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim *interest reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.".

(c) Another reason often cited for the purpose of the limitation defence is that a potential defendant should be able to assume that he is no longer at risk from a stale claim and should not have to live with the risk of the claim hanging over his head indefinitely.

See: *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1.

[2] Sources of law of limitation

(a) The law of limitation in Malaysia is found in the following statutes;

(a) Limitation Act 1953 (Act 254);
(b) Limitation Ordinance (Cap. 72) (Sabah);
(c) Limitation Ordinance (Cap 49) (Sarawak);
(d) Public Authorities Protection Act 1948 (Act 198);
(e) Civil Law Act 1956 (Act 67); and
(f) Railways Act 1991 (Act 463).

(b) At the outset it it should be borne in mind that the law of limitation in Sabah and Sarawak is not the same as in West Malaysia. It has been decided that the Limitation Act 1953 is not applicable in Sabah and Sarawak as Sabah and Sarawak have their own limitation law namely the Limitation Ordinance (Cap 72) and the Limitation Ordinance (Cap 49) respectively.

See: *Sarawak Securities Sdn. Bhd. v William Leong Wai Ling* [2002] 1 MLJ 294.

[3] Limitation period

(a) Limitation Act 1953

(i) The limitation period provided under the Limitation Act 1953 for the various actions is as follows:

No.	Actions	Period	Authorities
1.	Contract or Tort	6 years	s. 6 (1) Limitation Act 1953 *Credit Corp v Fong Tak Sin* [1991] 1 MLJ 409; *Sivapiran v Lim Yoke Kong* [1992] 2 MLJ 381
2.	Judgment	12 years	s.6(3) Limitation Act 1953
3..	Recovery of Land	12 years	s.9(1) Limitation Act 1953
4.	Recovery of principal secured by a charge or to enforce such charge	12 years	s. 21 (1) Limitation Act 1953
5.	Fraudulent breach of trust or recovery of trust property or proceeds thereof in the possession of trustees	No Limitation	s. 22(1) Limitation Act 1953: *Palaniappa Chettiar v Lakshamanan Chettiar* [1953] 2 M.L.J. 177.
6.	Breach of Trust other than Fraudulent breach of trust or recovery of trust property or proceeds thereof in the possession of trustees	6 years	s. 22(2) Limitation Act 1953; *Sok-Chun Tong v Vincent Tang Fook Lam & Anor* [1999] 6 CLJ 381
7.	Action in respect of any claim to the personal estate of a deceased person or to any share or interest therein (whether under a will or intestacy)	12 years	

(ii) Set-off or counterclaim – see section 31 of the Limitation Act 1953 and the words “to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded”.

(iii) Extension of limitation in case of disability: if a right of action accrued to a person under disability the action may be brought (subject to sections 6(4), 8 and 29) at any time before the expiration of six years when such person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired.

See: Section 24(1) of the Limitation Act 1953.

(iv) Fresh accrual of action on acknowledgement—

- Where a right of action to recover land has accrued and the person in possession acknowledges the title of the person to whom the right accrued, the right shall be deemed to be accrued on and not before the acknowledgement.

- Where the right of action to recover land has accrued and the person liable for the debt makes any payment, the right shall be deemed to have accrued on and not before the date of the last payment.

- Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.

- Every acknowledgement referred to in section 26 must be in writing and signed by the person making it

  See: Section 27(1) of the Limitation Act 1953;
  Section 26 of the Limitation Act 1953.

(v) Postponement of limitation period in case of fraud or mistake (section 29 of the Limitation Act 1953). Where, in the case of any action for which a period of limitation is prescribed by the Act, either—

- the action is based of limitation period in case of fraud of the defendant or his agent or of any person through whom he claims or his agent; or

- the right of action is concealed by the fraud of any such person as aforesaid; or

- the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

However section 29 of the Limitation Act 1953 does not enable any action to be brought to recover, or enforce any charge against, or set aside any transaction effecting, any property which—

- in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

- in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

See: *Beaman v A.R.T.S.* [1949] 1 KB 550;
Yong & Co v Wee Hood Teck Corporation [1984] MLJ 39;
Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409;
Sivaperan v Lim Yoke Kong [1992] 2 MLJ 318.

(b) Limitation Ordinance (Cap. 72) (Sabah) and Limitation Ordinance (Cap 49) (Sarawak)

(i) At the outset it must be stated that the arrangement of the sections and the substantive provisions of the Sabah Limitation Ordinance is identical to that of the Sarawak Limitation Ordinance. In Sabah and the Sarawak Limitation Ordinance the period of limitation for each type of suit is provided for in a Schedule. For example limitation period for actions for compensation for false imprisonment, malicious prosecution, libel and slander is one year; the limitation period for an action for compensation for trespass upon immovable property is three years. There is no one fixed period of limitation provided for in the Schedule. It can be between one year to 60 years.

(ii) In *Kong Ming Bank Bhd v Sim Siok Eng* [1982] 2 MLJ 205 it was held that the Limitation Ordinance of Sarawak, which is similar to other limitation enactments in Malaysia is based not on the English statutes but on the Indian legislation, the structure of which it follows closely. Argument by analogy from the English

law may result, therefore, in error, whereas the Indian and Malaysian case law is a useful guide to the interpretation of the Ordinance.

(iii) For the purpose of computing the period of limitation, the 4th column in the Schedule expressly provides the time from which the period of limitation should begin to run. In the case of a continuing breach of contract the Limitation Ordinance provides that a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

(iv) Section 4 of the Sabah and Sarawak Limitation Ordinance clearly states that if the period of limitation prescribed for any suit expires on a day when the court is closed, the suit may be instituted on the day that the court re-opens.

(v) Section 11 says that in computing the period of limitation prescribed for any suit, the day from which such period is to be reckoned shall be excluded.

(vi) The Limitation Ordinance also provides that in computing any period of limitation prescribed by the Sabah and Sarawak Limitation Ordinance, (a) the time during which the defendant has been absent out of Sarawak, and (b) the period commencing on 24 December 1941 and ending on 1 February 1950 shall be excluded. (See to sections 12 and 13).

(vii) On the extension of the limitation period in cases of disability, section 6 and 7 of the Sabah and Sarawak Limitation Ordinance appears to be similar to section 24 of the Limitation Act 1953. Section 8(1) makes it very clear that once time has begun to run, no subsequent disability or inability to sue shall stop the time.

(viii) The provisions relating to acknowledgement and part payment in the Sabah and Sarawak Limitation ordinance are sections 19 until 21. The effect of an acknowledgement or part would give rise to a fresh accrual of action. Sections 19(1) and 20(1) of the Sabah and Sarawak Limitation Ordinance clearly provide that the acknowledgement or part payment shall only be effective if it is made before the expiration of the period prescribed.

(ix) Section 18 in the Sabah and Sarawak Limitation Ordinance also postpones the limitation period until the time the fraud first became known to the person injuriously affected thereby or in the case where any document necessary to establish such right has been fraudulently concealed, when the person so

affected first had the means of producing it or compelling its production.

(x) Section 3 of the Sabah and Sarawak Ordinance also provides that every suit instituted after the period of limitation prescribed in the Schedule shall be dismissed provided that limitation is expressly pleaded as a defence.

(c) Public Authorities Protection Act 1948

Section 2 of the Public Authorities Protection Act 1948 reads as follows:

> "2. Where, after the coming into force of this act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written of any alleged neglect or default in the execution of any such written law, duty of authority the following provisions shall have affect—
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six month next after the ceasing thereof…".

See: *Lee Hock Ning v Government of Malaysia* [1972] 2 MLJ 12;
Phua Chin Chew & Ors v K.M. & Ors. [1987] 2 MLJ 604.

(d) Civil Law Act 1956

(a) Dependency claim

(i) If a person dies in an accident as a result of the negligence of another, his family members of dependants (as set out in section 7(2) may commence an action to recover damages against the tortfeasor. This is known as a dependency claim and must be commenced within three years after the death of the person deceased. Section 7(5) of the Civil Law Act 1956 reads—

> "Not more than one action shall be brought for and in respect of the same subject of complaint, and

every such action shall be brought within three years after the death of the person deceased."

(ii) In *Kuan Hip Peng v Yap Yin & Anor* [1965] 1 MLJ 252 held that—

"The terms of section 7(5) of the Civil Law Ordinance are absolute and contain no exceptions. They are that 'such action shall be brought within three years after the death of the deceased person'. It is true that, as Goddard LJ said with reference to the corresponding section of the English Act, the section 'merely prescribes a period of limitation' (Lubovsky v Snelling [1994] 1 KB 44,47) and that it does not contain a condition precedent or anything of the sort. Nevertheless the period is absolute. … There are none of the saving provisions in favour of the English Limitation Act of 1939 or our own Limitation Ordinance of 1953. There is no question of infancy or disability or anything of the sort or of acknowledgment. …

Finally, there can be no question of importing into the matter any of the saving provisions of the Limitation Ordinance by any process of construction for by section 3 of that Ordinance it 'shall not apply to any action… for which a period of limitation is prescribed by any other written law."

(iii) Section 7(5) provides that time runs from the date the deceased person died and not the date of the accident.

See: *Kuan Hip Peng v Yap Yin & Anor* [1965] 1 MLJ 252.

(b) Action in tort against estate of deceased person.

(i) Section 8 of the Civil Law Act 1965 provides with the exception of four causes of action, ie defamation, seduction, inducing one spouse to leave or remain apart from the other and adultery, that the death of any person does not affect any causes of action subsisting against of any person does not affect any causes of action shall survive against or as the case may be, for the benefit of the estate.

(ii) Section 8(3) of the Civil Law Act 1965 provides that proceedings must be taken not later than six months

after the deceased person's personal representative takes out representation. Section 8(3) reads:

> "(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action either—
>
> (a) were pending at the date of his death; or
>
> (b) are taken not later than six months after his personal representative took out representation.".

(iii) Section 8(3)(b) of the Civil Law Act 1965 is absolute and contain no exceptions.

See: *Lee Lee Cheng v Seow Peng Kwang* [1960] MLJ 1.

(e) Railways Act 1991

Section 97 of the Railways Act 1991 (Act 463) provides that the Public Authorities Protection Act 1948 shall apply to any action, suit, prosecution or proceeding against the Corporation or against any officer or servant of the Corporation in respect of any act, neglect or default done or committed by him in such capacity.

(f) Carriage by Air Act 1974

By virtue of the Carriage by Air (Applications of Provisions) Order, 1975 made under section 12 of the Carriage by Air Act 1974 (Act 148), Malaysia has adopted the Geneva Convention on air carriage. Article 29(i) of the Convention provides for a limitation period of two years for claims arising from international air carriage. The said Order stipulates that Article 29(i) applies to non-international air carriage as well.

(g) General

(i) The scheme of the Limitation Act 1953 generally allows a period of six years, sometimes twelve, to bring an action for the relief that is sought. Contract and tort covers an area that impacts most people's lives. Tort is a topic that covers subjects such as negligence, nuisance, defamation, occupier's liability, *etc*. For most people, grievances arise out of dealings and transactions in this area.

(ii) Where an action is founded or based on contract or tort, it must be brought before the expiration of six years from the date on which the cause of action accrued. In the case of *Sundrop Fruit Juices Berhad v Tan Yu Hock* (Unreported), it was held that the Sarawak Limitation Ordinance is primarily aimed at restricting indolent litigant from prosecuting a claim if it is not filed expeditiously. For example, there are a number of causes of action which must be filed in some two years, like in the instance of compensation for any malfeasance, misfeasance or non-feasance, most of them must be filed within 3 years, and this includes a claim for price of goods sold and delivered, where no fixed period of credit is agreed upon and the schedule says the time commences from the date of the delivery of goods.

(iii) There are also other causes of action where the limitation period is extended to six years, thirty years and sixty years. Further, section 3 of the Sarawak Limitation Ordinance is of a mandatory nature and says that the court is obliged to dismiss the action if the action is instituted after the period of limitation. Section 3 reads as follows:

> "Subject to sections 4 to 24 inclusive, every suit instituted after the period of limitation prescribed therefore by the Schedule, if limitation has been set up as a defence, shall be dismissed."

(iv) Section 10(1) of the Sabah and Sarawak Limitation Ordinances enacts that in respect of suit file in Sabah or Sarawak, the said Ordinances apply regardless of where the contract was entered into.

(v) It is necessary to some who wants to establish when the cause of action accrues. This is the effective point from which the time for purposes of limitations is computed. Lawyers always say that this is the point of time from which "time begins to run". When the point is reached when the time allowed to file an action comes to an end, the right to file an action is lost and it is said that the claim is time-barred.

[4] Can parties contract out of the law of limitation?

(a) Whether parties can contract out of any statute of limitation was discussed in the case of *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 MLJ 184. The suit was filed 17 months after the fire which was well within the six years provided by the Limitation Act 1953. However the filing of the claim 17 months after the fire was outside

the stipulated 12 month period within which suit of such nature could be brought under condition 19 of the fire policy. The court was of the opinion that condition 19 of the fire policy contravenes section 29 of the Contracts Act 1950. The court held that condition 19 of the fire policy is void by virtue of the imperative words of section 26 of the Contracts Act 1950 as it clearly limits the time within which the respondent can enforce his right under section 6(1)(a) of the Limitation Act 1953.

See: *New Zealand Insurance Co Ltd v ong Choon Lin* [1992] 1 MLJ 184;
Chop Eng Thye v Malaysia National Insurance Sdn. Bhd. [1997] 1 MLJ 161;
Corporation Royal Exchange v Teck Guan [1912] 3 FMSLR 92.

(b) Where the terms of the contract entered into between two parties do not limit the time within which any right may be enforced but instead enlarges the time period within which either party may sue one another such terms would not be void under section 29 of the Contracts Act 1950 which reads—

> "Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the legal usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.".

See: *Wong Logging Contractor v Arab Malaysian Eagle Accurance Bhd*. [1993] 1 MLJ 204.

[5] The Onus of Proof

Where the defence of limitation is raised, the burden of pleading and proving that the action was brought within the limitation period shifts to the plaintiff. In *Cartledge v E Jopling & Sons Ltd* [1963] 1 All ER 341, Lord Pearce said—

> "I agree that when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period. When, however, a plaintiff has proved an accrual of damages within the six years the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date.".

[6] When does time start to run?

(a) This is provided for in section 6 of the Limitation Act 1953. In respect of the Limitation Ordinances of Sabah and Sarawak, the moment of commencement of time varies for different types of action as provided in the Schedule.

(b) In respect of specific laws, time generally runs from the time of accrual of action.

[7] Extension of Time

Section 24 of the Limitation Act 1953, Order 3 r. 5 of the RHC and Order 3 r. 5 of the SCR provides for extension of time in cases of disability which is similar to section 6 of the Sabah Ordinance.

See: Section 24 of the Limitation Act 1953;
Order 3 r. 5 of the RHC; Order 3 r. 5 of the SCR;
Nurul Fatihah Amimi Nasi & 4 Ors v Tenaga Nasional Malaysia & Another [2007] 1 LNS 343.

[8] Which law prevails when there are conflicting limitation periods in the law?

(a) The Limitation Act 1953 and the Limitation Ordinances of Sabah and Sarawak are the general law in respect of limitation. In the event of any conflict between the Limitation Act and Ordinances and any specific law regarding limitation period, the special law on limitation should prevail. This because of the principle that a specific provision excludes the operation of a general provision.

See: *Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd* [2002] 6 MLJ 186.

(b) In respect of the Limitation Ordinances of Sabah and Sarawak, section 5 provides that any special law providing a limitation period shall prevail.

See: *Baltim Timber Bhd v Director of Forests and Ors* [1996] 4 MLJ 103.

[9] Conclusion

The law of limitation provides a time limit within which civil actions must be instituted. Otherwise stale claims would be filed in court by dilatory plaintiffs. However, it must be noted that once an action is filed in court, time will cease to run. Thereafter limitation law has no relevance as there is no legal requirement for a case that has already been filed to be disposed off within any specific time frame.

Appendix A – Sabah Limitation Ordinance Schedule

SCHEDULE
(SECTIONS 3 AND 6 (1))

	Description of Suit	Period of Limitation	Time from which period begins to run
PART I - ONE YEAR.			
1.	Upon a Statute, Act, Regulation or By-law, for a penalty or forfeiture.	One Year.	When the penalty or forfeiture is incurred.
2.	For the wages of a household servant, artisan or a labourer.	One Year.	When the wages accrue due.
3.	For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	One Year.	When the food or drink is delivered.
4.	For the price of lodging.	One Year.	When the price becomes payable.
5.	To set aside any of the following sales: (a) Sale in execution of a decree of a Civil Court; (b) Sale in pursuance of the order of a Collector or other officer of revenue; (c) Sale for arrears of Government revenue, or for any demand recoverable as such arrears.	One Year.	When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.
6.	Against Government to set aside any attachment, lease or transfer of immovable property, by the Revenue authorities for arrears of Government revenue.	One Year.	When the attachment, lease or transfer is made.

7.	Against Government to recover money paid under protest in satisfaction of a claim made by the Revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears.	One Year.	When the payment is made.
8.	For compensation for false imprisonment.	One Year.	When the imprisonment ends.
9.	(Deleted)		
10.	For compensation for a malicious prosecution.	One Year.	When the plaintiff is acquitted, or the prosecution is otherwise terminated.
11.	For compensation for libel.	One Year.	When the libel is published.
12.	For compensation for slander.	One Year.	When the words are spoken, or if the words are not actionable in them-selves, when the special damage complained of results.
13.	For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	One Year.	When the loss occurs.
14.	For compensation for inducing a person to break a contract with the plaintiff.	One Year.	The date of the breach.
15.	For compensation for an illegal, irregular or excessive distress.	One Year.	The date of the distress.
16.	For compensation for wrongful seizure of movable property under legal process.	One Year.	The date of the seizure.
17.	Against a carrier for compensation for losing or injuring goods.	Two Years.	When the loss or injury occurs.
PART II - TWO YEARS.			
18.	Against a carrier for compensation for delay in delivering goods.	Two Years.	When the goods ought to have been delivered.
19.	Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two Years.	When the perversion first becomes known to the person injured thereby.
20.	For compensation for any malfeasance, misfeasance or nonfeasance independent of con-tract and not herein specially provided for.	Two Years.	When the malfeasance, misfeasance or nonfeasance takes place.

PART III - THREE YEARS			
21.	For the hire of animals, vehicles, boats or household furniture.	Three Years.	When the hire becomes payable.
22.	For the balance of money advanced in payment of goods to be delivered.	Three Years.	When the goods ought to have been delivered.
23.	For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Three Years.	The date of the delivery of the goods.
24.	For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three Years.	When the period of credit expires.
25.	For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Three Years.	When the period of the proposed bill elapses.
26.	For the price of trees or growing crops sold by plaintiff to the defendant, where no fixed period of credit is agreed upon.	Three Years.	The date of the sale.
27.	For the price for word done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three Years.	When the word is done.
28.	For compensation for obstructing a way or a water course.	Three Years.	The date of the obstruction.
29.	For compensation for diverting a water course.	Three Years.	The date of the diversion.
30.	For compensation for trespass upon immovable property.	Three Years.	The date of the trespass.
31.	For compensation for infringing copyright or any other exclusive privilege.	Three Years.	The date of the infringement.
32.	To restrain waste.	Three Years.	When the waste begins.
33.	For compensation for injury caused by an injunction wrongfully obtained.	Three Years.	When the injunction ceases.
34.	To compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	Three Years.	The date of the payment or distribution.
35.	By a ward who has attained majority, to set aside a sale by his guardian.	Three Years.	When the ward attains majority.
36.	By any person bound by an order respecting the possession of property made by a magistrate.	Three Years.	The date of the final order in the case.

37.	For specific movable property lost, or acquired by theft or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.	Three Years.	When the person having the right to the possession of the property first learns in whose possession it is.
38.	For other specific movable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Three Years.	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.
39.	For money payable for money lent.	Three Years.	When the loan is made.
40.	Like suit when the lender has given a cheque for the money.	Three Years.	When the cheque is paid.
41.	For money lent under an agreement that it shall be payable on demand.	Three Years.	When the loan is made.
42.	For money deposited under an agreement that it shall be payable on demand.	Three Years.	When the demand is made.
43.	For money payable to the plaintiff for money paid for the defendant.	Three Years.	When the money is paid.
44.	For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three Years.	When the money is received.
45.	For money payable for interest upon money due from the defendant to the plaintiff.	Three Years.	When the interest becomes due.
46.	For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three Years.	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when the time arrives.
47.	For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three Years.	When the time specified arrives or the contingency happens.
48.	On a single bond, where a day is specified for payment.	Three Years.	The day so specified.
49.	On a single bond, where no such day is specified.	Three Years.	The date of executing the bond.

50.	On a bond subject to a condition.	Three Years.	When the condition is broken.
51.	On a bill of exchange or promissory note payable at a fixed time after date.	Three Years.	When the bill or note falls due.
52.	On a bill of exchange payable at sight, or after sight, but not at a fixed time.	Three Years.	When the bill is presented.
53.	On a bill of exchange accepted payable at a particular place.	Three Years.	When the bill is presented at that place.
54.	On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three Years.	When the fixed time expires.
55.	On a bill of exchange or promissory note payable on demand, and not accompanied by any writing restraining or postponing the right to sue.	Three Years.	The date of the bill or note.
56.	On a promissory note or bond payable by instalments.	Three Years.	The expiration of the first term of pay-ment, as to the part then payable; and for the other parts, the expiration of the respective terms of payment.
57.	On a promissory note or bond payable by instalments which provides that, if default be made in payment of one instalment, the whole shall be due.	Three Years.	When the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.
58.	On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three Years.	The date of the delivery to the payee.
59.	On a dishonoured foreign bill where protest has been made and notice given.	Three Years.	When the notice is given.
60.	By the payee against the drawer of a bill of exchange which has been dishonoured by non-acceptance.	Three Years.	The date of the refusal to accept.
61.	By the acceptor of an accommodation bill against the drawer.	Three Years.	When the acceptor pays the amount of the bill.
62.	Suit on a bill of exchange, promissory note or bond not herein expressly provided for.	Three Years.	When the bill, note or bond becomes payable.

63.	By a surety against the principal debtor.	Three Years.	When the surety pays the creditor.
64.	By a surety against a co-surety.	Three Years.	When the surety pays anything in excess of his own share.
65.	Upon any other contract to indemnify.	Three Years.	When the plaintiff is actually damnified.
66.	By an advocate for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid.	Three Years.	The date of the termination of the suit or business, or where the solicitor properly discontinues the suit or busi-ness, the date of such discontinuance.
67.	For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three Years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.
68.	On a policy of insurance when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers.	Three Years.	When proof of the death or loss is given or received to or by the insurers, whether by or from the plaintiff, or any other person.
69.	By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three Years.	When the insurers elect to void the policy.
70.	Against a factor for an account.	Three Years.	When the account is, during the continuance of the agency, demanded and refused, or, where no such demand is made, when the agency terminates.
71.	By a principal against his agent for movable property received by the latter and not accounted for.	Three Years.	When the account is, during the continuance of the agency, demanded and refused, or, where no such demand is made, when the agency terminates.
72.	Other suits by principals against agents for neglect or misconduct.	Three Years.	When the neglect or misconduct becomes known to the plaintiff.

73.	To cancel or set aside an instrument not otherwise provided for.	Three Years.	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.
74.	To declare the forgery of an instrument issued or registered.	Three Years.	When the issue or registration becomes known to the plaintiff.
75.	To declare the forgery of an instrument attempted to be enforced against the plaintiff.	Three Years.	The date of the attempt.
76.	For property which the plaintiff has conveyed while insane.	Three Years.	When the plaintiff is restored to sanity, and has knowledge of the conveyance.
77.	To set aside a decree obtained by fraud or for other relief on the ground of fraud.	Three Years.	When the fraud becomes known to the party wronged.
78.	For relief on the ground of mistake.	Three Years.	When the mistake becomes known to the plaintiff.
79.	For money paid upon an existing consideration which afterwards fails.	Three Years.	The date of the failure.
80.	To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three Years.	The date of the trustee's death, or, if the loss has not then resulted, the date of the loss.
81.	For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers.	Three Years.	The date of the plaintiff's advance in excess of his own share.
82.	By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three Years.	When the right to contribution accrues.
83.	For a seaman's wages.	Three Years.	The end of the voyage during which the wages are earned.
84.	For wages not otherwise expressly provided for by this Schedule.	Three Years.	When the wages accrue due.
85.	By a mortgagor or chargor after the mortgage or charge has been satisfied, to recover surplus collections received by the mortgagee or chargee.	Three Years.	When the mortgagor or chargor re-enters on the mortgaged or charged property.

86.	For an account and a share of the profits of a dissolved partnership.	Three Years.	The date of the dissolution.
87.	By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease.	Three Years.	When the trees are cut down.
88.	For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three Years.	When the profits are received, or where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession.
89.	(Deleted).		
90.	By a vendor of immovable property, to enforce his lien for unpaid purchase-money.	Three Years.	The time fixed for completing the sale, or, where the title is accepted after the time fixed for completion, the date of the acceptance.
91.	For a call by a company registered under any Ordinance.	Three Years.	When the call is payable.
92.	For specific performance of a contract.	Three Years.	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.
93.	For the rescission of a contract.	Three Years.	When the facts entitling the plaintiff to have the contract rescinded first become known to him.
94.	For compensation for the breach of any contract, express or implied, not in writing and not herein specially provided for.	Three Years.	When the contract is broken or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing, when it ceases.
94A.	For compensation for injury to the person.	Three Years.	When the injury is committed.

PART IV - SIX YEARS.			
95.	For compensation for the breach of a contract in writing.	Six Years.	When the period of limitation would begin to run against a suit brought on a similar contract not in writing.
95A.	For arrears of rent.	Six Years.	When arrears become due.
96.	Upon a foreign judgment.	Six Years.	The date of the judgment.
97.	Suit for which no period of limitation is provided elsewhere in this Schedule.	Six Years.	When the right to sue accrues.
PART V - TWELVE YEARS.			
98.	Upon a judgment obtained in the Colony or a recognizance.	Twelve Years.	The date of the judgment or recognizance.
99.	For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	Twelve Years.	When the legacy or share becomes payable or deliverable.
100.	To establish a periodically recurring right.	Twelve Years.	When the plaintiff is first refused the enjoyment of the right.
101.	To enforce payment of money charged upon immovable property.	Twelve Years.	When the money sued for becomes due.
102.	To recover movable property conveyed or bequeathed in trust, deposited or pawned and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Twelve Years.	The date of the purchase.
103.	To recover possession of immovable property conveyed or bequeathed in trust, or mortgaged or charged, and afterwards purchased from the trustee or mortgagee or chargee for a valuable consideration.	Twelve Years.	The date of the purchase.
104.	Suit instituted by a mortgagee or chargee, for possession of immovable property mortgaged or charged.	Twelve Years.	When the mortgagor's or chargor's right to possession determines.
105.	By a purchaser at a private sale for possession of immovable property sold when the vendor was out of possession at the date of the sale.	Twelve Years.	When the vendor is first entitled to possession.

106.	Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale.	Twelve Years.	When the judgment-debtor is first entitled to possession.
107.	By a purchaser of land at a sale in execution of a decree for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale.	Twelve Years.	The date of the sale.
108.	By a landlord to recover possession from a tenant.	Twelve Years.	When the tenancy is determined.
109.	By a remainder-man, a reversioner other than a landlord, or a devisee, for possession of immovable property.	Twelve Years.	When his estate falls into possession.
110.	For possession of immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve Years.	The date of the dispossession of discontinuance.
111.	Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	Twelve Years.	When the forfeiture is incurred or the condition is broken.
112.	For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve Years.	When the possession of the defendant becomes adverse to the plaintiff.
PART VI - THIRTY YEARS.			
113.	Against a depositee or pawnee to recover movable property deposited or pawned.	Thirty Years.	The date of the deposit or pawn.
PART VI - SIXTY YEARS.			
114.	By a mortgagee or chargee for foreclosure or sale.	Sixty Years.	When the money secured by the mortgage or charge becomes due.
115.	Against a mortgagee or chargee to redeem or to recover possession of immovable property mortgaged or charged.	Sixty Years.	When the right to redeem or to recover possession accrues.

8

Injunctions

Dean Wyne Daly
Amelati Parnell

Chapter 8

Injunctions

[1] Introduction

An injunction is an order which is preventive in nature, often utilized to restrain a person from doing a wrongful act. It may even be sought for to restrain an administrative authority from unlawful or ultra vires exercise of its powers. It may be issued against an administrative agency exercising any governmental functions, be it quasi-judicial, administrative or legislative in nature.

[2] Jurisdiction and power to grant injunction

(a) Injunctions are a form of an equitable remedy. In Malaysia, the jurisdiction to grant injunction is established by the Specific Relief Act 1950. The provisions for injunctions are found in Chapter IX of the Specific Relief Act 1950 and paragraph 6 of the Schedule to the Court of Judicature Act 1964.

See: *Kho Soo Teong v Khoo Siew Ghim & Anor* [1991] 3 MLJ 158.

(b) Paragraph 6 of the Schedule to the Court of Judicature Act 1964 empowers the court to—

> "provide for the interim preservation of property the subject-matter of an cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a *lis pendens* or in any manner whatsoever.".

(c) Section 50 of the Specific Relief Act 1950 provides that the granting of preventive relief is at the discretion of the court. It may be in the form of temporary or perpetual injunction. Section 51 of the Act provides—

> "(i) Temporary injunctions are such injunctions as are to continue for a specified time, or until the further order of the court. They may be granted at any stage of a suit and are regulated by the law relating to civil procedure;
>
> (ii) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit."

(d) Perpetual injunction is governed by sections 52 and 55(2) of the Specific Relief Act 1950 which provides as follows:

> "(i) A perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication;
>
> (ii) When such an obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II of the Specific Relief Act, 1950;
>
> (iii) When the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property the court may grant perpetual injunction in the following cases, namely—
>
> (a) Where the defendant is trustee of the property for the plaintiff;
>
> (b) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
>
> (c) Where the invasion is such that pecuniary compensation would not afford adequate relief;
>
> (d) Where it is probable that pecuniary compensation cannot be obtained for the invasion; and

(e) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.".

(e) Mandatory injunctions on the other hand are governed by section 53 of the Specific Relief Act 1950 and an injunction to perform a negative agreement is governed by section 55 of the Specific Relief Act 1950.

[3] Application for an injunction

(a) An application for injunction must be made in the High Court pursuant to section 25(2) of the Court of Judicature Act 1964 and paragraph 6 of the Schedule. No similar provisions were endowed under the Subordinate Courts Act to grant such order.

(b) The procedure which governs the application for an injunction is found in Order 29 of the RHC albeit it relates only to the application and issuance of an interlocutory or interim injunction, not one of final in nature.

(c) An interim injunction is an injunction made in the pendency of something or until something is done before the final disposal of the matter. An interlocutory injunction is an injunction which may be applied for in the course of the proceedings.

[4] General principles in granting Interim Injunction

(a) It is trite law that the following considerations must be weighed on the balance before an interlocutory injunction can be granted:

(i) That there are serious issues to be tried.

(ii) That the balance convenience lies on the side of granting the injunction. In this respect the court must consider the harm that the injunction would produce by its grant and the harm that would result from its refusal thereof.

(iii) That damages are not an adequate remedy.

(iv) The sufficiency of the undertaking of damages given by applicant.

(v) The sufficiency of the undertaking of the defendant to compensate the plaintiff in the event of judgment in the plaintiff's favour.

See: *American Cyanamid co. v Ethicon Ltd.* [1975] 1 All ER 504;.
Keet Gerald Francis Noel John v Mohd. Noor @ Harun Abdullah [1995] 1 MLJ 193;
Alor Janggus Soon Seng Trading Sdn. Bhd. v Sy Hoe Sdn. Bhd. [1995] 1 MLJ 241;
Sunrise Sdn. Bhd. v First Profile (M) Sdn. Bhd. [1996] 3 MLJ 533.

(b) The above principles were considered in the case of *Keet Gerald Francis Noel John v Mohd. Noor bn Abdullah & Ors.* [1995] 1 MLJ 193, where Gopal Sri Ram JCA, summarized what a judge hearing an application for interlocutory injunction should inquire. The head note of the decision are as follows:

> "A judge hearing an application for an interlocutory injunction should:
>
> 1. Ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify with precision the issue raised and decide whether they are serious enough to merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious question to be tried, he should move on the next step of his inquiry;
>
> 2. Having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal; and
>
> 3. The Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the status quo. It is a judicial discretion capable of correction on appeal. A Judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion."

(c) In the Supreme Court case of *Tien Ik Sdn. Bhd. & Ors v Kuok Khoon Hwong Peter* [1992] 2 MLJ 689, it was held that—

> "In an application for an interim injunction the Court is not called upon to make any final decision on any question of fact. What is required at that stage is for the learned judge to decide on the affidavits available before him that the claim in the originating summons is not frivolous or vexatious, in other words that there is a serious question to be tried, and having so decided he must go on to consider the question of balance of convenience."

[5] Balance of Convenience and status quo

(a) Prior to the House of Lords of decision in *American Cynamid v Ethicon Ltd* 1975 1 All ER 504, it was thought that a plaintiff has to prove *prima facie* case on affidavit evidence before the grant of an interlocutory injunction. However the *American Cynamid's* case firmly entrenched the principle that the plaintiff need only show that he has a good and arguable claim. If the plaintiff fails to establish a serious question to be tried or a good arguable claim, the matter ends there as the court is bound to refuse the injunction sought. However, if the plaintiff succeeds in the first step, the court must proceed to consider where the balance of convenience lies. In this exercise, the court must also resist the temptation to make any findings of fact on competing affidavits.

See: *American Cynamid v Ethicon Ltd* 1975 1 All ER 504; *Cavendish House (Chettenhan) Ltd v Cavendish-Woodhouse Ltd* [1970] RPC 234.

(b) The following is a summary of the questions the court should ask before considering the balance of convenience (distilled from Lord Diplock's speech in the *American Cynamid's* case):

- If plaintiff does not get the injunction and succeeds at the trial, which means the defendant had continued to do what the plaintiff sought to prevent from the time of the application for interlocutory injunction to judgment after full trial, *would damages from the defendant be an adequate remedy;*

- If the answer is yes, the interlocutory injunction should be refused even if the plaintiff has a very strong case on the merits;

- If the answer is no, the court should ask the further question if the injunction is granted and defendant succeeds at the end

of the trial, *would damages from the plaintiff be an adequate remedy;*

- If the answer is yes, the interlocutory injunction should be granted provided the undertaking of the plaintiff as to damages is sufficient.

Balance of convenience

(c) If there is doubt about the adequacy of damages to both the plaintiff and defendant, only then the question of balance of convenience arises. The factors to be considered will vary from case to case. These include the extent to which each party could not be compensated by damages in the event of success at the trial. Where the scales are evenly balanced, it is a counsel of prudence to maintain *status quo*.

Status quo

(d) In *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, Lord Diplock explained what he meant by "*status quo*" in the *American Cynamid's* case. It is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction. If there was an unreasonable delay between the date of the writ and the application for an interlocutory injunction, it is the period immediately preceding the application. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted, otherwise the state of affairs before the last change would be the relevant *status quo*.

See: *American Cynamid Co v Ethicon Ltd* [1975] 1 All ER 504;
Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 130;
Huang Ching Hwee v Heng Kay Pah & Anor [1991] 3 MLJ 349;
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn. Bhd. & Ors [1988] 3 MLJ 90;
Mohamed Zainuddin bin Puteh v Yap Chee Seng [1978] 1 MLJ 40;
Keet Gerald Francis Noel John v Mohd. Noor @ Harun Abdullah [1995] 1 MLJ 193;
Alor Janggus Soon Seng Trading Sdn. Bhd. & 6 Ors. v Sey Heo Sdn. Bhd. & 2 Ors. [1995] 1 AMR 549.

[6] Interim Mandatory Injunction

A mandatory injunction is an injunction to compel a person or an organization to perform a specific act. The court has a discretionary power to grant a mandatory injunction under section 53 of the Specific Relief Act 1950 (Act 137). Case law has extended the power to the granting of an interlocutory mandatory injunction before trial as well. However the discretion to grant an interlocutory mandatory is exercised in only exceptional and extremely rare cases. The circumstances where the court has granted interlocutory mandatory injunction are where the case of the plaintiff is *"unusually strong and clear"* and where *"the plaintiff's interest would be protected by the immediate issue of an injunction, otherwise irreparable injury and inconvenience would result"*. An interlocutory application which seeks for mandatory injunction requires the applicant to convince the court that he indeed has a high degree of success at the trial of his case. Therefore the guidelines given in the *American Cynamid's* case are not relevant to the application for a interlocutory mandatory injunction as the burden is higher. Where the case is one of urgency, an application for the grant of interlocutory mandatory injunction can be made *ex parte*.

See: *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192;
Shepherd Homes Ltd v Sandham [1971] Ch 340; [1970] 3 All ER 402;
Sivaperuman v Heah Seok Yeong Realty Sdn. Bhd. [1979] 1 MLJ 150;
Gibb & Co v Malaysia Building Society Bhd [1982] 1 MLJ 271;
Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v Chia Ngen Yiok [1975] 2 MLJ 109;
Timbermaster Tmber Complex (Sabah) Sdn. Bhd. v Top Origin Sdn. Bhd. [2002] 1 MLJ 33.

[7] Application for injunction before issuance of writ

Order 29 r. 1(3) provides that the plaintiff may not make an application for interlocutory injunction before the issue of the writ or originating except where the case is one of urgency. In the latter case, the court may grant injunction on terms providing for the issuance of the writ and summons.

See: *The New Straits Times Press (M) Bhd v Airasia Bhd* [1987] 1 MLJ 36;
Metalock Marine Construction Pte Ltd v Kelvinside Ltd [1985] 2 MLJ 9;
Ong Heok & Anor v Ooi Bee Tat & Ors [1982] 2 MLJ 326.

[8] Interlocutory injunction in a libel case

In defamation cases court will less readily grant interlocutory injunctions pending trial because of its effect on freedom of speech. In libel cases, it is the general principle of law that interlocutory injunction will not be granted if he intends to plead justification unless the plaintiff can prove that the statement is untrue. The authorities also show that the principle extends to the defence of "privilege" as in *Quartz Hill Consolidated Gold Mining v Beall* (1882) 20 Ch D 501 and the defence of "fair comment" as in *Fraser v Evans & Ors* [1969] 1 QB 349.

See: *Bonnard v Perryman* [1891] 2 Ch 269;
The New Straits Times Press (M) Bhd v Airasia Bhd [1987] 1 MLJ 36;
Dato' Kam Woon Wah & Ors v Mohd Abdul Jalil bin Sarip & Anor [1998] 2 MLJ 201;
Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar Shah [1998] 6 MLJ 365;
Kwek Juan Bok Lawrence v Lim Han Yong [1989] 3 MLJ 210.

[9] Interlocutory injunction against Government

(a) Section 29 of the Government Proceedings Act 1956 provides that the court shall not grant an injunction against the government. The court may not also grant an injunction against an officer of the government if the effect of it be to give any relief against the Government which could not have been obtained in proceedings against the Government. Similarly section 54 of the Specific Relief Act 1950 has a similar bar against granting of injunctions that interferes with the public duties of any department of any Government in Malaysia. Section 54 is in respect of permanent injunctions. However, there appears to be a raging debate whether a similar prohibition applies in respect of interim injunctions as opposed to permanent injunctions. As early as in 1968, Raja Azlan Shah J said in *Vethanayagam v Karuppiah & Ors* [1968] 1 MLJ 283 that a temporary injunction can be sought only in aid of a prospective order for a perpetual injunction. That means an interlocutory injunction cannot be granted if there was no prospect of obtaining a permanent injunction. In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, Salleh Abbas LP in the leading majority judgment held that the court has no jurisdiction to grant an interlocutory injunction against a private litigant if the injunction would have the effect of restraining the government or its officers from performing their functions. The minority judges in that case disagreed with his view. In *Sabil Mulia (M) Sdn. Bhd. v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122, the Court of Appeal held that an

interim injunction can be obtained against the government. In the recent case of *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn. Bhd.* [2009] 6 CLJ 75, the respondent attempted to argue that the strict prohibition against grant of injunctions does apply to interlocutory injunctions. The argument was that although a permanent injunction may not be granted at the end of the trial, the court has jurisdiction to make a declaratory order in favour of the respondent and until then, the subject matter could be preserved as in *Tengku Haji Jaafar v Government of the State of Pahang* [1978] 2 MLJ 105. *Tengku Haji Jaafar v Government of the State of Pahang* [1978] 2 MLJ 105 was expressly approved by the Court of Appeal in *Kekatong Sdn Bhd v Danaharta Urus Sdn. Bhd.* [2003] 3 CLJ 378. However the Court of Appeal in the *Kuching Waterfront* case appeared to take the position that no injunction can be granted against the government even if it be an interlocutory injunction if it interfered with the duties of government departments. It applied the judgment of Salleh Abbas LP in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 strictly and declined to follow *Tengku Haji Jaafar v Government of the State of Pahang* [1978] 2 MLJ 105 or the more recent Court of Appeal case of *Sabil Mulia (M) Sdn. Bhd. v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122.

See: *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12;
Tengku Haji Jaafar v Government of the State of Pahang [1978] 2 MLJ 105;
Sabil Mulia (M) Sdn. Bhd. v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122;
Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn. Bhd. [2009] 6 CLJ 751;
Kekatong Sdn. Bhd. v Danaharta Urus Sdn. Bhd. [2003] 3 CLJ 378 CA;
Vethanayagam v Karuppiah & Ors [1968] 1 MLJ 283.

Local Authorities

(b) Under the Government Proceedings Act 1956, government has been defined as government of the federation and of the states. It does not include the local government authorities or other public authorities. Section 54 of the Specific Relief Act 1950 refers to "any department of a government" Edgar Joseph Jr J in *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 said as follow in considering whether section 54 applies to local authority:

> "I do not consider that the Defendants although undoubtedly a Local Authority within the meaning of section 2 of The Local

Government Act, 1976 (Act 171) come within the scope of the words “any department of any Government of Malaysia ...” which phrase I understand to mean the Government of any State or the Government of Malaysia or any department thereof.”

(c) His Lordship held that the statutory bar encapsulated in section 54(d) of the Specific Relief Act 1950 is confined to perpetual or final injunctions and has no application to temporary injunctions which are governed by section 51 of the Act. However, local authorities stand in a different position compared to private litigants and this has been acknowledged by the courts. The reason is that the wider interest of the community is involved. The burden that the plaintiff must discharge to obtain an interlocutory injunction is higher. In the oft quoted case of *Smith v Inner London Education Authority* [1978] 1 All ER 411, Lord Denning MR said:

> “.... a local authority should not be restrained, even by an interlocutory injunction, from exercising its statutory powers or doing its duty towards the public at large, unless the plaintiff shows that he has a ‘real prospect of succeeding in his claim for a permanent injunction at the trial”.

(d) The higher burden of proof laid down by the above case has been consistently applied by the Malaysian courts in respect of interlocutory injunctions against local authorities.

See: *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323;
Smith v Inner London Education Authority [1978] 1 All ER 411;
Bina Satu Sdn. Bhd. v Tan Construction [1988] 1 MLJ 533.

[10] Anton Piller Order

(a) An Anton Piller order derives its name from the case of *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 All ER 405. It is a mandatory order permitting the applicant to enter specified premises to inspect and take into custody documents or articles relevant to the action which might be destroyed or otherwise concealed by the respondent. It is used to preserve material documentary evidence essential to the applicant’s case. In view of its nature, the application for such order is made ex-parte. It is heard in the absence of the other party against whom it is sought. The order is granted pursuant to the inherent jurisdiction of the court.

See: *Bank Bumiputra Malaysia Bhd & Anor; Lorrain Osman & Ors.* [1985] 2 MLJ 236.

(b) The court in *Reebok International Ltd v Royal Corp.* [1992] 2 SLR 136 observed the followings in regard an Anton Piller order:

> "The primary purpose of the Anton Piller order is to preserve the evidence of infringing acts which may otherwise be destroyed, removed or concealed. The secondary purpose it to obtain information with a view to taking proceedings against third parties involved in the infringing acts."

(c) Donaldson LJ noted that an Anton Piller order is 'draconian' in nature and as such it should be used in only exceptional cases. It is admitted that people are entitled not to have their privacy or their property being breached or invaded by a court order unless exceptional circumstances warrant it.

See: *Yousif v Salama* [1980] 1 WLR 1540.

(d) Malaysian courts however, have granted such order on a lesser requirement. In *Penerbit Fajar Bakti Sdn Bhd v Cahaya Buku dan Alat Tulis* [1989] 1 MLJ 386, it was held that in a copyright infringement complain, suspicion followed by a successful trap purchase exercise coupled with prima facie evidence of ownership to the copy right is sufficient to justify the application and the granting of such order. In other words, Anton Piller Order was granted even though the plaintiff had already obtained by trap purchase of the infringing copies of books from the defendants' premises.

[8] Application for Anton Piller Order

(a) The application for an Anton Piller Order is made by way of an ex-parte summons-in-chambers before a judge. The applicant must depose in affidavit all material facts to support the application. There must be full and frank disclosure on his part and he may give statement of information or belief with sources and his grounds.

See: Order 41 r. 5 (2) of the RHC.

(b) If the deponent fails to make full and frank disclosures of all material facts as required, the court may dismiss the application. There are however, instances where the court may still consider the application and exercise their discretions.

See: *Dormeuil Freres SA v Nicolian International (Textiles)*

Ltd [1998] 3 All ER 197;
Noor Jahan Bte Abdul Wahab v Md Yusoff bin Amanshah & Anor. [1994] 1 MLJ 156;
Yukilon Manufacturing Sdn. Bhd. & Anor. v Dato Wong Gek Meng & Ors. (No.4) [1997] 3 CLJ 209.

(c) Nevertheless, if discretion were to be exercised, it should be exercised sparingly. Where it is revealed that there was indeed non-disclosure, it may still be considered if it an unintentional omission. There must not any withholding of material information.

See: *Brinks-MAT Ltd v Elcombe & Ors.* [1988] 3 All ER 188.

(d) In the case of *Indian Movie News Productions Pte Ltd & Satu Lagi lwn Thamilvani Munusamy & Satu Lagi* [1998] 3 CLJ 866 the court found that the applicant had not disclosed material facts in the application. In addition there was misrepresentation of other material facts. On those grounds, the order was discharged.

(e) In *Apparatech (M) Sdn Bhd v Ng Hock Chong & Anor.* [2006] 2 MLJ 61, Justice Abdul Malik Ishak (as he then was) held that non-compliance with O.29 r. 1 (2A) of the Rules of the High Corut 1980, want of disclosure and the privilege against self-incrimination rule, non-justification of granting an Anton Piller order and the Anton Piller order was too wide, imprecise, vague and oppressive.

[11] Mareva Injunction

(a) Mareva injunction is an injunction to restrain the defendant from improperly disposing his assets or concealing the same or moving them out of the jurisdiction of the court to stifle the Plaintiff claim.

(b) It is pertinent to reproduce what Lord Denning said in *Mareva Compania Naviera SA v International Bulk-carriers SA* [1975] 2 Lloyd's Rep 509 at page 510 on the injunction which is now known as Mareva injunction. It reads—

> "If it appears that the debt is due and owing – and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment – the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction. There is money in a bank in London which stands in the name of these time charterers. The time charterers have control of it. They may at any time dispose of it or remove it out of this country. If they do so, the shipowners may never get their charter hire. The ship

is now on the high seas. It has passed Cape Town on its way to India. It will complete the voyage and the cargo discharged. And the shipowners may not get their charter hire at all. In face of this danger, I think this court ought to grant an injunction to restrain the defendants from disposing of these moneys now in the bank in London, until the trial or judgment in this action. If the defendants have any grievances about it when they hear of it, they can apply to discharge it. But meanwhile the plaintiffs should be protected. It is only just and right tht this court shuld grant an injunction."

(c) The defendant must be a legal or beneficial owner of the assets sought to be injunct (*The Theotokis* [1983] 2 Lloyd's Rep.204) for the application to be considered and not ownership by reputation.

(d) Essentially Mareva injunction is an equitable relief to aid the process of execution. It is to ensure that the Plaintiff would be able to reap the fruit of judgment. It is to prevent the assets from dissipating out of the jurisdiction of the court.

(e) In Malaysia, this injunction is granted pursuant to subsection 25(2) and paragraph 6 of the Schedule to the Court of Judicature Act 1964. By Order 92 rule 4 of the RHC 1980, the court is also empowered by its inherent jurisdiction to grant Mareva injunction. The first case that imported the Mareva injunction remedy into Malaysia was the Federal Court case of *Zainal Abidin v Century Hotel* [1982] 1 MLJ 260. The High Court had earlier refused the grant of the Mareva injunction on the ground that it was a motion unknown to our law as there was no statutory provision that is equivalent of section 45 of the English Supreme Court of Judicature (Consolidation) Act 1925. Raja Azlan CJ (as HRH then was) speaking for the Federal Court appreciated that the remedy of Mareva injunction was "wholesome" in that "it fulfilled a modern commercial need". His Lordship further held that the jurisdiction to grant Mareva Injunctions can be founded under paragraph 6 of the Schedule to the Court of Judicature Act 1964 because it is the equivalent to section 45 of the English Supreme Court of Judicature (Consolidation) Act 1925.

See: *Zainal Abidin v Century Hotel* [1982] 1 MLJ 260.
Aspatra Sdn. Bhd. v Bank Bumiputra Malaysia Bhd. [1988] 1 MLJ 97;
Mertowangsa Asset Management Sdn. Bhd. & Anor v Ahmad bin Hj. Hassan & Ors. [2005] 1 MLJ 654.

[12] Application for Mareva Injunction

(a) The mode of application for Mareva Injunction is by way of an ex-parte summons-in-chambers for obvious reasons, that is, there is a real risk of the assets being dissipated. It must be supported by an affidavit evidence to show those reasons. It is obtained more often then not before the commencement of trial. It may also be obtained after completion of trial.

See: *Orwell Steel Ltd v Asphalt and Tar Mac (UK) Ltd.* [1984] 1 WLR 1097.

(b) The Court has to consider the followings factors to determine whether a Mareva injunction is warranted:

(i) There must be strong prima facie case against the defendant. It would be sufficient to show a good arguable case or that the plaintiff has a fair chance of succeeding at the trial to obtain judgment in his favour. It is not necessary for the case to be so strong as in obtaining summary judgment.

See: *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093;
Mareva Compania Naviera SA v International Bulk-carriers SA [1975] 2 Lloyd's Rep 509;
Bank Bumiputra Malaysia Bhd. v Lorrain Osman [1985] 2 MLJ 236;
Biasasmas Sdn. Bhd. & Ors. v Kan Yan Heng & Anor. [1998] 4 MLJ 1.

(ii) The plaintiff must have clear evidence that the defendant has assets within jurisdiction.

See: *Third Chandris Shipping Corp v Unimarine SA* [1979] 2 All ER 972;
Bank Bumiputra Malaysia Bhd. v Lorrain Osman [1985] 2 MLJ 236.

(iii) The Plaintiff must show that there is danger that the defendant may cause the assets to be disspated before judgment is obtained.

See: *Mareva Compania Naviera SA v International Bulk-carriers SA* [1975] 2 Lloyd's Rep 509;
Third Chandris Shipping Corp v Unimarine SA [1979] 2 All ER 972;
Bank Bumiputra Malaysia Bhd. v Lorrain Osman [1985] 2 MLJ 236.

[13] Erinford Injunction

(a) An injunction may be granted pending appeal. This is now commonly known as an 'Erinford' injunction, the name of which was derived from the case of *Erinford Properties Ltd v. Cheshire Country Council* [1974] 2 All ER 448.

(b) It is a form of a prohibitory order available to a plaintiff who had failed in his action. The plaintiff may not have succeeded in the first instance at the interlocutory application for an interim injunction. He may thus apply for this injunction to maintain status quo pending appeal. The application may be made before the court of first instance which dismissed the interlocutory application in the action.

See: *Tun Datu Haji Mustapha bin Datuk Harun v Tun Datuk Haji Mohd Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan* [1986] 2 MLJ 391.

[14] Enforcement

(a) An injunctive order can be either mandatory or prohibitive and can be directed against an individual or a corporation. Different rules apply in respect of the enforcement of these injunctive orders. The general rule is that failure to comply with an injunction order is tantamount to contempt of court and the plaintiff may initiate contempt proceedings under Order 52 of the RHC. However, the preconditions to the enforcement of injunctive orders must be satisfied.

(b) Order 45 r. 5 sets out the power of the court to enforce a judgment to do or abstain from doing an act or in other words it refers to an injunctive order or judgment. It provides that the order of the court can be enforced by an order of committal if the defendant disobeys the judgment of the court to do or abstains from doing an act within the prescribed time. Since the consequence of disobeying an injunctive order is penal in nature, the Order 45 r. 7(4) provides for the endorsement of a notice that the defendant will be liable to the process of execution if he fails to obey the court order in accordance with Form 87. This is known as the "penal notice". Form 87 contains three type of penal notice endorsements depending on whether the order is mandatory, prohibitory and whether it is directed at directors or officers of a body corporate. The notice must be effected personally. In the case of directors or officers of body corporate, they must all be named in the notice. However Order 45 r. 7(6) provides that in the case of a prohibitory order, the strict rule of personal service can be dispensed with if the person against whom the order was obtained was present when the order was made or he had notice of the order otherwise, by telephone, telegram etc.

(c) Since the power of the court to punish for disobeying an injunctive order by committal is quasi-criminal in nature, the courts have been strict in requiring technical compliance with the mode of service and the requirement of the penal notice. However, in the case of a prohibitory injunction, the Singapore Court of Appeal in *Allport Alfred James v Wong Soon Lan* [1992] 2 SLR 385 held that the failure to include the penal notice in a prohibitory injunction order was not fatal as long as the defendant had knowledge of the order. The Singapore Court of Appeal overruled the High Court that held that the failure to include the penal notice in the order that was served was fatal. This case was applied in the Malaysian case of *Class One Video Distributors Sdn. Bhd. & Anor v Chanan Singh a/l Sher Singh & Anor* [1997] 5 MLJ 209. However, in *Tiger Powerhitz Sdn. Bhd. v Guinness Anchor Marketing Sdn. Bhd.* [2003] 1 MLJ 314, it was held that since there was no evidence that directors had notice of the order, the failure to include the penal notice was considered to be fatal. The court cited with approval the following passage from case of *Yukilon Manufacturing Sdn. Bhd. & Anor v Dato' Wong Gek Meng & Ors* (No 4) [1998] 4 CLJ (Supp) 319, where Abdul Malik Ishak J at p. 327 stated in no uncertain terms—

> "Difference penal notices should be used in cases of mandatory and prohibitory orders and also in a case where the order is against an individual or a corporation. In the case of an order against a company or a corporation, the penal notice must be specific and should name all the directors and officers of the company or corporation and that order should be served on each and every person named in the penal notice."

9

Service

Zaini Fishir
Korvent Wheezer

Chapter 9

Service

[1] Introduction

It is a fundamental principle of law that a person against whom any claim is made or any relief or remedy sought in any proceedings must be given due and fair notice of those proceedings so as to enable him to answer and defend them, if he so wishes. Service of process is an essential procedural step in properly constituted judicial proceedings. However, there are exceptions and qualifications, namely—

(i) Under the RHC the court has power to dispense with the service of originating process or of process in pending proceedings;

See: Order 62 r. 10 of the RHC;

(ii) The court has power to make an *ex parte* order before

service either of originating process or of process in pending proceedings such as applications for injunctions or Anton Pillar Orders, although it has the power to set aside an order made *ex parte*; and

(iii) The court has power to grant leave before service to enable certain proceedings, such as the judicial review to be instituted or continued.

[2] General Provisions

The provisions for service of originating process in the High Court are set out in Order 10 r. 1 to 6, Order 11 r. 1 to 9 and Order 62 r. 1 to 13 of the RHC and the provisions for service of process in the subordinate courts are laid out under Order 7 r. 1 to 23 of the SCR.

[3] Personal Service

(a) Originating process must be served personally on each defendant or respondent by the plaintiff or applicant or his agent, unless some alternative method is or has been authorized for that particular case.

See: Order 10 r. 1 and Order 62 r. 3 of the RHC;
Order 7 r. 1 of the SCR.

(b) Personal service is effected by leaving a copy of it with the person to be served and if so requested by him at that time when it is left, showing him the sealed copy of the summons.

(c) If the person to be served does not take the copy it should be left as nearly as possible in his possession or control and its contents explained to him.

(d) Where originating process is to be served on several co-defendants and by error of the process server, the wrong originating process is served on a defendant the court has held it to be a mere irregularity.

See: *Golden Ocean Assurance Ltd v Martin, The Golden Mariner* [1990] 2 Lloyd's Rep 215.

(e) An originating process should be served while the original or renewal of it is still in force. Service after its validity has expired, although not a nullity is an irregularity of such fundamental character that the court may exercise its discretion to validate it especially having regard to the availability of a procedure for renewing it.

[4] Service by Prepaid AR Registered Post

(a) In certain specified cases, as an alternative to personal service, originating process may be served on an individual defendant within the jurisdiction by sending a copy of the process by prepaid AR registered post at his last known address. In such a case, the service of process on an individual by post, service is, unless the contrary is shown, deemed to be effected at the time when the letter would have been delivered in the ordinary course of the post.

See: Order 10 r. 1 and Order 62 r. 6(b) of the RHC;
Order 7 r. 1 of the SCR.

(b) Service is presumed to be effected by properly addressing, prepaying and posting by registered post the letter containing the process. If the letter is returned to the sender through the post undelivered, any judgment obtained in default after the letter has been returned through the post undelivered will be irregular.

(c) By contrast, where the letter is returned through the post but a default judgment has been entered before the letter has been returned, the default judgment will be a regular judgment provided the plaintiff can make the required affidavit, notwithstanding the originating process was never in fact brought to the attention of the defendant.

See: *Catherineholm A/S v Norequipment Trading Ltd* [1972] 2 QB 314.

(d) In such a case, the plaintiff must, before taking any further step in the action for the enforcement of the judgment, either make a request for the judgment to be set aside on the ground that the writ has not been properly served or apply to the court for directions. To proceed with the execution of the default judgment would be improper and should be set aside unconditionally.

[5] Service at contractual address

Very often parties would have agreed that various notices, documents and correspondences are to be served on the agreed given addresses or last known addresses. This addresses are commonly referred to as “contractual addresses”. Court have generally given effect to the “contractual address” clause and to the mode of the service clause. Accordingly service of pleadings including writs and summons on the contractual address is deemed as proper service.

See: *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413.

[6] Substituted Service

(a) Another option to a party who is attempting to serve originating process or documents of process on another party is to apply to the court for an order of substituted service. The court may make an order for substituted service, in the event it is impracticable for any reason to effect personal service of originating process or documents of process on the other party.

See: Order 62 r. 5 of the RHC;
Order 7 r. 18 of the SCR.

(b) An application for an order of substituted service must be made by summons in the High Court or by a Notice of Application in the subordinate court supported by an affidavit stating the facts on which the application is founded.

See: Order 62 r. 5 of the RHC;
Order 7 r. 18 of the SCR.

(c) Substituted service of a document is effected by taking such steps as the court may direct to bring the document to the attention of the person to be served. Substituted service may take the form of service by post addressed to the defendant at a specified address, or by service on some person other than the defendant himself, or by advertisement in a newspaper.

(d) Substituted service will only be ordered where ordinary service is legally permissible in that the defendant must be a legal person;

See: *Sloman v New Zealand Government* [1876] 1 CPD 563.

(e) Substituted service of an originating process may not be ordered if the defendant is out of jurisdiction when the writ was issued unless he went away to avoid service. However such an irregularity may be waived.

See: *BBMB v Lorrain Esme Osman* [1986] 1 MLJ 426;
Fry v Moore [1889] 23 QBD 395.

[7] Service on Companies Registered under the Companies Act 1965

(a) There are three alternative methods of serving a document, which includes a writ of summons or other originating process, on a corporation and they are—

(i) by leaving a copy of it at the registered office (if any) of the corporation;

(ii) by sending a copy of it by registered post addressed to the corporation at the office or, if there are more than one office, at the principal office; or

(iii) by handing a copy of it to the secretary or to any director or other principal officer of the corporation.

See: Order 62 r. 4 of the RHC;
Order 7 r. 10 of the SCR.

(b) Where there has been a change of address, there could be no doubt that the company's registered office remains unchanged for the purpose of the Companies Act 1965 until notice of such change of registered office is lodged with the Companies Commission. Thus a company that has changed its registered office without notifying the Companies Commission as required by the Companies Act 1965 cannot rely on the change to defeat service which had been properly effected at its former registered office, especially when the fact of the change is not known to the plaintiff or the petitioner at the time of service.

See: *Shangri-La Cruise Pte Ltd* [1991] 1 MLJ 22.

(c) After notice of a change of address of a company's registered office is lodged, the effective date of such change is the date on which the notice was lodged with the Companies Commission. Thus, if documents are served at the previous address after notice of the change of address has been given, such service is irregular even if the plaintiff did not know of the change.

See: *Summit Co (M) Sdn Bhd v Nikko Products (M) Sdn. Bhd.* [1985] 1 MLJ 68.

[8] Service on a foreign company

(a) A foreign company which has a place of business or is carrying on business in Malaysia may either be served in an appropriate case, under the general provisions relating to service in Malaysia or under the special provisions of the Companies Act 1965.

See: Section 339 of the Companies Act 1965;
Order 10 r. 1 and Order 11 of the RHC;
Order 7 r. 11 of the SCR.

(b) A foreign company desiring to establish a place of business or to carry on business within Malaysia must lodge with the Companies Commission certain particulars, including the names and addresses of one or more persons resident in Malaysia, not including a foreign company, authorised to accept on behalf of the company service of process and any notices required to be served on it. Any process or notice required to be served on the company may be affected by handing a copy of it to, or sending it by registered post to, a person authorised to accept service of process on behalf of the company.

(c) Documents to be served on foreign companies are sufficiently served—

(i) by addressing it to the foreign company and leaving it at or sending it by post to its registered address in Malaysia;

(ii) by addressing it to an agent of the company and leaving it at or sending it by post to his registered address; or

(iii) where the company no longer has any place of business in Malaysia, by addressing it to the company and leaving it at or sending it by post to its registered office in place of its corporation.

[9] Service on Partnership or Firm

(a) Where partners are sued in the name of a firm, the writ or originating process may be served—

(i) on any one or more of the partners; or

See: Order 77 r. 3(1)(a) of the RHC;
Order 10 r. 3(1)(a) of the SCR;

(ii) at the principal place of business of the partnership within the jurisdiction, on any person having at the time of service the control or management of the partnership business there.

See: Order 77 r. 3(1)(b) and Order 10 r. 3(1)(b) of the SCR.

(b) Where the writ or originating process is served in accordance with any of the above provisions, it is deemed to have been duly served on the firm, whether or not any member of the firm is out of the jurisdiction.

See: *Hobbs v Australian Press Association* [1933] 1 KB 1.

(c) Every person served under the above paragraph (a) or (b) must, at the time of service, be given written notice stating whether he is served as a partner or as a person having control or management of the partnership business or as both and any person on whom the writ or originating process is so served but to whom no such notice is given is deemed to be served as a partner.

See: *Davis v Morris* (1883) 10 QBD 436.

(d) Where a partnership has, to the plaintiff's knowledge, been dissolved before an action against the firm is begun, the writ or originating process must be served on every person within the jurisdiction sought to be made liable on the action.

See: Order 77 r. 3(2) of the RHC;
Order 10 r. 3(2) of the SCR.

(e) Service upon a firm which does not carry on business within the jurisdiction cannot be effected in the firm's name. Service must be effected out of the jurisdiction with the leave of the court upon the individual partners unless there is a special agreement for serving a person within the jurisdiction.

See: *Dobson v Desti* (1891) 2 QB 92;
Montgomery, Jones & Co v Liebenthal & Co [1898] 1 QB 487.

[10] Service on Sole Proprietor

An individual carrying on business within the jurisdiction in a name or style other than his own name may be sued in that name or style and may be served as if it were the name of the firm, and the rules governing an action against a firm will, so far as applicable, apply as if he were a partner and the name in which he carries on business were the name of his firm.

See: Order 77 r. 2 to 8 and Order 77 r. 9 of the RHC;
Order 10 r. 2 to 8 and Order 10 r. 9 of the SCR.

[11] Service on Unincorporated Bodies

(a) When serving unincorporated bodies such as charitable institutions, the responsible officer of the institution should be served such as the secretary or treasurer.

See: *Re Pritt, Morton v National Church League* [1915] 31 TLR 299.

(b) In the case of a club, proceedings should be brought against representatives of the club.

See: Order 15 r. 12 of the RHC.

[12] Service on a Person under a Disability

(a) A document which is required to be served personally on a person who is under a disability must not normally be served on that person. Instead, in the case of an infant who is also not a patient, the document must be served on his father or guardian or, if he has no father or guardian, on the person with whom he resides or in whose care he is.

(b) In the case of a mental patient, the document must be served on the person, if any, who is authorised under the Mental Disorders Ordinance 1952 to conduct proceedings in the name of, or on behalf of, the patient, or, if there is no such person, on the person with whom he resides or in whose care he is.

See: Order 76 r. 14(1) to (3) of the RHC;
Order 9 r. 14 (1) to (3) of the SCR.

(c) The court may however order that a document which has been or is to be served on the person under disability, or on a person other than a person so authorised to be served on his behalf, is to be duly served on the person under disability.

See: Order 76 r. 14(3) of the RHC;
Order 9 r. 14(3) of the SCR.

[13] Service on Government

(a) Personal service of any document required to be served on the government for the purpose of or in connection with any civil proceedings is not required. Order 10 and Order 11 of the RHC do not apply in relation to service of any process by which civil proceedings against the government are begun. Further Order 62 r 6 and r. 10 are excluded in relation to the service of any document required to be served on the Government for the purpose of or in connection with any civil proceedings by or against the Government.

See: Order 73 r. 3(2) of the RHC.

(b) Where civil proceedings are begun by or against the Government, service on the Government must be effected—

(i) in the case of proceedings by or against the Federal Government, on the Attorney General or such other officer as may be designated in that behalf, either generally or specifically, by the Attorney General by notification in the *gazette*; and

(ii) in the case of proceedings by or against the Governments of a State, on the State Secretary of such State.

See: Order 73 r. 3(2) of the RHC;
Section 26 of the Government Proceedings Act 1956.

[14] Service Out of Jurisdiction

(a) The Rules of the High Court and the Subordinate Court Rules provides for the circumstances in which the process of the court may be served out of the jurisdiction, and of the practice and procedure to be followed.

See: Order 11 of the RHC;
Order 7 r. 9 to 22 of the SCR.

(b) Service out of the jurisdiction is recognized as the exercise of Malaysian Court of judicial power over a foreigner who owes no allegiance to Malaysia or over a person who is resident or domiciled out of the jurisdiction, but is nevertheless called upon to contest claims made out against him in Malaysia. It is generally accepted that in accordance with the comity of nations, each nation is entitled, in circumstances permitted by its own laws, to exercise judicial power over persons in other countries. The exercise of such sovereign powers by the issue and service of judicial process in another country is *prima facie* an infringement of the sovereignty of the other country.

(c) For the reasons above, the plaintiff is not entitled as of right, save for specified exceptions, to issue and serve judicial process out of the jurisdiction. The Plaintiff must first obtain leave of the court to do so. In all applications for such leave, the court has three separate questions to decide namely—

(i) whether the applicant's evidence discloses a serious issue to be tried (the merits);
(ii) whether there is a good arguable case that the court has

jurisdiction under the Rules of the High Court to grant such leave; and

(iii) even if the first two requirements are satisfied, whether as a matter of judicial discretion the court should grant or refuse such leave (applying the doctrine of *forum non conveniens*). The High Court has inherent jurisdiction to determine the existence and limits of its own jurisdictions.

(d) Other provisions and requirements that must be considered by the court are set out in Order 11 of the RHC and Order 7 r. 9 to 22 of the SCR which the applicant must establish before leave is given to the applicant to effect service out of the jurisdiction.

10

Appearance and Default Judgement

Noorhafizah Binti Mohd Salim

Chapter 10

Appearance and Judgement in Default

[1] Introduction

(a) When the defendant is served with the writ, he may enter an appearance and defend the action by himself or by his solicitor. However, if the defendant is a person under disability, he must act by *guardian ad litem* while a body corporate may only enter appearance and defend an action by a solicitor. Order 12 r. (1),(2),(3) and (4) of the RHC states the mode of entering appearance.

(b) Why does the defendant need to enter appearance? The rationale is that the process of appearance will enable the defendant to communicate his intention to defend or challenge the action against him.

(c) However, appearence need not to be entered in the following three situations:

(i) where the claim is for a debt or liquidated demand only, and the defendant pays the amount due and costs within the time limited for appearing;

(ii) where the judgment in default of appearance is entered against the defendant, the court may set it aside in which case the action proceeds; or

(iii) a person who is served with notice of a judgment may, within a

month of the service of notice, apply to the court to discharge, vary or add to the judgment without entering an appearance.

[2] Type of appearance

(a) Generally, there are two types of appearance known as unconditional appearance and conditional appearance. These two types of appearance bring different consequences.

Unconditional appearance

(b) Unconditional appearance means the defendant enters appearance without any objections. In other words the defendant does not intend to raise preliminary objections such as irregularity in the form or service of writ or to the jurisdiction of the court.

Conditional appearance

(c) Conditional appearance means the defendant enters appearance with objections. Order 12 r. 6 of the RHC states as follows:

(i) A defendant to an action may with the leave of the Court enter a conditional appearance in Form 16 in the action.

(ii) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the court makes an order thereunder.

(d) The application to enter a conditional appearance is made by an *ex parte* summons. Other than that, if the defendant does not want to challenge the validity of a writ or its service, but to oppose on a different basis, it is not necessary for him to enter conditional appearance.

See: Order 12 r. 7(2) of the RHC.

(e) In the case of *Tengku Jaafar Bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 156, the defendant entered an unconditional appearance and at the same time he applied to strike out the action on the basis that the plaintiff had no *locus standi.* Idris Yusoff J held that this was the correct procedure because the defendant is not precluded from seeking additional interlocutory reliefs under other provisions.

(f) While the case of *Tai Choy Yu v. The Government of Malaysia & Ors* [1993] 2 MLJ 311*,* Richard Malanjum JC (as His Lordship then was)

held that the defendant, who had entered a conditional appearance, was at liberty to challenge the statement of claim and to make an application to strike out under Order 18 r. 19 and Order 92 r. 4 of the RHC.

(g) Besides conditional and unconditional appearance, there are other forms of appearance known as the appearance under protest and appearance *gratis.* Appearance under protest is subjected to the preliminary objection where a person on whom a writ is served claim that he was not at the material time a partner of the firm which is being sued.

See: Order 77 r. 4(2) of the RHC.

(h) Appearance *gratis* occurs when the writ is not duly served on the defendant but he enters an unconditional appearance. If this situation occurs, the writ shall be deemed to have been duly served on him on the date he entered the appearance.

[3] Manner of entering appearance

(a) According to Order 12 r. 3 of the RHC, the defendant may enter an appearance by completing the 'requisite documents'. 'Requisite documents' consist of a memorandum of appearance and its copy which need to be presented or sending them to the registry. The memorandum of appearance must be in Form 15 and must be signed by the solicitor who represents the defendant or, if the defendant appears in person, it must be signed by the defendant himself. This procedure is for the High Court.

(b) In the subordinate courts, the manner of entering appearance is different. For the defendant who wishes to dispute his liability in respect of the whole or part of the claim, he has a choice. While for the defendant who wishes to admit liability at this stage, he may follow the procedure for tendering his admission. The notice of appearance which is appended to the summons may be used for this purpose. The defendant who dispute liability may serve a notice of appearance or a defence prior to the return day or merely appear in the court on the return day and indicate that he intends to dispute the claim. At the later stage, the court will usually order the defendant to file his defence within an appropriate time.

(c) If a defendant is a person under disability, he must act by a *guardian ad litem*. The *guardian ad litem* himself must act through a solicitor. If the defendant is a company or body corporate, it may only enter appearance and defend the action by a solicitor.

[4] The time limit for entering appearance

(a) In the case of service within a local jurisdiction of the High Court, the period is eight days after the writ is served to the defendant. If the writ is served out of local jurisdiction, but within Malaysia, the period is twelve days including the day of service. However, these limits are subject to the power of the court to extend the time.

See: Order 12 r. 4(a) of the RHC.

(b) For the writ served within Sarawak and Sabah, the period is ten days including the day of service. According to Order 12 r. 4 (b), the period is extended to twenty days including the day of service if the defendant's place of residence, or an incorporated society's registered office of business 'is not within the Division or residency in which is situated the Registry out of which the writ of summons was issued'.

See: Order 12 r. 4(b) of the RHC.

(c) Where a notice of a writ has been served out of jurisdiction, the duration is limited to that indicated in the order of the court authorizing such service.

See: Orders 12 r. 4(c), 10 r. 2(2) and 11 r. 4(3) of the RHC.

[5] Judgment in Default

(a) Order 13 rule 1(1) states that if the defendant fails to enter appearance within the time limit specified, the plaintiff may enter judgment in default of appearance against him. The nature of the judgment will depend on the type of the claim involved. The type of claim may range from the claim for liquidated damages, the claim for unliquidated damages, the claim for the possession of land, a claim in respect of the detention of movable property and to a combination of claims which are specifically referred to by the rules.

(b) There are final judgment, interlocutory judgment and partly final and partly interlocutory judgment. The type of judgment will depend on the nature of the claim.

(c) An interlocutory judgment occurs when further steps need to be taken to finalise it. As an example, the court may give an interlocutory judgment for unliquidated damages. It will be finalised on the assessment of those damages. This type of judgment also may be obtained when the claim concerns the detention of goods or where there is a combination of claims between unliquidated damages and detention of goods.

(d) A final judgment is granted in the case of a liquidated claim or a claim for a possession of land or a combination of such claims. If the action involves a mixture of claims, the judgment obtained maybe partly final and partly interlocutory.

(e) Where the claim is for a liquidated demand only, the plaintiff may, after the time limited for appearing, enter a final judgment for an amount not exceeding the claimed stated in the writ (for the demand and for the costs). In other words, the judgment in default of appearance must only be entered for the amount actually due at the time judgment is entered. If the judgment is entered for the amount larger than is due, the defendant is entitled to have it set aside.

See: Order 13 r.1 of the RHC;
Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457.

(f) In respect of the claims for unliquidated damages, the plaintiff may, after the time limit for appearing, enter interlocutory judgment against the defendant for damages to be assessed and costs.

(g) In the case of land possession, the plaintiff may enter judgment for the land and costs if the defendant fails to enter appearance within the required time. In order to obtain judgment in these circumstances, the plaintiff must show that he is not pursuing a mortgage action under Order 83, r. 1 of the RHC.

(h) Where the writ includes a combination of claims, the judgment must be entered severally, in isolation from the other.

See: Order 13 r. of the RHC.

[6] Procedure for entering judgment in default of appearance

(a) The procedure for entering judgment in default of appearance involves the production of appropriate documents at the court registry. The judgment will be entered if all the documents are in order and the procedures have been complied with. If the conditions are not complied with, the court may not enter judgment in default of appearance or defence.

(b) However, in certain actions, specific rules apply so as to exclude or to modify the operation of Order 13. For example, the order does not apply to probate action in respects of which a separate set of provisions operate and similarly in action in *rem*, a different set of procedures governs judgment by default in place of Order 13.

(c) In the case of judgment in default of pleadings, a party who fails to serve a pleading in the prescribed period will be in default. For instance, if the plaintiff fails to serve a statement of claim or defence to counterclaim within the prescribed period, the defendant may apply to dismiss the action or enter judgment on the counter claim. While in the situation where the defendant fails to serve a defence in time, judgment may be entered against him and in the case of judgment in default of appearance, the nature of the judgment will depend on the type of claim involved.

[7] Setting aside judgment in default of appearance

(a) A judgment in default, like any other judgment of the court, is valid and binding unless set aside. However, the general principle is that, unlike a judgment on the merits, a judgment in default can be set aside by the court that granted it. The rationale is this. A judgment on the merits is pronounced after the court hears both parties on the merits of the case whereas a judgment in default is pronounced without hearing the defendant. The court has therefore the power to revoke its own judgment. As stated by Lord Atkin in *Evans v. Bartlam* [1937] AC 473:

> "...unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

See: *Tetuan Tan Teng Siah Realty Sdn. Bhd. v Island Oil Palm Plantations Sdn. Bhd. & Anor* [1997] 4 CLJ 634.

Procedure

(b) The rule that confers the power to the court to set aside its own default judgment where there has been a failure to enter appearance is Order 13 r. 8 which reads as follows:

> "The Court may, on such terms as it thinks just set aside or vary any judgment entered in pursuance of this Order."

(c) The equivalent provision in respect of default of pleadings is Order 19 r. 9 of the RHC. The application to set aside must be made by summons in chambers supported by an affidavit (see Order 32 of the RHC). The three primary considerations that apply to the setting aside of a judgment in default are as follows:

(i) whether a judgment is irregular;

(ii) if regular, whether the defendant has a defence on the merits or an arguable defence;

(iii) whether there was inordinate delay in applying to set aside the judgment in default.

(d) The content of the affidavit in support would therefore depend on these considerations.

Irregular judgement

(e) An irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute, or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.

See: *Tuan Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd.* [1996] 1 CLJ 241.

(f) Examples of irregular judgment would be cases where a judgment had been entered for higher amount than due or cases where service is defective.

See: *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457.

(g) In *Cheow*'s case, judgment was entered for a sum beyond what was due. The Court of Appeal set aside the entire judgment on the ground it constituted an irregular judgment. The court reaffirmed the principle that an irregular judgment can be set aside *ex debito justitiae* in other words as of right. Therefore the applicant need not set out the merits of the defence in the affidavit in support. All that the defendant need to establish is the vitiating irregularity that would kill the judgment in its entirety.

Regular judgment

(h) In the case of regular judgments, the defendant must disclose a defence on the merits in the affidavit in support of the application. This has been described as an "inflexible rule".

See: *Farden v Richter* (1889) 23 QBD 124;
Evans v Bartlam [1937] AC 473;
Government of Malaysia v Sim Soe Hoe [1990] 1 MLJ 379;

PL Construction Sdn Bhd v Abdullah bin Said [1989] 1 MLJ 60;
Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat [1976] 1 MLJ 23.

(i) A defence on the merits has also been described as an arguable defence or a *prima facie* defence. The rationale of this principle is that an indolent defendant should not be allowed to set aside a judgement in default if he only has a shame defence to put up. However, it must be noted that there is a distinction between an arguable defence or *prima facie* defence and a good defence. The defendant is not obliged to disclose a good defence.

See: *Burns v Kondel* [1971] 1 Lloyd's Rep 554.

(j) There is no time limit to set aside a regular judgement. It is entirely within the descretion of the Court. However, in exercise of its discretion, the Court will require an affidavit showing a "defence on the merit".

See: Order 12 r. 8 and Order 13 r. 8 of the RHC;
B Dialdas & Co (Pte) Ltd v Sin Sin & Co & Ors [1984] 2 MLJ 223.

Delay and explanation

(k) Order 42 r. 1 RHC stipulates that an application to set to aside a judgment in default must be filed within 30 days after receipt of the said judgment. This rule was inserted in 1993. There are numerous cases that have discussed the issue of delay. For example in *Tuan Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd.* [1996] 1 CLJ 241, the court expressed the view that an irregular judgment can be set aside despite long delay. However, the court qualified its *dicta* by adding that the newly inserted Order 42 r. 12 was not taken into account in its decision. The general rule is that those who approach the court to set aside a judgment in default must do so timeously. The court has a discretion to set aside despite the breach of the 30 day rule in proper cases where the defendant gives a good explanation. Needless to say, the cases that deal with this issue turn on their own facts and it would be difficult to state what constitute reasonable delay or what qualifies as a good explanation. A good discussion on delay is found in the following case:

See: *Khor Cheng Wah v Sungai Way Leasing Sdn. Bhd.* [1996] 1 MLJ 223.

11

Pleadings

Shahrizat Bin Ismail
Maris Agan

Chapter 11

Pleadings

[1] What are pleadings?

[2] Why pleadings are important in civil trials?

[3] Issues on Pleadings—

(a) Whether court can decide a suit on a matter which is not pleaded?

(b) Can the court hear a case without pleadings?

(c) What happen if the plaintiff fails to file a reply to the defence?

(d) Whether defendant can apply for better particular before filing defence?

(e) Unpleaded material facts and objections

[1] What are Pleadings?

Pleadings are material facts on which the parties rely for the purpose of establishing a claim or defence. The pleadings are in the form of a Statement of Claim, Counterclaim, Defence, Defence to the Counterclaim or Reply. Their main purpose is to define and limit the issues in the action. In a properly pleaded action, the trial will proceed on the pleas at which the parties are at variance. As a general rule, evidence or legal arguments should not be pleaded in the pleadings.

See: *Janagi v Ong Boon Liat* [1971] 2 MLJ 196.

[2] Why Pleadings are important in civil trials?

The purpose and importance of pleadings is aptly summarized in the following excerpt from *Bullen and Leake's Precedents of Pleadings, 10th Edition,* at page 1:

(i) to define issues of fact and questions of law to be decided between the parties;

(ii) to give to each of them distinct notice of the case intended to be set up by the other and thus to prevent either party from being taken by surprise at the trial; and

(iii) to provide a brief summary of the case of each party, from which the nature of the claim and the defence may be easily apprehended so as to prevent future litigation upon matters already adjudicated upon between the litigants.

[3] Issues on pleadings.

(a) Whether a court can decide a suit on a matter which is not pleaded?

The purpose of pleadings is to give notice to the opposing party of the claim or the defence. Therefore, as a general rule the court should not decide a case on unpleaded issues. Otherwise the other party would be taken by surprise and would have lost the opportunity to rebut the issue by evidence. However, in cases where the other side can be said to have reasonable notice of the unpleaded issue from the pleadings, the court may allow the fresh point to be argued.

See: *Weeluk (S) Pte Ltd v Jid Fu Plywood Sdn. Bhd.* [1998] 1 LNS 1998;
Bousted Trading (1985) Sdn. Bhd. v Arab Malaysian Merchant Bank Berhad [1995] 4 CLJ 283;
Superintendent of Lands And Surveys (4th Div) & Anor v Hamit Bin Matusin & Ors [1994] 3 MLJ 185.

(b) Can a court hear a case without pleadings?

(i) The court can in only certain cases hear a case without pleadings. A trial without pleadings saves time and effort. It can be used where there is no dispute as to primary facts or where the parties have agreed on the facts and no oral evidence needs to be called. Such instances may arise in accident cases where the dispute is only on damages and liability has been determined.

See: Order 18 r. 22 of the RHC;
Order 14 r. 22 of the SCR.

(ii) An example is where after defendant has entered an appearance, the plaintiff or the defendant may apply by summons for an

order that the action be tried without pleadings. The application should be made promptly in order to save costs on interlocutory proceedings.

(iii) If the court is satisfied that the action can be tried without pleadings, the court may direct the parties to prepare a statement of the issues in dispute or settle the statement itself. If the court allows or dismisses the application for trial without pleadings, the court may give direction as to manner the action is to be further carried out.

(iv) Trial without pleadings cannot be used in claims by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage and based on an allegation of fraud.

(v) In the case of *L'Escargot Café Restaurant (M) Sdn. Bhd. v Far East Consortium (M) Ltd & Anor* [2008] 1 LNS 81, the court had conducted the trial without pleading. The trial was based on the summary of the agreed facts.

(c) What happen if the plaintiff fails to file his reply to the defence?

(i) There is no necessity to file a reply after a defence if the purpose is merely to deny the allegations contained in the defence. A joinder of issues is implied. A joinder of issue operates as denial of every material allegation of fact in the pleadings. No need to repeat what has already been stated in the statement of claim. Order 18 r. 14(1) of the RHC and Order 14 r. 20(1) of the SCR provide that—

> "If there is no reply to a defence, there is an implied joinder of issue on that defence".

(ii) In the case of *Ngui Yu Thau v Wong mu Khyun & Ors* [2002] 1 CLJ 151, Richard Malanjum J (as he then was) stated—

> "A reply is however necessary where a plaintiff wishes to raise any specific matters in answer.".

(d) Whether Defendant can apply for further and better particulars before filing defence?

(i) The Defendant can apply for further and better particulars before filing defence depending on the circumstances of each case. Order 18 r. 12 of the RHC and Order 14 r. 18 of the SCR state about particulars of pleadings. The functions of particulars are—

(a) to inform the other party in the matter the nature of the case they have to meet;

(b) to prevent surprises at trial;

(c) to enable the other in the matter to ascertain the evidence they ought to prepare for trial;

(d) save unnecessary expenses; and

(e) to define issues to be tried and to limit the issues that may be argued at trial.

Example: Plaintiff or defendant states that there is fraud but gives no facts. Plaintiff or defendant can then request for particulars of fraud.

(ii) It is up to the court's discretion whether to grant an order for particulars. Where there has been inordinate delay, the particulars are not necessary as they are already in the pleadings, what is being requested is evidence, the particulars are irrelevant to the cause of action and the purpose is to delay or gaining time for the defence, the court may be reluctant to give the order.

(iii) In the case of *Loh Yan Hui v Malaysian Banking Berhad & Anor.* [1997] 1 LNS 214 , the defendant had applied to the court for further and better particulars of the plaintiff's claim and Hj. Muhammad Kamil b. Awang J decided as follows:

> "In the instance case, the defendant is informed with reasonable particularity as to the various matters which are alleged against him. As it was, the defendant appears to be on a fishing expedition for more evidence from the plaintiff. This is not allowed as it will be brought up at trial. Having considered the application as a whole, I'm not disposed to exercise my discretion to allow the application. I would, therefore, dismiss the application with cost to be taxed unless agreed.".

(iv) In the case of *Osai Distributors Sdn. Bhd. & Anor v Penerbitan Sahabat (M) Sdn. Bhd.* [2007] 1 LNS 335, Dato' Kang Hwee Gee J stated as follows:

> ".....the defendant must file its defence before it applied for further and better particulars unless it can show that these particulars were necessary in order for the defendant to frame and deliver its defence.".

(e) Unpleaded material facts and objections

(i) The underlying well-known rationale for requiring material facts to be pleaded is to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence, if allowed, will prejudice and embarrass or mislead the opposing party. Order 18 r. 7(1) also provide that a pleading must contain only a statement, in summary form, of material facts but not the evidence by which these facts are to be proved.

(ii) If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges, for such evidence to be disregarded by the court, and the court will then uphold such timely objection. The court will generally, however, grant an adjournment if requested, on suitable terms as to costs, etc, for the pleading to be amended by the party seeking to adduce such evidence.

(iii) The exception to this general principle is when a party is not taken by surprise when the circumstances actually indicate so, eg when such evidence is the very evidence sought to be relied on by him from the outset, or when he fails to object to such evidence.

(iv) Evidence given at the trial can in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise. There is, however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence. The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question.

(v) In short a court must enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.

See: *Superintendent of Lands and Surveys (Fourth Division) & Anor v Hamit Matusin & Ors* [1994] 3 MLJ 185;
Ang Koon Kau & Anor v Lau Piang Ngong [1984] 2 MLJ 277 (FC);

Waghorn v George Wimpey & Co Ltd [1970] 1 All ER 474; [1969] 1 WLR 1764.

12

Striking Out Pleadings

Azreena Aziz

Chapter 12

Striking Out Pleadings

[1] Introduction

(a) Under Order 18 r. 19 of the RHC (Order 14 r. 21 of the SCR), a pleading or endorsement may be stuck out on the following grounds:

(i) it discloses no reasonable cause of action or defence; or
(ii) it is scandalous, frivolous or vexatious; or
(iii) it may prejudice, embarrass or delay the fair trial of the action; or
(iv) it is otherwise an abuse of the process of the Court.

(b) The word 'or' appears between (a), (b), (c) and (d) of Order 18 r. 19(1) of the RHC and in ordinary usage the word 'or' is said to be disjunctive. When resorting to Order 18 r. 19(1) of the RHC, it must be very specific and must not cumulatively add (a), (b), (c) and (d) together and lump them as one as it would run counter to the explicit provisions of Order 18 r. 19(2) of the RHC.

See: *Sambu (M) Sdn. Bhd. v Stone World Sdn. Bhd. & Anor* [1997] 1 CLJ 227.

(c) Although disjunctive, the grounds of striking out may be applied upon in one application. In *Bandar Builder Sdn. Bhd. & Ors v United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 the following elements in striking out application were set out:

(i) applicable only in plain and obvious case, in that it can be clearly seen that a claim or answer is on the face of it is 'obviously unsustainable'; In other words, there is no reasonable cause

of action or that the claims are frivolous or vexatious or that the defences raised are not arguable;

(ii) there is no necessity for a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence; and

(iii) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument.

[2] Procedure

(a) The application is usually made by summons to the Registrar or Judge supported by affidavit.

(b) However, Order 18 r. 19(2) disallows affidavit evidence on an application alleging that the pleading discloses no reasonable cause of action.

(c) It prohibits the use of affidavit evidence and confines the Court to four corners of a pleading only in applications made under Order 18 r.19(1)(a). It is settled beyond doubt that affidavit evidence is always admissible upon an application made under Order 18 r. l9(1)(b), (c) and (d) or under the inherent jurisdiction of the court.

See: *Owen Sim Liang Khui v Piasau Jaya Sdn. Bhd. & Anor* [1996] 4 CLJ 716;
Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director-General of Trade Unions & Ors. [1990] 3 MLJ 231.

(d) In considering the affidavit evidence, the Court is not expected to conduct a “mini trial” or to hear lengthy arguments.

See: *Tractors Malaysia Berhad v Tio Chee Hing* [1975] 1 LNS 133; [1975] 2 MLJ 1;
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-Ameican Life & General Insurance Bhd [1993] 3 MLJ 16.

[3] Power to strike out pleadings

The power to strike out any pleadings or any part of the pleadings under Order 18 r.19 is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality

and all the circumstances relating to the offending plea.

See: *Carl Zeiss Stiftung v Rayner & Keeler Ltd.* (No. 3) [1970] Ch 506;
Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director-General of Trade Unions & Ors. [1990] 3 MLJ 231.

[4] Time limit to file Order 18 r.19 application

(a) An application for striking out may be made at *'any stage of the proceedings'* and as a rule be made before the close of pleadings.

See: *Jamir Hassan v Kang Min* [1992] 2 MLJ 46.

(b) Where the statement of claim is being challenged, the application should be made before the defence is served.

See: *A-G of Duchy of Lancaster v L & N W Railway* [1892] 3 Ch 274.

(c) Where the defence or other pleadings are being challenged, it should be made as reasonably promptly after service of such defence or pleading.

See: *Malayan Banking Bhd v Gan Kong Yam* [1972] 1 MLJ 32.

(d) If the said application is made after close of pleading, the court has discretion to allow it. Where an application is made after setting down for trial, the court may refuse to exercise such discretion and refuse the application.

See: *Jamir Hassan v Kang Min* [1992] 2 MLJ 46.

(e) The filing of an unconditional appearance does not preclude a defendant from making an application to strike out under Order 18 r.19 of the RHC.

See: N Carrupaiya v MBF Property Services Sdn. Bhd. & Anor [2000] 4 CLJ 116.

[5] Effect of delay in filing Order 18 r. 19 application

(a) In the case of *Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman & Ors* [1987] 1 CLJ 572, Zakaria Yatim J stated that as

follows:

> "The rule does not specify a time limit during which a party may apply to the Court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The Court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See The Supreme Court Practice, 1985, v.1, page 304.".

(b) The delay of almost seven months by the plaintiff in filing an application to strike out certain paragraphs of the statement of defence as disclosing no reasonable defence or as being frivolous or vexatious or tending to delay the fair trial of the action after the plaintiff had filed its notice of entry of trial was held not to be fatal.

See: *Malayan Banking Berhad v Gan Kong Yam* [1969] 1 LNS 105.

(c) The delay of more than one year after the filing of the statement of defence was held not fatal to the second defendant's application made pursuant to Order 18 r. 19(1) of the RHC as the trial date has yet to be fixed.

See: *Doree Industries (M) Sdn. Bhd. & Ors v Sri Ram & Co & Ors* [2001] 4 CLJ 446.

(d) An unexplained delay by the plaintiff had caused prejudice to the defendants and had jeopardised the fair trial of the action.

See: *United Malayan Banking Corp v Petroleum Marketing Sdn. Bhd. & Ors* [2005] 6 MLJ 334.

[6] Grounds of striking out an application

(a) it discloses no reasonable causes of action or defence:

(i) The Statement of Claim should be struck out only in plain and obvious cases where the Judge can say at once that the Statement of Claim as it stands is insufficient even if proved to entitle the plaintiff to the relief. As long as the Statement of Claim discloses some ground of action, the mere fact that the plaintiff is not likely to succeed is no ground to strike out the Statement of Claim.

See: *Attorney-General, Malaysia v Chiow Thiam Fuan* [1983] 1 CLJ 27;

Loh Holdings Sdn. Bhd. v Peglin Development Sdn. Bhd. & Anor [1984] 2 CLJ 88, [1984] 1 CLJ 211(FC).

(ii) The test to be applied is *"whether on the face on the pleadings, the court is prepared to say that the cause of action or the defence is "obviously unsustainable"*.

See: *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn. Bhd. & Anor* [1985] 1 MLJ 226.

(iii) It is premature for the plaintiff to bring an action where the criminal proceedings against the plaintiff in the Kadi's Court was not finally determined by the Syariah Appeal Court.

See: *Taib Awang v Mohamad Abdullah & Ors.* [1984] 1 CLJ 44.

(b) it is scandalous, frivolous or vexatious:

(i) The scope of the word 'scandalous' means wholly unnecessary or irrelevant.

See: *Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn. Bhd.* [2002] 1 CLJ 405.

(ii) Where persons are made parties for the sole purpose of securing costs, it may lead to a "frivolous or vexatious" action.

See: *Burstall v Beyfus* [1884] 26 Ch D 246.

(c) it may prejudice, embarrass or delay the fair trial of the action:

(i) It must be given a wide and liberal interpretation.

See: *Berdan v Greenwood* [1878] 3 Ex D 256.

(ii) The following situations would be prejudice, embarrass or delay the fair trial of the action:-

- An action may be struck out if such action is proceeded even though it is time-barred.

  See: *Ronex Properties v John Laing Construction Ltd* [1982] 3 All ER 961.

- A pleading is embarrassing where it is not clear what is being pleaded. The court struck out the allegations in the Statement

of Claim referring to the conspiracy to defame as it had merged with the libel in this action.

See: *Mrs Kok Wee Kiat v Kuala Lumpur Stok Exchange Berhad & Ors* [1979] 1 MLJ 71 (FC).

- If the property had passed to the plaintiff then the defendants have no right to repossess the tractor.

See: *Tractors (M) Bhd v Kumpulan Pembinaan (M) Sdn. Bhd.* [1979] 1 MLJ 129 (FC).

- The court struck off the defence when an unsubstantiated allegation of corruption was raised as it was embarrassing.

See: *Pertamina v Kartika Ratna Tahir* [1983] 1 MLJ 136.

(d) it is otherwise an abuse of the process of the Court:

(i) Arises in situations where the process of the court has not been used in a *bona fide* manner and it has been abused.

(ii) The court is not concerned with the plaintiffs' merits or chances of success in the action.

See: *Abdul Rahim Abdul Hamid & Ors v Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417.

(iii) However, the court will prevent its machinery from being used improperly.

See: *Castro v Murray* [1911] 10 Ex 213.

(iv) The following situations would be an abuse of the process of the court:

- The defence is simply filed for the purpose of delaying and playing for time.

See: *Public Finance Bhd v S. Ramasamy s/o KMS Chockalingam Chettiar* [1990] 2 CLJ 431.

- The parties have readily submitted themselves to the jurisdiction of one forum and yet seek to complain about the same subject matter in another forum.

See: *Mohamed Habibullah bin Mahmood v Faridah bte*

Dato' Talib [1993] 1 CLJ 264.

- The party seeks relief which should have been done in a previous action.

  See: *Henderson v Henderson* [1843] 3 Hare 100 at 115;
  Greenhalgh v Mallard [1947] 2 All ER 255.

  - An action to recover debt is taken simultaneously with a foreclosure action in respect of the same debt.

  See: *Ng Yik Seng v Perwira Habib Bank* [1980] 2 MLJ 83.

- The same issue raised in different proceedings between different parties are to be relitigated.

  See: *North West Water Authority v Binnie & Partners* [1990] 3 All ER 547.

(e) Under the inherent jurisdiction of the Court:

The Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under Order 18 r. 19. Unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

See: *Raja Zainal Abidin bin Raha Haji Tachid & Ors v British-American Life & General Insurance Bh*d [1993] 3 CLJ 606.

13

Summary Judgement

Ummu Kalthom Binti Abd Samad

Chapter 13

Summary Judgement

[1] Introduction

(a) Summary judgment proceedings or also commonly known as Order 14 of the RHC or Order 26A of the SCR application is a procedure of disposal of a dispute without a trial involving witnesses. The main purpose of a summary judgment is to allow a plaintiff who is clearly entitled to his cause of action from being delayed in obtaining his judgment. In *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1997] 2 MLJ 183 the court explained the underlying philosophy in the Order 14 application as follows:

> "……..is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim."

(b) Order 14 application allows the plaintiff to obtain summary judgment under certain circumstances. The basic purpose of the procedural rule is to prevent the defendant from putting in a sham defence and hence delay the proceedings. However as a safeguard, because of its summary nature the court will allow the plaintiff such a relief only in clear cases.

[2] The Law

The law on summary judgment is set out in Order 14 of the RHC and Order 26A of the SCR and the numerous cases that has discussed both these provisions. For the purpose of this chapter reference shall be made to Order 14 and the principles of Order 14 shall apply with equal force to Order 26A applications.

[3] The Scope

(a) Summary judgement proceedings applies to every action begun by writ except, an action brought by the plaintiff for a claim for slander, libel, malicious prosecution, false imprisonment, breach of promise of marriage and a claim based on an allegation of fraud. Order 14 procedure does not apply to an action against the government but the government can make such an application.

See: Order 14 r.1 (2) of the RHC;
Order 73 r.5 (1) and (2) of the RHC.

(b) The procedure also applies to proceedings by or against the company, against its directors, an action for debt or liquidated demand, claim for unliquidated damages and also damages for breach of contract when there is clearly no defence as to liability. It is also applicable to many other actions including breach of a scholarship agreement.

See: *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400.

(c) Order 14 procedure is to enable the plaintiff to obtain summary judgment without trial if he can prove his case clearly and if the defendant is unable to set up a bona fide defence or raise a triable issue against the claim which ought to be tried. Summary judgment will be allowed for plain and obvious cases only. The Order 14 procedure is appropriate where the matter to be disposed involves merely construction with a few documents. When the matter involves lengthy argument by the counsel on difficult questions of facts and law, summary judgment is not an appropriate procedure.

See: *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400.

[4] Application and manner for the summary judgment

(a) Before a plantiff can apply for summary judgment against the defendant under Order 14 of RHC, the plaintiff must satisfy that—

(i) the statement of claim must have been served on the defendant.
(ii) the defendant must have entered an appearance;

(iii) the plaintiff must support his application by the requisite affidavit.

See: Order 14 r. 3 and 4 of the RHC.

(b) It is reminded that the supporting affidavit is an important part of the Order 14 procedure. The affidavit must satisfy the requirement of Order 14 r. 2. Where there is no such affidavit or no affidavit the summons may be dismissed. The affidavit may be by a plaintiff or any person duly authorised by him. The affidavit must be made by a responsible person who has personal knowledge of the facts.

See: *Siong Eng Co. v Malaysian Insurance Co. Inc.* [1964] MLJ 65.

(c) Application for summary judgment must be made by summons supported by an affidavit which must comply with Form 18 (Order 14 r.2). The affidavit must—

(i) verify the facts on the claim. When deponents verify the facts stated in the statement of claim but need not set out all the particulars again or verify the facts save by reference to the statement of claim; and

(ii) state the deponents belief that there is no defence to the claim except as to the amount of damages. Deposing to the belief that there is no defence means that the plaintiff must depose to the belief that he verily believes that the plaintiff has a strong case and the defendant has no defence.

See: Order 14 r. (2)(i) of the RHC.

[5] Time for Applying Summary Judgment

Generally summary judgment application should be made before delivery of the defence by the defendant. When a defence has been delivered, an application for summary judgment may still be made if it can shown that the defence is a sham defence and insubstantial. The burden is on the plaintiff to show why he did not apply sooner. In *Perkapalan Shamelin Jaya Sdn Bhd v. Alpine Bulk Transport New York* [1998] 1 CLJ 424, the Court of Appeal clearly decided that when defence has been delivered and only after that the plaintiff filed an application under Order 14, the defendant cannot raise the issue of

delay as an objection unless it is also supported by *bona fide* triable issue and shows that delay can no longer become a ground for opposing an application for summary judgment when there is an explanation.

See: *C.G.I.R. v Weng Lok Mining Ltd* [1969] 2 MLJ 98;
British American etc Insurance Bhd v Pembinaan Fal Bhd [1994] 3 MLJ 267;
MBSB v Ghazi bin Hasbollah [1994] 2 MLJ 1;
Lee Wah Bank Ltd v Chee Kong Electrical Engineering Sdn. Bhd. & Ors [1999] 6 MLJ 153.

[6] When to Enter Judgment for Plaintiff

When the plaintiff has satisfied and fulfilled all the conditions in Order 14 r. 1(1) and r. 2(1) of the RHC, and when the case comes within the order, the plaintiff would have established a *prima facie* case and is entitled to a summary judgment. In other words when the plaintiff satisfies the court with respect to the claim, or part of the claim, to which the application relates and there is no issue or question in dispute which ought to be tried, then court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed. At the time of giving judgment against the defendant, the court may stay execution of any judgment given against the defendants under this Order until after the trial of any counterclaim made or raised by the defendant in action. Summary judgement may not appropriate in situations where damaged have to be quantified such as in personal injury claims.

See: Order 14 r. 3(2) of the RHC;
Avel Consultants Sdn. Bhd. v Mohd Zain [1985] 2 MLJ 209.

[7] Dismissal of Plaintiff's application

Where the court dismisses the plaintiff's application for summary judgment, it has no discretion to dismiss the plaintiff's action. In other words dismisal of the Order 14 application does not dispose of the plaintiff claims. The plaintiff must therefore apply for summons for directions within one month of the dismissal of the application.

See: *Diamond Peak Sdn. Bhd. & Anor v Tractors Malaysia Berhad* [1980] 2 MLJ 127.

[8] Defendant's duty in Summary Judgment

(a) Where the plaintiff's file an Order 14 application, in the event the defendant wish to challenge it, the defendant may show cause by filling an affidavit in opposition. At this stage the question the court should ask is, "has the plaintiff's case any merit?" It is here that the defendant's affidavit in reply plays a crucial role. The defendant then has to show that there is an arguable case or for any other reasons the case ought to be tried. The principle of, "Where one parties make a positive assertion upon a material issue in an affidavit, the failure of his opponent to contradict is usually treated as an admission", is applicable to the defendant in summary judgment.

See: *Appadurey v Ananda* [1982] 1 MLJ 292;
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400;
Ng Lai Tien v Peregrine Finance Limited [1996] 2 CLJ 496;
Malek & Joseph Au (sued as a firm) v Bank Bumiputra (M) Sdn. Bhd. [1998] 4 MLJ 608;
Lin Securities v Noone & Co Sdn. Bhd. [1998] 1 MLJ 321;
Ng Hee Thoong v Public bank Bhd. [1995] 1 MLJ 281.

(b) The important point to note here is that in its attempt to show that the defendant has an arguable case or that for any other reason the case ought to be tried, the defendant in his affidavit in reply cannot get away by making a general denial, of the allegations made against him in the plaintiff's statement of claim. He must give particulars of his defence.

See: *Ng Hee Thoong v Public bank Bhd.* [1995] 1 MLJ 281.

(c) The court will not find a triable issue for the purpose of granting leave to defend on the basis of the defendant's allegation alone. There must be some evidence to support the allegation. The defendant must not only raise an issue or any issue but he must raise an arguable issue which would require a trial in order to determine it. The determination of whether an issue is triable depends on the facts or law arising from each case as disclosed in the affidavit evidence. All that the defendant needs to show is that there is a triable issue as to a matter of fact or any real difficulty as to matter of law.

See: *Alliance Bank Malaysia Bhd. v Exelus Corporation (S) Sdn Bhd.* [2003] 2 AMR 502;
Voo Min En v Leong Chung Fatt [1982] 2 MLJ 24.

(d) Critical evaluation of the facts are needed and mere bare assertions or denials must be rejected.

See: *Bank Negara Malaysia v Mohd Ismail Ali Johor & Ors* [1992] MLJ 400.

(e) A mere bare assertion by the defendant would not be sufficient. The duty of the court is quiet onerous in the extreme. The court must be vigilant and must view in perspective at the whole scenario in order to ascertain whether the defendant has a real or what is commonly known as a *bona fide* defence.

See: *Renofac Builder (M) Sdn. Bhd. v Chase Perdana Bhd.* [2000] MLJ 752.

[9] Leave to Defend: Conditional and Unconditional

(a) Defendant must show cause why leave to defend must be given. The defendant must provide answers on oath which constitute evidence that they have a defence which is fit to be tried and mere denials in defence do not constitute evidence. The procedure under Order 14 is not intended to shut out a defendant who can show that there is an issue or question that ought to be tried or that for some other reason there ought to be a trial. Leave to defend will be given where there is a *bona fide* triable issue requiring assessment of the witness at a trial.

(b) Where a defendant can show by affidavit that there is a *bona fide* triable issue, unconditional leave to defend would normally be granted. In the event the defendant's good faith is doubted (defence is sham, or that there is something suspicious in the defendant's mode of presenting their case or the court is nearly prepared to give judgment to the Plaintiff) and the court finds that the Plaintiff ought to be protected, especially if there is no grave hardship to the defendant's, the defendant may be granted leave to defend upon the condition that it pays into court the amount claimed by the Plaintiff.

(c) In a situation where the defendant raises a triable issue which was not challenged by the Plaintiff and there is no sign of bad faith, the plaintiff's application must be dismissed and unconditional leave to defend be granted.

See: *QBE Supreme Insurance Bhd. v Syarikat Chemas Pemborong Sdn. Bhd.* [1986] 1 MLJ 56.

[10] Summary Judgement on Counterclaim

When a defendant has served a counterclaim on the plaintiff, the defendant in certain cases may apply to court for summary judgment on the ground that the plaintiff has no defence to the counterclaim, or part of it in which the defendant applies for judgment. The procedure is same as in an application by the Plaintiff for a summary judgment.

14

Third Party and Interpleader

Portia Tham Ong Leng

Chapter 14

Third Party and Interpleader

[1] Introduction

(a) A Defendant, after having entered appearance may institute an action against a person who is not a party to the action for all or part of the plaintiff's claim against him. Such proceeding is termed as third party proceeding and is distinct and separate from the main action. This proceeding is provided under Order 16 of the RHC or in its corresponding rule of Order 12 of the SCR. Third party proceedings, being indemnity or contribution in nature, is for the purpose of bringing into the main action, a party who is or may be liable to the Defendant for all or part of the plaintiff's claim against the Defendant.

(b) Third party proceedings are strictly between the defendant and third party and not between the plaintiff and third party. Therefore, if the Plaintiff obtains judgment against the defendant, he cannot enforce it against the third party. Third party proceeding is available for a defendant to—

(i) claim against a person who is not a party in the proceedings;

(ii) claim against such person any relief or remedy relating to or connected with the original subject matter of the action and or substantially same relief claimed by the plaintiff;

(iii) determine the issues of the original action which are to be determined not merely between the plaintiff and defendant, but also between either or both of them and a person not a party to the action.

[2] Essence and Object of Third Party Proceedings

(a) Where the court has granted third party proceedings, then in actual fact there will be two separate actions in the same suit – between the plaintiff and the defendant and between the defendant and the third party. For practical purposes, more often than not, the defendant will be treated as the plaintiff against the third party and the third party will be treated as the defendant in this third party action.

See: *Valliammal Achi v Nachiappa* [1957] MLJ 27.

(b) The objects of third party proceedings are—

(i) to prevent multiplicity of actions and therefore cost effective;

(ii) to avoid different findings by court based on same facts;

(iii) to bind the third party with the decision derived in the proceedings between the plaintiff and defendant; and

(iv) to decide the issues between the defendant and third party immediately after the decision between the plaintiff and defendant to enable recourse by the defendant against the third party immediately after paying the plaintiff's judgment sum.

[3] Procedure

(a) A third party proceeding is initiated by the defendant when a third party notice in Form 22 or 23 is filed. The defendant may issue and serve a third party notice without leave of the court before it serves its defence on the plaintiff. But, although leave is not necessary to issue a third party notice, this does not prevent the court from exercising its discretion to set aside the third party notice at any stage of the proceedings.

See: Orders 16 r. 1(2) and 16 r. 6 of the RHC.

(b) If the action is initiated by originating summons or where it is intended to be served on the government, then leave of the court is necessary to issue third party notice. Order 73 r. 8 of the RHC requires that where

service is intended to be affected on the government, the notice must be issued with leave of the court and the application for such leave must be made on the plaintiff and the government.

(c) An application for leave to issue third party notice may be made by an *ex-parte* summons in Form 24. However, the court may direct the summons to be served. This application, like most applications, must be supported by an affidavit stating—

(i) the nature of the claim made by the plaintiff in the action;

(ii) the stage the proceedings in the action have reached;

(iii) the nature of the claim made by the applicant or particulars of the issues required to be determined as the case may be and the facts on which the proposed third party notice is based on;

(iv) the name and address of the person against whom the third party notice is to be issued.

(d) The granting of leave is at the discretion of the court. In considering whether or not to grant leave, the court need not consider the merits of the case. The court in granting leave may contain directions on the period within which notice is to be issued.

See: *Edisan & Swan United Electric Light Co v Holland* [1889] 33 Ch D 497.

(e) The third party notice should contain a statement specifying the nature of the claim made by the plaintiff against the defendant and grounds of the claim made by the defendant against the third party in relation to the plaintiff's claim. The third party notice must be personally served with the originating process and pleadings, if there is any. In turn, a third party, intending to dispute the claim must enter appearance within the stipulated time to enter appearance to a writ or within such time ordered by the court. If the third party enters appearance in form 25, then the defendant must issue summons for directions and serve on all parties to the action. If the Defendant fails to issue summons for directions, then the third party may, not earlier than 7 days after entering an appearance apply to the court for directions or for an order to set aside the third party notice. If the third party summons for directions is not taken, the court will not have the jurisdiction to hear the issues on the date of trial.

See: *Subramaniam Pillay v Sundarammal* [1967] 1 MLJ 260.

(f) The principles in setting aside a third party notice are the same as an application to strike out under Order 18 of the RHC. In addition, the applicant must show special circumstances why the proceedings should not continue. Delay in taking out third party proceedings may constitute special circumstances.

See: *Lee Kuan Yew v Devan Nair & Anor* [1993] 1 SLR 723; *Pacific Asia Leasing (M) Sdn. Bhd. v Senanti Motors Sdn Bhd* [1992] 2 MLJ 364.

(g) The party who intends to object a third party proceeding may do so by filing an affidavit stating the grounds of objection and then serving on all the interested parties.

(h) On hearing the summons for third party directions, the court may make such orders and directions that is proper for having the rights and liabilities of the parties conveniently determined and enforced. If liability is established, the court has wide discretion to make suitable orders and directions provided in Order 16 r. 4 RHC.

See: *Evans v Stuart Passey & Associates* [1986] 1 All ER 932.

[4] Execution of Judgment against a Third Party

If Judgment is awarded against the third party, the defendant cannot execute the judgment without leave of the court. The court will only give leave to execute the Judgment after having been satisfied that the defendant has paid the Judgment sum to the plaintiff. The court can also, at any time, set aside or vary the Judgment entered under Order 16 r. 5 of the RHC on such terms as it thinks fit.

See: *Rabiyah bte Malek v Foo Tak Siong* (Ngoh See Cheng, third party [1994] 1 MLJ 583.

[5] Limitation

(a) In third party proceedings, notwithstanding the Limitation Act 1953 and other statutory provisions on limitation, time does not begin to run against a third party until the defendant is made liable to the plaintiff. In *Mat Abu bin Man v Medical Superintendent General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226, the plaintiff in July 1983 filed its action in respect of a motor vehicle accident which happened on July 1981. The defendant appellant brought third party proceedings against the respondent. The respondent pleaded before the trial judge that the

appellant's action against the respondent is statute barred under section 2(a) of the Public Authorities Protection Act 1948. The trial judge dismissed the appellant's claim against the respondent third party. The appellant appealed. At the appeal, the Supreme Court held that the third party proceedings for contribution must be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When the defendant is found liable to the plaintiff, he then has a right against a third party to establish he possesses a right to contribution or indemnity from the third party. The court stated that time begins to turn from the date the defendant is made liable. The court stated further that section 10(1)(c) of the Civil Law Act 1956 provides a right to a tortfeasor to recover contribution from any other joint tortfeasor who has caused or contributed to the same damage. The court stated that third party proceedings under Order 16 of the RHC should not be treated in the same way as an action between a plaintiff and defendant. Therefore, in the case of third parties, the court stated that section 2 of the Public Authorities Protection Act 1948 should not assist the third party at all even though third party notices were issued out of the prescribed limitation period.

(b) However, in *Tan Chong & Sons Motor Co Sdn. Bhd. v Arumugam s/o Packrisamy & Anor* [1990] 3 CLJ 1477 the court stated that the principal in *Mat Abu's* case is only applicable when a defendant claims indemnity or contribution against a third party. If the indemnity or contribution claimed in contract is instituted after six years from the date of cause of action, the claim is time barred.

See: *Pacific Asia Leasing (M) v Senanti Motors Sdn. Bhd. & Anor* [1992] 2 MLJ 364.

[6] Interpleader Proceedings

(a) An interpleader proceeding is one whereby a person sued in respect of a property, disclaims any interest he or she has in it and request the court so that the rival claimants litigate their titles between themselves and relieve him or her from the responsibility. Interpleader relief is discretionary and cannot be claimed as of right.

See: *R v Turner* [1897] 1 QB 445.

[7] Situations where Interpleader can be claimed

(a) Generally, interpleader relief can be claimed in the following two situations:

(i) Where a third person makes a claim to the sheriff to the good or chattels after he has seized pursuant to execution proceedings under any process. Here, the sherrif will issue an interpleader summons usually referred to as sherrif's interpleader to determine the rights of the various claimants.

See: Order 17 r. 1 (1) (b) of the RHC.

(ii) Where any person, for example a stakeholder, who is under a legal liability to pay a debt or money or goods or chattels to a particular person and some third party makes a claim to the debt or money or goods or chattels, then the stakeholder may take out an interpleader summons, usually referred to as stakeholders interpleader to determine the rights of the various claimants.

See: Order 17 r. 1 (1)(a) of the RHC.

(b) The interpleader must have no personal claim to the property. By issuing the interpleader summons, they are seeking the court's guidance to determine the rights of the parties.

[8] Procedure

(a) Any claimant who intends to claim the movable property which has been taken or intended to be taken in execution under the process of the court must give notice of his claim in form 28 to the sheriff in charged with the execution of the process. The claimant must include in his notice, a statement of his address for service. Upon receipt of this notice, the sheriff must give notice in Form 29 to the execution creditor who must, within four days after receiving the notice, give notice informing the sheriff whether he admits or disputes the claim. For the claimant to succeed, he must satisfy the court that his claim is *bona fide* and is not instituted to defeat the execution proceeding of the judgment creditor.

See: *Harper Gilfilan Sdn Bhd v Kean Toh Amang Factory Sdn. Bhd. and Lee Kwee Hong (claimant)* [1986] 1 MLJ 249.

(b) An interpleader proceeding under Order 17 of the RHC must be instituted by way of an Originating Summons unless it is made in a pending action, in which case it is instituted by summons in action in Form 31 or 32, whichever is applicable. If it is by way of an Originating Summons, then no appearance is needed to be entered, the summons under this rule must be supported by evidence to the effect that the applicant—

(i) claims no interest in the subject matter in dispute other than for charges or costs;

(ii) does not collude with any of the claimants to that subject matter; and

(iii) is willing to pay or transfer that the subject matter into court or to dispute of it as the court may direct

(c) However, where the applicant is the sheriff, he need not provide such evidence unless directed by the court to do so. The Originating Summons or interpleader Summons in form 33 must be served personally at least seven days before the return day, unless otherwise ordered by the court. If on the hearing of the Summons all the claimants appear, the court may order that—

(i) any claimant be made a defendant in any action pending with respect to the subject matter in dispute, in substitution for or in addition to the applicant for the interpleader relief;

(ii) an issue between the claimants be stated and tried, directing which of the claimants is to be the plaintiff and which is the defendant.

See: Order 17 r. 3 of the RHC.

[9] Court may summarily determine

Where the applicant for interpleader relief is a sherrif, or all the claimants consent or any claimants so requests, or the question at issue between the claimants is a question of law and the facts are not in dispute, the court may summarily determine the question at issue between the claimants and make orders on such terms as may it thinks just.

See: Order 17 r. 5 of the RHC.

[10] When the claimant is absent

Where a claimant who has been duly served with an interpleader summons does not appear on the hearing of the summons, or having appeared, fails or refuses to comply with an order made in the proceedings, the court may make an order declaring the claimant, and all persons claiming under him barred from prosecuting his claim against the applicant and all persons claiming under him, but such order

does not affect the rights of the claimants between themselves.

See: Order 17 r. 5 (2) of the RHC.

15

Payment Into and Out of Court

Mellisa Chia Pui Fung
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Chapter 15

Payment Into and Out of Court

[1] Introduction

(a) For subordinate courts, payment into and out of court is governed by the SCR.

(b) The procedure on payment into court is simply an offer to encourage parties to settle a dispute without the need of going through a trial. This procedure is also commonly known as the *Calderbank letters* which derived from the matrimonial case of *Calderbank v Calderbank* [1975] 3 All ER 333. It must be pointed out that in civil proceedings costs is usually one of the most important factor which is considered by parties in dispute, Hence this procedure is made available to a defendant who wishes to obtain protection against an award of costs but who do not wish his offer for the settlement of the dispute to be revealed to the court during the course of the proceedings. He makes his offer by making payment into court in the hope that the matter be settled. Where the plaintif having knowledge of the defendant's payment into court but nevertheless proceeds with the trial and is subsequently awarded a lesser sum than he will be penalised wholly in respect of the costs.

See: *Calderbank v Calderbank* [1975] 3 All ER 333;
Martin French v Kingswood Hill [1961] 1 QB 96.

(c) The purpose of the rule is the hope that further litigation will be avoided, the Plaintiff being encouraged to take out the sum paid in,

if it be a reasonable sum, whereas, if he goes on and gets a smaller sum, he will be penalised wholly or to some extent in costs.

See: *Findlay v Railway Executive* [1950] 2 All ER 969.

[2] Payment into court

(a) Any defendant may pay a sum of money into court to satisfy the cause of action which the Plaintiff claims for. However, it is strictly confined to actions for 'debt or damages', which includes personal injury, and death claims and consequential damages recoverable. It excludes actions for account, such as a claim for compensation for resumption of land.

(b) Nevertheless, this rule covers action or counterclaim for bodily injury arising out of the use of motor vehicle on a road or any place to which the public have a right of access in which the claim or damages includes a sum of hospital expenses.

See: Order 17 r. 12 of the SCR.

(c) The Defendant may do so at any time after he has been served with the summons of the action claimed.

(d) If there is an increase of payment made, the Defendant may do so without leave. However, he must give a notice to the Registrar and the Plaintiff and all other co-defendants (if any) and the Plaintiff must send the Defendant a written acknowledgment of its receipt within two days after he received the said notice.

(e) If there is more than one cause of action, money paid into court must be specified in the notice in relation to which cause of action the payment if made.

[3] When the Defendant has a counterclaim

(a) If the Defendant, though with counterclaim against the Plaintiff, pays a sum of money into court, the Defendant must state whether the amount of his payment includes his counterclaim or not. It gives the Defendant an option to strike a balance between the Plaintiff's claim on one hand, and his own set-off and counterclaim on the other, and paying the balance.

(b) The Plaintiff against whom the counterclaim is made may also pay money into court and Order 17 of the same rule shall apply accordingly.

See: Order 17 r. 6 of the SCR.

[4] Time of acceptance

(a) Where more than one payment has been made or notice has been amended, the Plaintiff may accept the payment in within 14 days after the receipt of last payment or the amended notice. However, this must be done before the trial or the hearing of actions begins.

(b) Nonetheless, if the last payment s received after the beginning of the trial, the Plaintiff may still accept within two days after the notice. This must be done before the judge begins to deliver judgment.

(c) If the money paid in court is not accepted, the remaining money in court shall not be paid out except n pursuance of an order of the court

See: Order 17 r. 5 of the SCR.

[5] Payment out of money accepted

(a) Money paid into Court under the Order of the Court shall not be paid out except in pursuance of an order of the Court (Order 17 r. 8). Payment shall be made to the party entitled or on his written authority, or his solicitor or if the Court so orders, to his solicitors without such authority.

See: Order 17 r. 10 of the SCR.

(b) The court naturally disinclined to make such an order after the close of arguments. However, even if the court inclines to make such order, the court must apportion the money paid in among those entitled to the damages.

(c) Where a Plaintiff accepts any sum paid into Court and that sum was paid into court by some but not all the Defendants sued jointly, and if either before or after accepting the money paid into Court by some only of the Defendants sued jointly or in the alternative by him, the Plaintiff discontinues the action against all other defendants and those defendants consent in writing to the payment out of that sum, it may be pad out without an order of the Court.

(d) If the trial of an action has begun, and Plaintiff accepts any money paid into court and all further proceedings in the action or in respect of the specified cause or causes of action, the money shall not be paid

out except in pursuance of an order of the Court, and the order shall deal with the whole costs of the action.

[6] None-Disclosure of Payment

Payment that has been paid into Court under the provisions of this order shall not be pleaded and no communication of that fact shall be made to the court at the trial until all questions of liability and of the amount of debt or damages have been decided. A payment into court should also be a secret plea as far as an appeal court is concerned.

[7] Money Paid under Exchange Control Act 1953

If money has been paid pursuant to the Exchange Control Act 1953, any party concerning may apply for payment out of court of that money. Application can be made by notice which must be served on all parties interested. This is also to ensure the requirement under Exchange Control Act 1953is complied with. Money may not be pad out to a person resident outside the scheduled territories without the consent of the Controller of Foreign Exchange.

[8] When the person entitled intestate

In such situation, if the court is satisfied that no grant of administration of his estate has been made and that the assets of his estate do not exceed RM10,000.00 in value, including the value of the fund, the court may order that the share or fund to be transferred to his next of kin who would have the prior right to a grant of administration of the estate of the deceased.

See: Order 17 r. 11 of the SCR.

16

Amendment

Zulkifli Bin Abllah

Chapter 16

Amendment

[1] Introduction

(a) It is clearly the duty of the person responsible for the drafting and filing of the pleadings to ensure that the pleadings fall within the rules of pleadings. The provisions on pleadings are provided under Order 18 of the RHC. Mistakes however may be amended under Order 20. Sometimes the leave of the court is necessary. Amendments maybe made at any stage of the proceedings. Obviously the earlier the amendments are made the better it is so that the consequential amendment by the other side may be kept to the minimum.

(b) The general principal on amendment to pleadings is that however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

See: *Brett M. R. in Clarapede v Commercial Union Associatio*n [1883] 32 W.R. 262.

[2] Amendment possible without leave of the court

(a) Amendments of the writ by the Plaintiff is governed under Order 20 rule 1 of the RHC. The Plaintiff may do so once at anytime before the close of the pleadings, but not to add, omit or substitute a party to alter the capacity in which the parties are sued or is sued, or to add or substitute a new cause of action or amend the statement of claim endorsed on the writ. However, this rule does not apply if the writ has not been served. In such a case, the Plaintiff may amend without any restrictions.

(b) General rule under Order 20 r. 1 of the RHC is that it allows a writ to be amended before it has been served on any party to the action. The rule is not applicable to the statement of claim, except where it is indorsed on the writ. For amendment of statement of claim, rule 3 should be considered.

(c) Generally, a party may amend its pleadings once before the close of the pleadings. Where the Plaintiff has amended the statement of claim which is provided under Order 20 r. 3 (1) of the RHC, the defendant may amend his defence to answer the amendment and in turn the Plaintiff may amend his reply to the defence and the defence to the counterclaim.

[3] Basic principle on amendments

(a) The general principle is that an application for amendment should be granted if it does not cause injustice. For example, applications for amendment of pleadings have been allowed not only immediately before commencement of trial but also in the course of a trial. In the oft quoted landmark case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn. Bhd. & Ors* [1983] 1 MLJ 213, Mohamed Azmi J said that three basic questions must be considered in deciding whether injustice would or would not result when an amendment is granted. The three questions are—

(i) whether the application is bona fide;

(ii) whether the prejudice caused to the other side can be compensated by costs;

(iii) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

His Lordship said that if the answers are in the affirmative—

“an application for amendment should be allowed at any stage of the

proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.".

See: *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn. Bhd. & Ors* [1983] 1 MLJ 213,

(b) Plaintiff will not be allowed to amend by setting up a fresh claim in respect of causes of action which since the issue of the writ has become barred by the statute of limitation. Moreover, application for an amendment which is not *bona fide* and made on the merits but instead of tactical manouevres will not be allowed. An amendment also will not be allowed if it would amount to an abuse process of court. Delay in making of an application to amend will likely to be male fide may prove detrimental to the application.

(c) Generally leave to amend may not be granted in the following situations:

(i) amendment must not turn a suit of one character into a suit of another and inconsistent character.

See: *Chin Kok Kwong Construction Sdn. Bhd. v Sunrise Towers Sdn. Bhd.* [1986] 2 MLJ 41.

(ii) an amendment to add a party or to raise a cause of action after the expiry of the relevant limitation period.

See: *Liff v Peasley* [1980] 1 All ER 623;
Credit Corp (M) Bhd. v Fong Tak Sin [1991] 1 MLJ 406;
Suruhanjaya Pelabuhan Pulau Pinang v Boss s/o Ramasamy [2002] 4 MLJ 153.

(iii) an amendment to raise a cause of action which accrued to the plaintiff only after the action commenced.

See: *Simetech (M) Sdn. Bhd. v Yeoh Cheng Liam Const. Sdn. Bhd.* [1992] 1 MLJ 11.

(iv) futile, frivolous or not *bona fide.*

See: *Chip Chong Sawmill Co Sdn. Bhd. v Chai Khuin Fui* [1978] 1 MLJ 24.

(v) delay in applying for amendment.

See: *Lembaga Pelabuhan Johor v The Pacific Bank Bhd.* [1998] 5 MLJ 323;
Raphael Pura v Insas Berhad & Anor [2000] 1 MLJ 49.

[4] Service of amended pleading and application to court to disallow amendment

(a) Amended pleadings must be served on the other side and copies filed in the court. An application to court to disallow the amendment must be made by the parties. However, the right to amend is always subject to an application by the other party to court to disallow the amendment. This is provided under Order 20 r. 4 of the RHC. An application to court to disallow amendment should be summon to the registrar, unless made in the summons for direction.

[5] Amendment with leave of court

(a) However, there is a situation where amendment maybe made with leave of court. The court has a general discretion to allow or disallow any amendment sought to be made to the writ of pleadings or any other document other than judgment or order. But, no amendment will ordinarily be allowed after the relevant period of limitation current at the date of the issue of the writ has expired, though the court has the power to allow it as provided under Order 20 r. 5(2) of the RHC.

See: Order 20 r. 5 and Order 20 r. 8 of the RHC;
Suruhanjaya Pelabuhan Pulau Pinang v Boss s/o Ramasany [2000] 4 MLJ 153;
*Government of Malaysia v Mohamad Amin bin Hassa*n [1986] 1 MLJ 224;
Hock Hua Bank Bhd. v Leong Yew Chin [1987] 1 MLJ 230;
Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik bin Syed Mohamed & Anor and other appeals [2000] 3 MLJ 328.

(b) The general principle guiding the court in granting the amendment is to allow such amendment as will not cause injustice to the other side. In order to determine whether the injustice will cause, certain other principle would have to be considered. In *Ponnusamay v Nothu Ram* [1959] MLJ 629, it was held that in dealing with an application to amend the pleadings, the court should consider the materiality and effectiveness of the amendment, and that it will was a well established practice not to allow an amendment where it appeared that such an

amendment would be useless. The court should look at the probable consequences of the amendment and if the amendment would be ineffectual then it ought not to be allowed to be made. An amendment is more likely to be allowed where it departs the least from the pleadings and the least prejudice to the opposing party is likely to arise.

See: *Ismail bin Ibrahim v Sum Poh Development Sdn. Bhd.* [1988] 3 MLJ 348.

[6] Amendment at trial

(a) It is the duty of counsel to apply for leave to amend his pleading to formulate and state in writing the exact amendment for which he asks. The terms of amendment should be submitted at the earliest possible time to the other parties and handed over to the judge when the application is made. The court will not readily allow at the trial an amendment where the necessity for which was abundantly apparents months ago, and then not asked for it.

See: *Lim Koon Ee v Mohd Saad* [1962] 28 MLJ 242;
Abu Bakar v Mohd Zain [1967] 1 MLJ 168;
Mahan Singh v Govt of Malaysia [1973] 2 MLJ 149.

[7] Effective date of amendment and duration of Order allowing amendment

(a) An amendment dates back to the date of the document amended. Meaning that, the dates of amendment will revert back to the date of the document amended. Furthermore, the effective duration of an order is good for 14 days only as mention under Order 20 rule 9. The order obtained for the amendment should be carried out within this period of validity. However, the failure to amend has its effect. After period of 14 days, the order ceases to have any effect and it is as if no order has been made or obtained. The court however, has a general discretion to extend this period or to make a fresh order.

See: *Sio Koon Lin & Anor v Lt Col Sdn. Bhd. Mehra* [1981] 1 MLJ 225.

[8] Amendment after close of case and before Judgement

(a) The court would not grant amendments of the pleadings after the close of the case but before judgment unless there is strong reason and good ground for doing so. Such an amendment may be allowed

where—

(i) Where the matter involved has been raised in the course of the trial and counsel has addressed the court on it, since it will merely incorporating in the pleadings that which has emerged in the course of the case as an issue between the parties;

(ii) Where the subject of an amendment has been referred to by counsel in opening and evidence about it has been given and where there has been sufficient indication in the course of the trial and in evidence that it is a matter of for controversy and the amendment will enable the court to arrive at the view, if it thinks fit, that what is pleaded is a correct interpretation of the facts. Where leave to amend is given, the other party maybe allowed recalling a witness and/or amending his pleadings, and that it will be the obligation of the party asking for the original amendment to file the proper amendments, incorporating those of the other party, with the court before judgment.

[9] Amendment of Judgement or Order

(a) In terms of amendments towards judgment or order, strictly only clerical mistakes in judgment or orders arising from any accidental slip or omission both by the officers of the court as provided for in Order 20 rule 11, maybe made. Such mistakes may be corrected at any time by the court. No appeal lies. This is generally known as the 'Slip Rule'. The error must be an error in expressing what the court intended at the time when the order was made. If the order as drawn up, correctly expresses that intention, it cannot be corrected under this rule even if it contains a mistake in law, apparent on the face of it. Once a judgment has been passed and entered the court has no jurisdiction to amend it under the 'slip rule' unless there has been an accidental slip in drawing up the judgment or unless the judgment as drawn up does not correctly state what the court actually decided and intended. Any party to an action is entitled to come to the court and draw the attention of the court to the fact that a slip has been made in an order of court, even though the putting right to the slip does not, in fact, benefit and may injure, the party making the application.

See: *Meenambal v Ramasamy Chetty & Anor* [1934] MLJ 280;
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143.

(b) The limited jurisdiction granted to the court under this rule applies only after the order has been drawn up and perfected. But, prior to thereto

the court retains absolute jurisdiction to alter, vary, modify or set aside its own judgment or order. Apart from the rule, the court has inherent power to vary its own orders so as to carry out its own meaning and to make its meaning plain. But, if the order as drawn up correctly expresses the intention, it cannot be altered under this rule even if the decision of the court is procured by fraud or misrepresentation. The court also has jurisdiction at any time, and on such terms as to costs or otherwise as are just, to amend any defect or error in any proceeding.

See: *Lim Lian Hoe v Tan Meng San* [1961] MLJ 289.

(c) Situation where the is failure to amendment after order granted.

See: Order 29 r. 9 of the RHC;
Lim Oh & Ors v Allen Gledhill (sued as a firm) [1998] 4 MLJ 645.

[10] Slip Rule

Clerical mistakes in judgement or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

See: Order 20 r. 11 of the RHC; Order 15 of the SCR;
Philip Securities (Pte) v Yong Tet Miaw [1988] 3 MLJ 61;
Syarikat Marak Jaya etc Bhd. v Syarikat Masinda Sdn. Bhd. [1991] 2 MLJ 417;
Hotel Ambassador etc Bhd v Seapower (M) Sdn. Bhd. [1991] 1 MLJ 404;
United Malayan Banking Berhad v Chew Chee Sun [1996] 3 CLJ 533.

[11] Costs

On an amendment of a writ at the trial the proper order would be that the plaintiff should pay the costs thrown away occasioned by the amendment and all the defendant's costs up to the date of the amendment.

See: *State of Perak v Muthukaruppan Chettiar* [1938] MLJ 247.

17

Pre Trial Case Management and Dismissal for Want of Prosecution

Iris ak Awen Jon
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Chapter 17

Pre Trial Case Management and Dismissal for Want of Prosecution

[1] Preliminary

The new amendment to the RHC governs pre trial case management and applies to all actions begun by writ. Order 34 r. 2(1) of the RHC requires the Plaintiff to cause the Registry to issue a notice of pre tial case management in Form 63 not later than 14 days after the close of pleadings.

See: Amendment to the RHC, P.U (A) 342;
Order 34 r. 1(1) of the RHC

[2] Requirements under Order 34 r. 2 of the RHC

(a) The fulfilment of Order 34 r. 2 of the RHC is mandatory. Failure to do so will be fatal to the proceedings. However, this depends on the circumstances of each cases. This is enunciated in the case of *Sin Sung Ho v Usaha Cendera Cerah* [2007] 4 MLJ 452, where it was decided—

"There is now a duty i.e. a mandatory requirement for the plaintiff

to file Form 63 within 14 days from the close of pleadings, requiring the parties to the action to attend before the judge for purpose of seeking directions for case management. In the event the plaintiff for whatsoever reason fails to file Form 63 within the prescribed period, he must regularise the proceedings by filing an application seeking an order to condone the delay and in the affidavit explaining the cause for the delay. Such an application is not necessary if the respondent consents to filing of Form 63 out of time.".

(b) However, even where there is inordinate delay on the part of the plaintiff in taking out of the notice for pre trial case management and the summons for direction, this alone is insufficient to warrant the plaintiff's action to be dismissed or struck out. The defendant on the other hand must show that such delay will give rise to substantial risk that it is not possible to have a fair trial or a serious prejudice was caused or likely to be caused to them. The plaintiff's action should not be dismissed or struck out for want of prosecution where the limitation period for the cause of action has not expired. For instance where the parties were in negotiation for settlement and at the same time, Form 64 was not issued by the plaintiff, the plaintiff's claim should not struck out or similarly in the case where there is counter claim by the defendant in the event there is a delay in issuance of Form 64.

(c) On the other hand, a different approach was invoked in the case of *Hong Leong Assurance Bhd. v American Home Assurance Co, Malaysia* [2008] 8 MLJ 547 by Hishamudin J. In that case, the direction for pre trial case management was given in 2005. On 27 April 2005, during case management, Vincent Ng J set 10–13 July 2006 for hearing of the plaintiff's suit. He further directed the plaintiff to file and serve its witness statements at least 21 days before the date of trial. The action was postponed twice at the High Court's instance. When the suit finally came up for hearing on 18 March 2008, plaintiff's counsel had requested for an adjournment and explained the plaintiff's non-compliance, counsel had submitted that the original dates of the trial had been deferred by the court and there were amendments to the statement of defence subsequent to the direction. Hishamudin J found that the plaintiff had not complied with Vincent Ng J's direction hence dismissed the Plaintiff's suit in invoking Order 34 r. 7 RHC.

(d) The prescribed period is clearly stated in the RHC. It is essential that the plaintiff complies with Order 34 r. 2(1) RHC failing which the judge may direct the Registry to issue a notice in Form 64 to the plaintiff to show cause as to why the action should not be struck out. Once Form 64 has been issued, pursuant to Order 34 r. 2(2) of the RHC, the judge may, upon the return date specified in such notice, at his absolute discretion strike out the action or give further directions as may be specified in the Order.

(e) In the case of *Idealmart Rukindo Sdn. Bhd. v Capital Oca Berhad & Anor* [2009] 1 LNS 75 where Hishamuddin J had reminded us with the fact that the defendants have correctly invoked Order 34 r. 2(2) of the RHC as pleadings were deemed to be closed and the plaintiff had taken no step to file Form 63 for case management before the Judge. His Lordship further added that, in examining closely the provisions of Order 34 r. 2(2) of the RHC, the correct relief to pray for in an application pursuant to Order 34 r. 2(2) of the RHC, is not to directly apply for a striking out of the writ for want of prosecution, but to first apply to the Judge to issue to the plaintiff a Form 64 Notice requiring the plaintiff to show cause as to why the action should not be struck out. If the Judge were to grant the application, the judge would direct the Registrar to issue to the plaintiff a Form 64 Notice. Once served with the Form 64 Notice, the plaintiff would have to appear before the Judge to show cause. In other words, under the scheme of the provisions of Order 34 r. 2 and 3, a Judge has no power to strike out a plaintiff's action for want of prosecution unless the plaintiff has first been duly served with a Form 64 Notice, and this notice can only be issued upon the direction of a Judge acting under Order 34 r. 2(2) of the RHC.

(f) Generally, the non expiry of the limitation period is a good reason for not dismissing an action for want of prosecution inordinate or inexcusable delay. The reason that it is pointless to dismiss the action for want of prosecution if the cause of action is still within the limitation period as further action could be brought.

(g) Order 34 r. 3 (1) of the RHC gives the necessary power to the Judge to act summarily. Thus, if the parties to the action fail to appear before the Judge on the return date as stated in the notice in Form 63, the Judge may in his absolute discretion make any order as meets the ends of justice. This would include—

(i) striking out the action;

(ii) striking out the defence;

(iii) striking out the counterclaim;

(iv) striking out other pleading;

(v) entering judgment against the defendant;

(vi) entering judgment against one defendant or more of the defendants where there are several defendants; or

(vii) after recording his reasons, the Judge may adjourn the proceedings to another date.

(h) By virtue of Order 34 r. 3 (2) of the RHC, where the Judge has directed that the notice in Form 64 to be issued, the Judge may upon the return date specified in that Form 64 proceed to do the following:

(i) strike out the action;

(ii) make any other order; or

(iii) give such directions as he may specify.

(i) Besides striking out the matter, the Judge may alternatively make any other Order or to give such directions under Order 34 r. 3(2) of the RHC, as may meet the end of justice, including striking out the action or any defence or counterclaim. The Judge may also enter judgment against the Defendant. The Judge also has the discretion to adjourn the proceeding to another date.

[3] Pre Trial Conference

(a) At the pre trial case management, the Judge may pursuant to Order 34 r. 4(1) of the RHC, after the parties to an action appears on the return date appearing in Form 63 (the first pre trial conference) and after conferring with the parties to the action, give directions as to the future conduct of the action to ensure its just, expeditious and economical disposal.

(b) Order 34 r. 4(2) of the RHC allows the Judge to give the following directions:

(i) direct the parties to furnish further and better particulars (r. 4(2)(a));

(ii) order the parties to answer interrogatories (r. 4(2)(b));

(iii) require the parties to settle, with the occurrence of the judge, the principal issues requiring determination at the trial (r. 4(2)(c));

(iv) order the parties to deliver a list of documents(r. 4(2)(d));

(v) direct the parties to exchange the documents (r. 4(2)(e));

(vi) order the parties to furnish expert report (r. 4(2)(f));

(v) require the parties to provide a summary of the case of each party (r. 4(2)(g));

(vi) direct the parties to file a Bundle of agreed documents (r. 4(2)(h));

(vii) direct the parties to exchange and file a statement of agreed facts (r. 4(2)(i));

(viii) direct the parties to disclose or provide any information relevant to the issues, subject to all just exceptions as to privilege (r. 4(2)(j));

(ix) limit the number of witnesses (r. 4(2)(k));

(x) direct the Joinder of any party as a party to the action or removal of any party who is already a party to an action (r. 4(2)(l));

(xi) order the addition of a third party (r. 4(2)(m));

(xii) fix a hearing date (r. 4(2)(n));

(xiii) deal with all applications for amendments to the pleadings (r. 4(2)(o)); and

(xiv) limit the time within which any of the directions given are to be complied with (r. 4(2)(p)).

(c) It is apparent that Order 34 r. 4 (2) (a) to (p) of the RHC gives the Judge an overall command of the whole action and the Judge may make such orders and give such directions as to the future conduct of the action in order to ensure its just, expeditious and economical disposal. *Inter alia*, the Judge may give the following directions at the first pre-trial conference:

(i) direct the parties to identify the relevant documents and exchange it between themselves;

(ii) having done so, the parties are required to bundle up the documents into:

(iii) an agreed bundle and/or a disputed bundle;

(iv) preparation of bundle of pleadings;

(v) to formulate the principal issues for determination;

(vi) to prepare the statement of agreed facts;

(vii) to prepare the statement of disputed facts in both languages;

(viii) if an expert is required to be called as a witness his expert report must be prepared and furnish to the other party; and

(vix) each party to prepare a brief summary of their case each and this must be given to the Judge in advance of the trial date.

(d) Order 34 r. 5 of the RHC permits the Judge, when in any circumstances and for any reason, he or she is unable, at the first pre-trial conference to give all the directions necessary for the trial of the action, he or she may give any such necessary directions at that stage of the proceedings and shall fix the date of the next pre-trial conference. Order 34 r. 5 of the RHC allows the Judge to fix the next continuing date for pre-trial conference so that the Judge could give directions in stages.

(e) The Judge is allowed to conduct any number of pre trial conferences as is necessary. This is provided for in Order 34 r. 6 of the RHC which allows the Judge of his own motion or on application by letter by any party may schedule and convene as many pre-trial conferences, as the judge deem necessary for the giving of directions or of such further directions he may deem necessary or for the amendment or variation of any direction already given.

(f) Order 34 r. 6 of the RHC is worded in a wide fashion. It gives the power to the Judge on his own motion or own initiative, or on an application by way of a letter by any party to schedule and convene as many pre trial conferences as he may deem necessary for the giving of directions or of such further directions as he may deem necessary or for the amendment or variation of any direction already given. Briefly put, Order 34 r. 6 of the RHC gives absolute power to the Judge to conduct as many pre trial conferences as possible where the Judge may give the relevant directions or additional directions or to vary or amend his directions as he may deem necessary. Thus, the Judge may give additional directions in addition to the ones listed in Order 34 r. 4 (2)(a) to r. 4 (2)(p) of the RHC.

See: Summons For Direction and Other Related Issues Together With Case Management (2004) 3 MLJ lxxxiii.

(g) At the stage of pre trial case management, the Judge may give further directions if he is of the view or of the opinion that there is a possibility for the whole action to be settled amicably. Further, at this stage, the parties may also explore the possibility of disposing off the whole action by way of the new Order 14A of the RHC which came into effect on the same date as Order 34 of the RHC. Order 14A of the RHC involves the determination of any question of law or construction of any document without the need for a full trial of the action and that such determination will finally determine the entire cause or matter or any claim or issue.

See: Summons For Direction and Other Related Issues Together

[4] Failure to Comply With Directions in Pre Trial Conference

(a) Where any party failed to comply with any directions given by the judge at any pre-trial conference, Order 34 r. 7 of the RHC allows the Judge to make such order as is necessary against the defaulting party as meets the end of justice. Order 34 r. 7 of the RHC provides for the discretionary power of the judge to make such order against the defaulting party "as meets the ends of justice" should any party fail to comply with any direction given by the judge at any pre-trial case management conference.

(b) Order 34 r. 7 of the RHC provided for the discretionary power of the Judge to make such order against the defaulting party 'as meets the ends of justice' should any party fail to comply with any direction given by the Judge at any pre trial case management conference. Whilst it was true that a party's action or counterclaim could be struck out for non-compliance with a peremptory or an "unless order" of the court, the order should not be made unless there was a history of failure to comply with other orders. Therefore, all the circumstances of the case, inclusive of whether the failure to comply with the peremptory or unless order was indeed intentional and contumelious, should be looked at by the judge before penalizing the defaulting party.

See: *Md Amin bin Md Yusof & Anor v. Cityvilla Sdn. Bhd.* [2004] 4 MLJ 446.

[5] Pre Trial Procedures

(a) Order 34 r. 2 of the RHC provides for the orders that a court may make on the parties to the action during the pre trial case management conference. Some of these orders may be automatic in nature. The matters to be considered for pre trial procedures include—

(i) Discovery of documents,

(ii) Discovery by interrogatories;

(iii) Admissions;

(iv) Summons for directions;

(v) Setting down for trial.

(b) Discovery of documents and discovery by interrogatories is discussed in chapter 17.

[6] Admissions

(a) Admissions are statements by way of Pleading or otherwise in writing by one party to the action, in which admitting the truth of the whole or any part of the case, of any other party to the action. Admissions assist the litigant by dispensing the need to prove facts which are admitted there by saving costs and time. Admissions can be classified into five kinds, namely—

(i) Admission by pleadings or in answers to interrogatories;

A party is deemed to admit that—

- any document described in any list sent to him under Order 24 (for discovery and inspection of documents) as an original document is such a (i.e. original) document, in other words that it printed or written, signed or executed as it is purported to have been, or;

- the copy is a true copy.

Unless the authenticity of the document has been challenged in the Pleadings or unless within 14 days from the receipt of the list, he serves a notice that he doesn't admit it (Order 27 R 4 RHC 1980). It also has to be noted that admission is of the authenticity of the documents and not of the truth of the matter stated therein.

(ii) Admissions by agreements of parties;

Where the admission is such that it determines a claim or part of that claim, judgment may be obtained by summons for that claim, Judgment may be obtained by summons for that claim or any that part of the claim which had been admitted, without waiting for the determination of any other question between the parties (Order 27 r. 3).

(iii) Admission by notice;

A party may by notice require any other party to admit the truth of the whole part of the case of any other party (Order 27 r. 1).

(iv) Admissions of facts;
A party may by notice to admit may by notice require any other party to admit the facts specified in the Notice: Order 27 r. 2RHC 1980. Any admission is binding as against the party making it but only in that action, cause or matter including appeal. The forms to be used are Form 52 and 53.

(v) Admissions of documents in notice;

A party may by notice to admit may by notice require any other party to admit the authenticity of the documents specified in the Notice.

(b) A party may be required by notice to produce at the trial of Hearing any document which has not been admitted expressly or impliedly, from the failure to challenge it. A party should admit documents which cannot be challenged. Otherwise, he may be ordered to pay the costs of proving these documents (Order 27 r. 3(5) RHC).

[7] Summons for directions

(a) It is an application for the direction of the court, on the issues raised in the Pleadings, as to the manner in which the evidence is to be presented at the trial. The purpose is to shorten the length of the trial and to save the costs generally; it is a step that is required by the rules of this order to be taken unless at some earlier stage in the proceedings, the court had given such direction, for example, at the dismissal of an application under Order 14 RHC.

(b) The purpose of summons for directions also gives an occasion to the court to consider matters which would otherwise have to be dealt with in interlocutory applications, for instance, application for Further and Better particulars under Order 18r 12(3).

(c) The other purpose of Summons for direction is to give directions as to the future course of the action as will secure the just, expeditious and economical disposal of the action and the saving of costs.

(d) The principles which a court should apply when considering whether an action should be dismissed for failure to comply in due time with any of the important steps for bringing an action to trial are set out by Lord Diplock in *Birkett v James* [1977] 2 All ER 801.

(e) The Summons must be applied for not later than one month after the close of Pleadings; see O18 r. 20 RHC 1980. It may include an application for an order for discovery and inspection of the documents under Order 24 of RHC 1980.

(f) This rule applies to all actions begun with writ except in cases enumerated in para (a) to (g) of Order 25 r. 1 (2) of the RHC 1980. The exceptions refer to cases where directions have been ordered and are not necessary.

(g) It must be noted that the duty to take out the summons for directions lies on the Plaintiff as the one who has the conduct of the case, however should he failed, the defendant may apply to court to dismiss his action and the action may be dismissed when he can show that he had suffered from prejudice by reason of the delay or that a fair trial has become impossible (*Ling Kee Ling v Leow Leng Siong* [1992] 2 SLR 725). Alternatively, the defendant can himself take out the summons for directions.

(h) It is the duty of the court, Order 25 r. 2 of the RHC to consider all matters generally relating to the Hearing and, by the provisions of Order 25 r. 3 of the RHC, particularly—

- Order 25 r 3(a) ; relaxation of the Hearsay rule;
- Order 25 r. 3(b); any necessary amendments of the writ or Pleadings, giving leave to do so;
- Order 38 r. 2 to 7; the evidence to be led at the trial; and
- Order 70 r. 24(3); in an admiralty action, limiting the number of witnesses to be called.

(i) Further, the court shall also consider the appropriate orders or directions that simplify and expedite the proceedings and, among others, particularly; the period of exchange of affidavits of the evidence-in-chief of all witnesses at the trial; the mode in which the evidence-in-chief shall be given by any witness; limiting the number of expert witnesses are to give their evidence and whether they should endeavour on a "without prejudice" basis to reach an agreed evidence and the areas in issue; and lastly, relaxation of the Evidence Act 1950.

(j) The court shall also endeavour to secure all admissions and all agreements as to the proceedings as are reasonable to be made (Order 25 r. 4 RHC 1980), for example, the agreement as to the bundle of agreed documents especially those the authenticity of which is not or cannot be challenged (Order 27 r. 4 RHC 1980).

(k) Order 25 rule 6 RHC 1980, states that it is the duty of all parties and their solicitors to give all relevant information and produce all documents at the Hearing of a Summons for directions. Further, the duty of the Counsel includes making all relevant and necessary applications for the information and production of the necessary documents.

(l) There are exceptions which clearly states under Order 25 r. 8 of the RHC to the necessity for a Summons for directions in a case of a running down action.

(m) Order 25 r. 8 (1) of the RHC relates to the question of when the pleadings are deemed to be closed. Pleadings are deemed to be closed when—

(i) fourteen (14) days after service of the reply;

(ii) if there is no reply but there is a counterclaim by the defendant, then it would be fourteen (14) days after the service of the defence to counterclaim;

(iii) if there is neither a reply nor a defence to counterclaim, then it would be fourteen (14) days after the defence is served.

(n) One must always bear in mind that the court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings. So, it can be surmised that the parties can apply to the court for an extension of time or even consent in writing to such an extension without an order from the court. It is always salutary to remember that the purpose of the rules is to provide a time-table for litigation for the litigants: *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228, P.C.

(o) The significance of rule 8 of Order 25 of the RHC is this. That when the pleadings in any action are deemed to be closed the following directions would automatically be put into motion:

(i) discovery of documents to be made within fourteen (14) days in accordance with Order 24 rule 2 of the RHC, and inspection within seven (7) days thereafter except in cases where liability is admitted or where the action arises out of a road accident discovery shall then be limited to disclosure by the plaintiff of any documents relating to special damages;

(ii) where any party intends to place reliance at the trial on expert evidence, he shall, within ten (10) weeks, disclose the substance of that evidence to the other parties in the form of a written report, which shall be agreed if possible;

(iii) that unless such reports are agreed by the parties, there shall be liberty on the part of the parties to call as expert witnesses those witnesses the substance of whose evidence has been disclosed in accordance with sub-paragraph (b), with the exception that the number of expert witnesses shall be limited

in any case to two medical experts and one expert of any other kind;

(iv) photographs, sketch plans and police reports shall be receivable in evidence at the trial and shall be agreed, if possible;

(v) that the action shall be set down for trial within six months; and

(vi) that the court shall be notified, on setting down the action for trial, of the estimated length of the trial.

(p) It is the Plaintiff who started an action by issuing the writ of summons. Therefore, he should be required to prosecute his claim with reasonable diligence and to take all the necessary steps to bring the case to trial. The rule clearly provides that if the plaintiff fails to do so, his case may be dismissed for want of prosecution, for example, in the situation where the Plaintiff had failed to deliver a statement of claim.

[8] Setting down for trial

The case is set down at the summons for directions. It is done by request and hence, no summons is necessary and the request is merely filed in the court registry. The request is made in Form 63 and notice in for 64 must be given to the other party or parties. The request must give an estimate of the length of the trial and the number of witnesses expected to be called, to enable the court to allot the estimate time for the hearing (Order 34 r. 1 & 2 RHC 1980). The request should ordinarily be made by the Plaintiff, since he has the conduct of the case. Should he fail to do so, the Defendant may himself do so or apply to have the Plaintiff's case dismissed for want of prosecution.

[9] Dismissal for Want of Prosecution

(a) General

(i) The courts have the power to set aside or strike out any proceeding if the plaintiff failed to take a necessary step in his action which he is required to take under the rules, on the application by the defendant. Aside from Order 34 of the RHC which provides for pre trial case management, there are various provisions under the rules empowering the court to dismiss an action for want of prosecution. To name a few are—

- Order 16 r. 4(2) of the RHC (failure to serve summons on the third party),

- Order 19 r. 1 of the RHC (default in service of statement of claim),

- Order 24 r. 16(1) of the RHC (failure to comply with requirement for discovery, etc), and

- Order 26 r. 7 of the RHC and Order 21 r. 6 of the SCR (failure to comply order for interrogatories).

(ii) Public policy and the administration of justice demand that an action should proceed to judgment as quickly as possible, as much for the parties to the action and as the proper conduct of the Court's business.

(b) Established principle

(i) The attitude of the courts to a speedy disposal of the action has hardened since the decision of *Allen v Sir Alfred McAlphine* [1968] 2 QB 229, as qualified by *Birkett v James* [1979] A.C. 297.

(ii) In the case of *Allen v Sir Alfred McAlphine*, Lord Diplock observed, that the power of the Court to dismiss an action for want of prosecution should be exercised where—

- The plaintiff's default had been intentional and contumelious, or

- Where there has been inordinate and inexcusable delay on the plaintiff or the plaintiff's lawyer's part giving rise to a substantial risk that a fair trial would not be possible as it would seriously prejudice the defendant.

(iii) He further stated that;

> "… The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default…"

(iv) *Birkett v James* qualified the decision in *Allen v McAlphine* in observing that, other than in a case of contumelious conduct on the plaintiff's part, this power should not normally be exercised

where the delay has not extended beyond the end of the limitation period for the cause of action.

(v) In *Costellow v Somerset County Council* [1993] 1 All ER 952, the English Court of Appeal with a corum of Sir Thomas Bingham MR, Stuart-Smith and Simon Brown L.JJ held that in the ordinary way and in the absence of special circumstances, such as procedural abuse, questionable tactics, contumelious and intentional default or where a default was repeated or persisted in after a peremptory order, the Court should not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of the proceedings had caused at least a real risk of prejudice to the defendant. Sir Thomas Bingham MR delivering the judgment of the English Court of Appeal aptly laid down the law in these salient words as follows:

> "Counsel for the defendants did not argue for a rigid approach along the lines suggested by The Supreme Court Practice but did point to the plaintiff's four and a half month delay in serving his statement of claim, following a long delay in telling the defendants of his claim and issuing proceedings, and following repeated reminders and threats by the defendants. He could not, however, point to any prejudice the defendants might have suffered as a result of the plaintiff's failure to serve a statement of claim in time."

(vi) In the case of *Datuk Samy Vellu v Karpal Singh* [1989] 3 MLJ 493, Lim Beng Choon J observed:

> "… (c) It was of course not enough to dismiss the action merely upon the finding that there had been an inordinate and inexcusable delay in the prosecution of the case. It must be asked whether the delay had given rise to a substantial risk that a fair trial would not be possible or the delay was such as was likely to cause or to have caused serious prejudice to the defendant…"

(vii) In addition to the two well established principles in *Allen v. Sir Alfred McAlphine*, the Court of Appeal in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin* [1998] 4 MLJ 373 added a third limb and that would be that "where there was inordinate and inexcusable delay which involved a complete, total or wholesale disregard for the rules of court with full awareness of the consequences which is capable of amounting to such an abuse that it is fair to do so, the action will be struck off or dismissed on that ground".

(c) Court's inherent jurisdiction

Apart from the express powers of the Courts to dismiss for want of prosecution, the Courts too have the inherent jurisdictions to dismiss those cases where there have been defaults in complying with the rules or where there have been excessive delays in prosecuting the actions. The inherent jurisdiction of the courts allows it to dismiss or set aside any proceeding whenever the plaintiff or its lawyers fails to comply with any pre-trial order made by the Court. In the case of *Birkett v James*, Lord Diplock observed:

> "The court may and ought to exercise such powers (to dismiss an action for want of prosecution) as it possesses under the rules to make the plaintiff pursue his action witl all proper diligence, particularly where at the trial the case will turn upon the recollection of witnesses to past events. For this purpose the court may make peremptory orders providing for the dismissal of the action for noncompliance with its orders providing for the dismissal of the action for noncompliance with its order as to the time by which a particular step in the proceedings is to be taken."

(d) Can the plaintiff institute a fresh action after a previous action of the same matter had been dismissed for want of prosecution?

(i) Generally, there is no provision under the RHC prohibiting the plaintiff to institute a second action of the same matter. In the case of *Palaniappan v Ramanathan & Ors* [1972] 1 MLJ 227, Abdul Hamid J (as His Lordship then was) observed:

> "(a) the effect of the dismissal of the previous action for want of prosecution did not bar the plaintiff from instituting a fresh action.
>
> (b) the principle that where the plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action had been paid, equally applies to a case where there is a dismissal of action for want of prosecution, provided the second action is substantially for the same matter."

(ii) There is an exception however to the above general rule. The principle is clearly stated in the case of *Birkett v James* (supra),where Lord Diplock at pg 48 observed:

"…where the plaintiff's conduct in the previous proceedings has induced the defendant to do something which will create more difficulties for him in presenting his case at the trial then he would have had if the previous proceedings had never been started. In such a case, it may well be that the court in the exercise of its inherent jurisdiction, should stay the second proceedings on the ground that, taken as a whole, the plaintiff's conduct amounts to an abuse of the process of the court. But, such exceptional cases apart, where all that the plaintiff has done has been to let the previous action go to sleep, the court in my opinion would have no power to prevent him starting a fresh action within the period and proceeding with all proper diligence notwithstanding that his previous action had been dismissed for want of prosecution."

(iii) In the case of *Lau Mun & Ors v Chua Lai Seng & Ors* [1984] 2 MLJ 328, it was emphasized that the courts is reluctant to exercise its discretion solely on the grounds of delay to dismiss the action for want of prosecution, if the plaintiff will be able to file the action fresh.

(e) Practice

(i) It is for the defendant to satisfy the Court that one or the other conditions for dismissal of the action for want of prosecution exists and the nature and extent of the prejudice suffered by him. The Court will consider the conditions claimed by the defendant in all the circumstances of the case and also the conduct of all the parties and their lawyers. On an application to dismiss for want of prosecution, it is desirable that the plaintiff should file evidence to explain all the circumstances relied on as excusing the delay.

(ii) In the case of *Vasudevan v T. Damodaran & Anor* [1981] 2 MLJ 150, the trial court dismissed the action for want of prosecution (affirmed by the Federal Court on appeal) where even after seven years after the institution of the writ the plaintiff had not issued summons for direction and set the matter for trial.

(iii) It is however prudent for the defendant to take summons for direction if the plaintiff fails to do so because of the reluctance of the court to dismiss a case for want of prosecution if the plaintiff may well institute a second action of the same matter.

18

Discovery

Duncan Sikodol

Chapter 18

Discovery

[1] Introduction

(a) Discovery is the process of finding out material facts and documents from an adversary. As a general rule, discovery is only allowed against parties privy to a proceeding, and not against third parties. There are however known exceptions to this general rule.

See: *Burchard v MacFarlane* [1981] 2 QB 241;
Arab Monetary Fund v Hashim & Ors [1992] 2 All ER 911.

(b) The object of discovery can be summarised as follow:

(i) to ascertain the case of an adversary;

(ii) to narrow points in issue;

(iii) to avoid expenses in proving admitted facts

(c) There are two kinds of discovery available—

(i) discovery of documents relating to matters in question in the action, and in the possession of the party;

(ii) discovery by interrogatories of facts relevant to the issue in the action and within the knowledge of the party interrogated.

[2] Discovery of Documents

(a) The discovery of documents involves the disclosure and inspection by one party to another, compelling the production of documents in

the power of another for matters of inspection.

(b) The term ‘document’ is not just restricted to what is written on paper. Section 3 of the Evidence Act 1950 gives the term a wide definition, allowing the inclusion of all material substance on which the thoughts of man are represented by writing, a mark, or symbol. An example would be an inscription on stone, or matters embodied on tape.

(c) All material which comes under the section 3 definition may be the subject of discovery under Order 24 of the RHC.

(d) Discovery can be made for physical possessions, even over items which the party has no legal right over. All that is needed is that he has a presently enforceable legal right.

See: *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627.

(e) Generally, for an action started by a writ, discovery of documents is made automatically within 14 days after the pleadings are deemed closed

See: Order 24 r.1 of the RHC.

(f) It is generally not the practice of the courts to order for discovery before the delivery of the statement of claim. There are exceptions to this, such as—

(i) An action for personal injury arising from motor accidents - RHC Order 24 r.2(2);

(ii) An action for recovery of a penalty and action to enforce forfeiture.

See: *Speyside Estate & Trust Co Ltd v Wraymond Freeman (Blenders) Ltd* [1950] Ch. 96.

(g) An order for discovery can be made at the court’s discretion and will only be made if it is necessary either for the fair disposal of an action, or for cost-saving reasons.

(h) If a party fails to comply with a discovery order, or does so menially, the other party may serve a notice under Form 39. This requires the party to make an affidavit verifying the list. The served party then has 14 days to make and file an affidavit in compliance. Failure to comply may give room to the opposite party to apply to strike out his pleadings or apply for an order of discovery.

See: Order 24 r. 7 of the RHC.

(i) A discovery will only be ordered if—

(i) there is enough evidence that the documents exist;

(ii) the documents relate to matters in issue;

(iii) there is sufficient evidence that the other party has possession, custody or power over the document.

(j) There are several grounds in which a party may refuse to disclose the document for inspection, as dictated in *Berkely Administration Inc v McClelland* [1990] FSR 381 which are as follows:

(i) where it discloses his own evidence;

(ii) confidential communication between him and his legal advisor;

(iv) public official documents if its production would be injurious to public interests (RHC O.24 r.15);

(v) where he denies possession of the document.

(k) The general rule in place is that the documents disclosed should only be used for the porpose of the proceedings in which it was disclosed for and no other.

See: *Sim Leny Chua v JE Manghardt* [1987] 2 MLJ 153;
Coopers & Lybrand v Singapore Society of Accountants & Ors [1988] 3 MLJ 134.

[3] Discovery against a Third Party

(a) The general rule stands that the court will not order discovery against a person who is not a party to the action. Discovery may (though rarely) be ordered against a third party, where the third party has related, identical or common rights in the litigation.

(b) In *Norwich Pharmacal Company v Customs and Excise Commissioners* [1973] 3 WLR 164, the House of Lord decided that where a person, albeit innocently and without incurring any personal liability became involved in the tortious acts of others, he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers. He is therefore *prima facie* under a duty to disclose the information sought.

(c) An order of discovery may be made against anyone whom the plaintiff has a cause of action in relation to the same wrong. The exception to this general rule is if the party thought no fault of his own is involved in the tortious acts of other so as to facilitate their wrongdoing. He is under a legal duty to help the person who has been wronged.

[4] Discovery by Interrogations

(a) Interrogatories consist of a series of written questions about the case concerning discoveries of fact. When served to a party, it required the party to give answers under oath, usually by affidavit. However in *Marriot v Chamberlain* [1886] 17 QBD 154 CZ, Lord Esher MR observed:

> "The right to interrogate is not confirmed to facts directly in issue, but extends to any facts the existence or non existence of which is relevant to the existence or non existence of facts directly in issue."

(b) Fishing interrogatories can be defined as interrogatories not related to the cause of action against a third party, or attempts to obtain evidence for use of subsequent proceedings. They are not admissible.

(c) Interrogatories can be served before the pleadings are closed without leave of the court. However once pleadings are closed, the leave of the court is necessary for serving interrogatories. The granting of leave is exceptional.

See: Order 26 r. 2 of the RHC.

(d) The purpose behind interrogatories are—

(i) to determine the adversary's case and the material facts constituting it;

(ii) to obtain facts to support his own case, either—

- directly, by obtaining admissions; or
- indirectly, by damaging the adversary's case.

(e) Interrogatories will not be allowed unless it is related to the relevant facts. Therefore, it will not be allowed in the following cases:

(i) for obtaining discovery of facts of his adversary's case or title;

(ii) confidential communications between his opponent and his

legal advisors;

(iii) disclosure injurious to public interests;

(iv) premature claims;

(v) interrogatories which are fishing in nature.

(f) The court only grants leave to serve interrogatories if it is considered necessary for either disposing fairly the action or saving costs. The party may object if the interrogatory is—

(i) scandalous or irrelevant;

(ii) not *bona fide*;

(iii) matters enquired are premature;

(iv) matters enquired are privileged.

(g) In delivering the argument, the argument must have substantive and not evasive content which is to be decided by the court, who may direct changes as fit. The action may also be dismissed if the court's orders are not followed. It is the court's duty to ensure that oppressive documents or interrogatives parts are struck off.

See: Order 26 r. 7 & 8 of the RHC;
Phillip Hoalim v Amalgamated Theatres Limited [1936] MLJ 10.

19

Affidavits

Mohd Sabri Bin Othman

Chapter 19

Affidavits

[1] Introduction

(a) The use of affidavits as evidence in a trial is an exception to the general rule that evidence in a trial must be oral and direct. While it's undesirable to solve disputes on a basis of affidavits evidence, the use of the affidavits as provided for in SCR and the RHC is of a great value especially in circumstances, for example, where the witness is abroad and is unavailable to attend the trial or where the evidence is uncontested.

(b) This law provides for the use of affidavit evidence and where necessary, in certain circumstances, the cross-examinations of the deponents of the affidavits tendered into court in evidence on which the court is to base its decision.

See: Evidence In Chief By Affidavit: A Consideration of the New Rules, *Jeffery Pinsler* [1991] 3 MLJ xciii.

[2] Statutory provision

Order 25 of the SCR provides that an affidavit of any witness may be read at the trial if in the circumstances of the case, the Court thinks that it's reasonable so to order. Here the discretion must be

excised according to the circumstances of the case and whether it is reasonable to make such an order, either at the summons for direction or at the trial.

[3] How to apply?

(a) This rule applies to any proceedings in the subordinate court and is not limited, as in the High Court to actions begun by writ. Any party intending to read any affidavit at the trial should apply for the summons for directions to prevent the other side from being taken by surprise, which may be grounds for an adjournment of the hearing and the payment of costs.

(b) A wide discretion is given to the court to allow the use of affidavit evidence at the trial but the discretion must be exercised judicially. It has been held that if the evidence sought to be admitted on affidavit evidence is highly contentious the court may refuse to order the affidavit to be read even if the deponent is dead.

See: *UMBC Finance Ltd v Woon Kim Yan Robin* [1990] 3 MLJ 360.

(c) In *Syarikat Telekom Malaysia v Business Chinese Directory Sdn. Bhd.* [1996] 3 MLJ 692, it was held that where the Court is expected to make a decision on affidavit evidence without oral evidence or cross-examination of the deponents of the affidavits, the Court would be critical of the affidavit evidence which must on the face be at least plausible. If allegations were made in affidavits by one party and those allegations were credibly denied by the other party, in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations and decide the fate of the case by consideration of the undisputed facts.

[4] Contents of Affidavit

(a) Order 25 r. 22 of the SCR provides that any affidavits sworn in a cause or matter must be entitled in that cause or matter.

(b) All affidavits filed must be in national language, otherwise it cannot be considered.

See: Order 53 r. 5 of the SCR.

(c) Affidavits sworn in a cause or matter must be entitled in that cause or matter but where a cause or matter is entitled in more than one

matter, Order 25 r. 22(2) of the SCR makes it unnecessary to state all matters but requires only the first in which the cause or matter is entitled.

(d) Order 25 r. 22(3) of the SCR simplifies matters further by stipulating that if there is more than one plaintiff or defendant, it shall be sufficient to only to refer to the first plaintiff or defendant followed by the words "and others".

(e) If the deponent is a party to the proceedings, he or she must state so, i.e by saying "the above named Plaintiff/Defendant". If a party employs the deponent, the fact must also be stated e.g "employed by the above named (Plaintiff/Defendant)".

(f) In *Bank Utama (M) Bhd v Seri Mayhua Sdn. Bhd. & Ors* [2001] 5 MLJ 169 it was held that—

> "Where an employee of a party to a cause or matter swears an affidavit, the affidavit must state that the act of that employment but there is no requirement to go on further to state that the deponent is authorized to depose the affidavit."

(g) Reasonable grounds of belief must be stated. In *Re JL Young Manufacturing Co. Ltd* (1900) 2 Ch 753, CA, it was held that an affidavit of information and belief, not stating the source of information or belief, is irregular and therefore inadmissible as evidence whether on interlocutory or a final application and a party or solicitor attempting to use such an affidavit will do so at his peril as to costs.

(h) Order 25 r. 26 of the SCR requires an affidavit to contain only facts as deponent is able of his own knowledge to prove. By requiring the deponent to only swear to such facts as he is able of his own knowledge to prove, the effect of this rule is to equate affidavit evidence to oral evidence. The exception to the rule is given in—

(i) Order 25 r. 26(2) of the SCR: affidavits used in interlocutory proceedings—

> In *Gilbert v. Endean* [1848] 9 Ch D 259 and *Perumahan Farlim (Pg) Sdn Bhd & Anor v. Cheng Hang Guan & Ors* [1989] 3 MLJ 23, SC: Proceedings which do not decode the rights of parties but which are made for the purpose of keeping things in status quo until the rights can be decided, or for the purpose of obtaining directions as to how the cause is to be conducted, are interlocutory.
>
> In *MUI Bank Bhd v Alkner Investments Pte Ltd* [1990] 3 MLJ 385: An application for final judgment is not an interlocutory

application and therefore hearsay evidence is strictly not admissible;

(ii) Order 25 r. 3 of the SCR: evidence of particulars facts;

(iii) Order 26A r. 2 of the SCR: Affidavit in support of a summary judgment application;

(iv) Order 33 r. 2 of the SCR: Affidavit in support of a garnishee proceedings application in which statements of information or belief with the source and grounds thereof may be given.

(i) Order 25 r. 27 of the SCR provides the Court has the power to strike out an affidavit which is scandalous, irrelevant or oppressive. It appears that under this rule, the Court may act on its own motion or the party affected by the offending part, apply to exercise or strike out the offending part.

(j) A matter is scandalous if it is indecent or offensive or is included for the purpose of abusing or prejudicing the opposite party.

See: *Christie v Christie* [1873] 8 Ch App. 299.

(k) An application to strike out certain portions of an affidavit on the grounds that they are scandalous and irrelevant will be premature where the nature of application is such that if it were successful, it would have the obvious effect of causing the other party's application to fail. The proper time for objecting to the admissibility or portions of an affidavit in support of an application would be when the application comes up for hearing, not at such a preliminary stage by filing an application to strike out.

See: Y*eoh Kee Aun v PI Capital Asset Management Sdn. Bhd. & Anor* [2000] 4 MLJ 508.

(l) The scandalous matter in the affidavit is expunged in such a manner as to render the passage entirely illegible *(Warner v Moses* 1881 WN 69) or the whole affidavit may be ordered to be taken off the file and destroyed with all office copies thereof. The Court can order immediate destruction.

(m) In the case of *Walker v Poole* [1882] 21 Ch D 835, the Court has an inherent power to take an affidavit off the file for prolixity, eg an affidavit of documents of oppressive length.

(n) Order 25 r. 28 of the SCR provides no alteration in any affidavit after it has been filed. If the Commissioner for Oaths does not initial the erasure or interlineations in the affidavit, such erasure or interlineations

must be presumed to have been made after the affidavit was sworn and therefore the affidavit cannot be used.

See: *Goh Un Chong v Yap Tong* [1864] Leic 245.

(o) In *Goh Thian Guan v. Sarawak securities Sdn Bhd* [1999] 5 MLJ 413 where the defendant filed a corrective affidavit purporting to alter the original affidavit, it was held that the correct approach would have been for the Defendant to file a notice of application to amend the original affidavit, supported by a further affidavit.

(p) A solicitor who is also a Commissioner of Oaths is prohibited from administering the oath where the deponent is his client. The ban also extends to his partners and to his firm.

See: Order 25 r. 29 of the SCR.

(q) Order 25 r. 30 of the SCR requires that the affidavit must be indorsed with a note showing on whose behalf it is filed. Without such indorsement, the affidavit may not be filed and may not be used save with leave of the Court.

See: *Sharma Kumari d/o Oam Parkash v PP No.* 2 [2000] 6 MLJ 790.

(r) There is no format under the rules and Form 71 by which such indorsement ought to be recorded. The normal practice is that such indorsement is recorded at the end of the affidavit, in the space after the deponent has signed the affidavit before the commissioner for oaths. However this is merely a practice and not a legal requirement. In the case of *Delimec Hygiene Sdn Bhd v. EMIC (M) Sdn Bhd* 2001 5 MLJ 186, it was held that where an indorsement is made on the upper right hand side of the front page of the affidavit, this is sufficient to satisfy the requirements of this rule.

[5] Jurat

(a) Not only must the deponent sign the affidavit, he or she is required to sign before a person who is legally authorized to administer oaths. The administering officer or person before whom the affidavit was sworn must complete the required jurat, which must be one of the specified forms.

See: Form 71 of the SCR.

(b) A jurat means a certificate of the administering officer or a person before whom the affidavit was sworn. It refers to the clause written at

the foot of the affidavit, stating when, where and before whom such affidavit was sworn.

See: *Sharma Kumari d/o Oam Parkash v PP No.* 2 [2000] 6 MLJ 790.

(c) In *MBF Finance Bhd v Yong Thau Khi* [2003] MLJU 651, certain procedural defects concerning the jurat were considered which id not vitiate the affidavit—

(i) the interpreter did not sign on the jurat;

(ii) the title of the action was not in the jurat; and

(iii) the words "to an affidavit by a person who does not understand English"

(d) Order 25 r. 23 of the SCR states that when the oath is administered to deponents in different languages, there shall be a separate jurat for those sworn in each language.

(e) When it appears to the person administering the oath that the deponent is illiterate or blind, he must certify in the jurat.

See: Order 25 r. 24 of the SCR.

(f) It is not enough to state in the jurat that the affidavit was explained to the deponent without stating that he understood it.

See: *Lim Goh Huat v Saw Keng See* [1998] 6 MLJ 600.

(g) Failure to comply with this rule will result in the court removing the affidavit from the record.

See: *S Ravi a/l G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152.

[6] Exhibit in the Affidavit

(a) Any document to be used in conjunction with an affidavit must be exhibited as stated in Order 25 r. 32 SCR 1980.

(b) A document exhibited to an affidavit is part of the affidavit. It was held in *Re Hinchcliffe* (1895) 1 Ch 117 that anyone who has a right to see an affidavit has also a right to see an exhibit referred to it in the affidavit so as to be made part of it, just as if it were annexed to the affidavit.

See: *Gulwant Singh v. Amar Kaur* [1968] 1 MLJ 107.

(c) The word "any" in this provision does not mean "each and every". When a party files an affidavit containing more than one exhibit, it would be sufficient if the commissioner for oaths issues one certificate.

See: *Asia Commercial Finance (M) Bhd v. Umas Sdn. Bhd. & Anor* [2001] 1 MLJ 424.

(d) Any document in the English language may be used as an exhibit, with or without a translation into the national language.

See: Practice Direction No. 2 of 1990;
Order 53 r. 5 of the SCR.

[7] Use of defective Affidavit

(a) Order 25 r. 25 of the SCR allows an irregular affidavit to be filed and used in evidence. A defective affidavit may be received if leave of court is obtained, or alternatively it may be cured by filing a supplementary affidavit.

See: *Syarikat Islamiyah v Bank Bumiputera Malaysia Berhad* [1988] 3 MLJ 218.

(b) In *Dynast (S) Pte Ltd v. Lm Meng Siang & Ors* [1989] 3 MLJ 456, the High Court Singapore held that an omission to state the source of the knowledge or belief of the deponent is not an irregularity in the form. Even when a deponent fails to comply with r. 22 by failing to state his place of residence and his occupation, such a defect is a mere irregularity in form only and may under r. 4 still be filed and used in evidence.

See: Order 41 r. 4 of the RHC.

[8] Affidavit in Foreign Language

(a) Order 25 r. 33 of the SCR lays out the provision that affidavits which originate in other countries may be received if they appear on the face to have been legitimately executed before the appropriate official, such as a judge, notary public, commissioner of oaths or consular office.

(b) When it is desired to put upon the file an affidavit in a foreign language the usual course is to obtain a translation thereof and to annex the

foreign affidavit and translation as exhibits to an affidavit by the translator verifying the translation. The documents are filed together, filing fees being paid for two affidavits and if an office copy is requited, a copy of translation only should be given.

See: *Re Sarazin's Letters Patent* (1947) 64 RPC 51.

[9] Making translations

Making a translation is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document. A true translation is the putting into English that which is the effect of the language used under the circumstances. Not only is a competent translator required but if the words in the foreign country had in business a particular meaning different from their ordinary meaning an expert will be admitted to say what the meaning is.

See: *Hong Teck Guan & Anor v Lam Soon Cannery Ltd* [1959] MLJ 207.

20

Proceedings at Trial

Marlina Binti Ibrahim

Chapter 20

Proceedings at Trial

[1] Introduction

The proceedings in a civil trial are governed by Order 35 of the RHC which is in pari materia with Order 35 r. 1 of the SCR. The primary purpose of the trial is to enable the parties to produce evidence in support of their contentions.

[2] Failure to appear

(a) Neither Party Appears

(i) Order 35 r. 1(1) of the RHC provides the situation where if neither the Plaintiff nor the Defendant appears at the trial, the court may strike the case off the Hearing Lists. Order 28 r. 5(1) of the SCR which is in pari materia with Order 35 r. 1(1) of the RHC also gives the same effect.

(ii) However, the court does have the discretion to restore which is also commonly referred to in practice as "reinstatement of the case" to the list if it thinks it is just to do so. The Court is empowered to do so but at its discretion. The party's application for restoration will normally be granted unless the absence of the party was either intentional or contumacious.

See: *Gan Kim Kiat & Bros Realty Sdn. Bhd. v Leang Ah Kan* [1983] 1 MLJ 351.

(b) Non Appearance by One Party

(i) Where one party fails to appear, the court may proceed with the trial in the absence of the party. Order 35 r. 1(2) of the RHC provides that the judge may proceed with the trial of the action or any counterclaim in the absence of that party. In the circumstances, the party who appears still has to prove his case that is, the Plaintiff will prove his claim and the Defendant, his counterclaim, if any. In the absence of the Plaintiff, the court to may give judgment, dismiss the action or make any other order as it thinks fits. Order 28 r. 6 of the SCR provides that in the absence of the Defendant, the court may give judgment against the defendant and dismiss the Defendant's counterclaim with costs.

(ii) The absent party may apply to set aside the judgment under Order 35 r. 2 of the RHC.

See: *Liow Geok Lan v John Loh* [1993] 3 CLJ 158;
Hup San Timber Trading v Tan Ah Lan [1979] 1 MLJ 238.

(iii) However where a party is represented by his advocate he is not obliged to remain in court throughout the trial. The trial may continue in his absence as his advocate functions as his representative.

See: *Gan Kim Kiat & Bros Realty Sdn. Bhd. v Leang Ah Kan* [1983] 1 MLJ 351.

[3] Judgment given in the absence of party may be set aside

(a) This rule is an enhancement to Order 35 r. 1(2). It empowers the court at its discretion to set aside the judgment or order on the application of the absent party. The application should be made within seven days to

the judge. The court will look into the reasons for the party's absence. If the court is satisfied that a party was prevented by sufficient cause from appearing when the suit was called on for hearing, if justice can be done by compensating the other side for any costs thrown away, the court is bound to set aside the judgment and order a new trial.

See: *Buga Singh v Koh Bon Keo* [1967] 1 MLJ 16.

(b) However, where an application to set aside pursuant to Order 35 r. 2(2) by the absent party is unsuccessful, the said party may elect either to appeal to the Court of Appeal or to bring a fresh action. As in this circumstances, principle of r*es judicata* do not apply because the action in respect of the subject matter has not been adjudicated on its merits but thrown out on the grounds of non- appearance of parties.

See: *New India Assurance Co. Ltd v Karam Singh* [1972] 2 MLJ 26.

(c) Order 28 r. 8(1) of the SCR is substantially the same as Order 35 r 2(1) of the RHC save that in RHC the word 'trial' replaces the word 'Hearing'. However, Order 28 r. 8(2) SCR does not correspond to Order 35 r. 2(2) of the RHC.

[4] Adjournment of Trial

(a) Pursuant to Order 35 r. 3 of the RHC, the judge may if he thinks it is expedient in the interest of justice, adjourn a trial for such time. Application for adjournment should be made as soon as necessary and are usually made orally in court or by correspondence to the Deputy Registrar or Senior Assistant Registrar giving sufficient notice of the proposed adjournment to all parties. However, this rule is subject to court's discretion and ought to be exercised with acceptable and recognized principle. The discretion is unfettered, an appellate court will be 'very slow' to interfere with the exercise of the Judge's discretion and will do so only if rights of parties be defeated altogether and injustice is caused to one or the other party.

See: *Dick v Piller* [1943] 1 All ER 62.

(b) There are various circumstances in considering the scope of discretion. If party sought to obtain additional evidence which is material to the case, an adjournment may be justified enabling the court to decide on the issue of whether further evidence need to be obtained.

See: *Harold Shaw v Wong Phila Mee* [1990] 1 MLJ 205.

(c) When an adjournment requested on grounds of illness, it is the legal duty of the Judge to grant the request if he is satisfy of the medical fact. However, the court will be reluctant to grant an adjournment if numerous adjournments have already been granted. The court shall consider whether there are sufficient or adequate reasons to grant the adjournment. Consequently, the judge is also entitled to imposed terms upon granting the adjournment.

See: *Lee Ah Tee v Ong Tiaw Pheng* [1984] 1 MLJ 107;
Dick v Piller [1943] 1 KB 497;
Goh Pak Hoong Tractors and Building Construction v Syarikat Pasir Perdana [1981] 1 MLJ 314 (HC) and [1982] 1 MLJ 77.

[5] Order of Speeches

(a) The judge may give direction as who should begin. In most cases, the Plaintiff is entitled to commence the proceedings unless the Defendant bears the burden of proof on all the issues.

See: *Seldon v Davidson* [1968] 2 All ER 755.

(b) Nonetheless, the issue as to who shall bear the burden of proof largely rests on the construction of the pleadings.

See: *Kulandi v Subramaniam* [1983] 1 CLJ 302.

(c) The Plaintiff would normally state his case by introducing the issues and facts. He may then proceed to call and examine orally his witnesses in chief pursuant to Order 38 r. 1 of the RHC 1980 and section 137(1) of the Evidence Act 1950. The Defendant than conducts the cross examination as provided under section 137(2) of the Evidence Act 1950. Finally the plaintiff would be entitled to re examine the witness on points touched on by the Defendant as privided in section 137(3) Evidence Act 1950.

(d) In most High Courts civil trials, some or almost all the witnesses give their evidence in chief in the form of affidavits or witness statements. The parties may and do disclose to each other the affidavits or witness statements prior to the trial. Additional material may be given during examination in chief on issues which may have arisen subsequent to the filing of the affidavit or the witness statement, in which case examination in chief will be necessary or else, parties are bound by issues stated in their pleadings and only confined to those pleaded issues. If the affidavits stand as the complete evidence of the witness, upon confirmation by him of the facts stated in the affidavit, the Defendant may begin his cross-examination of the witness.

See: *State Government of Perak v Muniandy* [1986] 1 MLJ 490.

(e) Once the Plaintiff's witnesses have given evidence the Plaintiff closes his case. The Defendant may choose to submit that there is no case to answer on the ground that Plaintiff has failed to establish the elements required in his claim or the Plaintiff's burden of proof has not been discharged. In doing so, the Defendant is usually put to his election. It does not mean that counsel by submitting no case loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call for evidence. The Defendant may make the election expressly or impliedly. The Judge generally refuses to rule on such submission unless Defendant makes it clear that he does not intend to call evidence. However, once the Defendant elects to do so, he is bound not to call evidence in the event the judge decides against the Defendant. However, if for any reason, the judge does not put the Defendant to his election, and no election in fact takes place, counsel is entitled to adduce evidence. The purpose of such practice is because it has been undesirable for a judge to make any ruling on the evidence until the evidence is completed. Further, it avoids the expense and inconvenience of which would result in recalling the witnesses for the defence if the court's decision to uphold the submission is reversed on appeal.

See: *Yuill v Yuill* [1945];
Laurie v Raglan Building Co [1942] 1 KB 152;
Alexander v Rayson [1936] 1 KB 169;
Tan Song Gou v Goh Ya Tien [1981] 2 MLJ 317.

(f) If the judge upholds the submission of no case to answer, judgment will be entered for the Defendant. If otherwise, then the judgment will be entered for the Plaintiff. If no submission is made, the Defendant may open his case and call his witnesses who will be examined in the manner outlined in respect of the Plaintiff's witnesses. The Defendant may also give their evidence in chief in the form of affidavits or witness statements. If the witness is not to be examined, the Plaintiff may begin his cross examination once the Defendant's witness has confirmed that he deposed to the evidence in the affidavit.

(g) The closing speech is a final address by the party to the court. If the Defendant does not wish to adduce evidence, the Plaintiff after he has produced his evidence makes a closing speech after which the Defendant may state his case

See: Order 35 r. 4(3) of the RHC.

(h) If the Defendant does elect to give evidence, he may make the closing speech and the Plaintiff may make his closing speech in reply.

However, if there are points of law or authorities being raised, the other party would have a right of reply in relation to the points brought up.

See: Order 35 r. 4(3) of the RHC.

(i) Should two or more Defendants involved and separately represented, each may make an opening speech and may call their witnesses following the order in which their name appear on the record. If only some of the Defendants elect to adduce evidence, those defendants who are not giving evidence may state their cases after Plaintiff's closing speech in reply to the Defendants who have done so.

(j) If the burden of proof on all the issues is on the Defendant, or in a case involving two or more Defendants who appear separately or are represented separately and the burden of proof is on one or more of them, then the Defendant concerned is put, as far as the order of speeches is concerned, into the position on the Plaintiff and vice versa so that the Defendant may commence by opening the case and then adduce evidence.

See: Order 34 r. 4(6) of the RHC.

(k) The various procedures concerning proceedings at trial of two or more Defendants are as follows:

(i) If two or more Defendants none of whom elects to adduce evidence—

- the Plaintiff opens his case and then adduce evidence;
- the Plaintiff closes his case;
- the First Defendant states his case;
- the Second Defendant states his case.

(ii) If two or more Defendants who appear separately or separately represented elects to adduce evidence—

- The Plaintiff opens his case and then adduces his evidence;
- the First Defendant opens his case and then adduces his evidence;
- the Second Defendant opens his case and then adduces his evidence;

- the First Defendant closes his case;
- the Second Defendant closes his case;
- the Plaintiff closes his case

See: Order 35 r. 4(5)(b) of the RHC.

(iii) If two or more Defendants one or more of whom elect to adduce evidence whereas the other does not—

- the Plaintiff opens his case and then adduces his evidence;
- each Defendant who elects to adduce evidence will open his case and then adduce evidence;
- each Defendant who elects to adduce evidence closes his case;
- the Plaintiff closes his case in reply to the Defendant who adduced evidence;
- each Defendant who did not adduce evidence may state his case

See: Order 35 r. 4(5)(b) of the RHC;
Evidence, Advocacy and the Litigation Process, 1992 by Jeffry Prinsler.

[6] Inspection by Judge

(a) The Judge may inspect any place or thing with respect to which any question arises in the cause or matter during the trial. The decision to hold an inspection is a matter of judicial discretion and may not be prevented by the opposition of the parties, nor compelled by the application of the parties.

(b) The purpose of inspection is to enable the judge to understand the issues raised more concisely and to apply the evidence with a better understanding of the circumstances in which the facts occurred. Any dispute and argument should be reserved for the courtroom. However, explanation or demonstrations may be made at the inspection to facilitate the judge's understanding of the exhibit or the situation at the location. The trial is in process during inspection even though it is taking place in another location. Accordingly, to ensure that justice is seen to be done both parties must be given the opportunity of being

present during the process of inspection, failing which a new trial may have to be ordered.

See: *Goold v Evans* [1951] TLR 1189.

[7] Death of Party before Giving Judgment

Under Order 35 r. 6 of the RHC the general rule is that, where arguments have concluded on the facts, judgment may be entered notwithstanding the death of party. But under Order 15 r. 7(2) of the RHC, the judge may make an order substituting a party where the interest of the party who had died has been assigned or transmitted to or has devolved on another party.

See: *Leonard v Nachiappa Chetty* [1923] 4 FMSLR 265.

[8] Entries to be made by Registrar or Proper Officer of the Court

(a) The main purpose of Order 35 r. 7 of the RHC is to have a record kept for the purpose of settling hearing, fees and refreshers in the event of any dispute or uncertainty upon taxation of costs. It requires the registrar or the officer in attendance to certify the judgment given by the judge, and also any order as to costs. A judgment takes effect from the time the judge pronounces it unless it is ordered to be post-dated as in Order 35 r. 6 of the RHC. The judge may alter his judgment at any time before it is entered and perfected and the disclosure to him of a payment into court does not affect this right.

(b) Where there are separate issues, it is the duty of the judge to direct whether there is any issue upon which the unsuccessful party is entitled to his costs.

[9] Lists of Exhibits

Every document or object put in as an exhibit during the trial must be marked and labeled with a letter indicating the party by whom the exhibit is put in or the witness by whom it is proved. All the exhibits have to be numbered in a consecutive series that is, Plaintiff's documents may be marked as P1 – P10. The Registrar or other official of the court is to set out all the exhibits in the action in the form of a list, copies which may be obtained by the parties. The list is attached to the pleadings and forms part of the record of the action.

See: Order 35 r. 8 of the RHC.

[10] Custody of Exhibits after Trial

The Registrar shall retain all the exhibits in his custody labeled and marked in the event of an appeal to the Court of Appeal. If no appeal has been brought or after the final disposal of the appeal, the exhibits shall be returned on request to the party who put them in except where the claim or counterclaim is for money under a negotiable instrument which is received in evidence, such exhibits shall be retained in the Registry unless upon order of the Registrar.

See: Order 35 r. 9 of the RHC.

[11] Impounded Documents

Any impounded documents ordered by the court shall not be delivered out of the custody of the court unless an order made by a judge on application made by motion unless there is a written request from the Attorney General in which case, shall be delivered into his custody. Any impounded document ordered by the court shall not be inspected unless authorized by order signed by the judge.

See: Order 35 r. 10 of the RHC.

[12] Continuation of Trial by another Judge

(a) Where the judge is unable to continue with the trial whether due to death, illness or other cause, another judge may with the consent of the parties, take over the hearing and proceed from the stage at which the previous judge left it. The new judge may rely on the evidence already recorded but, if he wishes, he may recall any of the witnesses to give evidence before him. This is where the case is continued before another judge and not heard *de novo*, the judge may order that full liberty be given to recall and re-examine any witness and to resubmit on any points. The trial of the action may be continued on the evidence of the transcript of the earlier judge's notes. Where the trial is heard *de novo*, the evidence already given before the earlier presiding judge may merely be read at the rehearing without the witnesses being recalled. Where a Judge who replaces another after the conclusion of the trial but before the delivery of the judgment which may have been reserved, on the application of the parties, he may proceed to deliver judgment based on the evidence recorded.

See: *Shanmugam v Pitchamany & Anor* [1979] 2 MLJ 222;
HMS Vanity [1946] 79 L1 LR 594;
Chua Chee Chor v Chua Kim Yong & Ors [1963] MLJ.

(b) However, section 18(2) of the Courts Judicature Act 1964 override the requirement of consent under Order 35 r. 11 of the RHC where it does not require the consent of the parties as a precondition to a new judge taking over the case.

See: *Goh Cheng Teik & Anor v Syarikat Goh Guan Ho & Ors* [1997] 4 MLJ 403.

21

Evidence in Civil Proceedings

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Chapter 21

Evidence in Civil Proceedings

[1] Introduction

(a) Evidence can be described as that subject matter which under the applicable law is admissible in judicial proceedings which decide rights and liabilities in order that a decision may be arrived at. The Evidence Act 1950 *inter alia* sets out what evidence is admissible in both civil and criminal cases. This Chapter will briefly deal with some common evidential aspects in civil proceedings including bthe burden and standard of proof, estoppel, privilege evidence, hearsay evidence and expert evidence.

[2] Burden of Proof

(a) The term “burden of proof” refers to the general rule that in a legal proceeding, one party has to prove his case. Generally, in a civil case, the plaintiff has the burden of proof. However there are the exceptions, depending on the pleadings, when the defendant has the burden of proving certain issues. The question as to who bears the burden of proof in a legal proceeding is a question of law to be decided by the judge.

(b) It is important to understand the meaning of the words ‘proved’, ‘disproved’ and ‘not proved’. Section 3 of the Evidence Act 1950 explains the terms as follows:

> “‘proved’: a fact is said to be ‘proved’ when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.;
>
> ‘disproved’: a fact is said to be ‘disproved’ when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.
>
> ‘not proved’: a fact is said to be ‘not proved’ when it is neither proved nor disproved.

(c) The Act envisages two situations when a fact is said to be proven—

(i) when the court believes that a particular facts exists; and

(ii) when the court considers its existence so probable that a prudent man would believes that it exists.

(d) The term ‘disprove’ is the negative of ‘proved’. However, it requires a positive act of adducing evidence by the party trying to disprove a fact. Remaining silent is insufficient to disprove a fact.

(e) There are however three situations where proof is not required namely—

(i) cases of judicial notice;

(ii) cases where the facts are admitted by both parties, or where the accused pleads guilty to a charge; and

(iii) cases involving presumptions such as the common law presumptions that a man is innocent until proven guilty or that a man is sane until proven insane.

[3] Distribution of Burden

(a) The applicable provisions in the Evidence Act 1950 on whom lies the burden of prove are as follows:

(i) section 101—

- whoever desires any court to give judgment as to any legal rights or liability, dependent on the existence of facts which he asserts, must prove that those facts exist;

- when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

(ii) section 102—

- the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

(b) In a civil case, any party who makes an allegation bears the burden of proving that allegation. In an action for damages for pecuniary loss suffered as a result of libel, it is for the party who brings the action to prove the damages that he has suffered.

See: *John v Dharmaratnam* [1962] MLJ 187.

(c) Where both parties fail to adduce evidence, the party who bears the burden of prove loses.

See: *Lim Soh Meng & Anor v Krishnan* [1967] 1 MLJ 8.

(d) A party must prove his case before the burden of proof shifts to the other side.

See: *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4.

(e) Where the burden of prove is on the defendant to prove his defence and the defendant fails to do so, he or she will have to suffer the consequences provided by section 102.

See: *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86.

(f) The party who begins the case is not necessarily the plaintiff. In *Tun Datu Mustapha bin Datu Harun*'s case it was agreed by the parties that the defendants should begin first, and this was done. At the end of the case for the defendants, the counsel for the plaintiff submitted that there was no case for the plaintiff to answer and elected to call evidence only on the one issue as to whether the First defendant gave permission for the plaintiff to enter the Istana.

See: *Tun Datu Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertuan Negeri Sabah & Datuk Joseph Pairin Kitingan (No.2)* [1986] 2 MLJ 420.

(g) If at the end of the pleadings and from the substantive law, it becomes obvious that the defendant has the burden of proving his allegations first, then he will be the party to begin the case. Conversely, if the plaintiff has the burden to prove his allegations first, then he will begin the case.

[4] Quantum of Proof

(a) Standard of proof in civil cases is as follows:

(i) allegation not amounting to a crime—

It is settled law in Malaysia that the quantum of proof in civil cases is the preponderance of probabilities. The more serious the allegation, the heavier is the balance of probabilities required.

See: *PP v Yuvaraj* [1969] 2 MLJ 89.

(iii) allegations amounting to a crime—

- preponderance of probabilities—

In an allegation of running a brothel or permitting the use of premises for immoral purposes, the quantum of proof on the plaintiff is the ordinary civil standard, ie on the balance of probabilities.

See: *Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236.

Where there are allegations of criminal misconduct of conspiracy and threatening behavior, the party alleging must prove its case on the balance of probabilities.

See: *Tun Datu Mustapha bin Datu Harun v Tun Datuk Haji Adnan Robert* [1986] 2 MLJ 420.

- proof beyond a reasonable doubt—

In an allegation of fraud, the standard imposed on the party alleging such is proof beyond a reasonable doubt.

See: *Saminathan v Pappa* [1981] 1 MLJ 121.

In the case of *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34, the appellant sought the declaration that a property transferred to the respondent belonged to her deceased husband and that the purported transfer was a fraud. On the issue of standard of proof for an allegation of fraud, the Supreme Court imposed a criminal standard.

Where there is an allegation of fabrication of evidence, which amounts to a criminal offence, the standard imposed on the party making the allegation is the criminal standard of proof.

See: *Tun Datuk Mustapha bin Datu Harun v Tun Datuk Haji Mohd Adnan Robert* [1986] 2 MLJ 420.

(b) Standard of proof in matrimonial cases is as follows:

(i) in allegations of cruelty, the standard of proof is that of proof beyond reasonable doubt.

See: *Ng v Lim* [1969] 1 MLJ 139.

(ii) in an allegation of desertion, the standard of proof is that of proof beyond a reasonable doubt.

See: *Lim Nyun Yin v Gan Kim Biow &* Ors [1982] 2 MLJ 68.

(iii) in allegations of adultery, the standard of proof is that of proof beyond reasonable doubt.

See: *Wee Hock Guan v Chia Chit Neo & Anor* [1964] MLJ 217.

[5] Estoppel

(a) The doctrine of estoppel is provided for in Chapter VIII of the Evidence Act 1950. In general, the courts have accepted that these sections enact the common law doctrine of estoppel. Section 115 of the Evidence Act 1950 provides for the general doctrine of estoppel as follows:

> "When one person has by his declaration, act or omission intemtionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit of proceeding between himself and that person or his representative in interest to deny the truth of that thing.".

(b) In other words, section 115 estops a person from denying a fact, if the following elements are satisfied:

(i) he intentionally caused the other party to believe the fact to be true;

(ii) the other party acted upon such a belief;

(iii) the other party would not have acted but for that belief.

(c) The person estopped is then prevented from adducing any evidence with regard to the fact presented. The following are some illustrations—

(i) *Res judicata* a matter of procedure estoppes the Defendant from setting up a defence which he could have set up in a previous action but did not.

See: *Leong Cheong Kweng Mines Ltd v Kok Hoong* [1962] MLJ 224.

(ii) A representation made innocently or mistakenly cannot operate as an estoppel.

See: *V Veeriah v General Manager, Keretapi Tanah Melayu* [1974] 1 MLJ 201.

(iii) Estoppel by negligent conduct arises only in cases where the stopped party is under a duty to speak or act, mere silence cannot operate as an estoppel.

See: *Public Textiles Bhd v Lembaga Letrik Negara* [1976] 2 MLJ 58.

(iv) Estoppel cannot be set up to hinder the performance of a statutory body.

See: *Public Textiles Bhd v Lembaga Letrik Negara* [1976] 2 MLJ 5.

(v) A representation of either a physical fact or a state of mind attracts the rule of estoppel.

See: *Commissioners of the Municipality of Malacca v Sinniah* [1974] 1 MLJ 77.

(vi) The doctrine of estoppel is applicable to estop a challenge on the validity of a Muslim Wakf.

See: *Commissioner for Religious Affairs, Terengganu & Ors v Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222.

(vii) Estoppel is not merely confined to the immediate parties involved.

See: *Commissioner for Religious Affairs, Terengganu & Ors v Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222.

(d) Estoppel principles between landlord and tenant or licensor and licensee are as follows:

(i) Section 116 of the Evidence Act 1950 provides—

"No tenant if immovable property, or person claiming through the tenant, shall during the continuance of the tenancy be permitted to deny that the landlord of that tenant had at the beginning of the tenancy a title to the immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that that person had a title to such possession at the time when the licence was given.";

(ii) Where a tenant has been paying rent for so many years, he is estopped from denying his landlord's title.

See: *Ban Seng v Yap Pek Soo* [1967] 2 MLJ 156.

(iii) A tenant is not estopped from proving that a tenancy was created under a mistake as to the landlord's title.

See: *Cheong Lek San v Yong Kam Chin* [1970] 2 MLJ 179.

(iv) Notwithstanding the doctrine of estoppel, a tenant may plead that the title of the landlord has come to an end.

See: *Wee Tiang Yap v Chan Chan Brothers* [1986] 1 MLJ 47.

(v) A licensee is not estopped from denying the title of the licensor after the licensee has given up possession under a licence.

See: *Government of Penang & Anor v BH Oon & Ors* [1971] 2 MLJ 235.

[6] Privilege

(a) The Evidence Act 1950 provides for situations where a party to a suit may refuse to testify or disclose information to the other party. This is, in a way, an exception to the general rule that no one is entitled to hinder the course of justice in court proceedings by withholding evidence. It is this general rule that allows adverse presumptions in a case where a party to a proceeding withholds evidence, or refuses to answer questions in court. However, when a witness is entitled to claim privilege, he cannot be compelled to answer questions or to disclose any evidence, whether or not it be relevant to the issue before the court.

(b) Communication during marriage—

Section 122 of the Evidence Act 1950 provides—

"No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.".

(c) Affairs of state—

(i) Section 123 of the Evidence Act 1950 provides:

"No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Federal Government, and of the Chief Minister in the case of a department of a State Government.";

(ii) Section 162(2) provides:

The court, if it sees fit, may inspect the document unless it refers to affairs of State, or take other evidence to enable it to determine on its admissibility.

(iii) It is for the court, not the executive, ultimately to determine whether certain documents are affair of state.

See: *BA Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146.

(iv) A file relating to tender documents between third parties and the government is not privileged.

See: *Government of the State of Selangor v Central Lorry Service & Construction Ltd* [1972] 1 MLJ 102.

(v) A dispute between an employer and an employee arising out of a contract of service is not, prima facie, an affair of state.

See: *Wix Corp South East Asia Sdn Bhd v Minister for Labour and manpower & Ors* [1980] 1 MLJ 224.

(d) Communication to public officers

(i) Section 124 of the Evidence Act 1950 provides:

"No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure.

Provided that the court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to the public interest and, if the head of the department certifies that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications.".

(ii) For section 124 to apply, the information must be communicated in official confidence.

See: *Re Loh Kah Keng (deceased)* [1990] 2 MLJ 126.

(e) Professional communications

(i) The relevant sections are sections 126 and127 of the Evidence Act 1950.

(ii) Professional communication between a client and his solicitor or barrister is privileged.

See: *Dato' Au Ba Chi & Ors v Koh Kheng & Ors* [1989] 3 MLJ 445.

(iv) A statement made by a client to an officer of the Legal Aid Bureau, acting as his solicitor, is privileged.

See: *Yeo Ah Tee v Lee Chuan Meow* [1962] MLJ 413.

(f) Privilege against self incrimination

(i) The relevant section is section 132 of the Evidence Act 1950.

(ii) Section 132 is wide enough to withdraw or remove the privilege against self incrimination.

See: *Television Broadcasts Ltd & Ors v Mandarin Video Holdings Sdn. Bhd.* [1983] 2 MLJ 346.

(iii) Section 132 applies only to a person who actually testifies on oath or affirmation in a court of law.

See: *PMK Rajah v Worldwide Commodities Sdn. Bhd. & Ors* [1985] 1 MLJ 86.

(v) It is the duty of the court before compelling a witness to answer a question, the answer to which may or will incriminate him, to explain to him the purport of subsection 132(2) of the Evidence Act 1950.

See: *Chean Siong Guat v PP* [1969] 2 MLJ 63.

(g) Without Prejudice statements

(i) The relevant section is section 23 of the Evidence Act 1950.

(ii) Privilege in without prejudice statements may be waived by consent of both parties.

See: *AB Chew Investments Pte Ltd v Lim Tjoen Kong* [1989] 3 MLJ 328.

[7] Rule and Rationale of Hearsay

The adversarial system of trial emphasizes on the giving of evidence in court to ensure its reliability, the oath and cross examination being safeguards to accuracy in finding of fact, minimizing the dangers of distortion or mistake, and the court has the opportunity to observe and listen to the witness directly. The so called rule against hearsay excludes out of court assertions where such evidence is sought to affirm the truth of the facts asserted and where the makers of the statement are not witnesses. The objection to hearsay is that the evidence cannot be tested in court, the makers not being available to give evidence.

[8] Definition of Hearsay

(a) Hearsay can be explained as evidence which is not direct. A witness should speak only of a fact which he had perceived with one of his five senses. What amounts to hearsay evidence? It is to be noted that not all out of court assertions are hearsay. An out of court assertion if adduced to prove the truth of the matter therein is hearsay and is not admissible, but if it is adduced merely to show the state of mind of the maker of the statement then it is not hearsay and consequently is admissible. The Privy Council in the case of *Subramaniam v. PP* [1956] 22 MLJ 220 stated as follows:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.".

(b) At common law hearsay evidence is admissible as an exception to the hearsay rule. However, in Malaysia, hearsay evidence is admissible

when it is expressly provided so in the Evidence Act 1950. Meaning to say that an out of court assertion is admissible if it falls under one of the declared exceptions codified in the Evidence Act 1950. Section 5 of the Evidence Act 1950 declares that *"*evidence may be given in any suit or proceeding of the existence and non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.*"* Therefore, whatever is not declared by the Evidence Act 1950 as relevant is not admissible.

[9] Types of Hearsay

(a) Express assertions

(i) An example of an express assertion is where a witness testifies that "A said to me that B assaulted him" and this statement is tendered to prove that B is the assailant.

(ii) An example of oral express assertion is where a witness was not allowed to testify on what his father told him about a quarrel he had with the accused the night before he was murdered.

See: *Karam Singh v PP* [1967] 2 MLJ 25.

(iii) An example of written express assertion is where a statement made by the accused in Hokkien and interpreted by an interpreter to a Malay judge in English and reduced into writing was held to be hearsay because the interpreter was not called.

See: *Tang Lew Keng v PP* [1968] 2 MLJ 48.

(iv) Express assertion by conduct may amount to hearsay such as gestures made by a dying woman in response to questions as to identity of her killer, though a hearsay evidence, were admitted under the exception to the hearsay rule.

See: *Chandrasekera (alias Alisandiri) v R* [1937] AC 220.

(b) Implied assertions

(i) It is defined as statements or conduct not intended to be assertive but which rest on some assumption of facts believed by the maker of the statement or the doer of the act which can be inferred by the court.

(ii) A greeting is treated as an implied assertion because such a

statement is not intended by the maker to be assertive although it is based on an assumption of fact (that the person greeted was there) believed by the maker.

(iii) A telephone call placing a bet made to the premise operating illegal gambling is intercepted by the police and such evidence is tendered to prove that the premises from where the phone is operated is used for illegal gambling.

See: *Kok Ho Leng v PP* [1941] MLJ Rep 119.

(c) Hearsay and opinion

Hearsay rule only applies to a statement of fact. The exceptions to the hearsay rule under the Evidence Act 1950 do not apply to a statement of opinion as distinct from the statement of fact.

[10] Exceptions to the Hearsay Rule

(a) Generally, hearsay evidence is not admissible because the maker of such assertion cannot be tested in cross examination, being not available as a witness. However, Evidence Act 1950, stipulates the circumstances where out of court statements are admissible, that is, it declares relevant certain types of out of court statements such as admissions, confessions, dying declarations and business records. Since only relevant facts are admissible, any out of court statement which does not fall into any of the categories is “irrelevant” and “inadmissible”.

(b) Section 32 of the Evidence Act 1950 provides for the admissibility of statements made by—

(i) a person who is dead;

(ii) a person who cannot be found;

(iii) a person who has become incapable of giving evidence; or

(iv) a person whose attendance cannot be procured without an inordinate amount of delay or expense.

Statements made by such persons are relevant in cases outlined in paragraphs (a) to (h) of the Evidence Act 1950. Before a statement can be adduced under any of the said paragrapghs (a) to (h), one of the four pre conditions must first be satisfied. Therefore it must first be shown that the maker is dead, unable to be found, incapable of giving evidence or unable to be procured reasonably. If this is not satisfied

then the out of court statement cannot be adduced.

(c) Dying declarations – section 32(a)

Statements made by a person as to the cause of his death or circumstances of the transaction which resulted in his death are admissible if relevant. They would be so relevant, for instance, in a prosecution of his killer for murder or in an action for negligence which resulted in his death. To qualify as a dying declaration, the statement must relate to either of two matters, the cause of death or circumstances of the transaction which led to the death.

See: *Boota Singh v PP* [1933] 2 MLJ 195;
Mary Shim v PP [1962] 28 MLJ 132;
Ong Her Hock v PP [1987] 2 MLJ 45;
Toh Lai Heng v R [1961] 27 MLJ 53;
Mohd bin Allapitchay v R [1958] 24 MLJ 197.

(b) Business Records – section 32(b)

(i) Statements made in the 'ordinary course of business' are admissible. The justification for the admission of such statements is based on the assumption that regularity makes for accuracy.

(ii) Before a statement can be admissible under section 32(b), it must be proven to have been made in the ordinary course of business.

See: *Syarikat Jengka Sdn. Bhd. v Abdul Rashid bin Harun* [1981] 1 MLJ 201.

(iii) An out of court statement made in the course of business is admissible if it is proved that the maker of it is dead or cannot be found or has become incapable or whose attendance cannot be procured.

See: *Sim Tiew Bee v PP* [1973] 2 MLJ 200.

(c) Statements on pedigree relationship – section 32(e) & (f)

(i) Paragraph (e) includes statements made by persons still alive but who cannot be found or who have become incapable of giving evidence or whose attendance cannot be procured. Paragraph (f) is limited to relationships between persons deceased, and the statements referred to are in documentary form such as wills or deeds.

(ii) In a case involving an action to recover money and where the defendant pleaded infancy, an entry relating to the date of his birth in his father's book of births, deaths and marriages was admissible under subsection (e).

See: *Mohamed Syedol Ariffin v Yeoh Ooi Gark* [1916] 1 MC 165.

(iii) The entry of the son's name on a tombstone of the deceased is admissible evidence of pedigree relationship.

See: *Re Estate of Chan Chin Hee: Wee Guat Kui (f) and Others v Chan Choon Lay*.

(d) Evidence in an earlier judicial proceeding – section 33

(i) Section 33 of the Evidence Act 1950 deals with the admissibility of evidence given by a witness in previous judicial proceedings if he is not available at a later trial on substantially the same matter between the same parties or their representatives. When a retrial is ordered, it is normally expected that the same witnesses will be called to give evidence. However, a witness may become unavailable, in which case, this provision allows for his former testimony to be adduced. The situations of unavailability are similar to those in section 32 but section 33 includes the case where the witness is kept out of the way by the adverse party. The unavailability of the witness must be strictly proved.

(ii) Before any evidence can be adduced under section 33 of the Evidence Act 1950 it is incumbent on the party adducing such evidence to prove the prerequisite that the witness is dead or cannot be found or is incapable of giving evidence.

See: *Kee Siak Kooi & Anor v R* [1955] 21 MLJ 57.

(iii) Evidence is admissible under section 33 of the Evidence Act 1950 when the court is satisfied that the circumstances contemplated in that section have been proved.

See: *Mohamed Kunju v PP* [1966] 1 MLJ 271.

[11] Expert Evidence

Generally, opinion evidence is regarded as irrelevant for purpose of proving a fact in court. The giving of opinion is a matter to be left to the court, and this is done after the court has heard all the evidence

adduced by the parties. The role of witness is only to adduce evidence that amounts to facts, not opinion. From those facts, the court then draws certain inference or makes certain conclusions. However, in some situations, the court will accept opinion evidence where the court lacks the expertise to decide on a certain matter, such as foreign law, sciences and handwriting. This opinion is known as expert evidence.

[12] Statutory Provisions

The relevant statutory provisions that provide for expert opinion are sections 45 and 46 of the Evidence Act 1950 which are as follows:

"**Opinions of experts**

45. (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to the identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to the identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.";

"Facts bearing upon opinions of experts

46. Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant.".

[13] The Scope of Expert Evidence

(a) Section 45 of the Evidence Act 1950 provides that experts are persons specially skilled in four arears namely—

(i) foreign law;

(ii) science;

(iii) art;

(iv) identity.

(b) On handwriting expert evidence subsection 73(2) of the Evidence Act 1950 must also be kept in mind which provides as follows:

"(2) The court may direct any person present in court to write any words of figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person.".

(c) Expert evidence, especially of handwriting, is merely opinion evidence and is not conclusive.

See: *PP v Mohamed Kassim Bin Yatim* [1977] 1 MLJ 64;
Dalip Kaur v Pegawai Polis Daerah [1992] 1 MLJ 1.

(d) It would be erroneous for a judge to form his conclusion on a matter such as disputed handwriting without the aid of expert evidence.

See: *Syed Abu Bakar Bin Ahmad v PP* [1984] 2 MLJ 19.

(e) While the experts must be 'skilled', he need not be so by special study, he may be so by experience.

See: *PP v Muhamed bin Sulaiman* [1982] 2 MLJ 320;
Chong Soo Sin v Industrial & Commercial Insurance Bhd. [1992] 1 MLJ 636.

(f) A semi-skilled or a semi-professional may be accepted as an expert witness under certain circumstances.

See: *Kong Nen Siew v Lim Siew Hong* [1971] 1 MLJ 262;
PP v Mohamed Kassim bin Yatim [1977] 1 MLJ 64.

(g) The court is entitled to accept expert opinion on evidence that is of an elementary nature.

See: *Munusamy v PP* [1987] 1 MLJ 492.

(h) Expert opinion on typewriting is as much a matter of science study as handwriting and fingerprint evidence and is therefore admissible.

See: *Chandrasekaran & Ors v PP* [1971] 1 MLJ 153.

(i) It is the duty of counsel, who wishes to submit that the meaning of words in a foreign language is ambiguous, to call expert evidence on the point.
See: *Shriro (China) Ltd & Ors v Thai Airways International Ltd* [1967] 2 MLJ 91.

(j) Expert evidence is needed to prove a foreign law.

See: *Sivagami Achi v P RM Ramanathan Chettiar 7 Anor*

[1959] MLJ 221;
U Viswalingam v Viswalingam [1980] 1 MLJ 10.

(k) The evidence of an expert on handwriting, especially chinese characters, must be treated with caution.

See: *Teng Kum Seng v PP* [1960] MLJ 225.

[14] The Role of the Expert Witness

(a) The role of the expert is to furnish the court with knowledge of areas of the law which is outside the experience and knowledge of the judge. Experts should not be asked to give conclusions on matters which are eminently matters for the court to decide. The ultimate decision on any issue is with the court.

(b) In the case of *Ong Chan Tow v R* [1963] MLJ 160, it was stated—

> "Such an expert should not be asked to give his conclusions on matters which are eminently matters for the court to decide, otherwise he would tend to arrogate to himself the functions of the court. The motoring expert is there to help the court on technical and mechanical matters, not to draw an inference which even a layman can equally well draw.".

See: *Chin Sen Wah v PP* [1958] MLJ 154.

(c) In *Wong Swee Chin v PP* [1981] 1 MLJ 212, Raja Azlan Shah stated—

> "Our system of jurisprudence does not generally speaking, remit the determination of dispute to expert. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of the judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether be it a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion.".

[15] Procedure

(a) The procedure to be followed when an expert gives evidence has been explained by Hashim J in the case of *Wong Chop Saow v PP* [1965] MLJ 247 as follows:

> "May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows: He should first state his qualifications as an expert. He should then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts. He should then proceed to describe the various documents and give his reasons why in his opinion they relate to characters lottery. The trial magistrate must then come to a finding that he either accepts or reject the evidence of the expert witness *vis-à-vis* character lottery. In this case the trial magistrate did not come to any finding but merely stated what the expert evidence was…".

(b) This procedural requirement set out by Hashim J for adducing evidence presented by an expert witness has been adopted in subsequent cases.

See: *PP v Chong Wei Khan* [1990] 3 MLJ 165;
PP v Lin Lian Chen [1991] 1 MLJ 316.

[16] Grounds of Opinion

(a) Section 51 of the Evidence Act 1950 provides as follows:

"Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.".

(b) It has been held that—

(i) where the opinion of experts is based on reports of facts, those facts, unless within the experts' own knowledge, must be proven independently;

(ii) in all cases of opinion evidence, the grounds or reasoning upon which such opinion is based may be inquired into.

See: *Pacific Tin Consolidated Corp v Hoon Wee Thim* [1967] 2 MLJ 35.

(c) An expert must give the reasons in support of his evidence.

See: *Sim Ah Oh v PP* [1962] MLJ 42;
Lai Yong Koon [1962] MLJ 327.

[17] Conflicting Opinion Evidence

(a) Where there is a conflict between the opinions given by more than one expert, the judge has a right to prefer one opinion to the others.

See: *Collector of Land Revenue v Alagappa Chettiar, Collector of Land Revenue v Ong Thye Eng* [1971] 1 MLJ 43.

(b) In evaluating the conflicting expert evidence, the court may examine the scientific grounds and bases on which they rely.

See: *Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (Third Party)* [1984] 2 MLJ 202.

(c) When there is a difference in the evidence between two witnesses on scientific matters, such as drugs, then it is incumbent on the party concerned to have expert testimony to explain the differences.

See: *Pavone v PP (No 2)* [1986] 1 MLJ 423.

22

Motor Vehicle Personal Injury

Rodzariah Bt. Bujang

Chapter 22

Motor Vehicle Personal Injury

[1] Introduction

The foundation upon which a claim can be made for acts and or omissions which caused personal injuries and death lie in tort. It flows from the general principle in tort of a duty of care. Where a duty of care is established by a plaintiff against the tortfeasor, damages is recoverable for the acts and or omission which constitute a breach of this duty of care. The most common of this kind of action is that of negligence in motor vehicle accidents ("running down actions"). The lesser actions involves injuries sustained through criminal acts such as assault, battery and false imprisonment industrial accidents or employment accidents and much lesser still, one which involves a breach of an occupiers' duty of care.

[2] Duty of care

A plaintiff must first prove that the defendant owes him a duty of care and had breached the same by his acts and or omissions. Secondly and more importantly, he has to show that the injuries and damages he suffered were occasioned by that breach. Thirdly, the injuries and damages suffered by him are ones which are reasonably foreseeable by the objective standard of a reasonable man.

[3] Damages the Remedy

Once the plaintiff is able to establish the existence of the duty of care, it's breach and the causations between the injuries and or the loses he suffered following that breach, he is under the law entitled to be compensated for the same by an award of damages.

[4] Contributory negligence

(a) It is, in the words of Seah SCJ in *Lai Yew Seong v Chan Kim Sang* [1987] 1 MLJ 403 "*the failure by a person to use reasonable care for the safety of himself or his properly so that he becomes the author of his own wrong".*

(b) Once contributory negligence is proved, the court will apportion liability for the action according to the degree of blameworthiness of the parties and damages subsequently assessed would be awarded proportionate to that degree.

[5] Burden of proof in negligence cases

(a) The Federal Court held in *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 held that in a negligence action, the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence and the plaintiff cannot succeed without proof of the defendant's negligence.

(b) Further the Federal Court in *Chew Kay Kong v Ching Tong & Ors* [1967] 2 MLJ 31 held that where the evidence adduced by both parties was so evenly balanced that the judge had to look for evidence elsewhere to decide the issue, then it is abundantly clear that the plaintiff has failed to discharge the onus of proof which rests on him.

A. Liability

[6] General

(a) In arriving at a finding of liability in personal injuries and running down actions the court is assisted by the production of the following documents.

(i) **Police Reports**

Given that most acts which cause personal injuries to a person and almost all motor vehicle accidents are chargeable in courts as offences under the Penal Code and the Road Transport Act 1987, respectively, police reports are crucial in assessing the credibility of the complaint made. It is especially important in running down cases as stated by Abdul Malik Ishak J in *Abdul Kadir v Mohamad Kamarulzaman Mohd Zin & Anor* [2001] 5 CLJ 249 where the failure to mention material facts in the police report by the 1st defendant was construed adversely against him.

(ii) **Guilty plea of the accused**

A guilty plea of the defendant for a charge related to the plaintiff's claim is not conclusive evidence of the negligence of the defendant but is a factor and an admissible admission which supports the plaintiff's case. This proposition was made by the Supreme Court in *Chang Chong Foo & Anor v Shivanathan* [1992] 2 MLJ 473, affirming the decision of the High Court in Chock *Kek Ling v Patt Hup Transport Co Ltd and Ors* [1966] 1 MLJ 120.

Further, as decided by the Federal Court in *Chow Kay Kong v Ching Tong and Ors* [1967] 2 MLJ 31 the plea of guilty of the defendant precludes him from raising the defence of contributory negligence.

[7] Pertinent factors to consider in a finding of liability in running down cases

(a) Other than the above factors, the following factors are relevant in running down cases.

(i) Sketch plan drawn at scene of the accident

The positions of the vehicles after the collision, the brake marks, the skid marks on the road, the positions of the broken glass or parts of the vehicles on the road will assist the court in determining who is at fault in the accident. Where the evidence of the parties as to how the accident happened is very conflicting, the mute testimony of the sketch plan is of special assistance to the court and this was decided in the following cases:

Mohd Salleh bin Awang & Anor v Low Hau Leong & Anor [1982] 1 MLJ 82;
San Seong Choy & Ors v Yusof Bien [1963] MLJ 235;
Yahya bin Mohamad v Chin Tuan Nam [1975] 2 MLJ 117.

The importance of sketch plans has also been discussed in the following two cases:

Lee Hock Lai v Yeoh Wah Pein [1999] 5 MLJ 172;
Lee Ewe Teik v Arrifin bin Hussain [1990] 2 CLJ 191.

(ii) Significance of broken glasses drawn in the sketch plan

Generally, the presence of broken glasses are indicative of the point of impact of the accident as can be seen in the following three cases:

Mat Desa bin Salleh v Ang Hock Lee & Anor [1979] 1 MLJ 241;
Ng Aik Kian And Anor v Sia Loh Sia [1977] 1 AMR 1996;
Yahya bin Mat & Anor v Abdul Rahman bin Abu [1982] 1 MLJ 202.

However, in *Mat Desa bin Salleh & Ang Hock Lee & Anor* [1979] 1 MLJ 241 it was held that the presence of broken glasses

does not necessarily indicate the point of impact as the broken pieces could have been carried forward by heavier moving vehicles before they rested at the point indicated on the sketch plan.

(iii) Duty of a motorist

Generally a motorist coming from a minor road intending to go to the main road owes a duty to ensure that the way is clear and safe for him to do so before making his exit.

See: *Mohamed Repen v Lim Yu Kee* [1969] 1 MLJ 64;
Chu Kim Sing & Anor v Abdul Razak bin Amin [1999] 6 MLJ 433.

However there is a corresponding duty on the part of a person driving along a major road to be on a lookout for any person coming out of a minor road.

See: *Hussein & Anor v Maiden* [1970] 1 MLJ 114.

A motorist following another from behind owes a duty to move with due care.

See: *De Colta v Tan Hock Lee* [1977] 2 MLJ 173.

A motorist is bound to take precaution against danger which is 'reasonably apparent' but not 'to anticipate folly in all its forms'.

See: *Fardon v Harcourt – Rivington* (1932) 146 LJ 391;
London Passenger Transport Board v Upson (1949) AC 155;
Chu Kim Sing & Anor v Abdul Razak bin Amin [1999] 6 MLJ 433.

(iv) Dividing lines on the road

It was held in *Goh Beng Seng v Dol bin Dolah* [1970] 2 MLJ 95 that the centre line on the road is a guide and a reminder only for there is no territorial or geometrical division of the road. Sharma J held that a person's duty is to ensure safety for himself and for others and should not treat the half of the road he is travelling on as his '*exclusive domain'*. His Lordship held that a motorist is not totally immuned from liability even though he drives within the exact limits of his '*realm'* if he fails to take

any action to avoid colliding with a vehicle coming from the opposite direction and encroaching onto his side of the road.

(v) Collision between two vehicles from opposite direction

Where a collision happened between two vehicles from opposite directions, there is a *prima facie* presumption that both are negligent.

See: *Ong Yam Chong & Anor v Chan Wah* [1962] 28 MLJ 184.

(vi) Point of impact near the centre of the road

If it is proved that the point of impact is near the road centre, liability is to be shared equally by both parties to the accident.

See: *Abdul Rahman v Soon Ah Hai* [1978] 2 MLJ 31.

Finally, on the issue of liability, the statement made by Lord Dunedin in *US Shipping Board v Laird Line Ltd* (1924) AC 286 is worth considering. His Lordship said,

> "… *it is not in the mouth of those who have created the danger of a situation to be minutely critical of what is done by those whom they have by their own fault involved in the danger*".

[8] Liability of joint tortfeasors

(a) It was decided by the Supreme Court in *Malaysian National Insurance Sdn. Bhd. v Lim Tiok* [1997] 2 MLJ 165 that if several persons, not acting in concert, commit a tort against another person, substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the same damage and liable to pay the total sum of damages, costs and interest awarded by the court.

[9] Vicarious Liability

(a) The principle of vicarious liability is explained in *Hewit v Bonvin* (1940) 1 K.B. 188 as follows:

> "If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage he must establish that in doing

the act B acted as the agent or servant of C. If he says that he was C's agent he must further show that C authorised the act. If he can establish that B was the servant of C the question of authority need not arise."

(b) Thus, an employer is vicariously liable for the tortious act of his employee committed during the course of his employment and a principal, for the tortious act of his agent if he had authorized him to do something which leads to the act being committed.

(c) In running down actions, mere permission of the use of the car by its owner to the defendant is not sufficient to make the owner vicariously liable for the act of negligence. He is only liable if he has authorised or requested the driver to drive the vehicle or the driver was carrying out a task or duty delegated to him or that he was in control of the driver's conduct when the accident happened.

See: *Karthiyani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119.

[10] The maxim of *res ipsa loquitur*

(a) The maxim is commonly pleaded in running down actions and is applied in the following circumstances:

(i) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right of control;

(ii) the occurrence is such that it would not have happened without negligence;

(iii) there must not be any other evidence to show or to explain how the occurrence took place.

(b) When the maxim is successfully proved, a *prima facie* case of negligence is made out and the burden shifts on the defendant to rebut the same.

[11] Limitation period for negligence cases

Negligence comes within the definition of misfeasance as decided by Ian Chin J in *Vun Chun Fah & Anor v Telekom Malaysia Bhd* [1997] 1 LNS 165 and under Item 20 of the Limitation Ordinance of Sabah and Item 19 the of the Limitation Ordinance of Sarawak, the limitation

period is two years. Under the Limitation Act 1953 negligence which falls under the category of tort, the limitation period is six years.

[12] Limitation period for third party actions

In respect of third party proceedings for contribution, the Supreme Court in *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 held that it is an independent and a separate proceeding from that filed by the plaintiff against the defendant and time only begins to run only from the date the defendant is made liable for the plaintiff's claim.

B. Assessment of Damages

[13] The Civil Law Act 1950

(a) This is the primary legislation which regulates the assessment of damages in personal injuries and death cases.

(b) The relevant provisions in the said Act relating to these claims are as follows:

(i) compensation to the dependants of the deceased for loss of support arising from his death – Section 7;

(ii) claims which the estate of the deceased can make following his death – Section 8;

(iii) proceedings against and contribution between joint & several tortfeasors – Section 10;

(iv) apportionment of liability where contributory negligence is proved - Section 12;

(v) damages for loss of future earnings of an injured person- Section 28A.

[14] Assessment of Damages in Personal Injury Clauses

(a) The award of damages in these kind of cases are given under two heads that is special and general.

(b) In considering whether the award should be made and how much should be the amount, it is best to remember what the Federal Court

had said in *Ong Ah Long v Dr S. Underwood* [1983] 2 MLJ 324:

> "Damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give reparation for the wrongful act and for all the natural and direct consequence of the wrongful act, so far as money can compensate.".

(c) Damages can be for both pecuniary and non-pecuniary loss. Pecuniary loss is one which can be calculated in monetary terms such as loss of earnings, loss of support and loss of personal effects. Non pecuniary loss is one which is incapable of being quantified in monetary terms, such as for pain and suffering. All that the court can do in assessing non-pecuniary loss, said Lord Scarman in *Pickett v British Rail Engineering Ltd* (1980) AC 136, is to make an award of fair compensation as opposed to full compensation for pecuniary loss.

[15] What cannot be claimed

The following claims are prohibited under the Civil Law Act 1984:

(i) Loss of expectation of life (Section 28A).

This means the reduction in the plaintiff's life expectancy by reason of the disabilities brought about by the injuries he suffered.

(ii) Loss of earnings in the lost years for the benefit of deceased's estate (Section 8 (2) (a)).

'Lost years' here refers to the balance of the deceased's working life calculated from the time of his death.

(iii) Loss of consortium of a wife and services of a child (Section 7(3)).

A husband's right of consortium is his right to the comfort, society and services of his wife. It is a common law right once recognized by the court as forming a distinct award if the injuries suffered by the wife precluded the husband from enjoying the said right. Loss of services of a child is another common law right which was once accepted as a basis for an award of damages.

[16] Special damages

(a) Special damages are pecuniary in nature and are capable of exact quantification in ringgit and sen. These are normally out of pocket expenses such as medical expenses like hospital bills, operation costs and loss of earnings during the period of the plaintiff's incapacity due to his injuries. Other commonly pleaded types of special damages are as follows:

(i) transportation costs to and from the hospital;

(ii) costs of repair to the plaintiff's vehicle damaged in the accident;

(iii) cost of renovating the plaintiff's house to accommodate his disability arising from the accident;

(iv) cost of nursing care for the plaintiff during his period of incapacity;

(v) cost of personal items lost or damaged in the accident;

(vi) funeral expenses.

(b) It is trite law that special damages must be specifically pleaded and particularized before the court can order it.

(c) Medical Expenses

Pre-trial medical expenses is claimable under special damages but not post trial medical expenses for this comes under general damages. The plaintiff must be able to justify the need for these future expenses (such as operations) through expert evidence before the court can allow it.

(d) Public Hospitals vs Private Hospital

(i) It has often been argued, for the defendant that he is not liable for the costs of the plaintiff seeking treatment from a private hospital, when the same treatments are equally available in a public hospital.

(ii) In *Yaakub Foong v Lai Mun Keong & Ors* [1986] 2 MLJ 317, it was held that treatment in a private hospital is allowed so long as it is reasonable in the circumstances for the plaintiff to go there for treatment.

(iii) In *Pengarah Institut Penyelidikan Perubatan v Intera Devi*

[1988] 1 MLJ 19, the Supreme Court disallowed a government servant's claim for cost of plastic surgery in a private clinic, simply because she has had a prior unpleasant experience in a government clinic and did not want to go there for the procedure.

(iv) In short, the plaintiff must be able to justify with good reasons why treatment at the public hospital was not chosen, for example on the ground of urgency of the treatment which the public hospital cannot accommodate.

(e) Payment of medical expenses by others

The plaintiff is still allowed to claim for medical expenses paid by someone other than himself, for example an employer or a family member. The basis for allowing this is the principle, as applied in *Lim Kiat Boon & Ors v Lim Seu Kong & Anor* [1980] 2 MLJ 39, that *"the generosity of others is res inter alios acta and not something for which the wrongdoer should reap the benefit."*

(f) Cost of nutritious food

Often, the plaintiff is moved to spend a lot on money on extra nourishing food and supplements to facilitate his recovery. Where the consumption of these items have been taken following medical advice, the courts have been sympathetic and allowed reimbursement of the same. However, when there is no such advice as in the case of *Yeap Cheng Hock v Kajima – Taisei – Joint Venture* [1973] 1 MLJ 230, the cost of consuming brands essence of chicken was disallowed for lack of medical evidence to support its necessity.

(g) Traditional cure & treatment

(i) It is often the case that the plaintiff also seeks cure and treatment for alternative medicines such as traditional massage, acupuncture, reflexology and herbal remedies.

(ii) Whether such claim should be allowed was considered in *Seah Yit Chen v Singapore Bus Service (1978) Ltd & Ors* [1990] 3 MLJ 144 where the court applied the *'reasonableness test'* and held that such cost can be allowed if *"it was reasonable for the plaintiff to seek such traditional medicine and incur the expenses and the answer as to whether it was reasonable must depend on the facts of the case. There should be some evidence before the Court that the traditional treatment was undergone on reliable advice, with a reasonable expectation of benefit and not just on the impulse of the plaintiff."*

(h) Cost of nursing care

This cost is usually claimed during the period of treatment (even in hospital), during convalescence and rehabilitation or is permanent, when the disability is such that lifelong care is required. The plaintiff is entitled to compensation under this head as long as he proves that such care is required. Pre trial cost of care comes under a claim for special damages and post trial cost of care under general damages.

(i) At home

If care is provided by members of the plaintiff's family, the plaintiff is entitled to compensation based on the market rate of getting the kind of help provided by the family member or the cost of hiring a maid, if one is engaged.

(j) At an institution

If care for the plaintiff must be in a nursing home then the cost of such care can also be claimed but in *Lim Poh Choo v Camden & Islington Area Health Auth* (1980) AC 174, it was held that a deduction of the plaintiff's living expenses be made from the costs of this care but this deduction is not necessary if such living expenses was never incurred in the first place (for example, if the plaintiff lives with his parents) or he still has to incur such expenses (for example paying for the board and lodging of his other family members).

(k) Relevant factors for consideration in assessing costs of care

The following factors should be considered in the assessment:

(i) the actual cost of providing such care for example when a maid is hired;

(ii) the length the care is needed;

(iii) the equivalent market value of providing the care;

(iv) the life expectancy of the plaintiff when life long care is necessary;

(v) accelerated payment;

(vi) contingences of life and vicissitudes of life.

(l) Cost of hiring a substitute for the plaintiff's services

If the plaintiff's incapacity has prevented him from performing his normal duties to the family, for example, chauffeuring the children to

and from school or in case of a housewife, from doing housework, the plaintiff can be compensated for the cost of hiring another person to do the work.

See: *Raju Zam Zam v Vaithiyanathan* [1965] 2 MLJ 252.

(m) Transportation cost for family members

This is allowed as long as it is reasonably incurred and is not just confined to bus and taxi fares but airline fares as well when the plaintiff is seeking treatment in a hospital away from home and need a family member to accompany him for the treatment.

(n) Loss or damage to property and personal effects

This claim is normally allowed as long as the plaintiff can proved the nexus between the loss and the defendant's negligence. If the plaintiff cannot produce any evidence of the value of the items lost or damaged (such as receipts and invoices) the court is to give a reasonable value to the said items.

(o) Funeral expenses

(i) Even though funeral expenses come under the category of special damages and must be pleaded, the courts have been generous in matter of proof. Even if the claim is not supported by receipts or other documentary proof, the courts have compensated the estate of the deceased by taking judicial notice that funeral expenses of some communities would have been substantial.

See: Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153.

(ii) However, the court is guided by the principle that only reasonable expenses would be allowed. For example in *Hart v Griffith-Jones* [1948] 2 All ER 729, the cost of a monument over the grave of the deceased was not allowed. The status and station in life of the deceased person would also be considered in taking judicial notice of the expenses that would have been incurred.

(p) Loss of support and earnings

In assessing loss of support or loss of earnings, the court is requested to make an estimate of the following two matters:

(i) the value of the loss which is commonly called the multiplicand.

(ii) the duration of the loss which is called the multiplier.

(q) Pre trial loss of support and earnings

(i) This is a relatively easy exercise to undertake as the multiplicand would be the sum representing the loss and is even easier still where the plaintiff earns a fixed income. The multiplier would be the period of disability, usually starting from the date of the accident, unless the onset of the disability comes later.

(ii) However for loss of support, in the case *of Rebecca Matthews & Ors v Syarikat Kerjasama Guna Wong Siong Bhd & Anor* [1990] 1 MLJ 443, it was held that the court must deduct certain percentage from the income of the deceased which represents his own living expenses when assessing the multiplicand.

[17] General Damages

(a) One of the best guideline for assessing general damages was made by the Federal Court in *Ong Ah Long v Dr. S. Underwood* [1983] 2 MLJ 324 as follows:

> "The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant."

(b) In the other words of Raja Azlan Shah CJ in *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292, the resulting damages awarded must be *"fair and adequate and not excessive."*

(c) What constitutes general damages

The following are the common heads of general damages awarded:

(i) Pain and suffering.

(ii) Loss of amenities.

(iii) Post trial loss of earning/earning capacity.

(iv) Post trial loss of support.

(d) Pain and suffering

Both past and prospective pain and suffering of the plaintiff are factors for consideration but if the plaintiff is not totally conscious, the court must make allowance for that fact and adjust the award accordingly.

For a plaintiff who is in a coma, there cannot be award under this head.

See: *Lim Poh Choo v Camden Health Authority* (1980) A.C. 174.

(e) Loss of Amenities

It is also known as loss of enjoyment of life and for a plaintiff who is unconscious during the period of his disability and unable to feel pain, instead of an award for pain and suffering, the court can award him compensation for loss of amenities. Loss of amenities includes an inability to pursue a particular sport or hobby which the plaintiff was enjoying before the accident.

(f) Post trial loss of earning

Section 28A(2)(c) of the Civil Law Act 1950 stipulates the following conditions governing the assessment:

(i) The plaintiff must be below the age 55, in good health and earning an income either by his own labour or other gainful activity before he was injured. In other words, a plaintiff who is 55 years and above at the time of his injury cannot claim for lost of future earning. (Section 28 (2)(c)(i));

(ii) Only his income at the time of his injury is relevant and not any future increment of the same. (Section 28(2)(c)(ii));

(iii) The plaintiff's living expenses at the time of his injury is to be assessed and deducted. (Section 28 (2)(c)(iii));

(iv) For a plaintiff who is 30 years and below at the time of his injury, the multiplier is fixed at 16. (Section 28(2)(d)(i));

(v) For a plaintiff who is aged between 31 years to 54 years at the time of his injury, the multiplier is determined by subtracting his age from the figure 55 and dividing the remainder by 2. For example if the plaintiff is 35 years old at the time of his injury, the multiplier is calculated as follows:

55 – 35 = 20

20 ÷ 2 = 10 (multiplier)

(g) Loss of earning capacity

This is also claimable as an award under general damages. The court compensates the plaintiff for his diminished chances of getting alternative work or the risk of losing his job because of injuries he sustained.

See: *Yang Yap Fong & Anor v Leong Pek Hoon & Anor* [1987] 2 MLJ 201;

Salim bin Dawing v Lim Kat Kang [1986] 2 MLJ 50;

Dirke Pieternella Halma v Mohd Noor bin Baharom & Ors [1990] 3 MLJ 103).

(h) Earnings from illegal contract

It was held by the Court of Appeal in *Tay Lye Seng v Nazari bin Teh & Anor* [1998] 3 MLJ 873 that although the plaintiff was working illegally in Singapore without a work permit at the time of the accident, his claim for loss earnings was allowed as the fault of not renewing the work permit which was initially issued to him, lies with his employer. The Court of Appeal held that the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) lies mainly and most exclusively in an action founded on contract but has only a limited application in tort. It is to be noted that the illegality here is due to procedural requirements not met by a person other than the plaintiff and on that basis, the claim is allowed.

(i) Post trial loss of support

In order to assess the loss suffered by the dependants of the deceased, the following same conditions and multiplier for loss earning is repeated in sections 7(3)(iv) of the Civil Law Act 1950:

(i) The deceased must be less than 55 years of age, in good health but for the injury which caused his death and receiving earnings by his own labour or other gainful activity prior to his death;

(ii) Future increment of deceased's earning is not a relevant factor in the assessment;

(iii) Living expenses of the deceased is to be deducted from his earnings;

(iv) The multiplier for deceased aged 30 years and below at the time of his death is 16;

(v) The multiplier for a deceased aged 31 to 54 years at the time of his death would be calculated by deducting his age at the time of death from the figure 55 and dividing the remainder by 2. For example, if the deceased was 35 years old at the time of his death, the multiplier is 10:

55 – 35 = 20

20÷ 2 = 10 (multiplier)

(j) Dependants in claims for loss of support

Persons who can claim compensation following the death of another under section 7(2) read with and 7(11) of the Civil Law Act 1950 are as follows:

(i) Wife.

(ii) Husband.

(iii) Child which means son, daughter, grandson, granddaughter, stepson and stepdaughter.

(iv) Parent which means the father, mother, grandfather and grandmother.

(k) The meaning of wife

This includes a wife who marries the deceased under customary law as decided in *Chong Sin Sen v Janaki a/p Chellamuthu* [1997] 2 AMR 2217 and *Tan Sai Hong v Joremi bin Kimin & Anor* [1998] 1 AMR 522.

(l) What the dependants can claim other than loss of support

(i) Funeral expenses (Section 7(3)(ii));

(ii) RM10,000.00 for bereavement by the spouse of the deceased or his parents (if he is single and to be divided equally between his parents after deducting costs and expenses (Section 7(3B) and (3C)).

(m) A special mention of a married person's action in negligence

(i) Prior to 1994, section 9(2) of the Married Women Act 1957 prohibits a husband or a wife to sue each other for a tort unless it is for the protection or security of property. In other words neither of them cannot sue the other for personal injuries based

on negligence.

See: *Adnan bin Hj Mat Jidin v Irwan Wee bin Abdullah* [1997] 2 MLJ 778.

(ii) The position of the law is now changed after an amendment to the Act in 1994. Section 4A now provides that a husband or a wife is allowed to sue each other in tort for damages in respect of injuries inflicted by the other.

(iii) Therefore, a wife or a husband who is a victim of domestic violence (for example of assault and battery) can bring an action for damages in respect of the injuries sustained as a result of the violence committed.

(n) Duty to mitigate

(i) The plaintiff is under a duty to take reasonable steps to lessen the losses he suffered by reason of the injuries inflicted on him by the defendant. If he fails to do so, the damages would either be reduced or even disallowed altogether if it is proved that taking the mitigating action can avoid such a loss from taking place. The Federal Court's case of *Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thai* [1981] 2 MLJ 21 is an instance where the plaintiff's award for future earnings was reduced because he acted unreasonably by leaving the hospital against medical advice.

(ii) However, for a plaintiff who is a minor, the failure by his parents to take action to mitigate his loss will not be held against him. See the case of *Wan Norsiah bte Wan Abdullah v Che Harun bin Che Daud* [1980] 1 MLJ 237 where the decision to discharge the plaintiff's infant from the hospital against medical advice was made by her parents.

(o) Interest on damages

(i) The court's power to award interest is governed by Section 11 of the Civil Law Act 1950 and it is awarded to compensate a party for being deprived of the use of the money which he is entitled to receive.

(ii) Different types of damages carry interest for different periods and at different rates. Therefore, in awarding them the court must itemize the damages. This guideline is given by Raja Azlan Shah CJ (as he then was) in *Murtadza v Chong Swee Lian* [1980] 1 MLJ 216 where His Lordship said,

"An award of interest must be made having regard to the temporal conditions applicable to them. Thus under the head of special damages the discretion to award interest is calculated from the date of the accident; an award under pain, suffering and loss of amenities carries interest from the date of service of the writ to the date of trial; an award for future earning carries no interest at all."

(iii) In practice, the following interest rates have been given for special and general damages:

- Special damages: 4 percent from the date of the accident until the date before judgment and from the date of judgment until full settlement it is 8 percent as that is the statutory rate of interest provided for a judgment sum;

- General Damages: 6 percent from date of service of the writ of services until the date before judgment and from the date of judgment until full settlement is 8% p.a.

(iv) The following award of damages should not carry interest:

- Future earnings;

- Future expenses;

- Loss of earning capacity.

See: *Clarte v Rotax Aircraft Equipment Ltd* [1975] 3 All EC 794.

[18] Useful References

(a) *McGregor on Damages.*

(b) *Assessment of Damages in Personal Injury and Fatal Accident Claims: Principles and Practice by Lim Heng Seng.*

(c) *Nathan on Negligence.*

(d) *Personal Injury Claims by S. Santhana Dass.*

23

Recovery of Debt

Ravinthran Paramaguru

Chapter 23

Recovery of Debt

[1] Introduction

(a) The subject matter of this chapter is not about debt collection by third parties such as debt collection agencies. It is about first party collection which concerns debt recovery between the actual lender and the borrower.

(b) Most of the civil cases in the lower courts, especially the Magistrates Court, although labelled as contract, credit card, banking, hire purchase, equipment lease and money lending cases, are in reality debt collection cases. This is because the defendant had borrowed money and had defaulted in payment and the lender had instituted a court action to recover the debt.

(c) Some of the issues that arise in these cases may be covered by the specific law that governs the type of transaction in question. For example, the issue in relation to seizure of a hire purchase vehicle would be governed by the Hire Purchase Act.

(d) This chapter propose to discuss issues that are common to these cases. Needless to say, in debt collection cases, the fact the money was loaned to the borrower is rarely disputed. What is usually disputed is whether the lending institution is entitled to recover the loan. Therefore, the commonly utilized defences will be discussed here. Before the commonly raised defences is discussed, for sake of

completeness and context, the recovery procedure is outlined below.

[2] Recovery procedure

In a debt collection action the following are the usual steps taken for the recovery of the debt:

(i) The lender must establish that the grant of a loan of whatever nature to the borrower *vide* a contract. The contract need not be in writing as the Contracts Act 1950 recognizes an oral contract as valid. However, all institutional lenders such as banks and finance companies alway use a properly drawn up agreement which would contain various clauses to protect their interests.

(ii) To ascertain the date of default of the loan. Loan agreements normally contain provisions that allow the lender to terminate the agreement if the borrower defaults in paying a certain number of installments or if he fails to pay up by a certain date. The borrower then may treat the agreement as having come to an end and may prepare to sue for the balance. For this purpose, a letter of demand is issued to the borrower and guarantor. Generally speaking, except in the case of *on demand guarantees,* a demand is not a pre-condition to the institution of a suit.

(iii) The final step would be the filing of a writ action. The Statement of Claim in debt collection cases is typically brief. Only basic facts are pleaded, that is, the fact of loan and default, and indebtedness and refusal to pay. The common issues that arise in debt collection cases are discussed below.

[3] Address and mode of service

(a) Loan or hire purchase agreements require various notices to be served by the lender to the borrower. For example, in bank loan cases, the borrower may argue that he did not receive any of the bank statements that were posted to him. He may even claim that the letter of demand was not served on him.

(b) A number of decided cases have dealt with the issue of service of documents or notices to loan defaulters. Written agreements almost always require the borrower to state the address for service of process or notices and to notify the lender in the event of change of address in the future. Otherwise, the lending institution is entitled to treat the

last known address as the valid address. The address provided in the written agreement is also known as the "contractual address". The purpose of this requirement is to prevent borrowers from claiming that they have moved away from the address stated in the agreement. Similarly the agreements also contain deeming provisions in respect of service, that is, that service of documents or legal process are deemed served or received if sent by post to the contractual address. Courts have generally given effect to the "contractual address" clause and to the mode of service clause.

See: *Amanah Merchant Bank Bhd v Lim Tow C*hoon [1994] 1 MLJ 413.

[4] Letter of demand and principal debtor clause

(a) It is standard practice for lenders to issue a letter of demand to borrowers before commencing legal action. However, failure to do so is not fatal to the claim as a letter of demand, except in the case of demand guarantees, is not a *sine qua non.* As Shankar J said in *Public Bank Bhd. v Chan Siok Lie & Ors* [1989] 2 MLJ 305:

> "There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a *sine qua non* to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases. The writ itself is a notice: see Malayan Banking Bhd v Lim Ghee Leng [1985] 1 MLJ 214 (refd). Nor is there any general rule that in all cases, unless the precise amount owing is correctly stated in a notice, the notice will be invalidated.".

(b) However in the case of guarantees, the wording employed in the agreement may require a demand on the part of the lender to trigger liability. In the case of *Mok Hin Wah v United Malayan Banking Corp Bhd.* [1987] 2 MLJ 610 and *Orang Kaya Menteri Paduka Wah Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank* [1989] 3 MLJ 155 it was held that if the terms of a guarantee stipulate a demand on a guarantor, a proper demand must be made. In *Mok Hin Wah & Ors. v United Malayan Banking Corp. Bhd*. [1987] CLJ 219, Supreme Court said as follows:

> "Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor.".

(c) However, whether a demand is required or otherwise very much depends on the wording of the relevant clause of the guarantee

agreement. In the above case, as stated under the relevant clause the guarantor was required to pay:

> "*on demand* all money which now is or may during the continuance of the agreement be owing to you from the Customer(s)…".

(d) On the other hand, in *United Merchant Finance Bhd v Hockwood Holdings Sdn. Bhd.* [1999] 5 MLJ 85, the relevant words were:

> "… be entitled to demand repayment in full from the guarantors…"

(e) Clement Skinner J held that there were no words in any of the clauses which make a prior demand on the guarantors a condition precedent to liability. Whatever words are used, it is a question of ascertaining the intention of the parties.

See: *Sim Siok Eng v Kong Ming Bank Berhad* [1980] 2 MLJ 21.

(f) Many guarantee agreements also contain what is known as a "principal debtor clause". This clause makes the guarantor liable as if he were the principal debtor. The purpose of this clause is to obviate the necessity for the lender to make a demand on the guarantorThe utility of a principal debtor clause and its relationship to a demand clause was lucidly explained by Siti Norma Yaakob J (as her Ladyship then was) in *Credit Corporation (M) Berhad v Choi Sang & Anor.* [1989] 1 CLJ 1070:

> ".....a guarantee is a collateral agreement and before being sued, it is only right and just that a demand be made on the guarantor. However, the character of the guarantee changes where there is also included a principal debtor clause in the body of the guarantee. The guarantee is no longer a collateral agreement and as such there is no need for a demand as the issuance of the writ is a demand in itself. *Mok Hin Wali's* case is distinguishable in that the guarantee sought to be enforced did not contain principal debtor clause and as such the case is not applicable to the facts of the case before me.
>
> .... However where a guarantee contains both a written demand clause and a principal debtor clause, it is my considered opinion that the latter overrides the condition precedent of a written demand.".

See: *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305;

United Merchant Finance Bhd v Hockwood Holdings Sdn. Bhd. [1999] 5 MLJ 85;
Kurban Ali Shah Syed Ahmad Ali Shah v Pacific & Orient Insurance Co. Sdn. Bhd. [2001] 7 CLJ 284;
Elephant Gypsum Sdn. Bhd. v Elevia Trading Sdn. Bhd. & Ors [2001] 7 CLJ 405.

(g) *Public Bank Bhd v Chan Siok Lie & Ors*, *supra* and *Credit Corporation (M) Berhad v Choi Sang & Anor, supra* have generally been followed by the courts in respect of the effect of principal debtor clause save with rare exceptions. A good discussion in respect of divergent views on the effect of principal debtor clauses is found in the case of *Danaharta Urus Sdn Bhd v Chou Kok Hong & Anor* [2006] 7 CLJ 330.

See: *MBF Finance Bhd v Hasmat Properties Sdn. Bhd. & Ors* [1990] 1 CLJ 106.

[5] Certificate of indebtedness

Such a certificate may be issued by the proper officer of the lending institution to ascertain the exact quantum of debt that is owed at a given time. The purpose is to dispense with proof. If the loan agreement contains a conclusive evidence clause permitting such a certificate to be issued, the borrower is contractually bound to accept such a certificate as evidence of indebtedness. The effect of such a certificate is to shift the burden to the borrower to disprove the claim (see *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282) and *Cempaka Finance Bhd. v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 3 CLJ 544. The Court of Appeal in the latter case cited the following passage from *Dobbs v National Bank of Australia* [1953] 53 CLR 643, the Australian court which it found instructive:

> "The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate. But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness."

[6] Plea of *non est factum*

(a) In some cases, the alleged borrower may repudiate the loan agreement in question on the ground that he did not know what he signed. The odds in succeeding in this plea are usually stacked against the signer of the document. The burden is on him to prove that he was not negligent and that he was not misled. If he did not understand the language of the document, he ought to have sought independent advice from someone who could. In the case of *Lii Tat Credit Mortgage Sdn. Bhd. v Tang Liing Kang* [1988] 3 MLJ 104, the court said as follows:

> "To establish the plea, there must be clear and positive evidence. The burden lies on the party seeking to disown the document; this includes the burden of showing that in signing the document, he acted with reasonable care. He must show that the document signed was radically different from what he thought it was (see Saunders v Anglia Building Society [1970] 3 All ER 961 (HL).".

(b) In *Imbangan Utama Sdn. Bhd. v Lotan Engineering Sdn. Bhd*. [2002] 2 MLJ 313, the court discussed the difficulty in proving this defence in the following terms:

> "It is also trite that if a man's signature on a document was obtained by fraud or under the influence of mistake, or something of the kind, he may be able to avoid it up to a point, but not when it has come into the hands of one who has in all innocence advanced the money on the faith of it being the signer's document, or otherwise has relied upon it being (the signer's) document, as the latter had enabled it to be circulated by actually signing it. Thus, in a contest between the signer of a document and the innocent third party, the law has almost invariably chosen to prefer the latter.".

[7] Whether necessary to realize collateral before suing?

Lending institutions often secure a loan by requiring collateral either from the borrower or a third party. The usual collateral required by banks is a statutory charge on a land in its favour. In the event of default, the bank may not bring foreclosure proceedings against the land but may elect to sue the borrower for debt. In such a circumstance, the borrower or guarantor is not entitled to argue that the bank must seek to recover its loan by realising the collateral first before bringing an *in personam* action. This is because financial institutions can commence current proceedings by way of civil suit to claim for breach of contract or foreclose the property or do both. One should also note that of late,

standard loan and guarantee agreements contain special clauses that expressly allow the financial institutions to proceed by way civil suit for breach of contract and foreclosure action simultaneously or successively.

See: *Low Lee Lian v Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36;
HongKong & Shanghai Banking Corp Ltd v Kaline Holdings Sdn Bhd & Ors [1992] 2 CLJ (rep) 532;
Bank Bumiputra v Esah Abdul Ghani [1986] 1 MLJ 16.

[8] Late payment or penalty interest

(a) This is another issue that is frequently raised in debt collection cases. The general position is that financial institutions are allowed to charge additional interest in the event of default if provided for in the agreement and if the interest rate is not exorbitant. It does not matter whether it is called penalty interest, late payment interest or by any other name. As long as the additional interest is not exorbitant, it is not caught by section 75 of the Contracts Act 1950 as being a penalty. The legal position is summarized in *Alliance Bank v Chan Teik Huat* [2006] 3 CLJ 498 as follows:

> "As for the second issue, I am of the opinion that the plaintiff's claim for default interest of 1% is not subject to proof of its loss pursuant to s. 75 of the Contracts Act 1950. This is because the facility agreement contractually allows the plaintiff to charge interest and additional interest respectively. This was decided in a number of decisions like *Arab Malaysian Finance Bhd v Sukma Villa Sdn. Bhd. & Ors* [2002] 1 CLJ 391, which supports the view that s. 75 Contracts Acts 1950 was not applicable as the increase in the rates of interest was contractually provided for. Again, the default interest rate of 1% is not excessive as it would meet the requirement of genuine pre estimate contractually agreed by the parties.".

(b) In the Federal Court case of *Realvest Properties Sdn. Bhd. v Co-operative Central bank Ltd (In Receivership)* [1996] 2 MLJ 461 it was held that:

> "Default interest may or may not be a penalty, depending on circumstances. Illustration (d) of s. 75 of the Contracts Act gives rise to a clear implication that default interest rate must be exorbitant in order that it be caught by s. 75.".

[9] Compound interest

(a) This is also known as interest on interest. Compound interest is interest reckoned on the principal together with the accumulated unpaid interest whereas simple interest is reckoned on the principal only. The general rule is that interest on interest is disallowed unless parties have provided for it by agreement.

See: *Trengganu State Economic Development Corp v Nadefinco Ltd* [1982] 1 MLJ 365;
Yeong Ne Hong lwn Bumida Engineering and Construction Sdn Bhd [1996] 4 MLJ 350.

(b) The court cited *Chitty on Contracts, 26th Edition*, paragraph 3592 that says:

> "Compound interest is payable either by agreement or custom, but not otherwise.".

(c) Usually letter of offers for a bank loan would stipulate that compound interest is chargeable. However, even if there is no such provision, the universal custom of banks would justify charging of compound interest. In *Malayan Banking Bhd. v Foo See Moi* [1981] 2 MLJ 17, the Federal Court held that payment of compound interest on an overdrawn account was a usual and perfectly legitimate mode of dealing between banker and customer. The Federal Court referred to *Paget on Banking (8th Ed)* at page 133 which states as follows:

> "There is no common law right to charge even simple interest on an overdraft but the claim could be supported on the ground of universal custom of bankers or on the basis of implied agreement. Where the customer has acquiesced in the system under which the interest is charged, that also would justify the claim. Such acquiescence will justify the charging compound interest or interest with periodical rests, so long as the relation of banker and customer exists, and the relationship is not changed into that of mortgagee and mortgagor.".

(d) Accordingly any argument by the borrower that compound interest is illegal in banking cases has to considered in the light of express provisions in the written agreement and in the light of the universal custom of bankers.

24

Adoption

Jagjit Singh a/l Bant Singh

Chapter 24

Adoption

[1] How to adopt a child?

(a) Very briefly there are two ways to register an adoption in West Malaysia namely—

(i) by way of registration at the National Registration Department under the Registration of Adoptions Act 1952 (Act 253) ; and

(ii) through the registration of the adoption through the Court under the Adoption Act 1952 (Act 257).

(b) At the outset it must be pointed out that both the Registration of Adoptions Act 1952 and the Adoption Act 1952 are applicable in West Malaysia only. The Adoption Ordinance 1960 (Sabah No. 23) and the Adoption Ordinance 19 are applicable in the states of Sabah and Sarawak respectively. Both the Sabah and Sarawak Ordinances have substantially similar provisions to the Adoption Act 1952.

(c) The Registration of Adoptions Act 1952 and the Adoption Act 1952 are independent of each other and must therefore be read and interpreted independently of each other.

See: *Sean O'Casey Patterson v Chan Hoong Poh & Ors* [2008] 6 CLJ 896.

[2] Adoption under the Registration of Adoptions Act 1952

(a) Section 6 of the Registration of Adoptions Act 1952 provides for the registration of *de facto* adoptions. The pre requisites and the procedure for adoption under Registration of Adoptions Act 1952 are as follows:

(i) an application for an adoption must be made in the form prescribed in the First Schedule to Registration of Adoptions Act 1952 together with the payment of the prescribed fees;

See: Section 6(1) of the Registration of Adoptions Act 1952.

(ii) the child to be adopted must be below the age of 18 years and must ordinarily be a resident in West Malaysia;

See: Section 6 and 10 of the Registration of Adoptions Act 1952.

(iii) the child has never been married;

See: Section 6 of the Registration of Adoptions Act 1952.

(iv) the child has been in the care and custody of the adoptive parents for a period of not less than 2 years continuously and immediately before the date of such application;

See: Section 6(1) of the Registration of Adoptions Act 1952.

(v) The adoptive parents and the child are required to appear before the Registrar of Adoptions and produce oral or documentary evidence to satisfy the Registrar that such adoption took place;

See: Section 6(1) (a) of the Registration of Adoptions Act 1952.

(vi) The natural parents or if both the natural parents are dead then any guardian of the child are required to appear and express their consent to the adoption, unless the Registrar allows the consent to be dispensed;

See: Section 6(1) (b) of the Registration of Adoptions Act 1952.

(vii) The adoptive parents one of whom must be at least 25 years old and at least 18 years older than the child and must be residing in West Malaysia;

See: Section 10 of Registration of Adoptions Act 1952.

(b) Upon satisfying the pre requisites the Registrar shall register and adoption by entering the particulars in the Register of Adoptions.

See: Section 6(2) of the Registration of Adoptions Act 1952.

[3] Adoption under the Adoption Act 1952

(a) The pre requisites for adoption under Adoptions Act 1952 are as follows:

(i) consent of the natural parents or guardian of the child is required except under certain expressly provided circumstances;

(ii) the child has been continuously in the care and possession of the proposed adoptive parents for at least three consecutive months immediately preceding the date of the adoption order;

See: Section 4(4)(a) of the Adoptions Act 1952.

(iii) the adoptive parents have informed a social welfare officer of their intention to apply for an adoption order at least three months before the date of the adoption order;

See: Section 4(4)(b) of the Adoptions Act 1952.

(iv) the adoptive parents and the child must be ordinarily resident in West Malaysia. See paragraph [4] on the test for "ordinarily resident".

See: Section 4(3) of the Adoptions Act 1952;
T.P.C. (M.W.) v A. B. U. and Anor [1993] CLJ (Rep) 881;
Benjamin Taine And Sebinah Binti Raymond Ernus [2010] 4 CLJ 126;
Neil Duncan Gillies & Megan Sarah - Rose Gillies v Liew Mei Ling & 2 Ors (High Court Malaya at Kuala Lumpur Case Number F25-01-2010).

(b) Jurisdiction to hear adoption applications is as follows:

(i) the Court having jurisdiction to make adoption orders under the Adoption Act 1952 shall be the High Court or the Sessions Court;

See: Section 10 of the Adoption Act 1952.

(ii) where the Sessions Court Judge is of the opinion that the application should be dealt with by the High Court, the court may transfer the application to the High Court. Alternatively the Sessions Court may submit any question of law, practice or procedure in connection with any application for the decision of the High Court;

See: Sections 10, 3 and (4) of the Adoption Act 1952.

(iii) An appeal from a Sessions Court Judge or a High Court Judge shall lie to the Federal Court;

See: Section 10(5) of the Adoption Act 1952.

(c) Who should be named the parties in the application?

(i) The Applicants/Petitioners:

The application for an adoption should be made by an "applicant" which according to section 2 of the Adoption Act 1952 means a person who is proposing to adopt or who has adopted a child whether in pursuance of an adoption order or otherwise. In the Sessions Court the applicants are referred to as the Petitioners;

See: *Ah Moy @ Chiong Lai Yung (F) v Cheong Fook Hong @ Choong Fock Koon* [1996] 1 CLJ 315;
Rule 3 of the Adoption Rules 1955.

(ii) The Respondents:

The following persons shall be made respondents—

- child;
- guardian *ad litem*;
- the natural parent or guardian of the child unless whose consent has been dispensed; and
- the spouse of an applicant if not named an applicant.

See: Section 12(2) of the Adoption Act 1952.

(d) The documents (copies of which are attached to this chapter) that are usually filed for an application for adoption under the Adoptions Act 1952 are as follows:

(i) Notis Pelantikan Peguamcara;

(ii) Petisyen Untuk Perintah Pengangkatan;

(iii) Affidavit Menyokong Petisyen;

(iv) Notis Minta Arahan-Arahan;

(v) Notis Permohonan Untuk Pengecualian Kehadiran Ibu Bapa Kandung;

(vi) Notis Perbicaraan; dan

(vii) Laporan Guardian *Ad Litem*.

(d) The role of a guardian *ad litem*:

(i) it is the duty of the guardian *ad litem* to investigate as fully as possible all the circumstances of the child and the adoptive parents, and all other matters relevant to the proposed adoption, in order to safeguard the interest of the child.

(ii) amongst the matters which the guardian *ad litem* is required to investigate is whether the adoptive parents have the means and status to bring up the child suitably, and, what rights to or interests in property the child has.

(iii) the guardian *ad litem* may also consider whether it is desirable, for the welfare of the child, that the court should be asked to make an interim order, or if making an adoptive order to impose any particular terms or conditions.

See: Section 13 of the Adoption Act 1952.

(e) Matters with respect to which the court to be satisfied are as follows:

(i) the court must ensure that—

- the consent of the natural parents; and
- the need for the child to be in the continuous care and possession of the adoptive parents for a period of at least three months immediately preceding the date of the order;

See: Section 4(4) of the Adoption Act 1952.

(ii) on the issue of consent, the court may, under the circumstances listed in the proviso to section 5(1) of the Adoption Act 1952 dispense with the consent of the natural parents. The proviso

to section 5(1) reads as follows:

> "Provided that the Court may dispense with any consent required by this section if satisfied—
>
> *(a)* in the case of a parent or guardian of the child, that he has abandoned, neglected or persistently ill-treated the child;
>
> *(b)* in the case of a person liable as aforesaid to contribute to the support of the child, that he has persistently neglected or refused so to contribute;
>
> *(c)* in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld; or
>
> *(d)* in any case, that in accordance with the provisions of any written law relating to the adoption of children for the time being in force in any country any competent authority has given permission or granted a licence authorizing the care and possession of the child to be transferred to the applicant.".

(iii) the court must be satisfied of the following three factors:

- that the natural parents who have consented to the adoption understand the nature and effect of the adoption order, in particular that the effect of the adoption order will permanently deprive them of their parental rights;

  See: Section 6(a) of the Adoption Act 1952.

- that the order if made will be for the welfare of the child; and

  See: Section 6(b) of the Adoption Act 1952.

- that neither the adoptive parents nor the natural parents have received any payment or other reward in consideration of the adoption;

  See: Section 6(c) of the Adoption Act 1952.

(iv) the welfare of the child is only one of the three factors which the court needs to consider before making an order for adoption. Therefore, the nature of the proceedings in an adoption application is different to that applicable in cases of custody of infants under section 11 of the Guardianship of Infants Act 1961 (Act 351), or under section 88 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164), where the first and paramount consideration is the welfare of the infant.

See: *Re Baby M (An Infant)* [1994] 3 CLJ 98.

(f) Effect of an adoption order:

(i) the effect of an adoption order made by a court is that all rights, duties, obligations and liabilities of the natural parents are extinguished and these rights, duties, etc, shall become vested in the adoptive parents.

(ii) In other words, once an adoption order has been made, the child is, for all intents and purposes, treated as a child born to the adoptive parents and the child shall have the right of inheritance, etc, as if the child was born to the adoptive parents.

(iii) The adoptive parents, on their part would have the same legal obligations to the child as if she was their own natural child.

(g) Interim order:

(i) Section 17 provides that where all the pre requisites for an adoption have been satisfied, the court, instead of making a final adoption order, may make an interim order giving the custody of the child to the applicants for a period of six months to two years by way of a probationary period upon such terms as regard provisions for the maintenance, education, and supervision of the welfare of the child.

(ii) No interim order shall not be made in any case where the making of the adoption order would be unlawful.

See: Section 17(6) of the Adoption Act 1952.

(h) Hearing of adoption applications:

Adoption proceedings shall be held in camera and all documents filed in the Court shall be confidential.

See: Section 10(2) of the Adoption Act 1952.

(i) Can the Judge interview the child to assess the evidence of the child?

It has been held that though there is no requirement in law for the judge to interview the child as the child's evidence could be captured and communicated through the report of the Guardian *ad litem*, there is nothing stopping the Judge from doing so.

See: *AL Annamalai & Anor v Chandrasekaran Thangavelu & Anor* [1999] 8 CLJ 1;
Re G (An Infant) [1963] 2 QB 73.

[4] The test for "Ordinarily resident"

(a) The word "resident" or "ordinarily resident" is not defined in the Adoption Act 1952 or the Sabah and Sarawak Adoption Ordinances. Whether or not a person is ordinarily resident is a question of fact.

See: *Inland Revenue Commissioners v Lysaight* [1928] AC 217;
T.P.C. (M.W.) v A.B.U. and Anor [1983] CLJ (Rep) 881;
Benjamin Taine And Sebinah Binti Raymond Ernus [2010] 4 CLJ 126.

(b) For an adoptive child the minimum requirement is that the child must have been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order.

See: Section 4(4) (a) of the Adoption Act 1952;
T.P.C. (M.W.) v A.B.U. and Anor [1983] CLJ (Rep) 881.

(c) There is no requirement for an applicant to prove that he intends to reside permanently in this contry. Ordinary resident as opposed to occasional or temporary residence means no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life. The stay in this country has to be of sufficient duration and continuity to satisfy the requirement of ordinariness.

See: *Inland Revenue Commissioners v Lysaight* [1928] AC 217;
T.P.C. (M.W.) v A.B.U. and Anor [1983] CLJ (Rep) 881.

(d) In short there is no doubt that the applicant must be physically present in this country when the order is made. But he must futher show that he is actually living in this country and has a base here where his work is though he does not intend to live here permanently. However, he need not show that he has no immediate intention of residing anywhere else.

See: *T.P.C. (M.W.) v A.B.U. and Anor* [1983] CLJ (Rep) 881.

(e) In *Benjamin Taine And Sebinah Binti Raymond Ernus's* case the word "Resident" was considered in the context of a work pass in Sabah where it was held that it requires an element of permanency in one's dwelling and to determine that one must apply an objective test in that the circumstances in which the infant come to stay in Sabah must be taken into consideration. A work pass does not confer any permanency of residential status. Being allowed to stay in Sabah under a work pass is only coincident to the right to work which is derived from the work pass.

See: *Benjamin Taine And Sebinah Binti Raymond Ernus* [2010] 4 CLJ 126.

(f) However *Benjamin Taine's* case was not followed in *Neil Duncan Gillies and Anor v Liew Mei Ling and Others* (HCKL Case No: F25-01-2010) where it was decided that an applicant for adoption should not be automatically rendered ineligible or be rejected by the mere fact that he is here, in any part of this country, under an Employment pass or Work pass, as the case may be. An adoption order shall be made in favour of such applicant if the facts show that he is ordinary resident in Peninsular Malaysia, or resides in Sabah, as the case may be, according to the meaning of the term "ordinarily resident" as interpreted in *T.P.C.* 's case.

See: *Neil Duncan Gillies and Anor v Liew Mei Ling and Others* (HCKL Case No: F25-01-2010);
T.P.C. (M.W.) v A.B.U. and Anor [1983] CLJ (Rep) 881;
Benjamin Taine And Sebinah Binti Raymond Ernus [2010] 4 CLJ 126.

[5] Can the Court hear an application to set aside the Adoption Order

(a) At the outset it must be reminded that the adoption order is an *ex parte* order as it is based on an *ex parte* originating summons. It has

accordingly be held that the Court by virtue of Order 28 r. 4(1) of the RHC had full powers to vary or revoke the order made *ex parte* by a subsequent order of the Court on such terms as the Court thinks fit. The Court can therefore hear the application to set aside the adoption order and the issue of *functus officio* has no application.

See: *Ah Moy @ Chiong Lai Yung (F) v Cheong Fook Hong @ Cheong Fock Koon* [1996] 1 CLJ 315;
United Malayan Banking Corp. Bhd. v Syarikat Perumahan Lunas Sdn. Bhd. [1988] 1 MLJ 54.

(b) It has been held that where the statutory requirements of the Adoption Act 1952 are not met or satisfied the adoption order must be quashed. The requirements of the Adoption Act 1952 must be strictly complied as the adoption order gives a legal status to the applicant. Therefore the non compliance of the provisions of the Adoption Act 1952 is not a mere irregularity but a nullity.

See: *Ah Moy @ Chiong Lai Yung (F) v Cheong Fook Hong @ Cheong Fock Koon* [1996] 1 CLJ 319.

[6] The Registration of Adoptions Act 1952 or the Adoption Act 1952: Which to choose?

(a) Unlike the Adoption Act 1952, there is nothing to disallow the application of the ROA to person professing the religion of Islam. In other words Muslims and non Muslims can register the adoption under the Registration of Adoption Act 1952.

See: *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2008] 6 CLJ 896 ;

(b) *In Halsbury's Laws of Malaysia* (Vol. 8) MLJ 58 the following is stated:

> "It should be noted than the Registration of Adoption Act 1952 was intended for the use of Muslims. This is because Islam does not recognise adoption and in order to legitimate such customary practice, the adoption could be registered under this Act so as to safeguard the right to custody of the adopted parents.".

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

PETISYEN PENGANGKATAN,N0.: XX - YY – ZZ TAHUN 2010

DALAM PERKARA MENGENAI AKTA PENGANGKATAN, 1952
DAN
DALAM PERKARA MENGENAI **BABY J** SEORANG BUDAK LELAKI YANG AKAN DIKENALI SEBAGAI **BABY J**

.... SEORANG BUDAK

ANTARA

1.	A (Bapa Angkat) (No. Kad Pengenalan: XXXXXXXX)		
2.	B (Ibu Angkat) (No. Kad Pengenalan XXXXXXXX)	...	PEMPETISYEN-PEMPETISYEN

DAN

1.	BABY J (Seorang Budak)		
2.	M (Ibu Kandung) (No. Kad Pengenalan XXXXXXXXXX)		
3.	JABATAN KEBAJIKAN & MASYARAKAT	...	RESPONDEN-RESPONDEN

NOTIS PELANTIKAN PEGUAMCARA

Kami, **A** dan **B** yang beralamat 8, Jalan Sutera Mas, Kuala Lumpur, Wilayah Persekutuan sebagai Pempetisyen- Pempetisyen yang dinamakan di atas dengan im melantik Tetuan BSS Associates, Peguambela dan Peguamcara yang beralamat di No 18, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur untuk bertindak sebagai Peguamcara dalarn perkara diatas.

Bertarikh haribulan , 2010

…… ……

(Tandatangan A) (Tandatangan B)

……..

PEGUAMCARA BAGI PEMPETISYEN-PEMPETISYEN

Kepada:
Pengarah
Pejabat Kebajlkan Masyarakat Kuala Lumpur

NOTIS PERLANTIKAN PEGUAMCARA ini difailkan oleh Tetuan BSS Associates, Peguamcara bagi pihak Pempetisyen-Pempetisyen yang beralamat di No 18, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur.

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

PETISYEN PENGANGKATAN,N0.: XX - YY - ZZ TAHUN 2010

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DAN
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.... SEORANG BUDAK

ANTARA

1. A (Bapa Angkat)
   (No. Kad Pengenalan:)
2. B (Ibu Angkat)
   (No. Kad Pengenalan) ... PEMPETISYEN-PEMPETISYEN

DAN

1. BABY J (Seorang Budak)
2. M (Ibu Kandung)
   (No. Kad Pengenalan)
3. JABATAN KEBAJIKAN & MASYARAKAT ... RESPONDEN-RESPONDEN

PETISYEN UNTUK PERINTAH PENGANGKATAN

Kepada:

Hakim
Mahkarnah Sesyen Kuala Lumpur

Petisyen ini oleh **A** (No. Kad Pengenalan:) dan **B** (No. Kad Pengenalan:) suarni dan Isteri yang beralamat di 8, Jalan Sutera Mas, Kuala Lumpur, Wilayah Persekutuan menunjukkan:

1. Bahawa Pempetisyen-Pempetisyen ingin mengangkat **BABY J** dibawah peruntukkan Akta Pengangkatan, 1952.

2. Bahawa Pempetisyen-Pempetisyen tersebut biasanya bermastautin di Semenanjung Malaysia di alamat tersebut di atas.

3 Bahawa Pempetisyen Pertama **A** telah berkahwin Pempetisyen Kedua **B** pada 10 haribulan Oktober, 1999 di Putrajaya.

4. Pempetisyen **A** mempunyai pernigaan sendiri dan **B** adalah seorang kerani akaun di CIMB.

5. Pempetisyen Pertama **A** berumur 38 tahun dan Pempetisyen **B** berumur 34 tahun.

6. Bahawa kedua-dua Pempetisyen tiada hubungan kekeluargaan dengan **BABY J**.

7. **BABY J** tersebut ialah:

   (a) seorang budak lelaki;

   (b) tidak berkahwin;

   (c) seorang anak kepada **M** yang beralamat di No. AB, Taman Putih, Kuala Lumpur.

   (d) bermastautin di Semenanjung Malaysia;

(e) berurnur 22 hari dan dilahirkan pada 29 haribulan Jun, 2009 di Hospital Kuala Lumpur;

(f) tinggal di 8, Jalan Sutera Mas, Kuala Lumpur, Wilayah Persekutuan;

(g) sekarang dalam kustody Pempetisyen-Pempetisyen;

(h) dibawah penjagaan Pempetisyen-Pempetisyen dan

(i) berhak harta yang berikut, Tiada

8. **A** dan **B** yang, beralamat di 8, Jalan Sutera Mas, Kuala Lumpur, Wilayah Persekutuan untuk menanggung **BABY J**.

9 Bahawa **BABY J** tiada sebelum ini pernah menjadi subjek kepada Pefintah Pengangkatan atau permohonan atau petisyen untuk Perintah Pengangkatan.

10. Pempetisyen-Pempetisyen akujanji jika satu pefintah diberi petisyen ini, mereka akan memberi peruntukkan perlu yang berikut kepada **BABY J**:

(i) menanggung **BABY J**;

(ii) mendidlknya;

(a) Pempetisyen-Pempetisyen akan, jika dikehendaki, menjamin akujanji tersebut diatas secara satu Bon atau sebagai mana Mahkamah kehendak;

(b) Bahawa nama anak angkat tersebut didaftarkan sebagai **BABY J S** dalam Sijil Kelahiran/Sijil Anak Angkat;

(c) Bahawa kos permohonan Petisyen ini dipeiuntukkan sepa-ti tersebut diatas atau sebagai arahan Mahkamah;

(d) Apa-apa penintah dibuatmengenainya sebagaimana yang difikirkan patut oleh Mahkamah.

11. Semenjak 6-7-2009, Pempetisyen-Pempetisyen telah mengangkat **BABY J** dan sekarang ada dalam custody dan penjagaan PempetisyenPempetisyen yang menanggungnya. Semenjak sekarang anak angkat tersebut dikenali sebagai **BABY J** dipanggil dengan nama **BABY J** dan Pempetisyen-Pempetisyen ingin menggunakan nama ini seterusnya untuk kenalkan anak angkat tersebut.

12. Ibu kandung bernama **M** telah member Persetujuan untuk Perintah Pengangkatan yang telah difailkan disini. Pempetisyen-Pempetisyen akan bergantung kepada peruntukkan Seksyen 5(1) Akta Pengangkatan, 1952.

13. Pempetisyen-Pempetisyen tiada menerima apa jua pembayaran atau bersetuju menerima bayaran dari sesiapa pun atau menerima atau bersetuju menerima hadiah daripada sesiapa pun secara balasan untuk mengangkat **BABY J**.

14. Adalah dicadangkan bahawa kos permohonan Petisyen ini akan diberikan seperti, iaitu Pempetisyen-Pempetisyen membayar segala kos bagi Petisyen ini.

15. Pempetisyen-Pempetisyen memohon untuk perintah seperti berikut:

(a) Bahawa satu Perintah Pengangkatan untuk mengangkat **Baby J** yang dipanggil **Baby J** oleh Pempetisyen-Pempetisyen akan diberi menurut Akta Pengangkatan 1952 dengan sernua arahan yang perlu,

(b) Bahawa narna anak angkat tersebut didaftarkan sebagai **BABY J S**.

c) Bahawa kos permohonan Petisyen ini diperuntukkan seperti tersebut di atas atau sebagai arahan Mahkamah dan

(d) Apa-apa Perintah dibuat mengenainya sebagaimana yang difikirkan patut oleh Mahkamah.

Bertarikh pada haribulan 2010.

Diangkat sumpah oleh]
A dan **B** di Kuala Lumpur]

.....
(Tandatangan A)

.....
(Tandatangan B)

Dihadapan saya,

.....
Pesuruhjaya Sumpah

JURAT

Sava, BSS (No. K/P XXXXXXXXXXXX seorang)
Peguambela dan Peguamcara Mahkamah Tinggi Malaya)
setelah mula-mula sekali bersumpah bahawa saya telah)
dengan sebenamya, dengan nyatanya dan dengan)
dapat didengar menteijemahkan isi kandungan)
Petisven Untuk Perintah Pengangkatan kepada)
A dan **B** dalain Bahasa English dan bahawa saya akan)
sebenamya dan jujumya menterjemahkan sumpah yang)
sedang hendak dikendalikan ke atas diri mereka **A** dan **B**)
yang tersebut itu pada)

Dihadapan saya,

Pesuruhjaya Sumpah

AMBIL PERINGATAN: Adalah dicadang bahawa Petisyen ini disampaikan ke atas M yang beralamat di No. AB, Taman Putih, Kuala Lumpur.

PETISYEN UNTUK PERINTAH PENGANGKATAN ini difailkan oleh Tetuan BSS Associates. bagi pihak Pempetisyen-Pempetisyen yang beralamat di No 18, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur.

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

PETISYEN PENGANGKATAN,N0.: XX - YY - ZZ TAHUN 2010

DALAM PERKARA MENGENAI AKTA PENGANGKATAN, 1952
DAN
DALAM PERKARA MENGENAI **BABY J** SEORANG BUDAK LELAKI YANG AKAN DIKENALI SEBAGAI **BABY J**

.... SEORANG BUDAK

ANTARA

1. A (Bapa Angkat)
   (No. Kad Pengenalan:)
2. B (Ibu Angkat)
   (No. Kad Pengenalan) ... PEMPETISYEN-PEMPETISYEN

DAN

1. BABY J (Seorang Budak)
2. M (Ibu Kandung)
   (No. Kad Pengenalan)
3. JABATAN KEBAJIKAN & MASYARAKAT ... RESPONDEN-RESPONDEN

AFFIDAVIT MENYOKONG PETISYEN

Kami **A** dan **B** yang beralamat 8, Jalan Sutera Mas, Kuala Lumpur, Wilayah Persekutuan di dengan ini bersumpah dan menyatakan seperti berikut:

1. Kami adalah Pempetisyen-Pempetisyen tersebut dalam Petisyen ini dan fakta-fakta yang kami deposkan adalah dan' pengetahuan kepercayaan dan maklumat kami dan atau menurut rekod-rekod yang karni ada akses.

2. Kami telah berkahwin pada 10hb Oktober, 1999 di Putrajaya. Sesalinan Sijil Daftar Perkahwinan dilarnpirkan bersama ini dan ditanda sebagai "AB - A".

3. Sesalinan sah Sijil Beranak seperti tersebut di paragraph 7 dalam Petisyen dilampirkan bersama ini yang bertanda sebagai "AB - B".

4. Dokumen yang dilampirkan bersama ini yang bertanda "AB - C" adalah Surat Persetujuan oleh M ibu yang sebenar bagi Baby J untuk menyokong permohonan ini.

Diangkat surnpah oleh]
A dan B di Kuala Lumpur]
pada]

.....
(Tandatangan A)

……
(Tandatangan B)

Dihadapan saya:

Pesuruhjaya Sumpah

JURAT

Sava, BSS (No. K/P XXXXXXXXXXXX seorang)
Peguambela dan Peguamcara Mahkamah Tinggi Malaya)
setelah mula-mula sekali bersumpah bahawa saya telah)
dengan sebenamya, dengan nyatanya dan dengan)
dapat didengar menteijemahkan isi kandungan)
Petisven Untuk Perintah Pengangkatan kepada)
A dan **B** dalain Bahasa English dan bahawa saya akan)
sebenamya dan jujumya menterjemahkan sumpah yang)
sedang hendak dikendalikan ke atas diri mereka **A** dan **B**)
yang tersebut itu pada)

Dihadapan saya,

.....
Pesuruhjaya Sumpah

PETISYEN UNTUK PERINTAH PENGANGKATAN ini difailkan oleh Tetuan BSS Associates. bagi pihak Pempetisyen-Pempetisyen yang beralamat di No 18, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur.

"EKSIBIT AB - A"

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

PETISYEN PENGANGKATAN,N0.: XX - YY - ZZ TAHUN 2010

DALAM PERKARA MENGENAI AKTA PENGANGKATAN, 1952
DAN
DALAM PERKARA MENGENAI **BABY J** SEORANG BUDAK LELAKI YANG AKAN DIKENALI SEBAGAI **BABY J**

.... SEORANG BUDAK

ANTARA

1.	A (Bapa Angkat) (No. Kad Pengenalan:)		
2.	B (Ibu Angkat) (No. Kad Pengenalan)	...	PEMPETISYEN-PEMPETISYEN

DAN

1.	BABY J (Seorang Budak)		
2.	M (Ibu Kandung) (No. Kad Pengenalan)		
3.	JABATAN KEBAJIKAN & MASYARAKAT	...	RESPONDEN-RESPONDEN

PERAKUAN MENGENAL PASTI EKSIBIT

Saya dengan ini mengakui bahawa ini adalah eksibit yang ditandakan sebagai "Eksibit AB - A" yang dirujuk didalam Afidavit Menyokong Petisyen oleh A dan B yang telah diikrarkan dihadapan saya pada

Haribulan ,2010

Dihadapan saya,

……

Pesuruhjaya Sumpah

(Sijil Perkahwinan A dan B)

"EKSIBIT AB - B"

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

PETISYEN PENGANGKATAN,N0.: XX - YY - ZZ TAHUN 2010

DALAM PERKARA MENGENAI AKTA PENGANGKATAN, 1952
DAN
DALAM PERKARA MENGENAI **BABY J** SEORANG BUDAK LELAKI YANG AKAN DIKENALI SEBAGAI **BABY J**

.... SEORANG BUDAK

ANTARA

1. A (Bapa Angkat)
   (No. Kad Pengenalan:)
2. B (Ibu Angkat)
   (No. Kad Pengenalan) ... PEMPETISYEN-PEMPETISYEN

DAN

1. BABY J (Seorang Budak)
2. M (Ibu Kandung)
   (No. Kad Pengenalan)
3. JABATAN KEBAJIKAN & MASYARAKAT ... RESPONDEN-RESPONDEN

PERAKUAN MENGENAL PASTI EKSIBIT

Saya dengan ini mengakui bahawa ini adalah eksibit yang ditandakan sebagai "Eksibit AB - B" yang dirujuk didalam Afidavit Menyokong Petisyen oleh A dan B yang telah diikrarkan dihadapan saya pada

Haribulan ,2010

Dihadapan saya,

……

Pesuruhjaya Sumpah

(Sijil Kelahiran Baby J)

"EKSIBIT AB - C"

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

PETISYEN PENGANGKATAN,N0.: XX - YY - ZZ TAHUN 2010

DALAM PERKARA MENGENAI AKTA PENGANGKATAN, 1952
DAN
DALAM PERKARA MENGENAI **BABY J** SEORANG BUDAK LELAKI YANG AKAN DIKENALI SEBAGAI **BABY J**

.... SEORANG BUDAK

ANTARA

1.	A (Bapa Angkat) (No. Kad Pengenalan:)		
2.	B (Ibu Angkat) (No. Kad Pengenalan)	...	PEMPETISYEN-PEMPETISYEN

DAN

1.	BABY J (Seorang Budak)		
2.	M (Ibu Kandung) (No. Kad Pengenalan)		
3.	JABATAN KEBAJIKAN & MASYARAKAT	...	RESPONDEN-RESPONDEN

PERAKUAN MENGENAL PASTI EKSIBIT

Saya dengan ini mengakui bahawa ini adalah eksibit yang ditandakan sebagai "Eksibit AB - C" yang dirujuk didalam Afidavit Menyokong Petisyen oleh A dan B yang telah diikrarkan dihadapan saya pada

Haribulan ,2010

Dihadapan saya,

……

Pesuruhjaya Sumpah

IN THE SESSIONS COURT AT KUALA LUMPUR
IN WILAYAH PERSEKUTUAN, MALAYSIA
ADOPTION PETITION NO.: OF 2010

In the matter of the Adoption Act, 1952
And
In the matter of **Baby J**, a male child

LETTER OF CONSENT

I, **M (NRIC NO. : XXXXXXXXXX)** of No. AB, Taman Putih, Kuala Lumpur is the natural mother of Baby J, a male child born on the 29th June, 2009 at Hospital Kuala Lumpur.

I have given the child, **Baby J**, in adoption to the Applicants **A** and **B** knowing well that I will be permanently deprived of my parental rights. The said child was born to me and I am financially poor and unable to provide for the said child.

I consent to the adoption of said, **Baby J**, by the above-named Applicants and that in particular I understand the effect of the order will permanently deprive me of my parental rights and I hereby consent to the making of an Adoption Order in favour of the above-named Applicants, I hereby further consent that the above named **Baby J**, in adoption to the Applicants of **A** and **B** to taking the said child **Baby J** out of Malaysia.

I would like also to be excused from attending Court at the hearing of the Adoption Petition.

Signed/affixed the thumbprint by
M
at this day of 2010

……..
(Tandatangan M)

Before me,

……..
Commissioner of Oath

PETISYEN UNTUK PERINTAH PENGANGKATAN ini difailkan oleh Tetuan BSS Associates. bagi pihak Pempetisyen-Pempetisyen yang beralamat di No 18, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur.

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

PETISYEN PENGANGKATAN,N0.: XX - YY - ZZ TAHUN 2010

DALAM PERKARA MENGENAI AKTA PENGANGKATAN, 1952
DAN
DALAM PERKARA MENGENAI **BABY J** SEORANG BUDAK LELAKI YANG AKAN DIKENALI SEBAGAI **BABY J**

.... SEORANG BUDAK

ANTARA

1. A (Bapa Angkat)
   (No. Kad Pengenalan:)
2. B (Ibu Angkat)
   (No. Kad Pengenalan) ... PEMPETISYEN-PEMPETISYEN

DAN

1. BABY J (Seorang Budak)
2. M (Ibu Kandung)
   (No. Kad Pengenalan)
3. JABATAN KEBAJIKAN & MASYARAKAT ... RESPONDEN-RESPONDEN

NOTIS PERMOHONAN EX-PARTE

AMBIL PERHATIAN bahawa Pempetisyen-pempetisyen yang dinamakan di atas berniat untuk memohon kepada Mahkamah Sesyen di Kuala Lumpur, Wilayah Persekutuan pada haribulan 2010 pukul 9.00 pagi/petang untuk suatu Perintah:

1. Kebenaran untuk membawa Permohonan ini;

2. Kehadiran ibu kandung iaitu Responder Kedua M di prosiding pengangkatan ini dikecualikan di bawah peruntukkan Seksyen 14 Akta Pengangkatan 1952 serta mengemukakan apa-apa dokumen di Mahkamah memandangkan Pempetisyen-Pempetisyen telah memperolehi kebenaran bertulis di bawah Seksyen 5 Akta Pengangkatan 1952 daripada ibu kandung kanak-kanak untuk Perintah Pengangkatan tersebut;

3. Kos permohonan ini ditanggung oleh Pempetisyen-Pempetisyen;

4. Apa-apa relif lanjut ini ditanggung oleh Pempetisyen-Pempetisyen; dan

5. Alasan-alasan pennohonan ini adalah:

   (a) Ibu kandung kanak-kanak tersebut tidak mahu menghadiri prosiding pengangkatan ini;

   (b) Ibu kandung kanak-kanak tersebut telah dengan sukarela memberi keizinannya melalui surat persetujuannya yang difailkan untuk Pempetisyen-Pempetisyen mengambil kanak-kanak lelaki tersebut sebagai anak angkat; dan

   (c) Bahawa sebagai ibu tunggal, ibu kandung sememangnya tidak mahu menghadiri Mahkamah pada tarikh pendengaran petisyen pengangkatan kerana ibu kandung tidak berkerja dan mempunyai anak yang lain untuk dijaga dimana ibu kandung tidak mahu menanggung kos serta perbelanjaan pengangkutan untuk dia berulang alik ke Mahkamah pada tarikh perbicaraan kelak.

(d) Sehubungan dengan itu, Pempetisyen-Pempetisyen memohon agar kehadiran ibu kandung dikecualikan dari hadir ke Mahkamah.

Bertarikh pada: haribulan 2010

.....
Pendaftar
Mahkamah Sesyen
Kuala Lumpur

NOTIS PERMOHONAN EX-PARTE ini difailkan oleh Tetuan BSS Associates. bagi pihak Pempetisyen-Pempetisyen yang beralamat di No 18, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur.

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

PETISYEN PENGANGKATAN,N0.: XX - YY - ZZ TAHUN 2010

DALAM PERKARA MENGENAI AKTA PENGANGKATAN, 1952
DAN
DALAM PERKARA MENGENAI **BABY J** SEORANG BUDAK LELAKI YANG AKAN DIKENALI SEBAGAI **BABY J**

.... SEORANG BUDAK

ANTARA

1. A (Bapa Angkat)
   (No. Kad Pengenalan:)
2. B (Ibu Angkat)
   (No. Kad Pengenalan) ... PEMPETISYEN-PEMPETISYEN

DAN

1. BABY J (Seorang Budak)
2. M (Ibu Kandung)
   (No. Kad Pengenalan)
3. JABATAN KEBAJIKAN & MASYARAKAT ... RESPONDEN-RESPONDEN

AFIDAVIT MENYOKONG NOTIS PERMOHONAN EX-PARTE

Saya, **M (NO. K/P: XXXXXXXXX)** adalah warganegara Malaysia yang cukup umur yang beralamat di No. AB, Taman Putih, Kuala Lumpur.dengan ini bersumpah dan menyatakan seperti berikut:

1. Saya adalah Responden Kedua dalam Petisyen ini dan segala fakta-fakta yang dikemukakan di dalam Afidavit ini adalah daripada dokumen-dokumen di dalam milikan saya dan/atau daft pengetahuan saya.
2. Saya memohon supaya kehadiran saya terhadap permohonan Pempetisyen-Pempetisyen untuk mengambil Baby J (anak tersebut) sebagai anak angkat dikecualikan atas alasan-alasan sepeiti berikut:
   (a) Saya sebagai ibu kandung kanak-kanak tersebut tidak mahu menghadiri prosiding pengangkatan ini memandangkan saya sudah pun mempunyai anak yang lain.
   (b) Saya sebagai ibu kandung kanak-kanak tersebut telah dengan sukarela memberi keizinan saya melalui surat persetujuan yang difailkan, untuk Pempetisyen-Pempetisyen mengambil kanak-kanak lelaki tersebut sebagai anak angkat;
   (c) Bahawa saya sebagai ibu tunggal sememangnya tidak mahu menghadirkan diri ke Mahkamah pada tarikh pendengaran petisyen pengangkatan ini kerana saya tidak berkerja dan mempunyai anak yang lain untuk dijaga dan saya tidak mahu menanggung kos serta perbelanjaan pengangkutan untuk saya berulang alik ke Mahkamah pada tarikh perbicaraan kelak.
3. Sehubungan dengan itu, saya momohon kepada Mahkamah Yang Mulia ini untuk suatu perintah seperti yang dipohon.

Diangkat sumpah/diletakkan cap ibujari oleh M]

di pada haribulan 2010] .....

(Tandatangan M)

Di hadapan saya,

Pesuruhjaya Sumpah

AFFIDAVIT MENYOKONG NOTIS PERMOHONAN EX-PARTE ini difailkan oleh Tetuan BSS Associates. bagi pihak Pempetisyen-Pempetisyen yang beralamat di No 18, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur.

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

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.... SEORANG BUDAK

ANTARA

1. A (Bapa Angkat)
   (No. Kad Pengenalan:)
2. B (Ibu Angkat)
   (No. Kad Pengenalan) ... PEMPETISYEN-PEMPETISYEN

DAN

1. BABY J (Seorang Budak)
2. M (Ibu Kandung)
   (No. Kad Pengenalan)
3. JABATAN KEBAJIKAN & MASYARAKAT ... RESPONDEN-RESPONDEN

PERSETUJUAN UNTUK PERINTAH PENGANGKUTAN

Saya, **M (NO. K/P: XXXXXXXX)** adalah warganegara Malaysia yang cukup umur yang beralamat di No. AB, Taman Putih, Kuala Lumpur.ibu sebenar kepada budak tersebut dengan ini bersumpah dan menyatakan bahawa saya memahami yang pada masanya, Perintah Pengangkatan yang dipohon (dan khususnya saga memahami bahawa yang pada masanya Perintah itu kekal dan akan menahan saya mempunyai hak sebagai ibu)

Dan saya dengan ini beri persetujuan untuk Perintah Pengangkatan diberikan kepada Pempetisyen-Pempetisyen.

Diangkat sumpah/diletakkan cap ibujari oleh M]

di pada haribulan 2010] .....
(Tandatangan M)

Di hadapan saya,

.....
Pesuruhjaya Sumpah

PERSETUJUAN UNTUK PERINTAH PENGANGKATAN ini difailkan oleh Tetuan BSS Associates. bagi pihak Pempetisyen-Pempetisyen yang beralamat di No 18, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur.

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN MALAYSIA

PETISYEN PENGANGKATAN,N0.: XX - YY - ZZ TAHUN 2010

DALAM PERKARA MENGENAI AKTA PENGANGKATAN, 1952
DAN
DALAM PERKARA MENGENAI **BABY J** SEORANG BUDAK LELAKI YANG AKAN DIKENALI SEBAGAI **BABY J**

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ANTARA

1. A (Bapa Angkat)
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DAN

1. BABY J (Seorang Budak)
2. M (Ibu Kandung)
   (No. Kad Pengenalan)
3. JABATAN KEBAJIKAN & MASYARAKAT ... RESPONDEN-RESPONDEN

NOTIS PERBICARAAN

Kepada:

(1) A
(2) B
8, Jalan Sutera Mas, Kuala Lumpur, Wilayah Persekutuan.

(3) Pengarah
Pejabat Kebajikan Masyarakat Kuala Lumpur

(4) Tetuan BSS Associates
Peguambela dan Peguarricara
No 18, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur

AMBIL PERHATIAN bahawa satu Petisyen telah dikemukakan di mans Perintah Anak Angkat dipohon supada **A** dan **B** yang beralamat di 8, Jalan Sutera Mas, Kuala Lumpur, Wilayah Persekutuan dapat mengambil **Baby J** yang tersebut di atas sebagai anak angkat dan Pegawai Kebajikan dari Pejabat Kebajikan Masyarakat, Daerah Kuala Lumpur, telah dilantik sebagai Guardian *Ad Litem* kepada **Baby J** tersebut dan Petisyen tersebut akan dibicarakan pada haribulan 2010 jam pagi/petang.

Bertarikh pada: haribulan 2010.

.....
Pendaftar
Mahkamah Sesyen
Kuala Lumpur

NOTIS PERBICARAAN ini difailkan oleh Tetuan BSS Associates. bagi pihak Pempetisyen-Pempetisyen yang beralamat di No 18, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur.

LAPORAN GUARDIAN *AD-LITEM*

Di dalam Mahkamah Sesyen Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur.
Permohonan pengangkatan No:

Di dalam perkara Akta Pengangkatan 1952 dan di dalam perkara mengenai **Baby J** yang akan dikenali sebagai **Baby J** (seorang kanak-kanak lelaki)

Permohonan ini dibuat oleh **A** dan **B**. Bapa angkat dan ibu angkat kini tinggal menetap di alamat 8, Jalan Sutera Mas, Kuala Lumpur.

1. Latarbelakang Kanak-kanak:

Nama Gelaran :

Nama Asal :

No Daftar Sijil Kelahiran :

No. K/P :

Tarikh Lahir :
Umur :

Keturunan/ Agama :

Warganegara :

Alamat Kediaman :

1.1. Perihal kanak-kanak:

1.2. Perihal kesihatan:

1.3. Perihal persekolahan:

Kanak-kanak belum bersekolah.

1.4. Perihal perhubungan keluarga angkat/ keluarga kandung (jika ada):

1.5 Hal-hal lain:

2. Latarbelakang Keluarga Kandung:

2.1. Perihal bapa kandung (jika ada) :

2.2. Perihal ibu kandung (jika ada) :

2.3. Perihal adik-beradik kandung (jika ada) :

3. Latarbelakang Keluarga Angkat:

3.1 Bapa angkat

Nama :

No Kad Pengenalan :

Tarikh lahir :

Umur :

Keturunan / Agama :

Warganegara :

Pekerjaan :

Pendapatan :

Nama / Alamat Majikan :

3.2 **Perihal bapa angkat:**

3.3. Ibu angkat:

Nama :

No Paspot :

Tarikh lahir :

Umur :

Keturunan / Agama :

Warganegara :

Pekerjaan :

Pendapatan :

Nama / Alamat Majikan :

3.4. Perihal ibu angkat kanak-kanak:

3.5. Perihal adik beradik angkat kanak-kanak aika ada):

4. Perihal penghubungan kanak-kanak dengan keluarga angkat:

5. Perihal tempat kediaman:

6. Perihal ekonomi keluarga angkat:

7. Rancangan masa depan kanak-kanak :

8. Ulasan Guardian-ad-litem:

GUARDIAN *AD LITEM*
Jabatan Kebajikan Masyarakat

Tarikh:

25

Divorce

Cindy MC Juce Balitus
Aazina Lee Mujahid

Chapter 25

Divorce

[1] Introduction

(a) The law relating to Marriage, Divorce and other ancillary relief is dealt with in the Law Reform (Marriage and Divorce) Act 1976 (referred to as 'the Act'). The Act applies to all persons in Malaysia, and to all persons domiciled in Malaysia but are resident outside Malaysia.

See: Section 3 of the Law Reform (Marriage and Divorce) Act 1976.

(b) The Act does not apply to Muslims who are governed by Syariah Law or to natives of Sabah and Sarawak who are governed by native customary law or aboriginal law unless they elect to marry under the Act. The Act does not affect the validity of any marriage solemnized under any law, religion, custom or usage prior to the appointed date, and thus if such marriage is valid under the law, religion, custom or usage under which it was solemnized, it shall be deemed to be registered under the Act.

See: Section 4 of the Law Reform (Marriage and Divorce) Act 1976.

(c) The High Court has jurisdiction over matrimonial proceedings.

(d) As a general rule, a petition for divorce cannot be presented to the court before the expiry of 2 years from the date of marriage, except where there are—

(i) exceptional circumstances; and/or

(ii) hardship suffered by the petitioner.

whereby leave of the court may be obtained, and the court shall in determining the application, have regard to the interests of any child of the marriage, and reasonable probability of reconciliation between the parties during the specified period.

See: Section 50 of the Law Reform (Marriage and Divorce) Act 1976.

[2] General Requirements

(a) Every petition for divorce shall contain—

(i) Particulars of the marriage between the parties and the names, ages, and sex of the children, if any, of the marriage;

(ii) Particulars of the facts giving the court jurisdiction;

(iii) Particulars of any previous matrimonial proceedings between the parties;

(iv) A statement of the principal allegations which it will be sought to prove as evidence of the breakdown of the marriage;

(v) The terms of any agreement regarding maintenance of the wife or dependent party and the children, if any, of the marriage, or the division of any assets acquired through the joint efforts of the parties or the sole effort of one party; or where no such agreement has been reached, the petitioner's proposals; and

(vi) Particulars of the relief sought.

See: Section 57(1) of the Law Reform (Marriage and Divorce) Act 1976.

(b) Every petition for a divorce shall state what steps had been taken to effect reconciliation.

See: Section 57(2) of the Law Reform (Marriage and Divorce) Act 1976.

[3] Grounds for dissolution of Marriage

(a) The grounds for dissolution of marriage are—

(i) Conversion to Islam;

(ii) Dissolution by Mutual Consent;

(iii) Breakdown of Marriage;

(iv) Presumption of death and divorce.

(b) Conversion to Islam

See: Section 51 of the Act

Conversion to Islam is an undisputed fact for divorce.

(c) Dissolution by Mutual Consent

See: Section 52 of the Act

For dissolution of mariage by mutual consent there is no need to assign any ground for divorce.

(d) Breakdown of Marriage

See: Section 53 of the Act.

Must prove that the marriages has irretrievably broken down. Must establish proof of the one of the following under section 54 of the Act namely—

(i) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(ii) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(iii) that the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition; or

(iv) that the parties to the marriage have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition.

In deciding whether it would be just and reasonable to make a decree the court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved.

(e) Presumption of death and divorce

See: Section 63 of the Act.

Respondent is presumed to have been dead after absence of 7 years.

Petitioner has no reason to believe that the other party has been living within that time.

[4] Procedure

(a) Conversion to Islam

Where one party has converted to Islam, the other party who has not converted may petition for divorce provided that no petition under this section shall be presented before the expiration of the period of 3 months from the date of the conversion. (S. 51 of the Act)

See: Section 51 of the Law Reform (Marriage and Divorce) Act 1976

(b) Divorce by Mutual Consent/Joint Petition

If both parties agree to dissolve the marriage - after the expiry of 2 years from the date of the marriage, a joint petition can be presented to the court.

See: Section 52 of the Law Reform (Marriage and Divorce) Act 1976.

It was held in *Sivanesan v Shymala* [1986] 1 MLJ 400, that a court should only dissolve a marriage by mutual consent upon such terms and subject to such conditions as agreed to by both parties and accepted by the court as fair and reasonable.

Procedure

(i) The application is by way of a joint petition and shall contain the information required by Form 2 of the Divorce and Matrimonial Proceedings Rules 1980 (hereinafter referred to as 'the Rules').

(ii) Both petitioners must file an affidavit in support of the joint petition affirming that they have both consented to the divorce.

(iii) In a joint petition, parties are under no obligation to go through

reconciliation proceedings before the presentation of the joint petition.

(iv) The affidavit verifying the joint petition shall have annexed hereto:

- certificate of marriage
- birth certificates of children
- request for directions for trial
- directions for trial
- notice of trial

(v) If there is a minor child under 16 years of age or is over that age and is receiving instruction at an educational establishment or undergoing training, the joint petition shall be accompanied by a separate written statement as required by Form 4 of the Rules, and shall attach any medical report of the said child. Further, the statement as to arrangement of children must specify the living arrangements of the said child.

(vi) The joint petition shall also state whether there are any financial provision provided for the maintenance of the wife petitioner and the said child. The division of assets, if any, must also be agreed upon, before the filing of the joint petition. An affidavit of means of both the petitioners must be attached to the joint petition.

(vii) A joint petition shall be signed by the solicitors of both parties in their name or name of firms or by the petitioners if they act in person.

(viii) Hence if all documents are in order and have been filed in court, a hearing date will be fixed to hear the joint petition. During the open court hearing before the High Court Judge, if the court is satisfied that both petitioners had mutually consented to the divorce, the court will grant a decree nisi. However, it will only be made absolute after the expiry of three months from the date of the order. The petitioners can only remarry after the decree is made absolute.

(c) Single Divorce Petition/Contested Divorce Petition

This is the case where only a single party intends to file a divorce petition.

Procedure:

(i) The application is by way of a single divorce petition and shall contain the information as in Form 2.

(ii) The affidavit in support of the petition is affirmed by the petitioner and must state the grounds of divorce and steps taken to effect reconciliation. It must also be attached with the Acknowledgement of Service and Notice of Hearing.

(iii) If there is a minor child under 16 years of age or is over that age and is receiving instruction at an educational establishment or undergoing training, the joint petition shall be accompanied by a separate written statement as required by Form 4, and shall attach any medical report of the said child. Further, the statement as to arrangement of children must specify the living arrangement of the said child.

(iv) However, where a petition contains a financial provision for the respondent which was not agreed by both the petitioner and the respondent, the petitioner shall support the petition with his affidavit giving brief particulars of his means and commitments.

(v) The single divorce petition must be served personally to the respondent unless all efforts are futile and the petitioner can then apply for substituted service. If the respondent intends to contest the single divorce petition, then the respondent must fill in the Acknowledgment of Service.

(vi) Hence if all the documents are in order and the respondent has been notified, the petitioner must file for a Request for Direction for Trial before the Senior Assistant Registrar or the Deputy Registrar to set the date of hearing of the petition before a Judge and to inform the court the number of witnesses to be called and where the petition should be heard.

(ix) On the day of the hearing, both the petitioner and the respondent will appear in open court and the court will decide whether to grant the divorce. If the court is in favour of the petitioner, the court will grant a decree nisi. However, it will not be made absolute before the expiry of three months from the date of the order. The petitioner or respondent can only remarry upon the decree being made absolute.

(d) Divorce on Presumption of death

Section 63 of the Act clearly states that if the ground of the petition was based on the allegation that the other party was dead, sufficient evidence must be shown or the petitioner must demonstrate that for a period of more than 7 years the other party to the marriage has been continuously absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time.

(e) Divorce within 2 years of marriage

Application for leave to present a petition for divorce within 2 years of marriage under section 50 of the Act must be made by Originating Application supported by affidavit and exhibiting a proposed petition stating the grounds of the application as follows:

(i) Particulars of the exceptional circumstances or hardship alleged;

(ii) Whether there has been any previous application for leave;

(iii) Whether any, and if so what, attempts at reconciliation have been made;

(iii) Particulars of any circumstances which may assist the court in determining whether there is a reasonable probability of reconciliation between the parties; and

(iv) The date of birth of each of the parties or, if it be the case, that he or she has attained 18 years of age.

[5] Reconciliation

(a) Section 55 of the Act is a provision specifically designed to encourage reconciliation between the parties before filing divorce petition:

(i) Section 55 (1) of the Act clearly provides the court power to order that both parties, before presentation of the said petition for divorce, to have recourse to the assistance and advice from any bodies or persons for the purpose of affecting the reconciliation between the parties to a marriage who have become estranged.

(ii) The parties may proceed with presentation of the divorce petition if there is no possibility of reconciliation. Specifically as stated under section 57 of the said Act, it lays down the

particulars to be included in the said petition. Parties should also lay down the steps taken to effect the reconciliation.

(b) Reconciliation is a prerequisite to the presentation of a petition. However, this requirement is only applicable to divorce on the grounds of breakdown of marriage.

[6] Granting of *Decree Nisi*

(a) Under section 61 of the Act, every decree of divorce shall in the first instance be a decree nisi and will not be made absolute before the expiration of three months from the date of the order unless the court orders for a shorter period.

(b) Upon the lapse of the three month period from the date of the order of decree nisi, in the event there is no application made, the party may file an application to the court to—

(i) make the decree absolute;

(ii) rescind the decree nisi;

(iii) require further inquiry; or

(iv) deal with the case as the court thinks fit.

[7] Remarriage

(a) Section 62 of the Act governs the remarriage of a divorced person.

(b) It states that where a decree of divorce has been made absolute either party to the former marriage may marry again if—

(i) there is no right of appeal against the decree absolute;

(ii) the time for appealing against the decree absolute has expired without an appeal having been brought; or

(iii) an appeal against the decree absolute has been dismissed.

26

Maintenance

Cindy MC Juce Balitus
Ahmad Dzulfadzli Hamdan
Zulhairil Bin Sulaiman

Chapter 26

Maintenance

[1] Statutory Provisions

The statutes that govern the law of maintenance in Malaysia are—

(i) the Married Women and Children Maintenance Act 1950; and

(ii) the Law Reform (Marriage and Divorce) Act 1976.

[2] Maintenance under the Married Women and Children Maintenance Act 1950

(a) This law is only applicable to non muslims.

(b) This law is applicable to West Malaysia, Sarawak and the Federal Territory of Labuan.

See: Section 1(2) of the Married Women and Children Maintenance Act 1950;
P.U. (A) 271/1992;
P.U. (A) 274/1992.

Application for maintenance

(a) The application for maintenance is made by an applicant who is neglected and refused to be maintained and is made to the Sessions Court or First Class Magistrate.

See: S*ection 2* of the Married Women and Children Maintenance Act 1950.

(b) If the Sessions Court or the First Class Magistrate is of the view that it should be dealt in the High Court then it may be transferred to the High Court.

See: Section 8 of the Married Women and Children Maintenance Act 1950.

(c) Section 3(1) of the Married Women and Children Maintenance Act 1950 states that if any person neglects or refuses to maintain his wife or a legitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make a monthly allowance for the maintenance of his wife or such child, in proportion to the means of such person, as the court seems reasonable.

(d) Wife in the Married Women and Children Maintenance Act 1950 includes a secondary wife.

See: *Mui Siu Hing v Lee Hong Kee* [1940] MLJ xvi.

(e) Since the Married Women and Children Maintenance Act 1950 is silent on the meaning of child the Age of Majority Act 1971 shall apply, which means child is 18 years of age.

See: *Hashim Yeop J in Kulasingam v Rasammah* [1981] 2 MLJ 36.

(f) The paternity of a child may be proved through a DNA test.

See: *Peter James Binsted v Juvencia Autor Partosa* [2000] 2 MLJ 569.

(g) The words “in proportion to the means of such person, as the court seems reasonable” is decided after taking into account the means of the person, the needs of his wife, child, and other financial responsibilities such as maintenance of aged parents or siblings.

See: *Phua Beng Hong v Ho Shik Ho* [2000] 2 MLJ 289;
Sivajothi a/p K Suppiah v Kunathasan [2000] 6 MLJ 48.

(h) Under section 3(2) of the Married Women and Children Maintenance Act 1950 if any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make such monthly allowance, as to the court seems reasonable.

See: *Koh Lai Kiow v Low Nam Hui* [2005] 7 MLJ 143.

Exceptions where husband may be absolved from paying maintenance

(a) Section 5(1) of the Married Women and Children Maintenance Act 1950 provides as follows:

> "(1) If any person, against whom an order has been applied for the maintenance of his wife, offers to maintain his wife on condition of her living with him, and his wife refuses to do so, the court shall consider the grounds of refusal stated by such wife, and may make and enforce the order aforesaid, notwithstanding such offer, if it is satisfied that such person is living in adultery or for any other reason it is just so to do."

(b) The court has to consider whether the wife's refusal is sufficient to entitle her to maintenance.

(c) Where the husband has made an offer to the wife to live together, but if the husband brought another woman into the house and the wife could not tolerate the presence of the woman, the wife is still entitled to maintenance.

See: *Marimuthu v Thiruchitambalan* [1966] 1 MLJ 203.

(d) In a situation where the wife is earning her own income, the court may hold that the husband is not relieved from his duty to maintain his wife by the fact that she has money of her own. However the court will take into consideration the fact that the wife is earning her own income in deciding the amount of maintenance.

See: *Reed v Moor* 5 CP 200.

(e) Section 5(2) of the Married Women and Children Maintenance Act 1950 provides as follows:

> "(2) No wife shall be entitled to receive any allowance from her husband under this Act, if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband.".

(f) A single incidence of adultery is sufficient.

See: *Price v Price* [The Times, 12 February 1954] (unrep)

(g) It must be noted that, even if the wife is living in adultery, this does not affect the court's discretion to make an order for maintenance with respect to the children in her custody.

See: *Rajaletchmi v Sinniah* [1973] 2 MLJ 133.

(h) Section 4 of the Married Women and Children Maintenance Act 1950 provides that if the person willfully neglects to comply with the order made by court, the court may direct by warrant the amount due to be levied or may sentence him to imprisonment for a term which may extend to 1 month for each month allowance remaining unpaid. The spouse has the right to choose whether to sentence the person to imprisonment or to pay for the unpaid allowance.

Rescission and Variation Order

(a) Section 6 of the Married Women and Children Maintenance Act 1950 provides that on the application of any person receiving or ordered to pay a monthly allowance, and on proof of a change in the circumstances of such person, his wife or child, or for other good cause being shown to the satisfaction of the court, the court by which such order was made, may rescind, vary as it seems reasonable.

(b) Although the court has the discretion in considering any application made, it may take into consideration any change in the general course of living which may have occurred between the date of the making of the order sought to be varied and the date of the hearing of the application.

(c) Before a maintenance order under the Act can be rescinded or varied by the court, there must be evidence before the court either of a change in the circumstances of the person applying or of some other good cause. Where husband's salary was insufficient to pay the wife for maintenance, and he had to support an old mother, but no evidence of a change of the circumstances were shown the application was dismissed.

See: *Lee Swee Peng v Koon Kum Keng* [1954] MLJ 260.

[3] Law Reform (Marriage and Divorce) Act 1976

(a) The provisions under the Law Reform (Marriage and Divorce) Act 1976 on marriage, divorce, judicial separation and nullity of marriage are applicable to all persons in Malaysia and to all persons domiciled in Malaysia but are residents outside Malaysia except—

(i) a Muslim or any person who is married under the Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under the Law Reform (Marriage and Divorce) Act 1976;

(ii) any native of Sabah or Sarawak or any aborigine of West Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom unless he elects to marry under the Law Reform (Marriage and Divorce) Act 1976; he contracted his marrage under the Christian Marriage Ordinance; or he contracted his marriage under the Church and Civil Marriage Ordinance.

(b) On maintenance of a spouse section 77(1) of the Law Reform (Marriage and Divorce) Act 1976 states that the court may order a man to pay maintenance to his wife or former wife—

(i) during the course of any matrimonial proceedings;

(ii) when granting or subsequent to the grant of a decree of divorce or judicial separation;

(iii) if, after a decree declaring her presumed to be dead she is found to be alive.

(c) In the case of Diana *Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97 the husband had left the matrimonial home on February 1999 together with the three younger children. The wife continued to reside at the matrimonial home and commenced proceedings against the husband on 6 September 1999 claiming, for custody, care and control of the four children, a monthly maintenance of RM50,000.00 from 1 January 1998 and additional monthly maintenance of RM50,000.00 for all the four children once custody of the children had been given to her. No divorce proceedings had been commenced by any of the parties during the proceedings in the High Court. The trial judge ruled that the wife could not take advantage of section 77(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 due to the absence of a pending divorce petition.

(d) Section 77(2) of the Law Reform (Marriage and Divorce) Act 1976 states that the court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill health, and the court is satisfied that having regard to her means it is reasonable so to order.

(e) In determining the amount of maintenance, the court will base on the means and needs of the parties and the degree of responsibilities of each party to the breakdown of marriage.

See: Section 78 of the Law Reform (Marriage and Divorce) Act 1976.

(f) The right to maintenance shall cease if the spouse is living in adultery or remarry another person.

See: Section 82 of the Law Reform (Marriage and Divorce) Act 1976.

(g) Under section 93(1) of the Law Reform (Marriage and Divorce) Act 1976 the High Court may at any time order a man to pay maintenance for the benefit of his child. This section lists four situations where a man may be ordered to pay maintenance which are as follows:

(i) if he has refused or neglected reasonably to provide for the children;

(ii) if he has deserted his wife and the child is in her charge;

(i) during pendency of the matrimonial proceedings; or

(ii) when making an order placing the child in the custody of any other person.

(h) Section 93(1) of the Law Reform (Marriage and Divorce) Act 1976 also provides the court to order a woman to pay or contribute towards the maintenance having regard to her means.

(i) In the case of *Karunairajah A/L Rasiah v Punithambigai A/P Poniah* [2004] 2 MLJ 401 the appellant, pursuant to his divorce and an order of the High Court had paid maintenance for his children. However from May 1998, he stopped such payments for his eldest child on the ground that she had reached the age of 18 years. The issue for consideration was whether upon a proper construction of section 95 of the Law Reform (Marriage & Divorce) Act 1976, the involuntary financial dependence of a child of the marriage for the purposes of pursuing and/or completing tertiary and/or vocational education comes within the exception of physical or mental disability so as to entitle the child to maintenance beyond the age of 18 years. The appellate court decided—

- the case has to be decided according to the law as it stands, irrespective of a judge's personal view on it and moral obligations can never take precedence over the law. What the law should be is a matter for the legislature;

- clearly the word "disability" as used in section 95 of the Law Reform (Marriage and Divorce) Act 1976 covers only "physical" and "mental" disability. It cannot cover financial dependence. The word "child" used in section 95 is also defined in section 87, to mean a child under the age of 18 years;

- there was no legal basis therefore for interpreting the exceptions in section 95 to include financial dependence for the purpose of pursuing tertiary and/or vocational education after the 'child' had completed the age of 18 years.

(j) Assessment of maintenance is based on primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be. Regard must be had to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

(k) The court can also order security for maintenance. Any agreement of payment of settlement of future claims of maintenance is not effective until approved by court. Order of maintenance will only expire in the case of—

(i) death of a spouse;

(ii) remarriage; or

(iii) living in adultery.

(l) Court has wide power to vary or rescind orders for maintenance from time to time and upon change of circumstances.

(m) Order of maintenance cannot be assigned or transferable or liable to be attached, sequestered or levied upon for or in respect of, any debt or claim whatsoever. Arrears of maintenance are recoverable as a debt, subject to a limitation period of 3 years.

27

Landlord and Tenant

Elsie Primus
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Chapter 27

Landlord and Tenant

[1] Introduction

(a) The relationship of landlord and tenant arises when one person (the landlord) grants to another (the tenant) a right to the exclusive possession of land for a term less than that which the landlord has in the land. A landlord need not be the registered proprietor of the land.

(b) The following word have been defined in the National Land Code:

(i) "Landlord" means the leasor or subleasor of any premises, under any lease, sub-lease, or agreement of tenancy, and includes any person claiming to be entitled to receive rents due under any such lease or agreement;

(ii) "Tenant" means any person from whom a landlord claims rent to be due under any lease, sub-lease or agreement;

(iii) "Tenancy" means agreement between the landlord and tenant which is not more than three (3) years;

(iv) "Rent" means payment due under an agreement.

[2] Statutory Provisions

(a) There is no specific and comprehensive legislation which governs the law of landlord and tenant in Malaysia. However, the National Land

Code provides some provisions on the law of landlord and tenant and case law does provide some assistance. For instance under section 223 of the National Land Code any tenancy or sub-tenancy which last for a term not exceeding three years and any tenancy or sub-tenancy which last for one year granted pursuant to the provisions of any law relating to land in force before the commencement of the National Land Code are exempt from registration.

(b) In Sabah and Sarawak, the National Land Code is not applicable as the state enactments relating to land tenure have been enacted in Sabah and Sarawak namely the Sabah Land Ordinance (Cap 68) and Sarawak Land Code (Cap 81) respectively.

(c) The other statutes relevant to tenancy agreements are the Contracts Act 1950 Specific Relief Act 1950 and the Distress Act 1951 which provides for eviction of tenants.

(d) In relation to the control of rent, in West Malaysia before 1997, the law which governs the control of rent is the Control of Rent Act 1966. The Control of Rent Act 1966 was enforced on 1 January 1967. The Control of Rent Act 1966 was repealed on 1 September 1997. Now there is no legislation on the control of rent in West Malaysia except in relation to tenancies for the cultivation of padi that is the Padi Cultivators (Control of Rent and Security of Tenure) Act 1967 (Act 528). In Sabah and Sarawak the legislation on the control of rent still subsists. In general, the law states that the landlord and tenant can negotiate freely on rents but tenants may appeal to courts if the rents are too high for the tenant.

[3] Tenancy Agreement

(a) There are no standard terms and conditions in a tenancy. The landlord and the tenant may mutually agree on any reasonable terms or conditions. It can be a monthly tenancy or yearly tenancy. The landlord or the tenant may give one calendar month's notice to terminate such tenancy.

(b) There are four types of tenancy namely tenancy by contract, tenancy by attornment, tenancy by estoppel and tenancy arising by reason of statute.

(i) **Tenancy by Contract**

In order to create a valid and legal relationship of landlord and tenant, a contract shall be entered according to the law that is in force at the time of its execution. It may be entered in writing or orally based on any words that express the intention to create legal relations and

which grant exclusive possession for a fixed or periodic term, or by conduct.

(ii) **Tenancy by Attornment**

Attornment may be defined as the act of the tenant putting one person in the place of another as his landlord. This relationship is created when a person in occupation of property establish the relationship of landlord and tenant between himself and another person by acknowledging that he is tenant to that other person.

(i) Tenancy by Estoppel

A landlord having by his offer of a tenancy induced a tenant to enter into or remain in occupation and to pay rent, cannot deny the validity of the tenancy by alleging his own want of title to create it as dictated in doctrine of tenancy by estoppel. Similarly, the tenant of immovable property or person claiming through the tenant cannot be permitted to deny that the landlord of that tenant had a title to that immovable property. There is no difference between a tenant and a licensee with regard to estoppel; each is estopped from denying the title of the landlord, so long as he remains in possession under it. Although a tenant is estopped from denying the landlord's title, he can challenge the validity of the tenancy agreement on the ground of fraud, misrepresentation or probable mistake in order to show that the parties do not stand in the relationship of landlord and tenant.

(ii) Tenancy arising by reason of a statute

There are circumstances where the relationship of landlord and tenant exists by operation of statute for example section 6 of the Padi Cultivators (Control of Rent and Security of Tenure) Act 1967 provides that a tenancy agreement must be no less than three consecutive seasons, section 7 of the same Act provides that a tenant is entitled to renew his tenancy agreement and the landlord is obliged to grant the renewal.

(c) In limited circumstances, statute may also confer possessory title on a person in possession of a certain land who entered as a tenant, example, such as the land in settlement area. This can be seen in Kelantan where the District Officer will make a finding when he is satisfied that the person in possession of land in a settlement area entered into possession as tenant, chargee or otherwise than as owner, by leave or licence of or on behalf of the landlord and he will make an order to the Registrar to furnish the person with the appropriate document of possessory title.

[4] Remedy by Distress

(a) Historically, distress is a common law remedy enabling the landlord to secure the payment of rent by seizing goods and chattel found upon the premises upon which the rent or obligations are due. According to CLJ Law Dictionary, distress means the seizing of a personal chattel from a debtor or wrongdoer so as to obtain payment for a debt or satisfaction for a wrong committed. Further discussion on distress proceedings is found in chapter 36.

(b) The right of a landlord to distrain for arrears of rent is now embodied in a statute that is the Distress Act 1951 which came into force in West Malaysia on September 1951 and in Sabah and Sarawak on 1 June 1981.

(c) To invoke the remedy of distress there must be a tenancy between the parties to establish the relationship of landlord and tenant.

(d) Once the tenancy is terminated there can be no distress for rent for a period after the termination. It does not matter whether the termination was by election after forfeiture, effluxion of time or by a notice to quit.

[5] Distress Procedure in the High Court

In the exercise of its original jurisdiction, the High Court has power to issue and enforce writs or warrants of distress for arrears of rent. Section 75(2) of the Distress Act provides that every application for a writ of distress must be made *ex parte* by originating summons supported by affidavit. The landlord, his attorney or his agent may affirm the supporting affidavit. Where the application is made by a duly authorized agent of the landlord, he must produce his written authority.

[6] Distress Procedure in the Subordinate Court

(a) An application in the Subordinate Court for warrant of distress is made *ex parte* by originating application supported by an affidavit.

See: Order 38 r. 2 of the SCR.

(b) Sessions Court's jurisdiction—

Subject to limitations contained in the Subordinate Courts Act 1948, a Sessions Court has unlimited jurisdiction to try all actions and suits of

a civil nature in landlord and tenant and distress.

See: Section 65(1)(a) of the Subordinate Courts Act 1948.

(c) Magistrate Court's jurisdiction—

A first class Magistrate has jurisdiction to issue writs or warrants of distress for rent. A Magistrates' Court can hear and determine any civil cause or matter arising within the local limits of jurisdiction assigned to it.

See: Section 93(1) of the Subordinate Courts Act 1948.

[7] Recovery of Possession

(a) An action by a landlord to recover possession may be begun in High Court or in a Subordinate Court subject to statutory limitations. In an action for the recovery of immovable property, the right to sue for possession vests in the person entitled to immediate possession.

See: *Hup Bee Seng v Dr Ng Teng Kok* [1987] 2 MLJ 395.

(b) Termination of tenancy by notice is essential before proceedings for possession. When the notice to quit expires, the tenant is holding over. Every tenant holding over after the determination of his tenancy is chargeable, at the option of his landlord with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not. If the landlord accepts a single rent for the period covered by his claim to double value, it is a question of fact whether he has waived the claim, or whether he takes the amount of the single rent in part satisfaction of it.

See: *Alagappa Chettiar v Kader* [1939] MLJ 304;
Section 28(4)(a) of the Civil Law Act 1956;
Imbi World Sdn Bhd v Deluxe Tours Sdn Bhd [1997] 3 MLJ 531.

(c) A person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure. Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court. The common law remedy of self-help is

no longer available to a landlord even where the tenancy agreement specifically gives the landlord a right of re entry.

See: Section 7 of the Specific Relief Act 1950;
Er Eng Bong v New Kim Eng [2000] 1 CLJ 289.

(d) A judge may on the application of the landlord authorise the bailiff to enter on the premises, using such force as may be necessary to effect an entry into any building, and take possession thereof where any premises are let at a rack rent or a rent not less than three-fourths of its annual value, rent is in arrears for not less that two months of the tenancy.

28

Defamation

Ravinthran Paramaguru

Chapter 28

Defamation

[1] Introduction

Every human being has a right to maintain his or her good name and reputation from false injurious remarks or in other words a defamatory statement of another. The law of defamation is supposed to protect people's reputations from such unfair attacks. In practice though, its main effect is to hinder free speech and protect powerful people from scrutiny. The basic idea of defamation law is simple. It is an attempt to balance the private right to protect one's reputation with the public right to freedom of speech. Defamation law allows people to sue those who say or publish false and malicious comments.

[2] The law governing defamation

(a) The civil law of defamation is largely based on case law although the Defamation Act 1957 has given statutory force to some well known common law principles.

(b) In criminal cases of defamation, when the state prosecutes a private person for defamation, section 499 to section 502 of the Penal Code is applicable.

[3] Types of defamation

(a) There are two types of defamation—

(i) *Slander* — or oral defamation — for example comments or stories told at a meeting or party or any occasion when a third party is present; and

(ii) *Libel* — or published defamation — for example a newspaper article or television broadcast. Pictures as well as words can be libellous.

(b) The basic differences between the torts of libel and slander are as follows:

(i) Libel is a defamatory statement in permanent form, for example,

- writing;
- images;
- films;
- Radio and television broadcast; and
- public performances of plays.

(ii) Slander is a defamatory statement in a transient form. Libel is actionable *per se* whereas damage must be proved for slander, except in certain case for example—

Slander of women

Words spoken and published which impute unchastity or adultery of any woman or girl shall not require special damage to render them actionable.

See: Section 4 of the Defamation Act 1957;
Ummi Hafilda Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors [2006] [2006] 3 CLJ 252.

Slander affecting official, professional, or business reputation

In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or

business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

See: Section 5 of the Defamation Act 1957.

Slander of title, *etc*.

In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage:

- if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or

- if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

  See: Section 5 of the Defamation Act 1957;
  In-Comix Food Industries Sdn. Bhd. v A Clouet & Co (KL) Sdn. Bhd. [1997] 4 MLJ 71.

[4] What has to be proven?

(a) Subject to the differences between the two types of defamation, libel and slander, the claimant must prove the following:

  (i) the statement was defamatory;

  (ii) it referred to him; and

  (iii) it was published, that is, communicated, to a third party.

(b) The onus will then shift to the defendant to prove any of the following three defences:

  (i) justification or in other words the truth of the utterance;

  (ii) fair comment on a matter of public interest; or

  (iii) that it was made on a privileged occasion.

(c) In addition, some writers put forward the following as defences in their own right:

(i) unintentional defamation; and

(ii) consent.

(d) The High Court case of *Ismail Shamsudin v Abdul Aziz Abdan* [2007] 8 CLJ 65 sets out the requirements as follows:

(i) the words are defamatory;

(ii) they refer to the plaintiff; and

(iii) the words are published.

See: *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 CLJ 152;
Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32.

(e) It was a question of law for the court to decide whether the natural and ordinary meaning of the words used in the articles were capable of conveying a defamatory meaning of and concerning the plaintiff. Libel does not depend on the intention of the defamer but on the fact of defamation and it was irrelevant to consider the meaning the writer and publisher intended to convey. The question was to be determined by an objective test.

See: *Tan Sri Dato Vincent Tan Chee Yioun V Haji Hasan Bin Hamzah & Ors* [1995] 1 MLJ 39.

[5] What is defamatory matter?

(a) The Defamation Act 1957 does not define defamatory matter. There also does not appear to be any single uniform or comprehensive definition of what constitutes defamatory matter. In *Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56, Mohd Azmi J set out the defamatory test as follows:

> "Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness,

ingratitude or cruelty."

(b) In *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn. Bhd. & Ors* [1996] 1 MLJ 393*,* Richard Malanjum J (as he then was) followed *JB Jeyaretnam v Goh Chok Thong* [1996] 1 MLJ 393 and adopted the following approach:

> "As to whether the words complained of in this case were capable of being, and were in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally."

(c) The Court of Appeal also had occasion to deal with this issue in *Chok Foo Choo @ Chok Kee Lian v The China Press* [1999] 1 MLJ 371 where Gopal Sri Ram JCA said:

> "In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonorable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory."

(d) In *Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor* [2002] 4 AMR 4275 at 4289*,* Kamalanathan Ratnam J said:

> "As to whether the said meaning is defamatory, the test is to see if such words tend to make reasonable people think the worse of the plaintiff or whether such words would cause him to be shunned or avoided."

(e) In *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn. Bhd. & Anor* [2010] 2 MLJ 492, Harmindar Singh Dhaliwal JC considered all the foregoing cases and set out the test of defamatory matter as follows:

> "In my assessment, therefore, an imputation would be defamatory if its effect is to expose the plaintiff, in the eyes of community, to hatred, ridicule or contempt or to lower him or her in their estimation or to cause him or her to be shunned and avoided by them. This is to be judged by ordinary, right-thinking members of the community or an appreciable and reputable section of the community."

(f) Seen in this light, mere abuse or vulgar abuse is not defamatory. Mansfield CJ stated "For mere general abuse spoken no action lies."

See: *Thorley v Kerry* [1812] 4 Taunt 355 at 365;
Parkins v Scott [1862] 1 H&C 153 at 158, 159;
Ayob bin Saud v T S Sambanthamurthi [1989] 1 MLJ 315;
C Sivanathan v Abdullah Bin Dato' Haji Abdul Rahman [1984] 1 MLJ 62.

(g) Winfield & Jolowicz (at page 406) states that spoken words which are prima facie defamatory are not actionable if it is clear that they were uttered merely as general vituperation and were so understood by those who heard them. Further, the same applies to words spoken in jest.

See: *Donoghue v Hayes* [1831] Hayes R 265.

(h) When considering whether a statement is defamatory, it is essential to determine the meaning of words. The law recognizes two types of meanings; the natural and ordinary meaning and the innuendo or special meaning. In *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn. Bhd. & Anor* this was explained as follows:

> "The plaintiff would therefore have the burden of proving that the words in question conveyed a defamatory imputation. In this regard, the first task is to ascertain the meaning of the statement or publication. This is not always easy as the words in question, the essence of any defamation claim, may be understood differently by different people. The plaintiff can therefore rely on the natural and ordinary meaning of the words or the innuendo meaning. The natural and ordinary meaning would involve the literal meaning as well as any inferences that could be taken based on general knowledge and experience of human affairs. An innuendo meaning would be arrived at by an additional consideration or assistance of extrinsic facts not generally known. As the analysis of the offending words involves an objective test, the meaning intended by the publisher, however noble, is irrelevant.
>
> The proper approach would also be to consider the words complained of in the context of the whole article. A plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage."

See: *Lewis v Daily Telegraph* [1964] AC 234;
Tan Sri Dato' Vincent Tan Chee Yioun v Haji

Hasan bin Hamzah & Ors [1995] 1 MLJ 39;
Lee Kuan Yew v Derek Gwyn Davies & Ors [1990] 1 MLJ 390;
Charleston v News Group Newspaper Ltd [1995] 2 AC 65.

[6] Defamatory statement must refer to the Plaintiff

(a) In order to succeed in a defamation action, the plaintiff must prove that the statement referred to him or her or identified him or her, either directly or indirectly. At common law it is irrelevant that the defendant did not intend to refer to the claimant. Section 7 of the Defamation Act 1957 provides a special statutory defence in cases of 'unintentional defamation', by allowing the defamer to make an 'offer of amends' by way of a suitable correction and apology and may include an agreement to pay compensation and costs. The person accepting the offer may not bring or continue defamation proceedings. If the offer to make amends fails, the fact that the offer was made is a defence and may also be relied on in mitigation of damages.

See: *E Hulton & Co v Jones* [1910] AC 20;
Lee v Wilson (1934) 51 CLR 276.

(b) If a class of people is defamed, there will only be an action available to individual members of that class if they are identifiable as individuals. If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual.

See: *Eastwood v Holmes* [1858] 1 F&F 347 at 349.

(c) If the defendant made a reference to a limited group of people, eg the tenants of a particular building, all will generally be able to sue.

See: *Browne v DC Thomson* [1912] SC 359;
Knupffer v London Express Newspaper Ltd [1944] AC 116.

(d) A publication made 'maliciously' (spitefully, or with ill-will or recklessness as to whether it was true or false) will destroy the defence of unintentional defamation.

[7] There must be publication

(a) The words must be published, published in the law of defamation has a special meaning and at times much dispute takes place whether

there was publication. There would not be publication of the words complained if the offensive material was sent directly to the person of whom it is written. It is often the case that the person who is supposed to receive it in the ordinary cause of events will not have done so but may have been for example received by the secretary who may have instructions to open the mail. This is an area of law which promotes fertile litigation and occupies much of the court's time.

See: *Faryne v. Chorny* [1951] 4 WWR 171.

Innuendo

(b) Innuendo generally means the defamatory words complained of contain a hidden meaning or inner meaning. Though the words may not be defamatory in their natural and ordinary meaning, it is a strict rule of pleadings that innuendo must be pleaded and proved.

See: *Allsop v. Church of England Newspaper Ltd.* [1972] 2 QB 161;
Tolley v. J.S. Fry & Sons Ltd. [1931] AC 333;
Tan Sri Dato Vincent Tan Chee Yioun V Haji Hasan Bin Hamzah & Ors [1995] 1 MLJ 39.

Communication between husband and wife

(c) A statement made to one's own spouse will not be 'published' for the purposes of defamation. Communication between husband and wife is protected as any other rule "might lead to disastrous results to social life".

See: *Wennhak v Morgan* [1888] 20 QBD 635 at 639.

[8] Defences to the suit of Defamation

(a) There is no burden on a plaintiff to prove that a defamatory statement is false. The law presumes that the defamatory words are false. Therefore once it is proved that the imputations are defamatory, the burden shifts to the defendant to prove his defences.

See: *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn. Bhd. & Ors.* [1996] 1 MLJ 393.

(b) Truth or Justification

(i) It is settled law that in a suit for defamation, justification is a complete defence, if the same is available to the defendant. In *Abdul Rahman Talib v Seenivasagam & Anor*, Barakbah CJ (Malaya) stated as

follows:

> "Where the plaintiff proves publication of defamatory words it is for the defendant if he wishes to set up the defence of justification to plead and prove the facts on which he relies to show justification. It is for the defence to show that the defamatory imputation is true."

See: *Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66.

(ii) At common law the defendant was required to prove the truth of all the material statements in the libel. However, by virtue of section 8 of the Defamation Act 1957 the defence of justification—

> "shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

(iii) It follows therefore that what is true, cannot be defamatory. This must be on grounds of public policy because the exposure of truth must be paramount when compared to that of reputation. Therefore clearly there can be no room even for malice if the matter published is found to be true.

(iv) It must note that the failure of the defence of justification may cause higher damages to be awarded against the defendant.

See: *Tan Sri Dato Vincent Tan Chee Yioun v Haji Hasan Bin Hamzah & Ors* [1995] 1 MLJ 39.

(b) Fair comment on a Matter of Public Interest

(i) The defence of fair comment is frequently relied upon by the press, as it is designed to protect statements of opinion on matters of public concern. Lord Esher, in *Merivale v Carson* [1887] 20 QBD 275, stated that the test was:

> "Would any fair man, however prejudiced he may be, however exaggerated or obstinate in his views, have said that which this criticism has said of the work which is criticised?"

(ii) However, Lord Porter, in *Turner v MGM Pictures* [1950] 1 All ER 449, said that he would adopt this test, but substitute 'honest' for 'fair' in order to avoid the suggestion that the comment must be reasonable.

See: *Reynolds v Times Newspapers* [1999] 4 All ER 609.

(iii) In *Tun Datuk Patinggi Haji Abdul–Rahman Ya'kub v Bre Sdn. Bhd. & Ors* [1996] 1 MLJ 393, Richard Malanjum J (as he then was) said that the following basic elements must be established by the defendant:

- that the words complained of are comments, though they may consist of or include inference of facts;
- that the comments are on a matter of public interest; and
- that the comments are based on facts, truly stated. They must also be fair and which a fair-minded person can honestly make on the facts proved.

See: *JB Jeyaretnam* [1979] 1 MLJ 281.

(iv) The defence only applies to comments made on matters of public interest, eg comments on works of literature, music, art, plays, radio and television and also the activities of public figures.

(v) A publication made maliciously (spitefully, or with ill will or recklessness as to whether it was true or false) will destroy the defence of fair comment.

(vi) Where there are imputations partly based on fact and partly expressions of opinion, the defence of fair comment will not fail merely because the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

See: Section 6 of the Defamation Act 1952.

(c) Privilege

(i) Absolute

There are certain occasions on which the law regards freedom of speech as essential, and provides a defence of absolute privilege which can never be defeated, no matter how false or malicious the statements may be. The following communications are 'absolutely privileged' and protected from defamation proceedings:

- Statements made in either House of Parliament;
- Parliamentary papers of an official nature, ie, papers, reports and proceedings which Parliament orders to be published;
- Statements made in the course of judicial proceedings or quasi-judicial proceedings;

- Communications between lawyers and their clients;

- Statements made by officers of state to one another in the course of their official duty.

  See: *Chatterton v Secretary of State for India* [1895] 2 QB 189;
  Abdul Rahman Talib v Seenivasagam & Another [1966] 2 MLJ 66.

(ii) Qualified Privilege

Under our law this is a common law defence as the Act provides for no statutory defence of qualified privilege for individuals. Section 12 of the Act gives qualified privilege to publication in a newspaper of any report or other matter as is mentioned in Part I of the Schedule to the Act unless of course such publication is proved to be made with malice. *Gatley on Libel and Slander* 9th Ed states at para. 14.49 as follows:

> "... a person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusations made."

The definition of "qualified privilege" may be gathered from the following words—

> "In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits. per curiam, Toogood v. Spyring [1834] 1 CM & R 181 at 193; see per Lindley LJ, in Stuart v. Bell [1891] 2 QB 341 at 345; Adam v. Ward [1917] AC 309."

A more recent definition, possibly to be preferred as it refers to a duty or interest to make the communication rather than to an interest in its subject-matter, per Greene MR in *De Buse v. McCarthy* [1942] 1 KB 156 cf. *Harrison v. Bush* (1855) 5 E & B 344 at 348, per Lord Campbell CJ; *Pullman v. Hill & Co.* (1891) 1 QB 524 at 528, per Lord Esher MR; *Watt v. Longsdon* (1930) 1 KB 130 at 147, per Scrutton LJ; *While v. Stone (Lighting and Radio) Ltd* [1939] 2 KB 827 ("the person to whom it is made", in Lord Atkinson's statement, refers to the third party other than the plaintiff to whom the alleged defamatory statement is published); *Phelps v. Kemsley* [1942] 168 LT 18 at 20, per Goddard LJ is to be found in the speech of Lord Atkinson in *Adam v. Ward* [1917] AC 309:

> "A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

The above formulation of the principle of qualified privilege as adopted in the famous Malaysian case of *Abdul Rahman Talib v Seenivasagam & Another,* by Thomson LP at the Federal Court.

See: *Abdul Rahman Talib v Seenivasagam & Another* [1966] 2 MLJ 66.

There are three elements necessary to establish the defence of qualified privilege which are as follows:

- the occasion must be fit;
- the matter must have reference to the occasion; and
- it must be published from right and honest motives.

Burden of proof is on the plaintiff that the publication was not "from right and honest motives".

See: *Horrocks v Lowe* [1975] AC 135;
Reynolds v Times Newspapers [1999] WLR 1010.

Qualified privilege operates only to protect statements which are made without malice (ie, spitefully, or with ill-will or recklessness as to whether it was true or false). Therefore the defence of qualified privilege can be defeated by the presence of malice on the part of the defendant. The burden of proving malice is on the plaintiff.

See: *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173;
Pang Fee Yoon v Piong Kien Siong & Ors [1999] 3 MLJ 189.

The following communications will be protected by "qualified privilege":

- Statements made in pursuance of a legal, moral or social duty, but only if the party making the statement had an interest in communicating it and the recipient had an interest in receiving it;

- Statements made in protection of an interest, eg public interests or the defendant's own interests in property, business or reputation;

- Fair and accurate reports of parliamentary proceedings;

- Fair and accurate reports of public judicial proceedings. Example when the report is not published contemporaneously with the proceedings;

- Statements privileged by section 12 of the Defamation Act 1996, which applies to statements made in newspapers and radio and television broadcasts.

  However it must be noted that journalists, editors and newspapers do not have any special positions so as to entitle them to rely on the defence of qualified privilege on any matters which they may publish. In other words there is no general media privilege under the common law.

  See: *Tun Datuk Patinggi Haji Abdul–Rahman Ya'kub v Bre Sdn Bhd & Ors* [1966] 2 MLJ 66.

(iii) Extended Qualified Privilege

This type of privilege is afforded to mass publications such as those by the media. It is different from the traditional type of privilege in that it does not depend on whether the publication was made on an occasion of privilege but more so on whether it was done responsibly.

See: *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn. Bhd. & Anor* [2010] 2 MLJ 492;
Lange v Australian Broadcasting Corporation [1997] 189 CLR 520;
Lange v Atkinson [1998] 3 NZLR 424;
Reynolds v Times Newspapers [2001] 2 AC 127.

The Federal Court in *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 2 MLJ 65 held that the correct authority on qualified privilege is *Lange v Australian Broadcasting Corporation*. In *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn. Bhd. & Anor*, the High Court considered that the Federal Court decision was binding and approved the approach to the defence of qualified privilege as follows:

> "In this regard, and to recap, the plaintiff will have to first prove that the defamatory material published concerns government and political matters. If the plaintiff succeeds, then the burden will be on the defendants to show reasonableness of conduct. If the defendants succeed, then the onus will be on the plaintiff to prove that the publication was actuated by malice on the part of the defendants."

On the question of reasonable conduct, the defendants will have to show that they—

> "had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.

See: *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn. Bhd. & Anor* [2010] 2 MLJ 492.

(iv) Reportage

This doctrine was first depicted in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EMLR 13 as "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper". The circumstances under which a defence of reportage may apply was discussed in *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn. Bhd. & Anor* as follows:

> "From a consideration of the cases cited, it can be safely asserted that reportage would normally apply as follows. It would only apply in cases where there is an ongoing dispute where allegations of both sides are being reported. The report, taken as a whole, must have the effect that the defamatory

material is attributed to the parties in the dispute. The report must not be seen as being put forward to establish the truth of any of the defamatory assertions. This means that the allegations must be reported in a fair, disinterested and neutral way. The important consideration here is that the allegations are attributed and not adopted. Therefore reportage will not apply where the journalist had embraced, garnished and embellished the allegations."

[9] Damages

(a) Damages are awarded to compensate a person for harm to his or her reputation. Compensation by damages operates in two ways, that is, as a vindication of the plaintiff to the public and as consolation to him for a wrong done.

See: *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

(b) Factors to be taken into account in assessing damages are the conduct of the claimant, his position and standing, the nature of the libel, the mode and extent of the publication, the absence or refusal of any retraction or apology and the conduct of the defendant from the time the libel was published down to the verdict.

See: *Gatley on Libel and Slander*.

(c) On the question of when aggravated damages can be awarded the conduct of the defendant, his conduct of the case and his state of mind are matters which the claimant may rely on as aggravating the damages. Attempts to delay proceedings, hostile cross examination and plea of justification are matters which may lead to the award of aggravated damages. However, the want of apology alone cannot aggravate the plaintiff's injury.

See: *Gatley on Libel and Slander*;
Joceline Tan Poh Choo & Ors v V Muthusamy [2003] 4 MLJ 494;
Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492.

(d) In respect of exemplary damages, Richard Malanjum J (as he then was) held in *Chong Siew Chiang v Chua Ching Geh & Anor* [1995] 1 MLJ 551:

"Before considering any exemplary damages it must be considered first whether the sum in mind for compensatory

damages would be adequate. If it is not, in view of the outrageous conduct of the defendant and to indicate disapproval of such conduct and as a deterrence, an additional sum may be added to bring the sum sufficient as punishment."

See: *Chong Siew Chiang v Chua Ching Geh & Anor* [1995] 1 MLJ 551.

(e) Exemplary damages must be restricted to situations where there are oppressive, arbitrary or unconstitutional actions by servants of the government or where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

See: *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337;
Rookes v Barnard [1964] AC 1129.

29

Foreclosure Proceedings

Gerald Empaling

Chapter 29

Foreclosure Proceedings

[1] Introduction

(a) 'Foreclosure proceedings' is defined by Oxford dictionary as—

> "A remedy available to a mortgagee when the mortgagor has failed to pay off a mortgage by the contractual date for redemption. The mortgagee is entitled to bring an action in the High Court, seeking an order fixing a date to pay off the debt; if the mortgagor does not pay by that date he will be foreclosed, that is, he will lose the mortgaged property. If, after this order (a foreclosure *order nisi*) is made, the mortgagor does not pay on the date and at the place (usually a room in the Royal Courts of Justice) named, the foreclosure is made absolute and the property thereafter belongs to the mortgagee. However, the Court has discretion to allow the mortgagor to reopen the foreclosure and thereby regain his property. The remedy is unpopular: the mortgagee's power of sale may be more useful; moreover, if the mortgaged property is worth less than the loan, the mortgagee cannot sue for balance, a point that has recently re-acquired significance".

(b) In Malaysia, 'foreclosure proceedings' generally refers to the procedure by which a charged property is sold by the chargee on default of the chargor in satisfaction of charged debt. In the Malaysian context a charge can be a legal charge or equitable charge. If it is a legal charge the requirements set out in the National Land Code, 1965 and the relevant provisions of the RHC must be strictly complied with failing which the Court will not grant an order for sale. However if the charge is only an equitable charge the National Land Code, 1965 may not apply but the provisions of the RHC may need to be observed for the sale of property.

(c) The law governing foreclosure proceedings is provided in the National Land Code 1965 in West Malaysia and the Sarawak Land Code (Cap. 81) and Sabah Land Code for Sarawak and Sabah respectively.

[2] The Law

Order 83 stipulates the procedural rules, which parties to a foreclosure action of a charged property need to comply with. The manner of sale and the details thereof are governed by the National Land Code 1965 and in Sabah and Sarawak by the Sabah Land Code and Sarawak Land Code respectively.

[3] Foreclosure proceedings under the National Land Code

(a) Foreclosure proceeding are initiated in the High Court by an originating Summons

See: Order 83 of the RHC.

(b) Before foreclosure proceedings are initiated, a default notice under section 254 of the National Land Code must be issued.

(c) There are two types of notices that is Form 16D notice and Form 16E notice under the National Land Code.

(d) **Form 16D notice**—

(i) Used where breach is continuing for at least one month or such alternative period as may be specified in the charge.

(ii) Notice in Form 16D must—

- specify breach in question;
- require it to be remedied within one month of the date which notice is served, or such alternative period as specified in the charge;
- warn the chargor that, if the notice is not complied with, chargee will take proceedings to obtain order for sale.

(iii) If the breach not remedied within period specified in the notice then the whole sum secured by the charge shall become due and payable to the charge and the chargee will be entitled to

apply for order of sale of the said property.

(e) **Form 16E notice**—

(i) Used where the principal sum secured by the charge is payable on demand.

(ii) If sum not paid within or one month from the date of demand, the charge is entitle to apply for an order for sale without the need to serve a notice in form 16D.

(f) Order for Sale must be made to the High Court if the land is held under registry title pursuant to section 256 of the National Land Code 1965.

(g) If the land is held under Land Office Title then the order for sale must be made to the Land Administrator pursuant to section 260 of the National Land code as follows:

(i) An application to the Land Administrator must be made in Form 16G;

(ii) If there is no bid after Order for Sale is granted by Land Administrator, he may refer the matter to the High Court.

(iii) High Court may substitute the order of the Land Administrator with an Order for sale under section 256 of the National Land Code 1965 or may make such other order as the court may think just.

(h) The statutory notice in Form 16D and Form 16E is a condition precedent before taking foreclosure proceedings.

(i) If the statutory notice is bad for any reason then the charge action must be dismissed.

See: *Central Malaysian Finance Bhd. v Great Pacific Development Sdn. Bhd.* [1983] 1 CLJ 134.

(j) In foreclosure proceedings of a charged property, the charge must comply with the procedural rules set out in Order 83 of the RHC. Order 83 merely stipulates the procedural rules which the parties to a foreclosure action of a charged property need to comply with. The manner of the sale and the details thereof are governed by the National Land Code 1965, and the National Land Code envisages the manner of sale which may be ordered by the Court, that is sale by public auction.

See: *United Malayan Banking Corp Bhd v Chong Bun Sun & Anor* [1994] 2 MLJ 221.

[4] Foreclosure proceedings under the Sarawak Land Code (Cap 81)

(a) The position is different in Sarawak as it is governed by the Sarawak Land Code (Cap. 81). When a chargor defaults, section 148 of the Sarawak Land Code provides for remedies for default to the charge. Subsection 148(1) reads as follows:

> "If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the charge may give to the charger, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied."

(b) In *Citibank NA v Jong Tze Khiok & Anor* [1993] 3 MLJ 449, it was held that under subsection 148(1) of the Sarawak Land Code, it is the default and not the demand for payment under the charge that triggers off the right of the charge to issue the notice in writing. Such notice is not intended for purposes of demanding payment of the amount due but to notify the chargor that the chargee would resort to paragraph 148(2)(c) for an order of sale of the charged land unless such default is remedied. It was the default on the part of the chargor to make the payment on demand that constituted a condition precedent to an application under paragraph 148(2)(c) of the Code.

See: *Malayan Banking Bhd v Sykt. Jaya Perkasa (Sabah) Sdn. Bhd. & Ors* [1993] 3 MLJ 503.

(c) Section 148(2)(c) of the Sarawak Land Code provides as follows:

> "If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court—
>
> (a) for an Order entitling him to enter into possession and to be registered as proprietor of the charged land;
>
> (b) to receive the rents and profits of the charged land; or
>
> (c) for sale of the charged land,

and the Court after hearing the evidence may make such order as in the circumstances seems just."

(d) In *Hong Kong Bank (M) Bhd. v William Tan Enterprise Sdn. Bhd.* [1993] 3 MLJ 293, Muhammad Kamil J. held that the plaintiff had failed to file a notice that complies with the requirements of Order 83 r. 3 of the RHC. The originating summons and both the affidavits in support did not state the amount of repayments, the amount remaining due under the charge and the amount of a day's interest. Non-compliance with Order 83 r. 3 is not a mere irregularity which can be cured under Order 2 r. 2. In an action for sale of charged land to recover the loan and interest, it is mandatory on the part of the plaintiff to comply with Order 83 r. 3 of the RHC and failure to do so would warrant the dismissal of the originating summons by the Court.

Procedure for Sale by Order of Court

(e) Section 150(1) of the Sarawak Land Code provides for sale by order of the Court. This section provides the guidelines for an order of sale. The Court when giving out the order for sale shall first of all notify the Superintendent of Lands and Surveys of the particular Division where the land subject to the charge is located. The Court shall also serve a notice upon the chargor and upon the registered proprietor. It shall also give notice of the intended sale by advertisement in the *Gazette* and by such other means as it may deem sufficient. The sale shall be by public auction or tender of such other mode of sale as may be directed by the Court. Subject to such conditions of sale as shall be approved by the Court.

(f) The Court shall also fix the date of sale. The date of sale shall not be less than thirty days from the date of the order of sale. The Court shall also auhorise such other acts as may be necessary for the conduct of the sale. A reserve price shall be put on the land and shall be equal to its estimated market value.

(g) Section 150(3) of the Code provides that when a sale has been effected either to the charge or to any other person, a memorandum of transfer shall, after payment of the purchase price and such other moneys as may be necessary, be executed in favour of the transferee by such person, including an officer of the Court, as the Court may order and shall, with the necessary document of title, be presented to the Registrar for registration.

(h) Section 153(4) provides that upon the registration of any memorandum of transfer executed, the estate or interest of the chargor to be transferred shall vest in the transferee, freed and discharged from the liability under the charge under which the power of sale has been exercised. The Registrar may make in the Register any entry

necessary to show that every such liability, estate or interest has been so determined.

(i) Usually when there is no bid made at or above the reserve price, the Court will adjourn the sale. The Court will usually adjourn to another date and will order that the land be put up again for auction with either the same or a new reduced price. It is also the duty of the Court to publicly notify by advertisement or any other manner advisable on the time of the sale.

[5] Native Customary Rights Land in Sarawak

(a) The Sarawak Land Code was enacted "to make better provisions in the law relating to land". Except for native customary rights ("NCR") created through a permit given under subsection 10(4) on interior area land, NCR may also exist in native communal reserves created under the Code. This means that subsequent to 1 January 1958, for a native to create native customary rights over interior area land, he must obtain a permit under section 10 which can be issued by a Superintendent pursuant to subsection 10(4) of the Land Code. Other than the above methods, no recognition will be given to any NCR over land created after 1 January 1958. Any person who occupies State land in an attempt to assert rights over the same shall be deemed to be in unlawful occupation of State land and could be prosecuted for trespassing on such land.

(b) It is noted that the definition of "native customary land" also includes interior area land, upon which native customary rights had been lawfully created pursuant to a permit under section 10.

(c) While section 5(1) clearly sets out the requirements for the lawful creation of native customary rights over interior area land, subsequent to 1 January 1958, the Land Code also recognizes NCR lawfully created prior to 1 January 1958 and still subsisting as such. The term "native customary land" as defined in Section 2 of the Code includes land in which native customary rights, whether communal or otherwise, had been lawfully created prior to 1 January 1958.

(d) Section 5(2) stipulates the methods by which native customary rights may be created upon interior area land, if a permit is given under section 10(4) by the Superintendent post 1 January 1958. The methods for creation spelt out in section 5(2) are as follows:

"(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method."

(e) The term "any other lawful method" under section 5(2)(f) is usually understood involving transfer by way of inheritance or gift.

Historical Background

(f) As far as native customary rights and land occupied under native customary tenure is concerned, section 5(1) of the Sarawak Land Code provides that as from 1 January 1958, native customary rights may be created in accordance with native customary law of the community or communities concerned by any of the methods specified in section 5(2), if a permit is obtained under section 10, upon interior land.

(g) The exercise by the natives of customary rights over land has been recognized since the days of the first Rajah. Writing in his journal in 1841, the first Rajah stated as follows:

> "The fruit trees about the kampong, and as far as the jungle round, are private property, and all other trees which are in any way useful, such as bamboo, various kinds for making bark-cloth, the bitter kony … and many others. Land likewise, is individual property, and descends from father to son; likewise, is the fishing of particular rivers, and indeed most other things…".

(h) Legislation was subsequently introduced to deal with specific aspect of customary law. In 1899, the second Rajah issued the Fruit Trees Order. Section 1 reads—

> "Such fruit trees which have chiefly sprung up from seeds thrown out and about houses, and have become common property of the inhabitants of a long house or village, are in no cases to be sold or in any way transferred or claimed by individuals leaving such houses or villages."

and section 2 reads—

> "Any Dyak removing from a river or district may not claim, sell, or transfer any farming ground in such river or district, nor may he prevent others farming thereon, unless he holds such land under a grant."

(i) The significance of this Order is that it sets out the manner in which claims to native customary tenure may be made by a native community through cultivation of fruit trees on land which was deemed to belong to the State. Another important characteristic of native customary tenure was apparent, that is the rights so created through native customary tenure may be lost if a native moved from one river system to another.

(j) After the Second World War, the Land (Classification) Ordinance, 1948 was passed. This Ordinance gave legal effect to the system of land classification to regulate land use as well as to protect the special rights and interests of the natives over land. By that Ordinance, all land in Sarawak was classified as follows:

(i) Mixed Zone Land;

(ii) Native Area Land;

(iii) Native Customary Land;

(iv) Reserved Land; and

(v) Interior Area Land.

(k) The legal effect of this legislation was primarily to restrict non natives to areas falling within the Mixed Zone Land, and to limit the freedom of natives to deal in Native Customary Land or Native Area Land for such categories of land could only be owned and occupied by natives. Subsequent amendment to the Land (Classification) Ordinance deemed that natives who were in lawful occupation of Native Customary Land were "licencees of Crown Land". Hence, this important status of natives in occupation of Native Customary Land without title is recognized by statute. They are licencees in occupation of Crown (State) Land. Digby J. in *Keteng bin Haji Li vs. Tua Kampung Suhaili* (1951) SCR 9 at page 10 held as follows:

> "In Sarawak a person can be said to "own" land only if there is a Land Office title subsisting in respect of that land. If there is no such title the land is Crown land; the occupier is at best a mere licensee; and he has no legal interest which he can either charge or transfer. That is so whether for the purposes of the Land (Classification) Ordinance the land is Native Customary Land; Reserved land; or Interior Area Land. If a person abandons his legitimate occupation of such land he does so at his peril. If he wishes to enter into an arrangement whereby he surrenders his rights temporarily only, the Government department or official responsible for the land in question is an almost indispensible third party to the transaction; neither the

Land Ordinance nor the land Settlement Ordinance contains any provision for transferring or charging a right to occupy Crown Land. The effect desired can therefore only be obtained by a three-cornered arrangement; that is between the occupier, who desires to surrender his rights permanently or temporarily; the Government department or official who accepts such surrender and agrees to accept the proposed transferee as the new licensee; and such licensee can only be ejected, when his licence comes to an end, at the suit of such department or official. By abandoning possession during the Japanese regime the appellant once and for all lost his right to occupy the Crown land in question. He can only recover that right by arrangement with the authority controlling that land."

(l) With regards to Native Customary Rights land as the occupiers are mere licensees of Crown Land then there is no right of ownership. The occupier has no legal interest which he can either charge or transfer. As such, foreclosure proceedings are not applicable to Native Customary Rights land. In *Nyalong v The Superintendent of Lands and Surveys, Second Division, Simanggang* the Court expressed itself at page 251—

> "It must be remembered that a person can be said to own land only if there is a Land Office title subsisting in the land and if no such title exists the occupier is a mere licensee of Crown land".

(m) In the East Malaysian state of Sabah, if an owner of a land held under Native Title the owner of the land can charge his land and his land can also be foreclosed. However, the owner of the Native Title must be a native. In the case of *International Bank Malaysia Bhd. vs. Lovintih Balantai* (Civil Appeal No: S 02-527-2000) 2007, his Lordship Mokhar Sidin JCA, held that the First Defendant in the Court below, a certain Yeo Kee Seng had not furnished an appropriate declaration made by a Native Court under section 3 of the Interpretation (Definition of Native) Ordinance (Cap 64) to show that he was a "Native". Without such declaration, his status or position would be that of a non native. Hence, the defendant could not purchase the said land, which at the material time was owned by a native. Section 17(1) of the Land Ordinance (Cap 68) (Sabah) provides all dealings in land between non natives and natives are expressly forbidden and no such dealings shall be valid or shall be recognized in a Court of Law. Section 17(4) of the Ordinance clearly provides that only the owner of land held under a Native Title can charge the same. That owner must be a "Native". The appellant having omitted to ascertain or to make enquiries whether Yeo Kee Seng was native or a non-native as the said land was held under a Native Title, must bear the consequences. Therefore, the appellant would not be in a position to foreclose on the said land.

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Admiralty Proceedings

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Chapter 30

Admiralty Proceedings

[1] Jurisdiction of Malaysian Courts in Maritime Matters

(a) To a large extent the Malaysian courts apply English maritime law principles but the application is subject to local adaptation. The Civil Law Act 1956 provides for the application of English law in respect of issues with respect to the law of carriers by air, land, sea, marine insurance, average unless in cases where provision has been made by other written law.

(b) Section 5 of the Civil Law Act had its origin in section 6(1) of the Straits Settlement Civil Law Ordinance 1878 which provided—

> "In all questions or issues which arise or which have to be decided in respect to the law of partnership, corporations, bank and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the corresponding period if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by statute."

(c) The Admiralty jurisdiction of the Malaysian High Court is largely governed by statute. The Courts of Judicature Act 1964 provides that the Malaysian High Court shall have the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981.

(d) The procedure of admiralty action in Malaysia is provided under Order 70 of the RHC. Other provision of the RHC also apply example Order 6 r.6, Order 11, Order 12 r. 1, Order 13, Order 16 and Order 19.

Pleadings in admiralty action still governed by Order 18 but modified by r.17 and 19, Order 20, r.3, 4, 5 and Order 22 r.12, Order 25, Order 38 r.4, Order 60 and Order 90.

(e) If the parties do not need to invoke the admiralty jurisdiction of the court, they can file their cases in the Sessions Court or Magistrates Court. The Sessions Court or Magistrates Court have jurisdiction over offences under the Merchant Shipping Ordinance 1952 example section 252 for contravention of the Merchant Shipping (Collision Regulations) Order 1984 P.U. (A) 438/84 and section 492 for offences under the Merchant Shipping Ordinance 1952 generally.

[2] Admiralty Actions

Admiralty actions may be in *rem* or in *personam* or in some circumstances, both.

(a) Action *in rem*

(i) As far as action *in rem* under English Administration of Justice Act 1956 is concerned, section 3 is generally concerned with the different ways by which the admiralty jurisdiction of the High Court may be invoked.

(ii) Under section 3(2) litigants may proceed *in rem* with regard to claims specified in paragraphs (a) to (c) and (s) of section 1(1) of the Act. The section applies to the following claims:

(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;

(b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

(c) any claim in respect of a mortgage of or charge on a ship or any share therein;

(d) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for *droits* admiralty.

(iii) On the other hand, section 3(3) is confined to the in *rem* enforcement of claims which are in the nature of maritime liens. Under English Maritime law, (and this is also true of Malaysia and Singapore) “true”, “principal” or “genuine” maritime liens

arise in respect of—

(i) damage done by a ship;

(ii) salvage;

(iii) seamen and master's wages;

(iv) masters' disbursements;

(v) bottomry.

(b) Action *in personam*

(i) The admiralty jurisdiction of a Court may be exercised by an action in personam by virtue of sections 21(1) and 22 of the UK Supreme Court Act 1981. The admiralty action *in personam* is an ordinary civil action. It is therefore like an action in tort or in contract but differs because of the special rules in this order which apply in an admiralty action. Hence, an admiralty action *in personam* attracts the same jurisdictional requirements as a non-admiralty action *in personam*. However, to commence and admiralty action *in personam*, the claim in question must be within the subject matter of admiralty jurisdiction (see section 20 of the UK Supreme Court Act 1981) and High Court civil jurisdiction under section 23 of the Courts of Judicature Act 1964.

See: *Emilia Shipping v State Enterprise for Pulp and Paper Industries* [1991] 2 MLJ 379.

(ii) It is also important to note that there are certain jurisdictional restrictions in an action in *personam* which is brought for damage, loss of life or personal injury arising out of a collision between ships, or the carrying out of or omission to carry out a manoeuvre in the case of one or more ships or of non-compliance on the part of one or more ships with the collision regulations, the court's jurisdiction to hear the action is confined to a number of situations as provided in section 22(1) read with section 22(2) of the UK Supreme Court Act 1981.

(c) Action both in *rem* and *personam*

It is no longer possible to bring a hybrid writ conjoining an action in *rem* and in an action *in personam* The Court has an unfettered discretion to allow a claim *in personam* to be engrafted upon a claim in *rem* provided no injustice or inconvenience is cause: *Federal Flour Mills Ltd v Owners of the Vessel Ta Tung & Anor* [1970] 2 MLJ 147.

The purpose of such hybrid writs appears to be the savings of costs, which is archived by issuing one writ instead of two.

See: Order 70 r. 2 of the RHC;
Republic of India and others v India Steamship Company Limited Co Ltd ("The Indian Grace") (1998) 1 Lloyd's Rep 1*;*
Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd [1999] 3 SLR 721.

[3] Subject matter of admiralty jurisdiction

(a) Ships

(i) Since ships are most frequently the subject against which admiralty jurisdiction is invoked, it is appropriate that consideration be first given to the meaning of a 'ship'. Order 70 r.1(2) define that ship includes any description of vessel used in navigation.

(ii) By section 24(1) of the Supreme Court Act 1981 unless the context otherwise requires, a 'ship' includes every description of vessel used in navigation and includes hovercraft.

(b) Vessel

The High Court (Admiralty) Act does no define the word 'vessel' but it has been construed as 'usually hollow receptacle for carrying goods or people and includes every descriptions of watercraft designed or capable of being used as a mean of transportation on water'.

(c) Used in Navigation

(i) Interest in the notion of navigation is the ability of the water craft to moved or be moved in ordered fashion from one place to another. Where a vessel is used in a reservoir solely for pleasure, or conveys passenger round on artificial lake with a small enclosed sheet of water as opposed to being on non-tidal river that leads to sea via a lock, it would not be considered as being used in navigation. The vessel when used in navigation must be on navigable waters, that is, waters that are used by vessel going from point to point A to point B and not simple for pleasure purposes.

(ii) Another pertinent factor is the kind of use the water craft is put to. Navigation has conventionally been associated with the notion of transportation of goods or passengers to an intended destination, but water craft which facilitate navigation such as by dredging mud and

debris away while being towed or which engaged in land reclamation have also been regarded as ship.

(d) Property on board a ship

The meaning of a ship extends to cover the ship's apparel, tackle and stores. Indeed, according to Sheen J in *The Silia,* [1981] 2 Lloyd's Rep 534 'ship' extends to all property aboard other than which is owned by the ship owner. Thus, in the case, proceeds of sale of bunkers belonging to the shipowner, upon judicial sale, were available to the claimants *in rem* rather than the judgment creditor *in personam*. This test with respect, might in some situation be over-inclusive and taken literally, would include even the personal effects of the shipowner as well as the cargo he puts on board.

(e) Proceeds of sale of ship

Where an arrested ship has been sold pursuant to an order of court in action *in rem* and the proceeds into court, such proceeds lying in court represent the ship. Thus, any right of action against the ship could be enforced the proceeds of sale. Under Order 70 rule 7 (1) (b) of the Rules of High Courts of Malaysia, service should be affected on the Registrar instead of the ship.

(f) Cargo, freight and other maritime property

(i) Two types of maritime property that can be the subject of actions *in rem* are cargo and freight. Apart from these instances where a maritime lien attaches to the cargo, an action *in rem* can be brought for a claim arising out from the forfeiture or condemnation of cargo, the restoration of cargo after seizure or for droits of admiralty.

(ii) Freight can be arrested if it is subject to a maritime lien, whether arising out of claim for salvage, bottomry, crew or master's wages, master disbursements or damage done by the ship. The maritime lien on freight however, dependent on there being a maritime lien on the vessel whose carriage of cargo earned the freight. If there's no maritime lien on the vessel, there's no maritime lien on freight either. Furthermore, if freight has been paid over the ship owner by owners of the cargo, it cannot be arrested.

[4] Admiralty Practice and Procedure

(a) By Way of Writ

(i) Order 70 of the RHC is the specific rules that governed the Admiralty Proceeding in High Court of Malaysia. The definition of '*action in rem*

is stated in Order 70 r.1(2) where "action *in rem*" means an Admiralty action *in rem* while the definition of "ship" includes any description of vessel use in navigation.

(ii) According to Order 70 r.2, any action *in rem* must be begun by writ and the writ must be in Form 155 in which together with the rules are Order 6, r 6, and Order 12 shall apply in relation to such an action.

(b) Service

(i) Order 70 r.7 stipulated that a writ by which an action *in rem* is begun, must be served on the property against which the action is brought except in certain circumstances.

(ii) If the property is a freight itself, it must be served on the cargo in respect of which he freight is payable or on the ship in which the cargo was carried. And if the property has been sold, and where the proceeds of the sale has been paid to court, the writ must be served on the Registrar.

(iii) In any case where the writ is required to be served on any property, the plaintiff must leave the writ and a copy thereof at the Registry and file therein a praecipe in Form 159. After that, the sheriff or his officer shall serve the writ on the property described in the praecipe.

(iv) For service out of jurisdiction of notice of writ, the rules governed is Order 70 r.3, where, service out of the jurisdiction of a notice of a writ, containing any such claim as is mentioned in Order 11, rule 1(1)(i), (ii) and (iii) is permissible with the leave of the Court if the defendant has his habitual residence or a place of business in Malaysia; or the cause of action arose within inland waters of or within the limits of a port in Malaysia, or an action arising out of the same incident or series of incidents is proceeding in the High Court or has been heard and determined in the High Court; or the defendant has submitted or agreed to submit to the jurisdiction of the High Court.

(c) Warrant of arrest (Order 70 r. 4)

(i) After a writ has been issued in an action *in rem* a warrant in Form 156 for the arrest of the property against which the action or any counterclaim in the action is brought may, subject to the provisions of this rule, be issued at the instance of the plaintiff or of the defendant, as the case may be. A search in caveat book must be procure by the party applying for the issue of the Registry of warrant of Arrest to see whether there is a caveat in force in respect of that property where the Warrant of arrest will not be issued until the party applying for it has filed a praecipe in Form 157, it will required an issue of the warrant together with the affidavit. However, it is the court discretion to allow

such application.

(ii) What about in issuing a Warrant of Arrest in an action *in rem*, against a foreign ship that belong to a port of a state that having a consulate in Malaysia? According to Order 70 r.4(4), without the leave of the court, no warrant of arrest shall be issued not until a notice, one which that informed the action has been begun has been sent to the consul.

(iii) Order 70 r.5 is the provision in regards to enter a caveat to prevent the arrest of any property. First, in Order 71 r.5(1), a praecipe in Form 158 must be file to show that there's intention to enter an appearance in any action that may be begun against the property described in the praecipe; and within 3 days after receiving notice that such an action has been begun, to give bail in the action in a sum not exceeding an amount specified in the praecipe or to pay the amount so specified into Court. On the filing of the praecipe a caveat against the issue of a warrant to arrest the property described in the praecipe shall be entered in the caveat book. The fact that there is a caveat against arrest in force shall not prevent the issue of a warrant to arrest the property to which the caveat relates.

(iv) By virtue of Order 70 r.9, Warrant of Arrest only valid for 12 months beginning with the date of its issue and may be executed only by the sheriff or his officer. It could be served on weekly holiday whereas no other instrument enjoyed the same prerogative. The Warrant of Arrest must be filed by the sheriff within 7days of its service.

(v) The Warrant of Arrest issued against freight may be executed by serving the warrant on the cargo, provided that the freight is payable or on the ship in which that cargo was carried or on both of them. The Warrant of Arrest must also be served on the property against which it is issued. Service of Warrant of Arrest is provided in Order 70 r.10 of the RHC.

(d) Remedy for a property protected by caveat is arrested (without good and sufficient reason)

(i) If there is an arrest been made to the caveated property in pursuant of a warrant of arrest, the party in damage has the right to go to the court and asking for a remedy for the losses. The court may, after hearing, may order to discharge the warrant or order the other party to pay back the losses. (O. 70 r. 6)

(ii) If there is in force caveat against arrest with respect of the property in action, according to O70 r. 7(4) if the plaintiff in an action *in rem*, or his solicitors aware of such caveat, he must serve the writ forthwith on the person at whose instance the caveat was entered.

(e) Appearance

(i) Where a defendant to an action *in rem* fails to enter an appearance within the time limited for appearing, then, on the expiration of 14 days after service of the writ and upon filing an affidavit proving due service of the writ, an affidavit verifying the facts on which the action is based and, if a statement of claim was not indorsed on the writ, a copy of the statement of claim, the plaintiff may apply to the Court for judgment by default.

(ii) Where the writ is deemed to have been duly served on the defendant by virtue of Order 10, r. 1(2), or was served on the Registrar under rule 7 of this Order, an affidavit proving due service of the writ need not be filed under this rule but the writ indorsed as mentioned in the said rule 1(2) or indorsed by the Registrar with a statement that he accepts service of the writ must be lodged with the affidavit verifying the facts on which the action is based.

(iii) Where a defendant to an action *in rem* fails to serve a defence on the plaintiff, then, after the expiration of the period fixed by or under these rules for service of the defence and upon filing an affidavit stating that no defence was served on him by that defendant during that period, an affidavit verifying the facts on which the action is based and, if a statement of claim was not indorsed on the writ, a copy of the statement of claim, the plaintiff may apply to the Court for judgment by default.

(f) Applications with respect to property under arrest.

(i) The court has the right to give direction in notice to the application of property of arrest under action to any or all of the parties to every action against the property. (O. 70 r. 11).

(ii) Once the property arrested in pursuance of a warrant of arrest is sold under an order of the Court, property which has been so arrested shall only be released under the authority of an instrument of release (in this rule referred to as a “release”), in Form 160, issued out of the Registry. (O. 70 r. 12).

(iii) A release could also be made if there’s a withdrawal of the party before an appearance is entered in the action. The party has to file a notice withdrawing the warrant of arrest by filling a praecipe in Form 161 requesting issue of a release. However, the Court might otherwise orders, a release shall not be issued with respect to property as to which a caveat against release is in force. A release could also be in instance if all the party in action of warrant of arrest was issued consented.

(g) Caveat

The duration of a caveat is valid for 6 months beginning with the date of its entry but the person at whose instance a caveat was entered may withdraw it by filing a praecipe in Form 163.The period of validity of a caveat may not be extended but this provision shall not be taken as preventing the entry of successive caveats. (O.70 r 14).

(h) Bail

Bail on behalf of a party to an action *in rem* must be given by bond in Form 164; and the sureties to the bond must enter into the bond before a Commissioner for Oaths, not being a Commissioner, who, or whose partner, is acting as solicitor or agent for the party on whose behalf the bail is to be given, or before the Registrar. A surety to a bail bond must make an affidavit stating that he is able to pay the sum for which the bond is given. (O. 70 r. 15).

(i) Intervener

Where property against which an action *in rem* is brought is under arrest or money representing the proceeds of sale of that property is in Court, a person who has an interest in that property or money but who is not a defendant to the action may, with the leave of the Court, intervene in the action. An application for the grant of leave under this rule must be made *ex parte* by summons supported by an affidavit showing the interest of the applicant in the property against which the action is brought or in the money in Court. A person to whom leave is granted to intervene in an action must enter an appearance therein in the Registry within the period specified in the order granting leave; and Order 12, rules 1 to 4, shall, with the necessary modifications, apply in relation to the entry of appearance by an intervener as if he were a defendant named in the writ. The Court may order that a person to whom it grants leave to intervene in an action shall, within such period as may be specified in the order, serve on every other party to the action such pleading as may be so specified. (O. 70 r. 16).

(j) Counterclaim (O.70, r. 20)

(i) Where a defendant to a counterclaim in an action *in rem* fails to serve a defence to counterclaim on the defendant making the counterclaim, then, subject to rule (6), after the expiration of the period fixed by or under these rules for service of the defence to counterclaim and upon filing an affidavit stating that no defence to counterclaim was served on him by the first-mentioned defendant during that period, an affidavit verifying the facts on which the counterclaim is based and a copy of the counterclaim, the defendant making the counterclaim may

apply to the Court for judgment by default.

(ii) No application may be made under rule (5) against the plaintiff in any such action as is referred to in Order 11, rule 1(1)(i), (ii) and (iii).

(iii) An application to the Court under this rule must be made by motion and if, on the hearing of the motion, the Court is satisfied that the applicant's claim is well founded it may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action or, as the case may be, counterclaim is brought to be appraised and sold and the proceeds to be paid into Court or may make such other order as it thinks just.

(k) Judgement

(i) The plaintiff may, after filing an affidavit verifying the facts on which the action is based, apply to the Court for judgment by default. Judgment given may be enforced by the arrest of the property against which the action was brought and by committal of the party at whose instance the caveat with respect to that property was entered.

(ii) Judgment by default is governed by O. 70 r. 20.

(iii) The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this rule.

(l) Order for sale of ship (O. 70 r. 21)

Where in an action *in rem* against a ship the Court has ordered the ship to be sold, any party who has obtained or obtains judgment against the ship or proceeds of sale of the ship may after the expiration of the period specified in the order under rule 21 (2)*(a)*; or *(b)* in any other case, after obtaining judgment, apply to the Court by motion for an order determining the order of priority of the claims against the proceeds of sale of the ship.

(m) Appraisement and sale of property (O. 70 r. 22)

(i) A commission for the appraisement and sale of any property under an order of the Court shall not be issued until the party applying for it has filed a praecipe in Form 165.

(ii) Such a commission must, unless the Court otherwise orders, be executed by the sheriff and must be in Form 166.

(iii) A commission for appraisement and sale shall not be executed until an undertaking in writing has been given satisfactory to the sheriff to pay the fees and expenses of the sheriff on demand.

(n) Inspection of ship, *etc*. (O. 70 r. 27).

Without prejudice to its powers under Order 29, rules 2 and 3, and Order 35, rule 5, the Court may, on the application of any party, make an order for the inspection by the assessors (if the action is tried with assessors), or by any party or witness, of any ship or other property, whether movable or immovable, the inspection of which may be necessary or desirable for the purpose of obtaining full information or evidence in connection with any issue in the action.

(o) Originating summons: Procedure. **(O. 70 r. 34)**

Order 12 shall apply in relation to an originating summons in Admiralty proceedings to which appearance is required to be entered. In Order 28, rule 2, shall apply in relation to Admiralty proceedings begun by originating summons. Under Rule 25 [except rule (3)] shall, with any necessary modifications, apply in relation to an Admiralty cause or matter begun by originating summons, and Order 28, rule 9, shall not apply to such a cause or matter.

(p) Limitation action-Summons for Decree or Directions Parties (O. 70 r. 35)

(i) In a limitation action the person seeking relief shall be the plaintiff and shall be named in the writ by his name and not described merely as the owner of, or as bearing some other relation to, a particular ship or other property.

(ii) The plaintiff must make one of the persons with claims against him in respect of the casualty to which the action relates defendant to the action and may make any or all of the others defendants also. At least one of the defendants to the action must be named in the writ by his name but the other defendants may be described generally and not named by their names. The writ must be served on one or more of the defendants who are named by their names therein and need not be served on any other defendant.

(iii) In this rule and rules 36, 37 and 38 “name” includes a firm name or the name under which a person carries on his business, and where any person with a claim against the plaintiff in respect of the casualty to which the action relates has described himself for the purposes of his claim merely as the owner of, or as bearing some other relation to, a ship or other property, he may be so described as defendant in the writ and, if so described, shall be deemed for the purposes of the rules aforesaid to have been named in the writ by his name.

(q) Proceeding under Decree

(i) Under O. 70 r. 36, Plaintiff within 7 days after the entry of appearance by one of the defendants named by their names in the writ, or, if none of them enters an appearance, within 7 days after the time limited for appearing, without serving a statement of claim, must take out a summons returnable in Chambers before the Registrar asking for a decree limiting his liability or, in default of such a decree, for directions as to the further proceedings in the action.

(ii) The summons and every affidavit in support thereof must, at least 7 clear days before the hearing of the summons, be served on any defendant who has entered an appearance.

(iii) On the hearing of the summons the Registrar, if it appears to him that it is not disputed that the plaintiff has a right to limit his liability, shall make a decree limiting the plaintiff's liability and fix the amount to which the liability is to be limited.

(iv) On the hearing of the summons the Registrar, if it appears to him that any defendant has not sufficient information to enable him to decide whether or not to dispute that the plaintiff has a right to limit his liability, shall give such directions as appear to him to be appropriate for enabling the defendant to obtain such information and shall adjourn the hearing.

(v) If on the hearing or resumed hearing of the summons the Registrar does not make a decree limiting the plaintiff's liability, he shall give such directions as to the further proceedings in the action as appear to him to be appropriate including, in particular, a direction requiring the taking out of a summons for directions under Order 25.

(vi) Any defendant who, after the Registrar has given directions, ceases to dispute the plaintiff's right to limit his liability must forthwith file a notice to that effect in the Registry, as the case may be, and serve a copy on the plaintiff and on any other defendant who has entered an appearance.

(vii) If every defendant who disputes the plaintiff's right to limit his liability serves the notice on the plaintiff, the plaintiff may take out a summons returnable in Chambers before the Registrar asking for a decree limiting his liability.

See: O.70 r.37 of the RHC.

(r) Proceedings to set aside a decree. (O. 70 r. 38)

(i) Where a decree limiting the plaintiff's liability (whether made by a Registrar or on the trial of the action) fixes a time in accordance with rule 37(2), any person with a claim against the plaintiff in respect of the casualty to which the action relates, who—

- was not named by his name in the writ as a defendant to the action; or
- if so named, neither was served with the writ nor entered an appearance,

may, within that time, after entering an appearance, take out a summons returnable in Chambers before the Registrar asking that the decree be set aside.

(ii) The summons must be supported by an affidavit or affidavits showing that the defendant in question has a *bona fide* claim against the plaintiff in respect of the casualty in question and that he has sufficient *prima facie* grounds for the contention that the plaintiff is not entitled to the relief given him by the decree.

(iii) The summons and every affidavit in support thereof must, at least 7 clear days before the hearing of the summons, be served on the plaintiff and any defendant who has entered an appearance.

(iv) On the hearing of the summons the Registrar, if he is satisfied that the defendant in question has a *bona fide* claim against the plaintiff and sufficient *prima facie* grounds for the contention that the plaintiff is not entitled to the relief given him by the decree, shall set the decree aside and give such directions as to the further proceedings in the action as appear to him to be appropriate including, in particular a direction requiring the taking out of a summons for directions under Order 25.

(s) References to Registrar (O. 70 r. 39)

(i) Any party (hereafter in this rule referred to as the "claimant") making a claim which is referred to the Registrar for decision must, within 2 months after the order is made, or, in a limitation action, within such other period as the Court may direct, file his claim and, unless the reference is in such an action, serve a copy of the claim on every other party.

(ii) At any time after the claimant's claim has been filed or, where the reference is in a limitation action, after the expiration of the time limited by the Court for the filing of claims, but, in any case, not less than 28

days before the day appointed for the hearing of the reference, any party to the cause or matter may apply to the Registrar by summons for directions as to the proceedings on the reference, and the Registrar shall give such directions, if any, as he thinks fit including, without prejudice to the generality of the foregoing words, a direction requiring any party to serve on any claimant, within such period as the Registrar may specify, a defence to that claimant's claim.

(iii) The reference shall be heard on a day appointed by the Registrar and, unless the reference is in a limitation action or the parties to the reference consent to the appointment of a particular day, the appointment must be made by order on an application by summons made by any party to the cause or matter.

(iv) An appointment for the hearing of a reference shall not be made until after the claimant has filed his claim or, where the reference is in a limitation action, until after the expiration of the time limited by the Court for the filing of claims.

(v) Not later than 7 days after an appointment for the hearing of a reference has been made the claimant or, where the reference is in a limitation action, the plaintiff must enter the reference for hearing by lodging in the Registry a praecipe requesting the entry of the reference in the list for hearing on the day appointed.

(vi) Not less than 14 days before the day appointed for the hearing of the reference the claimant must file documents specified under r (6) (a) and (b) and, unless the reference is in a limitation action, he must at the same time serve on every other party a copy of every document filed.

(vii) A claim may be dismiss if the claimant fails to comply with r. (1) or (6) *(*b) of r 39 , the Court may, on the application of any other party to the cause or matter.

(t) Hearing of reference (O. 70 r. 40)

(i) The Registrar may adjourn the hearing of a reference from time to time as he thinks fit.

(ii) At or before the hearing of a reference, the Registrar may give a direction limiting the witnesses who may be called, whether expert witnesses or not, but any such direction may, on sufficient cause being shown, be revoked or varied by a subsequent direction given at or before the hearing. Evidence may be given orally or by affidavit or in such other manner as may be agreed upon, and the evidence may, on the application of either party, but at the expense in the first instance of the party on whose behalf the application is made, be taken down

by the official shorthand writer, if any, and in such case a transcript of the shorthand writer's notes, certified by him to be correct, shall be admitted to prove the oral evidence of the witnesses on an objection to the Registrar's decision.

(u) Objection to decision on reference (O. 70 r. 41)

(i) Any party to a reference to the Registrar may, by motion in objection, apply to a Judge in Court to set aside or vary the decision of the Registrar on the reference, but notice of the motion, specifying the points of objection to the decision, must be filed within 14 days after the date on which notice of the filing of the decision was sent to that party under rule 40(4) or, if a notice of the filing of a statement of the grounds of the decision was subsequently sent to him thereunder, within 14 days after the date on which that notice was sent. The decision of the Registrar shall be deemed to be given on the date on which it is filed, but unless he or the Judge otherwise directs, the decision shall not be acted upon until the time has elapsed for filing notice of a motion in objection thereto, or while such a motion is pending or remains undisposed of.

(ii) A direction shall not be given under r. 41(2) without the parties being given an opportunity of being heard, but may, if the Registrar announces his intended decision at the conclusion of the hearing of the reference, be incorporated in his decision as reduced to writing under r. 40 (4).

(v) Drawing up and entry of judgments and orders (O. 70 r. 42)

Every judgment given or order made in an Admiralty cause or matter shall be drawn up and shall be entered by an officer of the Registry in the book kept for the purpose.

(w) Inspection of document filed in Registry

In relation to documents filed in the Registry, Order 60, rule 4, shall be applied. A decree made in Chambers in a limitation action shall be deemed to have been made in Court. (O. 70 r. 43).

31

Assessment of Damages

Rajalingham a/l S.S. Maniam

Chapter 31

Assessment of Damages

[1] The aims of an award of Damages

(a) The main purpose of damages in tort is to place the plaintiff in the position as if the tort had not been committed. Compensation should nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong.

See: *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174.

(b) Of all the various remedies available at common law, damages are the remedy of most general application at the present day, and they remain the prime remedy in actions for breach of contract and tort. They have been defined as “the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract”.

See: *Cassell & Co Ltd v Broome* [1972] 1 All ER 801.

(c) In almost all actions for breach of contract, and in many actions for tort, the principle of *restitution in integrum*, that is, damages is to be

assessed on a compensatory basis, which is to restore the plaintiff to his position prior to the commission of the tort is the general rule.

See: *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352.

(d) This principle is an adequate and fairly easy guide to the estimation of damage, because the damage suffered can be estimated by relation to some material loss. It is true that where loss includes a pre-estimate of future losses or an estimate of past losses which cannot in the nature in the nature of things be exactly computed, some subjective element must enter in. But the estimate is in things commensurable with one another and convertible at least in principle to the Malaysian currency in which all sums of damages must ultimately be expressed.

[2] Damages recoverable once only

The damages to which a plaintiff is entitled from the defendant in respect of a wrongful act must be recovered once and for all. He cannot bring a second action upon the same facts simply because his injury proves to be more serious than was thought when judgment was given. The principal difficulties arise in actions for personal injuries, because there the judge has so often to base his award of damages upon an estimate of many future uncertainties, particularly the plaintiff's future from a medical point of view and for this reason the rule is modified by certain procedural devices

See: *Fetter v Beale* [1701] 1 Ld.Raym.339.

[3] Cases outside the Rule

(a) Where Two Distinct Rights are Violated

(i) Where distinct wrongful acts of the defendant cause damage to distinct rights of the plaintiff, successive actions can obviously be brought; a plaintiff is not obliged to consolidate in one action all the different causes of action he may have against the defendant. The same is true even where there has been only one wrongful act, provided two distinct rights of the plaintiff are violated. Thus in *Brunsden v Humphrey* [1884] 14 QBD 141, the plaintiff's cab was damaged by the defendant's negligence and the plaintiff himself was injured. Having recovered damages in respect of the cab alone, the plaintiff was held entitled to bring a second action for his personal injuries.

(ii) However, in *Talbot v Berkshire County Council* [1994] QBD 290,

it was held that *Brunsden v Humphrey* might have been wrongly decided as it failed to apply *Henderson v Henderson* [1843] 3 Hare 100. In *Henderson v Henderson*, applying the doctrine of *res judicata*, it was held that the parties must bring their whole case before the court, so that all aspects of the case may be considered before a final decision is made once and for all. The parties cannot return to court to advance arguments or claims which they failed to put forward on the first occasion – as was the situation in *Brunsden v Humphrey*. It is different however, if the second issue could not have been dealt with in the first action.

(iii) The Court of Appeal in *Talbot v Berkshire County Council* [1994] QBD 290 however ruled that the plaintiff may make a second claim, if there exists *'special circumstances'* as follows:

- the plaintiff was unaware of the existence of the claim; or
- there was an agreement between the parties that the action would be held in abeyance; or
- the plaintiff had not brought an action on the second issue, in reliance of a representation made by the defendant.

(iv) These circumstances were put to test in the Court of Appeal when *Wain v F Sherwood and Sons Transport Ltd* [1999] P.I.Q.R. P159 came before the court. It was held that where a plaintiff's full claim had not been put forward in previous proceedings due to a non actionable error on the part of the plaintiff's adviser, that error could not amount to a special or exceptional circumstance which would merit the court declining to apply the rule in *Henderson v Henderson* as the possible injustice to a plaintiff who had no other remedy could not override the public interest in avoiding abuses of process, wasting the court's time and possible unfairness or injustice to the defendant.Thus *Brunsden v Humphrey* might no longer be good law on its facts applying *Talbot* and *Wain*.

(v) In the Malaysian courts, the literal interpretation was expounded in *Malbai v Nawi* [1962] 28 MLJ 9. An angry exchange of words, culminating in a fight, took place between the plaintiff and the defendant. At some stage in the fight, a nephew of the defendant, intervened on his behalf, and assaulted the plaintiff. The plaintiff took a private summons for criminal assault against the defendant. Thereafter, he also took out a summons for assault against the nephew of the defendant but that summons appears to have been compromised by the payment of $ 50 as agreed compensation to the plaintiff. The court held that the attacks from the said nephew and the defendant were different in nature. Thus, the plaintiff's claim against the defendant was allowed.

(b) Continuing Injury

A continuing trespass to land gives rise to a fresh cause of action *de die in diem* that is, from day to day. Similarly, a continuing nuisance gives rise to a fresh cause of action each time a damage occurs as a result of it, and accordingly successive actions can be brought. In *Darley Main Colliery Co. v Mitchell* [1886] 11 App.Cas. 127, the defendant mined underneath the plaintiff's land. The plaintiff's land subsequently caved in and the defendant paid damages accordingly. Fourteen years later the plaintiff's land caved in again. The House of Lords held that the plaintiff was entitled to damages in the second cause of action. Damages however could only be recovered for any damage up to the day of the trial. In fact in a case of continuing nuisance prospective damages cannot be claimed, however probable the occurrence of future damage may be; the plaintiff must await the event and then bring fresh proceedings. It follows, somewhat unfortunately, that if the defendant has caused a subsidence of part of the plaintiff's land, damages can be awarded only for what has already occurred, and the plaintiff cannot recover damages for the depreciation in the value of his property attributable to the risk of further subsidence as held in *West Leigh Colliery Co. Ltd v Tunnicliffe and Hampson Ltd* [1908] AC 27.

[4] *Restitution in integrum*

(a) The basic principle for the measure of damages in tort as well as in contract is that there should be *restitution in integrum*, that is, that damages is to be assessed on a compensatory basis, which is to restore the plaintiff to his position prior to the commission of the tort.

(b) Apart from cases in which exemplary damages are awarded, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, one should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. This was decided so in *Livingstone v Rawyards Coal Co.* [1880] 5 App Cas 25 at 39.

(c) *Restitution in integrum* is easily achieved if the loss is financial but is rather impossible with pain and suffering incurred as a result of personal injury.

[5] Limitations to the Principle

(a) Mitigation of Damage

The victim of a tort is obliged to mitigate his loss, that is, he may not claim damages in respect of any part of his loss that would have been avoidable by reasonable steps on his part. Most of the authorities on mitigation relate to breach of contract, but the broad principles are equally applicable to tort. What is reasonable is a question of fact in each case. While the plaintiff must not be allowed to indulge his own whims or fancies at the expense of the defendant, it must also be remembered that the defendant is a wrongdoer who has caused the plaintiff's difficulty as held in *Banco de Portugal v Waterlow* [1932] AC 452. Accordingly, the standard of reasonableness is not a high one. The duty to mitigate does not however, protect a defendant from any inflationary increases in the amount of damages.

See: L*ee Tai Hoo & Anor v Lee Swee Keat & Anor* [1987] 1 MLJ 304.

(b) Plaintiff's Impecuniosity

(i) In *Liesbosch Dredger v Edison S.S.* [1933] AC 448 the *Edison*, by negligent navigation, fouled and sank the dredger *Liesbosch*, whose owners were under contract with a third party to complete a piece of work within a given time. They were put to much greater expense in fulfilling this contract because they were too poor to buy a substitute for the dredger. The House of Lords held they could recover as damages the market price of a dredger comparable to the *Liesbosch* and compensation for loss in carrying out the contract between the date of the sinking and the date on which the substituted dredger could reasonably have been available for work.

(ii) In *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928 the plaintiffs were allowed to delay repairing their premises (which was still usable) and claim from the defendants the higher cost of repair at the date of trial because the defendants' liability to pay would not be determined until then.

(iii) From a social-engineering perspective, the purpose behind awards made to plaintiffs is to compensate them and to fulfil the ideal of wealth distribution. Might it not be argued that a rule which specifically precludes an impecunious plaintiff from receiving any compensation for the tortuous act of a defendant, *because he is impecunious*, alters one fundamental purpose of tort law?

(iv) Naturally, if it is not the fact of impecuniosity but some other factors, such as the negligence of the plaintiff which materially contributes to

his final damage, no unfairness arises. In *The Flying Fish* (1865) 3 Mod PCCNS 77, the plaintiff's ship was destroyed as a result of the defendant's negligence. After the collision, the captain of the plaintiff's ship refused any help, as a result of which the ship was destroyed. The court held that the plaintiff was entitled to compensation for the collision but not for the consequential damage as that was due to the negligence of the captain.

[6] Actions for Personal Injury

(a) Claims for personal injury are made pursuant to section 28A(1) of the Civil Law Act 1956. Two types of claims may be made under this category, one for pecuniary losses and the other for non-pecuniary losses.

(b) In the case of a serious accident, the greater part of the plaintiff's claim for damages will be for pecuniary loss, usually lost of earnings or loss of future earnings and expenses. Any expected expenses as a result of the injury such as medical, nursing bills, domestic help and funeral expenses are also recoverable.

(c) On the other hand, non-pecuniary loss could be the claim for the injury itself, pain and suffering and loss of amenity or enjoyment of life. It is the nature of non-pecuniary loss that it cannot be translated directly into money, but nevertheless the only form of compensation available is an award of monetary damages and an assessment of damages have to be made.

(d) The amount of compensation awarded is of course subject to inflation and interest. In *Leong Thio v Sawiyah & Ors* (1982) 1 MLJ 286, it was held that awards tended to increase in value in recent years because of the fall in the value of money.

[7] Claims for Damage to Property

(a) Where property is damaged, the normal measure of damages is the amount by which its value has been diminished. The general principle is that the defendant is liable for all the damage or loss to the plaintiff's property as a result of the defendant's tort. In computing the amount awarded to the plaintiff, interest and inflation are taken into account.

(b) The principle of *restitution in integrum* can be more fully applied in claims for damage to property than in cases of personal injury. In cases where damage is caused to real property, the said principle is achieved by the application of one or the other of two different

measures of damage to the property and sometimes a combination of the two. One measure is to take the capital value of the property in the undamaged state and to compare it with its value in a damaged state. This is generally referred to as the 'diminution in value' assessment. The other is to take the cost of repair or 'reinstatement'. Generally the 'diminution in value' assessment applies where the plaintiff intends to sell the property and the 'reinstatement' assessment applies where he intends to occupy the premises.

(c) In Malaysia, it is not necessary that the diminution in value must be considered first before the cost of reinstatement. Indeed even where the owner intends to occupy the premises, the 'diminution in value' principle may also be appropriate.

See: *Milk Perusahaan Sdn Bhd v Kembang Masyur Sdn. Bhd.* [2003] 1 MLJ 6.

[8] Claim for Pure Economic Loss

The general principle is that pure economic loss is recoverable, subject to some requirements, if the loss is caused by negligent misstatement. If the loss is caused by the defendant's negligent act, recovery is possible provided it is foreseeable.

See: *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn & 9 Ors* [2000] 3 AMR 3567*;*
Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon [2003] 2 AMR 6.

[9] Joint and Several Tortfeasors

(a) Where two or more persons by their independent breaches of duty to the plaintiff caused him to suffer distinct injuries, no special rules are required, for each tortfeasor is liable for the damage which he caused and only for that damage.

See: Section 10(1)(a) of the Civil Law Act 1956;
Wah Tat Bank Ltd & Ors v Chan Cheng Kum [1975] 1 MLJ 97.

(b) In a situation where more than one action is brought in respect of the same damage, a plaintiff is entitled against each of the joint tortfeasors for the whole of the damage. A plaintiff cannot recover in the aggregate more than the sum at which the damage is assessed.

See: Section 10(1) (b) of the Civil Law Act 1956;
Razman bin Hashim v South East Asia Insurance Co [1995] 2 AMR 1502.

(c) Where however, several tortfeasors commit one tort, (in the sense that their actions cause the same or indivisible damage); they are deemed as joint tortfeasors and if the claim is made against all at the same time, only a single award is permissible against all the tortfeasors. If the claim is made against only one of them, then that tortfeasor is liable for the whole damage.

See: *Liew Yew Tiam v Cheah Cheng Hoc* [2001] 2 AMR 2320;
Oli Mohamed v Keith Murphy & Anor [1969] 2 MLJ 244;
Malaysian National Insurance Sdn Bhd v Lim Tiok (1997) 2 MLJ 165;
Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon [2003] 2 AMR 6.

(d) Where injury inflicted onto the plaintiff is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. The defendant may subsequently in a separate action seek to recover any contribution from a joint tortfeasor However, this section provides that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him, example recovering contribution from an employer who would have been vicariously liable.

See: Section 10(1)(c) of the Civil Law Act 1956;
Jayakumar v Chen Kit Hong & Anor [1984] 1 MLJ 376.

(e) The difference between joint and several tortfeasors is that with joint tortfeasors they are deemed to have participated in some common enterprise. In *Global Crossing Ltd v Global Crossing Ltd* [2006] EWHC 2043 it was held that even where a company is dormant when the action is brought, a director and anyone else personally bound up in the commission of a tort (such as the company secretary who helped incorporate the defendant company in this passing off case) will be joint tortfeasors.

(f) Where however, independent acts of the defendants coincide to produce the final damage to the plaintiff, the defendants are referred to as several tortfeasors. One distinction between joint and several tortfeasors is that with the former, a discharge from liability to one will be an effective discharge to all the other joint tortfeasors whereas this rule does not apply to several tortfeasors.

(g) Where there are two assaulters but one has been forgiven, then both parties are discharged from the assault. This principle is not applicable if the assaults are separate. In the case of joint tortfeasors, what is important is the conspiracy between both parties towards the final damage. Mere similarity of design on the part of the independent actors, causing independent damage, is not sufficient to make them joint tortfeasors.

See: *Malbai v Nawi* [1962] 28 MLJ 99.

[10] Suits between Spouses

A husband or a wife shall be entitled to sue each other in tort for damages in respect of injuries to his or her person. Further a husband or a wife shall be entitled to sue each other in tort for the protection or security of his or her property.

See: Sections 2 and 4A of the Married Women Act 1957 (Act 450).

[11] Types of Damages

(a) General and Special Damages

(i) General damages refer to damage or loss that the law presumes a person incurs as a consequence of a tort. The exact amount is not or cannot be quantified at the time of the trial. An award for general damages includes for instance, damages for pain and suffering, and society's prejudice as a result of a libel or slander. A claim for loss of future earnings and loss of earning capacity come under general damages. Future loss of earnings are awarded for loss that is capable of assessment at the trial date. The loss may be substantial, not remote or speculative. In the absence of this evidence, loss of earning capacity may be awarded if there is substantial or real risk that the plaintiff will end his working life, lose his job or get a less paid employment.

See: *Hj Ariffin Hj Ismail v Mohamad Noor Mohammad* [2001] 2 CLJ 609.

(ii) Special damages refer to damage or loss which the law does not presume to arise from the tort. The plaintiff must give notice in his pleadings that he is claiming for special damages. This needs to be specifically pleaded. A special damage may be described as something particular, other than the general damage that is suffered

by the plaintiff. It is capable of pecuniary assessment such as medical bills or the loss of earnings right up to the date of trial. It must be specifically pleaded and strictly proved. Special damage also refers to damage that the plaintiff needs to prove in torts that require proof of damage, examples being the torts of negligence, nuisance, slander which are not actionable *per se* and strict liability under the rule in *Rylands v Fletcher.*

See: S*am Wun Hong v Kader Ibramshah* [1981] 1 MLJ 295;
Ngooi Koo Siong & Anor v Aidi Abdullah [1984] 2 CLJ 163;
Rylands v Fletcher [1868] LR 3 HL 330.

(iii) General damages are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act so far as money can compensate.

See: *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324.

(iv) General damages are normally unliquidated damages in that the amount is not fixed. Special damages are calculated from the date the tort occurred until the time the case ends up in court. They consist of liquidated damages, or an amount which may be computed or determined monetarily.

(b) Contemptuous Damages

Contemptuous damages are awarded to a plaintiff when the court feels that the plaintiff does not have a good claim. It is awarded when the court does not in fact support the plaintifff's claim and the amount of damages is the smallest denomination of money. Contemptuous damages are common when the court feels that morally, the plaintiff deserved what happened to him, such as libel, assault and false imprisonment. The usual practice is that the party who loses the case pays for the cost of the trial. Where contemptuous damages are awarded however, the judge has discretion to instruct the plaintiff to bear the costs of both parties. Contemptuous damages may be awarded for all types of torts, whether actionable *per se* or otherwise.

(c) Nominal Damages

(i) Nominal damages are awarded when the plaintiff's legal right has been infringed but suffered no actual damage. As can most readily occur in the case of torts which are actionable *per se*, nominal damages does not necessarily involve a small sum of money as held in *Syarikat Kemajuan Kuari (M) Sdn Bhd v Su bin Abdullah* [2003] 1 AMR 787, where RM 5,000/- was awarded as nominal damages. The plaintiff

is awarded damages in recognition of the fact that there has been a violation of his right. Nominal damages are also awarded in cases where damage is shown but its amount is not sufficiently proved.

(ii) An award of nominal damages does not, therefore, connote any moral obliquity on the plaintiff's part, but even so the judge may in his discretion deprive the plaintiff of his costs or even make him pay the costs of both sides. In *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 100 at 103 the court held that if the liability of the defendant is established without the plaintiff having suffered any damage, he will only receive nominal damages.

(iii) In *Tay Tuan Kiat v Pritam Singh Brar* [1987] 1 MLJ 276, the defendant built a retaining wall on the plaintiff's land. The plaintiff sued the defendant for trespass to land. The court held that there was trespass to land, but the trespass did not result in any injury to the plaintiff. Furthermore, if the wall had not been built the plaintiff would not have used that particular section of his land. Nevertheless, in recognition of the fact that the plaintiff's right had been infringed, nominal damages of RM 500/- was awarded.

(d) Exemplary Damages

(i) Exemplary damages are awarded to reflect the court's displeasure with what the defendant had done, and is rather punitive in character. As a general rule, tortious damages being generally compensatory in nature, punitive damages would only be awarded in exceptional circumstances.

(ii) The leading case is *Rookes v Barnard* (1964) 1 All ER 367, HL. The plaintiff was an employee of BOAC and a member of its trade union. The plaintiff was not satisfied with the trade union and wanted to terminate his membership. The defendants who were the union officials met the employer and threatened to go on strike unless BOAC forced the plaintiff to resign. The plaintiff's employment was subsequently terminated, and he claimed against several of the trade union members. The House of Lords held that exemplary damages could not be awarded in this situation. Exemplary damages may only be awarded in the following circumstances:

- where the plaintiff has been a victim of oppressive, arbitrary or unconstitutional acts of servants of the government; or

- where the defendant's act has been calculated by him to bring in profit which exceeds the amount of compensation that he has to pay to the plaintiff; or

- where a statute allows for the award of exemplary damages.

(iii) In addition, a court must consider the following three additional factors before an award of exemplary damages may be made:

- the plaintiff cannot recover such damages unless he himself is a victim of such "punishable behaviour";

- since exemplary damages can be used for and against liberty and is a form of punishment without the safeguard of the criminal law, the weapon must be used with restraint and in this regard awards of exemplary damages should be moderate, but at the same time reflect the gravity of the wrongdoing as held in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn. Bhd. & Ors* [1993] 3 MLJ 352.

- the financial means of the parties, though irrelevant to compensatory damages, are relevant in assessing an award of exemplary damages.

(iv) The application of the second category laid down in *Rookes v Barnard* is illustrated in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801, HL. The defendant, a publisher and writer of a book, wrote that the plaintiff who was a retired but once well known naval officer, committed a wrong which led to a wartime disaster. The court found that the defendant realised the profits that he would obtain from the sale of the book would more than compensate for the amount of damages that he would have to pay to the plaintiff. Thus, the defendant was ordered to pay 15,000 British Pounds as general damages and 25,000 British Pounds as exemplary damages to the plaintiff.

(v) In *Alfred Templeton & Ors v Low Yat Holdings Sdn. Bhd. & Anor* [1989] 2 MLJ 202, the plaintiff and defendant were neighbours. The plaintiff claimed for trespass and nuisance as the construction work which was being carried out on the defendant's land obstructed the way out from the plaintiff's land. There was also earth and debris in the plaintiff's compound. The court allowed the plaintiff's claim for aggravated and exemplary damages as the defendant's act fell under the second category enunciated in *Rookes v Barnard.*

(vi) In *Janaki & Anor v Cheok Chaun Seng & Ors* [1973] 2 MLJ 96 exemplary damages was awarded to the plaintiff whose action did not fall under any of the three categories laid down in *Rookes v Barnard*. It is respectfully submitted that the case is bad law as an illustration of circumstances warranting the award of exemplary damages. (Defendant trespassing on plaintiff's land, widened an existing drain with consequence of exposing plaintiff's land to inundation of sea water).

(vii) Exemplary damages may also be awarded to a plaintiff who has been defamed in a newspaper if the statement concerning him has been deliberately or recklessly published and further, that any damages likely to be paid is likely to be less than the profit to be made from the publication of the matter as held in *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd.* [1993] 1 MLJ 408. This would fall under the second category laid down in *Rookes v Barnard.*

(viii) A controversy surrounding the award of exemplary damages is whether a claimant wishing to recover such damages is required to prove that his case merely comes within one of Lord Devlin's three categories in *Rookes v Barnard*; or if additional to that, he must also prove that the cause of action is one in which exemplary damages was available prior to *Rookes v Barnard*.

(ix) In *AB v South West Water Services Ltd* [1993] 1 All ER 609, CA, the court denied a claim for exemplary damages because the claim did not fall within the ambit specified in *Rookes v Barnard* and because exemplary damages had never been awarded for public nuisance cases. The large number of plaintiffs totalling a hundred and eighty, in this case further made the claim unsuitable for the award of exemplary damages. However, *AB* was criticised for introducing irrationality into the law and was overruled in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193, HL.

(x) The position now is that an award of exemplary damages is not conditioned on it having been recognised as justifying such an award before *Rookes v Barnard*. The House of Lords in *Kuddus* held that adopting such a rigid rule would limit the future development of the law. In deciding whether claimant's case falls within one of the categories in *Rookes v Barnard,* it is the features of the behaviour, rather than the cause of action, which ought to be the focus.

(e) Aggravated Damages

(i) Aggravated damages are awarded when the plaintiff has suffered injury or loss other than pecuniary loss, such as a smear on his reputation, feeling of shame, pain and so forth. Aggravated damages may be awarded for malicious falsehood as enunciated in *Tan Chong & Son Motor Co Sdn. Bhd. v Borneo Motors (M) Sdn. Bhd.* [2001] 3 AMR 3789. In awarding aggravated damages the court will take into account the defendant's act and his motive when the tort was committed. Aggravated damages may be awarded in addition to general damages. Libel cases are good examples of the award of this type of damages as in *Henry Wong v John Lee & Anor* [1980] 2 MLJ 254. Damages in a libel action constitutes of actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which

result or may be thought likely to result, from the wrong which has been done.

(ii) The difference between general damages and aggravated damages is that with the inclusion of the latter, the total amount of damages is higher than usual to denote the extra injury or loss that the plaintiff has suffered. Aggravated damages should not be confused with exemplary damages, although they often are in practice. Aggravated damages are not intended to punish the defendant, as in the case with exemplary damages; but it serves to compensate the plaintiff for the mental distress he has suffered arising from the tort. In *Roshairee Abdul Wahab v Mejar Mustafa Omar & Ors* [1997] 1 CLJ Supp 39*,* the court awarded aggravated damages to a ragging victim, for instead of being protected by his seniors, he was made to suffer humiliation, loss of pride and self-esteem. The court also stated that in assessing aggravated damages, all the circumstances of the case including the character of the plaintiff, is to be taken into account.

32

Judgements, Orders and Interest

Nixon Kennedy Kumbong

Chapter 32

Judgements, Orders and Interest

[1] Judgment to be pronounced in Open Court

(a) Order 42 r. 1 of the RHC provides that every judgment after trial must be pronounced in open Court, either immediately on the conclusion of the trial, or on some subsequent day of which due notice must be given to the parties.

(b) Whether a court has jurisdiction to record consent judgment where there is no trial? It has been held that Order 42 r.1 of the RHC does not prevent the court from delivering a judgment on the terms that have been agreed upon by the parties involved in a civil suit without holding the trial of the suit. The effect of this rule is that a consent judgment made before the court is not bound by Order 42 r. 1 and therefore the judgment need not be pronounced in open court.

See: *Horne Asia Sdn. Bhd. & Satu Lagi Lwn Ozvent (M) Sdn. Bhd. & Lain-lain* [1997] 2 MLJ 37.

[2] Written Judgment to be filed

Order 42 r. 2 of the RHC provides that whenever the Court delivers a written judgment, the original or a copy thereof, signed by the Judge must be filed.

[3] Judgment of absent Judge

Order 42 r. 3 of the RHC provides that when a Judge who has tried any proceedings is unable through death, illness, transfer, or other cause to pronounce judgment, the judgment written by him may be read by any other Judge or by the Registrar.

[4] Entry of Judgment in Cause Book

Order 42 r. 4 of the RHC provides that the proper officer must enter in the Cause Book a minute of every judgment or final order given or made by the Court.

[5] Form of Judgment

Order 42 r. 5 of the RHC provides that—

(i) If, in the case of any judgment, a form thereof is prescribed in Form 76 the judgment must be in that form;

(ii) The party entering any judgment shall be entitled to have recited therein a statement of the manner in which the summons or other originating process by which the cause or matter in question was begun was served;

(iii) An order must be marked with the name of the Judge or Registrar by whom it was made and must be sealed.

[6] Judgment requiring act to be done: Time for doing it

(a) Order 42 r. 6 of the RHC provides that a judgment or order which

requires a person to do an act must specify the time after service of the judgment or order, or some other time, within which the act is to be done.

(b) In *Patricia Liew Yam Ngoom v MME fashion Sdn. Bhd.* [1996] 5 MLJ 127 it was decided that—

> "Order 42 r 6(1) of the RHC states that an order which requires a person to do an act must specify the time after service of the order, or some other time, within which the act is to be done. It is essential that the time within which the act is to be done must be expressly stated in the order as required under O 45 r 5 of the RHC. Consequently, the said order was not enforceable under O 45 r 5 of the RHC and the indorsement of the said order with the notice was improper and should be deleted. The said order should be redrawn and perfected accordingly.".

(c) Where the act which any person is required by any judgment or order to do is to pay money to some other person, give possession of any immovable property or deliver any movable property, a time within which the act is to be done need not be specified in the judgment or order by virtue of paragraph (1), but the foregoing provision shall not affect the power of the Court to specify such a time and to adjudge or order accordingly.

[7] Date from which Judgment or Order takes effect

(a) Order 42 r.7 of the RHC states that a judgment or order of the Court takes effect from the day of its date.

(b) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day.

[8] Orders required to be drawn up

(a) Order 42 r.9 of the RHC provides that every order of the Court shall be drawn up unless the Court otherwise directs.

(b) However Order 42 r. 9(2) of the RHC lists out the exceptions that every order of the Court shall be drawn up. This includes an order which extends the period within which a person is required or authorised by the rules, or by any judgment, order or direction. to do any act, or grants leave for the the issue of any summons, other than a summons

for service out of the jurisdiction, the amendment of a summons or other originating process or a pleading or the filing of any document and which neither imposes any special terms nor includes any special directions other than a direction as to costs need not be drawn up.

[9] Preparation of Judgment or Order

(a) Order 42 r.8 of the RHC provides that where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor of the other party who shall within 2 days of the receipt thereof, or within such further time as may in any case be allowed by the Registrar, return such copy with his signed consent or any required amendments.

(b) When the solicitor omits to return the copy of the draft within the time prescribed, he shall be deemed to have consented to the terms in the draft order.

(c) Where the solicitors are unable to agree upon the draft, any one of them may obtain an appointment before the Registrar, of which notice shall be given to the other, to settle the terms of the judgment or order.

(d) Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge, any party may require the matter in dispute to be referred to the Judge for his determination.

(e) Where the other party has no solicitor, the draft shall be submitted to the Registrar.

(f) What is the proper procedure to be followed for clarification of an order?

(i) Counsels for both parties should sought an appointment with the judge for the dispute in respect of the draft order to be determined. It is not for the Registrar to resolve the dispute in their absence.

See: *Parasuraman a/l Kuppan v Sazali Bin Md Akhir & Anor* [1999] 4 MLJ 113;

(ii) Where there is a dispute between the parties on the endorsement of the said order with the notice, it is essential that either party refer the matter in dispute to the judge for his determination pursuant to Order 42 r. 8(4) of the RHC. The dispute must be settled before the judge before the said order is perfected. The court is not functus officio in hearing the application as the

court was not asked to alter, vary or set aside an order after it has been drawn up but only to settle the order under O 42 r 8(4).

See: *Patricia Liew Yam Ngoom v MME fashion Sdn. Bhd.* [1996] 5 MLJ 127.

[10] Drawing up and entry of Judgments and Orders

(a) Order 42 r. 10 of the RHC provides that where a judgment given in a cause or matter is presented for entry in accordance with this rule at the Registry, it shall be entered by an officer of the Registry in the book kept for the purpose.

(b) The party seeking to have such a judgment entered must draw up the judgment and present it to the proper officer of the Registry for entry.

(c) On entering any such judgment the proper officer shall file the judgment and return a duplicate thereof to the party who presented it for entry.

(d) Every order required to be drawn up must be drawn up by the party in whose favour the order has been made and if that party fails to draw up the order within 7 days after it was made any other party affected by the order may draw it up.

(e) The order must, when drawn up, be produced at the Registry, together with a copy thereof and when passed by the Registrar the order, sealed with the seal of the Court, shall be returned to the party producing it and the copy shall be lodged in the Registry.

[11] Duplicates of Judgments and Orders

(a) Order 42 r. 11 of the RHC provides that not less than 1 clear day after a judgment or order has been filed a duplicate of it shall be supplied on payment of the prescribed fee.

(b) The duplicate of a judgment or order may be a carbon copy of the original except that if the Registrar so directs, the duplicate of every judgment or order of such class as he directs, shall be a photographic copy or a copy produced by type lithography or other similar process.

(c) Before a duplicate of a judgment or order is issued it must be sealed and there must be noted thereon the number of the judgment, the date of entry and the amount of any stamp on the original.

(d) Where by any of these rules or any order of the Court the original judgment or order is required to be produced or served it shall be sufficient to produce or serve the duplicate.

(e) A further duplicate of a judgment or order may, on payment of the prescribed fee, be issued if the Registrar is satisfied that the duplicate has been lost and that the applicant for a further duplicate is entitled to it.

(f) A judgment or order shall not be amended except on production of the duplicate last issued, and if the judgment or order is amended the duplicate so issued shall be similarly amended, and the amendment sealed, under the direction of the Registrar.

[12] Interest on Judgment Debts

(a) Order 42 r. 12 of the RHC provides that every judgment debt shall carry interest at the rate of 8 per centum per annum, or at such other rate not exceeding 8 per centum as the Court shall direct (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

(b) The amendment to Order 42 r.12 of the RHC which came into force on 11 December 1986 clearly empowers the High Court to order an interest above 8% per annum if the rate has been agreed upon by the parties.

See: *Lee Tain Tshung v Hong Leong Finance Bhd.* [2000] 3 MLJ 364.

[13] Where money to be paid by instalments

(a) Where money payable under a judgment or order is, at the time when the judgment or order is given or made, directed to be paid by instalments, the direction to that effect must be inserted in the judgment or order.

(b) Any such direction if not given at that time may be given subsequently, in which case the judgment or order must be served on the party liable.

[14] Setting aside or Varying Judgments and Orders [O. 42 r. 13]

(a) Order 42 r. 13 of the RHC provides that where a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

(b) Although Order 49 of the RHC does not provide for an application to vary or set aside a garnishee order made absolute, it was not improper for the defendant to apply to set aside the garnishee order if it was not served with the show cause notice.

See: *Cedar Trading Sdn. Bhd. v Dong Ah Construction* [1999] 5 MLJ 65.

(c) The issue that often arises is what happened if delay? Lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. Further, under its inherent jurisdiction to prevent an abuse of proceedings, the court has power to set aside a judgment in default despite the defendant's application being out of time if the particular circumstances of the case require it."

See: *Muniandy a/l Thamba Kaundan & Anor. V D & C Bank Bhd & Anor* [1996]1 MLJ 374;
Atwood v Chichester [1878] 3 QBD 722;
Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd. [1996] 1 MLJ 30.

(d) However it has been decided that the Defendant's explanation that he should not be blamed for the delay as the Plaintiff did not make the first move to rectify the defective judgment completely ignored the provision of O.42 r.13 RHC 1980

See: *Tractors Malaysia* [1982] *Sdn. Bhd. v Chiew Chong Huat* [1999] MLJU 103.

[15] Issues

(a) Whether the court has jurisdiction to amend an order?

In *Kajang Logging Sdn. Bhd. v Tan Kim Lock & Anor*. (Suit No: D5-22-835-94 it has been held that the court has jurisdiction under Order 92 r. 4 of the RHC to amend its original order for the interest of justice.

(b) Whether the court is *functus officio* to set aside an order which has been drawn up and perfected?

In *Muniandy a/l Thamba Kaundan & Anor. v. D & C Bank Bhd. & Anor* (1996)1 MLJ 374 it has been decided that the rule that the court has no power under any application in the action to alter or vary a judgment after it has been entered or an order after it has been drawn up, except insofar as is necessary to correct errors in expressing the intention of the court, is subject to exceptions, one of which is that an order which is a nullity, owing to the failure to comply with an essential provision such as service of process, can be set aside by the court which made the order in the exercise of its inherent jurisdiction.

See: *Craig v Kanssen* [1943] 1 All ER 108;
United Malayan Banking Corp Bhd. v Sykt Perumahan Lunas Sdn Bhd [1988] 1 MLJ 546.

(c) What is the distinction between clarification of an order and the making of a further order?

This issue came up in the case of *Re Gyles QC (No.2)* [1996] 2 SLR 702 and it was decided as follows:

> "It was incumbent upon any party who wished to clarify an order of court to so promptly. What constituted sufficient promptness depended on the circumstances and could vary from case to case. In this instance, there was no explanation as to why it took applicant about a year to question the scope of the order….
>
> > This present application for clarification was only taken out after the fresh application had been dismissed. If the applicant's solicitor had felt that the order of court was not sufficiently clear, this application should have been taken out before the fresh application.
> >
> > There was no need for a clarification of any court order if the court order was set out in clear terms, and it was important to distinguish between the function of clarifying an order and that of making a further order. If an order did not meet the requirement of the applicant because his original application was not drafted clearly or sufficiently, then the only recourse for him was to make a further application or amend his original application if that was still possible….. Hence, if any clarification was required, it was, in effect a clarification of the application not the order of the court.".

(d) Whether a court can vary a consent order which has not been perfected?

If, before a consent order is drawn up, it appears that the consent was given under misapprehension, misstatement or want of materials, then the party affected can come to the court and request that the order should not be drawn up or that it should be set aside. However it must have a good reason to do so.

See: *Holt v Jesse* [1876] 3 Ch D 177;
Harvey v Croydon Union Rural Sanitary Authority [1881–85] All ER 1031;
Dietz v Lennig Chemicals Ltd [1966] 2 All ER 962.

In *Toh Seak Keng v Lim Huang Cheow & Ors; Toh Seow Ngan & Ors* (interveners) [1992] 2 MLJ 298 on a similar issue the court held—

> **"**It was not open to the interveners on the one hand to say that there had been a breach of the terms of the order and on the other hand to call to aid the fact that it had not been perfected. An estoppel of sorts arose to preclude the interveners from doing so.
>
> Since the order made was a consent order the general rule is that it may be varied only by consent of the parties. However, there are exceptions to the general rule, the courts having reserved to themselves a measure of control over its own orders, even consent orders. In the instant case the interveners had failed to prove that the consent order was made under a mistake."

(e) Whether a judgment can be set aside on the same day upon an oral application?

This question was discussed in the case of *Dr. Andre Das v Nasharuddin Bin Aidid* [2000] 3 MLJ 524 and it was decided—

> "….an order pronounced by the judge can always be withdrawn, or altered, or modified by him until it is drawn up, passed and entered and, when a judge has pronounced judgment, he retains control over the case until the order giving effect to his judgment is formally completed. The judgment by the magistrate in this case was far from being formally completed and as such the learned magistrate was clearly not functus officio. Thus, the learned magistrate was perfectly within her power as a presiding officer to recall her own order given earlier, on the same day, as here, before the court had risen for the day, to change, vary or set aside her own order and she could do so

without the necessity of a formal application in writing.

O.29 r.14 SCR 1980 provides for a judgment formally completed, meaning having it entered and drawn up, otherwise service thereof could not be effected and no receipt acknowledged. In the event a written application becomes necessary. It follows, therefore, that before it is formally completed, the court may entertain oral application to vary it, as the case may be.".

(f) What is the test to determine an order is an interlocutory or a final order?

The test in determining whether an order is final or interlocutory is whether the judgment or order, as made, has finally disposed of the rights of the parties. If it did, it is a final order.

See: *Ling Kee Ling & Anor. v Leow Leng Siong & Ors* [1996] 2 SLR 438;
Cheng Heng Guan & Ors v Perumahan Farlim (Penang) Sdn. Bhd. & Ors [1998] 3 MLJ 90;
Bozson v Altrincham Urban District Council [1903] 1 KB 547;
Peninsular Land Development Sdn. Bhd. v K Ahmad (No 2) [1970] 1 MLJ 253.

(g) Where no reasons are given for granting an order is the order justified?

An order cannot be said to be justified if no reason is given in coming to such conclusion. Without the benefit of the reasons, it is doubtful whether he applied the correct principles of law in making the order.

See: *New Straits Times Press (M) Bhd & Ors v Hazahar Bin Idris* [1998] 4 MLJ 564.

33

Costs

Nelson W. Angang

Chapter 33

Costs

[1] Introduction

(a) The object of awarding costs is to indemnify a party for the expenses the party had incurred in successfully establishing his or her rights. The general rule has always been that the successful party is entitled to costs unless he is guilty of misconduct, negligence or omission, or unless there is some other good cause for not allowing costs. The discretion of awarding costs by the Courts is very wide and is given in accordance to established judicial principle and rules and to be exercised judicially.

(b) Item 15 of the Schedule to the Court of Judicature Act 1964 confers the power to the High Court to award costs. Section 3 of the Legal Profession Act 1976 defines the general meaning of costs that is to include fees, charges, disbursements, expenses and remuneration.

(c) The charges which a solicitor is entitled to make and recover as remuneration for his professional services including legal advice, attendances, drafting and copying documents, conducting legal proceedings, etc. A solicitors' bill of costs is subject to special provisions as to taxation.

(d) The expenses which he is entitled to recover consists of Court fees, stamps, *etc* and also, where a party is represented by a solicitor, the reasonable and proper charges and fees of the solicitor and counsel.

(e) Unless the costs are agreed upon by parties the amount of costs is to be determined by the process of taxation. This general rule always follows the order of "costs to follow event". The Court in exercise of its discretion generally will make an order for costs to follow event and that the successful party is entitled to be paid to his costs unless there is special grounds to order otherwise.

See: *Petroleum Nasional Bhd. & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25.

(f) The party seeking to recover the costs after an order of court enabling him to do so must put up a bill of costs. He is the party whose costs are to be taxed and the taxing party is the party that will have to pay the costs so ordered.

[2] Taxation of Costs

(a) Order 59 of the RHC and Order 48 of the SCR deals with the award for costs to litigants. Under the SCR rules, the costs are dealt with under Order 48. Unlike in the RHC, the SCR makes a provision for fixed costs. Fixed costs are costs that are in accordance with the scale in Order 48 r. 12 of the SCR. In addition to the fixed costs under r. 12, there are other fixed costs under other provisions under Order 48 of the SCR which the Court may allow.

(b) The Court usually after the end of every proceeding will give an order in regards to costs. However under Order 59 r. 4 of the RHC and Order 48 r. 4 of the SCR, provides that costs maybe dealt with by the Court at any stage of the proceedings. In an interlocutory application the rules does not expressly state when the costs is payable. Usually after the hearing of an interlocutory application and that the Court makes an order that the costs of the interlocutory application to be paid forthwith then the party who is entitled to costs can enforce the order without waiting for the completion of the main proceedings. However if there was no such order made then the costs would be deemed to be payable only at the end of the main proceedings.

[3] Types of Costs

(a) General rule is for 'Costs to follow event'

The rule reflects the general imposition that a successful party has a "reasonable expectation" of being awarded costs against unsuccessful party.

(b) Party to Party Costs

Costs to indemnify the party against the expenses that he is being put by the litigation which to say costs that are necessary to enable the adverse party to conduct litigation, and no more.

(c) Solicitor and Own Client Basis

Order 59 r. 28 of the RHC is a provision for taxation of a solicitor's bill to his own client for contentious work. These costs are to include all costs except in so far as they are of an unreasonable amounts or an amount unreasonably incurred. However generally costs incurred with the express or implied approval of the client will conclusively presumed to be reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount.

(d) The Trustee's Costs

Under Order 59 r. 30(1) of the RHC costs to be paid to a person in the capacity of a trustee or personal representative which he shall be entitled to be paid out of any fund which he holds in that capacity of any proceedings. No costs shall be disallowed unless those costs were not incurred within the capacity of trustee or personal representative.

(e) Costs in the Cause

Costs of those interlocutory proceedings are to be awarded according to the final award of costs in the action.

Plaintiff's costs in the cause means that if the Plaintiff wins, he gets the costs of the interlocutory proceedings but if the Plaintiff loses, he does not need to pay costs to the other side.

Plaintiff's costs in any event means that no matter whether the Plaintiff or Defendant wins the main action, the Plaintiff still gets the costs for the interlocutory proceedings.

(f) Reserved Costs

It is where the Court has deferred in awarding costs of the interlocutory application and that such costs were to be determined only until the end of trial or final disposal of the action.

(g) Costs thrown away

Costs that have been incurred and which must be incurred over again. This is usually an order made on an application to set aside judgment in which was imposed upon a Defendant who has allowed a default judgment to be entered against him due to his failure to enter an appearance or to deliver his defence. This costs to include costs reasonably incurred in enforcing the judgment such as execution and garnishee proceedings, but do not include bankruptcy proceedings which are outside the action unless there is a special direction by the Court to include such direction.

See: *Hughes v Justin* [1894] 1 QB 667.

But where the judgment was obtained irregularly or bad the Defendant is entitled to have it set aside as of right and have all the cost to be thrown away in any event.

See: *Nicholls & Co Ltd* [1964] 1 All ER 137.

(h) Costs of the Day

Costs to be awarded against a party who makes a successful application of postponement on the hearing day proper.

(i) Costs here and below

Where an appellant is successful in his appeal the appellate Court will make an order of costs that he gets the costs of the appeal and reverse the order of costs made in favour of the respondent in the Court below and he gets the costs instead.

(j) Sanderson Order

A Sanderson order requires the unsuccessful Defendant to pay the costs of the successful Defendant leaving the Plaintiff out of the process entirely.

See: *Sanderson v Blyth Theater Co* [1903] 2 KB 533.

(k) Bullock Order

A Bullock order requires the unsuccessful Defendant to pay the Plaintiff by way of reimbursement any costs the Plaintiff has paid to the successful Defendant.

See: *Bullock v London General Omnibus Company* [1907] 1 KB 264.

[4] Discretion of the Court

(a) Order 59 r. 3(2) of the RHC gives the court the discretion to make any order as to costs. However, the very same rule also provides that the court shall, subject to this order, order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs. In other words, there must be materials or grounds present upon which the court can exercise its discretion. Order 59 r. 5 and r. 6 must also be taken into account, where applicable. The discretion to award costs must be exercised judicially.

(b) The court will not interfere with the decision of the taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion after consideration of all the circumstances and if no question of principle arises. It is only when such discretion has been exercised on some wrong principle or the quantum allowed is obviously wrong that a judge will interfere.

(c) The amount on the getting up fee is usually where the largest amount are sought and bitterly fought. The items concerned are items 26 and 27 of Appendix 1 Part IV of Order 59 of the RHC. The two items deal with instructions for trial or hearing of any cause or matter, whatever the mode of trial or hearing and with instructions for appeal from an interlocutory or final order or judgment. The amount to be awarded is “discretionary”. The Registrar must be guided by Part X, rule 1(2) which provides as follows:

> “In exercising his discretion under this paragraph or under rule 31(2) in relation to any item, the registrar shall have regard to all relevant circumstances, and in particular to—
>
> (a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
>
> (b) the skill, specialized knowledge and responsibility required of, and the time and lab our expended by, the solicitor or counsel;
>
> (c) the number and importance of the documents (however brief) prepared or perused;
>
> (d) the place and circumstances in which the business involved is transacted;
>
> (e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount or value;

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.".

(d) In the English case of *Re Elgindata* (No 2) (1993) 1 All ER 232, it provides four principles that the taxing master could use in determining the amount of costs to be given, namely—

(i) costs are at the discretion of the Court;

(ii) they should follow the event, except when it appears to the Court that some other order should be made;

(iii) where the successful party raises issues or makes allegations on which he fails, where that has caused a significant increase in the length or costs of the proceedings he may be deprived of the whole or part of his costs; and

(iv) if the successful party raises issues or allegations improperly or unreasonably, he may be deprived of his costs and also ordered to pay the whole or a part of the unsuccessful party's costs which implies that a successful party who either improperly or unreasonably raises issues or makes allegation on which he fails, ought not to be ordered to pay any part of the unsuccessful party's costs.

(e) The above principles are not intended to be exhaustive. There are plethoras of authorities to show how the Courts have exercised their discretion in awarding costs depending on the facts of each case.

[5] Taxation Procedures

(a) A party entitled to require any costs to be taxed must begin taxation proceedings by filing the notice of assessment and the bill of costs. A date would then be fixed for the hearing of the bill of costs. The bill of costs will consist of claim made by the taxing party (applicant) from the items drawn up from scale of costs Appendix I of Order 59 RHC or Order 48 SCR.

(b) In the article Taxation of Costs by Dato' Kamalanathan Ratnam, (1998) 1 MLJ xli, it was explained that—

> "The format of the bill of costs is important, with dates and item numbers clearly stated. Registrars are advised not to proceed with the taxation unless the bills are marked beforehand, or at the very least the parties must have exchanged marked copies before hand. The taxing party must mark 'P' or 'Q' against each item in the bill. On a taxation on the party and party basis, all costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed would be allowed. The proper principle upon which costs are taxed on this basis is that the successful party should be indemnified against the necessary expense to which he has been put in prosecuting or defending the action, although costs incurred in conducting the litigation more conveniently are not included.".

[6] Review by the Registrar

(a) Order 59 r. 34 of the RHC states that any parties who is dissatisfied with the amount allowed or disallowed by the registrar in respect of any item may apply to the Registrar to review his decision. On reviewing any decision in respect of any item, the Registrar may receive further evidence and may exercise all the powers which he might exercise on an original taxation in respect of that item, including the power to award costs of and incidental to the proceedings before him.

(b) Any party to whom a copy of the objections to taxation was delivered is entitled to be heard in the review in respect of any item to which the objections relate, notwithstanding that he did not deliver written answers to the objections: Order 59 r. 35(1) and (2) of the RHC. Under Order 59 r. 35(3), if requested by any party to the proceedings before him within 14 days after the review, the Registrar shall state in his certificate or otherwise in writing by reference to the objections to that decision the reasons for his decision on the review, and any special facts or circumstances relevant to it. The Registrar is under a duty to make a full statement of all his reasons and may not take cover under a general statement that he has taken all relevant circumstances into account and that the sum he is awarding is reasonable and fair without more.

[7] Review by the Judge

Under Order 59 r. 36 of the RHC, any party who is dissatisfied with the decision of the review made by the registrar may apply a review

before the Judge. This right may only be exercised if one of the parties to the proceedings had requested the Registrar to state his reasons for his decision under Order 59 r.35(3). The application to the Judge has to be made at any time within 14 days or such longer time as the Registrar at the time he signs the certificate may allow, by summons and shall be heard in chambers, unless the judge orders otherwise. The parties are also restricted to the grounds of objection raised before the Registrar and no ground which was not raised in the review by the Registrar shall be raised before the judge. However, the Judge may make such order as the circumstances require and in particular may make such order for the Registrar certificate to be amended or order the item to be remitted to the Registrar for taxation.

[8] Interests on Costs

Costs to be taxed carries an interest from the date of the entry of judgment and not from the date of taxation.

See: *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276.

34

Security for Costs

Nelson W. Angang

Chapter 34

Security for Costs

[1] Introduction

(a) Order 23 r. 1 of the RHC deals with the order for the security of costs. The exercise of the power to order security for costs is a balancing process, requiring the doing of justice between parties. The Court must have a concern to achieve a balance between ensuring that adequate and fair protection is provided to the Defendant, and avoiding injustice to an impecunious plaintiff by unnecessarily shutting it out or prejudicing it in the conduct of the proceedings.

See: *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744.

(b) The relevant factor to be taken into account in exercising the discretion cannot be stated exhaustively and will vary from case to case.

[2] Procedure

(a) The application for security for costs is to be made by summons in chambers supported by an affidavit setting out the grounds why the

application is made.

(b) The discretion must be exercised with regard to all the circumstances of each case as the Court thinks just to do so. The order for security of costs if made should be given in such manner, at such time, and on such terms.

See: Order 23 r. 2 of the RHC.

[3] Discretion of the court

(a) The power to order security for costs is a discretionary power which is exercised according to the circumstances of the case. The Defendant has a legal burden to justify to the court as to why they are entitled to security for costs as it is not for the Plaintiff to satisfy the court as to why they should not furnish security for costs.

(b) Under the law it is accepted that security for costs cannot be ordered as of right from a foreign Plaintiffs but only if the Court thinks it is just to order depending on the circumstances of the case.

See: *Kasturi Palm Products v Palmex Industries Sdn. Bhd.* [1986] 2 MLJ 310;
Luminous Crossroads Sdn. Bhd. v Lim Kong Huat Construction [2001] 4 AMR 4861.

[4] Ordinarily Resident

(a) It has been held that the definition of ordinarily resident also covers foreigners who set up homes in the country who must have a settle purpose of residing here. In *Rusdi Kirana v Cheah Khoon Tee* [1998] 7 MLJ 329 the Court held—

> "It is possible for a person to have a home in, say the United Kingdom, a home in Australia, and a home in Singapore. To my mind, when that person takes time off to spend time and stay in any of that country, he is then ordinarily resident in that country. Similarly, the plaintiff in this case have set up a home in Kuala Lumpur and are doing all things that a family would do when it has set up its home in Kuala Lumpur. In that sense, the Plaintiffs are ordinarily resident in Malaysia and not out of the jurisdiction. They are no doubt Filipino citizens but they are ordinarily resident in Malaysia with the consent and permission of the Government of Malaysia and the immigration department. The Plaintiffs are compelled by the exigencies of having to file proceedings in this country and to vindicate and

exculpate themselves and for these purposes they have to be ordinarily resident here, in other words there must be a settled purpose.".

(b) It is accepted that security for costs cannot be ordered as of right from a foreign Plaintiffs but only if the Court thinks it is just to order so depending on the circumstances of the case.

See: *Kasturi Palm Products v Palmex Industries Sdn. Bhd.* [1986] 2 MLJ 310.

(c) In *Raju Raram Pillai (T/A Dhanveer Enterprise) v MMC Power Sdn. Bhd. & Anor* [2006] 6 MLJ 551 the Court held—

> "The Plaintiff can safely be described to be ordinarily resident out of jurisdiction. The Plaintiff had no assets in Malaysia. It is purely a matter of discretion for the Court to insist that the foreign Plaintiff be ordered to give security for costs because it is the only just thing to do. Having regard to the circumstances of the case, the Plaintiff should be ordered to pay for security for costs. The scales of justice tilted in favour of the Defendants.".

[5] No assets within the Jurisdiction

(a) In *Chellew v Bown* [1923] 2 KB 844 CA it was held that the fact the Plaintiff had innocently misstated his address is no ground for making an order for security for costs. However if there is reason to believe that the Plaintiff resides out of jurisdiction the Court may and not must order security for costs. The Court will be reluctant to order security for costs if the Plaintiff can show that he possess tangible assets within the jurisdiction of the Court. When the Plaintiff fails to furnish security for costs after an order has been made by the Court, the Court generally will stay proceedings until the Plaintiff furnishes security for costs or in the alternative may dismiss his action.

(b) In *Shaik Ali v Shaik Mohamad* [1963] MLJ 300, the Court held that the fact that the Plaintiff is not residing within the jurisdiction is only one factor for consideration when deciding whether to order for security for costs. When coupled with a fact that the Plaintiff has no property or assets in the country, it is more likely that security will be ordered.

(c) It is not sufficient for the Plaintiff to claim that the Defendant has "no known" assets within jurisdiction as compared to no asset within the jurisdiction. The latter should be the proper test and for the Court to consider. The Court could not assume that the Defendant has no assets within the jurisdiction without any such evidence adduced as the burden of proof as to the existence or none existence of a

particular fact lies on the party who alleges it.

See: Section 103 of the Evidence Act 1950.

[6] The Plaintiff does not reside at the address as appeared in the Writ

The Plaintiff must be given an opppurtunity to explain for his failure to give his address or if the address given in the writ is not the correct one. The onus is on the Plaintiff to show to the Court as to why he has not provide an address or provides a wrong address and if he has satisfied to the Court that it was made innocently and without intention to deceive he should not be made to pay security for costs for his mistake.

See: Order 23 r. 1(2) of the RHC.

[7] Merits of the main action

(a) In deciding whether or not to order for security of costs, the Court should not try to examine the merits of the case concern as this would be premature, unless it can be clearly demonstrate one way or another that there is a high degree of probability of success.

See: *Raju Raram Pillai (T/A Dhanveer Enterprise) v MMC Power Sdn. Bhd. & Anor* [2006] 6 MLJ 55.

(b) Further in *Faridah Begum Bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404 it was held that the Court should avoid any attemt to make a detailed investigation on the merits of the case and should only do so in plain and obvious case. If the case were complex and the final outcome is far from clear the Court should not go into the merits of the case to decide whether or not security for costs should be imposed.

[8] Whether it would stifle the Plaintiff's claim

(a) Where the effect of an order for security would be to stifle or end the Plaintiff's claim, this is an important consideration to be weighed particularly in light of the poverty rule. In *Thune v London Properties Ltd* [1990] 1 All ER 972 where the Court of Appeal held that where a Plaintiff is impecunious and an order for security for costs would stifle his claim, that may well be a costs under this rule, his case must fall under rule (1) of the RHC. Even then such a Plaintiff is to be ordered to give security for costs only 'if, having regard to all the circumstances

of the case, the Court thinks it just to do so*'*.

(b) The Court must be cautious in ordering the amount for security for costs as not to be seen as suppressing a genuine claim by a plaintiff.

[9] Amount of the Security for Costs

(a) The power that lays for the Court is a discretionary one. The Court is bound to have regard to all the circumstances of the case in the exercise of its discretion. On the amount to be given as security for costs, the Court must thread with caution so that the amount that was to be paid into Court are not too high then it ought to be for it would seem that the Plaintiff is being punished for costs even before the case is set down for trial. The Court will therefore require evidence by which it might estimate the Defendant's probable recoverable costs.

(b) It would be helpful indeed if the Court is informed as to the estimated costs incurred by providing a skeleton bill of costs.

See: *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* [1974] 3 All ER 715.

(c) In *T Sloyan* the Court held that it would be 'greatly assisted', this indicates it is not a must for a Defendant to furnish such a skeleton bill of costs however it would indeed act as a guideline for the Court to reach a reasonable amount for the order of security for costs of a particular action.

[10] Sample Order

Example of an Order for Security of costs is as follows:

"The Plaintiff is to provide security for the Defendant's costs by paying into Court the sum of RM 88,888.88 or by otherwise providing security for that amount in a manner satisfactorily to the Defendant. Until that security is provided, there will be a stay of the proceedings. The security is to be provided on or before the 8.8.2008, on which date if the Plaintiff fails to do so, an order for dismissal of the proceedings shall be entered forthwith.".

35

Execution Proceeding

Musyiri Bin Peet
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Jagjit Singh a/l Bant Singh

Chapter 35
Execution Proceedings

[1] Introduction

(a) Execution means the process for enforcing or giving effect to the judgment of the court and this process is commonly referred to as execution proceedings. It is completed when the judgment creditor gets the money or other thing awarded to him by the judgment.

(b) The common modes of enforcing a judgment are as follows:

(i) Writ of seizure and sale;
(ii) Prohibitory Order;
(iii) Garnishee proceedings;
(iv) Writ of possession;

(v) Charging order;
(vi) Appointment of receiver;
(vii) Order of committal;
(viii) Writ of Distress;
(ix) Judgment Debtor Summons.

[2] Time limit for Execution

(a) Under section 6(3) of the Limitation Act 1953 an action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt be recovered after the expiration of one year from the date on which the cause of action accrued. Provisions on time limit are also found in Part V of the Schedule to the Limitation Ordinance (Cap 72) (Sabah) and Part V of the Schedule to the Limitation Ordinance (Cap 49) (Sarawak).

See: Section 6(3) of the Limitation Act 1953;
Part V of the Schedule to the Limitation Ordinance (Cap 72) (Sabah);
Part V of the Schedule to the Limitation Ordinance (Cap 49) (Sarawak);
Daud v Ibrahim [1961] 27 MLJ 43.

(b) If more than 6 years have passed from date of judgment but before the expiry of 12 years then leave of court is required for the writs of execution.

See: Order 31 r. 2 of the SCR; Order 46 r. 2(1)(a) of the RHC;
Tio Chee Hing v Chung Khiaw Bank [1981] 1 MLJ 227;
Affin Bank Berhad v Wan Abdul Rahman Bin Wan Ibrahim [2003] 2 AMR 1;
Tham Kok Onn v Perwira Habib Bank Malaysia [2005] 3 MLJ 338.

[3] Modes of execution

(a) Writ of Seizure and Sale

(i) The writ of seizure and sale can be used against movable as well as immovable property. The Plaintiff or Execution Creditor is only entitled to seize Defendant's assets. He is prohibited from subjecting any property that belongs to other persons to a writ of seizure and sale. Leave of court ought to be obtained before this writ can be issued after the expiry of time of six years to enforce the judgment. The basic

procedure is that Court Bailiff (the Sheriff) will seize the movable items belonging to the Defendant at the instance of the judgment creditor and a public auction will be held. The proceeds will be used to satisfy the judgment sum.

See: Order 46 and 47 of the RHC; Order 32 of the SCR.

(ii) Order 31 r. 1 of the SCR gives court the power to stay execution by writ of seizure and sale**,** either absolutely or subject to conditions in relation to judgment for payment of money.

See: *Che Wan Development Sdn. Bhd. v Co-operative Central Bank Bhd* [1989] 3 MLJ 40.

(iii) Power to stay is discretionary and must be exercised on correct principles. Application must be made promptly. It is the duty to make sure that the appeal does not become nugatory

See: *Ajaib Singh v Jeffery Fernandez* [1971] 1 MLJ 139;
Wilson v Church (No.2) [1879] 12 Ch D 454;
Re Kong Thai Sawmill (Miri) Sdn. Bhd. [1976] 1 MLJ 131;
Datuk Haji Kadir Mohd Mastan [1995] 2 MLJ 105.

(iv) Any subsequent dealings with seized property are void. This is for the protection against the defrauding creditors. Purchase of the property with the intention of defeating the claims of the creditors is fraudulent. This is so even though the full purchase price has been paid.

See: Order 32 r. 6 of the SCR;
Chong Sz Wun v RMPCN Andiappa Chetty & ors [1908] 1 FMSLR 8.

(b) Prohibitory Order

(i) A prohibitory order is almost always used in conjunction with a Writ of Seizure and Sale in respect of immovable property. The purpose of applying for a prohibitory order is to prevent a Judgment Debtor from dealing with his land or other immovable property whilst other execution proceedings such as Writ of Seizure and Sale are carried out. Otherwise, the process of execution by way of writ of seizure and sale would be frustrated before completion of the auction sale.

See: Order 30 of the SCR; Order 47 r. 6 and 7 of the RHC;
AirMartech Corporation (M) Sdn. Bhd. v Equaltra (M) Sdn. Bhd. [2003] 1 CLJ 191.

(ii) Where execution has been ordered by seizure and sale of land or any interest therein, the Court may, upon production of an abstract of title or other sufficient evidence of the title or interest of the judgment debtor, issue *ex parte* a prohibitory order, which may be in Form 80A prohibiting the judgment debtor from transferring, charging or leasing the land or interest th erein, or creating any lien or equitable charge thereover by deposit of the issue document of title. The judgment debtor must either be a registered proprietor of the land in question or must have an interest in his own right.

See: Order 30 r. 13 of the SCR.

(iii) A copy of the prohibitory order shall be served on the judgment debtor, but failure shall not effect the validity, if reasonable efforts have been made to effect service. The execution creditor may present the prohibitory order to the appropriate registering authority for registration in the appropriate register of titles, and the registering authority shall register the prohibitory order. Upon registration, the land or interest therein shall be deemed to have been seized. A prohibitory order acts as an injunction to prohibit the any dealings or any dealings specified therein from being done by the Judgment Debtor without leave of court as prescribed under section 336 of the National Land Code.

See: Order 30 r. 13(2) of the SCR.

(iv) A Prohibitory Order is valid for 6 months as provided in section 338(1) of the National Land Code. The period lapses one day after the last day. The last day will be the day before the anniversary day of the prohibitory order. On the expiry of the prohibitory order, the court which issued the prohibitory order has a discretion to extend it for a further period not exceeding 6 months. The discretion to extend the prohibitory order will be exercised to prevent an injustice. The order issued by the court to extend the prohibitory order must be presented for registration before the expiry of the prohibitory order itself, otherwise, the extension order will be null and void.

See: Order 30 r. 13(5) of the SCR;
Mook Meng Sum v Lo Aa Kau & Ors [2002] 2 MLJ 193;
Lim Lian Hoe v Tan Meng San [1961] 27 MLJ 289;
Ban Hin Lee Credit Sdn. Bhd. v Utama Computer Centre Sdn. Bhd. & Ors [1991] 2 MLJ 327.

(c) Garnishee proceedings

(i) A garnishee order is an execution mode to freeze and recover monies which are accruing to the defendant which are in the hands of third parties. The garnishee is a third party who is indebted to the judgment debtor. In other words, the Judgment Creditor is applying to the

Court for an order that the third Party pay that money directly to the Judgment Creditor. Under Order 49(1) of the RHC, the Court may, subject to provisions of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee. The usual garnishees are financial institutions who hold monies belonging to the judgment debtor.

(ii) The garnishment proceedings involve a two stage garnishee procedure, that is, a garnishee nisi order (the show cause notice) and the order absolute. The judgment creditor will, in the first instance, apply for a garnishee notice to be issued by the court for the garnishee to show cause why the monies held by the garnishee should not be attached to satisfy the judgment sum. The application must be made *ex parte* vide Summons In Chambers together with an Affidavit In Support in Form 99 of the RHC as provided for under Order 49 r. 2. If the Judge or Registrar is satisfied that the requirements have been fulfilled, he will grant a Garnishee Order to Show Cause as per Form 98 of the RHC. Once the notice is served on the garnishee, the debt is charged in that the garnishee cannot pay out the money to the judgment debtor. The garnishee may appear in court and dispute that the debt is due. If the garnishee does not dispute or fails to attend, the court may make an order making the garnishee order absolute. The garnishee is then obliged to comply with this order by paying the money of the judgment debtor to the judgment creditor.

See: Order 49 of the RHC; Order 33 of the SCR.

(iii) The statutory provisions which govern attachment of debts are as follows:

- a notice of claim under a court judgment is needed under section 35(1) Bank Simpanan Nasional Act 1974 (Act 146);
- for wages of federal/state officers written consent by Minister of Finance/Chief Minister is required under section 3(1)(f)(ii) Debtors Act 1957 (Act 256);
- EPF monies cannot be attached as in section 51 of the Employees Provident Fund Act 1991 (Act 452);
- wages of seaman/apprentice not attachable under section 142(1)(i) Merchant Shipping Ordinance 1952;
- payments under Act not attachable under section 11 Workmen's Compensation Act 1952 (Act 273).

(iv) Money payable by the government to another may be recoverable pursuant to section 35 of the Government Proceedings Act 1956 (Act 359). The prior consent of the government is not required before the filing of garnishee proceedings, in other words he may file the garnishee action, and later seek to obtain the consent of the government.

See: *Shukeriah bt Abbas v Ketua Setiausaha Perbendaharaan Kementerian Kewangan Malaysia & Ors* [2000] 4 AMR 3936.

(v) The judgment creditor is not entitled to a garnishee order against the garnishee where the garnishee application is made after the death judgment debtor as the money must be held on behalf of the estate of the judgment debtor.

See: *Hajee Ameer Bin Hajee Mohd Salleh Pitalolo v Tan Keng Neo* [1935] MLJ 143.

(vi) Despite the existence of a mareva injunction against a judgment debtor restraining him from disposing or dealing with the moneys due to him by a garnishee, a judgment creditor, who has obtained judgment for the payment of money due to him by the judgment debtor, is entitled to apply for a garnishee order absolute to attach any money owed by the garnishee to the judgment debtor in order to satisfy the judgment debt or part thereof. The mareva injunction merely restrained the judgment debtor from disposing of or dealing with any moneys received or owing to him by the garnishee. It does not prevent the judgment creditor from resorting to Order 33 to obtain a garnishee order absolute against the garnishee because the judgment creditor is not bound by the injunction which is a remedy in equity and acts only in *personam* against the judgment debtor.

See: *Labtec Sdn. Bhd. v Resilient Constructions Sdn. Bhd.* [1992] 2 MLJ 853.

(vii) Although the court has a discretionary power whether to make an order absolute or not, it would appears that once an order absolute is made, the court has no jurisdiction to set aside the order made. To set aside a garnishee notice or a garnishee summons should require cogent evidence that such notice or summons was issued *bona fide* and that the garnishee order had abused the court's process.

See: *Behn Meyer & Co (M) Sdn. Bhd. v Agropharm Sdn. Bhd. & Ors (Eskos Printing House Sdn. Bhd. & Ors, Garnishees)* [1988] 2 MLJ 636;
Wearne Brothers Malaysia Sdn. Bhd. v Gurdave Kaur & Anor (Baharuddin, Bernatt, Tan & Ker, Garnishees) [1982] 1 MLJ 23.

(viii) The court has a wide discretion as to the costs incurred in the garnishee proceeding which is unsuccessful, and may order the judgment debtor to pay the costs of both judgment creditor and garnishee, even if the judgment debtor did not attend the garnishee proceedings.

See: *T Wright & Son (Hull) v Westoby (Saffman & Co, Garnishee)* [1972] 3 All ER 1078.

(d) Writ of possession

(i) A writ of possession is a suitable mode of execution where the judgment debtor or other parties are in possession of a property that had been ordered to be given to the plaintiff. This writ permits the eviction occupants of the said property. A writ of possession may not be issued without leave of court. It is goverened by the Order 45 of the RHC or Order 30 of the SCR and the Specific Relief Act 1950.

See: Order 45 r. 3 of the RHC; Order 30 r, 3 of the SCR; Section 7 of the Specific Relief Act 1950.

(ii) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the immovable property has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.

See: Order 45 r. 3 of the RHC; Order 30 r. 3 of the SCR.

(e) Charging order

(i) This order is directed against securities to which the debtor is beneficially entitled and includes:

- shares, debentures and debenture stock;
- any government stock, and any stock of any company registered under any written law, including any such stock standing in the name of the Accountant-General;
- any dividend of or interest payable on such stock.

(ii) Order 50 of the RHC governs this mode of execution. The charging proceeding is a two stage procedure. At the first instance, a show cause notice would be issued specifying the time and place for further consideration of the matter. A charge would be imposed on the stock of the debtor until that time. This will prevent any dealing with said stock. Until the order has been discharged, the judgment debtor is not allowed to dispose the stock and any disposition would be invalid

against the judgment creditor.

See: Order 50 r. 2(2) of the RHC.

(iii) At the second stage, the court will consider whether sufficient cause has been shown by the judgment debtor to prevent the charge order from being made absolute. Persons other than the debtor who have an interest in the stock may also apply to discharge the order. If the order is made absolute, the judgment creditor has a right to enforce it in his favour but it must be done within six months from the date of the order to show cause.

See: Order 50 r. 6 of the RHC.

(f) Appointment of receiver

(i) Sometimes the judgment debtor is not in possession of any assets but would be receiving monies due to him in the future example by forced sale of his immovable property or future receipts of rental income. If a receiver is appointed, he would be able to receive it for the benefit of the judgment creditor. For example, under Order 47 the judgment creditor may apply to a Judge for the appointment of a receiver of the rents and profits of the property of the debtor or as a receiver and manager of the immovable property. The judge may appoint a receiver and give directions in respect of the rents or the immovable property.

See: Order 47 r. 7 of the RHC.

(ii) Order 51 r. 1 of the RHC provides for the execution of judgment, to appoint a receiver, to receive the income of the judgment debtor's property and pay it to the judgment creditor to satisfy the judgment sum whereas under Order 51 r. 2, the registrar shall have power to make an order for the appointment of a receiver by way of equitable execution and to grant an injunction if the injunction is ancillary or incidental to such an order.

See: Order 51 of the RHC.

(g) Order of committal

(i) The order of committal is actually penal in nature. This order is sought if the judgment debtor refuses to obey a court order to do or abstain from doing an act. The disobedience is tantamount to contempt. The power of the High Court to punish for contempt of Court may be exercised by an order of committal in Form 110 (see Order 52 r. 1 of the RHC). Pursuant to Order 52 r. 2 of the RHC, an application for such

leave must be made *ex parte* to the Court, except in vacation when it may be made to a Judge in Chambers, and must be 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.

(ii) After the leave has been granted to apply for an order for committal, the application for the order must be made by motion to the Court and, unless the Court or Judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing. The motion must be filed within 14 days from the grant of leave failing which the leave shall lapse.

See: Order 45 r. 5 of the RHC.

(iii) The lower courts power to punish for contempt is stated in item 9 of the Third Schedule to the Subordinate Courts Act 1948 which reads:

> "Power to commit to prison for such period, not exceeding 6 months… Any person who willfully disobeys or fails to comply with any order of the court or who… with a view of defeating the ends of justice or preventing or delaying the satisfaction of a judgment or order passed, or which may be passed against him, flees or attempts to flee jurisdiction, or disposes or attempts to dispose of any property, or evades or attempts to evades the service on him…"

(iv) The rationale for such powers to punish for contempt is that if such power is absent, then the public will lose all the confidence in the authority of the judicial arm of the state leading to anarchy and disorder. The purpose is not to vindicate the dignity of the individual judge or other judicial officer of the court or even of the court itself but to prevent an undue influence with the administration of justice in the public interest.

See: *MBF Holdings Bhd & Anor v Houng Hai Kong & Ors* (1993) 2 MLJ 516;
Re HE Kingdon v SC Goho (1948) MLJ 17.

(v) The standard of proof is that of beyond reasonable doubt.

See: *Wee Choo Keong v MBF Holdings Bhd* [1995] 3 MLJ 549.

(vi) The applicant for a committal order must prove beyond reasonable doubt that:

- the procedural requirements have been complied with;

- the respondents are guilty of contempt as alleged.

See: *Sivalingam a/l S Ponniah & Ors v Balakrishnan a/l S Ponniah & Ors* (2003) 3 MLJ 353.

(vii) Criticism of the courts decisions in the course of the exercise of right of free speech, even if it is inaccurate is not a contempt of court.

See: *Re Run Run Shaw & Anor* (1949) MLJ Supp 16.

(viii) Conduct which is odious and wicked or calculated to demean the dignity and standing of the court is contempt of court. Acts and words used which tends to attempt to mislead the court or any attempt to disrupt or interrupt court proceedings is contempt. Similarly concealment of a document by counsel may amount to contempt.

See: *Dr Leela Ratos & Ors v Anthony Ratos (No.3)*(1991)1 CLJ Supp 115;
Cheah Cheng Hoc v PP (1986) 1 MLJ 299;
*Attorney General * Ors v Arthur Lee Meng Kuang* [1987] 1 MLJ 206.

(h) Distress Proceedings

(i) The right of the landlord to distrain for arrears of rent is governed by the provisions of the Distress Act 1951(Act 255) and Order 38 of the SCR. A landlord or his agent duly authorised in writing may apply *ex parte* to a judge or Registrar for an order for the issue of a warrant, to be called a warrant of distress, for the recovery of land due or for a period not exceeding twelve completed months of the tenancy immediately proceeding of the date of the application and the judge or Registrar may make such order accordingly.

See: Order 38 r. 1of the SCR;
Section 5(1) of the Distress Act 1951.

(ii) "Landlord" is defined as "the lessor or sub-lessor of any premises, under any lease, sub-lease, or agreement of tenancy, and includes any person claiming to be entitled in any capacity to receive rents due under any such lease or agreement'. "Tenant' is defined as 'any person from whom a landlord claims rent to be due under any lease, sub-lease or agreement'. When a co-owner is neither the landlord nor the landlord's agent within the contemplation of section 5 of the Distress Act 1951, he does not have a right to distrain. The registered proprietors of the demised premises, not being the landlords, are not entitled to apply for a warrant of distress against the tenants.

See: Section 2 of the Distress Act 1951;
Goh Choo Kui & Ors v Star Coach Builders Sdn. Bhd. [1995] 2 AMR 1720;
J Selvam & Anor v S Mehta & Anor [1981] 2 MLJ 45;
Fatimah v Moideen Kutty [1968] 1 MLJ 3;
Kandasami v Mohamed Mustafa [1983] 2 MLJ 85.

(iii) An application for distress must be made *ex parte* by originating application supported by affidavit (Form 118). Affidavit affirmed by either landlord or his duly authorised agent. Where the application is made by the landlord's authorised agent, his written authority must be produced (Form 119). Form 119 is affirmed by the landlord.

See: Order 38 r. 2 of the SCR.

(iv) The applicant must satisfy that the relation of landlord and tenant must exist, both when the rent becomes due and when the distress is levied, and the rent must be in arrears.

See: *Perbadanan Pembangunan Bandar v Syabas Holdings Sdn. Bhd.* [1990] 2 MLJ 116.

(v) Arrears of rent may be distrained after the determination of the tenancy provided either the tenant is still in occupation of the premises or the goods of the tenant are still on the premises. Distress is only permitted for goods found on the premises.

See: Section 5(3) of the Distress Act 1951;
Hiap Lee (Cheong Leong & Sons) Brickmakers Sdn. Bhd. v Unicla Industries Sdn. Bhd. (and Raja Arshad Uda & Anor, Claimants) [1988] 1 CLJ 512.

(vi) Whether double rental is claimable is debatable. In *Medifiche Sdn. Bhd. v Persatuan Teknologi Malaysia* [1993] 2 CLJ 345 and *May Properties Sdn. Bhd. v Kong Phew Keng* [1996] 4 MLJ 39 it was held that double rent in is recoverable by distress up to the time the tenants quit by virtue of the statutory option given to landlord under section 28(4)(a) of the Civil Law Act 1956. In *Soong Ah Chow & Anor v Lai Kok Cheng* [1986] 1 MLJ 42 the court held that the recovery of double rental under section 28(4)(a) is not as of right of the Landlord but a matter of court discretion. Court may determine whether to grant and how much to grant. In *Bah Heng Hong Sdn. Bhd. v The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 3 CLJ 1421 it was held that double rent, which is just a penal sum does not fall under the classification of rent for distress process.

See: *Medifiche Sdn. Bhd. v Persatuan Teknologi Malaysia* [1993] 2 CLJ 345;

May Properties Sdn. Bhd. v Kong Phew Keng [1996] 4 MLJ 39;
Soong Ah Chow & Anor v Lai Kok Cheng [1986] 1 MLJ 42;
Bah Heng Hong Sdn. Bhd. v The Provisional Liquidator Choong Shin Cheong & Anor [1992] 3 CLJ 1421.

(vii) A warrant of distress need not be served on the tenant otherwise it loses its element of surprise. The entire distress proceedings are carried out *ex parte* and the writ of distress is addressed to the bailiff for execution.

See: Order 38 r 3 of the SCR.

(viii) A person who proposes to intervene in the distress proceedings must show that he has an interest directly related to the subject matter of distress action before he is entitled to intervene. A mere commercial interest is inadequate.

See: *Lee Meow Lim v Lee Meow Nyin t/a Cheong Fatt Merchant (Nabisco Brands (M) Sdn. Bhd., Intervener)* [1990] 3 MLJ 123.

(ix) After seizing any property under a warrant of distress, the bailiff shall make an inventory and an approximate valuation thereof, and shall give to the tenant notice of the seizure with a copy of the inventory and valuation attached, informing him of the amount due under the warrant and that the property seized will be sold at a time and place to be named in the notice (not being six days from the date thereof), unless he pays the amount due within five days from the date thereof, or obtains an order restraining such sale. If the tenant is not on the premises, such notice may be given to any person appearing to be in occupation thereof, or, if there is no such person, by posting it in some conspicuous place.

See: S 9(1) and (2) of the Distress Act 1951.

(x) An application under section 10 or 16 of the Act for the discharge or suspension of the writ or for the release of any part of the property distrained shall be made within seven days of the seizure supported by affidavit stating the grounds on which the application is made. Notice of the application must be served on the landlord or his agent, as the case may be. Delay in asserting ownership prevents a claimant from proceeding under section 10 of the Act from claiming ownership of distrained goods.

See: Order 38 r. 5 of the SCR;
Hong Leong Finance Bhd v Datang-Judi Industry Sdn.

Bhd. [1986] 1 MLJ 376.

(xi) The principle of reputed ownership is provided in section 12(a) of the Distress Act 1951. The test for reputed ownership is whether in all circumstances, a reasonable man would necessarily infer that the tenant was the owner of the distrained articles, and that this inference is one which must in the circumstances arise.

See: Section 12(a) of the Distress Act 1951;
Plaza Singapura (Pte) Ltd v Cosdel (S) Pte Ltd & Anor [1990] 3 MLJ 199.

(xii) Where rent is due, a claim in distress for more than what is lawfully due also known as excessive distress does not vitiate the distress. The tenant's remedy is in damages if the landlord has in fact distrained for more than is due.

See: *Medifiche Sdn Bhd v Persatuan Teknologi Malaysia* [1993] 2 CLJ 345;
MMK Meerah v Tahar bin Haji Hassan [1933] MLJ 76;
Indah Desa Saujana Corp Sdn. Bhd. v James Foong Cheng Yuen & Anor [2006] 1 MLJ 464 (Money need not be paid directly to the Judicial Commissioner.)

(i) Judgment Debtor Summons

(i) It is useful to know what the assets the judgment debtor owns before deciding on the mode of execution. For this purpose under Order 48, a judgment debtor may be examined on oath as to his liability and assets. If the debtor is company, the directors may be examined as well.

See: Order 48 of the RHC.

(ii) Failure on the part of the debtor to appear for the examination may result in an order for arrest being issued.

See: Section 4 of the Debtors Act 1957.

(iii) The judgment debtor or officers of the judgment debtor company can be ordered to produce all books, papers or documents in his possession or power relating to properties that are owned by the debtor or the debtor company. If the court is satisfied that the debtor has the means to pay instalment payments to satisfy the debt, the court may make such an order. Failure to comply with the order may result in imprisonment if the debtor cannot give a good reason to explain his inability to pay the instalments. This is because the Debtors Act 1957 aims at punishing "a dishonest use for other purposes of funds which

a man has or has had available towards paying what he has been ordered to pay."

See: Section 4 and 8 of the Debtors Act 1957;
Sathapan v Lim Chooi Hock & Anor [1962] 1LNS 183.

[4] Court Practices

(a) Writ of Seizure and Sale, Writ of Possession and Writ of Delivery

(i) Issuance of Writs of Seizure and Sale, Writs of Possession and Writs of Delivery involves administrative action and are issued on the same day the request for the writ is filed provided the necessary requirements under Order 31 r. 4 are complied. After a writ is issued and the applicant has deposited the required sum of money as costs of execution the court bailiff conducts the execution within three days.

(ii) Where leave is required under Order 31 r. 2 before the issuance of a writ, an application for leave filed under Order 31 r. 2 and 3, which is an *ex parte* application, it is fixed for hearing as follows:

- if filed before 10.30 am - the same day at 2.30 p.m.; and
- if filed after 10.30 am - the next working day at 2.30 p.m.

(b) Writ of Distress

(i) Application for a warrant of distress is an *ex parte* application and as such it is fixed for hearing as follows:

- if filed before 10.30 am - the same day at 2.30 p.m.;
- if filed after 10.30 am - the next working day at 2.30 p.m.

(ii) Applicants are advised to come prepared with their draft order and the judicial officer may approve it immediately after an order is granted. This would enable the fair order to be filed and extracted the following day. After the applicant has deposited the prescribed sum of money to defray the costs of execution an appointment may be made by the court bailiff to execute the distress the next day. In short a distress application may be executed within 3 days from the date an application for distress is filed.

(c) Garnishee Order and Prohibitory Order

Since the application for a garnishee order or a prohibitory order involves *ex parte* applications the application is heard and disposed off on the same day, in the case where an application is filed before

10.30 a.m., or the following working day, where the application is filed after 10.30 a.m.

(d) Judgment Debtor Summons

(i) A request for a Judgment Debtor Summons (JDS) is made in Form 108 by an applicant or his solicitor to enable the applicant to enforce a judgment or order for the payment of money, whether by installments or otherwise.

(ii) Since a JDS is an *inter parte* matter and the JDS must be served personally on the person summoned at least seven days before the day fixed for the hearing courts fix the mention date of the JDS to a date of one month but does not exceed six weeks.

[5] Analogous proceedings

There are two proceedings in the High Court which are analogous to execution proceedings namely bankruptcy and winding up. There had been some debate whether these proceedings qualify as execution proceedings. This issue was firmly settled by the Federal Court which ruled that a bankruptcy proceeding is not "a writ of execution" within the meaning of Order 46 r. 2 of the RHC. More is discussed on bankruptcy and winding up in Chapters 38 and 39 respectively.

See: *Perwira Affin Bank Berhad v Lim Ah Hee* (2004) 2 CLJ 787.

36

Enforcement of Foreign Judgement

Timothy Finlayson Joel

Chapter 36

Enforcement of Foreign Judgement

[1] Introduction

(a) Once a judgment is obtained, its enforcement become the next course of action. Different procedures apply when it is to be executed locally or outside the court's original jurisdiction.

(b) In respect of enforcement outside the jurisdiction, the proceedings would be governed by the Reciprocal Enforcement of Judgments Act 1958 (REJA), which is modelled upon the United Kingdom Foreign Judgments (Reciprocal Enforcement) Act 1933.

(c) The procedure is based on principles of reciprocity, whereby the courts in reciprocating countries would recognize the final judgments of the superior court of another country, and give effects to them just as they would expect their judgments would be given due recognition in the other jurisdiction.

(d) For non listed countries in the First Schedule, the alternative to the REJA, is to enforce judgment by applying the common law principles.

(e) The advantage of register scheme over common law principles was that it was considered fast and simple and less costly. What needed to be fulfilled were the requirements under the REJA as can be seen as follows.

[2] Pre Conditions for Enforcement

(a) If a foreign judgment is to be enforced in Malaysia, it is pertinent that the following questions be asked:

(i) Is the country listed under the First Schedule of REJA? (the schedule is self-explanatory on this);

(ii) Is the judgment that of a superior court?

The definition of superior court is reflected by the courts in the First Schedule. The judgment is that of superior court, "other than a judgment of such a court given on appeal from a court which is not a superior court" [section 3(2)]. By virtue of section 2 of REJA, it means both judgment and order in civil and criminal proceedings involving payment of money as compensation to injured party, and except for countries outside the Commonwealth, award given in arbitration proceedings ,where it becomes enforceable in the same manner as a judgment by the court in the place where it was given. Penalty in taxes or fines are not judgments for this purpose and it must be given after the reciprocating country is added to the First Schedule.

See: *SA Consortium General Textiles v Sun and Sand Agencies Ltd* [1978]1QB 27.

(iii) Is it a final judgment of a superior court?

A judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it,

or that it may still be subject to appeal, in the courts of the country of the original court. In *Santong Trading Pte Ltd v HJ Industries Sdn. Bhd.* [1996] 3 CLJ 95*,* the Court held that 'final' is intended to mean and should be construed as meaning " final in the sense of admitting no further disputation." A summary judgment was also held to be judgment within the Act in *Bank of New Zealand v Wong Kee Tat* [1990] 2 MLJ 435*.*

(iv) Is the one who enforces the judgment a judgment creditor within the meaning in section 2 of REJA?

(v) Is the judgment contrary to public policy?

In *Banque Nasionale De Paris v. Wuan Swee May & Anor* [2000] 4 CLJ 387, the Defendant obtained loan from the Plaintiff, a Singapore based bank. After full trial, the Plaintiff sought to enforce judgment in Malaysia. The Defendant applied to set aside the registration of the judgment on the ground firstly for breach of the BAFIA rules, that is, granting loan facilities without licence and secondly for breach of the Exchange Control Act 1953 for soliciting and offering Defendant to borrow foreign currency from a person outside Malaysia. The court held the transaction was not illegal, hence the argument that it was against public policy failed. Likewise, in the case of *The Aspinall Curzon Ltd v Khoo Teng Hock* [1991] 1 LNS 6, involving a judgment obtained by a licence casino in High Court of England, it was not held as against public policy when it was sought to be registered in Kuala Lumpur High Court.

(vi) Is notice of registration of judgment served?

Under Order 67 r. 7 of the RHC, it is stated that the notice of registration of judgment must be served personally on the judgment debtor unless otherwise directed by the court. Service of such notice out of jurisdiction is permissible without leave of the court, and Order 11 r. 5, 6 and 8 shall apply as they apply in relation to a writ.

(b) Thus, questions (a) to (f) are important considerations under the Act before execution of judgment is to issue upon expiration of period allowed for setting aside the registration of judgment by the judgment debtor, or after the disposal of the appeal matter in relation thereto, if any.

[3] Registration of Foreign Judgment

(a) The initial step in the process of enforcing judgment is by registration. The procedure is contained in Order 67 r. 7 of the RHC, namely, by way of originating summons, not later than 6 years from the date of judgment, or if there is an appeal from the judgment, after the date of last judgment in the appeal proceedings.

(b) In support of the application, the affidavit must contain evidence, *inter alia*—

(i) names, trade or business, and usual or last known address of the judgment creditor and judgment debtor;

(ii) information and belief that the judgment creditor was entitled to judgment;

(iii) the judgment sum being not satisfied;

(iv) that judgment does not fall within any of the case in which judgment may not be ordered to be registered;

(v) that at the date of application, the judgment could be enforced by execution in the country of the original court, and if registered, it would not be liable to be set aside under section 5 of the Act;

(vi) the rate of interest due,and conversion to Malaysian currency on the judgment sum which is sought to be registered.

[4] Judgments that not registerable

Judgments which at the time of registration, had been fully satisfied or incapable of being enforced in the country of the original court.

See: section 4 (1) of the REJA.

[5] Effect of registration

(a) Upon registration, the foreign judgment has the same force and effect as a Malaysian judgment, and it carries interest, and execution proceedings could be taken provided it shall not issue if application can be made to set aside it or if such application is made, until it is disposed of. The judgment creditor may enforce by writ of seizure and sale, charging order, garnishee proceedings, appointment of receiver, bankruptcy or winding-up proceedings.

See: Section 4(2) of the REJA;
Ferdinand Wagner (A Firm) v Laubscher Bros & Co (A Firm) [1970] 2 LR 1019.

(b) Once registered, the application of common law principles would be excluded, and the judgment would only be enforced by REJA.

See: *Re A Judgment Debtor (No 2176 of 1938);*
Hong Leong Finance Ltd v Liow Hock Seng [1996] 1 CLJ 462.

[6] Security for cost

The court may order a Judgment Creditor to give security for cost of the application for registration and of any proceedings which may be made to set aside the registration.

See: Order 67 r. 4 of the RHC.

[7] Order to state period upon which Judgment debtor must set aside registration

The period upon which the judgment debtor must set aside the registration of the judgment must be stated in the order for the registration of the judgment as failure to do so would render the order defective and not curable by a note of the time period.

See: Section 4(2) of the REJA;
Velautham Chettyar v Sayampanathan [1929] SSLR 99*;*
Re Raju Jayaraman Kerpaya, ex p Associated Asian Securities (Pte) Ltd. [1999] 5 CLJ 23.

[8] Extension of time to make application

An application to extend time to set aside registration of foreign judgment must be made within the time given to set aside the registration. In the case of *International Factors Leasing Pte Ltd v Winds Cruises Pte Ltd & Ors* [1999] 4 MLJ 165, the court did not exercise discretion to extend time as there was no explanation of delay. It held that Order 67 r. 7 of the RHC is specific provision, and the general rule for court discretion under Order 3 r. 5 of the RHC was not applicable in that case.

[9] Service of Notice of Registration of Judgment

(a) The notice of registration of judgment must be personally served unless otherwise directed by the court. In *Re Raju Jayaraman Kerpaya, ex p Associated Asian Securities (Pte) Ltd* [1999] 5 CLJ 23, the notice was not served, hence the bankruptcy notice that was later issued was bad in law.

(b) If other form of service was ordered by the court, it was sufficient service if documents were served in accordance with the terms of the order. In respect of service being effected at different territory inconsistent with the term of the order, such as where it was supposed to be served in Hong Kong, but eventually served in Malaysia, it was held that the service "cannot properly be said to be good service".

See: *NM Rothschild & Sons (Singapore) Ltd & Ors v Vincent Tang Fook Lam*. [1989] 2 BLD, para 50;
The Kah Wah Bank Ltd v Low Chung Song & Ors [1998] 1 CLJ 81;
Bonwell v Preston [1908] 24 TLR 758.

[10] Content of Notice of Registration of Judgment

Order 67 r. 7 provides that the notice of registration must state—

(a) the full particulars of the judgment registered and the order for registration;

(b) the name and address of the judgment creditor or of his solicitor on whom, and at which, any summons issued by the judgment debtor may be served;

(c) the right of the judgment debtor to apply to have the registration set aside; and

(d) the period within which an application to set aside the registration may be made.

[11] Setting aside Foreign Judgment

(a) The grounds for setting aside are provided in sections 5 and 6 of REJA as follows:

(i) that the judgment had been wholly settled.

See: *KS Das v P Suppiah* [1988] 2 MLJ 445.

(ii) that the original court lacks jurisdiction.

Section 5(2) creates a rebuttable presumption, and court need not rely on presumption so long as they are proof that the original court has jurisdiction. If the judgment debtor challenges jurisdiction on grounds of irregularity and non-conformity to the rules of the original court, he should apply to the original to set aside the judgment.

See: *United Malayan Banking Corp Bhd. v Soo Lean Tooi & Ors* [1984] 1 MLJ 47;
Bank of New Zealand v Wong Kee Tat [1990] 2 MLJ 435;
Vitclay Pipes Pty Ltd v Syarikat Vitco (M) Sdn. Bhd. [1993] 4 CLJ 300.

(iii) that the judgment was obtained by fraud.

See: *Syal v Heyward & Anor* [1948] 2 All ER 576.

(iv) that the registration is against public policy.

See: *Bank of New Zealand v Wong Kee Tat* [1990] 2 MLJ 435.

(v) that there was appeal or pending appeal. The court may set aside application or adjourn the application to set aside until reasonable time is given to judgment debtor to disposed of his appeal.

See: *Re A Debtor (No 11 of 1939), Debtor* [1939] 2 All ER 400;
SA Consortium General Textiles v Sun and Sand Agencies Ltd [1978] 1 QB 279;
Re A Debtor (No 11 of 1939) [1939] 2 All ER 400.

(vi) that it is not just and convenient that the judgment be registered.

In the case of *Yong Tet Miaw & Anor v MBf Finance Bhd* [1992] 2 SLR 761, touching on Order 67 r. 9(3) RSC 1970 (*in pari materia* with Order 67 r. 9(3)) and section 3(1) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264), it held that the words “just and convenient” in Order 67 r. 9(3) and section 3(1) cannot give an untrammeled discretion of the

courts. The words "just" and "convenient" are the same and the effects as described in *Edwards v. Pichards* [1990] 2 KB 903 is "where it is practicable and the interests of justice require it."

[12] Just and convenient for the Judgment to be registered

(a) In determining whether a judgment is to be registered or its registration set aside, it is normally not allowed to question the jurisdiction of the original court which give rise to the judgment.

See: *Koninklijke Bunge NV v Sinitrada Co Ltd*. [1973] 1 MLJ 19;
Bank of India v Trans Continental Commodity Merchants Ltd & Anor [1986] 2 MLJ 342.

(b) Nor to say that the foreign laws applicable be in the original court was rooted in illegality. Neither was the court entitled to investigate the propriety of the proceedings in the original court.

See: *Mendip Plywood Ltd v KTS Timber Industries Bhd* [1998] 1 CLJ Supp 481;
Tsang & Ong Stockbrokers (Pte) Ltd v Joseph Lina Kuok Hua [2001] 1 CLJ 292.

(c) It has also been held that it was not for the Singapore courts to sit on appeal against the decision of the Malaysian court as the later was a competent court to exercise jurisdiction over the parties.

See: *Yong Tet Miaw & Anor v MBf Finance Bhd.* [1992] 2 SLR 761.

(d) In *Bank of India v Trans Continental Commodity Merchants Ltd & Anor* [1986] 2 MLJ 342, it was held that the court could not give judgment on contentious issues not raised in the original court and allowed the second judgment debtor to profit from his wrong doing at the expense of innocent party, so it was just and convenient for the judgment to be registered.

[13] Issue of Execution

Order 67 r. 10 of the RHC provides that issue of execution takes place until the expiry of time for the judgment debtor to set aside the registered foreign judgment or until after the application had been determined. To execute the judgment, the judgment creditor must furnish the Bailiff with an affidavit of service of the notice of judgment,and any order made by the court in relation to the judgment.

[14] Execution

(a) It appears that once a foreign judgment is registered, the normal available execution proceedings could be commenced. This includes issue of bankruptcy notice.

See: *Tan Seow San v Ong & Co (Pte) Ltd* [1982] CLJ 157; *Re Tan Patrick ex p Walter Peak Resorts Ltd (in receivership)* [1994] 2 SLR 728.

(b) In *Re A Judgment Debtor (No 2176 of 1938)*, [1939] 1 All ER 1, it was held that the effect of the Foreign Judgments (Reciprocal Enforcement) Act 1933 is to place the foreign judgment on the same footing as an English judgment and a bankruptcy notice could issue upon the registered foreign judgment within the English Bankruptcy Act 1914.

[15] Arbitration Award as judgment

(a) By virtue of section 2 of REJA, a judgment may include award given by Arbitration in so far as it relates to a country or a territory not outside the Commonwealth if the award has, pursuant to the law in force in the place where it was made, become enforceable in the same manner as the judgment given by a court in that place. In this regard, one has to be familiar with how the award is made and under which statute it relates to.

(b) Under the Arbitration Act 2005 (Act 646), the awards given by international arbitration under the Act are exempted from supervision of the courts. This exemption, however, does not apply to domestic arbitration. Thus, it may mean that arbitration award would possibly be enforceable outside jurisdiction. In a similar manner, such category of arbitration award from other Commonwealth countries may have similar treatment here in Malaysia.

See: Enforcement of foreign judgments and arbitral awards, by Syed Ahmad Idid, [2002] 3 MLJ cxliii.

[16] Effects of Delisting Reciprocating Countries

(a) Under section 9 of REJA, the Yang Di Pertuan Agong can delist a country if it appears to him that the treatment accorded by the court in a reciprocating country is substantially less than favourable than that accorded by the courts in Malaysia to judgment of the superior court of the said reciprocating country.

(b) Under section 9(2) it is stipulated that other than the procedure in REJA, no proceedings shall be entertained in the courts in Malaysia for recovery of judgment given in any reciprocating country.

(c) In 1974, Australia was delisted in the First Schedule. It is submitted that section 9(2) may be applicable to registrable judgment only, and would not prevent Australian judgments to be enforced by way of common law principles which REJA did not expressly deny to a delisted country. There is an opinion which says that to interprete otherwise, would mean a restrictive approach instead of a purposive interpretation of statute generally favoured by the Malaysian courts. In *See Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107, the judgment sought to be enforced was a final judgment obtained in the Brunei High Court. Brunei is not a reciprocating country in the First Schedule, hence it was enforcement of judgment by common law. In that case, a summary judgment based on a final foreign judgment was recognized even though there was allegation of fraud, provided that the court was satisfied that the fraud alleged is frivolous.

See: Enforcement of foreign civil judgments, by Wu Min Aun, [1996] 2 MLJ xcvii.

37

Stay of Execution

Indra Bin Haji Ayub

Chapter 37

Stay of Execution

[1] Introduction

(a) Stay is legally defined as suspension of the case or some designated proceedings within it.

See: Black's Law Dictionary; Henry Campbell Black (6th Edition, 1990, West Publishing Co) at page 1413.

(b) The term 'stay of proceedings' can mean a total discontinuance of an action, but in strictness it is only accurate when a decree or judgment has been given, for in such a case the suit or action cannot be dismissed, because the court has adjudicated on it, and therefore all that can be done is to stay proceedings under the decree or judgment.

See: *Jowitt's Dictionary of English Law* (2nd Edition) at pages 1701 to 1702.

(c) Stay of execution simply means that, while awaiting for the hearing and determination of the appeal, the order appealed from is not carried into effect or its execution is suspended with or without any terms or conditions attached to the order staying execution of that earlier order. In other words, the order which has been stayed shall not be operative with effect from the time of the making of the order of stay. Further, a stay of execution only operates to prevent a judgment creditor from putting into operation the legal process of execution and does not affects rights acquired independently of the process stayed.

[2] General Principles

(a) A party appealing must first apply for a stay in the first instance to the court appealed from. If the application is refused, then the party must apply to the appellate court. There should be an application and not an appeal against the decision refusing stay.

(b) An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the court appealed from.

See: *Shanmugam Pillai v Panjali* [1961] 27 MLJ 290;
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn. Bhd. [2002] 3 MLJ 49;
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1.

[3] Discretion of Court

(a) The court has a discretion to grant stay however such discretion must be founded upon established judicial principles.

(b) On the question of stay of execution it is settled law that the granting of such a stay is a matter for the court's discretion, and it is true that the exercise of such discretion must be founded upon established judicial principles. One of the determining factors that calls for consideration is whether by making an order for stay of execution it would make the appeal if successful, nugatory in that it would deprive an appellant the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.

See: *Mohamed Mustafa v Kandasami (No 2)* [1979] 1 MLJ 126.

[4] Special Circumstances

(a) Definition of special circumstances

(i) In determining whether to grant a stay of execution, the Court will consider whether there are "special circumstances" in the case to grant a stay of execution. Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which

is usual or common.

See: *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn. Bhd.* [2002] 3 MLJ 49;
Kosma Palm Oil Mill Sdn. Bhd. & Ors v Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1.

(ii) There is no specific definition on what constitute as special circumstances under the statutes or the RHC. The word 'special' denotes something different from the ordinary, and a special circumstance must be a situation that is exceptional.

See: *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86.

(iii) The statutes or the rules of court do not define what constitutes a special circumstance. This is left practically to the opinion and judicial discretion of presiding judges. A special circumstance must mean something out of the ordinary or something unusual. The category of special circumstances can never be limited or closed, as from time to time and a case to case different and various factors may be accepted as special circumstances.

See: *Low Nam Hui & Sons Sdn. Bhd. v Huang Yan Teo* [2007] 7 MLJ 13.

(b) Factors that Constitute Special Circumstances

The courts have considered the following factors that may or may not constitute as special circumstances:

(i) Destruction of the subject matter of the action

In *Salim Bin Ismail & Ors v Lebbey Sdn. Bhd. (No 1)* [1997] 2 MLJ 1 the applicants were long standing occupants of a piece of land and had erected a permanent structure in which they lived. Throughout, they were permitted to occupy the land by the state authority without objection. The land was then alienated to the respondent (Lebbey). The respondent then initiated proceedings under Order 89 of the RHC and obtained orders for the summary eviction of the applicants. The applicants applied for a stay of execution but were refused by the High Court. The applicants appealed to the Court of Appeal. Mahadev Shankar JCA in his judgment granted a stay of execution and stated—

> "In deciding whether to grant a stay, we have to balance the financial repercussions which will be suffered by Lebbey with the imminent destruction of the homes of the applicants if the orders appealed against are enforced. The subject matter of

this appeal…their continued right to stay in their homes until their claims have been finally disposed of in a full trial. The destruction of that right cannot be adequately compensated with money. This is a special reason why a stay should be granted.".

(ii) Merits of judgment or appeal

The courts are divided in considering the merits of judgment or appeal as a special circumstance to justify a stay. Some authorities have established that merits of appeal is not a special circumstance. In *Ming Ann Holdings Sdn. Bhd. v Danaharta Urus Sdn. Bhd.* [2002] 3 MLJ 49 the Court of Appeal decided to dismiss the application for a stay of execution and held—

> "I do not think that a court hearing an application for a stay of execution should make a finding that the appeal is doomed to be failure or even that there are no merits in the appeal…in the case of the Court of Appeal or the Federal Court, the court that sits to hear the stay application, it is only constituted to hear the stay application, not the appeal.
>
> Indeed, the appeal may not even be heard by the same panel. Not only the grounds of judgment, usually, are not before the court, but so are the appeal records. The court too does not have the benefits of the arguments on the merits of the appeal.
>
> In the circumstances, I am of the view that, as a general rule, it is not only premature but it is also unfair to the parties and wrong for the court, hearing an application for a stay, to make a finding that the 'appeal is doomed to failure', 'without any prospect of success', 'has no merits' an the like.".

In *Low Nam Hui & Sons Sdn. Bhd. v Huang Yan Teo* [2007] 7 MLJ 13 the Court of Appeal did consider the merits of the case in deciding whether to grant a stay or not. It decided as follows:

> "In a case involving summary judgment, merit of the appeal is an important factor for consideration. The statutes or the rules of courts do not prohibit the courts from taking into consideration the merit of the application or the appeal in deciding whether or not to grant a stay and whether to impose any conditions on the stay which the courts consider to be reasonable.
>
> If merit is irrelevant, then injustice may be caused to an appellant/applicant in a case where the registrar or the judge decides the summary application arbitrarily or where they have

wholly failed to consider the facts and law clearly favouring the appellant/applicant.".

(iii) Permanent deprivation of money

Based on precedents and authorities this ground can not be regarded as special circumstances to justify an order for stay.

See: Sy*arikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406.

(iv) Financial Standing

Any allegations that there is a danger of the unsuccessful party not being repaid if its appeal is successful for any reason like the insolvency of the other party, this must be shown in affidavit supporting the application for stay. Failure to do so will run the risk of the application being dismissed.

See: *Dato' Francis Ng Tian Siang v Alexander Wong Shoon Choy & Other* [2002] 7 CLJ 301.

(c) Special circumstances and the nugatory test

(i) There are two tests which are commonly adopted by the courts, that is the special circumstances test and nugatory test. While the meaning of special circumstances test has been explained, the nugatory test simply means that a successful appeal should not be rendered futile.

(ii) Both these tests are not mutually exclusive. In either case, it is a matter of judicial discretion depending on the circumstances of the case. Pursuant to that, the courts have divided into two approaches in dealing with special circumstances and the nugatory tests. Some courts treated both as a two different and separate tests, while some others applied both as inter related.

(iii) Separate and different test

The nugatory test has been adopted as a separate and different approach from special circumstances in the case of *See Teow Guan & Ors v Kian Joo Holdings Sdn. Bhd.* [1995] 3 MLJ 598 where the Court of Appeal considered it as the paramount consideration governing a stay of application. Gopal Sri Ram JCA, delivering the judgment of the court said—

> "The authority constantly relied upon in support of the proposition that special circumstances ought to be demonstrated before a stay of execution may be granted…. I have come to the conclusion that the decision is bad law, and

ought no longer to be followed by this court…

In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or in the case of an application for some other form of interim preservation of the subject matter of an appeal…is that the appeal to this court, if successful, should not be rendered nugatory.

If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the status quo.".

(iv) In *Chong Wooi Leong & Ors v Lebbey Sdn. Bhd.* [1998] 2 MLJ 661 at p.673 where the Court of Appeal held that—

"….the applicants in their counterclaim…have amongst other, sought a declaration that they have a right to remain on the land in question until their equities are being satisfied in the form of compensation and damages. If a stay is not granted, then, the very grant of vacant possession to the respondent will mean the destruction of that right. From then on, any success in the application for leave to appeal or eventually in the appeal itself will be meaningless as that right can never be restored.

Thus, a stay is necessary to ensure that right would be available to the applicants in the event that the Federal Court decides their application for leave to appeal in their favour. Hence, any refusal to grant the stay would render the application for leave to appeal, or the appeal itself, if the Federal Court allows the application for leave to appeal, nugatory.

For these reasons I allow the application of the applicants to the extent that the execution of the order of the High Court Shah Alam shall be stayed forthwith until the disposal of the applicants' application for leave to appeal…".

(v) Part of and inter related

Some authorities have applied nugatory test as inter related and part of the special circumstances test. This approach has been adopted in the case of *Ming Ann Holdings Sdn. Bh.d v Danaharta Urus Sdn. Bhd.* [2002] 3 MLJ 49 where Abdul Hamid Mohamad JCA in delivering the Court of Appeal's judgment stated—

"I agree that in an application for a stay of execution that

the appeal, if successful would be rendered nugatory is 'the paramount consideration' or by whatever name it is called. And, I do not think that it matters whether it is considered under the head of 'special circumstances' or not, so long as it is considered and so long as he does not go so far as to say that no other factors may be considered because this is an exercise of discretion, and therefore all the relevant factors should be considered…….

The court is of the view that See Teow Guan & Ors [1995] 3 MLJ 598, should not be treated as laying down new principles to be applied in an application for a stay of execution. It should be confined to its own facts in an application for a stay of proceedings.

The principles that have been applied by the courts of all levels in this country remain the same. Call them whatever name one prefers. So long as the relevant factors are considered, the correct principles are applied, the exercise of the discretion should not be faulted.".

(vi) In *Kosma Palm Oil Mill Sdn. Bhd. & Ors v Koperasi Serbausaha Makmur Bhd.* [2003] 4 CLJ 1 the court held—

"It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances.

In other words, special circumstance is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established.

Thus, they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter related.".

[5] Tomlin Order

A Tomlin Order is an order which records that an action is stayed by the agreement of the parties on terms set out in a schedule. The stay is for the purposes of enforcing the terms of the contract of compromise.

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Bankruptcy

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Chapter 38

Bankruptcy

[1] Introduction

(a) Bankruptcy is a legal proceeding by which the Debtor, who is unable to settle his debts, has a court order filed against him to enable his property and assets to be distributed among his creditors by an officer appointed.

(b) A bankrupt is a creation of a court order. Before a person is adjudicated as a bankrupt, he can only be referred to as a Debtor.

(c) Section 3(3) of the Bankruptcy Act 1967 defines a Debtor to include any person who commits an act of bankruptcy when he was—

(a) personally present in Malaysia, or

(b) ordinarily resided or had a place of residence in Malaysia, or

(c) was carrying on business in Malaysia either personally, or by means of an agent, or

(d) was a member of a firm or partnership which carried on business in Malaysia.

(d) The Debtor must have committed an 'act of bankruptcy' first, before any proceeding can commence. If no action is taken to resolve the act, a Bankruptcy Notice will be issued and served to the Debtor. Bankruptcy proceedings commence upon the presentation of a bankruptcy petition (divided into a Debtor's or a Creditor's Petition) to the court, either by the Debtor himself or (usually) by a Creditor/s. The presentation of a Debtor's own petition itself would amount to an act of bankruptcy. The Petition will pray for a receiving order and an adjudication order to be made in respect of the Debtor's property. Upon hearing the petition, the court may make an order or dismiss it. Upon the granting of the receiving order, unless the debtor can satisfy the court that he is in a position to propose settlement that is satisfactory to the creditors, then the court shall also grant an adjudication order making him a bankrupt. By the adjudication order, the debtor's assets are then vested in the Director General of Insolvency.

(e) The principal objective of bankruptcy is to ensure that all of the debtor's property and assets be vested in the Director General of Insolvency (DGI) for equitable and just distribution among his creditor's according to certain priorities.

(f) Upon being adjudged a bankrupt, the bankrupt obtains protection from further legal proceedings by his creditors but with some exception for he is then subjected to certain disabilities and disqualification which is primarily aimed at preventing him from incurring further debts. His status as a bankrupt would only come to an end if the order by which he was made a bankrupt is annulled or when he is discharged as a bankrupt. Thereafter, he will be relieved from further liabilities and allowed to have a fresh start financially.

[2] Who may be adjudicated a Bankrupt?

(a) Foreigner

(i) Section 5(1)(d) of the Bankruptcy Act 1967 states—

"A creditor shall not be entitled to present a bankruptcy petition against a debtor unless the debtor is domiciled in Malaysia or in any State or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager."

(ii) Therefore, in order for a debtor to be presented with a bankruptcy petition, he must fall within the definition of a debtor, be domiciled in Malaysia or has a residential or business link in Malaysia.

(b) Minor/Infants

Section 2 of the Age of Majority Act 1971 (Act 21) states that a minor is one who is below the age of 18 years. Nothing in the Bankruptcy Act states that a minor or infant can or can not be made a bankrupt. However, bankruptcy proceedings may only be taken against a minor in respect of debts that are legally enforceable against him, such as for tax liabilities, necessaries supplied or on a judgment arising out of an action in tort.

(c) Married Woman

(i) The Bankruptcy law in Malaysia applies fairly to all women, as it does to men - whether or not they are married or single.

(ii) Section 120 of the Bankruptcy Act 1967 states—

> "A married woman shall be subject to this Act in all respects as if she was a *feme-sole*" ie: unmarried woman."

(iii) Section 4(d) of the Married Women Act 1957 (Act 450) also states—

> "A married woman shall be subject to the law relating to bankruptcy and to the enforcement of judgments and orders, in all respects as if she were *feme sole*."

(d) Lunatics/Persons of unsound mind

A person of unsound mind may be adjudicated bankrupt so long as the debts that they owe are enforceable under the general law. If adjudicated bankrupt, the court may appoint a representative or suitable person to represent him in the proceedings.

(e) Members of Parliament

(i) Members of either House of Parliament do not have Parliamentary Privilege over acts of bankruptcy or bankruptcy proceedings and therefore are subject to the Laws of Bankruptcy just like everyone else.

(ii) Article 48(1)(b) of the Federal Constitution states—

"A person is disqualified for being a member of either House of Parliament if he is an undischarged bankrupt."

(f) Diplomats/Ambassadors

Diplomats/Ambassadors are not subject to bankruptcy proceedings as there is a privilege/immunity conferred by the Vienna Convention Act 1966. However, this immunity can be waived by the Government.

(g) Companies

Section 121 of the Bankruptcy Act 1967 states—

> ”A receiving order shall not be made against any corporation or against any partnership, association or company registered under any Act dealing with companies.’ Therefore, Bankruptcy proceedings cannot be instituted against any corporation, partnership, association or company that is registered under the Companies Act 1965.”

(h) Firms

A partnership or a sole-proprietorship may be the subject of bankruptcy proceedings. Section 103 of the Bankruptcy Act 1967 states—

> “Any two or more persons being partners or any person carrying on business under a partnership name may take proceedings or be proceeded against in the name of the firm.’ ‘In such case the court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner and verified on oath or otherwise as the court directs.”

(i) Social Guarantor

(i) A social guarantor is immune from bankruptcy proceedings until the creditor exhausts all avenues to recover the debts owed by the debtor.

(ii) A social guarantor is defined by section 2 of the Bankruptcy Act 1967 as a person who provides guarantee, not for the purpose of making profit, with regard to—

- a loan, scholarship or grant for educational or research purposes;
- a hire-purchase transaction of a vehicle for personal or non-business use; and
- a housing loan transaction solely for personal dwelling.

(j) Deceased

(i) A deceased person cannot be made a bankrupt. However, bankruptcy orders may be granted against the estate or the deceased. Section 122 of the Bankruptcy Act 1967 states that 'Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against the debtor had he been alive, may present to the court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy.' 'The Director General of Insolvency may present to the court a petition in the prescribed form praying for an order for the administration in bankruptcy of the estate of any deceased debtor.'

(ii) In other words, the following persons may present the petition:

- a creditor to whom the deceased debtor owes a sum of not less than RM30,000;
- the Director General of Insolvency.

[3] Acts of Bankruptcy

(a) Section 3(1)(a) to (j) of the Bankruptcy Act 1967 sets ten acts of bankruptcy, which are as follows:

(i) Conveyance of property to trustee for the benefit of the general creditors;

(ii) Fraudulent conveyance;

(iii) Conveyance amounting to a fraudulent preference;

(iv) Defeating or delaying creditors;

(v) Property seized in execution;

(vi) Filing of declaration of inability to pay debts or debtor's petition;

(vii) Giving notice of suspension of payment of debts;

(viii) Non-registration of offer of settlement of debt or scheme of arrangement;

(ix) Non-compliance with bankruptcy notice; and

(x) Executing officer's return of no property liable to seizure.

(b) Should the debtor commit any one of the above acts of bankruptcy, the creditor will be able to commence bankruptcy proceedings.

Conveyance of Property to Trustee for the Benefit of the General Creditors

(c) Section 3(1)(a) of the Bankruptcy Act 1967 states—

> "A debtor commits an Act of Bankruptcy if in Malaysia or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.
>
> It is immaterial whether the conveyance/assignment took place in Malaysia or elsewhere."

Fraudulent Conveyance

(d) Section 3(1)(b) of the Bankruptcy Act 1967 states that a debtor commits an Act of Bankruptcy if in Malaysia or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof. The place of transaction is immaterial.

(e) There must be a fraudulent intention (Intention to defeat, hinder or delay the creditors). Proof is of the civil standard of balance of probabilities.

(f) Even if there is consideration for the conveyance, it can still amount to a fraud if there is an intention to defraud the creditors.

See: *Re Anson Cycle & Motor Works* (1960) MLJ 171.

Conveyance Amounting to a Fraudulent Preference

(g) Section 3(1)(c) of the Bankruptcy Act 1967 states that a debtor commits an act of bankruptcy if in Malaysia or elsewhere he makes any conveyance or transfer of his property or of any part thereof, or creates any charge thereon which would under this or any other written law for the time being in force be void as a fraudulent preference if he were adjudged bankrupt.

(h) This is a situation where the debtor has a dominant intention to prefer one creditor over the other.

Defeating or Delaying Creditors

(i) Section 3(1)(d) of the Bankruptcy Act 1967 states that a debtor commits an act of bankruptcy if with intent to defeat or delay his creditors he

does any of the following things;

(i) departs out of Malaysia or being out of Malaysia remains out of Malaysia, or

(ii) departs from his dwelling-house or otherwise absents himself, or begins to keep house or closes his place of business, or

(iii) submits collusively or fraudulently to an adverse judgment or order for the payment of money

(j) The intention to defeat/delay his creditors must be present in the Debtor's mind as he commits the act, for there to be an act of bankruptcy under this section.

See: *Re OK Varghese & Company* [1946] MLJ 2;
Re Yap E Boon [1933] MLJ 217.

Property Seized in Execution

(k) Section 3(1)(e) of the Bankruptcy Act 1967 states that a debtor commits an act of bankruptcy if execution issued against him has been levied by seizure of his property under process in an action or in any civil proceeding in the High Court, Sessions Court or Magistrates Court where the judgment, including costs, is for an amount of one thousand ringgit or more.

(l) The act of bankruptcy occurs the moment the property is seized.

Filing of Declaration of Inability to Pay Debts or Debtor's Petition

(m) Section 3(1)(f) of the Bankruptcy Act 1967 states that a debtor commits an act of bankruptcy if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself.

(n) This section is for a debtor who wishes to declare himself a bankrupt because of his inability to pay up his debts.

Giving Notice of Suspension of Payment of Debts

(o) Section 3(1)(g) of the Bankruptcy Act 1967 states that a debtor commits an act of bankruptcy if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts.

(p) There is no set form of notice, as long as there is notice given that the debtor has or is about to suspend payment of his debts.

See: *Re K Mohamed Ibrahim & Co* [1940] MLJ 90.

(q) Notice can be given orally but must be formally, and deliberately, and with the intention of giving notice.

See: *Re Walker* [1884] 13 QBD 469;
Re Friedlander [1884] 13 QBD 471.

Non-Registration of Offer of Settlement of Debt or Scheme of Arrangement

(r) Section 3(1)(h) of the Bankruptcy Act 1967 states that a debtor commits an act of bankruptcy if he makes to any two or more of his creditors, not being partners, an offer of composition with his creditors or a proposal for a scheme of arrangement of his affairs, and such offer or proposal is not followed by the registration within fourteen days thereafter of a deed of arrangement with his creditors, in accordance with the rules for the time being in force for the registration of deeds of arrangement under this Act.

(s) This kind of situation where an offer of composition or scheme of arrangement is not within 14 days, registered after there is a deed of arrangement with the creditors, would seldom arise in situations. If there is registration, then no act of bankruptcy would arise.

See: *Re Kong Mun Cheong* [1975] 2 MLJ 131.

Non-Compliance with Bankruptcy Notice

(t) Section 3(1)(i) of the Bankruptcy Act 1967 states that a debtor commits an act of bankruptcy if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice , or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained.

(u) Basically, this means that where a bankruptcy notice has been served on the debtor, and the debtor fails to comply with the requirement by either paying or securing or compounding for the demanded sum within the stated period, then the debtor commits an act of bankruptcy. This is the most common act of bankruptcy in support of a creditor's petition.

(v) The Bankruptcy notice may only be issued after the creditor has obtained a final judgment or order against the Debtor. However the debtor may file an application to set aside the bankruptcy notice if he has sufficient reason.

Executing Officer's Return of No Property Liable to Seizure

(w) Section 3(1)(j) of the Bankruptcy Act 1967 states that a debtor commits an act of bankruptcy if the officer charged with the execution of a writ of attachment or other process makes a return that the debtor was possessed of no property liable to seizure and for the purposes of this paragraph the date when the writ is lodged with the officer shall be deemed to be the date of the act of bankruptcy.

(x) Basically, this means that after the Executing Officer is satisfied that the debtor has no property liable to seizure, and makes a return to that effect, the act of bankruptcy is committed.

(y) The debtor can challenge the return if they feel that the return was incorrect. However, if the court finds that the return is correct, it may make a receiving order and an adjudicating order against the debtor.

[4] Bankruptcy Notice

(a) A Bankruptcy Notice is a notice issued by the court requiring a debtor to pay a specified sum or to secure or compound for it to the satisfaction of the creditor or court within a prescribed period. Basically it serves as a notice to inform the Judgment Debtor of the amount he has to pay to avoid being adjudged a bankrupt.

(b) Non compliance with the notice will give rise to an act of bankruptcy under section 3(1)(i) of the Bankruptcy Act 1967 unless there is a reason for non compliance.

The Requirements of a Bankruptcy Notice

(c) The following are the requirements:

(i) Must be a final Judgment

- The Bankruptcy Notice can only be issued if the creditor has obtained a final judgment or order against the debtor.

- A judgment or order is final only if—

  — It disposes of the rights of the parties finally;

  — no further step is necessary to perfect it.

(ii) Must be in position to execute Judgment

- The creditor must be in a position to execute judgment. Generally, a judgment can not be executed if it has been obtained for more than 6 years. If a judgment has lapsed for more than 6 years, leave of court must be obtained to enforce it.

  See: Order 46 r. 2(1) of the RHC.

(iii) Amount demanded must be quantified

- For the Bankruptcy Notice to be effective, it must—

  — Quantify the amount payable by the Judgment Debtor. The Bankruptcy Notice must disclose the amount the debtor has to pay clearly;

  — The amount demanded must be a liquidated sum which is payable either immediately or at some certain future time;

  — The interest demanded must be quantified to the date of the issue of the Bankruptcy Notice.

Service of a Bankruptcy Notice

(d) A Bankruptcy Notice which is sealed has to be served on the following parties:

(i) The Judgment Debtor;

(ii) The Director General of Insolvency.

(e) Service on the Judgment Debtor should be by personal service (Rule 97 and Rule 109) unless personal service is impossible, then it may be served by way of Substituted Service (Rule 110).

(f) Requirements for Substituted Service are as follows:

(i) It is impossible to serve personally;

(ii) Substituted Service is effective to bring knowledge of proceedings to Debtor.

Duration of Bankruptcy Notice

(g) A bankruptcy notice is only valid for 3 months after issuance (Rule 96). Therefore, service should be effected within 3 months from the date of its issue. However, an application may be made for an extension.

See: Section 93(4) of the Bankruptcy Act 1967.

Compliance with Bankruptcy Notice

(h) Debtor has 7 days to comply with a Bankruptcy Notice excluding the day of service of the Bankruptcy Notice.

(i) In calculating the period of compliance, the date of service itself is excluded.

(j) Where service is after 3.30 pm on a weekday or after 12 pm on the day preceding the weekly holiday, the service is deemed to have been effected on the following weekday. (Rule 66).

(k) Where the debtor fails to comply with the Bankruptcy Notice, he commits an act of bankruptcy upon the expiration of the 7 days.

(l) Where the debtor files an affidavit pursuant to Rule 95(1) to set aside the Bankruptcy Notice, then no act of bankruptcy has been committed until the application is heard and dismissed (Rule 95(2)).

Setting aside the Bankruptcy Notice

(m) A Bankruptcy Notice can be set aside on the following grounds:

(i) Counterclaim, set off or cross demand;

(ii) Settlement;

(iii) Irregularities;

(iv) Fraud.

Counterclaim, set off or cross demand

(n) A Bankruptcy Notice may be set aside by the debtor on the ground that he has a counterclaim, set off or cross demand which:

(i) equals or exceeds the amount demanded; and

(ii) could not be set up in the action in which the judgment or order was obtained.

(o) The counterclaim should be more or equal to the sum demanded. If it is less, but reduces the claim to less than RM30,000, then debtor can also apply to set aside the Bankruptcy Notice because there is no sufficient debt to support the Bankruptcy Petition.

(p) To set aside the Bankruptcy Notice, the debtor has to file an affidavit within 7 days of service of the Bankruptcy Notice (Rule 95).

Debt Settled

(q) Where the Judgment Debt has been settled, the creditor has no right to apply for an issue of a Bankruptcy Notice against him.

(r) To set aside the Bankruptcy Notice, the debtor can either—

(i) File an affidavit within 7 days of service of the Bankruptcy Notice (Rule 95); or

(ii) File a Summons In Chambers and affidavit (Rule 18).

Irregularities

(s) If an objection is raised and the court is of the opinion that substantial injustice has been caused by the defect or irregularity and that injustice can not be remedied by any order of that court, the Bankruptcy Notice will be set aside (Section 131 of the Bankruptcy Act 1967).

(t) Grounds for setting aside are as follows:

(i) No final judgment or order;

(ii) No leave to obtain issue of Bankruptcy Notice;

(iii) Demand not in accordance with terms of Judgment or order;

(iv) Excessive demand in the Bankruptcy Notice;

(v) Unspecified amount/interest claimed in the Bankruptcy Notice;

(vi) Bankruptcy Notice claims interest beyond 6 years;

(vii) Two or more judgments or orders combined;

(viii) Creditor out of jurisdiction;

(ix) Creditor not in position to execute judgment or order;

(x) Creditor acting in wrong capacity;

(xi) Debtor not subject to jurisdiction of the court;

(xii) Omission of endorsement on the Bankruptcy Notice;

(xiii) Bankruptcy Notice issued without authority;

(xiv) Service is Irregular;

(xv) Illegality.

(u) To set aside the Bankruptcy Notice, the debtor can make an application by way of Summons in Chambers supported by an affidavit (Rule 18).

Fraud

(v) The Bankruptcy Notice can be set aside on the ground of fraud. It is for the debtor to prove that there was a fraud on the part of the creditor in obtaining the judgment.

(w) To set aside the Bankruptcy Notice, the debtor can make an application by way of Summons in Chambers supported by an affidavit (Rule 18).

[5] Bankruptcy Petitions

(a) There are two types of Bankruptcy Petitions namely—

(i) Debtor's Petition;

(ii) Creditor's Petition.

Debtor's Petition

(b) A debtor may present a petition to make himself a bankrupt on his own initiative. It does not require a minimum amount of debt to be owed. By presenting this petition, a debtor is deemed to have committed an act of bankruptcy without his previous filing of a declaration of inability to pay his debts.

Creditor's Petition

(c) A creditor's petition is a petition presented to the debtor by a creditor.

Conditions

(d) There are 4 conditions which must be met before a creditor may present the petition—

(i) The debt owing is more than RM30,000.

See: Section 5(1)(a) of the Bankruptcy Act 1967.

(ii) The debt is a liquidated sum payable either immediately or at some certain future time

See: Section 5(1)(b) of the Bankruptcy Act 1967.

(iii) The act of bankruptcy has taken place less than 6 months before the presentation of the petition.

See: Section 5(1)(c) of the Bankruptcy Act 1967.

(iv) The debtor is domiciled in Malaysia or any State within 1 year before the presentation of the petition, has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm, partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager.

See: Section 5(1)(d) Bankruptcy Act 1967.

Procedure

(e) The procedure for issuing Creditor's Petition is that the following documents are to be filed in—

(i) The Creditor's Petition (Form 9) dated, signed and attested – Rule 99(2);

(ii) An Affidavit verifying the Petition – Rule 103(2);

(iii) The receipt from the Director General of Insolvency for deposit

paid – Rule 106 and Section 6(1) of the Bankruptcy Act 1967.

Hearing

(f) Hearing of the Creditor's Petition is as follows:

(i) Time

- The court will fix a time/date for the hearing of the petition (Rule 115);
- It should not be heard until the expiration of the 8 days from service on the debtor (Rule 114(2));

(ii) Adjournment

- An adjournment of the hearing may be granted where the petition has not been served on the debtor.

(iii) Attendance of Petitioner

- The presence of the petitioner's counsel is sufficient

See: *Re Teok Kien Seng* [1991] 3 CLJ 2599;
Re Sharma Kumari Shukla (No 2) [2000] 6 MLJ 391.

(iv) Hearing of the Petition

- Hearing is before a Registrar (Paragraph (i) Practice Direction No 3 of 1993).
- Where the petition has been served, the court requires proof of the following:
  - — The debt owing to the petitioning creditor (Section 6(2)(a) of the Bankruptcy Act 1967);
  - — The act of bankruptcy committed by the debtor (Section 6(2)(b) of the Bankruptcy Act 1967);
  - — The service of the petition on the debtor by way of affidavit of service if the debtor is not present in court (Section 6(2)(c) of the Bankruptcy Act 1967);
- If the court is satisfied with the proof, then it may make a receiving order against the debtor (Section 6(2) of the Bankruptcy Act 1967);

- If the court is not satisfied, it may dismiss the petition (Section 6(3) of the Bankruptcy Act 1967).

Opposing the Creditor's Petition

(g) The following are grounds for opposing or setting aside a creditor's petition:

(i) No debt owing;

(ii) Debt is less than RM30,000;

(iii) Debt is not liquidated;

(iv) Debtor is able to settle debt;

(v) Debtor has not committed an act of bankruptcy;

(vi) Petition presented after the 6 months expiry period;

(vii) Debtor not within jurisdiction of the court;

(viii) Debtor not domiciled or residing or carrying business in Malaysia;

(ix) Petition or affidavit is irregular;

(x) Illegality.

Procedure to show cause

(h) Debtor must file a notice in Form16 (Rule 117) and make an application by way of Summons in Chambers supported by an Affidavit (Rule 18).

[6] Receiving Order

(a) A receiving order is granted to protect the estate of the debtor by placing it under the custody and control of the court through the Director General of Insolvency (Section 4 of the Bankruptcy Act 1967) by appointing them as the receiver of the estate and restricting the rights of the creditors against the debtor's estate.

(b) It does not deprive the debtor of his ownership or his proprietary right to his property, but it deprives him of his possession and control over his property.

(c) Once the court is satisfied during the hearing of the creditor's petition that the debtor owes a debt, an act of bankruptcy has been committed, and the debtor knows of the debt and is unable to settle it, the court may grant the receiving order against the debtor.

[7] Adjudication Order

(a) An adjudication order is an order which makes the debtor a bankrupt. A receiving order does not divest the debtor of his rights over the property it only appoints the Director General of Insolvency as receiver of the debtor's property. The adjudication order will vest all the property of the bankrupt in the Director General of Insolvency which then becomes dividable among the creditors (Section 24(4) Bankruptcy Act 1967). The property becomes the creditors with the Director General of Insolvency as the trustee for the creditors.

(b) In Malaysia, it is a common practice that a receiving order and an adjudicating order are made simultaneously.

[8] The Official Assignee

(a) Upon the making of the adjudication order and receiving order, the Official Assignee will be constituted as the receiver of the property of the debtor. As matter of fact, the Official Assignee will examine every claim by creditor (s) put on the debtor. Once the creditors file in the proof of debt, the Official Assignee normally requires evidence in support of the claim to be furnished. If no debt can be prove or existed, the Official Assignee has discretion to reject the proof. The Official Assignee is the one who will determine the rate of dividend to be paid to the creditors during the distribution of the debtor's property.

(b) Under the Societies Act 1966, the Official Assignee assumes the role of the trustee of the deregistered societies. He is also trustee of the property of trade unions when they become deregistered. The Official Assignee is, in such instances, also an officer of the court.

[9] Discharge of Bankrupt

(a) Application for Discharge

(i) A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge. A bankrupt intending to apply for his discharge shall produce to the registrar a certificate from the Official Assignee specifying the number of creditors

of whom the former has notice, whether the creditors have prove or not. The court shall appoint a day for hearing of the application. The registrar shall 28 days before the hearing of the application give notice of the time and place of the hearing to the Official Assignee. The registrar shall forthwith send a copy of such notice for insertion in the Gazette. The Official Assignee shall send a copy of such notice to each creditor who has proved within 14 days before the hearing.

(ii) If a creditor who has proved intends to oppose the discharge of a bankrupt, he shall give notice of the intended opposition stating the grounds thereof of the Official Assignee not less than three days before the hearing of the application.

(iii) On the hearing of the application the court shall take into consideration a report of the Official Assignee as to the bankrupt's conduct and affairs including a report as to the bankrupt's conduct during the proceedings under his bankruptcy.

(iv) The order of the court made on an application for discharge shall be dated the day on which it is made and shall take effect as from that date. Such order shall not be delivered out or gazetted until after the expiration of the time allowed for appeal or, if an appeal has been entered, until after the decision of the appellate court thereon.

(b) Power of Discharge

(i) For every application for a bankrupt's discharge, the relevant report of the Official Assignee shall be filed not less than seven days before the hearing date, and a copy thereof shall be sent to the bankrupt by registered post.

(ii) Discharge of bankrupt can be done by two (2) ways, namely by the Court (Section 33 of the Bankruptcy Act 1967) or by the Certificate of Director General of Insolvency (Section 33A of the Bankruptcy Act 1967). However, the granting of a discharge is entirely at the discretion of the court. The court shall have to take into consideration the said Official Assignee's report. The contents of the report of the Official Assignee is *prima facie* evidence of the statements therein.

See: Section 33(8) of the Bankruptcy Act 1967.

(iii) Discharge by court raise no much issue compare to discharge by Director General of Insolvency (DGI). Once the DGI issue a Certificate of Discharge to creditor (s), the said creditor (s) can file in Summon in Chambers to object the said certificate

on various grounds (Section 33B BA). At the end, the Court will decide whether to grant or dismiss the application.

(iv) Examples of considerations that the Court should look at are as follows:

(xi) The debtor has adjudged bankrupt for a long period (more than 5 years as stated in section 33A (2) of the Bankruptcy Act 1967) and the debtor should be given a chance to a better living without his property been administered by someone else. In addition to that, the debtor never fails to contribute the payment to DGI [the debtor never escaped from his responsibility].

(xii) Re: *Siah Ooi Choe, Exp Hongkong and Shanghai Corporation* (1998) 1 SLR 903;

> "It would be in the interest of the society that people who had become bankrupt in such circumstances, and generally, would be given second chance in life, so that the social cost of waste of entrepreneurial resources could be reduced".

(xiii) For there no dividends to be obtained by the creditor, it will be unfair to the debtor be asked to contribute more from what he is able to pay once he been adjudged bankrupt (since in the creditor's meeting, amount for monthly payment was agreeable by creditor and debtor). The reason of bankrupt is that to administer the debtor property and assets by DGI and not to punish him and force him to pay his debt in full.

(xiv) Public Bank Berhad v Kok Lee Wah [2004] 4 MLJ 433;

> "Even if I were accept the appellant's assertion that a substantial sum still remain unpaid, I ask myself whether the predicament of having under a cloud of bankruptcy for such long period, which had derived her business opportunities….. In other words, the suffering under the bankruptcy order could be equated with the balance of the debt (or read from another angle, the unpaid debt had been sufficiently repaid by the long suffering under the cloud of bankruptcy".

(xv) The debtor is mere a guarantor. Admitted as guarantor is only to admit, but it cannot be expected all guarantor know what of the consequences being as guarantor. Therefore, it will be unfair if the debtor be put under bankruptcy for a long period not because of his own action.

[10] Disqualification and Disabilities of a Bankrupt

(a) Disqualification

(i) When a debtor is adjudged bankrupt, he is disqualified from holding any of the following positions of trust or high office:

- Member of parliament;
- Trustee under any written law including appointment as administrator of the estates of the deceased;
- Director of a limited company;
- Judicial office such as a judge or president or magistrate;
- Member of a local or municipal council;
- Justice of peace;
- The other disqualifications are as follows:
- A solicitor cannot continue to enjoy the status of having a practicing certificate;
- A shareholder in a company will not be given the privilege of his rights in company matters;

(ii) An administrator with letters of administration of a deceased estate will have to be removed and someone else appointed in his place.

(iii) A bankrupt cannot be an administrator or executor of a deceased's estate. The bankrupt, if holding such office, must be removed and replaced because he cannot be a trustee for any trust estate for persons under disability. If a person is adjudged bankrupt whilst holding the office of president of a session's court, magistrate, or councilor, of a local authority, his office shall thereupon become vacant. A solicitor cannot continue in practice if he is adjudged bankrupt.

(iv) These disqualifications may be removed if—

- The adjudication order is annulled or rescinded immediately after bankruptcy;
- The bankrupt is discharged with a certificate to the effect that his bankruptcy was caused entirely by misfortune and

not by any misconduct on his part.

(b) Disabilities

(I) Upon adjudication, a bankrupt who is undischarged is subject to certain abilities which are as follows:

(ii) He will be incompetent to maintain any action, other than an action for damages in respect of personal injury to his person, without the previous sanction of the Official Assignee;

(iii) He must once in six months tender to the Official Assignee an account of all moneys and property which have come to his hands for his own use during the preceding six months. Any money not expended for maintenance must be paid to the Official Assignee;

(iv) He is not permitted to leave Malaysia without the previous sanction of the Official Assignee or court;

(v) He may not, without the previous permission of the Official Assignee or of the court enter into or carry on any business, alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company;

(vi) He may not, without the permission of the Official Assignee or of the court engage in the management or control of any business run by his wife, children or relatives;

(vii) In granting permission under para (c), (d) or (e), the Official Assignee or the court may impose such conditions as he or it may think fit.

(ii) The Official Assignee may, by notice issued to any immigration officer, request that a bankrupt be prevented from leaving Malaysia. The immigration officer is empowered to seize and deliver to the Official Assignee any passport or travel document belonging to any bankrupt who is attempting to leave Malaysia without the previous permission of the Official Assignee.

(viii) The undischarged bankrupt is under a duty to immediately report to the Official Assignee all monies or properties or proceeds in any form received exceeding RM500 that comes into his possession after his adjudication. He must also immediately inform the Official Assignee if there is any change in his home address.

(ix) Contravention of any of the above disabling provisions will make the bankrupt guilty of contempt of court for which he

may be punished accordingly on the application of the Official Assignee.

[11] Fraudulant Bankrupt and Offences

(a) The common offences committed by bankrupt are—

(i) Failure or omission to disclose to the Official Assignee the truth as to his affairs;

(ii) For a petty trader, failure to keep a proper set of accounts including profit and loss accounts;

(iii) Concealment of any of the bankrupt's property or books from the Official Assignee;

(iv) Contributing to the bankruptcy by gambling, or rash or hazardous speculations, such acts occurring within two years prior to bankruptcy;

(v) Borrowing or taking credit from people by false pretences or fraud without an expectation to repay;

(vi) Compulsive borrowing, or attempting to borrow, after bankruptcy;

(vii) Making a gift of his property during bankruptcy.

(b) In case of the bankrupt is guilty of any of those offences mentioned, he may be punished with imprisonment, which may extend to two years, or a fine or both.

39

Winding Up

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Chapter 39

Winding-Up

[1] Introduction

A company upon being registered under the Companies Act 1965 (Act 125) may only be extinguished by way of winding-up or, in certain cases by being dissolved or struck off the register without any winding-up procedure being taken. The unregistered companies other companies and institution also may be wound up under Companies Act 1965. The winding-up of the company may be done either by way of a Court order or voluntarily.

See: Sections 218(1)(j) to (l), 314 and 315 of the Companies Act 1965.

[2] Types of Winding-Up

(a) Voluntary Winding-Up

(i) In a voluntary winding-up, the jurisdiction of the court is not invoked in order to place a company in liquidation. It is the members of the company who are in control. However, upon an application being made for a voluntary winding-up of a company, the court may exercise powers that it might exercise if the company were being wound up by the court.

See: Section 274(1) of the Companies Act 1965;
Re Choong Khiaw Realty Co. Sdn. Bhd. [1976] 2 MLJ 73.

(ii) A company may be wound-up voluntarily if—

- the duration of the company as stated in Memorandum of Article or Association has expired and the company in a general meeting has passed a resolution requiring it to be wound up voluntarily

  See: Section 254 (1)(a) of the Companies Act 1965; or

- the company resolves by special resolution that it be wound-up voluntarily

  See: Section 254 (1)(b) of the Companies Act 1965.

(iii) A voluntary winding-up is deemed to commence at the time of the passing of the resolution for voluntary winding-up and unless the Court on proof of fraud or mistake thinks fit otherwise to direct. After commencement of the winding-up no action or proceeding may be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court imposes.

See: Section 263(2) of the Companies Act 1965.

(b) Winding-Up by the Court

(i) The power to deal with winding-up by the court is vested on a Judge in the High Court. Where a company has become defunct and its name is struck off by the Registrar of Companies and it is dissolved, such dissolution of the company does not affect the power of the court to wind-up the company.

See: Section 4(1) of the Companies Act 1965.

(ii) However, if the court makes an order to wind-up a company without having a jurisdiction to do so, such order may not be treated as a nullity unless and until it is discharged on appeal, such order shall be binding on the company's creditors and contributors.

(iii) Where an order is made that the company be dissolved, the company will from the date of the order be dissolved accordingly and no action or proceeding may be proceeded or commenced against the company or its property except by leave of the court. However the winding-up order does not dissolve the company as a corporation or vest the company's property in the liquidator unless a vesting order is made. A compulsory

winding-up order has a retrospective effect;

See: Section 233(2) of the Companies Act 1965;
Fairview School Bhd. v Indrani a/p Rajaratnam [1998] 1 MLJ 99.

(iv) Grounds for winding-up by the Court are as follows:

- by company special resolution This is an unusual ground because a special resolution is usually the basis for a voluntary winding-up;

  See: Section 218 (1)(a) of the Companies Act 1965.

- default in lodging the statutory report or in holding a statutory meeting. Applies to companies incorporated as public companies and only the Minister and contributories may petition on this ground;

  See: Section 218 (1)(b) of the Companies Act 1965.

- business does not commence within a year from its incorporation or if the company suspends its business for a whole year;

  See: Section 218 (1)(c) of the Companies Act 1965.

- the number of members is below two;

  See: Section 218 (1)(d) of the Companies Act 1965;
  Lim Sooi See v Koay Thye Hong Sawmill Sdn. Bhd. [1984] 1 CLJ 370.

- *t*he company is unable to pay its debt;

  See: Section *218 (1)(e)* of the Companies Act 1965;
  Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn. Bhd. [1990] 1 MLJ 282;
  Pioneer Concrete (Malaysia) Sdn. Bhd. v Celini Corporation Sdn. Bhd. [1999] 5 CLJ 145.

- the Directors acted in any manner which appears to be unfair or unjust to its members;

  See: Section 218 (1)(f) of the Companies Act 1965;
  Foo Yin shung v Foo Nyit Tse & Brothers Sdn. Bhd. [1989] 2 MLJ 369.

- based on the opinion of an inspector appointed under Part IX of the Companies Act 1965 on grounds stated under sections 218 (1)(e) and 218 (1)(g) of the Companies Act 1965;

- the duration of the company as stated in Memorandum of Article or Association has expired;

  See: Section 218 (1)(h) of the Companies Act 1965.

- the Court is of the opinion that it is just and equitable such as when the substratum of the company has gone *(Chua Kien How v Goodwealth Trading Pte Ltd* [1992] 2 SLR 296, CA), the shareholder has been excluded from management *(Tay Bok Choon v Tahansan Sdn. Bhd.* [1987] 1 MLJ 433,PC), or where there is a deadlock in management *(Ng Eng Hiam v Ng Kee Wei* [1965] 1 MLJ 238 and *Grand Choice Sdn. Bhd. v Direct Idea Sdn. Bhd.* [1998] 1 CLJ Supp 427);

  See: Section 218 (1)(i) of the Companies Act 1965.

- the license of a company under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983 has been revoked or surrendered;

  See: Section 218 (1)(j) of the Companies Act 1965.

- the licensed company carried on business in contravention of the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989;

  See: Section 218 (1)(k) of the Companies Act 1965.

- the company has held a license under the Insurance Act 1996 and such license has been revoked or where Bank Negara Malaysia has petitioned for the winding-up under the Insurance Act 1996 or an order under certain provisions of the Insurance Act 1996;

  See: Section 218(1)(l) of the Companies Act 1965;
  Section 58(4) of the Insurance Act 1996;
  Section 59(4)(b) of the Insurance Act 1996.

- the company is being used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia;

See: Section 218(1)(m) of the Companies Act 1965 ; and

- the company is being used for any purpose prejudicial to national security or public interest.

  See: Section 218(1)(n) of the Companies Act 1965.

[3] Who May Petition?

The parties who may apply to the court for the winding-up of the company are—

(a) the company itself;

See: Section 217(1)(a) of the Companies Act 1965.

(b) any creditor including any contingent or prospective;

See: Section 217(1)(b) of the Companies Act 1965; *Morgan Guaranty Trust Co. of New York v Lian Seng Properties Sdn. Bhd.* [1990] 1 MLJ 282.

(c) any contributory;

See: Section 4(1) of the Companies Act 1965.

(d) the trustee in bankruptcy or any person who is the personal representatives of a deceased contributory;

(d) the Official Assignee of the estate of a bankrupt contributory;

See: Section 217(1)(c) of the Companies Act 1965.

(e) the liquidator;

See: Section 217(1)(d) of the Companies Act 1965.

(g) the Minister on the grounds specified in sections 218(1)

(d) and 217 (1)(e) of the Companies Act 1965;

(h) Bank Negara Malaysia in the case of—

(i) a company which is a licensed institution; or

(ii) a schedule institution in respect of which the Minister has

put in charge with responsibility for finance has made an order; or

(iii) a non-scheduled institution in respect of which such Minister has made an order; or

See: Section 217(f)) of the Companies Act 1965.

(iv) a company which is licensed under the Insurance Act 1996;

See: Section 217(g) of the Companies Act 1965.

(i) the Registrar on certain specified grounds

See: Sections 218(1)(m) or (n) and 217(1)(h) of the Companies Act 1965.

(j) any two or more of the parties as in section 217(1) of the Companies Act 1965.

[4] Practice and Procedure

(a) General

(i) An application to the court for the winding-up of a company is by petition. Any petitioner presenting the petition must use the prescribed form as stated in First Schedule of Companies (Winding-up) Rules 1972 with variations as circumstances may require.

(ii) A Petitioner must allege and prove the facts entitling him to present the petition and show one or more of the grounds for making a winding-up order. The petition must be verified by an affidavit of the petitioner and the affidavit must be sworn and filed within four (4) days after the petition has been presented and such affidavit will be sufficient prima facie evidence of the statements in the petition.

See: Rule 26 of Companies (Winding-up) Rules 1972;
Hong Leong Finance Bhd. v Delta Drive (M) Sdn. Bhd [1999] 6 MLJ 239.

(b) Application to the Court

(i) A petition verified by affidavit must be filed at the office of the Registrar of the court. When filing a petition, the petitioner must obtain and file the consent in writing of an approved nominated liquidator. If no approved liquidator is nominated, the court shall appoint an approved liquidator or the official Receiver as the liquidator as it deems fit.

(ii) A copy of the winding-up petition bearing the seal of the court must be served upon the company at its registered office and if there is no registered office then at the principal or its last known principal place of business of the company Service of petition must be proved by an affidavit specifying the manner of service.

See: *Summit Company (M) Sdn. Bhd. v Nikko Products (M) Sdn. Bhd.* [1985] 1 MLJ 68;
Forms 5 and 6 of the First Schedule of Companies (Winding-up) Rules 1972.

(iii) The petition must be advertised seven clear days or such longer time as the court may direct before the hearing. It must be advertised once in the Malaysian government gazette and at least twice in two local newspapers circulating in Malaysia or in such other newspapers as the court may direct Failure to do so, the petition will be cancelled by the Registrar unless the Judge or the Registrar directs otherwise.

See: *Teck Yow Brothers Hand Bag Trading Company v Maharani Supermarket Sdn. Bhd.* [1989] 1 MLJ 101;
Bank Utama (M) Bhd. v GKM Amal Bhd [2000] 5 MLJ 657.

(iv) On the day of hearing of the petition the petitioner or his solicitor will have to satisfy the court that the petition has been duly gazetted and advertised, the affidavit verifying statement in the petition and affidavit of service have been duly filed, the provisions of the rules have been complied with by the petitioner, the consent in writing from liquidator obtained and filed and that the prescribed sum has been deposited to cover fees and expenses to be incurred by the approved liquidator or the Official Receiver as the case may be. Failure to do so will preclude the making of winding-up order and the court may dismiss or adjourn the petition;

See: *Hong Leong Finance Bhd v Delta Drive (M) Sdn. Bhd.* [1996] 6 MLJ 239.

(v) If the company intends to oppose the petition, its affidavit in opposition to a petition must be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the hearing date of the petition. The court may refuse to admit affidavits in opposition for non-compliance with this rule. The petitioner on the other hand may file and serve an affidavit in reply including a further affidavit in support of an alleged point in the petition within three days from the date of service of the affidavit in opposition.

See: *Crocuses & Daffodils (M) Sdn. Bhd. v Developments & Commercial Bank Bhd* [1997] 2 MLJ 756.

[5] Application of the Rules of the High Court 1980

(a) Generally, RHC has no application in winding-up proceedings. Order 1 r. 2 of the RHC shows that the provisions of Order 18 r. 19 RHC has no application to a petition presented under section 218 of the Companies Act 1965 because such petition is governed by the provisions of the Companies (Winding-Up) Rules 1972 where specific rules were made pursuant to section 372(d) of Companies Act 1965 to regulate the winding-up of companies. Order 1 r. 2 of the RHC cannot be relied upon to make the RHC apply.

See: *Lyn Country Sdn. Bhd. v EIC Clothing Sdn. Bhd.* [1997] 4 MLJ 198*; Chong Chee Yan v Golden Dragon Garden Sdn. Bhd.* [1999] 1 MLJ 573.

(b) However, if the winding-up rules does not provide any provisions in relation to the winding-up of a company, then the RHC will apply. The court had held that *O8 r19(1) (d) RHC* directly refers to striking out an application for abuse of process and *r19 (3)* refers to petitions, therefore *O18 r 19(1) (d)* can be relied upon as an application to strike out a petition presented under section 218 of the Companies Act 1965.

See: *Fair View Schools Bhd. v Indrani a/p Rajaratnam* [1998] 1 MLJ 99; *Sri Binaraya Sdn. Bhd. v Golden Approach Sdn. Bhd.* [2000] 3 MLJ 465).

(c) In addition, Order 88 of the RHC applies generally to a variety of proceedings under Companies Act 1965 including an Anton Pillar order to compel an immediate inspection of the register of the minute book.

See: *Loo Mee Di v Bioray Corporation (M) Sdn. Bhd.* [1995] 4 MLJ 818.

[6] Formal Defects

No proceedings under the Companies Act 1965 or the Companies (Winding-up) Rules may be invalidated by any formal defect or by any irregularity unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity and that injustice could not be remedied by any order of the court.

See: *Bank Utama (M) Bhd v GKM Amal Bhd.* [2000] 5 MLJ 65;
Ann Joo Metal Sdn. Bhd. v Pembinaan MY Chahaya Sdn. Bhd. [2000] 5 MLJ 708.

[7] Appeal and Review of Court Order

(a) The Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter. The procedure and practice of the Court of Appeal and the Federal Court relating to appeals to the Court of Appeal and the Federal Court also applies to appeals in winding-up proceedings.

See: Section 253 of the Companies Act 1965;
Sri Hartamas Development Sdn. Bhd. v MBF Finance Bhd [1991] 3 MLJ 325;
Perdana Merchant Bankers Bhd. V Maril Rionebel (M) Sdn. Bhd. [1996] 4 MLJ 343.

(b) The time for appealing from an order made in a winding-up proceeding is one month from the date of such order. An appeal to the Court of Appeal is by way of rehearing and must be brought by notice of appeal. An appeal does not stay the execution of a proceeding except if the High Court or the Court of Appeal orders so. Where a winding-up is discharged on appeal, all proceeding taken shall also be discharged.

40

Judicial Review

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Chapter 40

Judicial Review

[1] Meaning and Scope of Judicial Review

(a) Judicial review is the term used to describe the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, and other administrative bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. In Malaysia, judicial review of civil matters is governed by the Rules of the High Court, the Specific Relief Act 1950 and the inherent powers granted to the court under Paragraph 1 of the Schedule to the Courts of Judicature Act 1964.

(b) In cases where the court finds it appropriate to do so, the court will exercise its supervisory jurisdiction by issuing orders of mandamus, certiorari, prohibition and other remedies available to it by statute and the rules of court. Order 53 of the RHC has been recently amended to grant wider powers to the court to grant the relief of declaration, damages, injunction or monetary compensation in judicial review proceedings.

(c) Judicial review has often been perceived to be politically and administratively inconvenient for the government and Parliament has responded to it by attempting to oust or limit the court's jurisdiction to review administrative decisions.

(d) In determining whether a body of persons is subject to judicial review, the test is to look at the source and the nature of its power that is, whether the power is from statute or non-statutory or prerogative. For instance, if the source of power is derived from statute or subordinate legislation than the said body will be open to judicial review, unless Parliament clearly declares and states its intention to rule out or limit

judicial review by means of ouster or privative clauses. The same position applies where the matter is non justiciable or is a matter of pure private law. Nevertheless, the court's jurisdiction to review such decision or order is not necessarily ousted by statutory clauses such as the 'finality', 'privative' or 'ouster' clauses. Even where statute provides for an order or a decision to be final and conclusive, shall not be challenged, appealed against, reviewed, quashed or called in question in any court of law, there can be interference by the court. For example, such ouster clauses in statutes would have to yield if it is clearly contrary to any constitutional rights granted as enshrined in the Federal Constitution. Where there is an error of law on the face of the record, finality clause would not be able to stop the court's jurisdiction to review. The availability for judicial review or the extent to which it is permitted, may be governed by statute even though it has been decided that whatever the clause may be, the court's jurisdiction is not necessarily barred in cases of jurisdictional error. The court's reluctance to yield to the ouster clauses generally has resulted in the court's giving 'an expansive rather than a narrow or strict interpretation' to ouster clauses.

(e) The general rule is that all administrative authorities and tribunals are bodies of limited jurisdiction where decision and proceedings were subject to judicial review. On the other hand, if the source of power is contractual, as in a private arbitration case, than the arbitrator is not subject to judicial review. Judicial review would not be a proper proceeding when the subject matter relates to matter of pure private functions as consistent with the general rule.

[2] Importance of Judicial Review

Lord Irvine, the Lord Chancellor of England and Wales in his keynote speech at Latimer House Symposium explained the importance of judicial review as follows:

> "judicial review promotes the rule of law. There should be no political and certainly no party political aspect of judicial review. In exercising their powers of judicial review the judges should never give grounds for the public to believe that they intend to reverse Government policies simply because they dislike them. The court does not substitute its opinion for that of the decision maker on whom Parliament has conferred power. The court rules only on the legality of the decision not its correctness. In doing so, the court is not acting against the will of Parliament but in support of it. That is how it should.".

[3] Nature of Judicial Review

(a) The function of this proceeding is to ensure that a person is given fair treatment by the authority in exercising its decision making power. It is not part of the purpose of the judicial review process to replace the view of the authority constituted by law who decides the matter with the opinion derived from courts. The jurisdiction of the court in judicial review proceedings has been described as being supervisory in nature and the court has no jurisdiction to examine the merits of the case. In other words, judicial review is concerned with ensuring that public authorities use their power as given by the law and the judicial function under judicial review jurisdiction is thus limited to the issue of legality. As a general principle, the role of the court is more to consider the decision making process, be it the hearing or the procedure itself rather than the correctness of the decision.

(b) In judicial review proceedings, the court does not sit as an appellate court to review the findings of the inferior tribunal. This principal is subject to any contrary provision found in the law. This principle has been constantly reaffirmed even in cases where the merits of the decision are reviewed and the original decision reviewed has been substituted which are considered as an exception to this principle. Judicial review is not only non-appellate in nature, it also does not confer the court with powers of the inferior court, tribunal or body under review. In short, a court sitting in judicial review proceedings cannot assume the exercise of discretionary powers of the reviewed body. Therefore, in the absence of written law the court cannot make an order that would be tantamount to making a decision of the reviewed body. It can only make an order on the issue of the legality of the decision making process. Accordingly, the powers conferred by statute to an authority could only be exercised by the authority to whom the power has been conferred.

[4] High Court's Jurisdiction in Judicial Review

(a) Leave is required before the High Court can entertain an application for judicial review under Order 53 of the RHC. Without leave the court does not have the jurisdiction to hear and decide any application for judicial review.

(b) The courts have refused to exercise their discretion to grant judicial review in the following circumstances:

(i) where there was delay or undue laches in the application. Under Order 53 of RHC application for leave to bring judicial review proceeding must be made within 40 days of the date when grounds for the application first arose or when the decision is

first communicated to the applicant. Long and inordinate delay in seeking judicial review by the applicant will disentitle him to the remedy sought;

(ii) where the relief sought is pointless or unnecessary. The court does not act in vain. Any relief sought which offends this rule would not be granted. The court has also refuse remedy where more effective alternative remedy is available;

(iii) where an appeal is available. In particular, the court will not make the remedy of judicial review available when other alternative remedy has not been exhausted by the applicant. Another factor to be considered in deciding whether or not remedy should be granted is the suitability of the relief sought;

(iv) where there is an acquiescence or waiver of right by the applicant. In short, the acquiescence or waiver bars the relief. What amounts to acquiescence or waiver is a question of law and fact and is an issue to be determined by the court. Even so, the waiver or acquiescence must have been intentional and done with knowledge of the applicant's right; and

(v) where the conduct of the applicant is inequitable. The court may not exercise its discretion in granting relief by looking at the conduct of the applicant.

(c) However, judicial review may be granted on the following grounds:

(i) illegality that is where there is dispute as to whether the decision maker has understood correctly the law that regulates his decision making power;

(ii) irrationality that is where there is a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it; and

(iii) procedural impropriety that is where the administrative tribunal failed to observe procedures that are expressly laid down even where such failure does not involve any denial of natural justice.

[5] Mode of judicial review

(a) The procedure to challenge public decisions is regulated by Order 53 of the RHC which reads as follows:

"Order 53. Application for Judicial Review.
Rule 1. Scope. (O. 53, r. 1) .

(1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

(2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.

Rule 2. Applications. (O. 53, r. 2) .

(1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form 111A.

(2) An application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:

Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

1. Prerogative writs.

Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.".

(b) The often quoted case of *O'Reilly v Mackman* (1982) 2 All ER 1124 has been used by the courts and legal profession as authority for the proposition that, as a general rule, litigants whose rights are affected by decisions of Public Authorities must challenge those decisions by way of judicial review under Order 53 and not by way of ordinary

claim and failure to do that would amount to an abuse of the process of the court. This stems from what Lord Diplock said in that case and that is—

> *"The position of applicants for judicial review has been drastically ameliorated by the new O. 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under O. 53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons O. 53 provided.*
>
> *Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O. 53 for the protection of such authorities.*
>
> *My Lords, I have described this as a general rule; for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis a process that your Lordships will be continuing in the next case in which judgment is to be delivered today (see Cocks v. Thanet DC [1982] 3 All ER 1135).".*

(c) The case of *O'Reilly v Mackman* was considered by the Federal Court in the recent case of *YAB Dato' Zambry Bin Abd Kadir & 6 Others v YB Sivakumar A/L Varatharaju Naidu* [2009] 4 CLJ 253 where the respondent argued that the applicant in challenging the decision of the Speaker of the Perak State Assembly should have commenced

his action under Order 53 and the case of *O'Reilly v Mackman* was relied on as authority. *O'Reilly v Mackman* of course had been followed by the courts in Malaysia (see *Dato Seri Anwar bin Ibrahim v. Perdana Menteri Malaysia & Anor* [2007] 3 CLJ 377, *Ahmad Jefri Mohd Johari v. Pengarah Kebudayaan & Kesenian Johor & Ors*[2008] 6 CLJ 473[1] and *Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [2009] 1 CLJ 192). The Federal Court through the judgment of Augustine Paul FCJ (as he then was) after examining the history of Order 53 concluded as follows:

(i) The rule in *O'Reilly v Mackman* ought to be applied with care in Malaysia in view of the uncertainties caused in England;

(ii) Order 53 of the RHC itself does not say that it is the exclusive mode of procedure in challenging decisions of Public Authorities;

(iii) Public decisions can be challenged pursuant to section 41 of the Specific Relief Act and the inherent jurisdiction of the court. The observation of Gopal Sri Ram JCA (as he then was) in *Attorney General of Hong Kong v Zauyah Wan Chik* [1995] 2 MLJ 620 was quoted with approval by the Federal Court and they are these—

> *"Now, the jurisdiction of a Malaysian court to grant declaratory relief springs from two sources. First there is the statutory basis to be found in s 41 of the Specific Relief Act 1950 which reads as follows:*
>
> *Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:*
>
> *Provided that no court shall make any such a declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.*
>
> *Explanation – A trustee of property is a 'person interested to deny' a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.*
>
> *The procedural adjunct to the statutory basis is to be found in O 15 r 16 of the Rules of the High Court 1980, which provides as follows:*

No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

The alternative basis for the grant of declaratory relief – a jurisdiction of great antiquity – is the inherent jurisdiction of the court: Kuluwante (An infant) v Government of Malaysia & Anor [1978] 1 MLJ 92. It has long been recognized by Indian courts administering their Specific Relief Act 1877 (later revised and re-enacted in 1963) that s 42 of that enactment, which is identical to s 41 of our statute is not a complete code upon the subject of declaratory 5 decrees. In Supreme General Films Exchange Ltd v Brijnath Singhji AIR 1975 SC 1810, Beg J explained the scope of the declaratory jurisdiction in these words:

Kishori Lal's case AIR 1952 Punj 387 was cited to show that declaratory decrees falling outside s 42 of the Specific Relief Act are not permissible because s 42 Specific Relief Act is exhaustive on this subject. This view must be held to have been rejected by this court when it declared in Vemareddi Ramaraghava Reddy v Konduru Seshu Reddy 1966 Supp SCR 270 at p 277; AIR 1967 SC 436 at p 440:

In our opinion, s 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the courts have power to grant such a decree independently of the requirements of the section. It follows, therefore, in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of s 42 of the Specific Relief Act.'

(d) The decision of the Federal Court is most welcome as it has taken away the uncertainty as to whether judicial review under Order 53 of the RHC is the only available mode in challenging decisions of Public Authorities. Further it has taken away the arduous and sometime impossible task of determining whether the infringed right is 'private' or 'public'. This is recognized by the learned author Sir William Wade in his book – 9th Edition Administrative Law where he lamented the decision of *O'Reilly* and this is what he wrote at page 665—

"As soon as O'Reilly v Mackman was decided the courts had to undertake surgical operations in order to sever public from private law. … Their work made a mystifying start in a decision of the House of Lords delivered on the same day as O'Reilly v Mackman and co-ordinated with that case (Cocks v Thanet District Council [1983] 2 AC 286)

The House of Lords held that there was now 'a dichotomy between a housing authority's public and private law functions': their decision whether they were satisfied that the plaintiff fulfilled the statutory conditions was a matter of public law, but their obligation to provide housing, if so satisfied, was a matter of private law enforceable by ordinary remedies."

(e) The House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 was faced with the same difficulty and this is what Sir William Wade said—

"The impossibility of dividing public and private law cleanly is illustrated by another case where the House of Lords gave a variety of different reasons for allowing an action by writ for a declaration to be brought against a government department. The department had issued a circular to local health authorities to the effect that doctors could in some circumstances give contraceptive advice and treatment to girls under 16 without parental consent. Mrs. Gillick, a mother of five young girls, sued by a writ for a declaration that to act on this advice would infringe her parental rights. Her claim failed on the merits, but the House of Lords approved the procedure used. Of the various reasons given the simplest was that the defendants raised no objection – an exception expressly recognised in O'Reilly v Mackman, presumably on the ground that if a public authority chooses to waive its procedural privileges, the logic of that decision no longer applies. Another reason, put forward by Lord Scarman, was that 'the private law content of her claim was so great as to make her case an exception to the general rule'; and abandoning the mutual exclusivity of O'Reilly, he held that she was entitled to proceed either by ordinary action or by judicial review. It might, indeed, be expected that she could bring an ordinary action for a declaration as to her personal legal rights without being caught in the O'Reilly entanglement, as had for so long been allowed in classic cases such as Dyson and Pyx Granite …"

(f) With the existence of Order 1 rule 1A and Order 2 rule 3 of the RHC which command the courts to have regard to the justice of case, the courts should be reluctant to entertain arguments as whether a suit should be struck out on the ground that a wrong procedure had been used.

Lord Saville in *British Steel Plc v. Customs & Excise Commissioners* [1997] 2 All ER 366, 379 expresses the same sentiment—

> *These proceedings have to date been concerned with the question whether British Steel plc used the correct form of action in which to make the claim for repayment of excise duty from the Commissioners of Customs and Excise.*
>
> *It is now well over 100 years ago that our predecessors made a great attempt to free our legal process from concentrating upon the form rather than the substance, so that the outcome of cases depended not on strict compliance with intricate procedural requirements, but rather on deciding the real dispute over the rights and obligations of the parties.*
>
> *The old forms of action have doubtless long been laid to rest, but others have sprung up in their place, giving rise once again to litigation which is devoted to the question whether the right form of action has been used, rather than addressing and resolving the real dispute between the parties.*
>
> *The present proceedings are of this nature, for the question is whether the claim is properly brought by ordinary action or should first have been advanced by way of judicial review. The question is of vital importance, for under our rules of procedure it is now too late to adopt the latter form of action, while if the wrong form is chosen, it is categorised as an abuse of the process.*
>
> *This is only the most recent such case, for over the last decade or so there has been a stream of litigation on this subject, much of it proceeding to the House of Lords. The cases raise and depend upon the most sophisticated arguments, such as the distinction and difference between what is described as 'public' as opposed to 'private' law, whether rights are of a 'private' or 'public' nature, whether 'private' rights depend upon the exercise of 'public' obligations and so on: as well as seeking to decide, in the context of legislation which does not make the position clear, whether or not the Parliament did or did not intend to limit or exclude rights that might otherwise exist under common law. The cost of this litigation, borne privately or through taxation, must be immense, with often the lawyers the only people to gain.*
> *Such litigation brings the law and our legal system into disrepute; and to my mind correctly so. It reinforces the view held by the ordinary person that the law and our legal system are slow, expensive and unsatisfactory. In this day and age it is surely possible to devise procedures which avoid this form of*

satellite litigation, while safeguarding both the private rights of individuals and companies and the position and responsibilities of public authorities."

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[1]However, in the recent decision of the Federal Court in Ahmad Jefri Bin Mohd @ Md Johari v Pengarah Kebudayaan & Kesenian Johor and 2 others (10 March 2010) it was held that where the infringement of right is based solely on 'substantive principles of public law" the procedure under Order 53 must be adopted, failing which it will be struck out on the ground that it abuses the process of the court. This decision hence requires the court to make an initial and difficult finding that whether the cause of action or the rights infringed is within the realm of public law or private law. It can be discerned from the judgment that the decision is premised on the policy consideration that "the public interest in good administration requires that public authorities and third parties should not be kept in suspense as the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer than is absolutely necessary in fairness to the person affected by the decision" – Lord Diplock in O'Reilly v Mackman.