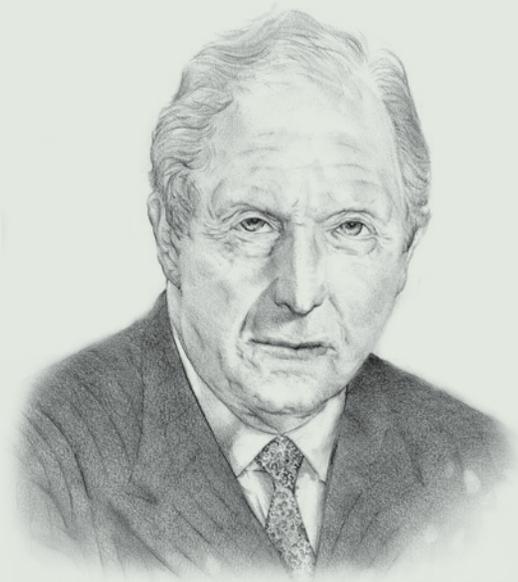




The Right Honourable Lord Woolf

Judicial Review of Financial Institutions



Harry Kenneth Woolf
(b. 2 May 1933)

Born in Newcastle in 1933, Lord Woolf attended Fettes, the Edinburgh public school, and read law at University College, London. He then embarked upon a career in law that eventually saw him rise to the position of Lord Chief Justice of England and Wales.

Lord Woolf was called to the Bar in 1954, practising at the Inner Temple. After spending time as a Recorder of the Crown Court and Junior Counsel for the Inland Revenue, he became a Judge of the High Court of Justice in 1979. Five years later he became a Lord Justice of Appeal of the Court of Appeal. By 1992, at the young age, for a judge, of 59, he became a Law Lord. In 1996, Lord Woolf became Master of the Rolls, and finally rose to his current position as Chief Justice in 2000.

Lord Woolf has always displayed phenomenal energy. He is extremely receptive to ideas and is



well-known for his humanitarian views. Of all the judges, it is primarily he who has been outspoken about the need for judicial review to check the power of government. Lord Woolf's great sense of morality is said to come from his family roots. His great grandfather, who emigrated from Eastern Europe to Newcastle upon Tyne, had a sense of duty and diligence which has permeated his descendants.

Lord Woolf is the author of *Protecting the Public—The New Challenge*, published in 1990 in the Hamlyn Lecture Series. He is joint-editor with his son, Jeremy Woolf, of *Zamir and Woolf: The Declaratory Judgment* (now 3rd edition, 2001); and the joint-editor (with Professor Jeffrey Jowell QC) of *De Smith, Woolf & Jowell: Judicial Review of Administrative Action* (now 6th edition, 2002).

He has served as Chairman of a number of committees, including the Civil Justice Council. In 1991, together with Judge Tumin, he completed a report on prison disturbances, following the Strangeways riots.

He served as the Chairman of the Board of Management of the Institute of Advanced Legal Studies from 1986–1994; President of the Association of Law Teachers from 1985–1989; and Chairman of the Lord Chancellor's Advisory Committee on Legal Education between 1986–1991.

In 1994, Lord Woolf was appointed Pro-Chancellor of the University of London. He is also currently a Member of the World Bank International Advisory Council on Law and Justice, Washington DC.

Lord Woolf is, of course, well-known for his recommendations for changes in the civil justice system in England and Wales. His report made history: see *Access to Justice, Final Report to the Lord Chancellor (The Woolf Report)*, July 1996, HMSO, London.

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Judicial Review of Financial Institutions

Lord Woolf
Master of the Rolls, Court of Appeal

Your Royal Highness, it is an immense privilege to be asked to give this lecture. I am well aware of the distinction of my eleven predecessors and the role these lectures have already played in developing the heritage which Malaysia shares with my country and other members of the Commonwealth, namely the common law and respect for the Rule of Law.

I am also conscious of the immense pains to which Dato' Dr Visu and others have gone to make our visit a success. While I feel far from confident of my ability to maintain the standards of my predecessors, I am at least fortunate that I start off with two advantages. The first, being that the ancient office going back to the 12th century that I hold of Master of the Rolls, means that I have the ideal vantage point from which to observe how our joint heritage is continuing to develop within my jurisdiction. The second is that the subject of my talk this evening is one of serious significance for both our countries. This should mean that it will be difficult for me to fail to say something which is of a modicum of interest to my audience.

Certainly my subject has ingredients which are capable of being of interest. It concerns the review by the courts of institutions whose decisions can have a massive effect on the wealth of individuals and the economics of a nation.

*Text of the Twelfth Sultan
Azlan Shah Law Lecture
delivered on 28 August
1997 in the presence of His
Royal Highness Sultan
Azlan Shah.*

The rise of regulatory bodies

Over the last few years, in the UK, we have had to learn some harsh economic lessons. The lessons are now learnt, and in general, accepted across the political spectrum. The lessons involve the recognition:

1. that financial and commercial markets and undertakings need freedom from government control, if they are to operate effectively;
2. that those very same markets still require regulation if they are not to act in a manner which is incompatible with the public interest;
3. that the control is best provided not by governments or governmental bodies but by regulatory bodies which have a practical knowledge of the way the market in which they operate works.

Across the financial and commercial spectrum in the UK there are now a range of these regulatory bodies. Some are self-regulatory, in that their members are appointed and their powers prescribed by the markets themselves. Some are wholly statutory and others are part statutory and part self-regulatory. Some are long established and historic institutions, such as the Bank of England or the Stock Exchange. Others are of much more recent origin, such as the Take-over Panel. In England we have recently gone through a period when the privatisation of what were formerly nationalised industries and institutions was a high priority of the government. Some of the sources of the supply of water, electricity, gas, telecommunications, road and rail transport have been transferred from national to private ownership. State monopolies have become private monopolies.

The advantages of the freedom of the private sector have had to be married to the need to protect public and national interests. The usual solution adopted to meet this need was to place over a newly privatised utility a watchdog in the form of a regulator. The

watchdog's task would not be fulfilled if its role was confined to barking. It has to have sharp teeth so that it can bite in a way which really hurts when necessary. This form of regulation is much more satisfactory than that which could be supplied by the courts. It is more expert, more expeditious, more flexible and more proactive than the courts can be. The same solution has been adopted in relation to the financial sector of the economy. To differing degrees the regulators which have been established have in common:

1. that how they perform their role is of great importance to the public and the economy of the UK;
2. that they exercise immense power and how they exercise that power can be a matter which seriously affects the bodies which are subject to their power. If they fail to exercise or exceed their power or exercise it unfairly or unreasonably this can cause injustice and dramatic financial consequences;
3. that to perform their roles effectively the regulatory bodies require considerable freedom of action. They need to be able to respond to rapidly changing situations.

Those to whom the decisions relate require to know that their decisions have to be obeyed. Uncertainty can be inconsistent with good regulation.

The courts' dilemma

The establishment of this regulatory framework has created an acute dilemma for the courts within my jurisdiction. I believe, as a result of what I have learnt about the situation in Malaysia, the same is true for the courts in this jurisdiction as well.

It is reasonably clear that as these regulatory bodies exist it is preferable for the courts not to become involved in disciplining or reviewing directly the activities of the bodies which are the subject of the regulation. To take an example, it is better for the regulatory body which has been established to discipline the underwriting members

of Lloyd's than for the courts to attempt to do so. Here there is no dilemma. The dilemma is the extent to which the courts should regulate regulators. If the courts were to abrogate any responsibility for reviewing the regulatory activities then that would mean they were above the law. They would not be subject to the Rule of Law.

If, on the other hand, the courts exercise their power to review, how are they to avoid interfering with the regulators' role, thus undermining their authority and creating undesirable uncertainty?

The dilemma is especially acute in the case of financial markets. Over-regulated, the markets will suffocate. Too little regulation and the reputation of the markets will suffer. This is true of the City of London.

That infrastructure includes the courts. The courts can enhance or seriously damage that reputation. Here I believe we are indeed fortunate although we cannot afford to be complacent. We have still the two critical features that civil justice must have if it is to enhance the reputation of an international financial centre:

1. We have a strong and independent legal profession.
2. We have a judiciary of unquestionable integrity, appointed and promoted on merit.

Of course our civil justice system is capable of improvement—I have recommended over 300 improvements in my recent report, *Access to Justice*.¹ That what I say is basically correct is confirmed by a visit to the Commercial Court in London any day of the working week. In half of the cases coming before that court only one party has, and in a third of the cases neither party has, any connection with England. They have elected to have their commercial disputes resolved in London presumably because of the quality of justice they receive. My concern, however, in this lecture is with the other leading part which the civil justice system has to play. This is to supervise the bodies to which I have referred, bodies that need to

¹ Lord Woolf, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, July 1996, HMSO, London.

exist to regulate the markets and other financial and commercial activities of any developed trading nation. These regulators require

If regulators make a defective or otherwise unlawful or unjust decision, there needs to be some form of mechanism to correct this.

and must have, for reasons I have already explained, very wide and important powers. When the powers are exercised constructively they are wholly beneficial. The regulators, however, amount to no more than the individual or individuals

appointed to exercise these powers. As is the case with any human institution, they can be fallible. If, as a result, they make a defective or otherwise unlawful or unjust decision, there needs to be some form of mechanism to correct this.

In the case of the United Kingdom, as in Malaysia, that mechanism is now operated by the courts on judicial review. It is part of my message this afternoon that the way in which judicial review has been developed in the United Kingdom and in Malaysia (according to the very interesting and instructive cases with which I have been provided) makes it an ideal procedure for achieving this purpose.

The need to intervene

In many areas in which the courts are required to intervene in order to uphold the rule of law they have to do so with delicacy and sensitivity, but in no area is this more true than in relation to the activities in which regulatory bodies of the type to which I have referred are involved.

Wisely in both our jurisdictions there have been established bodies such as the Stock Exchange, the Monopolies and Mergers Commission, Panels on Take-overs and Mergers, Securities and Futures Authorities and so on. It is their direct responsibility to ensure the probity and well-being of the market within the area of activity for which they have responsibility. Bodies of this sort have

an understanding of the workings of the operation of their markets which judges, even experienced commercial judges, cannot match. Frequently they have to take extremely rapid action. Their decisions can have enormous financial implications on those to whom the decisions relate. These are areas in which the involvement of the courts can create undesirable uncertainty. Often their effectiveness depends on the moral authority which their position and expertise command. It is important that the courts do not unintentionally undermine that authority. However, while this is true it is also true that situations do arise where it is essential that the courts are able to, and do, intervene. If there has been real injustice, the courts have to intervene. Regulatory bodies are not entitled to confer on themselves power to inflict injustice on those who operate in the markets which it is their responsibility to supervise.² If they were able to do so, without those involved having any possible remedy, this would result in the regulatory authorities, which should enhance the reputation of their particular market, undermining that reputation.

It is therefore of the first importance that the courts should protect punctiliously their jurisdiction to intervene when it is appropriate to do so. Parliament can limit the circumstances when intervention is appropriate but, as the House of Lords made clear in the landmark *Anisminic* case,³ the courts cannot be excluded from intervening to prevent even a statutory body exceeding the jurisdiction it has been given by Parliament. This is but a reflection of Your Royal Highness' statement made almost two decades ago that, "Every legal power must have legal limits, otherwise there is dictatorship,"⁴ a principle reaffirmed by Lord Browne-Wilkinson in *Payne*.

It is also a reflection of a decision of the Federal Court over which Your Royal Highness presided as Lord President in *OSK & Partners v Tengku Noone Aziz & Anor*⁵ and the Court of Appeal in England's later decision in *R v Panel on Take-overs and Mergers, ex parte Datafin*.⁶ In the *OSK* case, Abdooldader J, in giving a judgment of your Royal Highness' court, had to consider as a point of principle

² See *R v Take-over Panel, ex parte Guinness PLC* [1989] 2 WLR 863 at 901.

³ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, HL.

⁴ See *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise* [1979] 1 MLJ 135, at 148.

⁵ [1983] 1 MLJ 179, FC & HC.

⁶ [1987] QB 815; [1987] 1 All ER 564, CA.

whether the Kuala Lumpur Stock Exchange Committee was subject to the control of the High Court's supervisory jurisdiction. At the outset of his judgment the judge set out with admirable clarity the issue involved by asking:

How far can the long arm of certiorari reach? To whom can it extend? These are the central questions which radiate from and constitute the core of the sole issue on a preliminary point of law posed for resolution in this appeal as to the amenability of decisions of the Kuala Lumpur Stock Exchange Committee to orders and directions of this nature.⁷

These words were uttered only five years after the new procedure of judicial review had been introduced in England by the making of a revised new Order 53 of the Rules of the Supreme Court, and a year after its statutory reaffirmation by section 31 of the Supreme Court Act 1971. The provisions of that Order and that section are not part of the law of Malaysia but their source, which is the old prerogative orders, was and is part of Malaysian law. Having examined the English authorities dealing with very different bodies, your Royal Highness's court reversed the decision which the judge at first instance had understandably come to and held the Committee of the Stock Exchange was within the reach of certiorari.

Today, in both my jurisdiction and yours, this decision would cause no surprise. I do not know whether the decision was regarded as being radical in Malaysia at the time it was given. However, I can say that if it had been given in England in 1982 it would have been treated as a landmark decision of the greatest significance, marking a new step forward in what was by then the already rapidly developing field of judicial review. In England at that time the conventional approach would have been very much the same as that of the judge at first instance in the *OSK* case. It would have been to focus on the contractual and commercial relationship which the appellant stockbroker had with the Stock Exchange, under which he undertook to be bound by the rules of the Exchange. This would be treated as preventing him from seeking to obtain a remedy of certiorari

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[1983] 1 MLJ 179 at 182.

for the breach of natural justice which he alleged. However, rightly anticipating developments in England and elsewhere, the Federal Court adopted a more sophisticated approach to certiorari and thus to judicial review. It went back to the principles enunciated by the House of Lords in *Ridge v Baldwin*.⁸ Applying those principles, it declared that the Stock Exchange was a hybrid body with “an element of public flavour superimposed on the contractual element in relation to its members”; that as the Committee “is responsible for the management of the affairs of the Exchange [it] is accordingly a body of persons having legal authority to determine the rights of persons licensed under the [Company’s] Act to carry on business as stock brokers and it follows that in purporting to exercise its disciplinary functions it necessarily has the duty to act judicially in the administration of that power and it is therefore subject to judicial review by way of certiorari and prohibition”.⁹

This reasoning involves looking not only at the source of a body’s authority—whether it was a statutory or contractual body—but also the functions it performed in deciding whether it was subject to the ancient prerogative remedies. It was a decade later, in *R v International Stock Exchange of the UK and Ireland Ltd, ex parte Else (1982) Ltd*,¹⁰ that the Court of Appeal of England treated our Stock Exchange as the proper subject of judicial review for the first time. Our law had developed and there was by then no argument to the contrary.

In between the two Stock Exchange cases came the decision in 1987 of *R v Panel on Take-overs and Mergers, ex parte Datafin*.¹¹ The distinction between *Datafin* and the *OSK* case was that in the *OSK* case the court was considering the Malaysian hybrid statutory contractual body, while in the *Datafin* case the body was a self-regulating body, whose powers had neither a statutory nor contractual source. The Take-over Panel, lacking any powers de jure, exercises immense powers in fact. As Lord Donaldson said:

Perched on the 20th floor of the Stock Exchange building in the City of London, both literally and metaphorically, it oversees and regulates a

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[1964] AC 40.

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[1983] 1 MLJ 179 at 186.

¹⁰
[1993] QB 534.

¹¹
[1987] QB 815; [1987] 1 All ER 564, CA.

very important part of the UK's financial markets. Yet it performs this function without visible means of legal support.¹²

This being the nature of the body, the Master of the Rolls early in his judgment stated that “the principal issue in [the] appeal and the only issue that may matter in the longer term is whether this remarkable body is above the law”.¹³ That issue the members of the court, for slightly differing reasons, answered unanimously. The Panel was not above the law but was subject to judicial review. The Panel did not have a free hand to decide issues irrespective of the law. Interestingly, having regard to the earlier Malaysian *OSK* decision, the Master of the Rolls, like the Federal Court, considered this answer depended upon whether the old supervisory jurisdiction of the Queen's courts would “extend to such a body discharging such functions”. The second member of the court, Lloyd LJ, based his reasoning more on the statutory provisions to which I have already referred, but this passage from his judgment demonstrates the breadth of his approach in these words:

So long as there is a possibility, however remote, of the Panel abusing its great powers, then it would be wrong for the courts to abdicate responsibility. The courts must remain ready, willing and able to hear a legitimate complaint in this as in any other field of our national life.¹⁴

Lloyd LJ also clearly enunciated the functional test, to which I referred earlier. Having made clear that if the source is solely statutory the power will almost certainly be public and if the source is solely contractual the power will almost certainly be private, he went on to say:

... in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may ... be sufficient to bring the body within the reach of judicial review.¹⁵

¹²
[1987] 1 All ER 564 at 566.

¹³
Ibid, at 568.

¹⁴
Ibid, at 582.

¹⁵
Ibid, at 583.

On this approach there should be little risk of a regulatory body making decisions which could have material implications being wholly beyond the supervision of the courts. Of course, Parliament may with complete legitimacy limit the circumstances in which it is appropriate for the courts to grant relief, but I am totally committed to the view that, in a parliamentary democracy governed by the Rule of Law, even Parliament cannot prevent all resorts to the courts. For this reason I would respectfully commend the decisions of your Supreme Court in the protracted litigation involving your Panel on Take-overs and Mergers and Lee Kian Chan and others. As you know, the Malaysian Panel is a creature of statute. I note that the Companies Act 1965 in section 179(8) provides that:

The acts and decisions of the Panel in the exercise of its functions in respect of the general principles and rules in the Code shall be final and not capable of being challenged in any court.

However, I commend the decision in the *Lee Kian Chan* case which concluded that this provision could not protect the Panel from having an opinion it had expressed corrected by the court when the opinion was wrong and made outside its jurisdiction.¹⁶

It would be unthinkable that the decisions, if taken by government would be reviewable, but they would not be reviewable if taken by regulators.

The leading counsel whom the Take-over Panel in England retained in the *Datafin* case to argue that the Panel was not subject to judicial review was Robert Alexander QC. Lord Alexander, as he subsequently became, went on to be the Chairman of the Take-over Panel. Later he became chairman of one of our largest banks. It is not without interest to note that, with his distinguished legal and commercial background, he has publicly acknowledged that he is wholly in favour of the Panel being subject to the courts' powers of review.

¹⁶ See *Petaling Tin Bhd v Lee Kian Chan & Others* [1994] 1 MLJ 657.

The effect of the policy to establish regulators has been to transfer to the regulators what previously had been much of the business of government itself.¹⁷ It would be unthinkable that the decisions, if taken by government would be reviewable, but they would not be reviewable if taken by regulators. This is not what the UK government intended and the government (I have to admit with some qualification) has welcomed the protection for the public which judicial review has provided.

At present it appears that the English courts and, so far as I am aware, the Malaysian courts as well are resolving the dilemma satisfactorily. They are achieving the right balance.

Discretionary nature of judicial review

The courts have been assisted in doing so by the way judicial review operates. It is redolent of discretion. The position is not the same as when the courts are intervening to protect private rights. Then the courts' discretion is strictly limited. If you have a private right, normally you are entitled to insist that it should be enforced. In the case of judicial review the courts are concerned with ensuring that public bodies fulfil their public duties or responsibilities in the interests of the public. If, in any particular situation, it is not desirable for the courts to become involved or interfere then they should not do so because the traditional prerogative remedies available on judicial review are discretionary. They enable the courts not to become involved when this is not desirable. In public law, until the court has determined that an act or decision is invalid in proceedings properly constituted for that purpose, that act or decision remains perfectly effective. There is no undesirable uncertainty; if the court refuses relief this remains the position. The situation was made absolutely clear by Lord Radcliffe in *Smith v East Elloe RDC*¹⁸ in his celebrated statement:

... an order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless

¹⁷
See *R v Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 at 931 (Hoffmann LJ).

¹⁸
[1956] AC 736 at 769–770.

the necessary proceedings are taken at law to establish the cause of the invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

The advantage of this when compared to the position in private law is demonstrated by the litigation over swaps entered into by local authorities in the United Kingdom when they have no power to do so. The local authorities were able to rely on their own wrong (the fact that they had exceeded their powers) to have the actions to enforce the contracts set aside.¹⁹ In public law proceedings the court could refuse to treat an action or decision, even if ultra vires, as invalid in whole or in part.

The discretionary nature of judicial review, which enables the flexibility of action to be achieved which is so desirable when reviewing the actions and decisions of financial institutions, is supported by the procedural safeguards built into judicial review in England. The features of the procedure are well-known; I understand they are the same in Malaysia, although your Order 53 has not been revised in the way that has happened in England. I draw attention to:

1. the requirement of leave;
2. the obligation to bring proceedings promptly;
3. the need for the application to be made by a person “affected” (ie, a person who has a sufficient interest);
4. the expeditious and simple procedure;
5. the fact that all the remedies are discretionary; and
6. the fact that the cases are heard only by High Court judges who are selected for their experience of judicial review.

Whether to give leave to make and, if so, whether to grant a remedy are frequently decisions which are finely balanced. In the financial markets in particular any intervention by the courts, even the consideration of an application for leave, can have disastrous consequences which cannot be undone. The courts have had to accept that, by even opening their doors a fraction in the field of take-over

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See also *Credit Suisse v Allerdale Borough Council* [1996] 3 WLR 894.

bids, they have made themselves into a potential weapon which a party may be tempted to abuse. Fortunately, however, so far in our courts if there has been any abuse it has been limited. Thus, the Securities & Investment Board (SIB) has been in existence for over ten years,²⁰ yet it has only had to respond to about five applications. This, I believe, is due to the safeguards to which I have just referred as well as the foresight of Lord Donaldson in the *Datafin* case. In his judgment, Lord Donaldson emphasised that in the normal course of events the courts would not be prepared to interfere with rulings of the Take-over Panel during the progress of a take-over battle. Usually, if it would interfere at all, it would do so after the battle was over by granting declarations to provide guidance for the future after examining historically the facts which had occurred. This may not be the most attractive remedy for the applicant particularly as damages are not usually available in public law proceedings. It is, however, better than no remedy at all.

The advantage of declaratory relief is that it can be provided in a restrictive or broad manner. It can achieve exactly the result the court wishes, no more and no less. It can apply only in the future leaving past decisions intact, or it can apply retrospectively as well as prospectively. Lord Donaldson's successor as Master of the Rolls took much the same approach in *R v Securities and Futures Authority, ex parte Panton*²¹ saying:

... these bodies are amenable to judicial review but are, in anything other than very clear circumstances, to be left to get on with it. It is for them to decide on the facts whether it is, or is not, appropriate to proceed against a member as not being a fit and proper person and it is essentially a matter for their judgment as to the extent to which a complaint is investigated.

There are, of course, difficulties in reviewing the activities of a body if it is not subject to any statutory or contractual restraints on its powers. This naturally causes the courts to adopt a restrictive approach.

²⁰ Financial Services Act 1986.

²¹ (1994) Unreported (CA civil).

Restrictive approach in judicial review

However, it is not difficult to find statements advocating caution in relation to interfering with the decisions of regulatory bodies which have more conventional constitutions. This was the approach of Hirst J in *A v B Bank (Bank of England intervening)*²² and Henry LJ in the *Television Commission* case²³ (he said he did not regard the judgments of the Commission as being “readily reviewable”). The courts also recognise that the urgency with which the regulators must act inhibits them from being as sensitive as would otherwise be required in relation to consulting third parties prior to reaching a decision which affects them.²⁴

Similarly, the inquiries of regulators will not usually be postponed by courts to await the outcome of civil or criminal proceedings. Thus, the auditors of Robert Maxwell failed in their attempt to have disciplinary proceedings against them stayed pending the resolution of civil proceedings.²⁵

The relatively small number of challenges in the case of the SIB may also be due to the fact that the Financial Services Act 1986 requires a combination of self-regulation and public accountability by those who are authorised to conduct “investment business”. In this way, the SIB can avoid having to police the conduct of authorised bodies. It can leave this to be done largely through the self-regulatory bodies (SROs) and professional bodies (RPBs). Furthermore, those bodies can in turn delegate their roles and if they do this it may mean that they are not subject to review at all. Thus, LAUTRO (the Life Assurance and Unit Trust Regulatory Authority) has delegated part of its investigatory and complaints functions to the Insurance Ombudsman Bureau. The members of LAUTRO make themselves subject to the Bureau’s jurisdiction by contract. You would not expect this action of LAUTRO to affect the courts. However, in *R v Insurance Ombudsman Bureau, ex parte Aegon Life*²⁶ the Divisional Court decided that the Ombudsman Bureau was not subject to judicial review. Rose LJ in his judgment referred to the fact that:

²² [1992] 1 All ER 778.

²³ Editor’s note:
Now reported as *R v Independent Television Commission, ex parte Virgin Television Ltd* [1996] EMLR 318, DC.

²⁴ *R v LAUTRO, ex parte Ross* [1993], QB 17.

²⁵ *R v Chance, ex parte Smith* [1995] BCC 1095.

²⁶ [1994] COD 26.

... even if it can be said that the [IOB] has now been woven into a governmental system the source of the IOB's power is still contractual, its decisions are of an arbitrate nature in private law and those decisions are not, save very remotely, supported by any public law sanction.

If this case is followed by higher courts this will be an in-road on the reach of judicial review. In my judgment it involves an approach which is less attractive than that adopted in the OSK case to which

the English court was not referred. The ombudsmen are a success story, but their attractions must not be tarnished by the non-availability of judicial review. It is one thing for the court to make use of its ample discretion to decline to intervene; it is a different thing altogether for the court not to have the jurisdiction to intervene. As

As long as the court has the necessary jurisdiction, this will be a significant deterrent to the regulator adopting standards which would warrant intervention.

long as the court has the necessary jurisdiction, this will be a significant deterrent to the regulator adopting standards which would warrant intervention. Judicial review has an important day-to-day influence on the manner in which regulatory bodies perform their functions.

Judicial review is as concerned with promoting the principles of good administration on the part of regulators as it is concerned with enforcing "public rights".

In England there are already indications that, as anticipated, the new labour government will make the European Convention on Human Rights part of domestic law. This will significantly affect the manner in which judicial review operates because of its emphasis on individual rights. Thus, while the English courts have been supportive of the investigatory role of regulatory bodies and allowed the evidence obtained as a result of their investigations to be available for criminal proceedings, a more restrictive approach was adopted by the European Court of Human Rights. This has been demonstrated by Mr Saunders of Guinness fame and his success before the European Court of Human Rights after he failed before the Court of Criminal Appeal.²⁷ Making

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Saunders v United Kingdom (1997) 23 EHRR 313; [1996] IIHRL 107, ECHR (17 December 1996).

the Convention part of English domestic law could alter the balance between those who regulate and regulators.

Generally, the courts' approach on applications for judicial review of the conduct of the regulators of financial institutions is not significantly different from that in relation to other bodies. Standards of fairness will be required of the institutions which take account of the interests of third parties and a liberal approach will be adopted on any issue as to standing by English courts. As to standing, it is not necessary to adopt a restrictive approach because, on an application for judicial review, the court has ample discretion to prevent abuse of court proceedings without relying on technical rules. I know of no English case which had merit being refused relief because of a lack of standing on the part of the applicant.

On this last point it may well be that the approach of the English courts is more liberal than those of the Malaysian courts, but I would certainly not be critical of this difference without more knowledge of the Malaysian situation. I also note that, at least in the case of judicial review decisions in the employment field, Malaysian courts are more willing not only to quash flawed decisions but to make the decisions themselves than would be the English courts.

That, while we have so much in common, there should also be these differences does not surprise me. Indeed I welcome them as signs of the continuing vitality of the Malaysian judiciary and the common law. For us to always keep in step would inhibit progress.

I have attempted to give you a bird's eye view of how the English courts see their role today in relation to the regulation of financial institutions. The majority of what I have had to say no doubt contained nothing which was novel to my audience. However, the same would be true in most other common law jurisdictions. To the shores of each of those jurisdictions the common law has arrived like an incoming tide from England.

Thirty, forty, fifty years or more later, that tide is now turning and returning to England, enriched by the influence of the legal systems of about one third of the world, including of course Malaysia. Just as I hope you have benefited from that tide, so now are we in England doing so in our turn.

The importance of these occasions is that they give us an opportunity of benefiting from the experience of each other. Already in the course of this visit I have learnt much. I am sure I am going to continue to do so until the end of my visit. I only hope that I have been able to repay in some small part the warm and generous hospitality my wife and I have enjoyed since we have been here by contributing to this process. 

