Legal power and legal limits

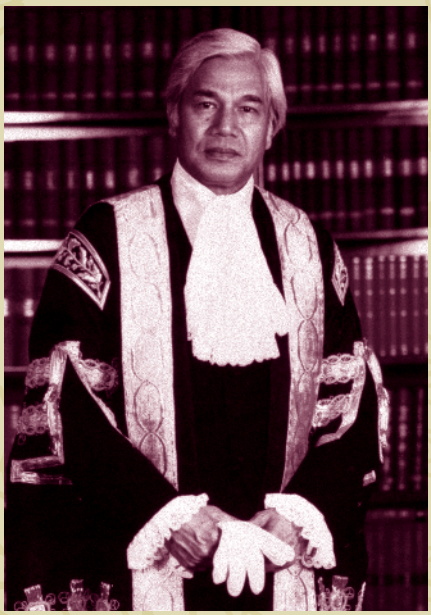
"Unfettered discretion is a contradiction in terms … Every legal power must have legal limits, otherwise there is dictatorship …

In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the court to intervene.

The courts are the only defence of the liberty of the subject against departmental aggression."

—Raja Azlan Shah Acting CJ (Malaya) (as he then was)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd
[1979] 1 MLJ 135, FC at 148

HRH Sultan Azlan Shah



The Sultan Azlan Shah Law Lecture Series

On 10 April 1985, the then Vice Chancellor of the University of Malaya, Royal Professor Ungku Abdul Aziz, announced that in appreciation of His Royal Highness's enormous support and guidance given to the Faculty of Law, University of Malaya, an annual series of law lectures to be named The Sultan Azlan Shah Law Lecture will be established.

Since 1986, when the first Sultan Azlan Shah Law Lecture was delivered in Kuala Lumpur, distinguished Lord Chancellors, Masters of the Rolls, Lords of Appeal in Ordinary, a President of the New Zealand Court of Appeal, an Associate Justice of the Supreme Court of The United States of America and academics from the Commonwealth have been invited to partake in the premier law lecture series of Malaysia.

The series of lectures have yielded brilliant insights on an extensive range of legal issues, and the expert and contemporaneously salient opinions of legal luminaries from around the Commonwealth.

These authoritative, stimulating and thought-provoking lectures have now been published in a single volume: *The Sultan Azlan Shah Law Lectures: Judges on the Common Law,* edited by Professor Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell, 2004.

Judges: Development of the law

“ Judges play an important role in the development of the law in a country. It is their decisions that become precedents in subsequent cases, and it is their decisions that reflect the current state of the law.

For this reason, their decisions must be based on the law, with sufficient authorities and reasoning. ”

—HRH Sultan Azlan Shah
The Judiciary: The Role of Judges

“ Laws alone are incapable of regulating the conduct of every aspect of business transactions. No amount of ingenuity on the part of legal draftsmen will suffice to anticipate every form of improper dealing or the various means of deception or fraud which may be perpetrated by persons in control of companies.

Should not businessmen be made to realise that besides compliance with the law, there are also moral obligations? Though corporations exist to maximise profits, they also have a social responsibility to partake in the general development of society. Corporations operate not in a vacuum but in a socio-political environment. The tendency among certain corporations to ignore these responsibilities and their failure to uphold pristine ethical values may prove to be self-destructive in the long run. ”

—HRH Sultan Azlan Shah
Corporate Activity: Law and Ethics

6 Corporate Activity: Law and Ethics

Malaysia Institute of Management
Silver Jubilee Dinner
Kuala Lumpur, 21 June 1991

Tonight's function marks the beginning of the year-long activities planned by the Malaysian Institute of Management to commemorate its 25th Anniversary. I congratulate the Institute for its accomplishments.

Of late, there has been an increasing awareness over the relevance of ethics in the conduct of business. It is a truism that corporate activity has to be regulated both by law and ethics. Sound business decisions may be reached through an ethical-oriented analysis as through a self-interest approach. As it is said, the ethical solution—the right solution—is also the practical solution. Ethics, after all is united with utility and reason, and this is what makes ethics an important factor in personal, institutional, business, sports and national decision-making. We are all the product of the accumulation of our decisions.[1]

1 Myers, "Ethics in International Affairs", (1991) 92 *Dialogue* 3.

In two of my earlier public lectures, I spoke on a similar theme: to the Academy of Medicine Malaysia, I addressed the doctors on *Medicine, Ethics and the Law*,[2] and to the Institution of Engineers Malaysia, I emphasised the ethical issues pertaining to engineers.[3] This evening, I am happy to have the opportunity to address the business community in Malaysia on the role of ethics in corporate activities.

Corporate activity has to be regulated both by law and ethics. The standards and values that management adopts reflect the socio-cultural milieu of society and have a significant effect in shaping the values of the nation.

There is no denying that management and business conduct have direct and indirect impact on all sectors of society. The standards and values that management adopts reflect the socio-cultural milieu of society and have a significant effect in shaping the values of the nation.

Whilst the conduct of professionals in many fields is governed both by law and a code of ethics pertaining to the particular profession, businessmen do not have any formalised code of ethics. More often than not, it is the law which controls their activities. But laws alone are incapable of regulating the conduct of every aspect of business transactions. No amount of ingenuity on the part of legal draftsmen will suffice to anticipate every form of improper dealing or the various means of deception or fraud which may be perpetrated by persons in control of companies. This evening, I hope to draw your attention to certain aspects of the conduct of business which highlight the inter-play between law and ethics.

2 The Eighth Tun (Dr) Ismail Oration organised by the Academy of Medicine of Malaysia on 5 October 1989. See chapter 9, below; also published in Sinnadurai (Editor), *His Majesty Sultan Azlan Shah*, 1989, Professional Law Books, pages 127–144 and 1990 *Supreme Court Journal* pages 1–18.

3 Second Public Lecture organised by the Institution of Engineers, Malaysia on 31 March 1989. See chapter 8, *Engineers and the Law: Recent Developments*, below; also published in *His Majesty Sultan Azlan Shah*, above, pages 99–125.

Corporate law

The area in which there is a clear display of the inter-relationship between law and ethics is in the field of company law: insider trading, securities fraud, minority rights, criminal breach of trust, and more generally, breach of fiduciary duties, are merely few illustrations of this.

With the increase in trade and foreign investment and as a consequence of the economy of the country progressing steadily, there has been a marked increase in the number of companies being incorporated in Malaysia and many seeking listing on the stock exchange. What was once family-owned companies or small companies have now grown in size both physically and in terms of capitalisation. As a result, the public have also taken a keener interest in participating in the ownership of these companies.

Company law in Malaysia has become one of the most rapidly developing areas of the law. The country has now reached such heights, that in the fields of securities, takeovers, mergers, reverse takeovers, and the like, the position is comparable to that existing in the other so-called advanced nations. In so achieving this position, some of the attendant problems associated with these corporate activities have also surfaced. The most common of these is, of course, corporate fraud, in whatever form it may take. New laws had to be introduced to keep pace with changing times. The Companies Act 1965 has been amended several times,[4] and new legislation, ie the Securities Industries Act 1983[5] and the Securities Industry (Central Depositories) Act 1991,[6] were enacted. About the same time, it is interesting to note that new regulatory bodies, like the Foreign Investment Committee (FIC) and the Capital Issues Committee (CIC), were established. Guidelines, not in the form of

4
Act 125, Reprint 1988 and Amendment Act A720.

5
Act 280.

6
Act 453.

legislation, were also introduced. The Regulations on Acquisition of Assets, Mergers and Take-Overs is an example of such guidelines.

Self-regulations

The question which may be asked is whether such self-regulations, and the body itself which administers it, especially since these bodies have no statutory powers to punish offenders who contravene their code or regulations,[7] are effective in instilling a certain degree of ethical values in the conduct of such corporate transactions.

In countries like England, these self-regulations have been well received by the business community, and the bodies regulating them have achieved a great deal of success.[8] Likewise, I am confident that with the introduction of similar self-regulations, a more ethical and responsible corporate image may gradually appear. This, in turn, would prove to be an attractive attribute of the corporate sector in Malaysia.

Company directors

Another important aspect of corporate activity which has come under close scrutiny is the role of company directors, and the image portrayed by them.

Company directors continue to consider their companies as their own, and in the process, appear to have lost sight of the fact that they are merely trustees of the general public who are the shareholders. Being trustees, they are, as a general rule, accountable to the shareholders. Yet the number of cases of abuse of power by

7
As to whether the decisions of such bodies are subject to judicial review, see *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 and *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1989] 1 All ER 509.
See also Lord Woolf, "Judicial Review of Financial Institutions" in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Professional Law Books and Sweet & Maxwell, chapter 12.

8
See generally Whittaker, "Legal Technique in City Regulation", (1990) 43 CLP 35;
Weinberg and Blank on *Take-over and Mergers*, 4th edition, pages 216–217.

directors reported over the recent years is a clear manifestation as to how those in power perceive their roles.

Such practices seem to suggest that some directors in an attempt to enrich themselves seem to lack an understanding of their moral, if not their legal obligations.

In most of these areas, the existing laws may provide some kind of a protection to the general public. But, as we know, the long arm of the law alone may not in every case provide the protection that is required. Most cases of corporate offences do not surface as the perpetrators of such crimes often conceal or camouflage their acts. Even in the cases which are brought to the attention of the relevant enforcement authorities, due to lack of evidence or other related matters, the offenders are able to get away scot free.

> Company directors consider their companies as their own, and have lost sight of the fact that they are merely trustees of the general public who are the shareholders. Being trustees, they are, as a general rule, accountable to the shareholders.

The same question again comes to one's mind, that is: Should not businessmen be made to realise that besides compliance with the law, there are also moral obligations? Though corporations exist to maximise profits, they also have a social responsibility to partake in the general development of society. It needs to be emphasised that corporations operate not in a vacuum but in a socio-political environment. The tendency among certain corporations to ignore these responsibilities and their failure to uphold pristine ethical values may prove to be self-destructive in the long run.

It is true that in certain circumstances, the law has not kept pace with the changes in the corporate sector. This is not because the law has inherent shortcomings or that it has inadvertently fallen behind: the role of the law is not to regulate the minute details of every aspect of corporate activity. Its only function is to help define the parameters of corporate activity, and generally to ensure that such activity is within the limits set by society.

Besides compliance with the law, are there also moral obligations? Though corporations exist to maximise profits, they also have a social responsibility to partake in the general development of society.

Another reason for the widespread instances of abuse of power is the fallacy in thinking that as a corporation is not a human being, moral values and ethics are inapplicable. A corporation, in law, is a legal entity.[9] Each subsidiary of a holding company is a separate legal entity.[10] A corporation, like a human being, has a brain and a nerve centre which control what it does: the employees being the hands and the directors being the mind of the company. This feature was lucidly explained by Lord Denning in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*:[11]

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these

9
Lord Macnaghten in the classic case of *Salomon v Salomon* [1897] AC 22, 51 said: "at law a [company] is a different person altogether from the subscribers to the memorandum of association." See generally *Palmer's Company Law*, Volume 1, 22nd edition, chapter 18.

10
See *Charterbridge Corp v Lloyds Bank Ltd* [1970] Ch 62 and generally *Palmer's Company Law*, chapter 67.

11
[1957] 1 QB 159.

> managers is the state of mind of the company and is treated by the law as such.[12]

It appears that this basic feature of companies is often, if not deliberately, overlooked.

Insider trading

An example of such abuse is that relating to insider trading. The subject of insider trading became increasingly lively in the late 1980's and has been heightened now by the recent Guinness/Distillery affair in England and the Boesky conviction in the United States.[13]

I should perhaps also point out that studies have indicated that such activities are frequently carried out by non-residents of a country. However, the existing instruments for international co-operation are not designed to facilitate the obtaining of information of such facts and for the punishment of such offenders. As there are deficiencies in international law with respect to the phenomenon of insider trading, certain countries, for example, in Europe, have established a Convention on Insider Trading for the Exchange of Information between the countries.[14]

Conventions of this nature enable countries to supervise the securities market effectively and to establish whether the participants of certain financial transactions on the stock markets are insiders. This would in turn reveal whether the transactions were fraudulent or proper. Maybe, the time has come for our country to consider the implementation of such agreements with other countries to combat such operations in Malaysia. As pointed out by Professor Loss of Harvard University, who is regarded as the leading authority on securities:

12
Ibid at 172.

13
See generally, Ashe and Counsell, *Insider Trading, The Tangled Web*, 1990, Fourmat Publishing, London.

14
Lowry, "The International Approach to Insider Trading: The Council of Europe's Convention", [1990] *Journal of Business Law* 460.

> … the very preservation of any capital market depends on liquidity, which rests in turn on the investor's confidence that current quotations accurately reflect the objective value of his investment.[15]

Insider trading is a classic case of abuse of power; there are many more. Directors, because of their special position, are often confronted with the difficulty of coping with questions flowing from conflict of duties and interest, an area which is rich in litigation.

Directors may be faced with numerous opportunities whereby the temptations to enrich themselves are compelling, for example, where a director uses his position to obtain a profit for himself. The director, in such a situation is, of course, accountable to the company for the profits made by him. A director, like an agent who receives a bribe, will otherwise be in breach of his fiduciary duty. The well-known dictum of Lord Herschell in *Bray v Ford*[16] still holds good as can be seen in its application in all its rigour by the House of Lords recently in *Guinness plc v Saunders*:[17]

> It is an inflexible rule of a court of equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.[18]

A strict application of the rule of equity that a director of a company, as a trustee of the shareholders, cannot make any profit from his trust, or even obtain remuneration for services rendered by him to the company, except as expressly provided in the trust deed, is clearly illustrated in the well-known recent case of *Guinness plc v Saunders*.[19] In this case, the House of Lords refused to allow a

15
Louis Loss, "The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States," (1970) 30 *Modern Law Review* 34 at 36.

16
[1896] AC 44 at 51–52.

17
[1990] 1 All ER 652, HL.

18
Ibid at 660. See also dictum of Cairns LJ in *Ferguson v Wilson* (1866–67) LR 2 Ch App 77 at 89–90 which was approved by the Privy Council in the recent case of *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 All ER 404 at 420 (on appeal from New Zealand).

19
[1990] 1 All ER 652, HL

director of Guinness to retain the £5.2 million paid to him for his assistance in a takeover bid made by Guinness. The court held that he was in breach of his fiduciary duty to avoid a conflict of personal interest and a duty to the company.

> A director of a company, as a trustee of the shareholders, cannot make any profit from his trust, or even obtain remuneration for services rendered by him to the company, except as expressly provided in the trust deed.

Likewise, to quote merely one well-known Malaysian case, *Mahesan v Malaysian Government Officer's Co-operative Housing Society*,[20] Mahesan, a director of the Housing Society, decided to buy land for the Society but came to a clandestine arrangement with a third party in exchange for a bribe, so that the third party bought the land at the asking price and sold it to the Society for twice the original amount. The Privy Council held that the Housing Society could recover the amount of the bribe, as money had and received, or sue Mahesan for fraud and loss, in excess of the amount of the bribe.

Protection of minority shareholders

Another aspect of corporate activity where law and ethics play an important role is in the area of minority shareholders rights. The general rule, of course, is that members of a company are bound by the decisions made by the majority of members. As was pointed out by Lord Wilberforce in the Malaysian case of *Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung*:[21]

20 [1978] 2 All ER 405; (1977) 3 PCC 323. See Goff and Jones, *The Law of Restitution*, 2nd edition, pages 490–511 and generally the Law Commission, Working Paper No 104 on *Criminal Law, Conspiracy to Defraud*, HMSO, 1987.

21 (1978) 3 PCC 388.

> Those who take interest in companies limited by shares have to accept majority rule.[22]

Therefore, as the actions of the majority bind all members, it is the duty of those in charge of the management of the company to ensure that the interests of all members are protected. Though they may have the support of the majority, they should ensure that no unlawful act or an act which may amount to a fraud should be implemented. As pointed out earlier, there is a tendency on the part of those who control companies to regard companies as a mere machinery or vehicle to further their own interests, and in the process to overlook the fact that the company is made up of individuals who are the shareholders.

As the actions of the majority bind all members, it is the duty of those in charge of the management of the company to ensure that the interests of all members are protected.

The law, of course, provides certain rights and remedies to minority shareholders. In cases where a member of a company feels that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members, or that some act of the company has been done or threatened or that some resolution of the members has been passed which unfairly discriminates one or more members, such person may apply to the court for an order to seek certain redress. In such a situation, if the court is satisfied with the merits of the application, the court may, under section 181 of the Companies Act 1965, inter alia:

22
Ibid at 389.

(a) direct or prohibit any act or cancel or vary the transaction or the resolution;
(b) regulate the conduct of the affairs of the company in future; and
(c) in certain circumstances, provide that the company be wound up.

The circumstances under which the court may grant any of the reliefs set out in section 181 of the Companies Act 1965 was dealt with in detail by the Privy Council in the case of *Kong Thai Sawmill*, which I have referred to above. Again, to quote Lord Wilberforce:

> It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made.[23]

In this case, a minority shareholder (the respondent) brought an action against the company and two directors seeking relief under section 181 of the Companies Act 1965. The respondent claimed 60 separate claims for relief concerning a large number of separate matters. The main allegation of the respondent was the misuse or misappropriation of company funds by the two directors. The Privy Council in refusing to grant the relief sought, rejected the respondent's claims on the ground that none of the allegations of the respondent was substantiated. The respondent's case for winding up the company was also rejected.

As can be seen, it is not always easy for a minority shareholder to succeed. In *Smith & Ors v Croft & Ors (No 2)*,[24] the court again

23
Ibid.

24
[1987] 3 All ER 909.

considered the circumstances under which a minority shareholder may bring an action against the directors for having received excessive remuneration and making unauthorised payments. The court in this case held that the minority shareholders, who were the plaintiffs, had no locus standi to bring the action as it was the company and not the plaintiffs who should have brought the action. The court drew a distinction between the personal right of a shareholder and a loss which was caused to the company. Knox J said:

> When a minority shareholder seeks to enforce a right of the company to claim compensation for a past ultra vires transaction, there are two separate rights involved. First, there is the minority shareholder's right to bring proceedings at all and, second, there is the right of recovery which belongs to the company but is permitted to be asserted on its behalf by the minority shareholders.[25]

It is the management's paramount duty always to act in the best interests of the company as a whole and not merely their own or that of the majority.

Cases of fraud exercised by those in control of the company against the minority are situations like:

(a) appropriation of the company's money or property;
(b) the majority obtaining a benefit at the expense of the company; or
(c) the majority's attempt to prevent an action from being brought.

25 Ibid at 945. See also *7 Halsbury's Laws of England*, 4th edition, paragraph 713.

Whilst it is true that in many instances of such oppression an action is not brought by minority shareholders either because the fraudulent acts are not known or because of other technicalities involved in the law, those in charge of the management of a company should not take advantage of such situations. It is their paramount duty always to act in the best interests of the company as a whole and not merely their own or that of the majority.

Computer misuse

Time does not permit me to delve into many other aspects of corporate abuse. I, however, wish to discuss briefly a recent development, which may be of particular interest to many of you. The arrest of a medical computer consultant in Ohio by FBI agents on behalf of Scotland Yard, and the conviction of a Cornell University undergraduate early last year in the United States,[26] are mere illustrations of the rapid spread of computer technology, the ever changing computer vocabulary and the growing global concern about computer misuse.[27]

With the advent of electronics and other technological development, especially in the area of computers, a number of legal and ethical issues have arisen and continue to arise. Computers are now a common feature of the financial and insurance sectors, particularly in the stock markets, money markets and electronic fund transfers, and many more. In the field of financial services, the introduction of on-line computer systems has replaced the physical trading floor in the stock exchanges in several countries. Even in Malaysia, with the advent of scripless securities to be introduced under the Securities Industry (Central Depositories) Act 1991,[28] the reliance on computers will increase.

26
This was the first conviction under the United States Computer Fraud and Abuse Act 1986. See page 143, below.

27
McConnell, "Global Warning in Computer Law", (1990) 140 *New Law Journal* 287.

28
Act 453.

The magnitude of business transactions conducted through computers can be seen from the following fact: it is said that US$250 million pass in and out of the City of London every day by electronic means.[29]

There is also no doubt that the banking industry has been radically changed with the extensive use of computers. As many of the banking transactions involving huge sums of money may be transacted by the mere keying in of certain numbers on a computer, the opportunities for the commission of computer related crimes, particularly fraud, have also increased.

As many of the banking transactions involving huge sums of money may be transacted by the mere keying in of certain numbers on a computer, the opportunities for the commission of computer related crimes, particularly fraud, have also increased.

Previously, one read with horror the staggering loss of £6 million by a British bank or of an employee of another bank using the bank's computers to transfer £1 million into a friend's bank account.[30] In Malaysia, we too have had our fair share of losses by our banks: recently a young employee of a local bank was alleged to have transferred over RM4 million into his own account so as to enable him to purchase luxury cars. In 1989, the Banking Ombudsman in Britain reported that "phantom" cash withdrawals from automated cash dispensers, where customer accounts had been wrongly debited for using ATMs, was the public grievance which occupied the bulk of his staff's time. Complaints to banks are running in the region of 50,000 a year.

29
See generally Wasik, *Crime and the Computer*, 1991, Oxford University Press, page 10.

See also for example the recent case of *Agip (Africa) Ltd v Jackson Bowers* [1991] 1 *Banking Law Review* 23, CA; [1991] Ch 547; [1991] 3 WLR 116; [1992] 2 All ER 451.

30
Wasik, *Crime and the Computer*, pages 10–11.

Computer fraud

Computer fraud has become so widespread in recent years that it now falls within the category of white-collar crimes.[31]

Any manipulation of a computer by whatever method in order to dishonestly obtain money, property or some other advantage of value, or to cause any loss is broadly termed as computer fraud. Such fraud may either be in-put fraud, or out-put fraud. There is also programme fraud, that is, the dishonest alteration of computer programmes, though such cases are less frequent than out-put or in-put fraud.

Any manipulation of a computer by whatever method in order to dishonestly obtain money, property or some other advantage of value, or to cause any loss is broadly termed as computer fraud.

I am sure you are aware of several cases of such computer fraud. The question, however, is whether the existing laws relating to criminal liability are sufficient to impose liability on offenders of such fraud. Whilst it is now clear that certain cases of in-put fraud, for example, to obtain money from a cash dispenser machine by either using a forged cash card or another's card, may amount to theft,[32] there are many other acts which fall within the grey area of the law. The point which I wish to stress is not so much whether the existing laws are adequate, but whether, wider ethical considerations should also apply.

31
See chapter 7, *White Collar Crime*, below. A number of books have now been published on this area of the law.
See generally Wasik, *Crime and the Computer*; Comer, *Corporate Fraud*, 2nd edition, 1985, McGraw-Hill.
See also Sutherland, *White Collar Crime*, 1949, Holt, Rinehart & Winston, New York.

32
See generally the Law Commission (UK) Report on *Criminal Law: Computer Misuse*, (1989) Cm 819, HMSO, London.
See also the Australian case of *Kennison v Daire* (1987) 160 CLR 129.

Unauthorised access to computers

I do realise that some of the ethical problems relating to computer misuse are far from straightforward. For example, the extent to which unauthorised access to computers, or to use the computer jargon, "hacking" or "time theft" should arouse condemnation or criminalisation is far from obvious. In some cases, a person does not intend to obtain a personal benefit by such computer misuse. More often than not, such a person is motivated solely by curiosity and the intellectual challenge of overcoming computer security devices, and feels a sense of achievement insofar as he feels that he has been able to outsmart the computer.[33]

Some of the ethical problems relating to computer misuse are far from straightforward. The extent to which unauthorised access to computers should arouse condemnation or criminalisation is far from obvious.

Furthermore, whilst stealing from a person may involve a certain amount of remorse or guilt, a hacker may in fact, command a certain element of envy and admiration from his peers or even the public.

In the leading case relating to hacking—*R v Gold* and *Schifreen*,[34] the House of Lords had to consider whether under the relevant laws of England, the hackers could be charged with forgery. As this case reveals the modus operandi of hackers and illustrates certain ethical issues, I shall expand on it.

33
See "Hacking into Computer Systems", (1990) 64 *Australian Law Journal* 105.

34
[1988] 2 All ER 186; [1988] 2 WLR 984.

In this case, a freelance computer journalist and an accountant, by taking advantage of some slack security procedures, were able to gain unauthorised access to material contained in the Prestel computer system, a public information service, and to use files containing all the identification numbers and passwords of subscribers. By an obvious password (1234), they obtained access to the account of a British Telecom employee, which contained confidential numbers of Prestel computers not available to the public. They altered the files. They even found codes belonging to the Duke of Edinburgh, amongst others.

The identity of the hackers became well-known when the defendants talked of their exploits on a BBC television programme and were interviewed by the computer news magazines. One of them gave a demonstration of the method of computer access to one reporter after which, apparently, he encouraged the reporter to inform British Telecom of the security lapse. Even after Prestel had been informed, the defendants continued with their unauthorised accessing of the system. Clearly, they did not expect to be prosecuted, but, in the event, they were charged with forgery. In fact, the court found that the persons accused of hacking were "carrying on these activities not so much to gain any profit for themselves as to demonstrate their skill as 'hackers'".

It was held by the House of Lords that the defendants had committed no offence. I hasten to add that changes to the law were introduced soon after this decision: the Computer Misuse Act 1990[35] now makes it a criminal offence to secure an unauthorised access to a computer.

In the case relating to the Cornell University undergraduate, which I alluded to earlier,[36] Morris was the perpetrator of the most

35
As to the position in Australia, see generally Greenleaf, "Information Technology and the Law", (1990) 64 *Australian Law Journal* 284.

36
See page 139, above.

spectacular act of computer abuse yet seen. He created a "worm" program which distributed itself across the world's largest computer network, the Internet, replicating itself and consuming computer resources so that it made over 5,000 computers on the network unusable within a few hours, many of them in major scientific and industrial establishments. The program is called a "worm" rather than a "virus", because it did not attempt to corrupt existing programs or data.

It may be of further interest to you to know that a "Hackers Conference" was held in Amsterdam with some of the delegates expressing an intent to make all computers and the information they hold to be "freely accessible to the people". Another group in the United States, known as "the Cyberpunks" has promoted a "charter of irresponsibility" with regard to accessing and opening up computer systems.

In a recent article, the following startling observation was made:

> Perhaps the most devastating loss a company can sustain is the theft of private corporate data. As the international marketplace expands, competition among industries has become more fierce. Businesses are seeking the competitive edge like Crusaders sought the Grail, and in the process ethics are sometimes wounded.[37]

Before, we in Malaysia reach a similar position, certain ethical attitudes to computer misuse have to be formulated. We cannot ignore these activities. We may not be able to wipe them out completely, but we can begin to make an attempt.

37 Wathen, "The Background Checks: The Backbone of Business", (1991) 14 *Leaders* 82, (New York).

Conclusion

Though this evening I have generally made reference to the role of directors, much of what I have said is equally applicable to managers, chief executive officers and others occupying top management positions in corporations.[38] I also hasten to add that these observations are not merely restricted to large companies. It is apparent from recent trends that ethical values have to be incalculated in all persons at all levels whose actions and decisions affect the general public. In this regard, senior and experienced management must realise that the younger managers in their own corporations will invariably look to them for guidance. If the senior managers conduct themselves in an ethical manner, chances are the younger managers will also emulate them.

> Ethical standards will determine the shape of the emerging new world of corporate activity. That is why morality and ethics matter.

Other than the strict enforcement of more stringent laws, a comprehensive code of ethics needs to be introduced to regulate commercial morality in the hope of achieving what is sometimes called "market egalitarianism". This, I believe will help to regain the public confidence in corporate activities which now appears to be swiftly eroding. Bodies like the Malaysian Institute of Management, and the newly founded Malaysian Business Council, may wish to undertake such a study so as to make recommendations for the implementation of such a code.[39] The underlying philosophy for such a code should be, as pointed out by the *Justice Report on Insider Trading*[40] that:

38
As to the position of managers and directors, especially in a take-over scheme, see generally Bradley, "Corporate Control: Markets and Rules", (1990) 53 *Modern Law Review* 170.

39
See for example the Cooney Report in Australia which is discussed by Professor Baxt in "Reforming the Law Relating to Company Directors", (1990) 64 *Australian Law Journal* 345. The article's main thrust is the need to improve the image of the Australian corporate scene.

40
For a summary of the Report, see (1973) 36 *Modern Law Review* 185.

> … good business ethics ought to be supported and reinforced by legal sanctions.

At the end of the day, it must be accepted that ethical standards will determine the shape of the emerging new world of corporate activity. That is why morality and ethics matter.

Editor's note

See also chapter 7, *Corporate Misconduct: Crime and Accountability*, below.

Computer crimes: See notes at the end of chapter 14 and the references mentioned therein.