REVIEW OF CIVIL LAW ACT 1956 (Act 67)
COMMENTS
By
Tun Abdul Hamid Mohamad

My focus is only on section 3 of the Civil Law Act 1956 (the Act).

Section 3 provides:

"Application of U.K. common law, rules of equity and certain statutes

3. *(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall—*

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

(2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

(3) Without prejudice to the generality of paragraphs (1)(b) and (c) and notwithstanding paragraph (1)(c)—

(i) it is hereby declared that proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division of the High Court by way of habeas corpus or for an order of mandamus, an order of prohibition, an order of certiorari or for an injunction restraining any person who acts in an office in which he is not entitled to act, shall be available in Sabah to the same extent and for the like objects and purposes as they are available in England;

(ii) the Acts of Parliament of the United Kingdom applied to Sarawak under sections 3 and 4 of the Application of Laws Ordinance of Sarawak [Cap. 2]

and specified in the Second Schedule of this Act shall, to the extent specified in the second column of the said Schedule, continue in force in Sarawak with such formal alterations and amendments as may be necessary to make the same applicable to the circumstances of Sarawak and, in particular, subject to the modifications set out in the third column of the said Schedule."

The effects of the provisions in respect of Peninsular are as follows:

(i) The court shall apply the common law of England and the rules of equity;

(ii) As administered in England on the 7 April 1956;

(iii) In so far as provisions have not been made (at that point of time) by any written law in force in Malaysia;

(iv) Provided that the said common law and rules of equity shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit;

(v) And subject to such qualifications as local circumstances render necessary.

The effects of the provisions in respect of Sabah are as follows:

(i) Points (i) to (v) above apply to Sabah with two differences:

(a) The cut-off date is 1 December 1951.

(b) Besides the common law of England and the rules of equity, statutes of general application are also applicable.

(iii) Proceedings by way of habeas corpus or for an order of mandamus, an order of prohibition, an order of certiorari or for an injunction shall be available in Sabah in the same way as they are available in England;

The effects of the provisions in respect of Sarawak are as follows:

(i) Points (i) to (v) above apply to Sarawak with two differences:

(a) The cut-off date is 12 December 1949.

(b) Besides the common law of England and the rules of equity, statutes of general application are also applicable.

(ii) There is a special provision regarding the the Acts of Parliament of the United Kingdom applicable to Sarawak under sections 3 and 4 of the Application of Laws Ordinance of Sarawak [Cap. 2].

General observation

It should be remembered that the Act was made in 1956 i.e. one year before the Malaya achieved her independence. Looking at the Act, we do not know the real reasons for it. I will not speculate.

However, I think, at that time, there was a case for having a general provision for the Court to apply the common law of England and the rules of equity subject to necessary conditions. The legal and judicial system established by the British was the English system. Common law and rules of equity form an important part of the law applicable by the Courts. Malaya then did not even have her Parliament yet. Written laws, as existed then, were perhaps inadequate. The written laws which had been made were common law-based. In areas where no written law had been made, the Courts applied the common law of England and the rules of equity. Indeed, in my view, with or without the provisions, the lawyers would resort to and the Courts would apply the same, without any guidance. Where else would they look to? They were all trained as common law lawyers, at that time, all in England. In the circumstances, it was natural for the applicability of the common law of England and the rules of equity be spelled out clearly by law.

Without going in the details, do we still need such a provision? In my view, yes. First, we may still need to refer to the common law of England, particularly in the law of tort. In the same way we may still need to refer to the rules of equity, particularly in the law of trust. Secondly, such a provision removes any doubt regarding the Court's jurisdiction to apply such laws. Bear in mind the provision of Article 121 of the Federal Constitution which, inter alia, states that the Courts shall have jurisdictions "as may be provided by federal law." Thirdly, it provides the guidance to the Court in applying such rules leading to greater consistency.

What should the provision contain?

1. The reference to the common law and the rules of equity should not be confined to that of England but also to that of the Commonwealth countries.

2. Even with conditions stipulated, the provision should not be mandatory on the Court. The word "shall" should be substituted with the word "may". That would give a discretion to the Court to make a decision to apply the said principles or not.

3. There should be no cut-off dates. Common law and the rules of equity grow through judgments of courts to cope with the time. There is no basis whatsoever to impose the cut-off date around 1950's (or whatever) unless we want live by an archaic law which may no longer be suitable even in England. Beides, it is difficult to determine the common law or rules of equity on a matter on the cut-off date. A case decided after the cut-off date may draw the principle from earlier judgments. There is not a judgment that does not refer to earlier precedents. **Hedley Byrne & Co. Ltd. v. Heller & Partners** [1964] AC (HL) 465 ia a good example. I had that problem when deciding **Nepline Sdn Bhd.** That is why judges hardly take the trouble to determine the common law

or the rules of equity as at the cut-off date. Judgments of English courts are cited and applied as if section 3 of the Civil Law Act 1956 does not exist.

4. The provision that such common law and the rules of equity should only be applicable in so far as provisions have not been made (at that point of time) by any written law in force in Malaysia should remain, subject to improved drafting, if any. This is obvious. Once the Malaysian Parliament enacts a law on the subject, it is that law that should be applied. No lawyer should be heard to argue and no Judge should be heard to say that common law rights or equitable remedy continue to run parallel with the written law enacted by Parliament. The introduction of the principle of equitable estoppel to contracts made under the Control of Rent Act 1966 (which has now been repealed) had cause great injustice to house owners affected and had caused the houses to to deteriorate.

5. The proviso that "*the said common law and rules of equity shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary"* should remain subject to improved drafting, if any.

6. With regard to Sabah and Sarawak, the provisions regarding the application of statutes of general application should be removed. Even if there were some justifications six decades ago, they do not exist anymore now. If it is not necessary to apply English statutes in Peninsular Malaysia, why should it be necessary for Sabah and Sarawak? Besides it may lead to disparity in the laws of Peninsular Malaysia and the the two States. Everything should be done to standardise the law applicable to the whole country.

7. There should be a new addition. The principles of Islamic law should be included too. I realise that due to ignorance and prejudice the mention of "Islamic law" would straight away raise a controversy. However, we must remember that, first, we are not dealing with the introduction of the Islamic criminal law or laws relating to *ibadah*. We are dealing with civil law and the scope is very limited. Consider this example. There is no equivalent of *caveat emptore* in Islamic law. Islamic Islamic law insists fairness and honesty on both parties in their dealings. The common law on disclosure of material information (e.g. as in **Hedley Byrne**) does not go so far as the Islamic law principle that "a seller must disclose the defects of the good he is selling". Please see discussion in **Nepline Sdn Bhd** enclosed. Indeed in that case the court went further than the common law of England and indeed drew an inspiration from the Islamic law position, without saying so. (I know because I decided the case.) The Court of Appeal confimed the judgment, perhaps without even knowing where the idea came from. Unfortunately, there is no written judgment of the Court of Appeal. I have not come across any criticism of the judgment. I hope there will not be any even after this "disclosure"!) The point I making is that there might be some principles of Islamic law which could be applicable. Due to ignorance and prejudice, many people do not realise the similarities between Islamic law and common law.

8. With regard to Sabah, section 3(3)(i) regarding habeas corpus, mandamus, prohibition, certiorari or injunction should be repealed. Habeas corpus is a criminal procedure. The laws on the subject applicable to Peninsular Malaysia should be extended to Sabah (and Sarawak) where necessary to provide for standardisation.

9. My comment in paragraph 8 should equally apply to Sarawak in respect of section 3(3)(ii).

For further reference I enclose the following judgments and lecture of mine on the subject (the full texts of which could be found on my website – see **http://www.tunabdulhamid.my):**

Enclosure 1: **Nepline Sdn Bhd v Jones Lang Wooten** [1995] 1 CLJ 865

Enclosure 2: **Pemakaian common3)(1) law England, kaedah-kaedah ekuiti dan penghakiman-penghakiman luar negara di Malaysia.**

Enclosure 3: **Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon** (2006) 2 CLJ 1

(Another paper titled “Seminar Perundangan dan Kehakiman Malaysia: Ulasan Kertas Kerja” (uploaded on 9 August 1993) could also be found on the same website.)

The above arguments may be applied to section 5 of the Act.

Thank you.

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3 November 2013

ENCLOSURE 1

NEPLINE SDN. BHD v. JONES LANG WOOTTON
HIGH COURT MALAYA, PENANG
DATO' ABDUL HAMID BIN HAJI MOHAMED J
CIVIL APPEAL NO. 12-68-89
11 NOVEMBER 1994
[1995] 1 CLJ 865

***TORT**: Negligent misrepresentation - Duty of care - Whether duty extended to omission - Misstatement incurred pure economic loss - Whether recoverable when definite amount claimed.*

***PRACTICE & PROCEDURE**: Section 3 Civil Law Act - Scope of applicability - Proviso thereof - Whether a guidance to Court to develop Malaysian common law.*

The respondent is a firm of registered real estate agents and chartered valuer. By a letter dated 20 September 1988 the respondent offered to let one-half portion of a premises to the appellant. In the course of the negotiations the respondent, by conduct or impliedly, represented to the appellant that, *inter alia*, the said premises was not subject to any foreclosure proceedings or order for sale. Relying on the representation, the appellant paid a sum of RM15,372 as rental and maintenance deposit. However at that material time, there was a foreclosure proceeding pending in Court in respect of the said premises and the respondent knew about it but did not disclose the fact to the appellant. The said premises was foreclosed and the appellant demanded return of the deposit.

The respondent contented that the duty of care is not applicable in this case as it is merely an omission and not a positive statement. It was further contended the in a case involving pure economic loss such as this the Courts should be strict in granting damages.

Held :

[1] In applying s.3 of the Civil Law Act 1956, the approach the Court should take is first to determine whether there is any written law in force in Malaysia. If there is none, then the Court should determine what is the common law of, and the rules of equity as administered in England on 7 April 1956. Having done that the Court should consider whether "local circumstances" and "local inhabitants" permit its application as such. If it is "permissible" the Court should apply it. If not, the Court is free to reject it totally or adopt any part which is "permissible", with or without qualification. Where the Court rejects it totally or in part, then there being no written law in force in Malaysia, the Court is free to formulate Malaysia's own common law. In so doing, the Court is at liberty to look at any source of law, local or otherwise, be it England after 7 April 1956, principles of common law in other countries, Islamic law of common application or common customs of the people of Malaysia. Under the provision of s.3 of the Civil Law Act 1956, that is the way the Malaysian common law should develop.

[2] This is not a case of a friend telling another friend that there is a horse for rent. This is a case of a professional firm, holding out to be a professional with expertise in its field earning its income as such professional. They know that people like the appellant would act on their advice. Indeed they would hold out to be experts in the field and are reliable. It would be a sad day if the law of this country recognises that such a firm, in that kind of relationship,

owes no duty of care to its clients yet may charge fees for their expert services.

In the circumstances the defendant in this case owned a duty to the plaintiff to disclose that there was a foreclosure proceeding pending. The provision of s.3 of Civil Law Act 1956, especially the proviso thereto allows the Court to do so.

[3] The claim in the present case is for pure economic loss. It is not for an injury to person or property. Also there is a need to limit recoverability of damages for pure economic loss. However, here the amount claimed is definite. It is a definite amount which had been paid by the appellant. It is that amount only which the appellant now seeks to recover. On the facts of this case, the respondent is liable.

[Appeal allowed]

Case(s) referred to:

*Hedley Byrne & Co. Ltd. v. Heller & Partners [1964] AC (HL) 465 (**refd**)*

*Anns v. London Borough of Merton [1977] 2 All ER 492 (HL) (**refd**)*

*Caparo Industries Plc v. Dickman & Ors. [1990] 2 WLR 358 (HL) [1990] 2 WLR 358 (HL) (**refd**)*

*Murphy v. Brentwood District [1990] 2 All ER (**refd**)*

*Pacific Associates Inc. & Anor. v. Baxter & Ors. [1990] 1 QB 993 (CA) @ 1009-1010 (**refd**)*

*Mooney & Ors. v. Peak Marwick, Mitchell & Co. & Anor. [1966] 1 LNS 109 [1967] 1 MLJ 87 (**refd**)*

Bank Bumiputra Malaysia Bhd. v. Yeoh Ho Huat [1977] 1 LNS 11

*Neogh Soo On & Ors. v. G. Rethinasamy 1983 CLJ 663 [1984] 1 MLJ 126 (**refd**)*

*Chin Sin Motor Works Sdn. Bhd. & Anor. v. Arosa Development Sdn. Bhd. & Anor. [1992] 1 CLJ 102;[1992] 1 MLJ 23 (**refd**)*

*Syarikat Batu Sinar Sdn. Bhd. & 2 Ors. v. UMBC Finance Bhd. 2 Ors [1990] 2 CLJ 691 (**foll**)*

*Commonwealth of Australia v. Mindford (Malaysia) Sdn. Bhd. & Anor. [1990] 1 CLJ 77 [1990] 1 MLJ 878 (**foll**)*

*The Philippine Admiral [1977] AC 373 (**refd**)*

*Khalid Panjang & Ors. v. PP (No. 2) [1963] 1 LNS 53 [1964] MLJ 108 FC (**refd**)*

*The Parlement Belge [1880] (5) PD 197 (**refd**)*

*Trendex Trading Corporation v. Central Bank of Nigeria [1977] 2 WLR 356 (**refd**)*

*The I. Congreso Del Partido [1983] AC 244 (**refd**)*

*Nocton v. Lord Ashburton [1914] AC 932 (**refd**)*

*Girardy v. Richardson [1793] 1 Esp. 24 (**refd**)*

Legislation referred to:

Civil Law Act, s. 3

Other source(s) referred to:

Law of Torts, R.P Balkin & J.L.R Davis, pp. 421 to 424

Clerk & Lindsel on Torts, 14th Edit, (1975), para. 866, p. 481

Counsel:

For the appellant - Tan Beng Hong; M/s. Lim Gim Leong & Co.

For the respondent - Logan B. Sabapathy (later Charanjeet Kaur Kang); M/s. Skrine & Co.

JUDGMENT

Abdul Hamid bin Hj. Mohamed J:

This is an appeal from a judgment of the Sessions Court. According to the Statement of Claim of the appellant/plaintiff, during all the material time, the respondent/defendant was a firm of registered real estate agents and chartered valuer. By a letter dated 20 September 1988 the respondent offered to let one-half portion of the premises in question to the appellant at a monthly rent of RM3,343. According to the appellant, in the course of the negotiations the respondent, by conduct or impliedly represented to the appellant that:

(a) the landlord and/or owner had a good title to the premises; (b) that the said premises was not subject to any foreclosure proceedings or order for sale; and

(c) that the appellant could have a quiet and peaceful possession of the premises.

Relying on the said representations, the appellant said that they:

(a) entered into a tenancy agreement with the landlord for a period of two years from 1 March 1989;

(b) paid to the landlord through the respondent a sum of RM15,372 as rental and maintenance deposit; and

(c) renovated the said premises at the cost of RM67,480.

The appellant alleged that the respondent had acted negligently in:

(a) failing to exercise any or proper care in ascertaining that the landlord or owner had a good right or title to the said premises;

(b) failing to exercise any or proper care in ascertaining that at all material times the said premises was not subject to any foreclosure proceedings and/or order for sale;

(c) failing to exercise any or proper care in ascertaining that the appellant could have quiet and peaceful possession of the said premises.

To give a clearer picture I should interject here to say that it was not disputed that during the material time there was a foreclosure proceeding in Court in respect of the said premises and that the respondent knew about it but did not disclose the fact to the appellant. The appellant executed the tenancy agreement on 31 January 1989, paid rental for March 1989 and rental deposit for three months to the respondent. Keys were handed to the appellant on 1 February 1989. Renovation work commenced on 20 February 1989. However on 25 February 1989 a proclamation for sale was put up on the premises. (It should be noted here that the tenancy was to commence from March 1989)

Going back to the Statement of Claim, on 1 March 1989, (upon becoming aware of the pending auction) the appellant through their solicitors sent a notice to the respondent rescinding the said tenancy agreement and demanding the refund of the rental, rental deposit and maintenance deposit amounting to RM15,372, costs of renovation, cost of advertising the appellant's premises and travelling expenses "and inconvenience caused".

As the respondent failed to pay the amount claimed the appellant filed this action.

The material defence raised by the respondent was that the respondent, in its capacity as an estate agent appointed by the landlord, was under no obligation whatsoever to carry out the investigations, inspections and searches. The respondent also denied that it owed a duty to the appellant to exercise proper care in ascertaining the matters that the appellant alleged the respondent was negligent of. Indeed the whole case finally turned on the question whether the respondent owed a duty of care to the appellant, in particular, to inform the appellant that there was a foreclosure proceeding pending during the negotiation, a fact which was admittedly known to the respondent.

To complete the narration of facts, the premises was auctioned on 15 March 1989. The

appellant purchased the premises at the auction, and if I may say so, moved in as the owner rather than a tenant.

Learned Sessions Court Judge, in a 25-page judgment made a finding that the respondent was in breach of the duty of care he owed to the appellant, in particular, in not informing the appellant of the impending foreclosure proceeding. However, he did not give judgment for the appellant. This is partly because, at the end of the trial the appellant abandoned their claims under the various heads except

(a) the refund of RM15,372; and

(b) general damages

Even as regards these two heads the learned Sessions Court Judge did not give judgment in favour of the appellant. This was because as regards (a), he was of the view that there was no privity of contract between the appellant and the respondent. The respondent, in his words "merely acted as a conduit pipe for the landlord" The tenancy agreement was signed between the appellant and the landlord. Payments were "promptly handed over" by the respondent to the landlord. The respondent was a mere agent of the landlord. Therefore, the appellant should have proceeded against the landlord.

As regards general damages, he held that there was absolutely no evidence led by the appellant.

Before me, learned Counsel for the appellant made a further concession. He abandoned the prayer for general damages leaving only the refund of the RM15,372 (rental and deposit). He argued that the cause of action against the respondent was in tort not contract. Therefore as the learned Sessions Court Judge had found that the respondent owed a duty of care to the appellant and had acted in breach of it, at the very least the rental and deposit paid by the appellant should be refunded.

The argument of the learned Counsel for the respondent who first argued the appeal was most interesting. He argued that the loss of the appellant was purely an economic loss. He argued that the Courts (in England) had "consistently stressed the need for some control mechanism, narrower than the concept of reasonable foreseeability to limit a person's liability for purely economic loss" The learned Counsel argued that *Hedley Byrne & Co. Ltd. v. Heller & Partners* [1964] AC (HL) 465 was an exception to the irrecoverability of pure economic loss for negligent misstatement. He however argued that the principle enunciated in *Hedley Byrne's* case is not applicable in this case because unlike in that case where there was a positive misstatement, in this case it is merely an omission.

The learned Counsel recognised that *Anns v. London Borough of Merton* [1977] 2 ALL ER 492 (HL) enlarged the recoverability of pure economic loss. However, subsequently, there were a number of cases including *Caparo Industries Plc v. Dickman & Ors.* [1990] 2 WLR 358 (HL) [1990] 2 WLR 358 (HL) and finally in *Murphy v. Brentwood District* [1990] 2 ALL ER the House of Lords overruled *Ann's*. Thus *Murphy*, marked a significant retreat concerning the scope of duty of care in pure economic loss cases. He therefore submitted the two-stage tests in *Ann's* was no longer applicable. The Court should approach the matter as follows:

i) whether the imposition of a duty of care is, in all the circumstances of the case, just and reasonable. (For this proposition learned Counsel referred to *Pacific Associates Inc. & Anor. v. Baxter & Ors.* [1990] 1 QB 993 (CA) @ 1009-1010.

ii) The actual nature of the damage is relevant to the existence and extent of any duty to avoid or prevent the damage. For this proposition he referred to *Caparo's* case.

I asked both learned Counsel about the position of the law in Malaysia. In particular, I wanted to know whether Courts in Malaysia, especially Courts superior to this Court, had occasion to consider *Hedley Byrne's* case or *Ann's* case or the retreat from *Ann's* cases. Even though I gave them time to research, they both come back with the same answer, that there was no decision by Courts in Malaysia on the point.

My own limited research was not much better. However I came across four cases in which *Hedley Byrne's* 465 Lt case was mentioned. They are *Mooney & Ors v. Peat Marwick, Mitchell & Co. & Anor* [1967] 1 MLJ 87; *Bank Bumiputra Malaysia Bhd. v. Yeoh Ho Huat[1977] 1 LNS 11*; *Neogh Soo On & Ors. v. G. Rethinasamy 1983 CLJ 663*[1984] 1 MLJ 126 dan *Chin Sin Motor Works Sdn. Bhd. & Anor. v. Arosa Development Sdn. Bhd. & Anor. [1992] 1 CLJ 102;*[1992] 1 MLJ 23.

However that was not the end of the problem. As I began to prepare my decision, another point crossed my mind, i.e., what is the effect of the provisions of s. 3 of the Civil Law Act 1956? For ease of reference, I reproduce here the relevant part.

> 3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall-
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956,
> (b).....
> (c).....
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary

Before going any further I think I should discuss this provision first. Many articles have been written on this provision. Many seminars have discussed this provision. There have been calls for the provision to be amended in order to allow our law to progress with the development of common law in England, or, to enable our Courts to look somewhere else also, including Islamic Law and local customs, for source of law. However, the provision remains in our statute book though rarely referred to by lawyers or judges in their submissions of judgments, respectively. More often than not, and this case is a good example, Counsel refer to English authorities as if the common law of England applies in toto in Malaysia. I must however point out that there is a decision of the High Court in Ipoh in which the learned Judge categorically relied on the proviso to s. 3(1) of the Civil Law Act 1956 in refusing to follow English authorities but instead followed a decision of the High Court of Brunei Darussalam which was reversed on appeal to Brunei's Court of Appeal.

In that case, *Syarikat Batu Sinar Sdn. Bhd. & 2 Ors. v. UMBC Finance Bhd. 2 Ors [1990] 2 CLJ 691* ***(foll)***, Peh Swee Chin J (as he then was) referring to the provsio to s. 3(1) of the

Civil Law Act 1956 had this to say:

> We have to develop our own common law just like what Australia has been doing by directing our mind to the "local circumstances" or "local inhabitants"
> I agree entirely with his view and attitude.

I must also mention the decision of our Supreme Court in *Commonwealth of Australia v. Mindford (Malaysia) Sdn. Bhd. & Anor. [1990] 1 CLJ 77*. [1990] 1 MLJ 878. The issue in that case was the question of sovereign immunity and the jurisdiction of the Courts in Malaysia. In the Judgment written by Gunn Chit Tuan, SCJ (as he then was), the learned Judge said, regarding section 3 of the Civil Law Act 1956:

> Section 3 of the Civil Law Act 1956 only requires any Court in West Malaysia to apply the common law and the rules of equity as administered in England on 7 April 1956. That does not mean that the common law and rules of equity as applied in this country must remain static and do not develop. We have not been referred to any cases decided by the former Court of Appeal or the Federal Court after 7 April 1956, on the subject of sovereign immunity nor have we discovered any such cases decided after that date. It is correct, as pointed out, that the law in England on sovereign immunity on 7 April 1956, was as declared in cases such as the *The Parlement Belge* [1880] (5) PD197 *(supra)*. That is, at that time a foreign sovereign could not be sued *in personam* in our Courts. But when the judgment in *The Philippine Admiral* [1977] AC 373 *(supra)* was delivered by the Privy Council in November 1975, it was binding authority in so far as our Courts are concerned. Therefore, by that time the common law position on sovereign immunity in this country would be that the absolute theory applied in all actions *in personam* but the restrictive view applied in actions *in rem*. When the *Trendex (supra)* case was decided by the UK Court of Appeal in 1977 it was of course for us only a persuasive authority, but we see no reason why our Courts ought not to agree with that decision and rule that under the common law in this country the doctrine of restrictive immunity should also apply.
> That is more so in view of the very strong persuasive authority in *The I. Congreso Del Partido* [1983] AC 244 case *(supra)* in which the House of Lords had in July 1981, unanimously held that the restrictive doctrine applied at common law in respect of actions over trading vessels regardless of whether the actions were *in rem* or *in personam*. We are therefore of the view that the restrictive doctrine should apply here although the common law position of this country could well be superseded and changed by an Act of Parliament later on should our Legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country.

The first two sentences of the paragraphs pose no problem. Indeed that is what it should be. The problem arises with what follows:

First, on the question whether the *The Philippine Admiral* [1977] AC 373 is a "binding authority in so far as our Courts are concerned." *The Philippine Admiral* is a decision of the Privy Council in an appeal from Hong Kong. It does not concern an interpretation of a statute which is in *pari materia* with a Malaysian statute as in the case of *Khalid Panjang & Ors. v. PP (No. 2) [1963] 1 LNS 53*[1964] MLJ 108 FC. Did the Supreme Court intend to extend the principle to cover all decisions of the Privy Council regardless from where the appeal comes? I do not think so because the Privy Council has to decide a case according to the law of the

country from which the appeal comes, which may be different from the law in Malaysia.

Secondly having said that only the common law of England as on 7 April 1956 was applicable to Malaysia, having said that "the law in England on sovereign immunity" on 7 April 1956 was as declared in cases such as *The Parlement Belge* [1880] (5) PD 197), the Court went on to say that the Privy Council decision in *The Philippine Admiral* [1977] AC 373 was binding on Malaysian Courts. Having said all that the Court went on to apply the persuasive authority of UK Court of Appeal in *Trendex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356) and the "very strong persuasive authority" of the House of Lords decision in the *The I. Congreso Del Partido* [1983] AC 244.

With greatest of respect, I would have thought that if the common law of England on 7 April 1956 was as was declared in *The Parlement Belge*, then by virtue of the provisions of s. 3 of the Civil Law Act, that law applies in Malaysia, unless it falls within the proviso to that section. Secondly, I would have thought that if the Privy Council decision in *The Philippine Admiral's* case was binding on Malaysian Courts, then Malaysian Courts would have no choice but to apply it. If that be the case, then it would not be necessary to consider *Trendex* or *The I. Congreso Del Partido*.

My humble view is that the provision of s. 3 of the Civil Law Act 1956 as it stands today, is the law of Malaysia. Courts in Malaysia have no choice but to apply it.

So, I will have to consider the provision of s. 3(1) of the Civil Law Act 1956. That section says clearly that save so far as other provision has been made prior to or may be made after 7 April 1956 by any written law in force in Malaysia, the Court shall, in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956. However, the said common law and the rules of equity shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

In my view the approach that the Court should take is first to determine whether there is any written law in force in Malaysia. If there is, the Court need not look anywhere else. If there is none, then the Court should determine what is the common law of, and the rules of equity as administered in, England on 7 April 1956. Having done that the Court should consider whether "local circumstances" and "local inhabitants" permit its application, as such. If it is "permissible" the Court should apply it. If not, I am of the view that, the Court is free to reject it totally or adopt any part which is "permissible", with or without qualification. Where the Court rejects it totally or in part, then there being no written law in force in Malaysia, the Court is free to formulate Malaysia's own common law. In so doing, the Court is at liberty to look at any source of law, local or otherwise, be it common law of, or the rules of equity as administered in England after 7 April 1956, principles of common law in other countries, Islamic law of common application or common customs of the people of Malaysia. Under the provision of s. 3 of the Civil Law Act, 1956, I think, that it is the way the Malaysian common law should develop.

In taking this approach I find that the most difficult thing to do is to determine what is the common law of England on 7 April 1956 on negligent misstatement or omission.

Take *Hedley Byrne* case as an example. It appears from the report that it was decided in 1963. If we say that that was the day when the principle was "born", it is clearly after 7 April 1956.

But, in deciding *Hedley Bryne* case, their lordships referred to numerous cases including those decided in the 19th century. In fact one of the cases referred to was the case of *Coggs v. Bernard* which was reported in [1703] 2 Ld. Rayon 909 - see [1664] AC @ 526. It appears to me that their lordships in *Hedley Byrne* applied the principle laid down in *Nocton v. Lord Ashburton* [1914] AC 932,), a decision made over 40 years prior to 7 April 1956. Does it mean that we can follow the *Nocton* but not *Hedley Byrne* ?

Anyway, I shall try to ascertain the position of the law in England on careless misstatement. In doing so, I shall rely on **Clerk & Lindsell on Torts,** 14th Edn. [1975] supplied to me by learned Counsel for the respondent. (This Court Library only has the 13th Edn. [1969]. But it does not matter because we are now looking at the earlier period). In paragraph 866 beginning from p. 481, the learned author says:

> Careless false statements. The development of the law as to loss resulting from reliance on careless misstatements is an example of the progressive recognition of wider areas of liability for carelessness. The House of Lords decided in *Derry v. Peek* [1889] 14 App. Cas. 337. (For Deceit, see Chap. 22, especially # 1632) that a careless misstatement of fact resulting in pecuniary loss did not constitute deceit. Their Lordships did not decide the question whether such a statement might be actionable on the alternative ground of negligence. This point was subsequently decided by the Court of Appeal in *Le Lievre v. Gould* [1893] a QB 491, which
> was followed by a majority of the same tribunal in *Candler v. Crane, Christmas & Co.* [1951] 2 KB 164 in both of which it was held that pecuniary loss inflicted by careless misstatements was not suable in negligence either.
> The same point was the basis of the decision in *Old Gate Estates Ltd. v. Toplis* [1939] 3 All ER 209, 216, per Wrottesley J where it was stated that the principle of *Donoghue v. Stevenson* [1972] 3 AC 562 was "confined to negligence which results in danger to life, danger to limb or danger to health"; and in *Heskell v. Continental Express Ltd.,* [1950] 1 All ER 1033, 1042, per Devlin J; but he repudiated his own dictum later in *Hedley Byrne & Co. Ltd. v. Heller & Partners.* [1964] AC 465, 532 where it was stated that "negligent misstatements can never give rise to a cause of action.

However, it was not long after the original decision that modifications were introduced into an apparently wide principle of non-liability, there was, in other words, piecemeal recognition of the infliction of damage, pecuniary and otherwise, by means of careless false statements, Parliament intervened immediately after *Derry v. Peek* to nullify its effect. That case concerned careless misstatements in a Company prospectus, and statute imposed liability in such cases. (See now Companies Act 1948, s. 43(1)). There were also developments in equity that created exceptions.

> Long before *Derry v. Peek* there had developed the rule that negligent statements could found an estoppel though not a right of action, and the rule was continued thereafter. (*Burrowes v. Lock* [1805] 10 Ves. 470, as explained in *Low v. Bouverie* [1891] 3 Ch. 82, 101, 102-103; *Nocton v. Lord Ashburton* [1914] AC 932, 952. *C.f.* the dubious explanations in *Brownlie v. Campbell* [1880] 5 App. Cas 925, 935, 936, 953; *Derry v. Peek* [1889] 14 App. Cas. 337, 360; *Candler v. Crane, Christmas & Co.* [1951] 2 KB 164, 191). Then the House of Lords itself in *Nocton v. Lord Ashburton* ([1914] AC 932. See also *Woods v. Martins Bank Ltd.* [1959] 1 QB 55, 72 (which is preferable to the reports in [1958] 1 WLR 1018, and [1958] 3 All ER 166). The case

> was approved in *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.* [1964] AC 465. See also *Boyd v. Ackley* [1962] 32 DLR (2d) 77) recognised the existence in equity of a duty of care in what came to be understood as "fiduciary relations." Where these existed liability for careless misstatements was introduced under the umbrella of "constructive fraud," which was a more extended meaning of "fraud" than that employed at common law. (*Nocton v. Lord Ashburton* [1914] AC 932, 951, 952; *Lancashire Loans Ltd. v. Black Equity*. The word "fraud" in the Limitation Act 1939, s. 26(b) (amended by the Limitation Act 1963, s. 4(3) is likewise wider than at common law; *Beaman v. ARTS* [1949] 1 KB 550; *Kitchen v. RAF Assn.* [1958] 1 WLR 563; *Clark v.Woor* [1965] 1 WLR 650)...

This development towards the wider recognition of liability for careless misstatements was given added momentum by the decision of the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, ([1964] AC 465; on which see McKerron, 80 SALJ 483; Stevens, 27 MLR 121; 98 ILT 215; Walker, 3 Osgoode Hall LJ 89; Norton [1964] JBL 231; Goodhart, 74 Yale LJ 286; Honore, 8 JSPTL (NS) 284; Atiyah, 83 LQR 248; Coote, 2 NZULR 263.), upon which the law as to liability for pecuniary loss caused by careless misstatements will in future rest. It has dispelled the idea that *Derry v. Peek* decided not merely that a careless misstatement does not amount to deceit but also, a *silentio,* that it is not actionable negligence either. This last proposition had been the basis of the decision in Le *Lievre v.Gould* and *Candler v. Crane, Christmas & Co.,* and in rejecting it the House of Lords has declared that these two cases were wrongly decided.

> Once liability for careless misstatements is admitted, the question arises as to how far responsibility should extend.

So, it appears to me that prior to 7 April 1956, *Nocton's* case was the highest watermark on the subject. Perhaps I should mention that in *Nocton's* case, a mortgagee brought an action against his solicitor, claiming to be indemnified against the loss which he had sustained by having been improperly advised and induced by the defendant, acting as his confidential solicitor, to release a part of a mortgage security, whereby the security had become insufficient. The statement of claim alleged that the defendant, when he gave the advice, well knew that the security would be merely rendered insufficient and that the advice was not given in good faith, but in the defendant's own interest. It was held, *inter alia*, that the plaintiff was not precluded by the form of his pleadings from claiming relief on the footing of breach of duty arising from fiduciary relationship and that he was entitled to relief on that footing.

And, in the words of the learned author, in *Hedley Byrne* (post 1956), the House of Lords had recognised the existence in equity of a duty of care arising from fiduciary relationship as in the case of a solicitor and his client, for misrepresentation.

However, I must admit that is a far cry from the facts in this case. Because, here, while I have no doubt that a fiduciary relationship between appellant and the respondent did exist, what happened here was not an active misrepresentation, not even a careless misstatement as in *Hedley Byrne* 's case. Here it was non-disclosure.

However, I do not think I should stop there. I think I am entitled to go on and consider whether local circumstances would require some "modification" to extend the concept of the duty of care to an omission as in this case. As I have said, I think the proviso to s. 3 of the

Civil Law Act 1956 allows me to do so if local circumstances so require. Indeed the same thing was done by Peh J in Batu Sinar 's case. In fact it can be said that the Supreme Court in *Commonwealth of Australia's* case did just that when it applied the post 1956 decisions of the English Courts, even though the judgment did not say so. How else could that judgment be justified in the light of the provisions of s. 3 of the Civil Law Act 1956?

I therefore ask the question whether local circumstances would require the respondent, an estate agent, a professional who advertised premises for rent, who knew that the premises was a subject matter of a pending foreclosure action, to owe a duty of care to the appellant, who answered to the advertisement and subsequently entered into a tenancy agreement for a period of two years, to disclose the fact that the premises was subject to a pending foreclosure action?

I do not have the slightest doubt that the answer should be in the affirmative.

This is not a case of a friend telling another friend that there is a house for rent. This is a case of a professional firm, holding out to be a professional with expertise in its field, earning its income as such professional. They know that people like the appellant would act on their advice. Indeed, I have no doubt that they would hold out to be experts in the field and are reliable. It would be a sad day if the law of this country recognises that such a firm, in that kind of relationship, owes no duty of care to its client yet may charge fees for their expert services.

In the circumstances, I think I am fully justified in taking the view that the defendant in this case owed a duty to the plaintiff to disclose that there was a foreclosure proceeding pending I think the provision of s. 3 of the Civil Law Act 1956, especially the proviso thereto, allows me to do so.

Learned Counsel for the respondent, referring to numerous texts and authorities, stressed the need for some control mechanism narrower than the concept of reasonable foreseeability to limit a person's liability for pure economic loss. He argued, correctly I must say, that subsequent to *Anns* 's case there are a number of cases, including *Caparo* which steered clear of it and were termed as the "retreat from *Ann's* cases."

First, I must say that I agree with him that the claim in the present case (for the refund of the deposit paid) is for pure economic loss. It is not for an injury to person or property.

Secondly, generally speaking, I also agree that there is a need to limit recoverability of damages for pure economic loss.

The reasons for judicial reluctance to impose liability in such cases are conveniently listed by R.P. Balkin and J.L.R. Davis in the **Law of Torts** from pp. 421 to 424. These are:

(i) the fear of indeterminate liability;

(ii) disproportion between defendant's blameworthiness and the extent of his liability;

(iii) interrelationship between liability in tort and contract;

(iv) the need for certainty; and

(v) the effect of insurance.

Considering these factors, it is a wise policy to limit liability in pure economic loss cases, generally speaking.

However, I am of the view that such fears do not arise in this case. Here the amount claimed is definite. It is a definite amount which had been paid by the appellant. It is that amount only which the appellant now seeks to recover. So, even using the two tests which learned Counsel for the respondent urged me to apply, I think, on the facts of this case, the respondent is liable.

As I have stated earlier, the only claim the appellant is seeking now is for the amount RM15,372 which is the amount paid by the appellant. The learned Sessions Court Judge did not allow this claim on the ground that there was no privity of contract between the appellant and the respondent.

With respect, I think he was misconceived there. The action is founded in tort not contract. As he himself had, after a lengthy discussion of authorities, come to the conclusion that the respondent had breached a duty of care owed by them to the appellant, though taking a different approach, and since the payment of that amount was never in dispute, he should have ordered that that amount be paid by the respondent to the appellant as damages. I also do not think that the damage can be said to be too remote.

The appeal is allowed. The respondent is ordered to pay the appellant a sum of RM15,372 with interest at 8% from today till the date of realisation. The respondent shall also pay the appellant costs of this appeal and costs in the Court below. The deposit is to be refunded to the appellant.

ENCLOSURE 2

PEMAKAIAN COMMON LAW ENGLAND, KAEDAH-KAEDAH EKUITI DAN PENGHAKIMAN-PENGHAKIMA LUAR NEGARA DI MALAYSIA
(Ucapan Umum di Universiti Kebangsaan Malaysia)
17.9.2004
oleh
Dato' Abdul Hamid Bin Haji Mohamad
(Hakim, Mahkamah Persekutuan Malaysia)

Sejarah perundangan di Malaysia bolehlah dikatakan bermula dengan kedatangan Islam di abad ketiga belas Masehi. Islam membawa undang-undang Islam ke rantau ini. Walau pun pada masa itu tidak terdapat mahkamah-mahkamah seperti sekarang, undang-undang Islam, di samping adat Melayu, menjadi teras undang-undang di negara ini sehingga kedatangan British.

Kedatangan British membawa bersama-samanya undang-undang Inggeris khususnya common law Engand dan kaedah-kaedah ekuiti. Ia dibawa masuk melalui "charter", melalui peguam-peguam dan hakim-hakim yang terlatih di England dan kemudiannya melalui undang-undang bertulis seperti ordinan, enakmen, kanun, kaedah dan peraturan.

Pada masa itu cuma terdapat satu system mahkamah di sini. Ia melaksanakan undang-undang yang dibuat di sini yang berasaskan undang-undang di England di samping memakai common law England dan kaedah-kaedah ekuiti. Sehari demi sehari semakin kukuhlah kedudukan undang-undang Inggeris dan pemakaiannya di negara ini.

Setahun sebelum British meninggalkan Malaya (pada masa itu) Akta Undang-Undang Sivil 1956 dikanunkan. Ia, antara lain, memperuntukkan bahawa common law England dan kaedah-kaedah ekuiti seperti yang berkuatkuasa di England pada 7 April 1956 hendaklah dipakai, melainkan jika ianya didapati tidak sesuai dengan keadaan di sini. Demikian juga dengan undang-undang perdagangan. (Terdapat peruntukan yang serupa bagi Sabah dan Sarawak, tetapi tarikh undang-undang yang dipakai di England itu berbeza.)

Saya belum temui satu kajian mengenai mengapa setahun sebelum memberi kemerdekaan kepada Malaya (pada masa itu) undang-undang itu dibuat dan dengan sedemikian rupa. Adakah pihak British hendak memastikan bahawa Malaya yang merdeka akan terus memakai common law England dan kaedah-kardah ekuiti seperti ia hendak memastikan pemakaian "basic law" di Hong Kong apabila ia hendak menyerah balik Hong Kong kepada China? Biar apa pun, pemakain common law England dan kaedah-kaedah ekuiti itu pun tertakluk kepada undang-undang yang akan dibuat oleh badan perundangan di negara ini dan kesesuaiannya dengan keadaan di Malaya, sekarang Malaysia.

Seawal tahun 1963, Professor L.C. Green menulis dalam (1963) MLJ xxviii di bawah tajuk "Filling the Lacuna in the Law", antara lain, berkata:

> "Apart from any problem that might arise from the fact this legislation attempts, to some extent at least, to introduce a supplementary English common law and equity which may have become out of date and which may no longer be applicable in England, the situation in Malaysia and Singapore is today different from what it was at the time of the enactment of the ordinances. In view of the increased political stature of the two territories, and in anticipation of further changes likely to be effected with the establishment of Malaysia, it is now perhaps evidence of an out of date attitude as well as contrary to national prestige to make provision of the supplementation of the local law in the event of lacunae by means of reference to any "alien" system, whether it be that of the former imperial power or not."

Pada 24 Februari 1990, dalam ucapan yang diberi di Universiti Islam Antarabangsa Malaysia, Tun Abdul Hamid Omar, Ketua Hakim Nagara pada masa itu, antara lain, berkata:

> "Pada pandangan saya oleh kerana negara kita adalah negara yang merdeka dan berdaulat, seksyen 3 (Akta Undang-Undang Sivil) dengan rujukannya kepada Common Law England dan kaedah-kaedah ekuiti seperti yang ditadbirkan di England pada 7 haribulan April 1956, tidak boleh dipertahankan dari segi politik."

Di samping itu, terdapt satu golongan yang mahu peruntukan itu dimansuhkan. Tujuan mereka ialah untuk menggantikan pemakaian common law England dan kaedah-kaedah ekuiti itu dengan hukum syarak atau untuk membolehkan mahkamah memakai perinsip-prinsip hukum syarak sebagai ganti kepada common law England dan kaedah-kaedah ekuiti.

Saya tidak sangat menekankan soal kaitan peruntukan itu dengan politik dan kedaulatan negara. Kerana, bagi saya tidak ada salahnya kita mengambil prinsip undang-undang daripada mana juga asalkan ianya sesuai dengan keperluan kita dan ianya baik dan adil. Tetapi, saya tidak senang dengan peruntukan itu: mengapa perlu diadakan langsung dan apabila diadakan, mengapa ada "cut-off date" yang mengikat mahkamah untuk mamakai undang-undang England yang, seperti kata Professor L.C. Green, mungkin sudah lapuk dan tidak dipakai lagi di England sendiri, walau pun ada jalan keluarnya ia itu dengan memakai proviso kepada peruntukan itu dan menolaknya atas alasan ia tidak sesuai dengan keadaan di Malaysia..

Sekarang, hampir lima puluh tahun selepas merdeka, mungkin kita boleh mengimbas ke belakang dan melihat apakah kesan sebenranya kewujudan peruntukan itu.

Pada pandangan saya, kesan peruntukan itu kepada undang-undang Malaysia, tidaklah sebesar yang kerap disangkakan, terutama sekali oleh bukan pengamal undang-undang. Ini kerana, pertama, peruntukan itu tidak, malah tidak boleh, menghalang Parlimen membuat apa-apa undang-undang bertulis yang tidak memakai prinsip common law England dan kaedah-kaedah ekuiti. Parlimen Malaysia bebas untuk membuat apa-apa undang-undang yang difirkannya perlu. Dalam berbuat demikian ia bebas mengambil contoh daripada mana-mana unsur jua.

Sebagai misalan, Kanun Tanah Negara 1965 adalah gabungan Torren's System yang dipakai di Australia, prinsip-prinsip undang-undang tanah "common law" dan keadaan tempatan. Kebanyakan undang-undang bertulis Malaysia dibuat kerana keperluan semasa di Malaysia. Ia lebih bercorak global. Misalannya ialah Akta Syarikat 1965, Akta Pangangkutan Jalan 1987, Akta Kerajaan Tempatan 1976 dan lain-lain. Undang-undang yang lebih awal dibuat, banyak yang merupakan pengkanunan prinsip-prinsip common law England seperti yang telah dibuat di India. Misalnya, Kanun Keseksaan, Kanun Acara Jenayah, Akta Keterangan 1950, Akta Kontrak 1950, Akta Kebankrapan 1967 dan lain-lain. Ada yang kita "cipta" sendiri seperti Akta Tabung Haji 1995, Akta Kemajuan Tanah 1956 termasuk yang dilakukan untuk membolehkan pemakaian prinsip-prinsip hukum syarak, seperti Akta Bank Islam 1983, Akta Bank Pembangunan Islam 1975 dan Akta Takaful 1984. Jadi, peruntukan itu sebenarnya tidak relevan dalam membuat undang-undang bertulis. Terserahlah kepada Perlimen untuk membuat apa juga undang-undang yang perlu dan mengambil contoh yang sesuai daripada mana juga atau menciptanya sendiri, syaratnya ia tidak menyalahi peruntukan Perlembagaan Malaysia.

Kedua, nampaknya peguam-peguam dan mahkamah juga seolah-oleh tidak mengambil hirau tentang kewujudan peruntukan itu. Sepanjang pengalaman saya, saya belum pernah dengar satu hujah bahawa sesuatu prinsip common law atau kaedah-kaedah ekuiti itu tidak terpakai kerana ianya bukan seperti yang dipakai di England pada 7 April 1956 atau kerana ianya tidak sesuai dengan keadaan di Malaysia. Biasanya peguam-peguam menghujahkan kes-kes mereka seolah-olah peruntukan itu tidak wujud dan semua prinsip yang dipakai di England terpakai di sini sehinggakan peruntukan undang-undang bertulis Malaysia pun ada kalanya tidak diberi perhatian seperti yang sepatutnya diberi. Kerapkali, peguam-peguam akan memulakan hujahnya mengenai sesuatu persoalan undang-undang dengan merujuk kepada penghakiman-penghakiman di England, malah India, selepas itu baru merujuk kepada penghakiman-penghakina mahkamah-mahkamah di Malaysia dan kemudiannya baru merujuk kepada peruntukan undang-undang bertulis Malaysia mengenai perkara itu. Saya tidak tahu mengapa ia kerap berlaku demikian. Mungkin kerana peguam-peguam itu terlatih di England atau rujukan-rujukan itu lebih mudah dicari atau apa sebabnya. Saya selalu menegur peguam-peguam supaya memberitahu mahkamah apakah undang-undang di Malaysia dalam perkara itu. Malah, saya pernah menegur peguam-peguam supaya mengingati bahwa "Malaysia bukan sebahagian daripada England dan bukan lagi tanah jajahan British." Dan "Adakah hakim-hakim di Malaysia akan turut batuk setiap kali hakim di England terbatuk?" Tetapi, mungkin saya keseorangan yang berpandangan demikian.

Hakim-hakim juga, kerpakali, seolah-olah tidak memperdulikan kewujudan peruntukan itu. Umumnya mereka amat gemar mengikuti perkembangan terkini undang-undang di England kadangkala tanpa meneliti peruntukan undang-undang bertulis di Malaysia atau, jika tidak ada, kesesuaian sesuatu prinsip itu di Malaysia. Jika ada undang-undang bertulis di Malaysia pun, ada yang masih mengatakan bahawa remedi common law masih terpakai disamping atau sebagai tambahan kepada remedi yang telah diperuntukkan oleh undang-undang bertulis di Malaysia itu.

Sebagai misalan prinsip "equitable estoppel" telah diterima-pakai dan telah menjadi sebahagian daripada undang-undang Malaysia. Saya tidak menyoal penerimaannya

atau baik-buruknya. Apa yang saya persoalkan ialah sama ada keadaan di Malaysia di pertimbangkan sebelum iannya di terima, apatah lagi diperluaskan pemakaiannya. Sekarang fakta kes Inwards v. Baker (1965) 1 All.E.R. 446 seolah-olah sudah dilupai. Dalam kes itu si-anak hendak membuat rumah di atas tanah yang dia bercadang untuk membelinya. Si bapa kerkata binalah di atas tanahnya supaya boleh dibuat besar sedikit. Si anak membinanya dan tinggal di rumah itu bersama keluarganya. Si bapa meninggal dunia dalam tahun 1951. Si anak dan keluarganya terus tinggal di rumah itu selepas kematian bapanya. Dalam tahun 1963 pemegang amanah bapanya mengehendaki mereka keluar. Dalam keadaan itu, memanglah adil bagi si-anak dan keluarganya itu dibenarkan supaya terus tinggal di rumah yang dibina di atas tanah bapanya itu. Common sense pun akan berkata demikian.

Apa terjadi setelah ia diterima di Malaysia? Nampaknya pemakaiannya telah berkembang sebegitu cara sehingga penyewa bulanan malah, penyewa tapak rumah pun menuntut “hak ekuitinya”. Dalam satu kes di hadapan saya di Pulau Pinang, seorang penyewa tapak rumah yang hanya membayar RM2 sebulan dan telah tinggal di atas tanah itu selama lebih kurang 70 tahun, menuntut pampasan sebuah rumah banglo lima bilik tidur sebagai pampasan untuk keluar apabila tuan tanah itu hendak membangunkan tanahnya. Saya mengikra dan dapati bahwa jumlah bayaran sewa yang dibayarnya pun tidak sampai sebanyak itu. Itu bukan kes terpencil. Kita semua tahu, hari ini, telah menjadi satu perkara yang lumrah, apabila tuan tanah hendak membangunkan tanahnya, untuk mengelak litigasi yang perpanjangan, mereka akan membayar pampasan, termasuk kepada penceroboh. Siapa yang membayar kosnya? Pembeli. Ia juga telah menggalakkan perncerobohan dan menyebabkan tuan-tuan tanah tidak akan menolong saudara maranya sendiri yang miskin, yang tidak mempunyai tanah untuk menduduki tanahnya.

Saya teringat satu kisah benar yang berlaku lebih kurang lima puluh tahun dahulu. Ayah saya membeli sebidang tanah sawah dan kampung. Anak-anaknya sendiri belum berumah tangga. Salah seorang anak saudaranya meminta kebenaran untuk duduk di tanahnya dan mengerjakan sawah itu. Ayah saya membenarkan dengan syarat apabila anak-anaknya sendiri sudah berumah-tangga dan memerlukan tanah itu, anak saudaranya itu akan menyerah balik tanah itu. Anak saudaranya tinggal di tanah itu lebih dari dua puluh tahun dengan percuma. Dia cuma membayar “penyewa” sawah yang dikerjakannya. Dalam tempoh itu, dari hasil pendapatan mengerjakan sawah ayah saya itu, dia sendiri dapat membeli sebidang tanah yang berdekatan. Apabila tanah ayah saya itu diperlukan oleh ayah saya untuk anaknya (abang saya) mengerjakan sawah itu, dengan baik anak saudara tadi menyerah balik sawah itu. Apabila abang saya hendak membuat rumahnya sendiri di atas tanah itu, anak saudara tadi pindah ke tanahnya sendiri. Alangkah baiknya amalan itu. Yang senang menolong saudara yang susah. Yang ditolong tidak menyusahkan yang menolong dan berterima kasih kepada yang menolong. Hubungan silaturrahim menjadi lebih erat.

Hari ini siapa akan membenarkan orang lain menduduki tanahnya secara percuma? Bukan sahaja yang ditolong tidak akan berterima kasih, malah akan menuntut gantirugi yang bukan-bukan. Maka wujudlah satu masyarakat “kamu kamu, aku aku”.

Jangan salah faham. Saya tidak mengatakan prinsip itu tidak baik atau tidak patut diterima. Saya cuma mengatakan sebelum menerimanya, apatah lagi meluaskan pemakaiannya dan semasa menimbang jumlah atau bentuk gantirugi yang hendak diberi, keadaan setempat perlulah diberi perhatian supaya dalam cuba berlaku adil kepada satu pihak kita tidak berlaku tidak adil kepada satu pihak lain. Prinsip ekuiti adalah untuk melakukan keadilan tetapi tidak pula sampai melakukan ketidakadilan kepada pihak lain.

Misalan kedua ialah mengenai pemakaian prinsip common law walau pun ada undang-undang bertulis mengenainya. Dalam kes M.G.G. Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun (2002) 2 MLJ 673 (M.P.), permohonan telah dibuat di Mahkamah Persekutuan untuk mengepikan penghakiman mahkamah itu. Salah satu persoalan yang timbul ialah mengenai bidangkuasa mahkamah itu berbuat demikian. Saya tidak mempersoalkan keputusan mahkamah itu. Saya cuma ingin menarik perhatian kepada salah satu alasan yang diberi oleh salah seorang hakim yang mendengar kes itu mengapa mahkamah itu mempunyai bidangkuasa mendengar permohonanitu. Katanya:

> "I agree entirely with the view expressed by the Supreme Court in Lye Thai Sang ((1986) 1 MLJ 166 – ditambah) that s. 69(4) of the CJA (sebelum dipinda - ditambah) could not be construed to confer an unlimited power on the Supreme Court to review an earlier decision in an appeal which already been heard and disposed of and therefore, in that context, the Supreme Court had no power to reopen, rehear and reexamine its previous decision for whatever purpose. Quite clearly, that observation was made in the context of the proper construction to be place on s 69(4) of the CJA. But that cannot be read to mean that the Supreme Court had been deprived of its inherent jurisdiction derived under the common law by virtue of s 3(1)(a) of the Civil Law Act 1956, read with art 121 (2) of the Constitution. This is the common law exception quite apart from the statutory exceptions referred to in Lye Thai Sang"

Pendapat yang sama juga telah diberi oleh hakim yang sama dalam kes Megat Najmuddin Dato' Seri Dr. Megat Khas v. Bank Bumiputra Malaysia Berhad (2002) 1 CLJ 645 (M.P.)

Saya tidak akan berhujah mengenai pendapat ini. Saya cuma ingin mengemukakan satu soalan: Bukankan Fasal 121(2) Perlembagaan dan peruntukan-peruntukan dalam Akta Mahkamah Keadilan 1964 mengenai bidangkuasa Mahkamah Persekutuan itu "undang-undang bertulis yang berkuatkuasa di Malaysia" yang dimaksudkan oleh seksyen 3(1)(a) Akta Undang-Undang Sivil 1956?

Walau bagaimana pun, saya temui satu kes, penghakiman Mahkamah Tinggi, dalam kes Syarikat Batu Sinar Sdn. Bhd. v. U.M.B.C. Finance Bhd. (1990) 2 CLJ 691 di mana beliau enggan mengikuti penghakiman House of Lords dan sebaliknya mengikuti penghakiman Mahkamah Tinggi Brunei D.S. Dalam berbuat demikian beliau menagbil kira keadaan tempatan.

Mungkin satu kes yang paling jelas di mana mahkamah menimbang peruntukan itu, memutuskan bahawa peruntukan itu, selagi ia ada mesti dipatuhi dan selepas itu menimbang sama ada proviso kepada subseksyen itu terpakai dalam kes itu dan memakainya ialah kes kes Nepline Sdn. Bhd. v. Jones Lang Wooten (1995) 1 CLJ 865 (Mahkamah Tinggi). Itu pun, ia dilakukan atas dayausaha hakim itu sendiri, bukan kerana persoalan itu dihujajkan oleh peguam-peguam. Peguam-peguam hanya menghujahkan perkembangan di England, seolah-olah semuanya terpakai secara otomatik di Malaysia. Saya difahamkan bahawa rayuan ke Mahkamah rayuan ditolak, ertinya penghakiman itu disahkan tetapi saya tidak tahu alasannya kerana saya belum pernah temui penghakiman Mahkamah Rayuan dalam kes itu. Salah seorang peguam yang menghujahkan kes itu memaklumkan saya bahawa, dengan persetujuan kedua belah pihak, Mahkamah Persekutuan telah memberi kebenaran merayu ke Mahkamah Persekutuan dengan kedua pihak membayar kos sendiri, memandangn pentingnya persoalan undang-undang dalam kes itu. Tetapi, saya tidak tahu apa yang berlaku kepadanya hingga sekarang. Memandangkan amaun yang dipertikainya adalah kecil dan kos kepeguaman mungkin lebih mahal, berkemungkinan kedua belah pihak tidak berminat meneruskannya. Kepentingan ekonomi mungkin mengatasi kepentingan undang-undang.

Kesimpulannya, amat jarang mahkamah memberi perhatian kepada peruntukan itu. Mungkin kerana peruntukan itu sendiri “unreasonable”. Mungkin kerana peguam-peguam dan hakim-hakim terlalu ghairah mengikuti perkembangan terbaru di England sehingga terlupa atau menganggap peruntukan itu tidak perlu di beri perhatian. Biar apa pun, satu perkara yang saya alami ialah, adalah amat sukar untuk menentukan kedudukan common law atau kaedah-kaedah ekuiti di England seperti yang berkuatkuasa pada 7 April 1956 itu.

Selain dari itu, saya dapati peguam-peguam dan hakim-hakim di Malaysia amat suka mengikuti penghakiman-penghakiman dari negara-negara lain terutama sekali dari England dan India. Merujuk dan mengikutinya tidak salah tetapi perhatian kepada undang-undang bertulis di negara-negara itu mengenai persoalan itu, undang-undang bertulis di negara ini dan fakta kes itu hendaklah diberi perhatian. Di zaman komputer ini, adalah amat mudah untuk memetik sesuatu bahagian daripada sesuatu penghakiman. Akibatnya, kerapkali, petikan dibuat tanpa meneliti fakta kes itu. Biasanya, sesuatu bahagian ditulis secara umum. Jika hanya makna perkataan-perkataan itu ditafsirkan dan perhatian tidak diberi kepada faktanya, maka sehari demi sehari maknanya akan menjadi lebih luas.

Keghairahan mengikuti penghakiman mahkamah asing pernah membawa kepada keadaan yang tidak menentu dan akibat yang tidak adil. Mislan terbaik mungkin penerimaan prinsip “prima facie” di penghujung kes pendakwaan. Seksyen 173 dan 181 Kanun Acara Jenayah telah wujud sekian lama. Tafsiran yang konsisten telah diberi sekian lama: tahap pembuktian yang diperlukan ialah “beyond reasonable doubt”. Semua orang tahu. Jika hendak memetik autoriti, memadai hanya dengan merujuk kepada Mat v. P.P. (1963) MLJ 263. Nama kesnya pendek. Penghakiannya mudah difaham. Kemudian Haw Tua Tau (ada orang sebut “wa tak tau”) (Haw Tua Tau v. Public Prosecutor (1981) 1 MLJ 49) penghakiman Privy Council dalam rayuan dari Singapura di impot ke Malaysia. Saya tidak pasti sama ada selepas kes itu diterima pakai di Malaysia, Pendakwa Raya, dalam rayuan-tayuan di mana mahkamah membebas tertuduh di akhir kes pendakwaan atas alasan pendakwaan

tidak membuktikan kesnya “beyond reasonable doubt” bahawa mahkamah itu telah terkhilaf kerana memakai ujian yang salah dan tertuduh sepatutnya dipanggil membela diri. Setelah sekian lama ujian “prima facie” dipakai, ada pula yang berfikir bahawa ianya tidak betul. Ujian “prima facie” digantikan semula dengan ujian “beyond reasonable doubt”, sedangkan sepanjang dua kali perubahan itu, peruntukan-peruntukan undang-undang bertulis berkenaan tidak pernah dipinda. Akibat-nya, yang mungkin tidak difikirkan, ialah banyak kes-kes yang memakai ujian “prima facie” di akhir kes pendakwaan sebelum perubahan kali kedua itu, diisytiharkan tidak sah walau pun di akhir kes pembelaan ujian “beyond reasonable doubt” dipakai dengan betul. Alasannya, hakim memakai ujian yang salah di akhir kes pendakwaan walau pun beliau memakai ujian yang betul di ahkir ke pembelaan. Hinggalah seksyen-seksyen berkenaan terpaksa dipinda.

Bagi saya, jika sesuatu peruntukan itu telah wujud sekian lama dan ditafsirkan dengan konsisten sebagitu lama, tak usahlah memandai-mandai untuk memberi tafsiran baru. Kedua, apa yang penting adalah ujian di akhir kes pembelaan. Jika, diakhir kes pendakwaan mahkamah memakai ujian “prima facie” pun, masih ada dua kemungkinan. Pertama, jika dipakai ujian “beyond reasonable doubt” kes pendakwaan itu tidak terbukti. Kedua, kes pendakwan masih terbukti. Dalam keadaan pertama, ia itu kes pendakwaan itu hanya terbukti pada tahap “prima facie”, setalah pembelaan dipanggil dan mendengar saksi-saki pembelaaan, tidak mungkin kes pendakwaan akan menjadi lebih kuat hingga terbukti “beyond reasonable doubt”. Ia sepatutnya menjadi lebih lemah atau sekurang-kurangnya sama, ia itu ia hanya terbukti pada tahap “prima facie”. Ertinya tertuduh masih tidak boleh disabitkan. Jika kes itu termasuk dalam golongan kedua, ia itu sekiranya mahkamah menggunakan ujian “beyond reasonable doubt” pun, kes pendakwaan tetap terbukti juga, diakhir kes pembelaan dua kemungkinan masih boleh berlaku. Pertama, setalah mendengar kes pembelaan, kes pendakwaan menjadi lebih lemah yang bererti tertuduh tidak boleh disabitkan. Kedua, kes pendakwaan tetap mantap yang membolehkan tertuduh disabitkan. Jadi, apa bezanya sama ada di akhir kes pendakwaan ujian “prima facie” atau “beyond reasonable doubt” dipakai, selain daripada persoalan akademik?

Kerana mengikuti penghakiman-penghakiman luar negara, ada kalanya kita tidak memberi kesan secukupnya kepada undang-undang bertulis. Lihat perkembangan prinsip “judicial review”, terutama sekali “certiorari”. “Certiorari” adalah satu remedy common law. Mahkamah di Malaysia diberi kuasa mengeluarkannya. Diperingkat awalnya, ianya hanya dikeluarkan jika terdapat “kesilapan bidangkuasa” (“error of jurisdiction”). Alasan untuk mengeluarkan telah dikembangkan sebegitu rupa sehingga ia seolah-oleah satu rayuan. Peruntukan undang-undang, seperti seksyen 33B(1) Akta Perhubungan Perusahaan 1967 “…shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.” tidak memberi apa-apa kesan, malah seolah-olah tidak ada. Sebaliknya kata-kata “shall be final” yang digunakan dalam seksyen 36, Akta Kesalahan Pilihanraya 1954 sahaja pun memadai untuk menghalang rayuan terhadap sesuatu keputusan dalam petisyen pilihanraya – lihat Yong Teack Lee v. Harris Mohd. Salleh (2002) 3 MLJ 230. demikian juga kata-kata “…any such order of the High Court shall be final and conclusive” dalam seksyen 37(6) Extradition Act 1992 adalah memadai untuk menghalang rayuan – lihat Pendakwaraya v. Ottavio Quattrocchi (2003) 2 CLJ 613 (M.R.) dan (2004) 3 CLJ 553 (M.P.). Sepuluh tahun selepas peruntukan itu

dimasukkan ke dalam seksyen 33B(1) Akta Perhubungan Perusahaan 1967, apabila seksyen 18C Akta Pertubuhan 1966 dipinda, maka ditambah lagi perkataan-perkataan "…on any ground, and no court shall have jurisdiction to entertain or determine any suit, application, question or proceeding on any ground regarding the validity of such decision." Namun demikian percanggahan pendapat berlarutan sama ada peruntukan itu menghalang "judicial review" atau tidak. Tetapi baru-baru ini Mahkamah Rayuan telah memberu kesan kepada peruntukan itu. Dalam penghakimannya mahkamah itu, antara lain, berkata:

> "Are these words still not clear or insufficient to say what the legislature wants to say? If these words are still ambiguous or insufficient to show the intention of Parliament, we do not know what else can bee said to achieve its intention."

- Lihat Pendaftar Pertubuhan Malaysia v. P.V. Das (20030 3 CLJ 404.

Walau bagaimana pun, baru-baru ini terdapat suara yang mengatakan:

> "The Industrial Court should be allowed to discharge its function as it was intended to be by statute. The Industrial Court should be more flexible to enable it to regulate the relations between the employers and the workmen and to prevent and settle difference and disputes arising from their relationship. That is what it is meant to be."

- Lihat Telekom Malaysia Kawasan Utara v. Krishnan Kutty a/l Sanguni Nair (2002) 3 MLJ 129 (M.R.)

Setakat ini, nampaknya saya amat konservatif. Tidak mengapa. Bagi saya, tugas hakim ialah melaksanakan undang-undang, bukan membuat undang. Kedudukan undang-undang perlulah jelas, seberapa yang boleh, bukan mengikut "firasat" seseorang hakim, supaya peguam-peguam boleh menasihatkan anak-guamnya dengan pasti. Lagi pula, hari ini kita beri satu tafsiran yang luarbiasa dan oleh sebab ia bersesuaian dengan kehendak pihak-pihak tertentu, kita disanjung sebagai seorang hakim yang kreatif. Esok kita melakukan perkara yang sama atau tidak melakukannya dan pihak yang menang kebetulan adalah Kerajaan, kita dikatakan "ditekan", "tak bebas" dan sebagainya. Oleh itu saya memilih untuk "mengikut undang-undang" ("follow the law"). Sekurang-kurangnya saya konsisten. Kita juga harus ingat bahawa pokok yang melentur ke kanan juga boleh melentur ke kiri apabila angin berubah. Saya lebih suka berdiri tegak seperti tiang letrik, sehingga tumbang.

Kembali kepada seksyen 3(1) Akta Undang-Undang Sivil 1956. Pada pandangan saya, peruntukan itu lebih baik tidak ada daripada ada. Walaupun ia ada, ia jarang dirujuk. Jika dirujuk pun hanya secara sambil lalu untuk menyokong pemakaian prinsip common law sehingga mengenepikan peruntukan undang-undang bertulis dan tanpa mengambil kira kesesuaiannya dan "cut-off date" yang diperuntukkan. Pengeritik-pengiritiknya pula menghujahkan bahawa ia menyekat pemakaian prinsip-prinsip undang-undang yang mungkin lebih baik daripada jurisprudensi lain.

Apa kesannya jika ia tidak ada? Pada pandangan saya, jika peruntukan itu tidak ada pun peguam-peguam akan tetap merujuk kepada undang-undang di England sebab undang-undang kita berasaskan common law England, kerana banyak peguam-peguam dan hakim-hakim, biar di mana pun mereka dilatih, talah didedahkan kepada penghakiman-penghakiman mahkamah-mahkamah di England, kerana ia ditulis dalam bahasa yang difahami oleh peguam-peguam dan hakim-hakim dan kerana ia mudah diperolehi. Kita tidak ada undang-undang yang menghendaki kita mengikuti undang-undang di India, Australia dan negara-negara Commonwealth lain. Penghakiman-penghakiman mahkamah-mahkamah di negara-negara itu tetap dirujuk. Sekurang-kurangnya jika peruntukan itu tidak ada kita tidak terikat kepada undang-undang di England dan kita lebih bebas mencari prinsip-prinsip yang sesuai jika ia tidak diperuntukkan oleh undang-undang bertulis kita. Dalam kata-kata lain, sekurang-kurangnya kita “cakap serupa bikin”.

Selagi ia masih ada, kita kena mengikutinya. Tetapi dalam berbuat demikian kita perlu menilai sama ada ia sesuai dengan keadaan di negara kita atau tidak. Jika tidak, tolak. Kita patut menggunakan proviso yang diperuntukkan dalam seksyen itu. Dalam hal ini, sikap dan pendekatan peguam-peguam dan hakim-hakim amat penting. Kita tidak harus terlalu taksub dengan common law England seolah-olah keadilan adalah monopoli common law. Kita perlu ingat bahawa undang-undang Malaysia dibuat oleh Parlimen Malaysia kerana keperluan di Malayisa berdasarkan keadaan di Malaysia. Dalam mentafsirkannya dan melaksanakannya, keadaan di Malaysialah yang perlu diambil perhatian.

Ucapan ini bukanlah hasil kajian mendalam mengenai tajuk ini. Ia hanya berdasarkan pemerhatian saya dan ingatan saya. Mungkin, ada di antara tuan-tuan dan puan-puan yang tertarik membuat kajian yang lebih mendalam mengenainya supaya kita dapat tahu kedudukan yang sebenar. Terserahlah kepada tuan-tuan dan puan-puan sekalian.

Terima kasih.

ENCLOSURE 3

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon
Federal Court
(2006) 2 CLJ 1

Per: Abdul Hamid Mohamad FCJ:

.....

[27] However, before going any further there is one point that I would like to make and, that is, regarding the provision of s. 3(1) of the Civil Law Act 1956 which provides:

3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949, subject however to subsection (3)(ii): Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[28] That provision was legislated, if I may so, by the British one year before the then Malaya obtained her independence and remains the law of this country for half a century now. Whatever our personal views about it, it is the law and no court can ignore it.

[29] That provision says (I am only referring to common law) that the court shall apply the common law of England as administered of England on the given dates provided that no provision has been made or may hereafter be made by any written law in force in Malaysia. Even then, it is further qualified that it is only applicable so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[30] Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first, the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia. Having done that the court should consider whether "local circumstances" and "local inhabitants" permit its application, as such. If it is "permissible" the court should apply it. If not, in my view, the court is free to reject it

totally or adopt any part which is "permissible", with or without qualification. Where the court rejects it totally or in part, then the court is free to formulate Malaysia's own common law. In so doing, the court is at liberty to look at other sources, local or otherwise, including the common law of England after 7 April 1956 and principles of common law in other countries.

[31] In practice, lawyers and judges do not usually approach the matter that way. One of the reasons, I believe, is the difficulty in determining the common law of England as administered in England on that date. Another reason which may even be more dominant, is that both lawyers and judges alike do not see the rational of Malaysian courts applying "archaic" common law of England which reason, in law, is difficult to justify. As a result, quite often, most recent developments in the common law of England are followed without any reference to the said provision. However, this is not to say that judges are not aware or, generally speaking, choose to disregard the provision. Some do state clearly in their judgments the effects of that provision. For example, in *Syarikat Batu Sinar Sdn. Bhd. & 2 Ors. v. UMBC Finance Bhd. & 2 Ors. [1990] 2 CLJ 691; [1990] 3 CLJ (Rep) 140* Peh Swee Chin J (as he then was) referring to the proviso to s. 3(i) said: We have to develop our own Common law just like what Australia has been doing, by directing our mind to the "local circumstances" or "local inhabitants".

[32] In*Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57* the Supreme Court, *inter alia*, held: (4) Because the principle of common law has been incorporated into statutory law as contained in s. 24 of the Contracts Act 1950, the trend on any change in the common law elsewhere is not relevant. Any change in the common law after 7 April 1956 shall be made by our own courts.

[33] In the judgment of the court in that case, delivered by Hashim Yeop A. Sani CJ (Malaya), the learned Chief Justice (Malaya), said: Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England. See also the majority judgments in *Government of Malaysia v. Lim Kit Siang ([1988] 1 CLJ 63 (Rep); [1988] 1 CLJ 219*; [1988] 2 MLJ 12 - added).

[34] That case is an example where our statute has made specific provisions incorporating the principles of common law of England. However, it shows the effect on the application of the common law in England. In the instant appeal, we are dealing with a situation where no statutory provisions have been made.

[35] In *Jamal bin Harun v. Yang Kamsiah & Anor [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11* (PC) a "running down" case in which the issue of itemization of damages was in question, Lord Scarman, delivering the judgment of the Board, *inter alia*, said: Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so.

[36] As early as 1963, this provision had been criticised. Professor L.C. Green, in an article *"Filling Lacunae in the Law"* [1963] MLJ xxviii, commented: Apart from any problem that might arise from the fact that this legislation attempts, to some extent at least, to introduce a supplementary English common law or equity which may have become out of date and which may no longer be applicable in England, the situation in Malaysia and Singapore is today different from what it was at the time of the enactment of the Ordinances. In view of the increased political stature of the two territories, an in anticipation of further changes likely to be effected with the establishment of Malaysia, it is now perhaps evidence of an out of date attitude as well as contrary to national prestige to make provisions for the supplementation of the local law in the event of lacunae by means of reference to any "alien" system, whether it be that of the former imperial power or not.

[37] It is not the function of the court to enter into arguments regarding the desirability or otherwise of the provision. That is a matter for Parliament to decide. As far as the court is concerned, until now, that is the law and the court is duty bound to apply it. In so doing, the provision is clear that even the application of common law of England as administered in England on 7 April 1956 is subject to the conditions that no provision has been made by statute law and that it is "permissible" considering the "circumstances of the States of Malaysia" and their "respective inhabitants". That is not to say that post_7 April 1956 developments are totally irrelevant and must be ignored altogether. If the court finds that the common law of England as at 7 April 1956, is not "permissible", it is open to the court to consider post-7 April 1956 developments or even the law in other jurisdictions or sources.

[38] The point I am making, if I may borrow the words of Hashim Yeop A. Sani, Chief Justice (Malaya) in *Chung Khiaw Bank Ltd. (supra)* is that "We cannot just accept the development of the common law of England". We have to "direct our mind to the "local circumstances" or "local inhabitants"," to quote the words of Peh Swee Chin J in *Syarikat Batu Sinar Sdn. Bhd. & 2 Ors (supra)*