



At the firm's Annual Dinner 2007. More on pages 22 and 23.

## Shook Lin & Bok: 90 years and going strong

Welcome to the special commemorative issue of the newsletter. This year the firm reaches a major milestone: the 90th anniversary of its founding. Considering that the country celebrated its 50th anniversary only last year, this is an achievement to be justifiably proud of. The success and longevity of the firm is built upon the toil and sweat of its founders and forefathers. Building on those foundations laid down and strengthened over the years, the firm looks ahead to the next milestone, its centenary, focused on its task of delivering exemplary service.

It is opportune in this special issue to reflect on the firm's history and the personalities past. We begin with a tribute to our founders Yong Shook Lin and Tan Teow Bok, and continue with glimpses of the faces and events from the past, inside.

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## The story so far...

### The early years (1918-1938)

In 1918, Yong Shook Lin was called to the Bar of the Federated Malay States. He was the first Chinese lawyer to be admitted to the local Bar. A graduate from Cambridge University, he proceeded to set up his practice under the style of Messrs Yong Shook Lin, in Kuala Lumpur, in the then Malaya.

The firm held the distinction of being the first to be established by a local advocate and solicitor. It occupied a three storey building at 89, Cross Street. The practice revolved round company and estate matters, tin-mining agreements, land matters and work for the Chettiah business community, reflective of the principal economic activities of the time.

### Tan Teow Bok joins the firm (1938)

In 1938, Shook Lin was joined by Tan Teow Bok, a Queen's scholar who read law at Oxford. The firm then took up its present name.

The Japanese occupation saw a slowdown in business activities. The firm evidently did more court work. The law reports show Tan Teow Bok doing criminal defence work in the Japanese military courts and later in the courts of the British Military Administration.

Apart from law, Shook Lin was active in public affairs and was a member of the Federal Legislative Council, serving in its Executive Council both before and after the War.

Shook Lin's son, Yong Pung How, followed in his footsteps and graduated in law from Cambridge. He joined the firm on his return in 1952 and this increased the partnership to 5. His partners were Tan Teow Bok, Thean Lip Ping, Lorraine Osman and Robert K.C. Hoh.

A firm of five was considered very large in those days: "Between 1953 and 1955, Messrs Shook Lin & Bok, reorganised and managed by Pung How, had expanded beyond recognition to become one of the largest and best-known law firms in Malaya. [Extract from Patrick Yu "A Seventh Child and the Law"].

### Lee Wah Bank Building

The firm moved to Lee Wah Bank Building at Medan Pasar in the mid-sixties. The firm occupied two floors of

the newest building in town then located in the business centre called "market square" with a clock tower. It coincided with the firm's active entry into banking law.

### The Singapore Office

In 1965, Thean Lip Ping was sent to Singapore to set up a branch office. It was a time when Singapore lawyers practised freely in Malaysia. Subsequently arising from the separation between Malaysia and Singapore, the Singapore branch became autonomous and continued as an independent law firm bearing the same name.

### Expanding the firm

Over the years, the firm grew steadily in keeping with the growing economy and increasing commercial work.

In 1970, Yong Pung How retired. He was later appointed to the Bench in Singapore and subsequently served as Chief Justice until retirement. Thean Lip Ping was also appointed to the Bench in Singapore. Another partner, Chan Sek Keong became the Attorney General of Singapore and is now the Chief Justice of Singapore.

Tan Teow Bok led the firm from 1970 as Chief Executive Partner for 11 years, until his retirement.

Michael K. L. Wong took over leadership of the firm in 1981 serving until 1991. He sat on the Central Presidential Council of the MCA and was a Central Committee Member. He was appointed as a Senator and Director of Bank Negara, the central bank.

Dato' Param Cumaraswamy took over the helm and held that capacity from 1992 to 1997. Dato' Param was a President of the Malaysian Bar Council and was the United Nations Special Rapporteur on the Independence of the Lawyers and Judges.

This year celebrates the transformation of the firm from a sole proprietorship to a practice with 80 lawyers and 120 staff.

The Chief Executive Partner is presently Too Hing Yeap who has led the firm since 1997. The Deputy Chief Executive Partner is Dato' Dr. Cyrus V. Das who was President of the Commonwealth Lawyers' Association and the President of the Bar Council.



Yong Shook Lin with his family

## Yong Shook Lin

Yong Shook Lin was born in 1898 in Kuala Lumpur. His father Yong Ngee Chai was a businessman who acquired interests in rubber and property. Their family home was one of the shophouses in Pudu.

Shook Lin was educated at the Victoria Institution and after obtaining his Cambridge Senior in 1912, proceeded to England for further studies earning his law degree from Cambridge. He returned to Kuala Lumpur and was called to the Bar in 1918.

Apart from practising law, Shook Lin was very active in public affairs and was a member of the Federal Legislative Council, serving in its Executive Council both before and after the War. It was during the post-war period that he devoted his time unsparingly to the service of the law and the State. He entered the political scene and established himself as a prominent figure in the Malaysian Chinese Association (MCA) which at that time was a component party of the governing Alliance. He was also Chairman of the Malayan Estate Owners Association and the Rubber Producers Council. He was Chairman of the Bar Council of Malaya and was conferred the C.B.E. by Queen Elizabeth II.

In recognition of his contributions to the country, Yong Shook Lin Road in Petaling Jaya, was named in his honour. After a long and distinguished career, Shook Lin passed away on the 3rd of September, 1955 at the age of 57.

In reference proceedings in the court when Shook Lin passed away, the Chief Justice paid tribute to Shook Lin and said, "He was a man who was incapable of relaxing and always gave one the impression that the day was not long enough for the fulfilment of his many duties. But I shall always remember him as a friend, a person anxious and willing to assist in any task on hand and who delighted in helping others. He was, and this stands out in my mind, a very great friend of the Red Cross, and without his help and encouragement they could never have accomplished what they have in this country. Not only was he very generous in his gifts to the Society, but he also took a personal interest in all their doings and went to great trouble to entertain the workers in the field, a group of persons often forgotten."

The Attorney General echoed the feelings and said, "He was a man who if he had wished might have led a life of ease and leisure but instead of that he chose a life of hard work and unrelenting toil, a great deal of it in the service of the people of this country.... He was a man of firm principles, when he decided that a particular course was right and proper, he followed that course with unrelenting determination and he met criticism fairly and boldly."

[From Malayan Law Journal Vol.21 1955]

## Interview with Yong Shook Lin's daughter

Few of us would have known Yong Shook Lin personally. To us he seems legendary and larger than life. Our Adrian Hii and Goh Siu Lin were fortunate to have had the opportunity to meet with Shook Lin's daughter, Mdm Phyllis Yong @ Mrs Hamid Tun Azmi, to gather some insights about her father.

*Please share with us some background about your grandfather's family.*

My grandfather, Yong Ngee Chai was a Hakka migrant from China. He had businesses in Hong Kong and settled there but he moved his wife to Malaya, as she preferred the warmer climate.



Madam Phyllis Yong Hamid Azmi at the interview

My grandfather was a prominent businessman in Hong Kong and after he had made good there, he came to Malaya and invested in rubber plantations. The family home was located in two adjoining shophouses along Jalan Pudu. My grandfather was successful in business and divided his time shuttling between Malaya and Hong Kong.

My grandmother had three sons, Joo Lin, Shook Lin and Loo Lin. The eldest became a businessman. The second was my father and the third became a doctor, but he did not enter the medical profession. He looked after my grandfather's business in Hong Kong.

Every weekend, my grandmother would send us a big pot of yong tau fu, char siew or siew ngap from the famous Pudu stalls.

*What was your father like as a child?*

He was very westernized in his ways and yet very filial to his parents in the traditional Asian way. He was the best behaved of the three sons and always returned from school neat and immaculate, while the other two would have unkempt hair and clothing.

According to my grandmother, they each had long hair which my grandmother would plait. His two brothers would be restless, but my father would sit quietly for my grandmother to do his hair.

My grandmother said that my uncles would spend the money my grandmother gave them for lunch, 10 cents or 20 cents. But my father would save that money and give it back to my grandmother. Understandably, he was her favourite.

My father was a filial son. He carried that trait into adulthood. Every Saturday and Sunday, after office, my father would send us and the driver in the car to my grandmother's house at Pudu to fetch her to our home. He would sit in the porch waiting for her. When we drove

up the long driveway, he would stand up, rush to open the door and escort his elderly mother up the three porch steps. He would take her to the armchair and bring a cushion for her feet. Have you ever seen a modern man doing that now?

So, I say my father, he really was it, very special.

*Was law your father's destiny?*

Yes, right from his childhood that was his aspiration. He graduated from Emmanuel College, Cambridge, at the age of 20. However, local Bar restrictions prevented him from practising until he was 21. So, he decided to spend one year in Hong Kong and during that sojourn, met my mother.

*What motivated your father?*

The opportunity to contribute to society. He was brilliant yet humble. Whenever photos were taken he would prefer to stand at the back. My father did not seek position, his ambition was to be a good lawyer.

*Could you describe for us his strongest qualities?*

His selflessness and generosity of heart. He was firm in his principles and strong in his conviction. He sought no recognition in philanthropy, and donated to schools, eg. Nan Khai School, the Lady Templer hospital in Cheras and various other charities, year after year without the family knowing. When he passed away, many school children came to pay their respects.

He mooted the setting up of the MCA lottery to raise funds to financially assist the villagers who were resettled during the communist insurgency in the Chinese new villages.

He was also instrumental in the establishment of Petaling Jaya as the first satellite town to Kuala Lumpur. He was then on the Kuala Lumpur Town Board. From his domestic staff, he came to know of the plight of lower income workers who were housed in cramped quarters (each room would house 10 people and there would be approximately 60-70 packed into each shophouse) in Kuala Lumpur which posed a fire hazard. The workers were resettled in Petaling Jaya (now regarded as the "old town"), with a railway line at its doorstep. It was in his honour and memory that Yong Shook Lin Road located in Petaling Jaya, was named after him.

*Could you tell us about your family?*

My father was devoted to my mother. For example, during the war, when food was scarce, our meals would consist of tapioca mixed with rice. But father would make sure that my mother's portion was purely rice.

For him, there was no favouritism. When my siblings and I were in England for studies, he sent the same amount of money and goodies to each of us, for example, Mars Bars, biscuits and tins of fruit and butter. These items were rationed in UK after the war but were plentiful in Malaya then.

During the war, the family was supposed to be evacuated to India by boat. At the last minute, my grandmother refused to go. My father listened to her wishes. That is why we remained here, we never left the country. My father was arrested by the Japanese and we didn't know where he was for six months.

After my father married my mother, Yu Tak Fong, he built a house named "Isola" at No. 5, Treacher Road which is the site on which Shangri-La hotel stands today. We later moved to 211, Jalan Tun Razak. In later years, the American Embassy was built opposite us.

My mother during her lifetime, was very active in social work. She was Patron of the Family Planning Committee for 25 years, member of the Discharged Women's Prisoners Committee and member of the Committee for Wayward Girls (Po Leong Kook).

*What family values did your father impart to you?*

He was traditional in his values. He drummed in us the virtues of independence and from young we were taught to stand on our own feet.

My father was strict. But he never needed to raise his voice or use a cane. He had this aura and one stare from him would be enough. For breakfast, he would insist that the children eat 2 raw eggs each. It was something I dreaded, I would surreptitiously pass my eggs to the servant maid standing behind me.

He would never allow us to eat outside at the hawker stalls. But we loved eating there. We would look into his diary to see when he would be away at meetings and on those days, we would sneak out with mother's permission to eat satay at Campbell Road.

If he were free, he would take us out to see the first show on a Friday evening. We would be driven back home. The driver would have brought steaks from the Coliseum and when we passed Campbell Road, my father would say, "You see, all your friends eating there, all those people may die of cholera you know." We would remain quiet, exchanging smiles and secret glances with our mother.

*How many siblings do you have?*

There were six of us altogether.

Siew Chin is the eldest. She is a practising lawyer in New York. My only brother, Pung How, is second. He was a partner in Shook Lin & Bok and later was the Chief Justice of Singapore until his retirement in 2006.

Third is Siew Kuen, an economist. She passed away in 1982. I am Siew Choon, the fourth in the family, and have a degree in Administration and Political Science from the London School of Economics. Siew Lee is the fifth and she qualified as a lawyer. The youngest, Siew Toong, is an architect, she qualified from the University of London with an A.R.I.B.A.

*What advice do you recall your father giving you?*

In a letter dated 15.10.1954 to me, he said, "I may have a temper but I only show it through my mouth and do not keep it in my heart. I suppose that is the reason why doctors have found nothing wrong with me physically. I may be thrifty on myself. I spend very little money on myself - my needs are very few but I have no objection to any of my children (daughters or son) spending any amount of money. You can take it from me that I have never regretted the expenditure of monies I have spent on my children (your sisters and brother).

I took great pains in building up my reputation. Work hard for what you want and preserve my reputation which I leave behind for all of you. That is all that I ask of you."

*Thank you for sharing with us your recollections of your father.*

The family joins me in thanking you all for respecting and preserving our father's memory at Shook Lin & Bok, the organization of his creation.



## Tan Teow Bok

A Penangite, Tan Teow Bok was educated in St Xavier's Institution and was an outstanding student and a Queen's Scholar. He did exceptionally well in Mathematics and was a gifted linguist, having mastered the French language. Tan Teow Bok read law at Oxford and was admitted to both the English and Malaysian Bars.

After being called to the Bar, he was appointed as a Magistrate in Seremban. In 1938, he was invited by Yong Shook Lin to join the partnership where he was to oversee conveyancing matters. During his distinguished legal career, he was known as one of the best draftsmen in the country, known for clear, precise and concise language. He was reputed to have drafted the first debenture in Malaysia.

Michael Wong, the firm's consultant remembers, "He was able to identify legal issues without being cluttered by other issues, thereby helping one to solve the problems at hand. Bok was remembered for his clarity of mind and brevity of expression".

Mrs Leong, a staff member recollects, "Mr Bok was like a father, he was also a very generous man. He paid the staff salaries twice a month. He was a good paymaster too and would also settle the bills of his suppliers twice a month. He used to say, "We mustn't owe people money".

After his retirement in 1981, Mr Bok continued to come to the office every day until he passed away in 1994, after a career spanning 62 years.

## Interview with Tan Teow Bok's daughter

We also caught up with Tan Teow Bok's daughter Audrey, for some reflections about her father.

*In your view, what were your father's most endearing qualities?*

His humility. He was a simple and humble person. Except for a few indulgences, that is food, cigars and liquor, he allowed himself few luxuries or pleasures. He was a person of honour and principle. It was that nature and his basic decency towards others that endeared him to others.

*What were his great loves?*

Other than his work, language was his main love. He was a passionate reader of dictionaries and derived great joy from it, to the last day of his life. To him, that was the greatest treasure trove of knowledge. He would buy new editions of the Oxford dictionary just to keep up with new words and changes in the English language. He was also an avid reader generally. His dictionary was one of his personal effects that we left him with when he was laid to rest.

He was also known for being the man with four pens. This was because he would always have four pens in his pocket with inks of different colours (red, blue, black and fountain ink). His favourite fountain pen ink colour was blue-black. In fact, his batik shirts would always have four pockets, one pocket for each pen.

*You mentioned his indulgences in life?*

Yes, food, cigars and liquor. He had a predilection for cigars, and when I was young, I used to run when he lit up. His stock was ample and once when the distributors ran out of stock, they had to temporarily replenish from dad's stock. Equally abundant was his stock of brandy. I still have them for sentimental value.

*How was your father towards his family?*

He was a devoted father. He would take the family mostly to the beach every school holiday without fail. He also loved the ocean and was an excellent swimmer. He was traditional in his family values and our upbringing. He was the disciplinarian but he never needed to raise his voice or lift a finger, he just commanded obedience from me.

*And his relationship with his staff?*

He was very good to his staff and in return, inspired deep unwavering loyalty from them. To give an example, once the firm's building had a bomb scare. I was then working in the same building. I was concerned that my father who was then rather frail, would not be able to take the stairs in the event of an evacuation. One of the staff Khoo Teck Chye said to me not to worry, he assured me that he would carry dad down if necessary. Another staff Mrs Lee Lye Khuan who was the office manager then, refused to leave the premises saying that if she were to die she would die taking care of the firm.

*Needless to say, your father was strongly committed to the firm.*

Yes, it was his love and he took great pride in it. When he retired, the firm kept a room for him and he continued coming to the office every day to spend his time until the last days of his life.

*Thank you Audrey.*

My pleasure.

## Interview with Michael Wong: Highlights from the firm's history

Michael KL Wong was the Managing Partner of the firm (the position was later renamed Chief Executive Partner) for about 19 years until 1991 when he retired as partner and thereafter, became a consultant to the firm, a position which he holds till today. Among his many appointments, Michael was a member of the Higher Education Advisory Council advising the Minister of Education, a Senator, and a director of Bank Negara, the Central Bank of Malaysia. As a senior previous head of the firm, Michael was bound to have a wealth of experience and knowledge of the firm's history. Our Adrian Hii and Goh Siu Lin invited him to share with us his recollections on the firm's development.

*When did you join the firm?*

I joined as a pupil in 1964. The partners then were Tan Teow Bok, Yong Pung How, LP Thean, Robert Hoh, and Lorraine Osman. There were only two legal assistants (lawyers) employed then. The total strength of the firm including staff was about 30. Yong Pung How was the Managing Partner at that time and he was also my pupil-master.

*How would you best describe the firm then?*

It was a dynamic and progressive practice and very prestigious. Many people aspired to join the firm and the firm attracted the best talents.

*What were the dominant areas of practice for the firm?*

These were commercial work including corporate, banking and conveyancing. Litigation was not as big at first. There was no strict division between litigation and non-litigation for the lawyers. We acted for many big corporations both local and foreign. The corporate team was renowned internationally and we acted for many Australian, British and American companies. We also acted for Bank Negara (the Central Bank) and Kuala Lumpur City Hall. The firm obtained referrals from quite a number of embassies. Litigation gained more prominence in the 80's and 90's during the economic slowdowns of the time which gave rise to an increase in banking and corporate recovery litigation.

*Please highlight some of the distinctive achievements of the firm.*

To start off with, we had some of the top lawyers in the nation. Tan Teow Bok was one the finest draftsmen in the country. In fact, some of the documents drafted by the firm are still being copied and followed in the country today. Yong Pung How was the leading corporate lawyer.



A visionary leader, he was largely instrumental in making the firm not only well known locally but also internationally. It was a privilege for me to have apprenticed under him. LP Thean was known for his advocacy and his skill in drafting court pleadings.

The firm was the first to do merger and domestication exercises for several foreign companies carrying on business in Malaysia. We helped draft the legislative changes to the Companies Act to accommodate the establishment of the first unit trust in the country.

We advised on the establishment of the first discount house in Malaysia. We advised Bank Negara on many matters pertaining to the banking industry. In addition to this, the firm drew up the first comprehensive vesting order for the mergers of financial institutions. We were the first legal firm to summarise the tax proposals contained in the Annual Budgets for circulation to clients. The firm was the first to use the new IBM typewriters and magnetic tape word processors.

*What was the management structure of the firm like?*

There was collective decision making by the partners. Apart from regular meetings, there were impromptu meetings allowing for quick and nimble decision making.

*You have led a busy and packed career. How did you, find the time?*

Someone once give me these words of wisdom: "Time is created". Much time spent on unproductive activities can be better utilised. The key is time management. I made time for the other activities at night and during the weekends.

*What is your advice for young lawyers?*

Faced with a choice between experience and money, always choose experience. The rewards will soon follow.

## A trip down memory lane

These are pictures from the firm's 50<sup>th</sup> Anniversary celebrations in 1968, held at the Federal Hotel. Tan Teow Bok and Mrs. Yong Shook Lin cut the anniversary cake.



## Elevation of Partners

The firm is pleased to announce the elevation of three of its Limited Partners to General Partners for 2008.



Yoong Sin Min

Yoong Sin Min graduated in Law from the University of Singapore and was called to the bar in 1985. She is a partner in the firm's Banking and Financing Litigation department.



Khong Mei Lin

Khong Mei Lin obtained her law degree from the University of Adelaide and was admitted to practice in 1989. She is a partner in the Corporate, Banking & Finance and Conveyancing departments.



Mohanadass Kanagasabai

Mohanadass Kanagasabai holds a Bachelor of Laws degree from the University of Buckingham. His admission to the bar was in 1991. He is a member of the Council of the Malaysian Institute of Arbitrators. Mohan is a partner in the Building Construction & Arbitration and General Litigation departments.

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## The Firm admits New Partners

In addition, the firm also welcomes two new members to the ranks of its Limited Partners this year.



Kelvin Loh Hsien Han

Kelvin Loh Hsien Han was born in Kuala Lumpur and is a graduate in Commerce and Law from University of Sydney. He was called to the bar in 1999. His specialization is Corporate Banking and Finance and Conveyancing law.



Lau Kee Sern

Lau Kee Sern hails from Muar, Johor, and obtained his LL.B from the University of London and was admitted to practice in 2000. His area of practice is Banking and Finance Litigation.



## Commonwealth Law Conference 2007

The firm's Dato' Cyrus Das (above) and Steven Thiru were invited to speak at the 15th Commonwealth Law Conference in Nairobi, Kenya on 9th to 13th September 2007. This marked the first time in over a quarter of a century that the conference has been held in Africa. A biennial event, the conference comes under the auspices of the Commonwealth Lawyers' Association.

The Association traces its roots to 1955, formed as a conference of representatives from the legal community in Commonwealth countries sharing a common historical bond of British colonial governance and legal heritage, to promote and advance the rule of law and legal professional standards throughout the Commonwealth.

Dato' Das was the President of the Association for the 1999-2003 term. The theme for the 2007 Conference was Governance, Globalisation and the Commonwealth. Dato' Das delivered a paper on Access to Justice as a Constitutional Right, while Steven Thiru spoke on Continuing Professional Education in Malaysia.

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## Extract from Cross-border Quarterly on Islamic Finance

The following is an extract from the article "Islamic finance legal experts Carving out a niche" in Cross-border Quarterly July-September 2007 published by Practical Law Company of the United Kingdom, a leading provider of legal know how and intelligence, on the impact of the growth of Islamic finance on the cross border legal market and the international legal expertise in this area, with a reference to the firm's Islamic Finance practice.

"In recent years, countries throughout the Middle East have experienced strong economic growth... As investment opportunities grow, so too does the demand for Islamic finance techniques, which enable Muslims to invest in compliance with Islamic law (Sharia). In the last few years, Islamic finance has grown considerably as has its global profile. Non-Muslim investors are increasingly looking to invest in Sharia-complaint products to tap into opportunities in the Middle East and western companies are beginning to offer Islamic finance products to attract Muslim investors....

While the UK strives to be a key Islamic finance centre, in South East Asia Malaysia has already achieved this. The multi-faith but Muslim majority country embraced Islamic finance at an early stage. In 1983, the government introduced legislation permitting the granting of licences for Islamic banks to operate in the country and in the early 1990s, the Central Bank allowed conventional banks to offer Islamic banking products. In recent years, Malaysia has become a key market for the issue of Sukuk....

Outside of England and the Middle East, Malaysia is one of few jurisdictions to have developed legal know-how in Islamic finance, supporting the government's determination to establish the country as a regional hub for this type of work as well as a leading global centre. Lawyers report that more and more clients are seeking advice on Islamic financing in preference to conventional forms of financing. Despite this, however, there are still relatively few Islamic finance experts there... Jal Othman at Shook Lin & Bok is also establishing a reputation for Islamic finance, in addition to his skills in more conventional forms of financing. Among other credits, Othman and his team advised on the first Islamic financing of a Chinese power plant project."

## Case Updates

### Land

#### Lien-holders' caveats: *Staghorn* - the sequel

The Federal Court has reversed the decision of the Court of Appeal in *Hong Leong Finance Berhad v. Staghorn Sdn Bhd* (reported in the 2nd Quarter 2005 issue of the newsletter). The Court of Appeal had earlier affirmed the High Court's decision to set aside the order for sale on the ground that the statutory lien over land created in favour of Hong Leong Finance under section 281(1) of the National Land Code (the Code) was invalid, as a lien can be created only:

- (a) by the deposit of title by the registered proprietor of the land itself, and
- (b) to secure a loan granted to the proprietor itself, but not to a third party.

The two registered proprietors of the land in the case agreed to sell the land to Staghorn. The Court found that subsequently Teck Lay Realty Sdn Bhd ("TLR"), a sister company of Staghorn became substituted as the purchaser and paid the balance of the purchase price. TLR then received the title and memorandum of transfer executed by the vendors but did not have the title registered in its name. Subsequently TLR deposited the title through another party with Hong Leong Finance to secure a loan granted by the latter to a third party borrower. It was intended that a Charge under the Code be granted by TLR to Hong Leong Finance once TLR was registered as proprietor, but the memorandum of transfer and the Charge could not be registered due to a private caveat on the land.

In the meantime, Hong Leong Finance entered a lien-holder's caveat, under the Code against the land. The borrower having defaulted, Hong Leong Finance enforced its lien-holder's caveat and obtained a court order for sale of the land. The land was sold by public auction and the certificate of sale was issued. Before the transfer to the purchaser took place, Staghorn applied to intervene in the court proceedings to set aside the order for sale and the sale itself, which application the High Court allowed. The decision was partially affirmed by the Court of Appeal.

The common ground which underpinned the decision of all three judges in the Federal Court reversing the Court of Appeal's decision, was that Staghorn did not have standing to intervene in the proceedings as it had divested itself of its rights in the land to TLR and further, it had applied too late in the day to intervene.

Of greater interest and significance to the banking community however, is the view of one of the Federal Court Judges, who in his judgment discussed the position relating to third party lien-holder's caveats.

In the Judge's view:

- (a) A lien may secure not only a loan to the proprietor, but also a loan to a third party.

- (b) The title deed need not be deposited by the proprietor itself. The act of depositing may be done by another party with the consent or authorization of the proprietor.

- (c) For loans to a third party, the judgment required to be obtained under section 281(2) of the Code before enforcement of the lien may take place, would be a judgment against the third party borrower and not the proprietor.

These views were those of only one judge, as the other two Federal Court judges did not deal with these issues. However the judgment should be strong authority for the propositions on lien-holders' caveats as set out above.

### Banking

#### Whether vesting order from High Court of Malaya effective throughout Malaysia

In Issue 2 2007 and Issue 3 2007 of the newsletter we reported on two divergent decisions of the High Court, namely *Lee Hui Jian v. Public Bank Berhad* and *Southern Bank Bhd v. Pantai Bayu Emas Sdn Bhd*, on the issue of whether a vesting order made by the High Court of Malaya (pursuant to section 50 of the Banking and Financial Institutions Act to give effect to a transfer of loan assets from one financial institution to another under a merger exercise between them), would be effective to transfer loan assets situated in Sabah or Sarawak (i.e. outside of the territory of Peninsular Malaysia).

The Judge in *Lee Hui Jian* held that the vesting order would not be effective to vest assets in Sabah and Sarawak whereas the Judge in *Pantai Bayu Emas* held to the contrary.

The decision in *Lee Hui Jian* spawned many challenges to the validity of vesting of loan assets located in Sabah and Sarawak, i.e. where the loans were granted in Sabah and Sarawak, but the vesting orders were made by the High Court of Malaya.

The Court of Appeal has affirmed the decision of the High Court in *Pantai Bayu Emas*, which should bring a resolution to the issue. Nevertheless, the defendant in *Pantai Bayu Emas* has on 24th March 2008 obtained leave to appeal further to the Federal Court and the appeal is pending a hearing date.

#### Bank loans are subject to Bank Negara limitations

The ability of financial institutions to give loans is controlled by any limitations or restrictions imposed by Bank Negara (the Central Bank). This was the decision of the High Court in *Solitaire Land Sdn Bhd v. Hong Leong Bank Bhd* [2007] 3 MLJ 756.

The defendant bank granted credit facilities to the borrower, the plaintiff, which included a term loan of

RM2 million to finance the foundation works and infrastructure of a housing and commercial project being developed by the borrower.

Two months after the facilities were approved, the Asian Financial Crisis hit and in December 1997, Bank Negara announced a raft of measures to restore macroeconomic stability to the economy, including the tightening of lending to the property sector. In a Guideline dated 16th December 1997 issued to all banking institutions, the Central Bank directed that in the situation of tight liquidity, priority for access to credit was to be given to productive and export sectors, and banks were to be selective in lending to the property sector. With the exception of factories and industrial buildings, no credit facilities should be granted to property projects where construction had not started. For projects where construction had started, and if they are viable, credit could be extended for projects with residential properties costing below RM150,000.00. Other projects should preferably be deferred. For projects that are no longer viable, the financing should be reviewed.

A term of the loan agreement with the borrower provided that in the event by reason of the enactment or change of law or the making of any request or direction from Bank Negara or other authority, the Lender is of the opinion that it has become unlawful to perform or it is otherwise prevented from performing its obligations, then its obligations to continue the facilities shall be terminated.

Acting on the Bank Negara Guideline, the bank decided to cancel the term loan and the decision was conveyed to the borrower, but at the latter's request to draw down RM500,000.00 to pay its completed earthworks, the Bank informed the Borrower that the facility was to be reduced to RM500,000.00 instead, with immediate effect.

The borrower initially accepted this, but later filed the suit against the bank claiming wrongful withdrawal of the balance of the facility. The court dismissed the suit, holding that the bank was bound by the Bank Negara Guideline and the bank's action was justified by the directions from Bank Negara. The Judge noted the provisions of section 67(a)(ii) of the Banking and Financial Institutions Act 1980 which authorized Bank Negara to specify limitations, terms and conditions in respect of giving of credit facilities by financial institutions.

The Judge found that for the borrower's project, construction was to be regarded as not having lawfully commenced, as the borrower did not comply with the statutory provisions on regulatory approvals for the project. The bank acted lawfully by reason of both the Guideline and the contractual provisions of the loan agreement.

## Intellectual Property

### Trade Marks

In *Godrej Sara Lee Ltd v Siah Teong Teck & Anor (Part 2)* [2007] 7 MLJ 164, the applicant filed an application for

registration of the trade mark "GOODKNIGHT" for inter alia, mosquito repellent mats and coils. The application was objected to by the Registrar of Trade Marks on the ground that an identical trade mark (cited mark) had been registered for the same goods by the respondent. The applicant then filed an application to remove the cited mark under section 46(1)(b) of the Trade Marks Act 1976 (Act) on the basis that the cited mark had not been used by the respondent for a continuous period of three years up to one month before the application to remove the cited mark was filed, i.e. between 5 January 2004 to 5 January 2007.

In allowing the application, the High Court affirmed an earlier High Court decision (*Industria De Diseno Textil, SA v Edition Concept Sdn Bhd* [2005] 3 MLJ 347) that computation of the period of non-use commences after the trade mark is entered upon the Register. The High Court found that there was no use of the cited mark by the respondent during the relevant period. The respondent's claim that there was use of the cited mark by Sri Dapat Sdn Bhd, a third party in a purported application to the Pesticides Board was dismissed as the alleged use was outside the relevant period and was not use by the registered proprietor or registered user of the trade mark.

Further, the High Court said that use must be use on or in relation to the goods which would include affixing the mark to the goods or in an advertisement, circular or catalogue, which was not the case here.

The respondent also sought to rely on the exception provided under section 46(4) of the Act which provides that removal under section 46(1)(b) will not be granted if non-use is due to "special circumstances in the trade". The respondent claimed that it had not used the cited mark because use would result in a conflict of interest as Sri Dapat Sdn Bhd had entered into agreements with third parties to manufacture and sell other brands of mosquito coils.

The High Court dismissed this ground as baseless. The High Court said that firstly, such conflict of interest does not constitute "special circumstances in the trade" which must be circumstances which are peculiar, abnormal and external and non-use of this nature was a purely commercial choice and was not influenced by any external circumstances. Secondly, the purported conflict relied on by the respondent was unrelated to the respondent in any way whatsoever as the agreements were entered into by Sri Dapat Sdn Bhd.

Finally, the respondent suggested that the High Court's power to remove a trade mark under section 46 is discretionary by drawing an analogy with the High Court's power under section 45. In dismissing this proposition, the High Court said that unlike section 45 of the Act, the wording of section 46 does not use the words "it thinks fit" and is thus more straightforward in that if it is shown on the facts that the trade mark which is the subject matter of the action has not been used during the relevant period, the trade mark ought to be removed.

## Recruiting And Retaining Talent In Today's Legal Marketplace



*Abridged version of paper presented by the firm's chief Executive Partner Too Hing Yeap at the Asia Pacific Law Firm Management Conference 2007 organised by The Asia Business Forum on 29th and 30th November 2007 in Singapore.*

*The summit drew together Managing and Senior Partners of leading law firms in the region including from Singapore, Australia, Malaysia and Hong Kong for broad ranging discussions on the challenges and opportunities presented by today's complex environment, in managing and growing law firms, winning clients and recruiting and retaining talents.*

The general perception is that if one has money and is prepared to pay there would be no difficulty in employing talent and in retaining them.

As many law firms have found out, this is very often not the case in today's market place. The reality is that good lawyers are hard to come by and there are never enough of them. To be sure, if one is not too picky about the quality of lawyer one is recruiting, there is generally not much difficulty in recruiting lawyers.

When we talk about "good" lawyers or talent in the legal profession we are talking about lawyers who not only have a very sound grasp of the law but those who are able to navigate through a host of facts, cover all relevant issues, separate the relevant from the irrelevant, and consistently come out with high quality solutions for the clients. We are talking about lawyers who are effective in discharging their mission statements. Stories abound of lawyers who render voluminous opinions which are of no use to their clients. There are also cases of lawyers who will cover all the issues, read all the relevant cases yet provide no answers or definite conclusions to their clients in their so-called advice. You may say it is due to a lack of confidence or lack of courage, but whatever the reasons, you have in such instance a lawyer who is not able, despite his knowledge of the law, to apply that knowledge competently to provide solutions for his clients.

Some of the desired qualities described require (even in the case of lawyers with talent and potential) time and repeated exposures to similar problems to develop. In many instances the talent does not stay with the law firm long enough for these qualities to be developed or their temperament to mature, let alone for such talent to be developed to their maximum/fullest potential. This underscores the importance of not only recruiting the right lawyers but also the equally important need to have in place a strategy to retain talent.

Unless the partners of a firm plan to do everything themselves or for the firm not to survive or last beyond the current crop of partners, recruiting and retaining talent is probably one of the most important and challenging tasks facing partners of law firms today.

Theoretically, if partners of a firm and their lawyers are already working at full capacity, and the number of lawyers remain the same, each passing year (with its increasing operating costs) will see a gradual decline in the income of the firm – unless one is able to increase the gross income of the firm.

One way to overcome this problem is to increase the firm's absolute capacity to take on more work by recruiting more lawyers.

However, as we all know it, it is not just a question of increasing the number of lawyers in the firm. Increasing the number of lawyers also increases the costs of operation. One can stay ahead only if the increased revenue generated by the increased number of lawyers exceed the increased costs occasioned by such increase in the number of lawyers.

Unless your lawyers are good they will not be able to generate the kind of income needed to off-set the increased costs and unless your lawyers are good, very good in fact, you could end up losing business to other law firms who are perceived to be "better" or more effective – and that can translate into lower earnings for the firm.

Add to that, the competition of the market place with competitors offering to do the job for lower and lower fees and you have an idea of the difficulties that are produced by the free market.

The point is that notwithstanding all the problems described above, which all law firms have to face, one has a better chance to survive (if not do well) if one can recruit and retain talent.

The competition amongst law firms for talent is very intense. Law firms can no longer sit-back and wait for applications from lawyers to come in. If one does that, it is unlikely that one will get the "best" or the cream of the crop.

The reality is that if one for whatever reason is not able to recruit talent, then with no infusion of fresh talent to lead the next generations, the firm will have great difficulty in facing up to the relentless competition of the market

place. One will either end up being a second or third rate law firm or a law firm where survivability may be an issue.

### **Universities, forum, debating competitions-a leg-up for law firms**

In the fight for talent, law firms go to great lengths to attract talent. Some approach law faculties in the various universities to introduce their best students to the partners. Promising students are often identified/ interviewed/ wooed before they graduate and jobs offered to them.

### **Image as a recruitment tool**

In recruiting talent it pays to take some action to ensure that a proper or desired image of the firm is projected or exposed to prospective applicants.

Most talent coming on to the market place these days are very computer-savvy and among the places they will first check will be the firm's web-site which they can access on the internet. The thing to bear in mind is that if, for example, your firm's web-site gives the impression of a dull and uninteresting law practice whereas the competitors' come across as dynamic and fresh, some talent may be drawn away from your firm. The web-site is of course not the deciding or only factor yet it certainly helps if it gives a positive impression to whomever is reading it. Other sources of initial information that can have an effect in formulating impressions in the minds of young talent are write-ups in professional journals and publications. One cannot just ignore these things simply because very often your competitors may be putting in a lot of effort to burnish their image and if one is not careful one can lose out in the hunt for talent.

Giving talks to students or participating at forums where talent have a tendency to attend helps in projecting the image of a firm that is very much engaged with current legal issues of the day and that its partners' interest in the law is still strong.

The point to be made here is that it helps your recruitment efforts if the image of the firm is perceived by prospective applications as being one that is professional, progressive, and in tune with the times amidst the changing landscape. Conversely if the prospective applicant has a "poor" impression or a negative impression drawn from a poor image of the firm, it is unlikely that the talent will even apply to the firm, let alone come for an interview.

### **Work environment**

A lot of applicants these days do a lot of homework/ research about the firm they apply to concerning their reputation, work environment, pay structure etc, before applying to such firms.

Applicants will normally apply to more than one law firm. Obviously a firm with a comfortable work environment with adequate research and back-up facilities is more attractive. Lawyers tend to get demoralized if research facilities and back-up staff are inadequate or deficient and they, the lawyers end

up having to make do with inadequate research or having to do non-legal, "clerical" or administrative work.

The existence of a friendly environment where Senior and Junior Lawyers mix, where the Junior Lawyers can receive help and guidance from the Senior ones, also goes a long way in creating the right kind of Esprit de Corps – and in enhancing the chances of retaining talent.

In some firms, lawyers, particularly the junior ones, are encouraged to check and discuss with other lawyers in the firm if they encounter difficulties in their work without any adverse inference being drawn against them (provided they have done all the necessary background work). This kind of a leveraging of the firm's collective experience goes a long way towards the creation of a comfortable work environment.

The atmosphere can be competitive but so long as it is generally friendly and collegial it will generate the kind of environment that is more conducive to talent staying with the firm.

### **Career path**

One has a better chance of recruiting and retaining talent if the candidate can see that if they are suitable or good, the firm has a career path for them.

Generally this would involve telling them the kind of work the lawyer will be exposed to and trained for with a view of them excelling in the chosen field at some point of time in the future. The lawyer's area of responsibility, prospects for promotion with at least a general indication of a time line, if told to the candidate, helps.

It is good to discuss these things with the talents up front because it demonstrates a long term commitment on the part of the firm. Many lawyers these days do not want to run the risk of working for a firm for a few years, only to find that there are no longer term prospects for them. They are then told, for instance, that the firm has no intention of enlarging its partnership.

### **Opportunity to learn**

The firms' commitment to training and enhancing the skills of its lawyers often ranks very high on the list of important criteria, in the minds of young talent. In some cases it can be the tipping point between choosing to join one firm over another.

Ours is a profession where ultimately skill in the craft is what separates a good or outstanding lawyer from a mediocre one. The firm that can show that it is prepared to commit resources to train, expose and help its young talent to achieve the pinnacle has the edge in the recruitment arena.

### **The firm's philosophy and its vision**

This is important to many lawyers coming on to the job market today. They want to know what the firm whom they have applied to, stands for; its vision and goal for

the future. If this matches what they perceive as what they would like to be associated with, then there is a better chance they will join the firm. Such vision or good does not have to be something ground-breaking or original but it must at least be something which a good or serious practitioner can identify with and would be proud to be associated with.

Good lawyers like to know that the firm they are joining are noted, *inter alia*, for its professionalism and integrity and where talent, skills and efforts will be recognized and appreciated by the bosses.

### **What has not worked**

There are a growing number of cases of young lawyers attached to good firms and drawing a good salary leaving after a few years of employment with the firm.

These are cases where for some reason or other the lawyers get disillusioned with their firm and in some cases, the practice itself. They feel that even though they are paid/rewarded reasonably well, the firm does not really have long term plans for them. They feel that the firm, whilst paying them well, is merely trying to get maximum returns from them by working (more like overworking) them to death.

In cases like these, the complaints is really not so much about overworking (although invariably they are overworked) as it is about the firm whom they work for being perceived to be cold, mercenary and uncaring.

If the firm is serious about attracting and retaining talent, these issues must be addressed and resolved by the partnership.

One has to do many things at the same time depending on the circumstances prevailing but one thing that can help in enhancing the chances of retention is where the partners are able to put a "human face" to the whole partner-lawyer/employer-employee relationship. This is where a point is reached where the talent does not perceive the partners as viewing them as nothing more than a digit in a numbers game or beasts of burden helping the partners generate income, but a colleague or a person whose welfare they genuinely care for and whose future in the firm is important to them.

Whilst earnings, profitability and performance are important elements in one's relationship with one's lawyers, the perception that the firm or its partners care, have the long term interests of the lawyer at heart, appreciate the efforts, sacrifices and difficulties that a lawyer goes through to produce the work for the firm, goes a long way in contributing to a longer term relationship.

## Judicial Control of Administrative Action : Vistas in Malaysian Public Law



*Abridged version of paper presented by Steven Thiru at the 20th Lawasia Conference, Hong Kong, 5th to 8th June 2007*

### The evolution of judicial control of administrative action

- The emergence of administrative law, as an important facet of public law, is universally recognized.

The plaudits for administrative law :-

" ... the outstanding legal development of the 20th century."  
(*Vanderbilt's Introduction to Schwartz, French Administrative Law and the Common Law World*, xiii (1954))

" ... the greatest achievement of the English courts in my judicial lifetime."  
(*per Lord Diplock in Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617)

- At the heart of this epochal development is the judicial control of administrative action that the courts exercise through judicial review.
- Judicial review is today a potent weapon in the armoury of the courts; the dividing line between the fundamental rights of private citizens and capricious administrative behaviour.
- The growth of judicial review is a direct result of the inevitable expansion of administrative powers in the modern welfare state, and the resultant "executive hegemony", which has impinged on the rights of individuals and impacted on a whole host of activities in civil society.
- The advent of administrative powers in the 20th century United Kingdom:-

" Since the 16th century and except in time of war, never has a government possessed more power than it has today. Never has it spent more money, employed a greater army of people, imposed so many regulations, passed so many laws, raised so much in taxation, operated in so many spheres or exercised a wider patronage."

(*Lord Hailsham, The Dilemma of Democracy 1978*)

- The common law courts were quick to recognize that the rule of law required that uncanalised powers in the hands of the administration should be subject to judicial control to balance individual rights and legitimate administrative endeavours.
- Judicial review was resorted to and it has proven to be "one of the most legally fertile areas" of the common law in the face of the exercise of administrative powers in an abusive manner :-

" If, as some thought, the common law had proved so senile and impotent that it could not develop to meet this change in society, the rule of law would not have regulated administrative action. Governments are not notorious for introducing legislation which limits their own powers. Happily, the common law has proved to be fertile not impotent."

(*Lord Browne-Wilkinson, Foreword to Supperstone & Goudie, Judicial Review 1992*)

- The common law doctrine of ultra vires is the foundation of judicial review and it is broadly applied to every executive action, or inaction, which affects the rights of citizens.
- A whole range of administrative activities were therefore brought within the compass of judicial control as to their vires, on the footing that:-
  - (1) every executive action must have a legal basis to it, and
  - (2) every legal power must be exercised within its limits, in good faith and reasonably to achieve the objective of the power.
- It is evident that the control of administrative action through judicial review is essentially the product of judicial creativity and activism. In the result, the courts have been able to define appropriate administrative behaviour.
- But, on the other side of the coin, is the executive retort that judicial review has "... begun to substitute government by unelected judges for government by elected ministers" (Michael Howard, the former Home Secretary, *The Times* (London), 1 Dec 2001).

### The genesis of judicial control of administrative action in Malaysia

- Malaysia has also experienced extensive growth of governmental powers and bureaucracy since the late 1970's and we continue to see the conferment of wide discretionary powers on our administrative bodies.

- The Malaysian judiciary, like their English counter-parts, have been largely alive to this threat of unbridled administrative powers and our courts have developed a system of judicial control, through a vibrant judicial review jurisdiction, to repulse the threat.
- For a long time, our administrative law was primarily based on the common law and statute-law.
- As a former English colony, Malaysia has strong common law roots and we inherited the ancient (17th century) prerogative writ jurisdiction of the Court of King's Bench, which is the historical fount for judicial review in the United Kingdom.
- Thus, locus classicus English cases such as *Ridge v Baldwin* [1963] 2 All ER 66 (on procedural fairness), *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (on jurisdictional errors of law), *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 (on unreasonableness), *Padfield v Minister of Agriculture, Fisheries & Food* [1968] 1 All ER 694 (on the exercise of discretionary powers), *Council of Civil Service Union v Minister for Civil Service* ("CCSU") [1985] AC 374 (Lord Diplock's 4 heads of judicial review) and *Bugdaycay v Home Secretary* [1987] 1 AER 940 (the anxious scrutiny of executive conduct) are all today part of the corpus of Malaysian administrative law.
- The statutory basis of judicial review actions in Malaysia is provided by in section 25(2) read with Para 1 the Courts of Judicature Act (CJA) 1964.

#### Section 25(2) CJA

Without prejudice to the generality of subsection (1), the High Court shall have the additional powers set out in the Schedule.

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

#### Para 1

##### *Additional Powers of High Court* *Prerogative writs*

Power to issue to any person or authority, directions, orders, writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

### **The dawn of a new era: a constitutional dimension to judicial review in Malaysia**

- Judicial control of administrative action in Malaysia enjoyed a renaissance period in the late 1990's when our "trail-blazing" Court of Appeal established a constitutional foundation for judicial review actions.
- Malaysia has, as its supreme law, a written constitution. This is the Federal Constitution 1957, which is based on the Westminster model and it provides for a system government with three distinct organs of state; a bicameral legislature, a cabinet style executive government and an independent judiciary.

- Our constitutional scheme is underpinned by the doctrine of separation of powers that diffuses legislative powers executive powers and judicial power respectively between the three organs of state. Thus, the Federal Constitution vouchsafes that:

" ... no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial Branches of government, compendiously expressed in modern terms that we are a government of laws, not of men." (*Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187).

- The principal courts in Malaysia are the apex court: the Federal Court, the intermediate appellate court: the Court of Appeal and the court of first instance in all judicial review actions: the High Court.
- In the Westminster-style constitution, judicial power is vested in the hands of the judiciary and it is this judicial power that enables the judiciary to ensure, in the exercise of its supervisory jurisdiction, that the executive acts in accordance with law.
- Article 121 of the Malaysian Constitution previously provided that the judicial power of the Federation vested in the two High Courts and such inferior courts as might be provided by federal law.
- However, there were a raft of judicial review cases in Malaysia in the late 1980's where the courts repeatedly impugned the exercise of discretionary powers by the executive. The executive responded by amending Article 121 and the reference to the vesting of judicial power on the judiciary was removed.
- This attempt to whittle down judicial power, and hence the judicial review jurisdiction of the courts, failed because of a basic canon of constitutional interpretation. It was alluded to by the Privy Council in *Liyange v The Queen* [1967] 1 AC 259 (per Lord Pearce) :-

" ... Manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature. The constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by the executive or the legislature."

- Professor Wade has also noted that judicial review "... is a constitutional fundamental which even the sovereign parliament cannot abolish" (Wade, *Administrative Law* OUP, 1982).

- Next, the Federal Constitution contains a chapter (Part II) on fundamental liberties, which includes two important humanizing provisions that house the right to judicial review and which are capable of extending its reach into new horizons.

*Article 5(1) – the right to livelihood*

No person shall be deprived of his life or personal liberty save in accordance with law.

*Article 8(1) – the right to equality*

All persons are equal before the law and entitled to the equal protection of the law.

- Our Court of Appeal has held that judicial review of administrative action in Malaysia is a constitutional right :-

“ [We] are of the view that the liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by Article 5(1) of the Federal Constitution.”  
(*Sugumar Balakrishnan* [1998] 3 MLJ 289)

- In establishing a constitutional foundation for judicial review, our courts have relied heavily on Indian constitutional jurisprudence on their Articles 21 (on procedural fairness) and 14 (on equality), which are equivalent to our Articles 5(1) and 8(1) respectively.

### Malaysian common law on ouster clauses and jurisdictional errors

- The *Syarikat Kenderaan Melayu Kelantan* case (“SKMK”) in 1995 was the first in a series of cases where our resurgent Court of Appeal began to change the face of administrative law in Malaysia.
- A common feature in many of our statutes is the conferment of vast administrative powers on the executive through statutory provisions couched in extremely broad language coupled with the inclusion of privative clauses to exclude or qualify judicial review.
- The Court of Appeal in the *SKMK* case was faced with such an ouster clause, viz, section 33B(1) of the Industrial Relations Act 1967. The clause purported to insulate decisions of the Industrial Court from judicial review.
- The scope for judicial review in Malaysia had been severely limited by the Privy Council decision of *South East Asia Firebricks Sdn Bhd* [1981] AC 363 (“the *Firebricks* case”), an appeal from our Federal Court, where the Board advised that an ouster clause immunized decisions made within the jurisdiction of the decision maker however wrong the decision may be.
- The Court of Appeal in the *SKMK* case refused to follow the Privy Council in *Firebricks* on the ground that the Board had failed to truly appreciate the effect of the earlier House of Lords decision in *Anisminic* that had jettisoned the esoteric and obsolete distinction between

errors of law that went to jurisdiction and errors of law that did not.

- Relying on, inter-alia, the House Lords cases of *Re Racal Communications* [1981] AC 374 and *O’Reilly v Mackman*, the Court of Appeal recast our common law as follows :-

“ An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision...”

Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause however widely drafted.”

- The Court of Appeal went on to declare that the “categories of errors of law are not closed”:-

“ It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.”

- Thus, the Court of Appeal in the *SKMK* case put Malaysian law on ouster clauses on par with the English common and in its sweep, the decision denuded the efficacy of ouster clauses and enlarged the scope of judicial review.

### From common law natural justice to “procedural fairness” as a constitutional right

- The modern rebirth of the twin pillars of natural justice (*audi alteram partem* and *nemo iudex in causa sua*) is the common law doctrine of procedural fairness/procedural impropriety, viz, every administrative body has a duty to act fairly and the duty encompassed, but was wider than, the rules of natural justice.
- As it is in the case with all common law principles, Parliament could at the behest of the executive dispense with the requirements of procedural fairness/impropriety in a statute. This would remove from the armoury of the judiciary a powerful ground for judicial review of administrative action.

- The entire Malaysia jurisprudence on natural justice, and then procedural fairness/impropriety, was at one time based on the common law. This put us on very tenuous grounds.
- In a trilogy of cases (*Raja Abdul Malek Muzaffar Shah* [1995] 1 MLJ 308, *Tan Tek Seng* [1996] 1 MLJ 261 and *Hong Leong Equipment* [1996] 1 MLJ 481), our Court of Appeal decided to discard the slavish reliance on the common law.
- Our law on procedural fairness/impropriety was given a constitutional grounding :-

“English common law, which lacks the distinct advantage of a supreme law contained in a written constitution, has had to grope about in the dark and unlit passages of constitutional and administrative law, and undergo a rather slow and gradual development .....”

“In my judgment, it is wholly unnecessary for our courts to look to the courts of England for any inspiration for the development of our jurisprudence on the subject under consideration. That is not to say that we may not derive useful assistance from their decisions. But we have a dynamic written constitution, and our primary duty is to resolve issues of public law by having resort to its provisions.” (*Tan Tek Seng*)

- As the Malaysian Constitution is modelled on the Indian constitution, the Court of Appeal discovered that Articles 21 and 14 (which were similar to our Articles 5(1) and 8(1)) were the source of procedural fairness in India. The Indian Supreme Court in *Maneka Gandhi* [1978] AIR SC 597 held that the effect of these constitutional provisions was to ensure that all administrative action should be carried out with procedural fairness, as the equality provision in Article 14 strikes at arbitrariness in State action and ensures “fairness” whilst Article 21 mandated the compliance of procedure established by law.
- Thus, procedural fairness “... has been lifted to a higher plane than natural justice. Clothed with constitutional protection, procedural fairness cannot be negated by statute” (Sudha CKG Pillay, *The Changing Faces of Administrative Law in Malaysia* [1999] 1 MLJ cxi at p cxliii).

#### **The expansion of the scope of judicial review powers: Ramachandran**

- Traditionally, the Malaysian courts have adopted the common law position, viz, that judicial review is concerned not with the decision but the decision making process.
- Our courts have also embraced the touchstones of judicial review that Lord Diplock neatly set out in the *CCSU* case, namely, illegality, irrationality (*Wednesbury* unreasonableness), procedural impropriety and proportionality.
- The underlying basis and scope of the judicial review powers of our courts was revolutionized by the Federal Court in *Ramachandran* [1997] 1 MLJ 145.

“It is often said that Judicial Review is concerned not with the decision but the decision making process. This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock’s other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open to challenge on grounds of “illegality” and “irrationality” and, in practice, this permits the courts to scrutinize such decisions not only for process, but also the substance.”

- The Federal Court therefore broke new ground in holding that when an administrative decision is impugned in a judicial review action for “irrationality” or “illegality”, the court is empowered to consider both the decision making process as well as the merits (substance) of the decision.

#### **Judicial review as a constitutional right: access to justice**

- The decisions in the *SKMK* and *Ramachandran* cases armed our courts with the common law judicial review grounds (that were established in *Anisminic* and the *CCSU* case) to neutralize ouster clauses.
- Our Court of Appeal then sought to emasculate ouster clauses from the sphere of Malaysian public law on the basis that free access to an independent judiciary to obtain redress by way of judicial review is a fundamental constitutional right, viz, access to justice.
- An ouster clause that gives administrative finality and prevents access to justice would be void as it infringes a constitutional right.
- In *Sugumar Balakrishnan* [1998] 3 MLJ 289, the Court of Appeal categorized access to justice to seek judicial review of administrative action as an aspect of personal liberty (life) guaranteed by Article 5(1) of the Malaysian constitution.
- However, the Federal Court in *Sugumar’s* case disagreed:-

“We therefore disagree with the Court of Appeal that the words “personal liberty” should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life... In our view, Parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb a statutorily unreviewable decision...”

- The decision by the Federal Court has been severely criticized as going back to the days of *Liversidge v Anderson* [1942] AC 206:-

“... the Federal Court (without discussing *Anisminic*) sanctioned that access to justice could be denied

by a suitably drafted ouster clause. There was no discussion of the rule of law principles that necessarily apply in a democratic system and that the right of an aggrieved person to seek legal remedy in the courts could not be easily abrogated.”

(Cyrus Das, Trends in Constitutional Litigation: Malaysia and India – No Longer a Shared Experience, The Law Review 2007)

- The Federal Court’s decision in *Sugumar’s* case on the reach of Article 5(1) is a retrogressive decision. Indeed, the later Federal Court case of *Mohd Ezam Bin Mohd Noor* [2002] 4 CLJ 309 adopted a mere liberal interpretation of Article 5(1) and it is therefore doubtful whether it is still relevant.

## Conclusion

- The Malaysian courts have adopted the common law and strengthened its judicial review jurisdiction.
- With the exception of “proportionality”, all other heads of curial review are today available.
- The effective restraint of governmental power must be grounded in the supreme law and not left to the vagaries of the common law.
- Our Court of Appeal has paved the path in establishing a constitutional dimension to judicial review in

Malaysia based on Articles 5(1) and 8(1) of the Federal Constitution.

- A confluence of administrative law and constitutional law has enabled judicial control of administrative action under the broad title of public law.
- The Federal Court has however been reticent and continues to rely on the common law foundations for judicial review. However, in the very recent Federal Court decision of *Lina Joy v. Majlis Agama Islam*, delivered on 30th May 2007, the Chief Judge of Sabah and Sarawak in his powerful dissent said:

“The implementation of the policy has a bearing on the Appellant’s fundamental constitutional right to freedom of religion under Article 11 of the Constitution. Being a constitutional issue it must be given priority and independent of any determination of the *Wednesbury* reasonableness. A perceived reasonable policy could well infringe a constitutional right. Hence, before it can be said that a policy is reasonable within the test of *Wednesbury* its constitutionality must first be considered.”

- Our Court of Appeal will be encouraged by this and will undoubtedly continue to advocate the constitutional right to judicial review in Malaysia.



## Law Career Convention 2007

The Annual Law Career Convention jointly organized by the United Kingdom and Eire Malaysian Law Students’ Union and the Law Society of University of Malaya, was back again bigger and better than ever, on 25 August 2007 at the Law Faculty of University of Malaya. This has become the largest and best attended public law career fair, with the participation of twenty four law firms and commercial organizations, and law students and graduates. The firm’s Lai Wing Yong and Yoong Sin Min started the ball rolling with the opening career talk on “Banking and Corporate Law” in the main event programme, with subsidiary career presentations throughout the day.





## Feeling the Fire of the Roaring Sixties at the Annual Dinner 2007

The firm's Annual Dinner for 2007 was held over the weekend of 17th and 18th November 2007 at the Avillion beach resort, Port Dickson. The dress theme for the night was "The Roaring Sixties". Here are some impressions of the day's festivities by the firm's pupil Petrina Tan:

"The day dawned bright and early. After a sumptuous buffet lunch, it was time to head to the beach for the telematch games. As was the tradition, there were 4 teams: Team A "Naranja", Team B "the Titans", Team C "the Groovy Babies" and Team D "D'Kumbangs". The competition was fierce but fun, with the participants getting more drenched with the passing minutes as the games of Water Balloons and Water Relay took off. Needless to say, the beach echoed with hearty laughter. The highlight was of course, the tug of war, which was won by Team A which heaved, pulled and grunted its way to victory, defeating the other teams in its wake.

It was now time for dinner at the Admiral Marina and Leisure Yacht Club. The audience was entertained by performances by the young lawyers, the teams and the pupils respectively. From the explosive start by the young lawyers with their sizzling dance moves to the tune of 'Candyman' by Christina Aguilera, the show moved on to Team A's musical sketch which featured oranges, cross-dressing and plenty of drama. Team B danced to a medley of 60s songs, ranging from P. Ramlee classics to 'Rose Rose I Love you'. This was closely followed by Team C which also showcased their dance steps to a variety of 60s music. Team D emerged with a fashion show, presenting 60s fashion which included Vietnam War soldiers, hippies, Elvis and a surprise pirate appearance.

The dinner ended with the awards of Best Performance and Best Overall Team to Team A and Team D respectively. However for those with energy left to spare, the festivities continued at the poolside (and inside pool) party late into the night."

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