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INTRODUCTION

The function of administrative law is to draw a balance between public power and individual rights. Every administrative law case arises out of a dispute between an individual and the administration. In this era of expanding public power, there is a great need of a body of law which will regulate the exercise of public power and provide redress to the individual whose rights are unduly affected. No one can assert that there is no danger of the bureaucracy ever going wrong and hence the need of an effective control mechanism over the bureaucracy. In a democracy the need for an effective system of administrative law is still greater for, in the ultimate analysis, the administration is accountable to the people for what it does or does not do. Therefore, a test to evaluate a country's administrative law may be to assess the efficacy of the remedial part of the law. How effectively does the law provide a remedy to the person whose rights are adversely affected by administrative action? However, it needs to be underlined that whether an individual gets relief against the administration depends not only on the body of law but also on judicial attitudes.

In the common law world, by and large, hitherto, administrative law is the creation of the judges. Malaysia is no exception to this rule. It is in this context of judicial creativity that it becomes essential to look into the decisions delivered by His Royal Highness Sultan Azlan Shah as a Judge of the High Court, Chief Justice of the High Court, Federal Court Judge and finally as the Lord President of the Federal Court. In many pronouncements of His Royal Highness, in the area of administrative

law, one can find streaks of creativity and judicial activism, though in the ultimate analysis, it may be that in most of the cases the individual concerned was not able to get the relief he wanted against the administration.

From amongst the Sultan's early decisions, reference needs to be made to *Doresamy* v *Public Services Commission*[1] where Raja Azlan Shah J (as he then was), taking a liberal view of natural justice emphasised upon the need of legal representation before administrative bodies in the following words:

> The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before disciplinary tribunals. This is so especially when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage. Where he has a statutory right of appeal and the regulations are silent on the right to the assistance of counsel, he cannot be deprived of such right of assistance. I can find nothing from regulation 13(1) to limit his right.

A very significant pronouncement in the area of administrative law made by Sultan Azlan Shah was *Ketua Pengarah Kastam* v *Ho Kwan Seng.*[2] The basic question involved in the case was whether the principles of natural justice were applicable to cancellation of a forwarding agency under section 90(4) of the Customs Act? In his opinion, Raja Azlan Shah FJ (as he then was) made the following classic statement:

> In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing.

This statement of law by Raja Azlan Shah FJ was very meaningful as it expanded the scope of natural justice in Malaysia. The Malaysian administrative law was freed from the restrictive effect of *Nakkuda Ali* v *Jayaratne*[3] in which the Privy Council had taken the view that natural justice was not applicable to revocation of a licence. By this pronouncement, Raja Azlan Shah FJ brought the Malaysian administrative law in line with the British administrative law where a new liberal trend had been introduced in this area by the House of Lords' decision in *Ridge* v *Baldwin.*[4] This can really be regarded as a landmark case in Malaysian administrative law.

Fadzil bin Mohamed Noor v *Universiti Teknologi Malaysia*[5] also

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[1][1971] 2 MLJ 127.

[2][1977] 2 MLJ 152.

[3][1951] AC 66.

[4][1964] AC 40.

[5].[1981] 2 MLJ 196.

raised a point of great interest in administrative law, *viz,* is natural justice applicable in the matter of dismissal of a lecturer by the University. Here again, Raja Azlan Shah CJ (as he then was) sitting in the Federal Court made a great contribution to the development of Malaysian administrative law by laying down the proposition that the relationship between a lecturer and the University is not purely that of "master and servant" but that a lecturer "has a status supported by statute" and that he "is entitled to the protection of a hearing before the appropriate disciplinary authority". Raja Azlan Shah CJ thus observed:

> We find it hard to believe that in a field of employment such as the present, the legislation can really be said to have intended that the appellant is *ipso facto* to be deprived of his employment without any regard for vested right.

The significance of the *Fadzil* case lies in the acceptance of the principle that the relation between a University (a statutory body) and a member of its academic staff has an element of public employment in it and, as such, the University has to follow natural justice before dismissing a member of the academic staff.

This is one of those rare cases where the dismissal of the lecturer was held *ultra vires* not, however, on the ground of failure of natural justice but on the ground that the University had acted outside its authority in dismissing. According to Raja Azlan Shah CJ at the material time when Fadzil was purported to be dismissed by the University "there were no disciplinary rules, and as such, no known disciplinary offences created and no known disciplinary punishments provided." The University Council was an "executive body" of the University and not the "disciplinary authority". Raja Azlan Shah CJ emphasized that the university being a corporate body could only do such acts as were authorised directly or indirectly by the statute creating it. The University must act only in pursuance of the power given to it by law. Under the law, the general powers of the University Council did not extend to disciplinary matters which were vested in the Disciplinary Committee alone and therefore the purported exercise of jurisdiction by the University Council in dismissing was held to be *ultra vires.*

Another case in the same category is *Pengarah Tanah dan Galian, Wilayah Persekutuan* v *Sri Lempah Enterprises Sdn Bhd*[6] where Raja Azlan Shah FJ expressed the idea of controlled discretionary power very forcefully as follows:

> 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 courts to intervene. The courts are

[6][1979] 1 MLJ 135.

> the only defence of the liberty of the subject against departmental aggression.

The last case which may be mentioned in this category is *BA Rao* v *Sapuran Kaur*[7] where Raja Azlan Shah FJ went into the question of the scope of the government privilege not to produce documents in the Court as envisaged in section 123 of the Evidence Act. The highlight of this pronouncement is to bring the Malaysian law in line with the progressive view taken in this connection in *Conway* v *Rimmer*[8] in England or in *State of Uttar Pradesh* v *Raj Narain*[9] in India. Raja Azlan Shah FJ thus stated the principle as follows:[10]

> In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an inquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest.

On the other hand, one can point out some of the pronouncements where Sultan Azlan Shah adopted a cautious and restrictive view of the law. His Royal Highness' two pronouncements on declaration may be cited in this connection. In *Land Executive Committee of Federal Territory* v *Syarikat Harper Gilfillan Bhd* Raja Azlan Shah Ag LP (as he then was) said:[11]

> Thus it can be seen that the modern use of declaratory judgment has already developed into the most important means of ascertaining the legal powers of public authorities in the intricate mixture of public and private enterprise which is a distinctive feature of our life. But we must add a warning note that its use must not be carried too far. The power to grant declaratory judgment in lieu of the prerogative orders or statutory reliefs must be exercised with caution. The power must be exercised "sparingly", with "great care and jealously".

He had revealed a similar cautious attitude as regards the issue of a declaration in *Dato Menteri Othman bin Baginda & Anor* v *Dato Ombi Syed Alwi bin Syed Idrus.*[12]

Raja Azlan Shah FJ did realize that this restrictive judicial attitude may be regarded by some as denial of justice "by a timid and conservative approach". But in answer to such a criticism he said:

> They are wrong. Consistency makes for certainty, and this court being at

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[7][1978] 2 MLJ 146. For comments see [1978] *Survey of Malaysian Law 1953.*

[8][1968] 2 AC 910.

[9]AIR (1961) SC 493.

[10][1978] 2 MLJ 146 at page 150.

[11][1981] 1 MLJ 234, 236.

[12][1981] 1 MLJ 29. In this case Tun Suffian LP gave a dissenting opinion.

> the centre of the legal system in this country, is responsible for the stability, the consistency and the predictability of the administration of law.

One may however make the suggestion that in the area of administrative law which is a fast and modern branch of law all the above-mentioned qualities will cease to be virtues if the law were to become static thereby. Administrative powers are expanding enormously in quality and quantity and judicial law-making must keep pace with this development if law is not to cease to be an instrument of controlling administrative power.[13] This writer had occasion to make the following comment on the above two cases:[14]

> It is clear from the above two cases that the Federal Court has adopted a very cautious and restrictive stance in the matter of giving declaration. In both these cases, the High Court had adopted a liberal approach but this did not find favour with the Federal Court. It remains doubtful whether here, in the face of such judicial attitude, declaration can ever come to play any meaningful role as a remedy in Administrative law. The judicial attitude in other common-law countries is in favour of expanding the remedial base and not to restrict it. The fact remains that declaration can serve a very useful purpose if the courts use it as a supplementary remedy in addition to the statutory remedy where the same is somewhat restrictive or onerous or where it is lost for no fault of the applicant. It is necessary in the area of public law to make the motto: *ubi jus ibi remedium,* as true as possible.

In *Mohamed Nordin bin Johan* v *Attorney-General, Malaysia*[15] Raja Azlan Shah Ag LP (as he then was) held that the power of the Attorney-General under regulation 2(2) of the Essential (Security Cases) Regulations 1975 was one of "pure judgment" and not subject to an "objective test" and not amenable to judicial review. In so holding, Raja Azlan Shah Ag LP went counter to what he had said in an earlier case.[16] No convincing reasons were advanced by the Judge to justify such a departure from his earlier thesis that "unfettered discretion is a contradiction in terms".

Writing recently on the contribution made by Lord Denning to the development of administrative law in England, JL Jowell says:[17] The development of an activist administrative law is surely one of Lord Denning's great contributions. The English administrative law at the outset of Lord Denning's career has been characterised by him as belonging to the "restraint model which was deferential to the new administrative powers". Malaysian administrative law also belongs more

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[13]For comments on the above two cases on declaration see [1981] *Survey of Malaysian Law* 58-64.

[14]*Ibid* 63-4. [15][1983] 1 MLJ 68. [16]*Supra.*

[17]Jowell JL and McAuslan JPWB (Editors), *Lord Denning: The Judge and the Law* (1984) Sweet and Maxwell 209-212.

or less to the same model. Only judicial creativity can transform it into, what Jowell calls as, an "activist model".

DECISIONS AND COMMENTS

DISCRETIONARY POWER OF THE ADMINISTRATION

Pengarah Tanah Dan Galian, Wilayah Persekutuan
v
Sri Lempah Enterprise Sdn Bhd

[1979] 1 MLJ 135 Federal Court, Kuala Lumpur

Coram: Suffian LP, Raja Azlan Shah Ag CJ (Malaya) and Chang Min Tat FJ

Cases referred to:-

(1) *Shell Co of Federation of Malaya Ltd* v *Chairman, Municipal Council* [1961] MLJ 141, 142.
(2) *Johnson* v *Johnson* [1969] 1 WLR 1044.
(3) *Youngstown Sheet & Tube Company* v *Charles Sawyer* [1951] VS SC 343,585, 588.
(4) *Ehugbayi Eleko* v *Officer Administering the Government of Nigeria* [1931] AC 662.
(5) *Belfast Corporation* v *OD Cars Ltd* [1960] 1 All ER 65, 70.
(6) *Sir Kameshwar Singh v The Province of Bihar* AIR [1959] Patna 392, 402-471.
(7) *McClintock* v *The Commonwealth* [1947] 75 CLR 1, 24.
(8) *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government* [1958] 1 All ER 625.
(9) *Fawcett Properties* v *Buckingham County Council* [1960] 3 All ER 503.
(10) *Associated Provincial Picture House Ltd* v *Wednesbury Corp.* [1947] 2 All ER 685.
(11) *Westminister Corp* v *London and North Western Railway Co* [1905] AC 430.
(12) *Roberts* v *Hopwood* [1925] AC 613.
(13) *Kruse* v *Johnson* [1898] 2 QB 99.
(14) *Fischer* v *Secretary of State for India in Council* [1898-99] 26 IA 16.
(15) *Fairmount Investments Ltd* v *Secretary of State for the Environment* [1976] 1 WLR 1255, 1265-6.
(16) *R* v *Hillingdon Council, ex parte Royco Howes Ltd* [1974] QB 720.
(17) *Bradbury* v *London Borough of Enfield* [1967] 3 All ER 434, 442.
(18) *Chertsey UDC* v *Mixnam's Properties Ltd* [1964] 2 All ER 627.
(19) *Hall & Co Ltd* v *Shoreham by Sea UDC* [1964] 1 WLR 240.
(20) *Smith* v *East Elloe Rural District Council* [1956] AC 736, 763.
(21) *Kingston-upon-Thames Royal London Borough Council* v *Secretary of State for the Environment* [1974] 1 All ER 193.

RAJA AZLAN SHAH Ag CJ (MALAYA): This is an appeal from a judgment of the High Court, Kuala Lumpur, declaring that a condition imposed by the Land Executive Committee, Federal Territory, when approving of a proposed conversion and sub-division under sections 124 and 137 of the National Land Code was invalid. The judgment was given in an action brought by the respondents as the registered proprietors of a parcel of town land held under Grant No 2412, Lot 82, section 53, measuring 31,853 sq ft in the city of Kuala Lumpur ('the said land'). The defendants were the Land Executive Committee, Federal Territory, and they are the appellants in this appeal.

We have been informed that this is the second case in which the

question has arisen for determination in our courts. The first case was in the High Court, Ipoh, where judgment was reserved pending the determination of this appeal. It therefore falls to us to determine for the first time what are the considerations by which the courts should be guided. Before dealing with the important question of law of which the appellants have sought to obtain a determination in this appeal, it is necessary, at the outset, to state briefly the relevant facts, none of which are disputed.

In 1900 the respondents' predecessor was granted the said parcel of land in perpetuity under the provisions of the Land Enactment, 1911 (now repealed), subject to the three express conditions, one of which was that "the grantee shall within two years from the date of the grant build upon the land a substantial house to the value of $250", in default the said land would revert to the Government. In March, 1974 the respondents became the registered proprietors.

The respondents proposed to develop it for commercial purposes, i.e., to build a 3 four-storey shop houses on 3 lots and a four-storey hotel complex on the remaining 4 lots.

The legal position is this. All land alienated before the commencement of the National Land Code is subject to an implied condition that it shall be used for agricultural purposes (section 53). There is an exception, that is, the section does not apply to such land which is already subject to an express condition. Therefore the said land is still subject to the 3 express conditions (section 104), and if the respondents proposed to develop it for commercial purposes, that condition must be amended. Hence the necessity to apply for amendment to the Land Executive Committee [section 124(1)(c)]. Further, since the said land is to be subdivided into separate lots to be held under separate titles for the purpose of erecting the shop houses and the hotel complex, application for permission to sub-divide it must also be made to the Land Executive Committee (section 137).

The respondents did that in early 1975. They also applied to surrender a part of the said land for the purpose of a service road, side lanes and back lane (section 200). That is in accordance with the approved lay-out plan.

The Land Executive Committee, by letter dated March 22, 1976, gave the respondents the approval they applied for, but subject to certain conditions. First, the respondents had to surrender the whole of the said land and in return it would alienate part of it as comprised in the 4 lots for the building of a four-storey hotel and the 3 lots for a shop site; secondly, the grant in perpetuity would be substituted with a registry title of 99 years lease; thirdly, the express condition would be restricted to commercial building; fourthly, documents of title would not be issued and compensation would not be paid for the areas required for road reserve; and fifthly, additional premium in the sum of $43,392 based on gross acreage of the land to be issued with new titles, i.e., 18,080 sq ft at $2.40 must be paid within 6 months.

It is of course well known, and it would be unrealistic to pretend that it is not, that the respondents have a strong feeling that they have never

had their case determined by the Land Executive Committee in accordance with law, or to borrow a recent phrase of Lord Russell of Killowen in *Fairmount Investments Ltd* v *Secretary of State for the Environment* [15] that in the circumstances the respondents have not had 'a fair crack of the whip'. They appealed to the High Court under the provisions of section 418 of the National Land Code, and on their behalf their counsel has cogently submitted and contended that that is the true position. At the hearing a number of preliminary points regarding procedure were raised and argued by Senior Federal Counsel but the learned judge rejected them. We are no longer concerned with those points as they were, quite properly, abandoned in this Court.

It is important to note that the respondents consented to surrender part of the said land for the purpose of a service road without compensation. But they objected strongly to exchange the title in perpetuity for a 99 years lease. Therefore the only point of any public importance that has emerged in the course of the argument is whether the condition imposed by the Land Executive Committee was valid. That condition was challenged on the ground that the Committee went beyond its powers and therefore the condition was *ultra vires.*

It would appear that the Land Executive Committee in granting approval for conversion, is relying on the provisions of section 124(5)(c) which reads thus: "Any direction given by the State Authority under this section may be made conditional upon all or any of the following matters — (c) compliance with such other requirements as the State Authority may think fit". The learned judge seems to think that the power given by the legislature to the Land Executive Committee by the section to impose conditions as it may think fit is restricted to conditions that it may otherwise impose under the National Land Code or under any other written law, and for that reason he held that the Committee had exceeded its jurisdiction in directing approval for conversion subject to the condition. In my opinion the learned judge came to the right decision, though not for the right reason.

In my opinion, the present case falls to be decided on well established principles and they are to be found in the cases decided under the (UK) Town and Country Planning Acts. It is unfortunate that neither in the court below nor in this court has reference been made to any of them. The Acts empower planning authorities to refuse permission or to grant permission unconditionally or to impose such conditions 'as they think fit'. On principle and authority, the discretionary power to impose such conditions 'as they think fit' is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp,*[10] have regard to all relevant considerations and disregard all improper considerations, and they must produce a result which does not offend against common sense, or to repeat Lord Denning MR's words in *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government,*[8] approved in *Fawcett Properties Ltd* v *Buckingham County Council*[9] the conditions to be valid must fairly and reasonably relate to the permitted

development. The dictum of Lord Denning MR has been frequently quoted and followed in these matter: see *R* v *Hillingdon Council, ex parte Royco Homes Ltd.*[16] Lord Denning said (page 572):

> The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

Applying the principles stated above, what is the effect of the condition under consideration? I read the affidavit of the Chairman, Land Executive Committee as claiming an unfettered discretion to grant or reject any application under section 124 or impose such conditions or other requirements as the Committee think fit. I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite, ante,* and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place": *per* Danckwerts LJ in *Bradbury* v *London Borough of Enfield.*[17]

The Land Executive Committee is a creature of statute, and therefore possesses only such power as may have been conferred on it by Parliament. Therefore when a power vested in it is exceeded, any act done in excess of the power is invalid as being *ultra vires.* If authority is needed for what may be considered as axiomatic, I need only refer to the cases of *Chertsey UDC* v *Mixnam's Properties Ltd*[18] and *Hall & Co Ltd* v *Shoreham by Sea UDC.*[19] In the former case, a statute required the occupier of land to obtain a licence before he used his land as a caravan site, and in granting such a licence the authority were empowered to impose such conditions "as the authority may think necessary or desirable to impose", it was held that these conditions must be confined within the general purpose of the Act, and in so far as they exceeded this, they were void. In the latter case, Willmer LJ cited the well known judgment of Lord Greene MR in *Associated Provincial Picture Houses*

ante, which has several times been approved in the House of Lords, that it is in excess of power to "come to a conclusion so unreasonable that no reasonable authority could ever have come to it", and he held that the condition to be "utterly unreasonable and such as Parliament cannot possibly have intended."

For the above reasons, it does not seem to me that the decision of the Land Executive Committee can possibly be regarded as reasonable or as anything other than *ultra vires.* It has exceeded its power and the decision was therefore unlawful as being an unreasonable exercise of power not related to the permitted development and for an ulterior purpose that no reasonable authority, properly directing itself, could have arrived at it. The Committee, like a trustee, holds power on trust and acts validly only when acting reasonably. In such circumstances I would follow the dictum of Hodson LJ in *Pyx Granite, ante,* page 579, to the effect that, if condition is held to be *ultra vires,* it nullified the whole planning permission. For it must be assumed that without the impugned condition the permission would never have been granted.

It remains to deal with the order made by the learned judge. He found that the respondents had fulfilled all the conditions under the National Land Code and accordingly he made an order to the effect that the Land Executive Committee approve the applications for conversion and sub-division but excluding the impugned condition, and that the Registrar issue titles in continuation of the grant in perpetuity to the sub-divided lots retained by the respondents in accordance with section 202(3)(a) of the National Land Code. With respect, that is not an appropriate order to make and one which certainly does not commend itself to this Court. In the first place it must be made clear that the existence of a statutory remedy is no bar to an action for a declaration. This case falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words, and this applies to an action for a declaration: see *Pyx Granite, ante.* Secondly, all that a declaration does is to declare the rights of the parties, and the effect of making a declaration would be that it would give the Land Executive Committee an opportunity of having second thoughts at the problem. Lastly, it is not the province of the courts to review the decisions of government departments merely on their merits. Government by judges would be regarded as an usurpation. That clear statement of principle has since been approved and applied by the appellate courts. In *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp, ante,* Lord Greene MR in the course of a judgment since approved by the House of Lords in *Smith* v *East Elloe Rural District Council,*[20] and in *Fawcett Properties Ltd* v *Buckingham County Council, ante,* in dealing with the power of the court to interfere with the decision of a local authority which has acted unreasonably, said (page 686):

> The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it.

That is the reason for such cases to be remitted to the relevant authority for a fresh consideration and conclusion according to law. In *Kingston-upon-Thames Royal London Borough Council* v *Secretary of State for the Evironment,*[21] the case was sent back to the Secretary of State for reconsideration; in *R* v *Hillingdon London Borough Council, ante,* the Council was required to reconsider the application for planning permission and reach a conclusion on it according to law. In my opinion the appropriate order would be to remit the case to the Land Executive Committee for reconsideration and reach a conclusion on it according to law.

I am therefore of the opinion that this appeal should be dismissed with costs.

Fong Seng Yee (Senior Federal Counsel) for the Appellants.
Lim Kean Chye for the Respondents.

Notes

(i) This is a landmark pronouncement in Malaysian administrative law for two reasons. Firstly, the principle has been unequivocally laid down that unlimited discretion is not proper, that the courts do not accept the concept of absolute or unfettered discretion and that no discretionary power is completely discretionary in the sense of being completely unreviewable. Secondly, it is one of those rare cases in Malaysia where a decision of an administrative body has been invalidated on the grounds of unreasonableness, irrelevent considerations and improper purpose. The case has been cited in several later cases.
(ii) For further comments on this case see page 667 below.

DELEGATED LEGISLATION

Dr Paramsothy s/o Murugasu
v
University of Malaya

[1983] 1 MLJ 289 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah LP, Abdul Razak and Abdoolcader JJ

Cases referred to:-
(1) *Cowey* v *Liberian Operations Limited* (1966) 2 Lloyd's Rep 45.
(2) *John Lee & Son (Grantham) Ltd* v *Railway Executive* (1949) 2 All ER 581, 583.
(3) *Kong Ming Bank Bhd* v *Leong Ho Yuen* [1982] 2 MLJ 111.

RAJA AZLAN SHAH LP (delivering the judgment of the Court): The appellant was appointed a lecturer in the Radiology Department in the

Faculty of Medicine, University of Malaya ('the University') on August 22, 1978 in pursuance of a letter of offer dated May 18, 1978. The letter of offer expressly sets out a number of conditions. The first condition was that the appointment offered was permanent and pensionable subject to a probationary period of 3 years. Two other conditions are very material for the purpose of this appeal and we reproduce them below:

> (ii) Subject to satisfactory service, passing the prescribed examinations and fulfilling other relevant conditions you shall be eligible to be considered for confirmation in your appointment at the end of this period.
> (ix) You shall at all times, be subjected to the Constitution of the University of Malaya, Statutes, Acts and Regulations in force in the University of Malaya, Amendments and Adaptations to these regulations and practices may, from time to time, be made by the Council of the University of Malaya.

The University Council in a policy decision passed a resolution requiring all officers in Groups A and B (appellant is in Group A) who are still on probation on or after January 1, 1978 to pass the Peperiksaan Am Kerajaan in addition to any other examination as a prerequisite for confirmation in their posts. The resolution is contained in Service Circular UM No 2/1978 ('Service Circular') dated October 9, 1978.

The respondent's letter of offer did not stipulate the prescribed examinations which the appellant had to pass to be eligible for confirmation. It certainly did not contain the requirement of passing the Peperiksaan Am Kerajaan.

Without going into unnecessary detail the appellant filed a writ on February 27, 1982 seeking a declaration and an injunction to restrain the University from implementing the Service Circular on the ground that it is invalid and conflicts with the terms and conditions of his contract of employment and is also in violation of section 45(3)(b) of the Constitution of the University.

It is the contention of the appellant before us as well in the High Court that the Service Circular which imposed a new condition of service requiring the appellant to sit for the Peperiksaan Am Kerajaan was invalid as it amounted to a unilateral variation of his contract of employment. It is said that on the authority of *Cowey* v *Liberian Operations Limited*[1] the University could not impose a new condition of service unless it terminates the existing employment and then enters into another contract of employment providing for the new condition, or, alternatively, the appellant had agreed formally to a variation of the existing contract of employment, neither of which applied in this case. In that case the common law requirement of giving 3 months' notice to terminate a contract of employment was unilaterally substituted with a month's notice and it was held to be invalid: see also *Chitty on Contracts,* 24th ed Vol 1, para 1376.

The issue therefore is whether there was a variation.

The learned judge held that the Service Circular did not impose an additional condition outside the terms of the contract of employment

and therefore did not constitute a unilateral variation. He was of the view that by virtue of conditon (ii) of the letter of offer it was within the power of the Council to prescribe from time to time examinations to be passed. He also held that the Service Circular was not *ultra vires* section 45(3)(b) of the Constitution of the University. Since there were no Statutes, Acts or Regulations in force on the date of appointment of the appellant, there was no restriction whatsoever in the power of the Council to issue the Service Circular.

In our view, the appeal turns, in part, on a consideration of the provisions of the Constitution of the University.

The powers of the University are contained in section 4 of its Constitution. Paragraph (b) of sub-section (1) thereof gives power to the University to regulate the conditions of service of its staff, including schemes of service, salary scales, leave and disputes. Section 16 provides that the executive body of the University shall be the Council and the Council may exercise all the powers conferred on the University as contained in section 4. Section 25 provides for the making of statutes dealing with the methods of appointment and the conditions of service of officers and teachers. Section 45 deals with the provisions relating to the appointments of teachers and employees. As the crux of the case turns on the construction of section 45(3)(b) we set it out in full:

> 45. (3) Every person employed by the University shall hold office on such terms and conditions as may be prescribed by the Council and the terms and conditions to be so prescribed shall be deemed to include a provision:
> (b) in relation to all other terms and conditions of service that his employment is subject to the provisions of this Constitution and to the provisions of all Statutes, Acts and Regulations in force on the date of the commencement of his employment.

A number of statutes have been made by the Council in the exercise of the powers conferred by section 4(1), for example Statute X (New Series) in relation to the Appointment of Salary Group A Employess, but none has been made in respect of the matter referred to in paragraph (n) of section 4(1) in regard to conditions of service relating to 'prescribed examinations' expressed in condition (ii) of the letter of offer.

In the absence of provisions relating to what are the 'prescribed examinations' it was argued that condition (ii) is not free from ambiguity and as such the learned judge erred when he failed to apply the *contra proferentem* rule against the University: see *John Lee & Son (Grantham) Ltd* v *Railway Executive*[2]; *Kong Ming Bank Bhd* v *Leong Ho Yuen*[3]; 12 *Halsbury's Laws of England* 4th ed para 1473. On behalf of the University it was argued that the phrase passing the 'prescribed examinations' is not in itself ambiguous because in the absence as to what the 'prescribed examinations' are in the contract, reference is to be made to the Constitution of the University and in particular, section 45(3)(b) of the Constitution which sets out the appropriate prescribing authority. It would mean that examinations will be prescribed by the Council.

We are satisfied that the respondent's contention is correct. The phrase 'prescribed examinations' does not introduce uncertainty into the contract.

Therefore, the answer to these opposing contentions must depend on a consideration of the Constitution of the University. The power exercised by the Council, as the executive authority of the University, in appointing the appellant, was that conferred on it by section 45(3)(b). It consists of two limbs. First, the appointment of the appellant was made subject to 'such terms and conditions *as may be prescribed*' (emphasis added) by the Council. Secondly, such terms and conditions to be so prescribed *shall be deemed* (emphasis supplied) to include a provision that the appellant's employment is subject to the provisions of the Constitution, Statutes, Acts and Regulations in force on the date of the appointment. With regard to the second limb of the provision, it is common ground that no Statute, Act or Regulation has been made by the Council pursuant to section 4(1)(n) of the Constitution defining or regulating 'prescribed examinations' for the purposes of the conditions of service. There is accordingly still left for consideration the first limb of that provision which expressly provides for 'such terms and conditions as may be prescribed by the Council'. A consideration of the statutory provision clearly emphasizes its potentially broad scope in its application where 'prescribed examinations' (in plural, it will be noted) are otherwise undefined. It should, in our view, consistent with its language, be given a broad as opposed to a narrow construction and one which will serve to achieve the broad objects and purposes Parliament intended.

When the Council resolved to issue the Service Circular, the question before it, in our opinion, went far beyond the circumstances of the appellant, and involved as well the exercise of the powers conferred on it under the Constitution of the University as its governing authority. The argument that in issuing the Service Circular the Council was merely acting under (but beyond) the conditions of the appellant's contract of employment and not under its basic statute as well cannot be supported. The Service Circular was not tailored only for the appellant, but applied to all staff in Groups A and B. In our opinion the decision was inescapably one which was made in exercise of the powers conferred by the Constitution of the University even if the occasion for its exercise arose as a result of a contractual arrangement.

We therefore hold that the Service Circular was valid and did not amount to a unilateral variation of the appellant's contract of employment.

The argument that the Council's resolution containing a new condition of employment relating to the requirement to pass the Peperiksaan Am Kerajaan must only be implemented by Statute, Act or Regulation and not by a Service Circular is in our opinion to confuse form with substance. We see no reason in principle why the Council could not implement its resolution by way of a Service Circular.

The appeal is accordingly dismissed with costs. We direct the deposit

lodged as security to be paid out to the respondent to account of its costs.

Appeal allowed.

C Abraham for the Appellant.
CV Das for the Respondent.

Note

This case pertains to the area of subordinate legislation in administrative law. In this case, Raja Azlan Shah LP (as he then was) gave a broad interpretation to the provision delegating legislative power on the University. What is more, His Lordship even dispensed with the requirement of form in which delegated legislation ought to have been made. It needs to be emphasized that in administrative law, many a time, the only safeguard a person can have against invasion of his rights by the administration is of a procedural nature and, therefore, the importance of the form in which administrative action should be expressed ought not to be minimised. Many a time 'form' may become important.

ESTOPPEL AGAINST ADMINISTRATIVE BODIES

Public Textiles Berhad
v
Lembaga Letrik Negara

[1976] 2 MLJ 58 Federal Court, Penang
Coram: Gill CJ (Malaya), Ali and Raja Azlan Shah FJJ

Cases referred to:-
(1) *Maritime Electric Company Limited* v *General Dairies Ltd* (1937) AC 610.
(2) *Taranaki Electric-Power Board* v *Proprietors of Puketapa 3A Block Incorporated* [1958] NZLR 297.
(3) *Sarat Chunder Dey* v *Gopal Chunder Laha* (1892) LR 19 Ind App 203.
(4) *Mercantile Bank of India Ltd* v *Central Bank of India Ltd* [1938] 1 All ER 52.
(5) *Swan* v *North British Australasian Co* (1863) 2 H&C 175 Ex Ch. .
(6) *Greenwood* v *Martin's Bank Ltd* [1933] AC 51.
(7) *Greenwood* v *Martin's Bank Ltd* [1932] 1 KB 379, 380.
(8) *Freeman* v *Cooke* (1848) 2 Ex 654, 663.
(9) *Pickard* v *Sears* (1837) 6 A&E 469, 474.
(10) *Gregg* v *Wells* (1839) 10 A&E 90, 97.
(11) *Moorgate Mercantile Co Ltd* v *Twitchings* [1975] 3 All ER 314.
(12) *R* v *Blenkinsop* [1892] 1 QB 43.
(13) *Commissioners of Customs and Excise* v *Hobson Ltd* [1953] 2 Lloyds Rep 382.
(14) *Kok Hoong* v *Leong Cheong Kweng Mines Ltd* [1964] 1 All ER 300, 308; [1964] MLJ 49.
(15) *Southend-on-Sea Corporation* v *Hodgson (Wickford) Ltd* [1962] 1 QB 416.
(16) *Smith* v *Attorney-General* [1973] 2 NZLR 393.
(17) *Ashbury Railway Carriage and Iron Co* v *Riche* (1875) LR 7 HL 653.
(18) *Attorney-General* v *Great Eastern Railway Co* (1880) 5 AC 473, 481.
(19) *Fender* v *Mildmay* [1938] AC 10.

(20) *Re a Bankruptcy Notice* [1924] 2 Ch 76.

RAJA AZLAN SHAH FJ: The respondents ('the Board') had contracted to supply electricity to the appellants. By mistake, it had considerably undercharged the appellants to the amount of $84,624.01 and successfully claimed that amount from them. The learned trial judge held that the Board was not estopped from claiming that amount although the appellants had utilised the accounts rendered by the Board for the purpose of costing their products. To have admitted the estoppel, so the learned judge held, would have had the effect of nullifying the statutory provisions of the Electricity Act, 1949 (Revised - 1973). .

This is an appeal against that decision.

Before stating the facts on which this appeal turns, and the contentions of counsel, it seems to be convenient to refer to the relevant statutory provisions of the Electricity Act, 1949 (Revised - 1973) and the Electricity (Board Supplies) Rules, 1949, (LN 515/49; amended LN 235/64).

The Board is a corporate body constituted under section 3 of the Act, and is accordingly under a statutory duty to secure the supply of energy at reasonable prices (section 15), to enter into contracts with any person upon such terms and conditions as it may determine (section 16), and to fix the prices to be charged which shall be in accordance with such tariffs as may, from time to time, be fixed by regulations made under section 89 [section 21 (1)]. The Board is under the control and supervision of the Minister who appoints the members (section 5) and is required to make annual reports and returns and a copy thereof to be transmitted to the Minister as well as to be laid before the Dewan Raayat: sections 25, 27. Although the Board has a free hand to enter into contracts for the supply of energy, the rates which it can make and exact are strictly limited, and must be in exact accordance with the provisions of the First Schedule: 'contracts at scheduled rates' (rule 29). It has power to amend the schedules and to make charges for energy supplied in different places or districts on different systems, or while maintaining the same system, at different rates [rule 4(5)], but that power cannot override the statutory duty of the Board not to show undue preference or undue discrimination as between consumers similarly situated: section 21(2). Monthly bills are rendered by the Board to the consumer which must be paid within 7 days of presentation, failing which the installation may be disconnected without further notice: rule 8(1).

The appellants during the material times carried on a textile business in Butterworth, Province Wellesley. They had entered into a contract with the Board to buy from it electricity energy at scheduled rates — at Tariff E — Fixed Block Industrial Tariff. Because at that time a 2-way summation system was not available and because of the urgency of the appellants' need, a 3-way summation system was installed. Since the factory is using 2 power transformers, a multiplication factor of 3/2 is required to ascertain the actual units consumed. If a 2-way summation

metering system is used, then a multiplication scale is not required, and a direct reading would show the actual units consumed. Due to an error of the Board's servants, the correct multiplication factor was not applied, thus the appellants were not rendered proper bills from the commencement of the contract i.e. December 16, 1970, until the omission was discovered on April 29, 1972. At that time an engineer of the Board was taking stock of summation current transformers in order to assess its requirements for the next annual period and he called in these forms as well as the requisitions. It was then discovered that there was discrepancy between Form LLN 90 and the particular requisition form. The former, which is normally used to advise meter readers as to what factor to use on the meter reading, showed a 2-day summation metering system, whereas the latter showed a 3-way system. Of course, the former is not correct. A junior technical assistant of the Board had not entered the correct summation current transformer. Since there is no tag on the meters to advise meter-readers to make the necessary conversion of the readings, they naturally took a direct reading of the meters, the course applicable to a 2-way summation metering system. Hence the error, thus resulting in under-billing the appellants. The Board therefore issued a supplementary bill to recover the difference between the amount for which the appellants had already been charged and paid, and the amount which should have been charged, had there been no error.

The Board grounded its claim on *quantum meruit* and in contract. The forefront of the defence, and indeed, the only one that merits consideration before the trial judge is the doctrine of estoppel. Since the contract between the parties was drawn up under the Act and was basically for the payment of the actual amount of electricity consumed at scheduled rates, the learned judge held the view that the Board could succeed in contract and not on *quantum meruit.* With that view, I am in complete agreement. Where, as here, the claim is based on contractually agreed sum, for example, under Tariff E of the First Schedule to the Electricity (Board Supplies) (Amendment) Rules, 1964, *quantum meruit* does not lie.

The learned judge treated the case as governed principally by the Privy Council decision in *Maritime Electric Company Limited* v *General Dairies Ltd.*[1] and upheld the Board's claim because he felt constrained to do so by that decision. He said: "In the present case, I accept, with respect, that the local statute is of the type considered in the *Maritime Electric Company's* case and I must accordingly hold that there can be, even if the facts justify it, no admission of an estoppel to nullify the statutory provision. The duty of the defendants is to pay for the electricity consumed at the rates determined". The facts in *Taranaki Electric-Power Board* v *Proprietors of Puketapu 3A Block Incorporated,*[2] a case of the Court of Appeal in New Zealand, bear a resemblance to the facts of the present case, and needless to say, that case was strongly relied on by the appellants. The learned judge however distinguished *Taranaki's* case from the present case both on the facts and in the provisions of the respective statutes. He said, *inter alia,* the Board's duty

to fix and collect reasonable prices for the supply of energy immediately takes the present case outside the ambit of *Taranaki's* case and puts it fairly within the scope of *Maritime Electric Company's* case. So it is necessary to examine the authorities to seek to determine what principles can be deduced from them.

The doctrine of estoppel is enacted in section 115 of the Evidence Act, 1950, which is *in pari materia* with section 115 of the Indian Evidence Act. Of the latter it is conceded that the law it enacts is the same as English law: see *Sarat Chunder Dey* v *Gopal Chunder Laha*[3]. It seems to me that what was there said in relation to the Indian Evidence Act must apply *a fortiori* to our Evidence Act. Our Evidence Act which gets its inspiration from the Indian Evidence Act does not therefore enact as law anything different from the law in England on the subject of estoppel, and English decisions on the subject are relevant to the determination of questions arising for decision under the Act.

The appellants relied on the doctrine of estoppel by negligence and also estoppel by representation. Of the former they pointed to 4 specific acts of negligence of the Board's employees: (a) installation of the wrong equipment, *i.e.,* the appellants asked for a 2-way summation system, but a 3-way summation system was installed, (b) in view of the fact that no proper equipment was available, why did the Board not instal a direct metering system, (c) failure to affix a warning tag, and (d) the absence of wiring plan.

With regard to (a) and (b), the learned judge held that because at the relevant time a 2-way summation system was not available and the urgency of the appellant's needs and that a 3-way summation system was available, and that was ordered by the appellants, the latter system was installed. That is a finding which has got the sanctity of a pure finding of fact with which, of course, this court cannot interfere. It is not however controverted in the court below that to instal a 3-way summation system for 2 transformers is an internationally accepted practice. Indeed the metering system installed in the factory are in accordance with British Standard Specifications. The purchase was inspected by the Crown Agents in London and also tested by the Board's employees. I accept this evidence for it was not seriously contradicted.

Whatever could have been said about the failure to indicate the multiplication factor, in my view, the term estoppel by negligence is misleading; it is only one aspect of estoppel by conduct. Spencer Bower, *Estoppel by Representation* (2nd Edn 1966) page 69 in his well-known text said:

> It is relevant at this point to make mention of the expression 'estoppel by negligence', the use of which has encouraged some to consider this so-called variety of estoppel as in a separate class. It is conceived that there is no justification whatever for such a special classification. The term 'estoppel by negligence' is used to signify those examples of estoppel in which the silence of one under a duty in the circumstances to speak will be taken to estop him from denying the truth of the assumption which by his silence he has allowed to be made. It is this breach of a duty to speak which is the negligence which is alluded to in the term estoppel

by negligence.

On the case law I need only refer to the speech of Lord Wright in the Privy Council case of *Mercantile Bank of India Ltd* v *Central Bank of India Ltd*[4] where after recalling Blackburn J's *dictum* in *Swan* v *North British Australasian Co*[5] that "it must be the neglect of some duty that is owing to the person led into the belief" concluded that estoppel by negligence must always depend upon the existence of a legal duty owed by him who is sought to be estopped to the person raising the plea.

Therefore, mere silence cannot operate as an estoppel unless it is established that there is a duty to speak or act. Then deliberate silence or inaction becomes equivalent to a representation as much as if a representation has been made by express language or positive acts. I propose to refer only to *Greenwood* v *Martins Bank Ltd*[6] as it affords a good example of a whole line of cases on the subject. In that case the husband owed a duty to the bank to disclose his wife's forgeries when he became aware of them so that the bank could take steps to sue the forger, but through his silence or failure to disclose the bank was prevented from taking action against the forger. In an action by the husband against the bank to recover the sums of money paid out by the latter on account of his wife's forgeries, the husband, because of his silence or failure to disclose the forgeries which he was under a legal duty to do, was held estopped from asserting the cheques were forgeries. Scrutton LJ in the Court of Appeal[7] states the principle with great precision:

> The classic exposition of the principle of estoppel is that given by Parke B, in delivering the judgment of the Court in *Freeman* v *Cooke*[8]. He cites the rule in *Pickard* v *Sears*[9]: 'That, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time' . And continues, 'The principle is stated more broadly by Lord Denman, in the case of *Gregg* v *Wells,*[10] where his Lordship says, that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving'.

Lord Tomlin in the House of Lord [1933] AC on page 58 said:

> The appellant's silence, therefore, was deliberate and intended to produce the effect which it in fact produced — namely, the leaving of the respondents in ignorance of the true fact so that no action might be taken by them against the appellant's wife. The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged cheques were in fact in order, and assuming that detriment to the respondents followed there were, it seems to me, present all the elements essential to estoppel.

In my view, the so-called cases of estoppel by negligence are associated with those cases in which the silence of one under a legal duty to speak or act is regarded as the representation, and it is a breach of that duty which is relied upon as creating an estoppel. But where there is an

express representation made by or on behalf of the representor, negligence as a necessary element in estoppel is not relevant. The judgment of Browne LJ in *Moorgate Mercantile Co Ltd* v *Twitchings*[11] contains a valuable exposition of certain features of the law. He said (page 326):

> In my view, negligence is not a necessary element in estoppel where there has been an express representation made by or on behalf of the representor. Negligence, and therefore duty, are relevant where a party is alleging that silence or inaction amount to a representation, because in such cases he must establish a duty to speak or act: see Spencer Bower, and e.g. *Greenwood* v *Martins Bank Ltd.*

Adopting that hint — if it be permissible to regard it as such — the doctrine of estoppel by negligence has no application to the present case, because here there was an express representation by the servant or agent on behalf of the representor, the Board.

Turning to the plea of estoppel by representation, there appears to me to be, consistently with the authorities as I understand them, a valid reason why the appellants could not succeed in their appeal. The appellants never at any time argued the accuracy of the meter readings; their case throughout the proceedings in the court below and before us has been that where the Board as creditor renders its monthly account to the debtor, the appellants, and the latter pays, and the creditor accepts, the amount shown therein as the amount finally owing, the creditor is estopped from later representing a correct account, if by reason of the promises the appellants have moved to their detriment. The monthly account is said to be the representation; the detriment to be that it had utilised the monthly accounts rendered by the Board for the purpose of costing their products.

The appellants' argument is entitled to some weight, but I do not think the proposition is here accurately formulated by them. The true position, in my opinion, is that the rules as to the nature of the representation alleged have only limited application to promissory estoppel.

I will now examine the question on principle as to when estoppel can be pleaded against a public corporation. For that purpose it may be convenient now to examine closely the case of *Maritime Electric Company Limited* v *General Dairies Limited, supra.* In that case the relevant words of section 16 of the Public Utilities Act of New Brunswick were: "No public utility shall charge, demand, collect or receive a greater or less compensation for any service than is prescribed in such schedules as are at the time established, or demand, collect or receive any rates, tolls or charges not specified in such schedules." The Maritime Electric Company, a private company which generated and supplied electrical power in the City of Fredericton, New Brunswick, were a public utility company within the meaning of the Act, that is to say, a commercial undertaking formed for promoting public interest, and were accordingly under a statutory duty to furnish reasonably adequate service and facilities and were strictly limited, in accordance

with filed schedules open to public inspection, as to the rates, tolls and charges which they could make and exact (sections 14, 15). If it charged different rates to different customers it would be guilty of 'unjust discrimination' (section 18), and would be charged to a penalty. Section 19 provided that: "no person, firm or corporation shall knowingly solicit, accept or receive any rebate, concession or discrimination in respect to any service in, or affecting or relating to, any public utility whereby any such service is by any device whatsoever, or otherwise, rendered free or at a less rate than that named in the schedules in force, as provided herein, or whereby any service or advantage is received other than is herein specified".

A penalty was also provided for violation of this section.

General Dairies Ltd, who carried on a dairy business in Fredericton, bought from the Electric Company electric energy which they used in the manufacture of butter, ice-cream and other milk products. To arrive at the correct amount of electric energy supplied it was necessary to multiply the meter dial reading by ten, but owing to a mistake on the part of the Electric Company that was not done over a period of twenty-eight months, with the result that during that time General Dairies were charged with only one-tenth of the electric energy supplied to them. The bills so made were duly paid by General Dairies. That company was purely a commercial undertaking. On the basis of these payments so made it prepared its annual balance sheets, which consequently showed more profit earned than these balance sheets would have shown if the electric bills had been correctly made out. The company accordingly declared larger dividends and paid them to its share-holders. Thereafter the Electric Company discovered its mistakes and made further demands for those past years by supplementary bills. Those bills not being paid, the Electric Company brought the suit to recover the balance of nine-tenths. General Dairies pleaded estoppel. It was admitted that General Dairies acted on the representation made in the original bills as to the amounts payable for electric energy supplied in the belief that the representations were true and had acted on those representations to its detriment by paying larger sums of money as dividends to its share-holders. It was held by the Privy Council that the Electric Company was not estopped from recovering the sum claimed. "The duty imposed by the Act on the Electric Company to charge, and on General Dairies to pay, at scheduled rates, for all the electric current supplied by the one and used by the other could not be defeated or avoided by a mere mistake in the computation of accounts.The relevant sections of the Act enacted for the benefit of a section of the public, and in such a case where the statute imposed a duty of a positive kind it was not open to General Dairies to set up an estoppel to prevent it. An estoppel is only a rule of evidence, and could not avail to release the Electric Company from an obligation to obey the statute, nor could it enable General Dairies to escape from the statutory obligation to pay at the scheduled rates. The duty of each party was to obey the law:" see the speech of Lord Maugham on pages 619,620. In my opinion the key words in his speech are the following: "The court should first of all determine the nature of

the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision." The principle on which the decision rests is that a corporation cannot indirectly do, by placing itself under the disability of estoppel, what it could not have directly done by reason of statutory prohibitions.

There is a considerable number of existing authority to support the decision in the *Maritime Electric Company* case. For example, it had been held in *R* v *Blenkinsop,*[12] one of the cases cited to us, that the overseers of a parish who had charged a railway company only one-third of their correct share of the rates could recover the balance in an action for arrears. The court held that an estoppel could not arise in that case since the ratepayer's liability was not a private debt but a public obligation.

There are also a number of later decisions that go the same way. In *Commissioners of Customs and Excise* v *Hebson Ltd,*[13] Pearson J held that customs officers who had mistakenly allowed imports of goods of a certain type in the past were not thereby estopped from claiming that goods of the same type were being imported in contravention of an order under the Import, Export and Customs Powers (Defence) Act, 1939. The learned judge said (page 396):

> An officer having a public duty cannot be deprived of his duties and powers, or cannot be prevented by any estoppel from performing their duties and powers which he has a statutory or other public obligation to exercise in the general public interest.

In *Kok Hoong* v *Leong Cheong Kweng Mines Ltd* [14] the Privy Council had occasion to consider *Maritime Electric Company's* case with reference to the plea of estoppel in the face of a statute and explained it in this way (page 308):

> Thus a corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel *in pais* from performing its duty and asserting legal rights accordingly.

and

> Gives a 'statutory obligation of an unconditional character' it is not open to the court to allow a party bound by the obligation to be barred from carrying it out by the operation of an estoppel.

Subsequent decisions show that it has been extended to cover cases where the statute lays down a duty to exercise a discretion which is intended to be performed or exercised for the benifit of the public: see *Southend-of-Sea Corporation* v *Hodgson (Wickford) Ltd,*[15] *Smith* v *Attorney-General.*[16]

It is manifest that the principle of estoppel as laid down in *Maritime Electric Company* is not eroded in modern times but in fact appears in our law in many forms. That principle is not formulated for the first time in that decision but is a well established principle. It is stated in general and in more comprehensive terms in 15 *Halsbury's Laws of England* (3rd Edn) 223-232, 235-246, paragraphs 422-434, 440-454.

There is no justification for jettisoning that case in order to save the appellants. That case was decided 38 years ago by the court and has been acted upon ever since as dependent upon and enshrining a true legal principle that estoppel cannot be set up to hinder the performance of a statutory duty. It is the leading authority on the subject. In many of the cases to which our attention have been drawn, the court has not been in any doubt or difficulty as to the principle, which has been established so firmly that nothing can shake it now, but only as to the application of the principle to different sets of facts.

It will be seen that the cases referred to above are concerned with the proposition that we cannot avoid our statutory duties in the face of an estoppel. It is our bounden duty to obey the law which is enacted in the interests of the general public or a section of it. In other words, in cases where the doctrine of estoppel has been excluded it is because to have decided otherwise would have allowed a person to achieve by an estoppel against himself something which he could not otherwise lawfully do. In the *Maritime Electric Company's* case, for example, to have allowed the operation of estoppel against the Electric Company would be to have allowed it to do an *ultra vires* act, which by the statute creating it enacted that it could not lawfully do, *i.e.,* not to collect charges at scheduled rates. The result would have adversely affected someone to whom the Electric Company owed a duty- the public of Frederiction.

Therefore the *Maritime Electric Company's* case can be explained in this way. The company was performing a duty in claiming the scheduled charges for electricity consumed. As far as that duty was concerned, it could not be estopped from performing it. Under the Public Utilities Act of New Brunswick it had a duty to perform, namely to charge a certain amount, no more, no less, for their services.

Accordingly in cases of this kind the first duty of the court is to determine the nature of the obligation imposed by the statute on the parties which prevents the plea of estoppel being raised. If the statute is enacted for the benefit of someone other than the person against whom the estoppel is pleaded, then the doctrine of estoppel is excluded. Because the statute must be obeyed, it is sometimes called a 'positive'. or an 'imperative' statute. It is not always easy to decide whether a particular statute is laying down a positive duty or a negative one. Hence the issue is one of considerable difficulty, and importance.

An elaborate argument has been addressed to us on the interpretation of the Electricity Act,1949. It has been said on behalf of the appellants that for the doctrine of estoppel to apply the Act in question must have been enacted on principles of public policy,and that the Electricity Act is not of this category. Counsel submitted that the Board is nothing but a trading corporation enacted under the Act which does not have provisions similar to sections 14,15 and 16 of the New Brunswick Act. Our Act imposes no duty to assess rates as the Board is given a free hand to fix them in view of its powers to amend the schedules at any time it sees fit [rule 4(5)]; and section 89 does not empower the Board to make penal provisions for disobeying any of its provisions. Since there is no

punishment provision, it is said that the Board can waive the payment of scheduled rates and accept less than that prescribed and accordingly would not be acting *ultra vires* the Act. It is further said that the rules prohibit the issue of supplementary bills. Therefore it is argued that the Electricity Act is outside the public policy principles and accordingly brings it in line with the provisions of the Electric Power Boards Act 1925 which was construed in *Taranaki's* case.

The facts in *Taranaki's* case cannot be more adequately put than was stated by the learned judge in his judgment. He said: "Shortly after the installation of the new equipment, the defendant's mill manager noticed that the accounts rendered by the Board for electricity were less than had been in the past. He drew the attention of the Board's inspector to that circumstance and the inspector re-checked the wiring but could detect no fault. Some 3 years later, a meter became defective and was replaced. A sum of £39 8s was demanded and paid as a fair and reasonable adjustment, on the assumption that the defect in the meter had existed for the previous year. Two years later by using check-meters, it was found that the current drawn from one of the transformers was insufficiently recorded by reason of the wrong connection of a cable from the transformer to the meter, although the manufacturer's tag indicated it was correctly connected. Further tests appeared to establish that the short payment for the period from August 3, 1950 to October 30, 1955 came to £1,181 7s 5d, comparatively a smaller sum for a much longer period. North J considered that the payment of £39 8s amounted to a representation of the existence of a certain state of affairs and perhaps was a compromise of all past claims. He also held that the monthly accounts thereafter were also representations of the existence of a certain state of affairs. This state of affairs was acted on by the consumer to its damage in the belief of its truth. The learned judge also found that the knowledge of the defect was solely in the possession of the Board and the defendant in the nature of things also had no possible means of verifying the accuracy or otherwise of the Board's accounts and the defendant had throughout displayed the utmost frankness."

I do not find anything in *Taranaki's* case which can be of assistance to the appellants. That case turns on special facts and in my view there is a manifest distinction between that case and the present. I have indicated how the learned judge distinguished that case. Adding to what he has there said, it is possible to state summarily what is the essential difference between that case and the present. There North J had to consider section 82(o) of the Electricity Power Boards Act 1925, which authorises power boards to sell electricity to any local authority or consumers generally within the district in bulk or otherwise on such terms and conditions as it deems fit. Owing to a defect in the meters, the Board had charged the defendants for less supply than had been actually supplied. The learned judge held no offence or breach of a statutory prohibition was committed by the Board in supplying electricity to the defendants at the amount charged in the monthly statements, and that there were,therefore, no obligations imposed by the provisions of the Electricity Boards Act, 1925, and the regulations made thereun-

der, either on the Board or on the defendants, which prevented the plea of estoppel being raised. The defendants had been led into the belief that the monthly accounts were correct, and in so acting on them they did so to its prejudice.

In my view, in *Taranaki's* case it is not an offence to supply and to charge electricity *less* (italics are mine) than the actual supply recorded on the defective meters. In our case, it is admitted that the meters were never defective; therefore the supply of energy is never in question. The supply of electric energy was correct but the appellants were under-charged. The question arises whether it is *ultra vires* the Electricity Act to charge the appellants at less than the scheduled rates? If the answer is in the affirmative, if it is *ultra vires* the Act, then the operation of the doctrine of estoppel will nullify the statutory provision. Here it is necessary to distinguish between a natural person and an artificial person, i.e., a corporation. In the case of a natural person whatever is not expressly forbidden by law is permitted by law. He has the capacity to do everything save and except those forbidden by law. In the case of a corporation the rule applicable to a natural person is reversed. Whatever is not permitted expressly or by necessary implication by the incorporating statute is prohibited not by the express or implied prohibition of the legislature but by the principle of *ultra vires:* see *Ashbury Railway Carriage & Iron Co* v *Riche;*[17] *Attorney-General* v *Great Eastern Railway Co.*[18]

In construing the Electriciry Act,1949, it is not correct to go by the criterion that it must be framed on principles of public policy. The term public policy is vague and unsatisfactory. From time to time judges of the highest reputation have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in this field. The 'unruly horse' of Hobart CJ is common place: see *Fender* v *Mildmay.*[19] In my opinion, the public policy yardstick is too wide and elusive. The true test, as it seems to me, is the principle of public interest, that is, whether looking at the Act as a whole and particularly at the relevant provisions, it is framed for the benefit of some third party, or the state or public at large or a section of it. We need to ascertain where the duty is imposed, for whose benefit it is imposed and why it has been imposed. The point has been canvassed in *Kok Hoong* v *Leong Cheong Kweng Mines Ltd, supra.* I think it is not inexpedient to quote a passage from the speech of Viscount Radcliffe which expresses, in my view, the correct test (page 308):

> It has been said that the question whether an estopel is to be allowed or not depends on whether the enactment or rule of law relied on is imposed in the public interest or 'on grounds of general public policy' (see *Re a Bankruptcy Notice,*[18] *per* Atkin LJ). However a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statute, for which this claim might not be made. In their lordships'opinion a more direct test to apply in any case such as the present ... is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the

public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise.

Applying that test, the Electricity Act does not appear to me to be founded on considerations of trade as for the benefit of the public in general. It is enacted to give the Board the sole monopoly in the Federation to generate, distribute and sell electric energy at reasonable prices. Indeed the learned judge in his judgment said that it is conceded by the defence that the Board is a public utility operating under the Act. It has a duty to perform — to assess the appellants for rates in accordance with Tariff E of the First Schedule to the Rules, no more, no less, for electricity actually supplied. Equally, the appellants have a corresponding duty to perform — to pay at scheduled rates, no more, and no less, for electric energy actually consumed. That is a statutory obligation for which the Board is responsible to the Minister who is in turn responsible to Parliament. To waive the payment at scheduled rates is 'prohibited not by the express or implied prohibition of the legislature but by the doctrine of *ultra vires.*' In other words, if the plea of estoppel is allowed, the scheduled rates due in respect of the actual amount of electric energy supplied which are not irrecoverable for it has been sued, would be indirectly remitted which the Board could not by any act directly remit. That would be nullifying the statutory provisions of the Act.

It seems to me that our case amounts to no more than a reassertion and reapplication of the doctrine of estoppel as laid down in the *Maritime Electric Company* case and that the present situation is exactly within the language of Lord Maugham which is in conformity with a long line of previous decisions to be found in 15 *Halsbury's Laws of England* (3rd Edn).

I would accordingly dismiss the appeal with costs.

Gill CJ (Malaya) and **Ali FJ** concurred.

Appeal dismissed.

Lim Kean Chye for the Appellants.
Chin Yew Meng for the Respondents.

Note

In this case, the court declared that the doctrine of estoppel as contained in section 115 of the Evidence Act was held not applicable in the fact-situation of the case, for to do so would be to do an *ultra vires* act. In this case, the court did not probe into the question of applicability of the doctrine of equitable estoppel which is broader than the doctrine contained in section 115 of the Evidence Act.

PRIVILEGED DOCUMENTS

B A Rao & Ors
v
Sapuran Kaur & Anor

[1978] 2 MLJ 146 Federal Court, Ipoh

Coram: Gill CJ (Malaya), Ong Hock Sim and Raja Azlan Shah FJJ

Cases referred to:-

(1) *Conway* v *Rimmer* [1968] 2 AC 910.
(2) *R* v *Lewes Justices* [1973] AC 388.
(3) *Duncan* v *Cammell, Laird and Co Ltd* [1942] AC 624.
(4) *Ellis* v *Home Office* [1953] 2 QB 135.
(5) *United States* v *Reynolds* (1953) 35 US 1.
(6) *New York Times Co* v *United States* (1971) 403 US 713.
(7) *Robinson* v *South Australia (No 2)* [1931] AC 704.
(8) *Bruce* v *Waldron* [1963] VR 3.
(9) *Ex parte Brown, Re Tunstall* (1966) 67 SR (NSW) 1.
(10) *Corbett* v *Social Security Commission* [1962] NZLR 878.
(11) *Union of India* v *Sodhi Sukhdev Singh* AIR (1961) SC 493.
(12) *Niranjan Dass* v *State of Punjab* AIR (1968) Punjab & Haryana 255.
(13) *State of Uttar Pradesh* v *Raj Narain* AIR (1975) SC 865.
(14) *D* v *National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589.
(15) *Glasgow Corporation* v *Central Land Board* [1956] SC 1.

RAJA AZLAN SHAH FJ: This is an appeal by the defendants in Civil Suit No 10 of 1974 from the decision of the learned judge of the High Court at Raub on a preliminary issue in the matter of Notice to Produce dated December 2, 1976 all the documents in respect of a Committee of Enquiry held into the death of one Siminder Singh s/o Lall Singh disallowing objection by appellants' counsel and ordering production of the reports and findings of the Committee of Enquiry.

In Civil Suit No 10 of 1974 the estate of the deceased is claiming damages for his death as a result of the alleged negligence of the medical officers of Bentong and Mentakab District Hospitals where the latter was admitted and treated as a patient as a result of a motor car accident along the Karak/Kuantan main trunk road. The Government is brought in as their employer.

As in the court below, it was urged before us that section 123 of the Evidence Act is applicable and the documents are privileged from disclosure. Section 123 reads:

> 123. 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 as 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.

It is contended that the learned judge erred both in fact and law in

holding that the notes and findings of the Committee of Enquiry were not unpublished official records relating to affairs of State in terms of section 123 of the Evidence Act.

Prior to *Conway* v *Rimmer*[1] the position in England was that the court could not go behind the Minister's certificate that disclosure of a class of documents or the contents of particular documents would be injurious to the public interest. His certificate was conclusive. That was decided in the celebrated case of *Duncan* v *Cammell, Laird & Co Ltd*[2] which was followed in *Ellis* v *Home Office*[3]. In *Conway* v *Rimmer, supra,* the House of Lords held that the wide interpretation of *Duncan* v *Cammell, Laird & Co Ltd, supra,* was wrong and that the court could go behind a Minister's certificate claiming privilege and examine the documents in question (without their being shown to the parties) and decide whether or not the decision was justified. This judgment has now been put into statutory form *viz.* the Administration of Justice Act, 1970, enabling a court to order disclosure of documents, etc., applying specifically to the Crown, except that no such order may be made if the court considers 'that compliance with the order, if made, would be likely to be injurious to the public interest'. Thus the law in England has been brought into line with the law of the United States and other Commonwealth countries. In the United States the courts have consistently refused to recognise any absolute power in the executive to forbid disclosure of evidence. In the leading case of *United States* v *Reynolds,*[4] several civilian observers aboard a military plane on a flight to test secret electronic equipment were killed when the said plane crashed and their widows sued the Government.The plaintiffs applied for discovery of the accident investigation report but the Government claimed privilege and refused to produce the report. The court rejected the view that the assertion of executive privilege was conclusive on the question of production. The court recognised that there are State secrets which need not be produced but held that the determination of whether they are State secrects is a judicial function and only when it is satisfied that compulsion of the evidence will expose military matters which, in the interest of national security, shall not be divulged, will it refuse to require disclosure. The refusal of the United States courts to allow the claim to executive privilege received striking confirmation in the case of *New York Times Co* v *United States*[5] — popularly known as the *Pentagon Paper* case. In that case the Supreme Court refused an injunction sought by the Government to restrain the New York Times and Washington Post from publishing the contents of a classified study entitled 'History of U.S. Decision-Making Process on Vietnam Policy' prepared within the Defence Department.

In Australia, the courts had decided, long before *Conway* v *Rimmer, supra,* that an affidavit of the Minister was not conclusive and that the court had power to call for the documents, examine them, and determine the validity of the claim for themselves. The decision of the Privy Council in *Robinson* v *South Australia*[6] was to this effect. The courts of Victoria and New South Wales had held that they had a residual power to override the executive's claim to privilege except in relation to

defence and matters of State: see *Bruce* v *Waldron,*[7] and *ex parte Brown; Re Tunstall.*[8]

In New Zealand in the case of *Corbett* v *Social Security Commission*[9] the courts refused to follow *Duncan* v *Cammell, Laird & Co Ltd, supra,* preferring instead the earlier advice of the Privy Council in *Robinson* v *South Australia, supra.*

It can be seen that there has never been an American counterpart of *Duncan* v *Cammell, Laird* and in all the three Commonwealth jurisdictions *Duncan* v *Cammell, Laird* had been given the *coup de grace* and judges are free to adopt the practice by inspecting the documents when the Minister's certificate is not sufficient information to enable them to say that privilege applies and it is necessary to decide the issue on the balance of competing considerations.

In India, as in Malaysia, the law on the subject is contained in sections 123 and 162 of the Evidence Act. In the former, the controversy has centred upon the last phrase in section 162 and the extent to which the court can take evidence of the contents of the documents. Courts in India tend to rely on the wording of the Evidence Act rather than English law: see *Sarkar on Evidence* (1971 Ed.) 1161-1175. The Indian Supreme Court first considered the matter in *Union of India* v *Sodhi Sukhdev Singh*[10] which has been followed by all Indian courts including the Supreme Court but in a notable Punjab case, i.e., *Niranjan Dass* v *State of Punjab,*[11] the High Court took a common sense view of the problem and refused to allow the claim for privilege to camouflage official misconduct. In *Sukhdev's* case the court delivered three judgments. Gajendragadkar J (for Sinha CJ and Wanchoo J) opined that the courts had power to enquire whether the documents were official or not and take evidence to that effect. Kapur J followed the traditional English view and denied the right to take evidence. Subba Rao J took the view that the only limitation on the court was that they could not inspect the documents or allow the parties to adduce secondary evidence of their contents. What makes these opinions interesting is that all the judges rely on English law and the common law. All of them seemed to regard the problem before them as if they were looking at an English law problem in the abstract. In 1975 the Supreme Court clarified the law relating to executive privilege. In the *State of Uttar Pradesh* v *Raj Narain*[12] the Supreme Court took the following stand:

> The foundation of the law behind sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will *proprio motu* exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to

> bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of a class which demand protection. To illustrate the class of documents would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security of the State and high level inter-departmental minutes. In the ultimate analysis the contents of the documents are so described that it could be seen at once that in the public interest the documents are to be withheld.

The high-water mark of *Raj Narain's, supra,* case is the clear acceptance of the principle by the court that affidavit evidence claiming privilege is not conclusive and the court has power to inspect the document to satisfy itself that it requires protection. Secondly, a claim to privilege cannot be rejected merely on the ground that no affidavit was filed or that it was defective. Where no affidavit was filed, an affidavit could be filed later; if an affidavit was defective, an opportunity could be directed to file a better affidavit. In any case, the question of privilege is one for judicial resolution.

In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations . It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest. Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents, or departmental policy documents, private interest must give way. It is for the court, not the executive, ultimately to determine that there is a real basis for the claim that 'affairs of State is involved' before it permits non-disclosure. While it is clear that the final decision in all circumstances rests with the court, and that the court is entitled to look at the evidence before reaching a concluded view, it can be expected that categories of information will develop from time to time. It is for that reason that the legislature has refrained from defining 'affairs of State'. In my opinion, 'affairs of State', like an elephant, is perhaps easier to recognise than to define, and their existence must depend on the particular facts of each case.

I am of the view that the learned judge adopted the right and proper approach in the instant case by scrutinizing the affidavit of the Deputy Secretary-General of the Ministry of Health sworn to on December 14, 1976, more than $1^1/_2$ years after the issuance of the writ of summons. As the learned judge said:

> As provided under section 162(2) of the Evidence Act, I have now to take other evidence to enable me to determine the admissibility of the document and I can do this by making an enquiry to ascertain the status of the document in question by calling the Head of Department to give evidence and be examined or to require him to furnish a supplementary affidavit or I may decide on the affidavit already affirmed, if I consider it

> contains sufficient information for me to come to a decision. Page 1164 of *Sarkar on Evidence*, 12th Ed provides what type of further information that may be sought:
> (a) what injury to the public is apprehended?
> (b) what affairs of State are involved in the matter?
> I take it that the defendants are not objecting to that part of the inquiry relating solely to the death of the deceased but to other parts containing facts, remarks, opinions and recommendations, all alleged to have been given in strict confidence, and also to that part of the contents which were compiled and furnished for the guidance of the Ministry in formulation of policy relating to medical services and hospital administration. It is not easy for me to state with a certain degree of confidence what injury to the public is apprehended.... As regards what matter of State is involved I think this is clearly set out in the affidavit. This being the position as deduced by me I do not think I should require any further information from the Head of Department and I shall therefore proceed to decide the matter on the relevant facts and circumstances adduced in the case.

A mere assertion of confidentiality and that affairs of State are involved without evidence in support cannot, in my view, shut out the evidence sought by the respondents. Paragraph 2 admitted that the Committee was set up by the Ministry to inquire into the death of the deceased at the Hospital Daerah Mentakab on June 1, 1973. The terms of reference or any document relating thereto were not before the court. The affidavit went on in paragraph 3 to broaden the base by asserting that the inquiry was "to investigate into matters relating to the medical facilities and services and hospital administration existing in the Hospital Daerah Mentakab *in 1973* with a view to make such comments and recommendations... to enable my Ministry to carry out its policy of promoting greater efficiency in hospital administration and the provision of medical services not only in respect of the Hospital Daerah Mentakab but also in respect of all hospitals throughout the country." I am of opinion that this was uttered with tongue in cheek and with no other object than to suppress evidence which may or may not assist the respondents in their claim based on negligence of the appellant medical officers and the Government as their employer.

Ground 2 of the Memorandum of Appeal claimed disclosure would be in "breach of the pledge by the Ministry that all facts, remarks, opinions and recommendations of witnesses and members of the Committee were to be given in strict confidence." I see no substance in this contention, regard it as entirely captious, and reject it by saying that there is no evidence of such pledge. I feel that the only reason for the claim is generalities about candour within the public service with the sole object of gaining an unfair advantage over the respondents' case. I may also point out that confidentiality is not a separate head of privilege, but may be a material consideration to bear in mind in determining whether the public interest falls on the side of disclosure or non-disclosure. "The fact that information has been communicated by one person to another in confidence is not a sufficient ground for protecting from disclosure in a court of law the nature of the information if it would assist the court to ascertain facts which are relevant to

an issue on which it is adjudicating": see *D* v *National Society for the Prevention of Cruelty to Children.*[13] The need to preserve freedom and candour of communication with and within the public service has been a favourite argument but once this unsound argument is allowed to run riot, free rein would be given to the tendency to secrecy which is inherent in the public service. Freedom and candour of communication is not a factor in itself that will persuade the court to order that information be not disclosed, and that line of argument was scorned by the House of Lords in *Conway* v *Rimmer, supra.* The approach taken was that the number of instances of revelation in judicial proceedings is infinitesimal when compared with the number of occasions on which it is necessary for public servants to express their views. Further, it would be belittling them to suggest that their advice would vary according to whether or not it was exposed to public scrutiny. I do not think public servants would shrink from giving honest opinions just because there is a distant chance that their report may one day have to be disclosed in open court. As Lord Radcliffe said in *Glasgow Corporation* v *Central Land Board:*[14] 'I should myself have supposed Crown servants to be made of sterner stuff', and he criticised the insidious tendency to suppress 'everything however commonplace that has passed between one civil servant and another behind the departmental screen'.

The documents of the said Committee of Enquiry consist of a report dated October 3, 1973 compiled by the said Committee and notes of evidence. These departmental documents are not unpublished documents relating to affairs of State. Consequently where the Government or the doctor is sued for negligence the Government cannot screen the alleged wrongful act from the purview of the court on the ground that it is an affair of State demanding protection. In the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth. To ordain that a court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person who best knows them and can prove them at first hand seems to be a contradiction in terms. It is best that truth should be out and that truth should prevail.

The appeal is dismissed with costs.

Gill CJ (Malaya) and **Ong Hock Sim FJ** concurred.

Appeal dismissed.

Fong Seng Yee (Senior Federal Counsel) for the Appellants.
M Sivalingam for the Respondents.

Note

This is another landmark pronouncement by Raja Azlan Shah FJ (as he then was) insofar as the power of the government to refuse to produce documents in the court has been subjected to judicial review. The law in this regard has undergone changes in England at the hands of the judiciary as is demonstrated by the House of Lords' case of *Conway* v

Rimmer[1968] AC 910. The significance of *Rao's* lies in the fact as to how an antiquated provision (section 123 of the Evidence Act) has been interpreted so as to bring the relevant law in Malaysia in line with the law in England. The case establishes the principle that when government claims privilege in respect of a document the court can look into the document and determine whether the claim of the government should be accepted or not.

ATTORNEY-GENERAL'S DISCRETION UNDER THE ESSENTIAL (SECURITY CASES) REGULATIONS, 1975

Mohamed Nordin bin Johan
v
Attorney-General, Malaysia

[1983] 1 MLJ 68 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah Ag LP, Abdul Hamid FJ and Abdoolcader J

Cases referred to:
(1) *Merdeka University Bhd* v *Government of Malaysia* [1981] 2 MLJ 356,360
(2) *Labour Department* v *Merrit Beazley Homes Ltd* [1976] 1 NZLR 505,506.
(3) *Romesh Thappar* v *State of Madras* AIR (1950) SC 124, 127.
(4) *Ram Nandan* v *State* AIR (1959) All. 101.
(5) *Public Prosecutor* v *Su Liang Yu* [1976] 2 MLJ 128, 132.
(6) *R* v *Home Secretary, ex parte Hosenball* [1977] 1 WLR 766, 781.
(7) *Mak Sik Kwong* v *Minister of Home Affairs (No 2)* [1975] 2 MLJ 175, 178.
(8) *Education Secretary* v *Tameside Borough Council* [1977] AC 1014, 1047.
(9) *Regina* v *Secretary of State for the Environment, ex parte Norwich City Council* [1982] 2 WLR 580, 593.
(10) *Regina* v *Industrial Injuries Commissioner, ex parte Amalgamated Engineering Union* [1966] 2 QB 21.
(11) *Regina* v *Croydon Justices, ex parte Lefore Holdings Ltd* [1980] 1 WLR 1465.
(12) *Hubli Electricity Company Limited* v *Province of Bombay* LR 76 IA 57.
(13) *Sungei Wangi Estate* v *Uni* [1975] 1 MLJ 136.
(14) *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, 213, 233.
(15) *Re Tillmire Common, Heslington* [1982] 2 All ER 615, 622.

RAJA AZLAN SHAH Ag LP (delivering the judgment of the Court): This is an appeal against the refusal of the learned judge to grant leave to apply for an order of certiorari to quash (i) the certificate issued by the Attorney-General under regulation 2(2) of the Essential (Security Cases) Regulations, 1975, (ii) the consequential certificate issued by him under regulation 6(1) of the said Regulations and (iii) the consequential order of the learned Magistrate, Tampin, transferring the criminal case in question to the High Court, Kuala Lumpur.

On July 10, 1982 the appellant together with four others, one of whom is the Federal Minister of Culture, Youth and Sports, were charged in the Magistrate's Court at Tampin, Negeri Sembilan with the

murder of the former Negeri Sembilan State Assembly Speaker, Dato' Mohd Taha bin Talib, an offence punishable under section 302 of the Penal Code read with section 34 of the same Code. The alleged offence was committed on April 14, 1982 that is 7 days after nomination day for the Federal and State General Elections 1982 which were held on April 22, 1982.

The learned Attorney-General who appeared for the prosecution tendered two certificates under regulations 2(2) and 6(1) of the Essential (Security Cases) Regulations, 1975. The effect of the two certificates is that the Attorney General treated the offence as a security offence and specified the High Court, Kuala Lumpur as the place of trial. He then successfully applied for transfer of the case to the High Court, Kuala Lumpur. On July 13, 1982 the appellant together with the other three (one has since died) appeared before the High Court, Kuala Lumpur. They claimed trial. The case was then fixed for hearing to commence on October 11, 1982.

Regulations 2(2) and 6(1) of the Essential (Security Cases) Regulations,1975 read as follows:

> 2(2) Where the commisssion of any offence against any written law other than sections 57, 58, 59, 60, 61 and 62 of the Internal Security Act, 1960, in the opinion of the Attorney-General, affects the security of the Federation, he shall issue a certificate to that effect and the case shall thereupon be dealt with and tried in accordance with these Regulations.
>
> 6 (1) Where a security case is triable by the High Court, no preliminary enquiry shall be held in respect thereof, and the Magistrate before whom the accused is produced shall forthwith commit the accused for trial by the High Court at such place (whether within the same State or not) as the Public Prosecutor may specify and upon such charge as the Public Prosecutor may prefer.

On July 29, 1982 the appellant filed an *ex parte* originating motion for leave to apply for an order of certiorari to quash the two certificates and the order of the learned Magistrate transferring the case to the High Court, Kuala Lumpur. The gravamen of the appellant's case is that murder is not an offence which affects the security of the Federation in the context of regulation 2(2). Counsel on his behalf said that the regulation is framed in an 'objective' form — 'in the opinion' of the Attorney-General. He submitted that there is a condition precedent to be fulfilled before the Attorney-General can classify the case as a security offence, namely, that the offence must be one that affects the security of the Federation. He said the appellant is not a communist, a communist terrorist or insurgent or a subversive element, nor are the other three accused persons. Therefore it is contended that the Attorney General had acted on extraneous considerations which ought not to have influenced him and he had thus acted in excess of the power conferred upon him by the regulation. Counsel referred us to the following cases: *Merdeka University Bhd* v *Government of Malaysia*[1]; *Labour Deprtment* v *Merrit Beazley Homes Ltd*[2]; *Romesh Thappar* v *State of Madras*[3]; *Ram Nandan* v *State*[4]; *Public Prosecutor* v *Su Liang Yu*[5]; *R* v *Home Secretary, ex parte Hosenball*[6].

On the other hand the Attorney-General argued that the power conferred upon him by regulation 2(2) is one of pure judgment and is not reviewable by this court. He said the test is subjective and referred us to the following cases: *Mak Sik Kwong* v *Minister of Home Affairs (No 2)*[7]; *Education Secretary* v *Tameside Borough Council*[8]; *Regina* v *Secretary of State for the Environment, ex parte Norwich City Council*[9].

We allowed the appeal and granted the appellant leave to apply for an order of certiorari because we are of the view that the learned judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion for certiorari. When this Court grants leave, it has jurisdiction to hear the substantive motion itself. This practice is not inconsistent with the one in vogue in England: see *Regina* v *Industrial Injuries Commissioner, ex parte Amalgamated Engineering Union*[10] which was followed in *Regina* v *Croydon Justices, ex parte Lefore Holdings Ltd.*[11].

We now turn to the substantive motion which counsel for the appellant undertook to formally file in the registry. In our view the sole question which the court must ask itself, and answer, in this case is simply whether regulation 2(2) confers on the Attorney-General a discretion which is a matter of pure judgment or imposes a condition that there must in fact exist some basis on which he must take into consideration before he can validly exercise the discretion, the condition being that the commission of the offence affects the security of the Federation. We note that regulation 2(2) is certainly draconian in its terms. On the other hand Parliament has authorised the Yang di-Pertuan Agong to make the Regulations read in the light of its context, background and purpose in such a way as to confer a wider power on the Attorney-General than that, as for example, conferred on the Secretary of State in the *Tameside Case (supra)* which was held to attract the objective process. In this connection we would refer to a judgment of the Judicial Committee of the Privy Council in *Hubli Electricity Company Limited* v *Province of Bombay*[12]. In that case section 4, sub-section 1, of the Indian Electricity Act, 1910, which was the subject for determination, reads as follows:

> The Provincial Government may, if in its opinion the public interest so requires, revoke a licence in any of the following cases, namely: (a) where the licensee in the opinion of the Provincial Government makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act.

It was held on the construction of that provision that it was the subjective opinion of the government which was relevant not the grounds on which the opinion is based. Further, the relevant question was that there had been a wilful and unreasonably prolonged default; not that a default had been wilfully and unreasonably prolonged. Similarly, in the present case, we think the subjective opinion of the Attorney-General that the alleged commission of the offence of murder by five accused persons affects the security of the Federation is the determinative factor. The language of the regulation leaves no room for

the relevance of a judicial examination as to the sufficiency of the grounds on which he acted in forming his opinion. His opinion in the context of the regulation in question is not open to review and a contrary construction would render inefficacious the whole purpose and scheme of the Regulations as a whole. As Lord Wilberforce said in *Tameside, supra* at page 1047:

> But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at.

We therefore conclude that regulation 2(2) attracts the pure judgment of the Attorney-General and cannot be subjected to an objective test and is not accordingly amenable to judicial review. We accordingly dismissed the motion for an order of certiorari.

That is not the end of the matter before us. There was another appeal (Federal Court Civil Appeal No 218/82) by the appellant regarding an originating summons for declaratory relief which he had earlier brought and which was struck out by the learned judge under Order 18, rule 19 of the Rules of the High Court, 1980. The appellant had also in that case sought to similarly impugn the certificates issued by the Attorney-General under regulations 2(2) and 6(1) of the Essential (Security Cases) Regulations, 1975 and the order of the learned magistrate transferring the case to the High Court, Kuala Lumpur. We think that in the circumstances of this case certiorari is the appropriate remedy to be sought and not a declaration, and we need only refer to the judgment of Abdoolcader J in *Sungai Wangi Estate* v *Uni*[13]; *Anisminic Ltd* v *Foreign Compensation Commission*[14] (*per* Lord Reid at page 213 and *per* Lord Pearce at page 233) and *Re Tillmire Common, Heslington*[15] in support. To dispose of this matter we allowed this other appeal and set aside the judgment of the learned judge in that case, and counsel on behalf of the appellant then very properly at our suggestion withdrew the originating summons which we accordingly struck out.

Order accordingly.

Sri Ram for the Appellant.
Tan Sri Abu Talib Othman (Attorney-General) for the Respondent.

Note

In this case, the discretion conferred on the Attorney-General by regulation 2(2) of the Essential (Security Cases) Regulations, 1975, has been held to be 'a matter of pure judgment'. Even though the court accepted that the regulation in question was 'draconian in its terms, the court refused to impose any supervision on the exercise of the discretion by the Attorney General. Raja Azlan Shah, Ag LP (as he then was) delivering the judgment of the Federal Court in *Nordin's* case did not refer to what His Lordship had said in the earlier case of *Pengarah Tanah dan Galian.* It is now a well accepted proposition that merely characterising a power as 'discretionary' does not make it free from judicial review. Also, the

point needs to be emphasized that the discretion of the Attorney-General in Malaysia is statutory in nature unlike that of the Attorney-General in England where it is derived from the common law and so the two do not stand on the same footing.

PUBLIC NUISANCE — POWERS OF LOCAL AUTHORITY

Majlis Perbandaran Pulau Pinang
v
Boey Siew Than & Ors

[1979] 2 MLJ 127 Federal Court, Penang
Coram: Raja Azlan Shah CJ (Malaya); Chang Min Tat and Syed Othman FJJ

Cases referred to:-
(1) *Tottenham Urban District Council* v *Williamson & Sons Ltd* [1896] 2 QB 353, 354.
(2) *Nuneaton Local Board* v *General Sewage Co* (1875) LR 20 Eq 127, 133.
(3) *Prestatyn Urban District Council* v *Prestatyn Raceway Ltd & Anor* [1970] 1 WLR 34,44.
(4) *Solihull Metropolitan Borough Council* v *Maxfern Ltd & Anor* [1977] 1 WLR 127.
(5) *Assa Singh* v *Mentri Besar, Johore* [1969] 2 MLJ 30,48.
(6) *American Cyanamid* v *Ethicon Ltd* [1975] AC 396.
(7) *Charles Ostenton and Co* v *Johnston* [1942] AC 130, 138-139.
(8) *Evans* v *Bartlam* [1937] AC 473.
(9) *Gardner* v *Jay* (1885) LR 29 Ch. D. 58.
(10) *S Sivaperuman* v *Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ.
(11) *Attorney-General* v *Harris* [1961] 1 QB 74.
(12) *Attorney-General* v *Melville Construction Co* [1968] 67 LGR 309.
(13) *Attorney-General* v *Chandry* [1971] 1 WLR 1614.
(14) *Attorney-General* v *Times Newspaper Ltd* [1974] AC 273.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): These two appeals, heard together and the subject of one judgment, were from the decisions and orders of the High Court in Penang (reported in [1978] 2 MLJ 156) refusing interim injunctions and striking out both the actions under Order 25 rule 3 as disclosing no reasonable cause of action. We allowed them on December 6, 1978. We now proceed to give our reasons.

The facts in Federal Court Civil Appeal No 29 of 1978 are as follows. The appellants who are the local authority are concerned with the illegal activities of the respondents. In their statement of claim dated December 15, 1977 they allege that the respondents, who are in possession and control of the dwelling house at No 42, Jalan Tanjong Tokong, Pulau Pinang, have on September 21, 1977 applied to them under section 144(7) of the Municipal Ordinance (Cap 133) to convert it into an eating-house, but without waiting for approval carried out structural alterations which in the absence of an approval is an offence punishable under section 144(9) of the said Ordinance. To convert the dwelling-house into an eating-house is by virtue of section 144(11)(e)

of the said Ordinance deemed to 'erect a building'. They also complain that the respondents are operating the said eating-house known as the 'Restaurant Jade Dragon' since November 10, 1977 without a licence duly issued by them under by-law 2(i) of the Council's by-laws with respect to bakeries, eating-houses and places where food or drink is sold or prepared or stored for sale, an offence punishable under by-law 27(i). Enforcement notices dated October 6, 1977 and November 14, 1977 requiring the respondents to "stop work of carrying out alterations and additions and conversion of the dwelling-house without prior approval, demolish all unauthorised structures and revert to previous use" were ignored. They therefore seek an injunction to restrain the respondents from illegally operating the said eating-house and damages for public nuisance which they have a statutory right to abate otherwise than upon the intervention of the Attorney-General by virtue of sections 13 and 80 of the Local Government Act, 1976 (Act 171).

In Federal Court Civil Appeal No 30/78 the facts are similar. The respondents who are in possession and control of the building at No 180-N, Burmah Road, Pulau Pinang, have since October 10, 1977, converted it into an eating-house in breach of by-laws 2(i) and 27(i) of the Council's by-laws. Enforcement notice issued on the same day was served on the respondents on October 17 but was ignored. On December 14, 1977 the appellants sought a similar remedy.

On December 15, 1977 the apellants obtained *ex parte* injunctions restraining the respondents from operating the said eating-house until trial of the actions. On December 28, 1977 and January 12, 1978 the respondents moved the court to strike out the actions and also to dissolve the *ex parte* injunctions. On February 9, 1978 the court upheld their applications.

It is necessary to reproduce the relevant provisions of the law. Section 144(7) of the Municipal Ordinance is as follows:

> No person shall commence any building operations involving the erection of a building ... unless:
> (a) he has given to the Commissioners four day's notice of his intention to commence or resume such operations with particulars of the intended works; and
> (b) a plan and specification of the building have been approved by the Commissioners or the President within one year before the date of the notice.

Section 144(11)(e) enacts:

> For purposes of this section and of sections 144B, 145 and 146 a person shall be deemed to erect a building who-
> (a) converts to other purposes a house originally constructed as a dwelling-house.

Section 144(9) of the Municipal Ordinance is as follows:

> Any owner who fails to comply with the requirements of such notice shall be liable to a fine not exeeding ten dollars for each day during which such non-compliance continues, and the Commissioners may themselves

> cause the work to be done and the owner shall pay to the Commissioners the cost and expense thereof.

By-law 2(i) of the Council's by-laws reads as follows:

> No person shall keep any aerated water or ice factory, bakery, cookshop or eating- house within the limits of the Municipality without a licence therefor issued under these by-laws.

Section 27(i) of the Council's by-laws lays down as follows:

> Any person who uses or causes or permits to be used any premises in contravention of by-law 2 shall be guilty of an offence.

The issues which fall for consideration in these appeals are the same issues as those which the trial judge below had to resolve. First, whether the cause of action is wrongfully instituted and secondly, whether interlocutory relief is an appropriate remedy at this stage of the proceedings.

It is common ground that the cause of action is founded on public nuisance and that the action of the respondents constitutes non-compliance with the law and has to be restrained. The forefront of the argument below and before us is whether the appellants can institute proceedings seeking an injunction to restrain a public nuisance without the relation of the Attorney-General because section 8(i) of the Government Proceedings Ordinance, 1956, it is argued, directs that only the Attorney-General, or two or more persons having obtained his written consent, may institute such proceedings. Section 8(i) is in these terms:

> In the case of a public nuisance the Attorney-General, or two or more persons having obtained the consent in writing of the Attorney-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

We all know the reason behind the salutory provisions of the section which is nothing more than a restatement of the English common law that when anyone complains of a public nuisance he must obtain the *fiat* of the Attorney-General for proceedings by way of information, unless he can show that the nuisance which he complains is the cause of special damage to himself, and so a ground for action: see *Tottenham Urban District Council* v *Williamson & Sons Ltd.*[1] It is sufficient to say that the principle was laid down to avoid multiplicity of actions or the institution of actions which may well be of no proper concern for the weighty consideration of the courts of law. The argument was put in this way as long ago as in 1535 in a case in the Year Books which was translated by CHS Fifoot in *History and Sources of the Criminal Law* (1949), page 98 as follows:

> If one of those injured were allowed to sue, a thousand might do so;

and that was considered intolerable. *Blackstone* in his *Commentaries* (17 ed Book IV page 166) said:

> ...It would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects.

But does this principle prevent the present appellants who are the local authority and statutorily entrusted with the task of maintaining the municipal law of their area for the common good of all from seeking an injunction in their own name to restrain a public nuisance within their own area? Counsel on behalf of the appellants submitted that there is a statutory exception for a local authority to abate a public nuisance without the intervention of the Attorney-General and he referred us to the provisions of section 80 of the Local Government Act, 1976, which reads:

> The local authority shall take steps to remove, put down and abate all nuisances of a public nature within the local authority area or public or private premises and may proceed at law against any person committing any such nuisance for the abatement thereof and for damages.

We take the view that the provisions of section 80 mean what it says, namely that the appellants as the local authority of the area are invested with statutory powers and duties to 'take steps to remove, put down and abate a public nuisance' whether on public or private premises within their area, and they can institute legal proceedings in their own corporate name by virtue of section 13 of the Local Government Act, 1976 which reads as follows:

> Every local authority shall be a body corporate and shall have perpetual succession and a common seal, which may be altered from time to time, and may sue and be sued, acquire, hold and sell property and generally do and perform such acts and things as bodies corporate may by law do and perform.

It is argued on behalf of the appellants that Parliament intended to modify the principle applicable to the *locus standi* of private individuals to abate a public nuisance in their own name and not on the relation of the Attorney-General, by removing the requirement that such a litigant suffer special damage. We have no doubt that the section goes that far. Sir James Bacon VC as long ago as in 1875 prophesied that "the day may possibly come when the question, whether a corporation, created by statute to discharge such duties as a local board of health are created to fulfil, may or may not file a bill to restrain the infringement of a public right with or without the Attorney-General, will have to be decided": see *Nuneaton Local Board* v *General Sewage Co*[2] quoted by Golf J in *Prestatyn Urban District Council* v *Prestatyn Raceway Ltd & Anor.*[3] In England that day has arrived with the coming into force of the UK Local Government Act, 1972 on April 1, 1974. Section 222(i) of the Act reads:

> Where a local authority considers it expedient for the promotion or protection of the interests of the inhabitants of their area-
> (a) they may prosecute or defend in any legal proceedings and, in the case of civil proceedings, may institute them in their own name....

That section has been judicially considered and applied in *Solihull Metropolitan Borough Council* v *Maxfern Ltd & Anor*[4] where Oliver J held that the Council had *locus standi* to be awarded an injunction to restrain the use of an unlawful Sunday market.

In this country, the Local Government Act, 1976 is a major milestone in administrative history, and one of its notable results is the disappearance of the relator action. It is to be noted that the Act is not merely a consolidating Act, but also an amending Act which gives a local authority by virtue of section 80 (read with section 13) a wide new enabling power and duty altering the law and removing the question of standing from the discretion of the Attorney-General where it has hitherto pursuant to section 8(1) of the Government Proceedings Ordinance, 1956 rested. The remedy afforded by the section is a remedy primarily in protection of the class of persons affected by the conduct of the respondents. In this sense it is in protection of the public against their illegal activities. The appellants' standing rests on the contention that the essential nature of their case is one for the protection of the public interest. In our view, the section speaks so plainly that it is clear from its terms that Parliament had intended to release a local authority from the obligation to sue on a relator action and not in their own name, where they are taking proceedings at law to abate a public nuisance on public or private premises within their own area in protection of the public interest. We think this principle is relevant:"Where a power is coupled with a duty, the power cannot be divorced from the duty. They are inseparable; whoever exercises the power, he it must be who has to perform the duty, which is a condition precedent for the exercise of the power": see *Assa Singh* v *Mentri Besar, Johore.*[5]

We now turn to the vexed question whether this is a case in which an interlocutory injunction should issue.

The main argument has centred on the proposition that an injunction cannot be granted if an equally efficacious relief can be obtained. Section 54(i) of the Specific Relief Act,1950 (Act 137) reads:

> An injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;

The summary procedure available to the appellants to abate a nuisance pursuant to section 82(1) of the Local Government Act, 1976, it is argued, is an equally efficacious relief as that of an injunction to restrain the respondents from flouting the law. Section 82(1) of the Act is as follows:

> On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act, the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default or sufferance the nuisance arose or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance exists, requiring him to abate the same within the time specified in the notice and to execute such works and do such things as are necessary for that purpose and, if the local authority thinks it desirable, specifying

any works to be executed.

The question whether an equally efficacious relief can be obtained by any other usual mode of proceeding within the meaning of section 54(i) of the Specific Relief Act is a question of fact to be determined in each case on its own circumstances and no hard and fast rule can be laid down in the matter. For the appellants it is argued that the conduct of the respondents is very plain and that they will continue to flout the law unless immediately restrained and further it is urged that any fines payable under the law are unlikely to deter them from operating the said eating-house in view of the profits they are making.

At the interlocutory stage, it is, we think, important to bear in mind that it is inadvisable to express detailed or concluded views on the evidence relating to the issues in dispute. The application before the learned judge below for an interlocutory injunction is based on a breach of the planning permission law under Cap 133 and the Council's by-laws and the clear duty to restrain such continued breach pending the determination of the respondents' application for structural alterations and the issue of an eating-house licence and to preserve the *status quo.* In order for the appellants to be entitled to interlocutory relief, it is necessary for the court to be satisfied that there are serious questions to be tried in the sense explained by the House of Lords in *American Cyanamid* v *Ethicon Ltd.*[6] These no doubt will vary from case to case. If the court is satisfied that there are serious and difficult questions of law or fact involved in the proceedings, it will not undertake a preliminary trial of the action in order to forecast a probable result, but if the appellants have a real prospect of ultimate success, it will then proceed *to consider the balance of convenience, viz.,* whether the inconvenience or injury which the appellants will be likely to suffer if an injunction is refused outweighs or is outweighed by, the injury which the respondents will suffer if an injunction is granted. These two issues are distinct and separate and the court must so consider them.

Now, the court is given jurisdiction to grant an interlocutory injuction under sections 50 and 51(1) of the Specific Relief Act which read:

> Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.
>
> Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.

These words confer a judicial discretion of the widest kind upon the court. It is not to be arbitrarily exercised but must be done judicially in accordance with principle. We think that the principle applicable when the appeal is from the exercise of discretion is best stated by Viscount Simon LC in *Charles Ostenton and Co* v *Johnston:*[7]

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that rises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already

exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. This matter was elaborately discussed in the decision of the House in *Evans* v *Bartlam,*[8] where the proposition was stated by my noble and learned friend, Lord Wright as follows: It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal. Thus in *Gardner* v *Jay*[9] Bowen LJ in discussing the discretion of the judge as regards mode of trial says:

"That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed."

We have given careful consideration to the primary judgment and we feel that on the whole the learned judge did fall into error in discharging his task in that he did not direct his mind at all to the two distinct and separate issues as enunciated by the House of Lords in *American Cyanamid* case, *supra.* The learned judge having thus erred in his approach, it is now for this court to come to its own conclusion as to how, in this case, the relevant discretion should be exercised.

It cannot be regarded as an absolute and inflexible rule that the court will not grant interlocutory relief before trial. Each case must depend on its own facts. Thus the court has jurisdiction to grant it in exceptional circumstances: see the judgment of this court in *S Sivaperuman* v *Heah Seok Yeong Realty Sdn Bhd.*[10]

We feel that in this case there are serious questions to be tried in the sense that if the evidence remains as it is there is a probability that at the trial of the action the appellants will be entitled to relief. How strong the probability needs must depend, no doubt, upon the nature of the rights they assert and the practical consequences likely to flow from the order they seek. In the serious and urgent situation faced by the appellants there are reported cases which have held that an injunction will be awarded to restrain repeated breaches of regulatory legislation where the sanctions of the criminal law have proved inadequate. In *Attorney-General* v *Harris*[11] it was held that persistent and deliberate flouting of the law was in itself a grave and serious injury to the public, which warranted the grant of an injunction where the monetary penalties imposed by stature were ineffective to secure compliance with the law.

An injunction has also been awarded against individuals breaking or proposing to break the criminal law where the matter is very urgent, notwithstanding that the criminal courts have not yet dealt with this issue: see *Attorney-General* v *Melville Construction Co*[12] (tree preservation order); *Attorney-General* v *Chandry*[13] (breach of fire safety law); *Attorney-General* v *Times Newspapers Ltd*[14] (where publication of article would have been criminal contempt of court).

The second inquiry is directed to whether, on the balance of convenience, injunctive relief should be granted.

After considering the facts so far as they appear from the affidavits and the authorities, we are of the opinion that in all the circumstances of the case, there is a reasonable prospect of the trial court granting an injunction, whereas if breaches of the law are allowed to continue, it will be impossible or useless to grant it at the trial. In such circumstances we consider it right to grant an urgent relief of an interlocutory nature which works in the interest of justice and also in the interests of the proper functioning of the appellants as a local authority. The case is brought by them solely for the protection of the public interest in their area and in the case where relief is brought by a local authority in the public interest the court gives weight to such interest in deciding where the balance of convenience lies.

Appeal allowed.

Ghazi Ishak for the Appellants.
Jagjit Singh & R Rajasingam for the Respondents.

Note

This case establishes the principle that since the local authority is charged with the responsibility of abating a public nuisance under the law, it can take action for the purpose on its own without seeking the assent of the Attorney General. It means that if a local authority is under a statutory duty to remove a public nuisance, then it must also be conceded that it has the power to do so. The pronouncement of Raja Azlan Shah CJ (as he then was) is also very instructive on two other points: (a) Can an injunction be granted when an equally efficacious relief can be obtained otherwise? (b) When can an interlocutory relief be granted? On both these points the court ruled in favour of the Majlis. To some extent, this case liberalises the remedial aspect of Malaysian administrative law.

REVIEW BY HIGH COURT

Hotel Malaya Sdn Berhad & Anor
v
National Union of Hotel, Bar And Restaurant Workers & Anor

[1982] 2 MLJ 237 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah CJ (Malaya), Wan Suleiman FJ and Abdoolcader J

Cases referred to:
(1) *Garland* v *Westminster City Council* [1970] 21 P&CR 555.
(2) *Austin Reed Ltd* v *Royal Insurance Co Ltd* [1956] 1 WLR 1339.
(3) *Re Rosenfeld and College of Physicians and Surgeons* (1970) 11 DLR (3d)148.
(4) *R* v *Halifax City Council Committee of Works, ex parte Johnston* (1962) 34 DLR (2d) 45, 57.
(5) *R* v *Huntingdon Confirming Authority* [1929] 1 KB 698.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): This is an appeal from the decision of Hashim Yeop A Sani, J dismissing the application of the appellants for an order of certiorari to quash the decision of the Industrial Court ('the Court') holding it had jurisdiction to hear and determine two applications under the provisions of section 33A of the Industrial Relations Act, 1967 ('the Act') to refer to the High Court certain questions of law that had arisen out of two awards made by a different panel of the court. To appreciate the arguments that have been raised before us it would be necessary to state a few facts.

On August 16, 1979 the Minister of Labour and Manpower referred two trade disputes between the National Union of Hotel, Bar and Restaurant Workers, the 1st respondent to this appeal, and Hotel Malaya Sdn. Bhd., Kuala Lumpur and Kuala Lumpur Restaurant Sdn Bhd, the appellants,to the court. On May 30, 1981 the court composed of Encik K Somasundram as Chairman and three members — Datuk K K Nair, Encik Jaffar Mohd Ali and Encik Qua Chiew Peng — handed down two awards. Encik K Somasundram has since retired. On September 18, 1981 the court constituted of Harun Mahmud Hashim, J, President of the court and three members — Datuk Chong Shih Guan, Encik Esa bin Haji Ahmad, and Encik R Retnam — heard applications by the 1st respondent in relation to the two awards to refer certain questions of law arising out of both the awards to the High Court under section 33A of the Act. Counsel on behalf of the appellants unsuccessfully contended that that differently constituted Court had no jurisdiction to hear the applications on the ground that it was not the same court that handed down the awards on May 30, 1981. He argued that the same court which handed down the awards on May 30,1981 should and indeed must hear the applications. It is said that the competence of the court to hear the applications goes to the very root of its jurisdiction and, where it is lacking, it is a case of inherent lack of jurisdiction.

The court after hearing argument held on October 31,1981 in what it

termed an interim award that it has jurisdiction to hear the two applications.

Pursuant to the leave granted by Hashim Yeop A Sani, J in the High Court to apply for an order of certiorari to quash the decision of the court dated October 31, 1981, the learned Judge, after hearing arguments with regard to the alleged defect or lack of jurisdiction in the court which heard the applications under section 33A of the Act, dismissed the application for certiorari. He was not prepared to analyse and dissect the language of section 33A to read into it the supposed requirement that the court as constituted which made the two awards in the first instance must hear the applications under section 33A of the Act. He was of the view that sub-section (4) of section 22 of the Act is an enabling provision facilitating a member, whose term of office has expired, to continue to sit in uncompleted proceedings, and since the proceedings had been finally disposed of when the court handed down its awards on May 30, 1981, that provision did not apply.

Before us counsel on behalf of the appellants starts with the submission, and we think that is his main ground, that the proceedings which had begun before the court presided by Encik K Somasundram were not finally disposed of until the expiry of thirty days after the making of the award had expired [section 33A (3)] or, if an application was made under section 33A, until that application had been rejected or refused by the Industrial Court or, if granted, until the determination by the High Court of the questions referred to it [section 33A (5)]. He relies on the provisions of sub-section (4) of section 22 of the Act and two cases, *Garland* v *Westminster City Council*[1] and *Austin Reed Ltd* v *Royal Insurance Co Ltd.*[2]

Section 22 of the Act deals with the constitution of the court; sub-section (4) of section 22 of the Act is as follows:

> Any member of the court constituted under this section whose appointment expires during the proceedings of the court shall for the purpose of the proceedings continue to be a member of the court and the term of his appointment shall be deemed to have been extended until the final disposal of the trade dispute or matter.

Garland v *Westminster City Council, supra,* was concerned with failure to comply with enforcement notices requiring the appellant in that case to demolish certain buildings. The short point about that case is that the enforcement notices would be of no effect if the appellant's appeal had not been 'finally determined'. The relevant statutory provision, section 46(3) of the Town and Country Planning Act 1962 enacts: 'Where an appeal [to the Minister against an enforcement notice] is brought under this section, the enforcement notice shall be of no effect pending the *final determination or withdrawal of the appeal*' (emphasis supplied). It was held 'that the time at which an appeal should, under the section, be considered as having been finally determined must be, at the latest, the time when an appeal to the Minister or from the Minister to the Divisional Court or from the Divisional Court to the Court of Appeal had been dismissed and the time for appealing further had

expired without any such further appeal having been instituted'. It is significant to note that that case was decided upon the construction of section 46(3) of that particular statute.

Austin Reed Ltd v *Royal Insurance Co Ltd, supra* was a case concerning the date on which an application for the grant of a new tenancy was 'finally disposed of' within the meaning of section 64 of the Landlord and Tenant Act, 1954. The facts do not concern us but the section, *inter alia,* provides that 'date on which an application is finally disposed of shall be construed as a reference to the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired...'. It was held that the application was 'finally disposed of' when the application was refused by the judge, and the appeal from his decision was dismissed by the Court of Appeal and leave to appeal to the House of Lords was refused by the Court of Appeal and when the time within which a petition could be lodged with the House of Lords for leave to appeal had expired.

It is unnecessary and not within our province to cavil at the decisions of those two cases. Suffice it to say that they rested on the particular construction of the two provisions of the English statutes in question. Hashim Yeop A Sani J has rightly expressed his view that they have no application to the facts of the present case. In our opinion, the reliance placed on those two authorities is misplaced. They have no bearing on the question that arises for decision here.

With all respect to the energy and persistence with which counsel on behalf of the appellants has brought to his task, in our judgment, one only has to look at his submission superficially to see that it cannot be sustained.

It is axiomatic that the Act is a self-contained legislative enactment which, *inter alia,* established the court with power to resolve trade disputes referred to it and deal with references to it under sub-section(3) of section 20 of the Act. The Industrial Court is constituted pursuant to the provisions of Part VII of the Act and includes, unless a contrary intention appears, any court under section 22 constituted for the purpose of dealing with any trade dispute or matter referred to it, and any division thereof (section 2). In practice there are five Divisions of the court, *viz.* the court consisting of the President and three members; and four other Divisions, each presided by a Chairman and three members (section 23). Encik K Somasundram was one of its Chairman. It exercises a quasi-judicial function. It gives a full reasoned judgment in the nature of an award (section 30). Its functions comprise an investigation of the facts, an analysis of the facts, findings of facts, and lastly, the application of the law to those findings.

In our opinion, sub-section (4) of section 2 of the Act obviously refers to a situation which arises when the appointment of a member of the court expires during the proceedings of the court and in those circumstances he shall continue to sit as a member of that court for the purpose of completing the hearing of and determining any trade dispute or matter commenced before it. In simple language, that member cont-

inues to sit until the court hands down its award under section 30 of the Act, irrespective of the fact that his appointment as a member of that court has expired. It would be absurd to say that the fact that there is an application under section 33 (A) of the Act prevents the final disposal of the trade dispute or reference already determined and in respect of which an award has been made by the court for the purposes of section 22(4) in the event, as in this case, when one of its members has ceased to be such after the award has been made.

In the circumstances, we are of the view that sub-section(4) of section 22 of the Act does not apply in the present case. The court which handed down its award on May 30, 1981 had completed its business.

Another ground which counsel on behalf of the appellants takes is of even less substance than the first. It relates to the construction of section 33A of the Act. In a nutshell it is said that the section envisages that the same members who constituted the court which handed down the awards on May 30, 1981, must hear the application under section 33A because they were familiar with the proceedings, having taken part in them in the earlier stages and that a differently constituted Court would not possess first-hand knowledge of the substantive proceedings. That, it is submitted, can be gathered from the language used in paragraphs (c) and (d) of sub-section (1) of section 33A of the Act which read:

> 33A. (1) Where the court has made an award under section 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law-
> (c) which, in the opinion of the court, is of sufficient importance to merit such reference; and
> (d) the determination of which by the court raises, in the opinion of the court, sufficient doubts to merit such reference.

We are not impressed by the argument of counsel. Having regard to the language of the section which admittedly contemplates that the court mentioned therein is the court as defined in section 2 of the Act, it would, in our opinion, be a perfectly legitimate view to take that if the legislature did intend to make an exception to the language therein it would have done so in clear and express terms, as it has done in sub-section (5) of section 33, instead of leaving it as a matter of mere inference from its provisions. Section 33 deals with the interpretation of an award or collective agreement with the object of removing ambiguity or uncertainty and subsection (5) is as follows:

> (5) The expression 'court' for the purpose of this section, means the court by which the award was made or any other court specially constituted under section 22 for the purpose.

In our opinion, the legislature could very well have said in section 33A, if it had indeed intended to, 'Where the court by which the award was made may in its discretion, refer to the High Court ...', instead of using in its present form 'Where the court has made an award ...'.

A further point taken by counsel on behalf of the appellants is the effect of the principles of natural justice. Shortly stated, it is a breach of

natural justice for the freshly constituted court to participate in the decision of October 31, 1981 if it has not heard all the evidence given, and submissions made when the two awards were handed down at the earlier proceedings before the court presided by Encik K Somasundram. The authorities cited to us, *viz, Re Rosenfeld and College of Physicians and Surgeons*[3] R v *Halifax City Council Committee of Works, ex parte Johnson*[4] and *R* v *Huntingdon Confirming Authority*[5] deal with an entirely different situation and it is therefore neither necessary nor pertinent to discuss these cases. We do not accede to the view expressed by counsel that this is a blatant case of a breach of natural justice. In our opinion, this is a case in which the court presided by Harun, J, heard an application to refer to the High Court certain questions of law arising out of the two awards; it did not hear any evidence or hand down any award. It was a differently constituted court but a court nevertheless as defined in section 2 of the Act to hear and determine a new and different matter which was only consequential to and an aftermath of the awards handed down previously.

We accordingly dismiss the appeal with costs.

Appeal dismissed

V K Palasuntharam for the Appellants.
DP Xavier for the 1st Respondent.

Note

This case pertains to the working of the Industrial Court. The proposition has been laid down that after the Industrial Court has given an award in an industrial dispute a differently constituted court can refer questions of law arising out of the award to the High Court under section 33A of the Industrial Relations Act, 1967.

RETIREMENT — THE USE OF RECORD BIRTH DATE

Doraisamy
v
Government of Malaysia

[1982] 2 MLJ 155 Federal Court, Ipoh
Coram: Gill CJ (Malaya), Raja Azlan Shah and Ong Hock Sim FJJ

Case referred to:-
(1) *General Manager, Keretapi Tanah Melayu* v *Verriah* [1975] 1 MLJ 123.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the grounds of judgment of the Court): This appeal against the judgment of the High Court dismissing the appellant's claim in this matter was heard on October 25, 1977 and

at the end of argument was dismissed with costs. One of my brother judges who sat in this appeal has since passed away and the other has retired and it therefore devolves on me to give the grounds for our decision which the appellant now requests for the purpose of applying to the Privy Council for leave to appeal in *forma pauperis*.

I need say no more than that we were so convinced regarding the proper and indeed inevitable outcome of this appeal that we did not find it necessary to reserve judgment and dismissed the appeal immediately at the conclusion of the hearing as we were in complete agreement with the decision arrived at by the learned trial judge for the reasons which appear in his judgment in reliance on the decision of this court in *General Manager, Keretapi Tanah Melayu* v *Verriah.*[1]

G T Rajan for the Appellant.
Lim Beng Choon (Senior Federal Counsel) for the Respondent.

Note

The principle established in this case is that for purposes of retirement, the recorded birth date is to be taken into account except when the Director General of Public Services approves a change therein.

NATURAL JUSTICE
a) Right to counsel — of a person with a statutory right of appeal

Doresamy
v
Public Services Commission

[1971] 2 MLJ 127 High Court, Kuala Lumpur

Cases referred to:-
(1) *Mundell* v *Mellor* [1929] SSLR 152.
(2) *R* v *Assessment Committee of Saint Mary Abbotts, Kensington* [1891] 1 QB 378.
(3) *Jackson & Co* v *Napper* (1886) 35 Ch D 162, 172, 173.
(4) *Pett* v *Greyhound Racing Association Ltd* [1968] 2 WLR 1471.
(5) *Enderby Town Football Club* v *The Football Association Ltd & Anor* [1971] 1 All ER 215.

RAJA AZLAN SHAH J: This is an application for a order of *mandamus* against the Public Services Commission and the Public Services Disciplinary (Division II, III, IV and Industrial and Manual Group Employees) Appeal Board to hear the applicant's appeal against dismissal made by the Public Services Disciplinary Board. Leave for the hearing of the application for the order against both the respondents has been granted.

The applicant was employed as an officer-boy at the Registry of Societies, Kuala Lumpur. On May 24, 1969 he was arrested by the

police and kept in custody under the Emergency (Public Order and Prevention of Crime) Ordinance, No 5 of 1969. He was then placed under a Restricted Residence Order. He has thus committed a breach of code of conduct under regulation 3(e) of the Public Services (Conduct and Discipline)(General Orders, Chapter 'D') Regulations, 1969 [PU (A) 273/69] in that he had conducted himself in such manner as to bring the Public Services into disrepute or to bring discredit thereto. His head of department invited him to show cause why he should not be dismissed from service. He made representations by letter through his solicitors. The Public Services Disciplinary Board, which has jurisdiction in this matter, after due deliberation, recommended disciplinary proceedings against the applicant with a view to dismissal.

The applicant was given an opportunity to exculpate himself. His solicitors made representations on his behalf and the board, after due consideration, dismissed the applicant from his service. He was informed of his right of appeal against such decision to the Public Services Disciplinary (Division IV and Industrial and Manual Group) (Dismissal) Appeal Board. The applicant appealed to the Appeal Board in writing through his solicitors. The Chairman of the Disciplinary Board who was responsible for the preparation of the appeal record and forwarding the same to the Appeal Board noticed that the appeal was made by the applicant's solicitor. So he wrote a letter to the applicant in the following terms:

> I have the honour to ... inform you that your appeal against your dismissal from the service cannot be considered by the Public Services Commission as the appeal was made through your solicitor and not by you personally in writing as provided by regulation 13(1) of the Public Services Disciplinary Board Regulations, 1967. In view of the above, your dismissal from the service has now become absolute....

Regulation 12(1) of the Public Services Disciplinary Board Regulations,1967 allows any person aggrieved by the decision of the disciplinary board to appeal to an Appeal Board. Now regulation 13(1) states:

> An appeal shall be made in writing by a person aforesaid (hereinafter referred to as 'the appellant' to an Appeal Board through his Head of Department...

within a specified period, which was complied in this case. Regulation 14 in general terms provides for the convening of a meeting to hear the appeal. It also preserves the appellant's right of being heard before the Appeal Board. Regulation 15 provides for the Rules of Procedure of the Appeal Board. Paragraph (1) of regulation 15 says that the rules made by the Public Services Commission for the purpose of regulating its procedure for the time being in force shall apply to the Appeal Board with such modifications as may be necessary as if such rules form part of these regulations.

Prior to the emergency i.e., 15th May 1969, disciplinary procedure in respect of Government servants was governed by the Public Officers (Conduct and Discipline) (General Order. Chapter 'D') Regulations

1968 [PU 290/68]. When the emergency was proclaimed Regulations 1968 was suspended and the provisions of Public Officers (Conduct and Discipline) (General Orders, Chapter 'D') Regulations, 1969 took effect, *vide* [PU (A) 273/69]. Therefore it is my opinion that the procedure to be adopted by the Appeal Board would be guided by Regulations 1969, in particular regulation 30(8) with necessary modifications. In its modified form the Appeal Board may in its discretion permit the Government or the officer to be represented by an officer in the Public Service or, in exceptional cases, by an advocate and solicitor and may, at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission: provided that where the Appeal Board permits the Government to be represented, it shall also permit the officer to be similarly represented.

The objection taken by counsel for the applicant is that there is nothing in regulation 13(1) of the Public Services Disciplinary Board Regulations, 1967, which excludes legal representation. It is said that if that regulation were expressed in these terms:

> An appeal shall be made in writing by a person aforesaid and *none other.*

then the regulation can be construed as barring a right to legal representation. Learned counsel contends that the common law right of any person who is *sui juris* to appoint an agent to act on his behalf can only be whittled down by expressed words in the regulation or by necessary implication. He relies strongly on *Mundell* v *Mellor*[1] which he says is directly in point. In that case the consultant engineer in whose factory an accident had occured was summoned by the Chief Inspector of Machinery to appear before an enquiry. If the enquiry made a finding adverse to him he would be prejudiced by it. He therefore engaged Mr Mundell, an advocate and solicitor, to represent him at the enquire. Mr Mundell attended the enquiry and claimed a right of audience on behalf of the consultant engineer but was refused on the ground that the tribunal had no power under section 15(iii) of Ordinance No 42(Machinery) to allow advocates and solicitors to take any part in the proceedings on behalf of their clients. It is necessary to reproduce section 15 which appeared from the judgment itself at page 155:

> By section 15 of that Ordinance it is provided that whenever an accident causing loss of life or grievous hurt has occured in connection with machinery, the owner or the engineer in charge of such machinery should at once report the facts so far as known to them to an Inspector who shall thereupon visit the spot and make a preliminary investigation of the circumstances, and record in writing his finding upon such investigation, and if there has been any loss of life or there is reason to believe that any person has been fatally injured shall inform the officer in charge of the nearest Police Station; then sub-section (iii) of section 15 provides that if upon such preliminary investigation it appears to the Inspector making such investigation that there is reason to believe that the accident was due to any failure to comply with the provisions of this

> Ordinance or of the rules made thereunder, or to neglect of any lawful order given by an Inspector, or if the Inspector making such investigation as aforesaid is satisfied that the accident might have been prevented if proper precautions had been taken and observed in the working of any machinery, the Chief Inspector shall with one or more assessors appointed by the Local Authority (who under the Definition Clause is, in Singapore, the Colonial Secretary) hold an inquiry into the nature and cause of the accident, and shall forward to the Local Authority a copy of the evidence taken at such inquiry together with his finding thereon moved as may seem necessary, and if he is of opinion that criminal proceedings ought to be instituted against any person in connection with the accident, he shall also forward to the Public Prosecutor a copy of the said evidence, findings and report.

On appeal Deane J held that the common law right to appear and be heard through an agent cannot be restricted in the absence of an expressed provision restricting or taking away that right. The learned judge referred to the case of *R* v *Assessment Committee of Saint Mary Abbotts, Kensington*[2] in which Charles J had to decide on the question whether a person exercising the statutory right of objecting could appear by an agent: the learned judge quoted a passage of Stirling J in *Jackson & Co* v *Napper:*[3]

> I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally, and not by an agent, you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is *sui juris* to appoint an agent to act on his behalf. Of course, the legislature may do so; but *prima facie* when there is nothing said about it, a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose.

Another case cited by counsel is *Pett* v *Greyhound Racing Association Ltd.*[4] Mr Pett, a trainer of greyhounds, was accused of doping a dog. An enquiry was to be held. Should he be found guilty his reputation and livelihood would be at stake. He also engaged counsel to represent him at the enquiry but was refused. He successfully asked for an injunction. On appeal that decision was reversed on the ground that there was nothing in the 'Rules of Racing' which excludes legal representation. In fact the rules contained nothing about the procedure on an inquiry. That led the Master of the Rolls, Lord Denning, to remark that when a man's reputation or livelihood is at stake he not only has a right to speak with his own mouth but also has a right to speak by counsel or solicitor.It is clear that earlier on the Master of the Rolls quoted an earlier passage from that quoted by Charles J in *R* v *Assessment Committee of Saint Mary Abbotts, Kensington, supra:*

> ...that, subject to certain well-known exceptions, every person who is *sui juris,* has a right to appoint an agent for any purpose whatsoever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right.

The statement of the law enunciated by the Master of the Rolls must

therefore be qualified by 'certain well-known exceptions' and in my judgment the 'exceptions' are those in which a legislation either by expressed words or necessary implication restricts the common law right of legal representation.

That brings me to the recent case of *Enderby Town Football Club* v *The Football Association Ltd & Anor.*[5] In that case the Enderby Town Football Club, a member of the Leicestershire and Rutland County Football Association, runs a totalisator on which members of the public can bet. The County Football Association took exception to it. The association appointed a commission to hear charges against the club. The commission found gross negligence in the administration of the club and imposed a fine. The club appealed to the Football Association which is the governing body of Association Football. The club asked to be legally represented at the appeal but was refused. An application for an injunction restraining the Football Association from hearing the appeal was dismissed. The matter went up to the Court of Appeal. Lord Denning, after distinguishing *Pett* v *Greyhound Racing Association Ltd, supra,* said that there is no absolute right of legal representation before a domestic tribunal and much depends on the wording of the rule in question. In the *Football Club* case much turns on the wording of rule 38(b) of the Football Association Rules which provides:

> An association, competition or club may be represented at the hearing of an appeal, complaint or claim, or at an enquiry, by one or more of its members. A barrister or a solicitor may only represent an association, competition or club,of which he is a member if he be the chairman or secretary. Any person summoned to attend an enquiry or the hearing of an appeal, complaint or claim must attend personally and not be legally represented.

It was held that on a true construction of the rule it barred legal representation for the club on the hearing of its appeal; and so the club was not entitled to legal representation before the Football Association.

The present case has not reached the stage of appellate review on the merits. If that stage is reached the Appeal Board has an unfettered discretion to allow for legal representation: see regulation 30(8) of Regulations 1969. Our case concerns the right to appeal to the Appeal Board and the issue narrows down to this: whether the presentation of the appeal may be made by a solicitor on behalf of an aggrieved person. That turns on the true construction of regulation 13(1) of the Public Services Disciplinary Board Regulations, 1967. It is manifest that the regulation gives an aggrieved person a statutory right of appeal. He is the person against whom a decision has been pronounced; he is the person with a legal grievance. Only this person may appeal. It is not open to a stranger to appeal. The language of the regulation is perfectly clear. Now this question must be posed: if he has a statutory right of appeal why cannot his solicitor appeal on his behalf? The regulation is silent on the right to the assistance of counsel. Is that adequate to deprive the aggrieved person of the right to the assistance of counsel? I think not. The considerations requiring assistance of counsel in the ordinary courts

are just as persuasive in proceedings before disciplinary tribunals. This is especially so when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful, every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage. Where he has a statutory right of the appeal and the regulations are silent on the right to the assistance of counsel, he cannot be deprived of such right of assistance. I can find nothing from regulation 13(1) to limit his right. In coming to this conclusion I derived much assistance from the exposition of the law in the three authorities cited. I will allow the application with costs.

Application allowed.

G Sri Ram for the Applicant.
Mrs Ng Mann Sau (Federal Counsel) for the Respondent.

Note

Raja Azlan Shah J (as he then was) laid down the salient principle: when a person has a statutory right of appeal to an adjudicatory body and the law is silent as to the right of legal assistance the concerned person ought not to be deprived of such assistance, especially when his reputation or livelihood is in jeopardy. It may be noted that this proposition is confined to assistance before appellate adjudicatory bodies and may not perhaps be extended to such bodies as enquiry commissions or before quasi-judicial bodies of first instance.

(b) University service — dismissal of a lecturer

Fadzil bin Mohamed Noor
v
Universiti Teknologi Malaysia

[1981] 2 MLJ 196 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Abdul Hamid FJ & Abdoolcader J

Cases referred to :-
(1) *Attorney-General* v *Leeds Corporation* [1929] 2 Ch 291.
(2) *Public Textiles Bhd* v *Lembaga Letrik Negara* [1976] 2 MLJ 58.
(3) *Ridge* v *Baldwin* [1963] 2 All ER 66.
(4) *Malloch* v *Aberdeen Corporation* [1971] 2 All ER 1278, 1294.
(5) *Harry Tong Lee Hua* v *Yong Kah Chin* [1981] 2 MLJ 1.
(6) *Esso Standard Malaya Bhd* v *Southern Cross Airways (M) Bhd* [1972] 1 MLJ 168.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): This appeal is against the judgment of the learned judge dismissing an application by the plaintiff (appellant before us) for summary judgment in an action brought by the appellant against the Universiti

Teknologi Malaysia (respondents before us) for a declaration that the purported dismissal by the respondents (whom we shall call 'the University') of the appellant was *ultra vires,* illegal and void and that the appellant is entitled to be paid his salary and all emoluments as from the date of the purported dismissal.

The appellant was during the material period an assistant lecturer employed by the University. He was granted leave for period 21st to 24th June 1978 for the purpose of participating in the General Election. As he found the period insufficient he sent a telegram requesting for extension of leave which request was refused. Unfortunately, the letter refusing the leave was never received by the appellant but nevertheless he proceeded to go on leave without approval. On July 13, 1978 the Secretary of the Disciplinary Committee wrote a letter to the appellant to show cause in writing why disciplinary action should not be taken against him. On July 25, 1978 he replied giving his explanation. After a period of 8 months the appellant received a letter dated February 13, 1979 stating that the University Council at its meeting held on January 22, 1979 considered the decision of the Disciplinary Committee on the complaint regarding the appellant's absence without leave and the University Council decided to terminate his employment with effect from February 15, 1979. We reproduce excerpts of the said letter;

> Encik Fadzil bin Mohd. Noor. Pusat Pengajian Kemanusiaan, Universiti Teknologi Malaya.
>
> Tuan,
>
> Adalah dimaklumkan Majlis Universiti Teknologi Malaysia telah pun mengadakan satu Mesyuarat Khas pada 22hb Januari 1979 bagi menimbangkan perakuan yang dikemukakan oleh Lembaga Jawatankuasa Tatatertib mengenai tuduhan bahawa tuan telah mengengkari arahan pihak Universiti dan seterusnya tidak hadir bertugas tanpa kebenaran daripada 26hb Jun hingga 10hb Julai 1978...
> ...Setelah mengkaji perkara ini dengan teliti Majlis telah mendapati bahawa adalah sabit kesalahan tuan terhadap tuduhan mengengkari arahan pihak Universiti dan seterusnya tidak hadir bertugas tanpa kebenaran daripada 26hb Jun 1978 hingga 10hb Julai 1978.
> ...Oleh demikian dengan sabitnya kesalahan tuan itu Majlis berpendapat tidaklah ada jalan lain yang sesuai diambil melainkan tuan dibuang kerja. Dengan itu inilah di maklumkan bahawa tuan adalah dibuang kerja oleh Majlis Universiti Teknologi Malaysia mulai daripada 15hb Februari 1979.
>
> Yang benar,
>
> Sd.(AINUDDIN BIN ABDUL WAHID)
>
> *Naib Cansellor.*
> b.p. Majlis Universiti Teknologi Malaysia.

On July 17, 1979 the appellant filed a specially endorsed writ in which he asked for a declaration mentioned above. On August 8, 1979 he unsuccessfully applied by way of summons-in-chambers for summary judgment in terms of the statement of claim.

The argument on the appeal ranged over wide matters, but as it developed it became apparent that the appeal should be disposed of on a ground relating to *ultra vires* and that it was unnecessary to call on counsel to argue other issues.

The question of whether or not the purported dismissal was validly made is now in substance the question raised in this appeal.

It is plain from the course of events, as set out in the judgment of the learned judge, that the whole matter was dealt with by the Disciplinary Committee purporting to act as the delegate of the University Council. Thus the question arises whether the disciplinary authority of the University in respect of a member of the staff was in law a delegated power of the Disciplinary Committee. The learned judge seems to think that the disciplinary authority is vested in the University Council and that the Council had power to delegate and did in fact delegate it to the Disciplinary Committee by virtue of section 16A of the Universities and University Colleges Act, 1971 (Act 30 of 1971). He found some support for this conclusion in the language of subsection (5) of section 16A of the Act which provides for the right of appeal of any person dissatisfied with the decision of the Disciplinary Committee to the University Council and which he construed as not restricting the power of the University Council to appoint or dismiss officers and staff of the University as conferred by its Constitution. Section 4(1)(m) and section 16 of the Constitution of the University were also referred to and applied. The difficulty in the way of this conclusion is that it finds no support from the language used in the Act or Constitution.

We are of the view that this appeal turns ultimately, and we think exclusively, on the proper meaning and operation of sections 7, 16A and 16C of Act 30 of 1971 and section 4(1)(m) and section 16 of the Constitution of the University. We reproduce the relevant provisions in some detail:

> Section 7(1) Upon the coming into force of the Incorporation Order ... a University... established... and shall be deemed to have been constituted a body corporate ... with full power and authority...
> (e) to exercise, discharge and perform all such powers, duties and functions as may be conferred or imposed on the University by this Act or the Constitution.
> (2) The powers conferred on a University by subsection (1) shall, unless otherwise expresssly provided by this Act or the Constitution, be exercised by the University Council.
> Section 16A(1) Subject to subsection (4), the disciplinary authority of the University in respect of every member of the staff,... shall be the Disciplinary Committee of the University which shall consist of:
> (a) the Vice-Chancellor; and
> (b) two members of the University Council elected by the University Council.
> (2) In the exercise of its disciplinary functions, the Disciplinary Committee shall have the power to take such disciplinary action and impose such disciplinary punishment as may be provided for under any disciplinary rules that may be made by the University Council under section 16C...

> (5) Any member of the staff, officer or employee of the University who is dissatisfied with the decision of the Disciplinary Committee or of any person or board delegated with functions, powers or duties under subsection (3) may appeal against such decision to the University Council which may give such decision thereon as it deems fit and proper.
> Section 16C (1) The University Council shall have the power to make such disciplinary rules as it deems necessary or expedient to provide for the discipline of the members of the staff...; the disciplinary rules made under this subsection shall be published in the Gazette...
> (3) The disciplinary rules made under this section shall create such disciplinary offences and provide for such disciplinary punishments as the University Council may deem appropriate, and the punishments so provided may extend to dismissal or reduction in rank in the case of members of the staff, officers or employees of the University, and expulsion from the University in the case of students of the University.

It may be noted that the disciplinary rules, contained in a detailed and elaborate code which prescribes the procedure, which is fair and appropriate, to be followed when there is an allegation of a disciplinary offence, were gazetted only on February 15, 1979 [PU (A) 22/79/, that is on the same day the purported dismissal was made by the University Council. Therefore at the material time there were no disciplinary rules, and as such, no known disciplinary offences created and no known disciplinary punishments provided.

The powers conferred on the University as defined in section 7(1)(e) of Act 30 of 1971 are enumerated in section 4 of the Constitution of the University [PU (A) 231 of 1976]: subsection (1) reads:

> 4.(1) The University shall, subject to the provisions of this Constitution, have the following powers:
> ...
> (m) to appoint, promote and discipline officers, teachers and staff of the University;

By virtue of the provisions of section 7(2) and 16A of the parent Act, disciplinary powers under this provision of the Constitution are exercisable only by the Disciplinary Committee.

The powers of the University Council are contained in section 16 of the Constitution. It reads:

> The Council shall be the executive body of the University, and may exercise all the powers conferred on the University, save in so far as they are by this Constitution or the Statutes, Acts and Regulations conferred on some other Authority or body or on some officer of the University: ...

This provision in the Constitution constitutes the University Council as the executive body of the University and not the disciplinary authority and must necessarily be limited in scope and read in the light of the relevant provisions of the enabling Act we have just referred to.

The University was incorporated under Act 30 of 1971. It is a corporate body, and as such it can only do such acts as are authorised directly or indirectly by the statute creating it: see *Attorney-General* v *Leeds Corporation.*[1] In *Public Textiles Bhd* v *Lembaga Letrik Negara*[2]

this court said in relation to a corporation that whatever is not permitted expressly or by necessary implication by the incorporating statute is prohibited not by the express or implied prohibition of the legislature but by the principle of *ultra vires.* Therefore the university authority can only act in pursuance of the powers given to it by law.It follows that it has to follow proper procedure as prescribed by law before condemning an erring member of the staff. If it goes outside its limit of operation, or is not warranted by it, then any decision made by it is *ultra vires.*

To elaborate somewhat, the University Council in the present case is the executive body of the University. It may exercise all the powers conferred on the University by Act 30 of 1971 or the Constitution. But such powers are circumscribed. Subsection (2) of section 7 of the Act enacts 'unless otherwise expressly provided by this Act or the Constitution.' The general powers of the University Council do not by virtue of section 16A of the Act extend to disciplinary matters. Such matters are conferred on and vested in the Disciplinary Committee alone. That committee must itself take the responsibility of deciding a disciplinary case, that is to say, the charge and the consequences of a positive finding upon it. The University Council's limited role in this matter is as an appellate body exercising judicial function for the determination of appeals from any decisions of the Disciplinary Committee. It is, therefore, obvious that the functions of these two bodies are separate and distinct. The Act deals with the situation in language which could scarcely be plainer. And it pointedly omits any reference to delegation. It prescribes the bodies who are to be the disciplinary authority and the appellate authority. Such being their respective jurisdiction, we are of the opinion that the purported exercise of jurisdiction by the University Council in dismissing the appellant was *ultra vires* its powers. The University Council was purporting to do the very thing which, by Act 30 of 1971 and the Constitution, it was prohibited from doing.

It was further argued that since there were no disciplinary rules at the material time and therefore no disciplinary action that could be taken by the Disciplinary Committee, the power of disciplinary dismissal was still vested in the University Council. As such the University Council could dismiss the appellant under the master and servant principle. In *Ridge* v *Baldwin*[3] Lord Reid developed the point in an illuminating way. He said, *inter alia,* that in a pure master and servant case, dismissal is governed by the law of contract *inter partes* and there is no right to be heard. In other words, in a pure master and servant relationship, the principles of administrative law, including those of natural justice, have no part to play. The administrative law remedies, such as a declaration, that the dismissal is *ultra vires* is not available; no order for reinstatement can be made. The most that can be obtained is damages, if the dismissal is wrongful. In *Malloch* v *Aberdeen Corporation,*[4] Lord Wilberforce took that point to mean 'cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection'. In cases where such an element is present, Lord Wilberforce pointed out that

'there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared void'. In that case the House of Lords held that a school teacher had a special status conferred on him by statute which converted him from being a public servant holding office at the pleasure of a public authority into a servant who, by virtue of his statutory position, had implied into that position the right to be heard. Lord Wilberforce stated (p1294):

> The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found...A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.

Lord Wilberforce's speech is important because it opens the way for there to be a general application of the principles of natural justice to the employment relationship.

Clearly this is not a straight-forward case of master and servant. The appellant, as an Assistant Lecturer employed by the University, has a status supported by statute and is entitled to the protection of a hearing before the appropriate disciplinary authority, including the right of appeal to the University Council from the decision of that authority. If that right is violated as happened here then the court may allow declaratory relief, enabling him to retain his employment, and continued eligibility to be paid his salary and all emoluments from the date of the purported dismissal. The point is, here, the appellant's employment had never been terminated. It would be open to the University at any time hereafter to dismiss him if it so chooses to do and does so in a lawful manner. Until it chooses to do that the appellant's contract of employment will continue. We find it hard to believe that in a field of employment such as the present, the legislature can really be said to have intended that the appellant is *ipso facto* to be deprived of his employment without any regard for vested right. To say that there were no disciplinary rules under which he could be charged is an argument which has only to be stated to be rejected.

We now consider the application for summary judgement. It was rightly raised by counsel for the University that the case turns on the interpretation of the provisions of Act 30 of 1971 and the Constitution of the University, and therefore the court ought to be very cautious in treating it under Order 14. We are disposed to agree with that argument for this reason: not that cases depending on the interpretation of a statute or statutes deserve any different treatment from that of any other case under Order 14. An Order 14 order in the view we have always taken of it is a very stringent procedure because it shuts the door of the court to the defendant. The jurisdiction ought only to be exercised in proper cases. If the University and University Colleges Acts and related legislation come into an Order 14 case, no greater attention in principle is to be given by the court to that class of action than to any other class of action. The only point is that, as everybody knows, the

pertinent legislation is long and complicated. But it is not sufficient under an Order 14 case to flourish the title of the University and University Colleges Act, etc., in the face of the court and say that is enough to give leave to defend. If a point taken under the Acts is quite obviously an unarguable point, and the court is satisfied that it is really unarguable, the court has precisely the same duty under Order 14 as it has in any other case. The court has the duty to apply the rule: see *Harry Tong Lee Hwa* v *Yong Kah Chin*[5].

In *Esso Standard Malaya Bhd* v *Southern Cross Airways (M) Bhd* [6] I pointed out that in an Order 14 case, where it turned on the construction of a few documents and the court was only concerned with what, in its judgment, was the true construction, there could be no reason to go formally to trial where no further facts could emerge which would throw any light on the documents that had to be construed. We think we can safely apply that principle to the present case. On the view we have taken of the construction of Act 30 of 1971, and the Constitution of the University, the University had an absolutely hopeless case. The only function of the court is *jus dicere* and to ascertain the intention of Parliament from the words used in the statutes and nothing more. No useful purpose would then be served to go formally to trial.

We accordingly allowed the appeal.

Appeal allowed.

Peter Mooney for the Appellant.
V George for the Respondent.

Note

In this case, Raja Azlan Shah CJ (as he then was) lays down the significant principle that service in a University is public employment and is not regulated by the principles applicable to private employment. Hence natural justice is applicable when the University seeks to dismiss a lecturer. Raja Azlan Shah CJ also emphasizes the principle that a statutory body like the University has to act within the terms of the law and follow proper procedure as prescribed by law before condemning an errant member of the staff. In this case, the action of the University to dismiss a teacher was held to be *ultra vires* the University Council for under the law, the disciplinary function belongs to the Disciplinary Committee.

(c) Quasi-judicial function of the administration

Ketua Pengarah Kastam
v
Ho Kwan Seng

[1977] 2 MLJ 152 Federal Court, Kuala Lumpur
Coram: Gill CJ (Malaya), Ong Hock Sim and Raja Azlan Shah FJJ

Cases referred to:-

(1) *Leo Hoon Hong* v *Municipal Commissioners of the Town and Fort of Malacca* [1950] MLJ 297.
(2) *Nakkuda Ali* v *Jayaratne* [1951] AC 66.
(3) *University of Ceylon* v *Fernando* [1960] 1 All ER 631, 638.
(4) *Ridge* v *Baldwin* [1964] AC 40.
(5) *R* v *University of Cambridge* (1723), 1 Str 557.
(6) *Cooper* v *Wandsworth Board of Works* (1863), 14 CBNS 180.
(7) *R* v *Gaming Board for Great Britain, ex parte Benaim and Khaida* [1970] 2 QB 417.
(8) *Wiseman* v *Borneman* [1971] AC 297.
(9) *Local Government Board* v *Arlidge* [1915] AC 120,138.
(10) *R* v *Secretary of State for Environment* [1976] 3 All ER 90,95.

RAJA AZLAN SHAH FJ: Ho Kwan Seng (the 'respondent') was the sole proprietor of Oriental Forwarding Agency at Klang. He was granted permission to transact business relating to the import and export of goods by a senior customs officer under section 90(1) of the Customs Act, No 62 of 1967. As a forwarding agent he was statutorily required to be faithful and incorrupt [section 90(3)].

On April 5, 1972 the respondent was alleged to have committed two offences under the Customs Act, one under section 133(1)(a) and the other under section 135(1)(g). On July 15, 1974 he was convicted and fined $1,000 and $11,530.48 respectively. On July 18,1974 he lodged notice of appeal. But there was no stay of execution pending appeal. On December 28,1974 a senior officer of customs wrote a letter to the respondent notifying him of his decision to cancel the registration of the forwarding agency with effect from January 4, 1975 stating as his reason the two convictions. That was done in pursuance of section 90(4) of the Act which reads:

> A senior officer of customs may suspend or cancel any permission granted under this section, if the agent commits any breach of this Act or of any regulation made thereunder or if he fails to comply with any direction given by an officer of customs with regard to the business transacted by the agent.

On January 2, 1975, the respondent appealed to the same customs officer not to cancel the agency as that would have an adverse effect on his business as his turnover exceeded $200,000 a month. On January 6,1975 the said customs officer wrote to the respondent notifying him that he had reconsidered the matter but his earlier decision could not be revoked.

Under section 90(5) of the said Act, the respondent could, within one month from the date on which the decision was notified to him, appeal against the cancellation to the Comptroller-General, whose decision was final. He appealed to the Comptroller-General on December 31, 1974. On January 21. 1975, the Comptroller-General replied, *inter alia, 'saya telah mengkaji perkara pembatalan kebenaran kepada Oriental Forwarding Agency menjadi wakil pengimpot-pengimpot di Pelabuhan Kelang dan berpendapat bahawa keputusan pembatalan yang dibuat oleh Penolong Kanan Pengarah Kastom, Pelabuhan Kelang*

itu adalah wajar, sesuai dan tepat. Tidaklah ada didapati kekurangan dipertimbangannya itu bahkan sekiranya beliau tidak membuat pertimbangan yang demikian beliau mungkin dianggapkan tidak cekap dalam perkhidmatannya.'

The respondent successfully applied to the High Court for an order of certiorari to quash the decision of the senior officer of customs. The learned judge gave as his reason that the cancellation was premature because the appeal against the convictions were still pending before the court. He therefore held that there was an excess of jurisdiction. He further held that there was an error of law on the face of the record as the excess of jurisdiction was founded on the wrong interpretation of section 90(4) of the Customs Act by the customs officer and the failure of the Comptroller-General to consider that point when dealing with the appeal before him. The learned judge seemed to think that a senior officer of customs could only cancel the agency after the appeal against the convictions had been finally determined.

The Comptroller-General appealed. We allowed the appeal.

The first issue that was raised in the court below was the principles of natural justice, *i.e.*, whether they applied to the machinery to cancel the agency under section 90(4) of the Customs Act. The said Act does not provide any machinery for an inquiry. The learned judge was of the opinion that because the said Act does not provide for an inquiry, he held that the principles of natural justice did not apply. He seemed to have based his reasoning on the analogy of *Leo Hoon Hong* v *Municipal Commissioners of the Town and Fort of Malacca*[1] which decided that since the Commissioners had authority to cancel the licence at any time '...if the licensee has been convicted of any offence against the provisions of the Municipal Ordinance or any bye-laws thereunder ...' they could cancel such licence without the formality of an inquiry. With due respect to the learned judge that case was not decided on that line. It was decided on the basis that the cancellation of the licence was done after an inquiry which was lawful. The particular bye-law provided two ways to cancel a licence in a given situation: first, at any time if the licensee was convicted of a municipal offence, secondly, after an inquiry. Before us counsel for the appellant relied on the Privy Council case of *Nakkuda Ali* v *Jayaratne*[2] for the proposition that the principles of natural justice did not apply to the revocation of licences. On the other hand, counsel for the respondent cited to us the Privy Council case of *University of Ceylon* v *Fernando*[3] as authority that notwithstanding the absence of any statutory provision for an inquiry, a fair hearing was implicit when a customs officer was exercising his powers of cancellation under the Customs Act.

The principles of natural justice that no man may be judge in his own cause and that no man may be condemned unheard today play a very prominent role in administrative law, particularly since the House of Lords invigorated them by a strong decision in *Ridge* v *Baldwin*[4]. The second principle is the rule requiring a fair hearing. This is of central importance because it can be used to construe a whole code of administrative procedural rights. The principle has a long history. One

of the most famous cases is *Bentley's* case in 1723, in which it was held that the University of Cambridge could not deprive that great but rebellious scholar of his degrees without hearing his excuses for his misconduct: see *R* v *University of Cambridge.*[5] In *Cooper* v *Wandsworth Board of Works*[6] damages were awarded against a local authority which demolished a building erected without due notification, although they did only what the statute said that they might do in such circumstances. The essence of this and many other such cases is that drastic statutory powers cannot be intended to be exercised unfairly, and that fairness demands at least the opportunity of a hearing. The courts clung to this principle as the powers of government expanded, and applied it frequently in many fields such as housing law, compulsory purchase of land and dismissal from public offices. In one case the Court of Appeal has made it clear that the right to a fair hearing applies generally in licensing cases and in particular to an application for a licence for a gaming club: see *R* v *Gaming Board for Great Britain, ex parte Benaim and Khaida*[7] In that case the licensing authority had a legal duty arising purely from implication of law to explain to the applicants what objections they had to meet and to give them a fair opportunity to meet them. The cases show that a fair hearing is required as a 'rule of universal application', 'founded on the plainest principles of justice.' In particular, the silence of the statute affords no argument for excluding the rule, for the 'justice of the common law will supply the omission of the legislature.' These quotations are derived from the case of *Cooper* v *Wandsworth Board of Works, supra,* which has several times recently been approved by the House of Lords as expressing the principle in its full width: see *Ridge* v *Baldwin, supra, Wiseman* v *Borneman.*[8]

In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly. Lord Shaw's caveat on administrative adjudication that 'judicial methods may... be entirely unsuitable, and produce delays, expenses, and public and private injury' is too well-known to be sidestepped: see *Local Government Board* v *Arlidge.*[9] In the last analysis, it depends on the subject-matter. The great need is to deal efficiently and fairly, rather than to preserve all the accoutrements of the courtroom; the considerations of basic fairness are paramount. A passage from the judgment of Lord Denning MR in *R* v *Gaming Board for Great Britain, ex parte Benaim and Khaida, supra,* is apt:

> It is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject-matter: see what Tucker LJ said in *Russell* v *Norfolk (Duke of)* [1949] 1 All ER 109, 118 and Lord Upjohn in

> *Durayappah* v *Fernando* [1967] 2 AC 337, 349. At one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge* v *Baldwin* [1964] AC 40. At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong. *Reg* v *Metropolitan Police Commissioner, ex parte Parker* [1953] 1 WLR 1150 and *Nakkuda Ali* v *Jayaratne* [1951] AC 66 are no longer authority for any such proposition. See what Lord Reid and Lord Hodson said about them in *Ridge* v *Baldwin* [1964] AC 40, 77-79,133.

And in the following passage he said this:

> It follows, I think, that the board have a duty to act fairly.They must give the applicant an opportunity of satisfying them of the matters specified in the sub- section. They must let him know what their impressions are so that he can disabuse them. But I do not think that they need quote chapter and verse against him as if they were dismissing him from an office, as in *Ridge* v *Baldwin* [1946] AC 40; or depriving him of his property, as in *Cooper* v *Wandsworth Board of Works* (1863) 14 CBNS 180.

Tested by those rules, and applying them to this case, I think that the senior officer of customs acted with complete fairness. He put it before the respondent in his letter of December 28, 1974 the information that led him to cancel the agency. The respondent did not challenge it but appealed to the same customs officer to reconsider his decision which he did. When he was unsuccessful he took his case further and appealed to the Comptroller-General who reconsidered the matter and gave a decision. It cannot be said the respondent was not given a chance of a fair hearing. On occasions such as this, representation in writing would be all that was required and the fact that a personal hearing was not demanded was a relevant consideration. Here again the conduct of the respondent was relevant. If he did not ask for legal representation, and I doubt very much if he was entitled to it, then this might disbar him from complaint.

In this connection, it is well to remember the distinction between a judicial decision and an administrative decision. In the former the rights of the parties are in issue; the public interest is irrelevant. In the latter the public interest plays an important part. The point is, to what extent are private interests to be subordinated to the public interest: see *R* v *Secretary of State for Environment.*[10]Forwarding agents appointed under the Customs Act are required to be honest and incorrupt in their dealings with the public as well as with the administration. The customs administration is there to protect the public interest, to see that persons running a forwarding agency are fit to be trusted. It would be contrary to the public interest to allow a convicted person to run a forwarding agency.

The second and third issues adumbrated in the court below and before us were excess of jurisdiction and error of law on the face of the record. These were dealt with together. It was contended that the learned judge was wrong in his reasoning that it was premature to cancel the agency when the appeal was pending before the court. The question is whether there was excess of jurisdiction. In this context

'jurisdiction' merely means legal authority or power. Had the customs officer the power to cancel the agency if the agent 'commits' a breach of the Customs Act?. In this context 'commits' means 'convicted'. Giving the word that meaning, I can say with confidence that it is only if an agent is convicted of an offence under the Customs Act that his agency is liable to be suspended or cancelled. I think it is against the public interest to wait after the final determination of an appeal to cancel the agency, especially when there is no stay of execution. In the circumstances I conclude that it was within the power of the customs officer to cancel the agency when the respondent was convicted of the two offences under the Customs Act. There was therefore no excess of jurisdiction. There was also no error of law on the face of the record because the customs officer had not misconstrued the law.

Gill CJ (Malaya) and **Ong Hock Sim FJ** concurred.

Appeal allowed.

Fong Seng Yee (Senior Federal Counsel) for the Appellant.
Morris Edgar for the Respondent.

Notes

This pronouncement by Raja Azlan Shah FJ (as he then was) is a landmark decision in Malaysian administrative law as it broadens the applicability of natural justice to varied administrative decisions. Natural justice does not depend on giving the label 'quasi-judicial' to an administrative action. Hearing must be given to a person whenever he is adversely affected by administrative action. Cancellation of a licence is one such instance. By this pronouncement, Raja Azlan Shah FJ brought Malaysian law in line with the English Administrative Law after the *Ridge* v *Baldwin* decision of the House of Lords. The case however invites two observations:

(a) The use of the expression 'every case' in the above statement for application of natural justice is too broad-based. There do crop up a few situations (land acquisition being one) where natural justice is not a must.

(b) In spite of the admirable general statement of law on the applicability of natural justice, the weakness of the case lies in its utter dilution of the concept of hearing. Right of hearing is a flexible concept but this flexibility ought not to be stretched to the point where there is no effective hearing at all. Hearing is not merely a matter of form but substance as well. This phrase is used by the His Lordship himself in *Dr Paramsothy* v *University of Malaya, supra.* From the facts of the case, one can see that while the ritual of hearing may have been undergone (even this is doubtful) there was no hearing in substance.

CERTIORARI

(a) Error of law on the face of the record in a tribunal's decision.

Lijah binte Mahmud

v

Commissioner of Lands And Mines, Trengganu & Anor

[1967] 1 MLJ 76 High Court, Kuala Trengganu

Cases referred to:-

(1) *Martin* v *Mackonochie* (1879), 4 QBD 697.
(2) *Roberts* v *Ummi Kalthom* [1966] 1 MLJ 163.
(3) *Habsah binte Mat* v *Abdullah bin Jasoh* [1950] MLJ 60.
(4) *Rex* v *Northumberland Corporation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338.
(5) Rex v *Northumberland Corporation Appeal Tribunal, ex parte Shaw* [1951] 1 KB 711 at p 722.
(6) *Walsall Overseas* v *London and North Western Rly Co* (1878) 4 App Cas 30,39.
(7) *Rex v Nat Bell Liquors Ltd* [1922] 2 AC 128.

RAJA AZLAN SHAH J: This is an application for an order of *certiorari* to quash an order made by the Commissioner of Lands & Mines, Trengganu, reversing the order of the Collector of Land Revenue, Kuala Trengganu. The circumstances leading to the application are as follows.

The applicant was married to the second respondent for some ten years. During the coverture of the marriage the second respondent acquired a piece of land AA 457/55 which was then jungle land. The applicant assisted the second respondent in felling the jungle and planting rubber trees. The parties divorced, and the applicant claimed a half share in the property as *harta sapencharian.* The claim came before the collector under section 60 of the Trengganu Land Enactment No 3 of 1357. The collector heard evidence on behalf of the applicant and her four witnesses who, if believed, seemed to support her claim. The second respondent gave evidence but no witnesses were called. The collector adjudicated upon the matter and in due course came to the conclusion that the applicant's claim was well founded and accordingly awarded her a half share in the property. The second respondent, being dissatisfied with the collector's decision, appealed to the commissioner under section 138(i) of the Land Enactment. The appeal eventually came before the commissioner. He recorded further evidence from both the second respondent and the applicant and in due course gave judgment for the second respondent and set aside the order of the collector. He based his decision on two grounds: firstly, that the land was acquired and paid for from the second respondent's savings, and secondly, that the applicant was never at any time forced or asked by the second respondent to assist him in planting the rubber. The commissioner concluded that the applicant assisted her husband voluntarily. The applicant was dissatisfied with the decision, and it is in those circumstances that the application came before this court.

The application dealt with three matters. Firstly, it was alleged that

the commissioner had acted in contravention of the rules of natural justice; secondly, that he had acted in excess of his jurisdiction; and finally, there was an error of law on the face of the record. In my view the first ground does not avail the applicant. A fair consideration of the record established beyond doubt that the rules of natural justice were not denied to the applicant. With regard to the second ground, two considerations arise i.e. whether the provisions of section 138(i) of the Enactment permit the taking of further evidence, and if so, whether it amounts to a procedural defect which goes to jurisdiction. I shall content myself with the proposition that the power given to an authority under a statute is limited to the four corners of the statute.It is therefore pertinent to consider the relevant provisions of the Enactment. Section 60 is the provision of law under which the collector heard the application at first instance. It is divided into twelve sub- sections. Sub-section (i) deals with the cause of action; sub-section (ii) deals with service of notice; sub-section (iii) deals with the procedure to be adopted at the hearing. Sub-section (iii):

> On the day and at the time and place fixed for hearing the collector shall proceed to hear the application in the presence of both the parties and shall record the evidence in writing and may thereafter make such further enquiry as he shall think fit.

The collector has power to adjourn the case from time to time. Sub-section(vi) deals with the decision and order of the collector. Chapter XV of the Enactment deals with appeals and appearances before the commissioner. It consists of two sections. Section 138 is divided into four sub-sections. Sub-section (i) is the relevant sub-section for present purposes and I will quote in full:

> Any party dissatisfied with any decision made by a collector as registrar or otherwise in matters arising under this Enactment may, if no other appeal is specially prescribed and unless it is prescribed that the decision of the collector is final, appeal to the commissioner within a period of one month from the date of such decision and on payment of the prescribed fee, and the decision of the commissioner shall be final.

Sub-section(ii) gives any party dissatisfied with the decision of the commissioner the right of appeal to the Supreme Court within a stipulated time. Sub-sections (iii) and (iv) are not relevant for our present consideration. Section 139 deals with appearances before the commissioner. It is to be observed that whereas section 60 gives an exhaustive description of the steps to be taken when hearing appeals before the collector, section 138(i) does not specify in express terms the procedure for hearing appeals from an order of the collector. In the absence of such express provisions I must interpret the provision of section 138(i) as stipulated in the sub-section itself. A careful analysis of the section leads me to the inescapable conclusion that a commissioner is not permitted to take further evidence on an appeal from the order of the collector. I do not think that it is open to any other interpretation. So to read the section appears to me to read into it a great

deal that is not there.That being the case, what is the result? Counsel for the applicant argued that non-observance of the steps envisaged in the section goes to jurisdiction. I venture to express the view that non-observance of the requirements of the section constitutes a procedural defect occurring during the hearing and such procedural defect is not an error going to jurisdiction but remediable only by way of appeal. To hold otherwise would be to assert that although a tribunal had jurisdiction at the outset a subsequent error in procedure relates back to the start and makes the whole proceeding in excess of jurisdiction. Whatever may be the true reason for it, there is ample authority to justify me in concluding that procedural defect in the course of the hearing does not go to jurisdiction but merely affords a ground of appeal. *Martin* v *Mackonochie*[1] is the authorityfor the above proposition. Cotton LJ at p 735 said as a follows:

> But the general rule is clear, that if the court of limited jurisdiction, in dealing with a matter over which it has jurisdiction, has fallen into an error of practice or of the law which it administers, this can only be set right by appeal, and offers no ground for prohibition.

And Lord Coleridge CJ at p 788 said as follows:

> .....but I think they establish this, that where the subject-matter is for the court Christian, and where the act done is something which in itself the court Christian can do, the steps by which the court arrives at the act, however erroneous they may be, are matters of appeal and not ground of prohibition.

I now come to the 'final' ground. The question that is to be posed is whether the High Court can interfere and correct the decision of the commissioner if it is erroneous in point of law. That involves a prior consideration whether the commissioner's decision was wrong in law. As stated earlier, the commissioner arrived at his decision on the basis that the applicant had worked the land voluntarily, and I quote his reasoning:

> During the period of the appellant and the respondent living as husband and wife the respondent did not at any time ask the appellant as to the ownership of the land when it was first alienated to the appellant nor did the respondent ask the appellant as to whether by assisting the appellant in planting rubber on the land, the land should be jointly held by them as registered co-proprietors of the land.
>
> The question in issue in this case is that whether a wife by doing something for or giving assistance voluntarily to a husband is entitled to a share of the land. It is my conviction that it is customary for a wife to assist a husband in the hope that they can settle down peacefully during their stay as wife and husband not of course in expectation of something (*sic*) to be given to the wife when divorced except matters governed by the religious principles.
>
> As such the appeal is allowed and the order made by the Collector of Land Revenue, Kuala Trengganu, is hereby quashed.

In my opinion the commissioner was clearly wrong in his application of

the law to the facts before him. It is not denied and in fact his decision is based on the established fact which he had accepted from the findings of the collector that the applicant did assist the second respondent in felling and clearing the jungle and planting the land with rubber. Now, the position of a divorced Muslim spouse relating to property acquired during the coverture of marriage is, I hope, sufficiently dealt with in my judgment in the case of *Roberts* v *Ummi Kalthom,*[2] and I do not wish to add anything more to what I have said there. Broadly speaking, once it is clearly established that property was acquired subsequent to the marriage out of joint resources or efforts, a presumption arises that the property is *harta sapencharian* and the presumption can only be rebutted by evidence such as that the property was acquired by the sole efforts or resources of the husband. The onus is on the husband to rebut the presumption. In the present case it is beyond controversy that the second respondent acquired the land during the coverture of the marriage with his sole resources, and it is also beyond controversy that the land was cleared and planted with rubber by the joint efforts of both the applicant and the second respondent. In such circumstances the presumption is that the property is *harta sapencharian.* What evidence was led to show the contrary? That can only be gauged from the second respondent's evidence adduced before the collector and a summary of his evidence disclosed that he did not allow the applicant to work on the land because he said that the custom in the *kampong* was that womenfolk do not work, meaning other than household duties. He further said that he disallowed the applicant to work on account of his love and affection for her. That, to my mind, is not sufficient evidence to rebut the presumption. It therefore follows that in the absence of evidence to the contrary the said land is *harta sapencharian,* and relying on established principles the applicant is entitled to half share in it. I think the present case is not dissimilar to the facts found in *Habsah bte Mat* v *Abdullah bin Jasoh.*[3]

Where upon the face of the record it appears that the order of the commissioner is wrong in law *certiorari* is available to quash it on the ground of error of law.I need only cite the leading case of *Rex* v *Northumberland Compensation Appeal Tribunal, ex parte Shaw*[4]. In that case the applicant Shaw lost his employment as clerk to the West Northumberland Joint Hospital Board by the passing of the National Service Act, 1946. Aggrieved by the amount of compensation awarded to him by the compensating authority, he referred the matter to the tribunal designated by the National Health Service (Transfer of Offices and Compensation) Regulations, 1948. It became the duty of the tribunal to consider the matter so referred 'in accordance with the provisions' of the regulations and 'to determine accordingly' whether any land, if so, what compensation ought to be 'awarded to the claimant'. The tribunal therefore were bound by the definition of 'service' contained in the regulations. The order of the tribunal set out the period of the applicant's service with the hospital board. It set out the contention of the compensating authority that the compensation payable should be based on that period of service with the hospital

board, and the tribunal stated that it agreed that this service was the only service to be taken into account. The decision did not set out the contention of the applicant that the whole of his local government service should be taken into account. The tribunal dismissed the appeal from the decision of the compensating authority. Thereupon the applicant applied to the divisional court for an order of certiorari to remove the decision of the tribunal into the King's Bench Division that it might be quashed. Before the divisional court it was admitted by counsel for the tribunal that there was error on the face of the decision given by the tribunal, but he contended that certiorari would lie to such a statutory tribunal only in the case of want or excess of jurisdiction. The divisional court consisting of Lord Goddard C J, Hilbury and Parker JJ granted the order for certiorari. For present consideration it is sufficient if I quote a passage from the judgment of Lord Goddard:[5]

> What is the result of that? The result clearly seems to me to be that a court before whom the order in the present case is brought can examine it. The tribunal have told us what they have taken into account, what they have disregarded, and the contentions which they accepted. They have told us their view of the law, and we are of opinion that the construction which they placed on this very complicated set of regulations was wrong.

The tribunal appealed to the Court of Appeal. Counsel for the tribunal made the same submission that an order of certiorari could only be granted in respect of a decision of a tribunal on the ground of want or excess of jurisdiction. Singleton L J found himself in complete agreement with the reasoning of Lord Goddard as being 'as clear and as forcible as any judgment could be.' After dealing exhaustively with the relevant judicial exegesis notably *Walsall Overseers* v *London and North Western Railway Co*[6] and the Privy Council case of *Rex* v *Nat Bell Liquors Ltd*[7] the Lord Justice said at p 343:

> Thus it appears to me that in a case such as the one before this court certiorari will lie if there be error on the face of the proceedings.

The applicability of certiorari in this court is not dissimilar to that exercisable by the Courts of Queen's Bench in the United Kingdom. It is within the inherent jurisdiction of the court to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. The control extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. Denning L J in the above case traced the history of the writ and (at page 348) he gives a word of caution which I think ought to be re-stated in the light of the emergence of many new statutory bodies in this country:

> Of recent years the scope of certiorari seems to have been somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law; and several judges have said as much. But the Lord Chief Justice has, in the present case, restored certiorari to its rightful position and shown that it

> can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction. I have looked into the history of the matter, and find that the old cases fully support all that the Lord Chief Justice said. Until about 100 years ago, certiorari was regularly used to correct errors of law on the face of the record. It is only within the last century that it has fallen into disuse, and that is only because there has, until recently, been little occasion for its exercise. Now, with the advent of many new tribunals, and the plain need for supervision over them, recourse must once again be had to this well-tried means of control.

The Lord Justice concluded his judgment by saying that:

> There are, however, many cases in the books where certiorari was used to correct errors of law on the face of the record. A striking instance was where the commissioners of sewers imposed an excessive fine, and it was quashed by the Court of King's Bench on the ground that in law their fines ought to be reasonable. Other instances are the numerous cases where certiorari was used to determine the validity of a sewer's rate imposed by the commissioners of sewers. There are several cases where an auditor's certificate has been quashed for error of law on the face of it. And I have no doubt that many more instances could be found throughout the books.

Morris LJ, another member of the court, agreed 'that an order of certiorari will go to the respondent tribunal does not admit of doubt.' At page 356 the Lord Justice said:

> The speeches in the House of Lords in *Walsall Overseers* v *London and North Western Railway Co, supra,* demonstrated that if that which was stated upon the face of an order of an inferior court showed that the order was erroneous in law, then the order could be removed by certiorari and its existence could be ended by quashing it.

I am satisfied that there was an error of law on the face of the record because the facts which were fully stated on the record were plainly inconsistent in law with the decision reached. I therefore quash the order of the commissioner and restore the order of the collector.

Order accordingly.

A Wilson for the Applicant.
Dato' Abdullah for the Respondents.

Note

This case reiterates the well established principle that certiorari is issuable by the High Court when a tribunal's decision suffers from an error of law on the face of the record.

(b) Delay

Gnanasundram
v
Public Services Commission

[1966] 1 MLJ 157 High Court, Kuala Lumpur

Cases referred to:-
(1) *Gandhinagar Motor Transport Society* v *Bombay State* AIR (1954) Bom 202.
(2) *Satish Chandra Anand* v *The Union of India* AIR (1953) SC 250 at p 252.

RAJA AZLAN SHAH J: This is an application for leave to apply for an order of certiorari to quash the decision of the Public Services Commission terminating the appointment of the applicant as a temporary enforcement officer in the Road Transport Department. In the alternative, to ask for leave for enlargement of time to make the application.

The procedure in applying for an order of certiorari is well settled in the United Kingdom. Unfortunately, no provisions exist in our *Rules of the Supreme Court* to entertain such an application. However, Order 1 rule 2 of the *Rules of the Supreme Court* permits us to resort to the procedure adopted in the High Court of Justice in England. Order 59 rule 3 of the English *Rules of the Supreme Court, 1883,* provides:

> (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

Order 59 rule 4 provides:

> (2) Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any enactment; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

It is necessary to go briefly into the facts of this case in order to consider the application.Pursuant to an offer of appointment by the Public Services Commission, the applicant was appointed as a temporary enforcement officer in the Road Transport Department on 4th December, 1961. The offer of appointment, among other things, states:

> I am directed to inform you that on behalf of the Government of the Federation of Malaya, the Public Services Commission is pleased to offer you appointment as
>
> Temporary Enforcement Officer, Road Transport Department, Federation of Malaya,
>
> on a salary of $605 per mensem of the scale $605 x 23 — 835 with effect from the date of assumption of duty following the acceptance of this offer.

2. This offer is subject to the following conditions:
(d) That during the first year of the period of your appointment, your services would be terminable at any time with one month's notice or one month's salary plus cost of living allowance in lieu, and without any reason being given. You would also be free to relinquish your appointment by giving one month's notice or one month's salary in lieu plus cost of living allowance. During the rest of your period of appointment, the appropriate notice required for both parties would be three months or one month's salary in lieu plus cost of living allowance.
3. The appointment offered is temporary.

On 10th August 1964, the Acting Registrar and Inspector of Motor Vehicles, Pahang, Raub, handed to the applicant, who I shall presume to be stationed at Raub at that time, a letter dated 4th August 1964, from the Public Services Commission which reads as follows:

> I am directed to inform you that in accordance with paragraph 2(d) of the offer of appointment as temporary enforcement officer in the Road Transport Department made vide PSC R/34/15 dated 21st November 1961, and which you have accepted the Commission has decided to terminate your services by payment of one month's salary and cola, in lieu of notice.

The applicant appealed to the Public Services Commission to let him know the reasons why his service was terminated without notice. There was an exchange of letters between the applicant and the Public Services Commission and, on 9th August 1965, the present application was made.

It is admitted by counsel for the applicant that the cause of action arose on 10th August 1964, and consequently his application which was dated 9th August 1965 is caught within the ambit of Order 59 rule 3, that is to say his application was out of time. He now seeks the court's indulgence to extend the time for leave to apply for an order of certiorari. He cited a passage at page 1370 of *The Annuall Practice,* 1960, which reads:

> The court may extend the time under Order 64 rule 7, but will only do so where a strong case for it is shown.

Order 64 rule 7 is substantially the same as our Order 64 rule 7.

Without going into the merits of the case, counsel contended that the existing facts are strong enough for a *prima facie* case to be established to found his present application. Firstly, he contended that the delay was due to the fact that his client was negotiating with the Government so that the latter would reconsider his position. As indicated above, there was an exchange of letters betwen him and the Government between 12th August 1964 until 28th May 1965. There appears to be no local authority in point although a good deal of light is, I think, thrown on the problem by the decision of an Indian case. In *Gandhinagar Motor Transport Society* v *Bombay State,*[1] the petitioners were granted a permit to run a public service vehicle in 1949. In 1951 they applied for a permit to run a second bus. In 1952 the regional transport officer

granted them the permit. The respondents had also applied for a permit, but that was refused. One of them unsuccessfully appealed to the State Transport Authority. He then appealed to the Government in January 1953. The Government allowed the appeal and reversed the decision of the State Transport Authority and directed that a permit be granted to the respondent. The petitioners challenged that order. A preliminary point taken was that there was delay in the application. The order of the Government was made in January 1953.The petitioners' petition was made in May 1953. The explanation given was that the petitioners had made representation to Government to reconsider their decision and the Minister concerned rejected that representation in March 1953, and the petitioners received the final order of the Government in April 1953. In the course of the judgment the court said:

> Now, we have had occasion to point out that the only delay which this court will excuse in presenting a petition is the delay which is caused by the petitioner pursuing a legal remedy which is given to him. In this particular case the petitioner did not pursue a legal remedy. The remedy he pursued was extra-legal or extra- judicial. Once the final decision of Government is given, a representation is merely an appeal for mercy or indulgence, but it is not pursuing a remedy which the law gave to the petitioner. But even assuming that that time should be condoned, the petitioners did not make a representation to Government till 15.2.1953, a month after the order was passed, and even when they received the final decision of Government on 3.4.1953, they waited a month more before this petition was presented. Therefore, in our opinion, there has been such a delay in the presentation of this petition as would disentitle the petitioner to any relief at our hands.

That case is not binding on our courts but it is of great weight and I shall respectfully adopt it as my own. It follows therefore that counsel's contention cannot hold water. The only delay that the court will excuse is the delay involved in the pursuit of a legal remedy open to the petitioner, and no other. Secondly, it was contended that the applicant's relationship with the Government is not one of contract and therefore the letter dated 4th August 1964, purporting to terminate his service by the payment of one month's salary in lieu of notice is an error in law on the face of the record. In my view, a Government, like any other employer, is not fettered to enter into special contracts of employment with temporary employees. I am encouraged in that view by a passage in the persuasive judgment of the Supreme Court of India in *Satish Chandra Anand* v *The Union of India:* [(2)]

> But of course the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who choose to accept those terms and enter into the contract are bound by them, even as the State is bound. When the employment is permanent there are certain statutory guarantees but in the absence of any such limitations Government is, subject to the qualification mentioned above, as free to make special contracts of service with temporary employees, engaged in works of a temporary nature, as any other employer

In the light of the facts presented by the applicant,the offer made by the Public Services Commission was in respect of temporary employment and clause 2 (d) specifically states that during the rest of the period of employment, that is to say after the first year of employment, the appropriate notice required by both parties would be three months' or one month's salary in lieu thereof plus cost of living allowance. The applicant accepted those terms and entered into a contract with the Government. He was thus bound by those terms in the same way as the Government was bound. In the circumstances I see no escape from the conclusion that the present case is sufficiently analogous to a contractual relationship. Thirdly, it was contended that by virtue of article 132(2A) of the Federal Constitution the applicant holds office during the pleasure of the Yang di-Pertuan Agong and therefore he cannot be dismissed unless he was given a reasonable opportunity of being heard: see article 135(2) of the Federal Constitution. Without deciding whether the applicant holds office during pleasure, I am clearly of the opinion that article 135(2) does not apply. The applicant was never dismissed from service. Dismissal pre-supposes some disciplinary proceeding against him whereby he is found guilty of indiscipline and misconduct under the Public Officers (Conduct and Discipline) Regulations, 1956. That is not the present position here. This is purely a case of a contract being terminated under one of its clauses. To say that the applicant was dismissed would be to use that word in quite a different sense from any in which, as far as I can see, it has hitherto been used.

In the existing state of facts, I am satisfied that a strong case has not been established to warrant this court in enlarging the time in respect of this application. The application is therefore dismissed with costs.

Application dismissed.

A Mahendra for the Applicant.
Au Ah Wah (Senior Federal Counsel) for the Respondent.

Note

RAJA AZLAN SHAH J (as he then was) laid down the principle in this case that the only delay the court will excuse in seeking certiorari is the delay involved in the pursuit of a legal remedy open to the petitioner. The judicial attitude on condoning delay in the pursuit of remedies for administrative wrongs is, on the whole, somewhat restrictive and not liberal.

(c) Quasi-judicial body — natural justice and bias

In Re R Sambasivam

[1969] 1 MLJ 219 High Court, Kuala Lumpur

Cases referred to:-
(1) *General Medical Council* v *Spackman* [1943] 2 All ER 377 at p 341.
(2) *Russell* v *Duke of Norfolk & Ors* [1949] 1 All ER 109 at p 118.
(3) *Jeffs* v *New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551.
(4) *Metropolitan Properties Co (F.G.C.) Ltd* v *Lannon* [1968] 1 WLR 694.
(5) *State of Mysore* v *Shivabasappa* AIR (1963) SC 375.

RAJA AZLAN SHAH J: This is a motion for an order of certiorari to quash the decision of the Public Services Commision dated 30th April, 1968, terminating forthwith the appointment of the applicant as a Junior Assistant Commissioner for Labour in the Ministry of Labour of the Government of Malaysia.

The applicant was on the permanent establishment in Division II of the Public Service. On 8th December, 1966, the Secretary to the Commission wrote to the applicant through the Secretary of his Ministry that his 'conduct appears to the Head of the Department to merit dismissal' and called upon him to exculpate himself. It is obvious that he failed to exculpate himself, and in accordance with General Orders 38(c) Cap D, a committee of enquiry was set up to investigate the complaints against the applicant. The committee sat on 27th, 28th and 29th November 1967, when hearing was adjourned, and resumed on 5th, 6th, and 7th March 1968. The proceedings were conducted by Mr S Kumar the Commissioner for Labour, and Mr M Shankar represented the applicant.

On 28th November 1967, in the course of cross-examination of Mr S Kumar, the following evidence was elicited:

Q. The letter dated the 8th December 1966 to Sivam that his conduct appeared to the Head of Department to merit dismissal was sent through the Setia Usaha Kementerian Buruh?
A. Yes.
Q. Dato' Yeap Kee Aik was then the Secretary to the Ministry of Labour?
A. Yes.
Q. The letter was sent through him because it was he who reported to the Public Services Commission that it appeared to him that Sivam's conduct merited dismissal?
A. Yes.
Q. Did he make this report verbally or in writing?
A. He did it in writing by a letter dated the 26th October 1966.
Q. So the decision to initiate proceedings against Sivam was his and his alone?
A. Yes.
Q. But it is you who is Head of Department and not Dato' Yeap Kee Aik?
A. Yes, I am the Head of Department and not Dato' Yeap.

When the above evidence was elicited, Mr Shankar put in a written submission on 29th November 1967, to the effect that the proceedings initiated against the applicant were *ultra vires*. The committee adjourned to consider the submission. On 13th January 1968, the Secretary to the Commission in reply to the applicant's letter of 28th December 1967, indicated that the committee had decided to defer its decision

pending completion of the enquiry. It is established that the said decision was never communicated to the applicant. On 30th April 1968, the applicant was notified of his dismissal.

Before me four grounds were relied in support of this application:

(i) that the proceedings before the committee of inquiry of the Public Services Commission were improperly instituted;
(ii) that the committee of inquiry had failed to consider matters preliminary or collateral to the matter before it and affecting its jurisdiction;
(iii) that the proceedings before the committee of inquiry are void on the ground that they are contrary to the rules of natural justice;
(iv) that the committee of inquiry improperly admitted hearsay evidence against the charges preferred against the applicant.

It is urged on behalf of the applicant that the proceedings before the committee of inquiry, which were instituted by the Secretary to the Ministry and not by the Head of Department, violated the provisions of General Order 38 Cap D, were *ultra vires,* and therefore void. General Order 38 reads:

> If the conduct of an officer on the pensionable establishment in Division I or II of the Public Service appears to the Head of Department to merit dismissal, the following procedure will be adopted, unless the method of dismissal is otherwise provided for either in these Regulations, or by special legislation;

and then follows the procedural provisions relating to disciplinary proceedings with a view to dismissal. I agree that these procedural provisions are to be treated as mandatory and therefore must be strictly construed. Reliance is also placed on a passagge in S A de Smith on *Judicial Review of Administrative Action* 2nd Edn, at page 212:

> If procedural rules have been laid down (e.g. for the hearing of disciplinary charges against police officers), those rules will be treated as mandatory except in so far as they are of minor importance; and upon them there will be engrafted the implied requirements of natural justice.

It is true that Mr Kumar is the Head of the Department of Labour and not Dato' Yeap Kee Aik, but the Department of Labour is one of many Departments in the Ministry of Labour. The overall administrative head of the Ministry is the Secretary. In the light of this observation the meaning to be attached to the provisions of General Order 3(g) Cap A is quite clear. The Secretary to the Ministry of Labour is also Head of Department. General Order 3(g) reads:

> The term 'Head of Department' shall be deemed to include a Secretary to a Minister or Ministry and the Principal Establishment Officer in respect of the services listed in sub-paragraph (a) of General Order 41.

It is said that the definition of 'Head of Department' as defined in General Order 3(g) Cap A which deals with appointments and promotions is not applicable to the provisions under Cap D, i.e., conduct and discipline regulations. The fallacy lies in assuming that there are two different Heads of Departments, one dealing with appointments and

promotions and the other dealing with disciplinary proceedings. It is obvious that that is not the intention of the General Orders. It is then urged that the said regulation concerns services listed in sub-paragraph (a) of General Order 41 Cap A and the applicant is not a member listed under the said paragraph. In my opinion that is a misinterpretation of the said regulation. Only the services listed in sub-paragraph (a) of General Order 41 Cap A come within the portfolio of the Principal Establishment Officer while other services come under the administrative heads of the various Ministries. The true view is that while the mandatory provisions of General Order 38 Cap D must be strictly construed, the phrase 'appears to the Head of Department to merit dismissal' which precedes those provisions is only a machinery providing for the mode in which the question which can only be decided by the disciplinary authority is to come before him. There can be no doubt that the power of dismissal remains solely with the disciplinary authority.

The next argument proferred is that failure to consider the collateral question of jurisdiction is a serious procedural defect which deprives the committee of jurisdiction: see *S A de Smith* at page 101. I would associate myself with counsel's submission if that is the correct position, but that is not the case here. The committee did not shut its eye to the issue. It considered the collateral question but indicated in its letter of 13th January 1968, that it 'had decided to defer its decision pending completion of the enquiry'. The fact that it completed the enquiry and submitted its report to the disciplinary authority is indicative of conduct amounting to rejection of counsel's submission. Regretably that decision was never conveyed to the applicant. Is failure to do so a serious defect in procedure as to deprive it of jurisdiction? I think not. That cannot be equated with failure to consider the collateral question of jurisdiction or breach of the principles of natural justice both of which are very serious defects which amount to deprivation of jurisdiction.

The third point relied upon by the applicant is that in initiating proceedings against him the Public Services Commission was influenced by extraneous considerations without giving him an opportunity to explain them, thereby violating the rules of natural justice. In essence it is said that the letter of Dato' Yeap Kee Aik of the 26th October 1966 contained allegations of misconduct against the applicant but they were not made the subject-matter of the charges preferred against him. That letter was shown to the applicant on the 2nd day of hearing but it was not formally produced in the course of the enquiry. The net result of such omission, it is alleged, is that he was denied an opportunity of making his defence on matters which the commission was cognisant but which did not form part of any of the charges, thereby leading to the inevitable inference that the commission was influenced by that letter in commencing proceedings against him. On behalf of the commission it is contended that the said letter never formed part of the proceedings and had in no way influenced their decision.

The law requires that the commission should observe the rules of natural justice in the conduct of the enquiry and if they do so, their

decision is not liable to be impeached. What is the essence of natural justice in rendering justice? It is well settled that the rules of natural justice vary with the varying constitutions of statutory bodies and the rules prescribed by the legislature under which they have to act and the question whether in a particular case they have been contravened must be judged not by any pre-conceived notions of what they may be but in the light of the statutory rules and regulations. As was pointed out by Lord Atkin in *General Medical Council* v *Spackman*[1] at page 341:

> The procedure which may be very just in deciding whether to close a school or an insanitary house is not necessarily right in deciding a charge of infamous conduct against a professional man.

See also the observations of Tucker LJ in *Russell* v *Duke of Norfolk & Ors.*[2] Stating it broadly, and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. There must be no malversation of any kind.

As I have indicated earlier, that letter is merely an information which entitles the commission to act. It was shown to the applicant but it was not made use of against him. That is the explanation why it was not formally produced and formed part of any of the charges. That being so, it is beyond comprehension how it can be argued that the applicant was deprived of an opportunity of explaining something which is not the subject matter of any of the charges. In my view the rules of natural justice had not been violated. The case of *Jeffs* v *New Zealand Dairy Production and Marketing Board*[3] relied on by the applicant is too remote for present consideration.

This application is also supported on the authority of *Metropolitan Properties Co (FGC) Ltd* v *Lannon*[4] which held that *certiorari* would lie where there is a reasonable impression of bias even though there is no actual bias. Assuming that is an unassailable proposition of law, the probabilities in the present case, viewing it objectively, do not justify such an inference, let alone on the basis of 'real likelihood' of bias: see *SA de Smith* at pp 244-246.

The last but by no means the least point for consideration is whether in admitting hearsay evidence in the course of the inquiry by the Committee of Inquiry, the said committee had violated the implied duty to act judicially. The short answer is that the committee in exercising quasi-judicial functions is not a court of law. It can obtain any information which is relevant for the purpose of the inquiry, from any source or through any channel unfettered by the strict rules of evidence and procedure which govern court proceedings. The only limitation is that the rules of natural justice must be observed. If the rules are satisfied, the inquiry is not open to attack on the ground that the procedure laid down in the Evidence Ordinance was not strictly

followed: see *State of Mysore* v *Shivabasappa.*[5]

The motion is dismissed with costs.

Motion dismissed.

S Woodhull for the Applicant.
Ajaib Singh (Federal Counsel) for the Respondent.

Note

This case reiterates the well established principle of administrative law that a quasi-judicial body is bound only by rules of natural justice and not by the formal rules of evidence as contained in the Evidence Act.

DECLARATION

(a) The power to grant a declaration

Dato Menteri Othman bin Baginda & Anor
v
Dato Ombi Syed Alwi bin Syed Idrus

[1981] 1 MLJ 29 Federal Court, Kuala Lumpur

Coram: Suffian LP, Raja Azlan Shah CJ (Malaya), Salleh Abas FJ, Ibrahim Manan FJ and Hashim Yeop A Sani J

Cases referred to:-

(1) *Ibeneweka* v *Egbuna* [1964] 1 WLR 219, 225.
(2) *Pyx Granite Co Ltd* v *Ministry Housing and Local Government* [1958] 1 QB 554, 571.
(3) *NTS Arumugam Pilai* v *Government of Malaysia* [1980] 2 MLJ 283.
(4) *Rediffusion (Hong Kong) Ltd* v *Attorney-General* [1970] AC 1136, 1155-6.
(5) *Minister of Home Affairs* v *Fisher* [1979] 3 All ER 21.
(6) *Attorney-General of St Christopher, Nevis and Anguilla* v *Reynolds* [1979] 3 All ER 129, 136.
(7) *Government of Malaysia* v *Government of the State of Kelantan* [1968] 1 MLJ 129.

RAJA AZLAN SHAH CJ: We have been entrusted with a grave and delicate issue; whether or not to issue a declaration that the purported election of the 15th Undang of Jelebu is *ultra vires* adat laws and constitution of Luak of Jelebu.

My first observation is that judges should adjudicate on such matters as the present with restraint and certainly not to emulate the quasi-legislative role of the United States Supreme Court. The power to grant a declaration should be exercised with a proper sense of responsibility and after a full realization that judicial pronouncements ought not to be issued unless there are circumstances that properly call for their making: see *Ibeneweka* v *Egbuna*[1].

What perhaps stands out about declaratory relief is the wide range of circumstances in which the procedure has been invoked already and the wide variety of cases in terms of subject matter where this type of

proceedings has been used. It has now become a regular feature of litigation and Lord Denning was probably only anticipating a little when he said in *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government*[2] that:

> The wide scope of it can be seen from the speech of Viscount Kilmuir LC in *Vine* v *National Dock Labour Board* ([1957] A C 488, 498) from which it appears that if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

Being discretionary, the remedy may, of course, be denied in appropriate cases. It may also be excluded by enactments. Some enactments expressly exclude the remedy: see *NTS Arumugam Pillai* v *Government of Malaysia*[3] where some of the cases are discussed, whereas the courts have to look behind the not very clear language of others in order to discover whether Parliament or some other enacting body had intended that result. In general the existence of another remedy is not sufficient to make a declaration unavailable but the courts may decide that that other remedy is more appropriate to the circumstances.

It is here we must distinguish cases where the courts have held that they lack jurisdiction to deal with the matter and those cases where in the exercise of discretion, jurisdiction is declined. In *Rediffusion (Hong Kong) Ltd* v *Attorney-General,*[4] the Privy Council discussed the distinction and recognised that what is often loosely referred to as matters of jurisdiction really are not so at all but merely situations where a court, having jurisdiction in the matter, refuses to exercise it:

> When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, i.e., to embark upon the inquiry whether facts exist which would entitle the court to grant relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.

The history of the case has been admirably dealt with at length by the learned Lord President and Tan Sri Dato' Salleh Abas FJ. I shall not repeat it. I shall confine my judgment to the issue of jurisdiction. Shorn of its massive publicity and its numerous surrounding issues the case is essentially one of interpretation of Article 71 of the Federal Constitution which 'guarantees the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges', and Articles XIV and XVI of the Constitution of the State of Negeri Sembilan. Article XIV deals with the election of the Ruling Chiefs (the Undangs) who 'shall be persons lawfully elected in accordance with the custom of their respective luaks.' Article XVI is reproduced in full:

> There shall be a Dewan Ke'adilan dan Undang to be called in English

> 'The Council of the Yang di-Pertuan Besar and the Ruling Chiefs' hereinafter referred to as the Dewan to advise on questions relating to Malay Custom in an any part of the State or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs and to exercise such functions as may be conferred upon it by this Constitution or any other written law.

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Act': see *Minister of Home Affairs* v *Fisher*[5]. A constitution is *sui generis,* calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case:

> A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.

The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla* v *Reynolds.*[6]

It is in the light of this kind of ambulatory approach that we must construe our Constitution. The Federal Constitution was enacted as a result of negotiations and discussions between the British Government, the Malay Rulers and the Alliance Party relating to the terms on which independence should be granted. One of its main features is the enumeration and entrenchment of certain rights and freedoms. Embodied in these rights are the guarantee provisions of Article 71 and the first point to note is that that right does not claim to be new. It already exists long before Merdeka, and the purpose of the entrenchment is to protect it against encroachment. In other words the provisions of Article 71 are a graphic illustration of the depth of our heritage and the strength of our constitutional law to guarantee and protect matters of succession of a Ruler (including election of the Undangs) which already exist against encroachment, abrogation or infringement.

Election of Undangs has since time immemorial been made in accordance with the ancient customary laws of their respective luaks. Article XVI of the Constitution of the State of Negeri Sembilan as pointed out by Salleh Abas FJ preserves and protects the ancient customary laws of Negeri Sembilan. It was drafted in broad and ample style which lays down principles of width and generality pertaining *inter alia* to Malay custom. It gives *carte blanche* to the Dewan to give 'advice' on such

matters. 'Advice' here calls for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism'. This must mean approaching the question with an open mind. In that context the Dewan does not make suggestions; it takes cognizance of such matters as may be referred to it and gives decisions in the form of 'advice' in the same way the Privy Council gives 'advice' to His Majesty the Yang di-Pertuan Agong on matters of appeals from this country.

This court, being the highest court in the land in constitutional matters, should take the occassion to reaffirm expressly, unequivocably and unanimously the constitutional position of the Ruler in matters of succession including the election of the Undang and to hold that it is non-justiciable. Here is something basic to our system of government: the importance of holding it far transcends the significance of any particular case. The Dewan in this case has blessed the appointment of the 15th Undang of Jelebu and for judges at first instance or an appeal to pre-empt its function is for courts to usurp the function of the Dewan, and apart from this, the Dewan is a far more suitable forum for discharging that function than a panel of five judges. It is open to the courts in this country to refuse a remedy on the ground that it is *forum non conveniens*. This doctrine is that a court may decline to exercise jurisdiction on the ground that another body would be more appropriate.

I would allow the appeal with costs here and below.

Abdul Razak Ahmad for the Plaintiff.
Ariffin Jaka for the Defendants.

Notes

In this case, Raja Azlan Shah CJ (as he then was) adopted a very cautious attitude in the matter of issuing declaration by the High Court. According to His Lordship, the power to grant a declaration should be exercised "with a proper sense of responsibility". The court may decline to exercise jurisdiction on the ground that another body would be more appropriate to deal with the matter. Declaration was denied in the instant case on two main grounds:

(a) The position of the Ruler in matters of succession including the election of the Undang is non-justiciable;
(b) The Dewan Ke'adilan is a more suitable forum to consider the matter in issue than the court.

The restrictive view regarding declaration adopted by the court becomes more notable when it is seen that Tun Suffian LP dissented with the majority view and that the High Court had expressed its view in favour of the maintainability of the application for the issue of declaration arguing that a serious question had been raised for consideration and that there was no reason why the court should be divested of its inherent jurisdiction to hear the case.

Reference may also be made in this connection to the comments on the *Harper Gilfillan* case below.

(b) Societies

Datuk Pasamanickam & Anor
v
Agnes Joseph

[1980] 2 MLJ 92 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Chang Min Tat and Salleh Abas FJJ

Cases referred to:-
(1) *Tharmalingam* v *Sambanthan* [1961] MLJ 63.
(2) *Arthur M'Cowan* v *The City of Glasgow Friendly Society & Ors* [1913] SC 991.
(3) *Scott* v *Avery* 10 ER 1121.
(4) *Atlantic Shipping Co* v *Dreyfus* 38 TLR 534.
(5) *Czarnikow* v *Roth, Schmidt & Co* [1922] 2 KB 478.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The respondent successfully sought a declaration that the annual general meeting of the Parit Bakar Branch of the Malaysian Indian Congress held on March 19, 1979 was unconstitutional and unlawful and therefore ineffective, null and void. She named the first and second appellants in Federal Court Civil Appeal No 245/79 who were elected chairman and secretary respectively of the branch at that meeting as the first two defendants. She also named the appellant in Federal Court Civil Appeal No 248/79 who acted as the returning officer at the said meeting as the third defendant.

The appellants appealed against the decision of the learned judge. We allowed the appeal and now give our reasons.

It is trite law that the relationship between the Malaysian Indian Congress (a registered society under the Societies Act) and its members is based on contract and the terms of the contract as embodied in the Malaysian Indian Congress Constitution will *prima facie* be binding on the parties. Article 15(4) of the said Constitution impliedly forbids members from resorting to court proceedings in matters relating to their rights, obligations, duties and privileges unless and until such matters are first referred to the Central Working Committee. The said article reads as follows:

> Every member shall be bound by the decision of the Central Working Committee in matters relating to his rights, obligations, duties and privileges as a member of the Congress. If he resorts to court proceedings in respect of his rights, obligations, duties and privileges or on behalf of any other member or in respect of the rendering or meaning of the provisions of this Constitution without first referring to the Central Working Committee or in violation of any decision or directive of the Central Working Committee, he shall *ipso facto* cease to be a member of the Congress and shall not be entitled to exercise any of the rights of a member.

The only ground of appeal taken before us is that as an agreement article 15(4) purports to oust the jurisdiction of the courts and is

consequently against public policy and void. Indeed the learned judge held that such a provision in the rules of the Malaysian Indian Congress has the effect of ousting the jurisdiction of the courts to hear any dispute between a member and the Congress or its office-bearers.

One of the long standing difficulties in a subject which is often difficult is the absence in public law of any definition of an 'ouster of jurisdiction'. That has yielded much discussion and deep analysis, with comparisons being drawn from developments in other countries. The lack of clear definition may not always matter much, and in some respects insight might be thought to resemble the old quip about the elephant: easy enough to recognise, but difficult to describe. This is well indicated by the difference of opinion in the speeches of their Lordships in the House of Lords in *Scott* v *Avery.*[3] Crompton J said that he considered the agreement which came under consideration in that case a mere attempt to evade the law (page 1131), while Coleridge J (page 1134) took the view, which was upheld by the House of Lords, that the judgment of the Court of Exchequer stood on safe distinction between an agreement which would close entirely the access to the courts of law and that which only imposed a condition precedent to the appeal to them, that the parties should have first settled by an agreed mode the precise amount to be recovered. The case of *Atlantic Shipping Company* v *Dreyfus*[4] is another illustration of the same kind of differences of opinion, the House of Lords putting an entirely different construction upon the agreement between the parties to that which was put upon it in the Court of Appeal. In the present case article 15(4) provides as a first step that reference to the Central Working Committee is a condition precedent before resorting to court proceedings. The effect of this is that a member is not excluded from going to court but must first refer the matter to the domestic forum. It has been held in *Scott v Avery, supra,* that such a clause is legitimate and not contrary to public policy. The effect of the decision is that an agreement that no right of action shall arise by action in the courts unless and until parties' differences have been settled in some other way, for example arbitration, is not void as being an ouster of the jurisdiction of the courts: see also 10 *Halsbury's Laws of England* (4th ed) 326-327, para 719.

The principles on which the law proceeds are in our view well explained by the Court of Appeal in *Czarnikow* v *Roth, Schmidt & Co.*[5] In that case a term in a contract containing an arbitration clause provided that 'neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid shall require, nor shall they apply to the court to require, any arbitrators to state in the form of a special case for the opinion of the court any question of law arising in the reference, but such question of law shall be determined in the arbitration in manner herein directed.' Scrutton LJ said at page 489: 'I think it is necessary to

> I think it is necessary to add a word about the effect of *Scott* v *Avery, supra.* I have always understood it to be a decision that while parties cannot agree to oust the jurisdiction of the King's courts, they can agree that no action shall be brought in those courts till the amount of liability has been settled by arbitration. Alderson B states this as agreed by all

> parties, and Lord Cranworth begins his judgment in the same way. I do not think the language of Lord Dunedin in commencing his judgment in *Atlantic Shipping Co* v *Dreyfus, supra,* can have been meant to impugn the first part of this proposition. The courts always decline to recognize an agreement to refer all disputes to arbitration as compelling them to stay an action, and do so because such an agreement would oust the jurisdiction of the King's courts. I prefer the language of Lord Sumner, concurred in by Lords Buckmaster and Atkinson, to the effect that as long as a clause does not exclude the claimant from such recourse to the courts as is always open by virtue of the provisions of the Arbitration Act, 1889, but only requires certain conditions as precedent to a valid claim, it does not oust the jurisdiction. I think that Lord Sumner would have regarded a clause depriving the claimant of the protection of the Arbitration Act as an ousting of the jurisdiction and unenforceable. And I can conceive some conditions precedent to enforcing a claim which English courts would decline to enforce.

There are provisions in the rules of powerful organisations such as trade unions and political organisations forbidding their members, as far as they can lawfully do, from submitting their disputes to the decision of the courts unless and until certain conditions precedent are observed, for example, until certain matters have been resolved by their domestic forums, upon which they themselves agree. The present case is a case in point. There have been others before the courts. What reason can there be for saying that there is anything contrary to public policy in allowing members to enter into such contracts? It seems to us that it would be a most inexpedient encroachment upon the liberty of the subject if he were not to be allowed to enter into such contracts. Is there anything contrary to public policy in saying that such organisations shall not be harrassed by court actions, the costs of which might be ruinous, and in which the delay in coming to a final decision disastrous? Does it not make for speedy and economical determination to refer such disputes to a domestic forum? We can see not the slightest inconvenience or denial of justice that can flow from such agreements. On the other hand, we see great advantages that may arise from them. So long as the courts retain sufficient hold over them to prevent and redress any injustice on the part of such organisations, and to secure that their decisions are in substance made in accordance with the requirements of natural justice and not with some home-made and arbitrary rules of the organisations, the courts will not interfere with their decisions. By allowing the disputes to be first decided according to the rules of the organisations, courts do not release real and effective control over them or allow them to be a law unto themselves or to give them a free hand to decide disputes according to their whims and fancies. No association is outside or above the law. But so long as, at the appropriate moment, recourse to the courts is available to the members, the courts can and will safely allow the members to organise their own affairs according to the terms and tenor of their agreements, but that appropriate moment will not have arrived until and unless the members have fully utilised their rights and privileges under such agreements. We are satisfied that

article 15(4) contains no indication of an intention to fetter the power of the courts to enforce the contractual position of the parties. In our view it is not essentially different in character from ordinary statutory provisions limiting the time during which various procedural steps can be taken to enforce an action. Such provisions are, generally speaking, not designed to oust the jurisdiction of the courts but may, at the option of the party sued, be set up to bar a remedy and correct a grievance until the grievance has been investigated in the proper forum.

We would be slow to interfere with the decision of the members of the Malaysian Indian Congress professing to act under their rules, unless it could be shown either that the rules were contrary to natural justice, or that what had been done was contrary to the rules of the association, or that there had been *mala fides* or malice in coming to a decision. It gives us great satisfaction to know that these points were not in issue before us.

Appeal allowed.

VC George for the Plaintiff.
DP Vijandran for the 1st & 2nd Defendants.
M Jayasingam for the 3rd Defendant.
John Gomez for the 4th Defendant.

Notes

(i) In this case, the court considered a very interesting as well as a topical question, *viz:* how far a society can bar its members from resorting to court in disputes between them and the society? Raja Azlan Shah CJ (as he then was) laid down the proposition that a society can make a rule that no member may resort to a court without exhausting internal remedies available under the society's constitution. It means that the courts cannot be completely excluded from taking cognizance of society-member disputes. This is in line with the courts' general attitude to interpret ouster clauses restrictively.

(ii) Raja Azlan Shah CJ also laid down another proposition in this case, *viz:* The court will not interfere with a decision of a society unless it can be shown that there was breach of natural justice, or that it was contrary to the rules of the society, or that there had been *mala fides* or malice in coming to a decision. This remains a leading case in the area and has been invariably cited in later cases dealing with similar problems.

(c) Declaration in lieu of an appeal to the High Court under section 41B of the Land Code

Land Executive Committee of Federal Territory
v
Syarikat Harper Gilfillan Berhad

[1981] 1 MLJ 234 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah Ag LP, Syed Othman and Salleh Abas FJJ

Cases referred to:-
(1) *Baraclough* v *Brown & Ors* [1897] AC 615.
(2) *A Subramaniam* v *SMRM Muthiah Chetty* [1934] MLJ 222.
(3) *Chop Chuah Seong Joo* v *Teh Chooi Nai & Ors* [1963] MLJ 96.
(4) *Sundaram* v *Chew Choo Khoon* [1968] 1 MLJ 90.
(5) *Metal Industry Employees Union* v *Registrar of Trade Unions & Ors* [1976] 1 MLJ 220.
(6) *Barnard & Ors* v *National Dock Labour Board & Ors* [1953] 2 QB 18.
(7) *Francis* v *Yiewsley and West Drayton Urban District Council & Ors* [1960] AC 260.
(8) *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government* [1960] AC 260.
(9) *Punton & Anor* v *Ministry of Pensions and National Insurance (No 2)* [1964] 1 All ER 448.
(10) *South-East Asia Firebricks Sdn Bhd* v *Non Metallic Mineral Products Manufacturing Employees Union & Ors* [1980] 2 MLJ 165.
(11) *Cooper* v *Wilson* [1937] 2 KB 309.
(12) *Dato Menteri Othman bin Baginda & Anor* v *Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.
(13) *Punton* v *Ministry of Pensions* [1963] 1 All ER 275, 279-280.
(14) *Pasmore* v *Oswaldthistle Urban District Council* [1898] AC 387.
(15) *Collector of Land Revenue, Federal Territory* v *Garden City Development Berhad* [1979] 1 MLJ 223.

RAJA AZLAN SHAH Ag LP: The respondents are the registered owners of two pieces of land situated in Jalan Ampang Hilir, in the Federal Territory and comprised in EMR Nos 2119 and 2120 Lots 157 and 225. The condition of use endorsed on the extracts of title is 'fruit trees', that is for the planting of fruit trees. On September 2, 1968 they entered into an agreement with two joint purchasers to sell a part of the said land on which is erected a block of three flats. Since the said sale was only of a part of the land, the agreement provided for the transfer of a separate document of title to the purchasers after sub-division. They therefore submitted to the Collector of Land Revenue the necessary forms together with the requisite plan and fees for the purpose of amalgamation and sub-division. The Collector replied to the respondents stating that they should first apply for a change of category of land use pursuant to section 124 of the National Land Code before applying for amalgamation and sub-division under sections 137 and 148 of the Code. There ensued an exchange of letters regarding the ruling of the Collector. In the meantime the respondents' application was referred to the Commissioner of Lands and Mines, Selangor, (now the Director of Lands and Mines, Federal Territory). The Director's reply to the respondents was to the same effect. There was a further

exchange of letters. The crux of the matter seems to be the true interpretation of the provisions of the National Land Code, particularly section 124 (1)(a).

The respondents by originating summons seek a declaration that upon the true construction of the provisions of the National Land Code they are not required to apply for a change of category of land use under section 124(1)(a) of the Code prior to the application for amalgamation and sub-division. However, they did not appeal against the decision of the Director under section 418 of the National Land Code and even if they had done so they were well out of time.

The appellants applied to set aside the originating summons on three grounds: first, there is no provision in the National Land Code to enable the court to grant the declaration sought; secondly, the respondents had failed to exercise their right of appeal pursuant to section 418 of the Code and, thirdly, the matter complained of was time-barred by virtue of section 2(a) of the Public Authorities Protection Ordinance, 1948.

The learned judge held that apart from the fact that the provisions of the National Land Code did not circumscribe the jurisdiction of the High Court to make binding declarations of right, section 447 of the National Land Code which is a procedural section relating to appeal from the decision of the Director to the Court, read with Order 54A rule 1A of the *1957 Rules of the High Court,* makes it quite clear that the court's power in respect of land matters is not conferred exclusively by the National Land Code. He further held that section 418 of the National Land Code which sets the time-limit for an appeal to the High Court does not arise on the ground that the Director had not made any decision on the matter but only 'a series of requests, opinions, expressions of advice and threat.' In the circumstances he held that as no decision was ever taken time had not started to run.

For the purpose of this appeal it is only necessary to decide on the availability of declaration in lieu of the statutory right of appeal enacted by section 418 of the National Land Code. We are satisfied that there was a decision from which an aggrieved party may appeal to the High Court under the section. The section reads:

> 418. (1) Any person or body aggrieved by any decision under this Act of the State Commissioner, the Registrar or any Collector may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.

It is said by the appellants that the National Land Code being a creature of statute and providing for special procedure relating to appeals on matters pertaining to it, declaratory relief is not available to the appellants. The case of *Baraclough* v *Brown & Ors;*[1] *A Subramaniam* v *SMRM Muthiah Chetty;*[2] *Chop Chuah Seong Joo* v *Teh Chooi Nai & Ors;*[3] *Sundaram* v *Chew Choo Khoon;*[4] and *Metal Industry Employees Union* v *Registrar of Trade Unions & Ors*[5] were cited in support of the proposition that when an appeal from an administrative decision is exclusively provided, resort cannot be had to a declaratory relief. In *Baraclough* v *Brown & Ors, supra,* the House of Lords held

that the plaintiff's choice of the High Court as the forum for the recovery of the cost of removal of a ship sunk in the River Ouse was misconceived as a special procedure for the enforcement of the right was conferred only on the court of summary judisdiction. In *A Subramaniam* v *SMRM Muthiah Chetty, supra,* declaratory relief was held not to be available to a party dissatisfied with the decision of the Collector where an appeal therefrom was provided under section 237 of the National Land Code to the court. In *Chop Chua Seong Joo* v *Teh Chooi Nai & Ors, supra,* declaratory relief was not granted since the Control of Rent Ordinance 1956 expressly provided for a right of appeal to the High Court. In *Sundaram* v *Chew Choo Khoon, supra,* it was held that the only recourse of a party dissatisfied by the decision of the Collector under section 37 of the National Land Code was to appeal against the decision to the court and a declaratory suit was misconceived. In *Metal Industry Employees* v *Registrar of Trade Unions & Ors, supra,* an application for a declaration to show that on a proper construction of section 2(2) of the Trade Unions Ordinance 1959, the Registrar of Trade Unions had no power to decide on the eligibility of any group of workers to join the union was dismissed by this court on the ground that it lacked jurisdiction as the statutory remedy of appeal to the Minister excluded the declaratory jurisdiction of the High Court.

On the other hand the respondents contend that there is nothing in the provisions of the National Land Code to prevent them from coming to the court to seek declaratory relief: clear words are necessary to oust the jurisdiction of the court. The following cases were cited: *Barnard & Ors* v *National Dock Labour Board & Ors;*[6] *Francis* v *Yiewsley and West Drayton Urban District Council & Ors;*[7] *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government;* [8] *Punton & Anor* v *Ministry of Pensions and National Insurance (No 2);*[9] *South East Asia Firebricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.*[10]

In *Barnard's* case, *supra,* the local board had no authority to delegate its quasi-judicial disciplinary functions to the port manager who had purportedly suspended the plaintiffs from work. The original notices of suspension were therefore a nullity, and the decisions of the appeal tribunal in affirming the suspension were equally a nullity. Although certiorari was the appropriate remedy and the plaintiffs could have invoked it well within time, there was no way in which they could have discovered that their suspension was a nullity, as there was no discovery and inspection in proceedings by way of certiorari. That left the plaintiffs without a remedy, and it was in those special circumstances that the court took the line that it had the power to grant a declaration in order to prevent an injustice to the plaintiffs. That led Denning LJ to say at page 41: 'I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself.' Equally in *Cooper* v *Wilson*[11] special circumstances existed which rendered certiorari inefficacious: the plaintiff could not have claimed by way of certiorari the sum which the Watch Committee had wrongfully deducted from his pay. A declaration was granted in lieu of certiorari.

In *Francis* v *Yiewsley, supra,* the court declared the enforcement notice requiring the plaintiff to cease using the land as a caravan park invalid as it was based upon a fundamentally false basis of fact: the fact that he had failed to appeal against the enforcement notice to a court of summary jurisdiction did not bar him from applying to the court for a declaratory relief as the indications in section 23(4) of the Town and Country Planning Act, 1947, did not contain clear words to that effect. In *Pyx Granite* v *Ministry of Housing, supra,* the plaintiff successfully sought declaration that they were not required to seek a local council's approval to develop their land, although there was an alternative statutory right of appeal to the local planning authority. The House of Lords held that the court's jurisdiction could not be taken away in that indirect manner. Viscount Simonds said, at page 286:

> It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J called it in *Francis* v *Yiewsley and West Drayton Urban District Council* (1957) 2 Q B 136, a ' fundamental rule ' from which I would not for my part sanction any departure. It must be asked, then, what is there in the Act of 1947 which bars such recourse.

In *Punton* v *Ministry of Pensions and National Insurance (No 2), supra,* the court held that a bare declaration could not quash a valid but erroneous decision, that is, an error of law within jurisdiction. In that case the plaintiffs lost their employment as a result of strike action by some of their fellow-workers. Their application for unemployment benefits was rejected by the National Insurance Commissioner on the ground that they had not adduced sufficient evidence to satisfy him that they were not supporting the strike. They sought declarations that on the facts as found by the Commissioner he had come to a wrong decision in point of law. The court held that if it made a bare declaration, then the Commissioner's decision would still subsist and, as long as the Commissioner's decision stands, 'it would be out of harmony with all authority to have two contrary decisions between the same parties on the same issues obtained by different procedures.' The court had no jurisdiction to impugn such a decision by merely granting a bare declaration.

South East Asia Firebricks, supra was concerned with the provisions of section 29(3)(a) of the Industrial Relations Act 1967 — whether certiorari would lie to quash an award of the Industrial Court for error of law on the face of the record. It is not in point.

Thus it can be seen that the modern use of declaratory judgment has already developed into the most important means of ascertaining the legal powers of public authorities in the intricate mixture of public and private enterprise which is becoming a distinctive feature of our life. But we must add a warning note that its use must not be carried too far. The power to grant declaratory judgment in lieu of the prerogative orders or statutory reliefs must be exercised with caution. The power must be exercised 'sparingly', with 'great care and jealousy'. I said in

Dato Menteri Othman bin Baginda & Anor v *Dato Ombi Syed Alwi bin Syed Idrus*[12] that the power to grant a declaration should be exercised with a proper sense of responsibility and after a full realization that judicial pronouncements ought not to be issued unless there are circumstances that properly call for their making. Beyond that there is no legal inhibition to the grant of declaratory judgment. That is consistent with the attitude of the courts in this country. To some it may appear that justice is being denied by a timid and conservative approach. They are wrong. Consistency makes for certainty, and this court being at the centre of the legal system in this country is responsible for the stability, the consistency and the predictability in the administration of law.

The present appeal must be determined upon a consideration of the terms of the National Land Code. As was stated by Diplock L J in *Punton* v *Ministry of Pensions*[13]:

> I do not wish it to be thought that, without further careful examination, I necessarily assent to the proposition that a declaration lies as an alternative remedy wherever certiorari would die. I think that it must depend or may at any rate depend, on the statutory terms in which jurisdiction is conferred on the inferior tribunal and on the statutory effect of its decision.

First of all we have to see the nature of the claim. It is an action for a declaration that conversion is not necessary before sub-division. That is a question of law by virtue of a statutory provision in section 124 of the National Land Code. If the relevant authority commits an error in the interpretation of the section, then an aggrieved party has a right of appeal to the High Court under section 418 of the Code. Parliament has on the ground of public policy found that that is a just and necessary right. But in the same section Parliament has also enacted a special procedure of enforcing that right. If the right had been simply created and no specific method of enforcing it had been provided for, the existing law itself would have provided a method through the court already invested with jurisdiction to determine a claim of that nature. But a specific method having been created by providing a time limit within which the right may be pursued, it becomes a question whether that method is exclusive or not. That depends not upon any rigid rule but upon the intention of Parliament appearing from the Code.

As a general rule where a statute creates a new obligation and provides a special mode of enforcing it, no other court has jurisdiction to enforce that obligation. The case generally referred to as establishing that rule is *Pasmore* v *Oswaldthistle Urban District Council.*[14] We quote from the speech of the Earl of Halsbury LC:

> The principle that where specific remedy is given by a Statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the Statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe* v *Bridges* (1 B & Ad, 847, at p 859). He says: ' where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot

> be enforced in any other manner '. The words which the learned Judge, Lord Tenterden, uses there appear to be strictly applicable to this case. The obligation which is created by this Statute is an obligation which is created by the Statute and by the Statute alone. It is nothing to the purpose to say that there were other Statutes which created similar obligations, because all those Statutes are repealed; you must take your stand upon the Statute in question, and the Statute which creates the obligation is the Statute to which one must look to see if there is a specified remedy contained in it. There is a specified contained in it, which is an application to the proper Government department.

In *Baraclough* v *Brown & Ors, supra,* Lord Herschell said (page 619):

> The only right conferred is 'to recover such expenses from the owner of such vessel in a court of summary jurisdiction'. I do not think the appellant can claim to recover by virtue of the Statute, and at the same time insist upon doing so by means other than those prescribed by the Statute which alone confers the right.

Lord Watson said (page 622):

> The right and the remedy are given *uno flatu,* and the one cannot be disassociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters.

We now ask ourselves, what is there in the National Land Code which bars declaratory relief. Section 418 of the Code must be now looked at. If on proper a reading of it leads one to the conclusion that it is the intention of Parliament to create the right absolutely and independently of any specific from of remedy, the respondents' action is well maintained. If on the other hand the proper interpretation is that the right and the remedy are *uno flatu,* that they are not mutually exclusive, that they are part and parcel of the remedy, then the action is misconceived.

Reading section 418 of the Code, we are satisfied that the latter is the correct interpretation. Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The time-limit is the foundation of the right given in the section. It is in the highest degree improbable that the period of three months as a limitation would have been inserted if an indefinite period were intended to be given. The period of three months is obviously for the purpose of preventing stale claims. If the contrary is sustainable, then the respondents are allowed to seek to enforce their statutory right by a method other than that prescribed by the Code creating it.

For these reasons we are of the view that the court has no jurisdiction to entertain the claim sought by the declaration and the appeal must be allowed with costs here and below.

Although we feel compelled to allow the appeal on the ground

indicated, it may be satisfactory to the parties to know that, in the light of the recent decision of this court, which is binding on the High Court, that is, the case of *Collector of Land Revenue, Federal Territory* v *Garden City Development Berhad,*[15] we arrived at the conclusion that the same result must have followed even if the question of jurisdiction had been determined the other way. Unfortunately the attention of the High Court was not drawn to that case, neither party alluding to it. The facts there were not greatly dissimilar. The landowners held a Registry title of a piece of town land. A substantial house had been build on the land. The landowners desired to erect and they did erect a more substantial building. But there was no category of land use imposed on the title. It is however the clear intention of the National Land Code that the use of land in the country should be classified into one of three uses, *viz.* agricultural, building or industrial. To achieve uniformity of classification, it has to make specific provisions for the conversion of land alienated before the commencement of the Act, i.e., the Code, into the system. These provisions are in sections 53 and 54. The relevant section for our purpose is the former section. Other than land which immediately before the commencement of the Act is subject to an express condition requiring its use for a particular purpose, all land which at the commencement of the Act is country land or town or village land held under Land Office title becomes subject, at the commencement of the Act, to an implied condition that it shall be used for agricultural purposes only and all other land that is held under Registry title shall become subject to an implied condition, expressed, curiously but purposely, in a negative manner 'that it shall be used neither for agricultural nor for industrial purposes.' Express provisions exist in the section for the continued use of the land to which it had been put prior to the commencement of the Act. Such continued use would not be unlawful.

From this imposition of a category of use by statutory implication, it follows that whenever it is desired to use the land differently from that to which the land is for the time being subject to (in the case of land alienated before the commencement, it would be the implied condition imposed by section 53), the proprietor must apply for alteration of the category of land use under the requirements of section 124. This court accordingly held in *Garden City, supra,* that since the title was 'neither for agricultural nor for industrial purposes' and there is no necessary consequence that it was for the only other purpose, *viz.* for building purposes, it was incumbent on the proprietor to apply under the second part of section 124(a) for the imposition, not the alteration, of a category of use to which the land would be put.

Where the land as in this case is held under a Land Office title and by section 53(2) the implied category of land use is agricultural and while the continued use of the land for the flats built on it is lawful under the proviso, the issue of title to the sub-divisional portion sought by the respondents cannot continue a use not known to the National Land Code or delay or frustrate the implied system of land use by any contention that the new title does not need to have imposed on it one of

the three recognized categories of land use.

Order accordingly.

Lim Heng Seng (Federal Counsel) for the Appellant.
MHK Lim for the Respondent.

Notes

(i) This is another case on declaration which again demonstrates a restrictive attitude of the Judge in the matter of the issuance of a declaration. Although Raja Azlan Shah Ag LP recognised that declaration is an important tool to ascertain the legal powers of public authorities, yet His Lordship took the attitude of caution in the matter of issuing declarations. Thus, His Lordship ruled that a person cannot seek declaration in lieu of an appeal to High Court under section 418 of the Land Code. The Judge did not give any strong reason to answer the question: if the High Court can hear an appeal in a matter then why it cannot issue a declaration as well when the statute does not say anything in this connection?

(ii) The two cases on declaration noted here, *viz Menteri Othman* and *Harper Gilfillan,* depict that the judiciary displays a restrictive attitude towards declaration as a remedy in public law. In both these cases, the High Court adopted a liberal attitude but such an approach did not find favour with the Federal Court. The remedial aspect of administrative law thus remains weak in Malaysia. The judicial attitude in other common-law countries, on the other hand, is in favour of expanding the remedial base of the law, not to restrict the same.

(iii) For futher comments on this case, see pages, below.

PROHIBITION

(a) Error of law going to its jurisdiction

Fung Keong Rubber Manufacturing (M) Sdn Bhd
v
Lee Eng Kiat & Ors

[1981] 1 MLJ 238 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah CJ (Malaya), Syed Othman and Salleh Abbas FJJ

Cases referred to:-

(1) *Vine* v *National Dock Labour Board* [1957] AC 488, 500, 507.
(2) *Francis* v *Municipal Councillors of Kuala Lumpur* [1962] 1 WLR 1411; [1962] MLJ 407.
(3) *Wall's Meat Co. Ltd* v *Khan* [1979] ICR 52.
(4) *National Union of Hotel, Bar and Restaurant Workers* v *Minister of Labour and Manpower* [1980] 1 MLJ 189.

(5) *Estate and Trust Agencies (1927) Ltd* v *Singapore Improvement Trust* [1937] AC 898; [1937] MLJ 161.
(6) *In re London Scottish Permanent Building Society* (1893) 63 LJ (QB) 112, 113.
(7) *Rex* v *North, ex parte Oakey* [1927] 1 KB 491.

RAJA AZLAN SHAH CJ (MALAYA): On December 24, 1976 and June 16, 1977 an Industrial Court assumed jurisdiction to hear the complaint of Lee Eng Kiat (respondent 1) and S Balasuppramaniyam (respondent 2), the chief security guard and security guard respectively, that they had been dismissed without just cause or excuse by their employer, the appellants. It assumed jurisdiction on the ground that section 20(1) of the Industrial Relations Act, 1967 (Act 177) does not impose an absolute obligation on a workman to make the representation within one month of the dismissal. It also rejected the view of counsel that the word 'may' refers to the discretion vested in the respondents either to bring the matter to the Industrial Court or to the common law court.

Section 20(1) of the Act is as follows:

> Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within one month of the dismissal, make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

The facts leading to the present appeal are as follows. Both the respondents (non-union members) were employed by the appellants as chief security guard and security guard some time in 1971. At about 2.00 am on November 17, 1973, there was a report of theft at the appellants' factory premises. As a result of investigations conducted by the appellants on the spot, they found a substantial quantity of motor scooter tyres, motor scooter tubes, motor cycle tubes and motor car tubes manufactured by the appellants (total value of $560) in the boot of the respondent 1's car which was parked in the bicycle shed near the factory. Respondent 1 who was standing near the boot of his car admitted the theft and gave a written statement to that effect. Respondent 2 also admitted his part in the theft and he also gave a written statement to that effect. On the evidence available, the appellants were satisfied that the respondents were guilty of grave misconduct inconsistent with their express or implied conditions of employment. They were summarily dismissed.

A police report was immediately lodged. The respondents were taken into custody the same morning. They were charged with the theft of the said goods under section 381 of the Penal Code. They were granted bail. On June 21, 1976, they were (surprisingly) acquitted. On that date, some 31 months after their dismissal, they sought re-employment. The appellants refused to re-employ them. In July 1976, both respondents made representations to the Director General of Industrial Relations for

reinstatement under section 20(1) of the Act. The Director General was not able to effect a settlement within the statutory period; he notified the outcome of it to the Minister who, exercising his discretion, referred the matter to the Industrial Court on September 30, 1976. The said court was invited to consider and determine a preliminary question, i.e., whether it had jurisdiction to entertain the claim in view of the time limit clause.

The Industrial Court found as a fact that both the respondents were summarily dismissed on November 17, 1973 and that time should run from that date. It also found that although there was inordinate delay in presenting the claim for reinstatement before the Director General, the said officer had considered this fact in the setting of all the other representations for reinstatement and all the facts and reasons for such delay. It further considered the fact that the Minister, after being notified by the Director General, thought fit to refer the representations to the Industrial Court whether or not to make an award. In those circumstances it came to the conclusion that the delay was such that the Minister could justifiably enlarge and had correctly enlarged the period and accordingly it was not for the Industrial Court to question the Minister's discretion and it would therefore proceed to hear the claim under section 20(3) of the Act.

In November, 1977, the appellants thereupon applied to the High Court for an order of prohibition to prohibit the Industrial Court from proceeding further in the matter.

The learned High Court judge who heard the application was of the opinion that it was for the Director General to decide whether the claim was made within the statutory time limit. He held that there was evidence for the Director General to find that the representations were made within time and that it was for the appellants to show that there was no such evidence. On that premise he was satisfied that the Industrial Court was conferred with jurisdiction and that it was not open to the court to question the Minister's discretion in referring the matter to it .

In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, e.g., a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given. He may even get less than the wages for the period of notice if it can be proved that he could obtain a similar job immediately or during the notice period with some other employer. He cannot sue for wounded feelings or loss of reputation caused by a summary dismissal, where for instance, he was dismissed on a groundless charge of dishonesty. At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, *viz,* an award of damages. Further, the courts will not normally 'reinstate' a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid: see *Vine* v

National Dock Labour Board;[1] *Francis* v *Municipal Councillors of Kuala Lumpur.*[2] At the most it will declare that it was wrongful. However his common law right has been profoundly affected in this country by the system of industrial awards enacted in the Industrial Relations Act, 1967. The wrongfully dismissed workman can now look to the remedies provided by the arbitration system. He can now look to the authorities or his union to prosecute the employer and force the latter to reinstate him. Reinstatement, a statutorily recognized form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law. The speedy and effective resolution of disputes or differences is clearly seen to be in the national interest, but it is also apparent that any attempt to impose a legal obligation without a prior exploration for a voluntary conciliation could aggravate rather than solve the problem. To this end the Director General is empowered by section 20 of the Act to offer assistance to the parties to the dispute to expedite a settlement by means of conciliatory meetings. The process is entirely voluntary and the Director General will not usually become involved unless the workman fulfills the internal procedure as laid down by the section, which is, 'he may, within one month of the dismissal, make representations in writing to the Director General to be reinstated in his former employment.' The word 'may' in our view refers to the alternative remedy available to the wrongfully dismissed workman to claim for reinstatement under our arbitration system. We say this because the general common law considerations applicable to contracts of employment have been modified, in the area to which industrial awards are applicable, to the advantage of the workman in relation to wrongful dismissal where he could now ask to be reinstated in his former employment.

In our view the whole purpose of this part of the legislation is to provide workmen with a cheap and speedy remedy to obtain reinstatement. Quite clearly it would be extraordinarily difficult for employers to keep industry going if claims for reinstatement on the ground of wrongful dismissal could be made many months or years, instead of the statutory period of one month, after dismissal had taken place. Under section 20(1) of the Act, a workman who claims reinstatement for wrongful dismissal is bound to comply with a very strict time limit. He must present his claim within one month of the dismissal. There is no similar escape clause as is provided by paragraph 21(4) of Schedule 1 to the (UK) Trade Union and Labour Relations Act, 1974, on the ground that it is 'not practicable' to present a claim within the statutory period: see, for instance, *Wall's Meat Co Ltd* v *Khan.*[3] It is for that special reason that the time-limit clause with no escape clause is inserted in the section. It is so strict that it goes to the jurisdiction of the Industrial Court to hear the complaint. By that we mean that if the claim is presented just one day late, the court has no jurisdiction to consider it.

In the present case the respondents were summarily dismissed for theft. They were charged with it and did not make a claim for wrongful dismissal until after they were acquitted, that is, some 2 years and 7

months later. If it is argued that they had to wait for the outcome of the criminal case against them before making such claim, then we say that that argument is not acceptable: they are clearly time-barred as soon as the statutory period of one month has elapsed. If they were completely innocent they would do everything in their power to obtain redress and it would be surprising if they had not started making their claim for reinstatement within a comparatively short time and well within the statutory period. An innocent workman can be expected to put forward his claim at the earliest moment.

We cannot agree with the learned judge that it was for the Director-General to decide whether the claim was made within the time limit, and we think he went too far when he said that there was evidence for the Director-General to come to the conclusion that their claim was made within time. The determination of the issue whether the claim was made within the time limit involved mixed questions of law and fact for the Industrial Court, the fact being the ascertainment of the relevant conduct of the parties in pursuing their claim and the inferences properly to be drawn thereform. Once that is ascertained, it is a question of law whether or not there was sufficient evidence that the claim was made in time. On the facts, we are of the view that the claim was presented well outside the time limit and that being so, it was for the Industrial Court to say that it was wrongly conferred with jurisdiction. In the circumstances it is open to this court to interfere with the exercise of the Minister's discretion in referring the matter to the Industrial Court. He had certainly exercised his discretion wrongly: see *National Union of Hotel, Bar and Restaurant Workers* v *The Minister of Labour and Manpower*[4]. If an error of law by the Industrial Court be seen as a misconception of its own jurisdiction and therefore an absence of jurisdiction, this court assumes a free-wheeling power to interfere by way of prohibition whenever it appears to it that some error of law going to its jurisdiction has been made by the Industrial Court.

Apart from the question of jurisdiction there remains a subsidiary matter to be decided, not the less important because it is one of a purely technical character. The respondents now say that the appellants were guilty of undue delay in applying for an order of prohibition and since the order is a matter of discretion we should refuse it. It is said that the application should have been made sometime in July, 1976, well before the Minister had referred the matter to the Industrial Court. It is not in dispute that the application was made in November, 1977. But, in our view, so long as there remains something to which prohibition can apply, some act which the Industrial Court if not prohibited may do in excess of its jurisdiction, prohibition may lie: see *Estate and Trust Agencies (1927) Ltd* v *Singapore Investment Trust.*[5] In such a case delay is immaterial. We would adopt the view expressed by RS Wright J, a judge who had great familiarity with this subject in *In re London Scottish Permanent Building Society*[6] that 'an application for prohibition is never too late so long as there is something left for it to operate upon.' In *Rex* v *North, ex parte Oakey,*[7] Scrutton LJ, after expressly approving this *dictum,* said page 503:

> When the sentence is unexecuted a statement of intention to execute it may be followed by a writ of prohibition, however long a time may have elapsed since the original sentence was pronounced.

In the present case we are disposed to think that the court in its discretion would order prohibition to issue against the Industrial Court prohibiting it to proceed to hear the claim under section 20(1) of the Act on the ground of lack or absence of jurisdiction.

We would therefore allow the appeal with costs here and below.

Appeal allowed.

V T Nathan for the Appellants.
G T Rajan for the 1st Respondent.
T Thomas for the 2nd Respondent.

Note

This case lays down the well accepted proposition that the High Court can issue prohibition if it appears to it that a tribunal has made an error of law going to its jurisdiction, that is, a jurisdiction error.

HABEAS CORPUS — EXTRADITION

Chua Han Mow
v
Superintendent of Pudu Prison

[1980] 1 MLJ 219 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah CJ (Malaya), Wan Suleiman FJ and Hashim Yeop A Sani J

Cases referred to:-

(1) *Schtraks* v *Government of Israel* [1962] 3 All ER 533.
(2) *In re O'Dowd* (1903) 23 NZLR 31.
(3) *In re Prisk* (1903) 22 NZLR 876.
(4) *Reg* v *Richards* 5 QB 926; 13 LJMC 147.
(5) *Ex parte Cross* 26 LJMC 201.
(6) *Ex parte Smith* 27 LJMC 186; 3 H & N 227.
(7) *Ex parte Dauncey* 8 Jur 829; 13 LJ Ex 165.
(8) *R* v *Home Secretary, Ex parte Iqbal* [1979] 1 WLR 425; [1979] 1 QB 264.
(9) *R* v *Lewes Prison (Governor), Ex parte Doyle* [1917] 2 KB 254, 266, 269, 270.
(10) *Re Low Kuan Meng* [1962] MLJ 265.
(11) *Re Osman* [1954] MLJ 237.
(12) *Public Prosecutor* v *Ng Goh Weng* [1979] 1 MLJ 127.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): On June 1, 1978, Syed Othman FJ refused an application by counsel for the appellant for writs of *habeas corpus* directed to the Superintendent of Pudu Prison, Kuala Lumpur to secure the release of the appellant from the said prison where he has been detained under section 10(1) of the Extradition Ordinance, 1958. The applicant was committed pursuant to

the orders of the learned President, Sessions Court, Kuala Lumpur who heard the applications by the United States Government for his extradition to that country to be tried on six counts of offences relating to narcotic drugs alleged to have been committed by him in New York under the United States Code (Criminal Application No 16/78) and on three other counts of similar offences alleged to have been committed by him in California (Criminal Application No 17/78). It is not disputed that the alleged offences are extradition crimes within the meaning of the said Ordinance.

The application to the learned judge was accompanied by various affidavits made by the appellant from which the following facts appear. He is a Malaysian Citizen. On December 21, 1977 he was arrested at the General Hospital, Penang. On April 4, 1978 the President, Sessions Court, Kuala Lumpur committed him to Pudu Prison under section 10(1) of the said Ordinance in respect of Criminal Application No 16/78. On May 12, 1978 another President, Sessions Court, Kuala Lumpur made a second committal order under the same section in respect of Criminal Application No 17/78. It is conceded that both the orders were in fact erroneous since they were made in accordance with the provisions of Criminal Procedure Code and not, which should have been the case, in accordance with Form D of the Second Schedule of the said Ordinance.

The appellant appealed on a number of grounds which in our view can be grouped under three main heads. Firstly, non-compliance with statutory Form D invalidated the detention: secondly, the proper test as laid down in *Schtraks* v *Government of Israel*[1] was not adhered to and finally, the learned judge erred in law in holding that it was not the function of the court to examine whether there was a valid treaty or any other arrangement between Malaysia and the United States, and in not holding that there had been non-compliance with the provisions of section 5(2) of the said Ordinance.

Non-compliance with statutory Form D:

In a nutshell the learned judge held that although the first committal orders were erroneous they could be cured by the simple expedient of directing the committal courts to issue fresh committal warrants in proper form. He accordingly directed them to do so. On February 26, 1979, that is some six months before the hearing of the present appeal, fresh committal warrants were issued to the Superintendent of Pudu Prison by the committal courts. It is now said on the authority of a statement of Lord Reid in *Schtracks'* case, *supra,* that the learned judge had no power to issue fresh committal warrants. Briefly what Lord Reid said was that the court is not entitled to receive further evidence in a *habeas corpus* proceeding. The short answer to counsel's contention is that a fresh committal warrant is not fresh evidence.

It is established law that a warrant of commitment erroneous in form, even where such error makes it invalid as an authority in law for the detention of a prisoner, can be cured by the issue of a subsequently validly drawn warrant by the competent authority, and that such warrant justifies the continuance in prison of a person who, before the

issue of such warrant, may have been held in custody without lawful authority. In *Re O'Dowd*[2] the magistrate pronounced judgment sentencing the applicant to three months' imprisonment, but the warrant was wrongly drawn up with the words 'three months' imprisonment with hard labour' inserted. That the magistrate had no power to do. A rule *nisi* for a writ of *habeas corpus* having been granted and before the case came up for argument, a new warrant was lodged with the gaoler omitting the words 'with hard labour'. It was held that the new warrant was a complete answer to the motion for a rule absolute. In that case the court was only concerned with jurisdiction; as long as there was jurisdiction to make the order or give the judgment that was pronounced a fresh warrant of commitment following the said order or judgment may be substituted for a warrant of commitment that was erroneous in form. The fresh warrant must not therefore be an alteration of the said order or judgment or in respect of an offence other than which was considered when the said order or judgment was imposed. It must express the intention of the court on sentencing the prisoner. That power exists to issue a new warrant to express the true intention of the court, even after proceedings for *habeas corpus* have been commenced and a rule *nisi* issued as was also decided in *Re Prisk.*[3] A very useful review of the English cases is to be found in the judgment and I would with respect reproduce them here (pages 885-6):

> In *Reg* v *Richards*[4] a new warrant was issued a week after the prisoner was lodged in gaol. Lord Dennam said, ' It is impossible not to see that the gaoler has returned good warrants, upon which the parties may be lawfully detained '. A like decision was given in *ex parte Cross,*[5] where a new warrant had been lodged, as here, before a rule for a writ was obtained. The court said the second warrant is an answer to the rule. In *ex parte Smith*[6] the same was held, and in *ex parte Dauncey*[7] the new warrant was issued after the rule *nisi* was granted, as in this case.

A close analogy is also afforded by the case of *R* v *Home Secretary, ex parte Iqbal*[8]. There an immigration officer detained the applicant as an illegal immigrant. The detention order was printed in the alternative and set out alternative grounds of detention under paragraphs 16(1) and 16(2) of section 2 of the Immigration Act, 1971. By mistake the wrong ground of detention was given. The applicant brought *habeas corpus.* On the day of the hearing before the Court of Appeal a fresh detention order was made which was valid. It was held that a writ of *habeas corpus* could not issue when there was a valid order detaining the applicant.

In the face of that formidable array of authority we are satisfied that the fresh committal warrants which were in proper form, issued by the same committal courts following the committal orders before the hearing of the present appeal, are a good and sufficient answer to the application for writs of *habeas corpus.* Where, as here, there is jurisdiction to commit the applicant, formal or technical defects in the warrants of commitment are not a good ground for the granting of the writs: see *R* v *Lewes Prison (Governor), ex parte Doyle.*[9]

The proper test in Schtraks' case:

It was further contended that the depositions taken in the United States were that of accomplices and *agent provocateurs* and applying the test as laid down by Lord Reid in *Schtraks'* case, *supra,* no reasonable jury properly directed could convict the applicant on such evidence. Lord Reid said this (page 533):

> It is not in dispute that the proper test for the magistrate to apply was whether, if this evidence stood alone at the trial, a reasonable jury properly directed could accept it and find a verdict of guilty.

In our view that observation was directed to the trial proper, that is, whether at the hearing before the jury there was sufficient evidence to convict. An extradition proceeding is ni the nature of a committal preceeding [see section 9(2) of the Extradition Ordinance]; and a committal proceeding is not a trial: see *Re Low Kuan Meng*[10] and as such the sole function of the committing magistrate is to adjudicate upon the question whether there is a *prima facie* case against the accused, that is to say, whether there is such evidence that, if uncontradicted at the trial, a reasonable jury properly directed could convict upon it. Where there is a doubt as to the weight or quality of the evidence the committing magistrate should refrain from assessing it but instead commit the accused and leave the duty of resolving the doubt to the trial court: see *Re Osman;*[11] *Public Prosecutor* v *Ng Goh Weng.*[12]

In our view the proper test has been applied. There is a *prima facie* case for extradition and any question with regard to the weight or quality of the testimony is more properly the function of the court having jurisdiction to try the case.

Whether there was a valid treaty or arrangement between Malaysia and the United States and non-compliance with section 5(2) of the Extradition Ordinance:

Let us first look at the relevant provisions of the Ordinance itself. Section 3(1) of the Ordinance, *inter alia,* provides that where an arrangement has been made between this country and any foreign country for the mutual surrender of fugitive criminals, the Yang di-Pertuan Agung may be Order to be published in the *Gazette* declare that the provisions of the Ordinance shall apply to such foreign country. No such order has been made in respect of the United States. The new section 3A provides that where a foreign country (meaning a non-Commonwealth country or a Commonwealth country which is not a prescribed Commonwealth country within the meaning given in the Commonwealth Fugitive Criminals Act, 1967) in respect of which no order has been made under section 3(1) referred to earlier, or the order, if made, is not in force and such foreign country makes a request for the extradition of a fugitive criminal, the Minister responsible may personally if he deems it fit to do so give a special direction in writing that the provisions of the Ordinance be applied in relation to the extradition of that particular fugitive criminal as if there is in force in respect of that foreign country an order under section 3(1). A special direction by the Minister of Law was made under section 3A of the Ordinance in respect

of the appellant on March 21, 1978 (page 108).

The object of the new section 3A of the Ordinance is obviously to provide for the *ad hoc* extradition of a fugitive criminal at the request of a foreign country in respect of which there is no subsisting extradition treaty or any other arrangement with this country so that the provisions of the Extradition Ordinance shall nevertheless be applied to the extradition to ensure compliance with certain established principles in international law relating to the extradition of fugitive criminals. One such principle which the appellant contends had not been complied with is the *principle of specialty* usually embodied in extradition treaties. This in our domestic law is a requirement to be complied with under section 5(2) of the Ordinance before a fugitive criminal can be surrendered to a foreign country. The section provides that a fugitive criminal shall not be surrendered to a foreign country unless provision is made by the law of that country, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to the Federation, be detained or tried in that foreign country for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded.

According to the deposition of the Principal Assistant Secretary of the Malaysian Foreign Affairs (page 65) there is an extradition treaty between Malaysia and the United States. What the foreign affairs officer meant of course was that after she gained Independence in 1957 the Federation of Malaya (later became Malaysia) has not entered into any formal extradition treaty with the United States. In fact on record there is so far only one foreign country which has been the subject of an order made under section 3(1) of the Ordinance and that foreign country is Thailand — see the Extradition (Thailand) Order 1960 — LN 305/60. However, although there has been no order made under section 3(1) in respect of the United States there is in fact an arrangement by way of succession in the form of the extradition treaty between the United States and Great Britain entered into on December 22, 1931 (sometimes referred to as the 'Dawes-Simon Treaty') which although it has not been gazetted nevertheless exists and mutually recognised as between Malaysia and the United States by virtue of an exchange of letters between the two sovereign governments. On October 15, 1958 the American Embassy at Kuala Lumpur addressed an *aide-memoire* to the Malaysian Ministry of External Affairs stating, *inter alia,* that the US Department of State was of the view that the extradition treaty of 1931 between the United States and Great Britain extended to all states and former colonies then constituting the Federation of Malaya. The *aide-memoire* further stated the view of the Department of State that the assumption of the government of the Federation of Malaya by the agreement of September 12, 1957 between the Federation and the United Kingdom of all obligations and responsibilities of the Government of the United Kindom arising from any valid international instrument extended the 1931 Treaty into force between the United States of America and the Federation of Malaya. To this *aide-memoire*

the Malaysian Ministry of External Affairs replied that the Federation Government accepted the responsibilities and obligations of the Extradition Treaty of 1931 referred to and regarded the treaty as binding between the United States and the Federation of Malaya It was also noted that the *aide-memoire* of October 15, 1958 and the Note of the Malaysian Ministry of External Affairs were to be regarded as constituting the agreement in this matter (pages 166-167).

Article 7 of the Dawes-Simon Treaty expressly provides for the *principle of specialty* as follows:

> A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has surrendered.

We therefore agree that it would not be necessary to make a finding whether there is a valid extradition treaty or arrangement between the United States and Malaysia. But for the purpose of satisfying the requirement of section 5(2) of the Ordinance, it will be sufficient if there can be found somewhere an undertaking on the part of that foreign country (in this case the United States) that the *principle of specialty* is guaranteed. The fact that no order has been made under section 3(1) in respect of the United States does not preclude us from examining the Dawes-Simon Treaty of 1931 and the undertaking expressed in the subsequent exchange of letters between the two governments. We have found it as a fact that the 1931 Treaty, although it has not been gazetted, read with the exchange of letters constitutes an undertaking in compliance with the requirement of section 5(2) of the Ordinance.

The appeal is dismissed.

Appeal dismissed.

Karpal Singh for the Appellant.
Zakaria Yatim (Deputy Public Prosecutor) for the Respondent.

Note

This case raises the question of availability of *habeas corpus* to one awaiting extradition proceedings. The court has taken the position that when there is jurisdiction in the court to commit the applicant, formal or technical defects in the warrants of commitment are not a good ground for granting *habeas corpus.*