DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN SIVIL)

GUAMAN SIVIL NO: S2-23-93-1999 (5)

ANTARA

RAJA SEGARAN A/L S KRISHNAN	**…**	**PLAINTIF**

DAN

1. BAR COUNCIL MALAYSIA **2. RR CHELVARAJAH** (didakwa bagi pihak semua ahli-ahli Majlis Peguam Malaysia termasuk dirinya sendiri) **3. BAR MALAYSIA**	…	**DEFENDAN-DEFENDAN**

JUDGMENT

Facts

The facts relating to this case have been earlier set out by me in detail in *Raja Segaran al S. Krishnan v. Bar Council Malaysia & Ors* [2000] 1 MLJ 1; [2000] 5 CLJ 136; [2000] 1 AMR 540, which I shall call Case No. 1. Case No. 1 was the plaintiff's application for an interim injunction to restrain the defendants from holding an EGM. There was also an application by the defendants to strike out

the writ. In a lengthy judgment, which decided many issues, I granted the plaintiff's prayer for an interim injunction. I also dismissed the defendants' application to strike out the writ. Out of this Case No. 1, two matters went up to the Court of Appeal. The first, which is Court of Appeal No. W-02-48-00, is against my dismissal of the striking out application. The Court of Appeal dismissed this appeal. The next issue was the substantive appeal against my decision granting the interim injunction, which was Court of Appeal No. W-02-47-00. This too was dismissed by the Court of Appeal. I shall revert in detail to this decision of the Court of Appeal later. The defendants' leave applications to the Federal Court against both issues from the Court of Appeal, filed as Federal Court No. W-07-64-00 (the striking out issue) and Federal Court No. W-02-63-00 (against the grant of the injunction), were dismissed.

The next matter that arose out of this case and which I heard, is reported as *Raja Segaran a/l S. Krishnan v. Bar Council Malaysia & Ors* [2001] 1 MLJ 472; [2001] 1 CLJ 680. I shall call this Case No. 2. This was the plaintiff's O. 33 application under the Rules of the High Court 1980 (the RHC) to determine a preliminary issue before the trial of the action, namely, 'whether the Resolution

dated 12.10.99 and the proposed EGM of the Malaysian Bar to be held on 20.11.99 were *ultra vires* the powers and objectives of the Malaysian Bar under the Legal Profession Act 1976' (the LPA). It was the defendants' case that since the plaintiff's suit against the defendants was premised on three different causes of action, that is, that the Resolution and the proposed EGM were (a) *ultra vires* the LPA; and/or (b) constitute contempt of Court, and/or (c) constitute offences under the Sedition Act 1948 and since the plaintiff's application was only to try one of the three different causes of action, the plaintiff could not contend that the determination of the proposed issue would dispose of the plaintiff's case without the necessity of a trial. The defendants also contended that whether the matter was *ultra vires* or not was a matter of evidence which ought to be determined at the full trial of this action and also for the Court to know the reasons behind the Resolution.

It was my judgment that the defendants had failed to see the difference between the cause of action and the grounds on which the cause of action was founded. I held that the cause of action was that the notice of the EGM with the Resolution and the proposed meeting were all *ultra vires* the powers and objects of the Malaysian

Bar under the LPA on the grounds that it was contemptuous and seditious and unconstitutional. I also held that if the parties see the need to, they could apply to adduce oral evidence and that therefore it was unacceptable for the defendants to complain that by making an order under O. 33 of the RHC, this Court would deprive them of the right to adduce oral evidence. I also held, that since where contempt and sedition were concerned, intention or motive was irrelevant and immaterial, the defendants' argument that evidence must be led to show intention and the motive for calling the EGM and moving the Resolution, was no longer meritorious. The defendants have, by way of Court of Appeal No. W-02-647-00, appealed against this decision.

The next matter that arose out of this case and which I heard, is reported as *Raja Segaran a/l S. Krishnan v. Bar Council Malaysia & Ors (No. 3)* [2001] 5 MLJ 305; [2001] 2 CLJ 44. I shall call this Case No. 3.

During the O. 33 r. 2 proceedings of the RHC, I had as stated earlier ruled that parties, if they wished, would be permitted to adduce oral evidence; otherwise the case was to proceed based on

the pleadings, the affidavits filed and the statement of agreed facts. Based on this ruling, Mr. Vijandran for the plaintiff applied to be allowed to call to testify, (a) the plaintiff, and (b) Mr. (now Dato') R. Rajasingam, a member of the Bar Council. He also gave notice that he intended to cross-examine Mr. R.R. Chelvarajah, the then President of the Malaysian Bar, on his affidavit and promised to limit the cross-examination to the issues in dispute.

Mr. Bhaskaran for the defendants, whilst agreeing that the plaintiff was entitled 'to call evidence or to give notice', pointed out that because the defendants were appealing against my order allowing the O. 33 application, they did not wish to call evidence. From the notice of appeal filed I noted that the appeal is only against my allowing Dato' R. Rajasingam to be called as a witness and to produce relevant documents. There was no objection to both Mr. R.R. Chelvarajah and the plaintiff giving evidence.

The judgment will show that the Court did not call Dato' R. Rajasingam as a witness. He was called by the plaintiff.

When Dato' R. Rajasingam testified he raised section 76(2) of the LPA and said that in the light of that sub-section which required the maintenance of secrecy, he was unable to answer any further questions.

By consent, the question posed to the Court was **'whether the provision of section 76(2) prevents any witness from giving evidence in Court as to any proceedings of the Bar Council and to produce documents relating to the proceedings of the Bar Council?'.** Having gone through the various authorities, I held that it is the Evidence Act that determines the admissibility of any evidence in a Court of law, and in respect of this case I held that the relevant provisions for consideration ought to be sections 123 and 162(2) of the Evidence Act 1950. I also held that there was nothing in the LPA that excluded the application of the Evidence Act.

I therefore held that the meaning of the word 'secrecy' given to section 76(2) of the LPA is that all decisions and discussions or resolutions passed that relate to investigations relating to the conduct or affairs (or complaints) against members of the Bar are the matters that ought to be kept secret to protect the interest of

such members, lest the conduct and affairs of members or any complaints against any members be discussed by the Council or Committee members in the open. I rejected the defendants' request to apply the literal interpretation to the meaning of the word 'secrecy'. The defendants have appealed against this decision to the Court of Appeal by way of No. W-02-780-00.

The final judgment I had given so far in this case is reported as *Raja Segaran a/l S. Krishnan v. Bar Council Malaysia & Ors* (No4) [2001] 6 MLJ 166; [2001] 4 AMR 3999. I shall call this Case No. 4. This case relates to the instance when I advised parties to settle their differences since the former Chief Justice, the subject of the Bar's motion had retired and the new Chief Justice (also since retired) had in speeches exhorted for a better Bench/Bar relationship. Taking the advice of the Court, the plaintiff indicated his desire to withdraw this suit and filed an application for that purpose. The Bar resisted. I heard full arguments and I allowed the plaintiff's application, but the Court of Appeal allowed the defendants' appeal against my decision of striking out the suit and directed that I deliver my judgment on the substantive trial since the matter had already been concluded and I had reserved my

judgment. Although the Court of Appeal directed that I write my judgment, it did say that I was to do so at my convenience. I was then transferred to the High Court in Penang and by the time the bundles of files and authorities were traced and despatched to me in Penang, it has taken some time. In its bulletin called 'Relevan' the Kuala Lumpur Bar had made adverse comments by stating that I had my judgment ready and that they saw no reason why I could not deliver my judgment if it was ready.

The Editorial Board of that relevant 'Relevan' either was oblivious to the reported judgment (Case No. 4) or had adopted a totally indifferent attitude to the truth of the matter. In that judgment I had said as follows:

> "Gentlemen of the Bar
>
> In so far as this case is concerned I have already reached a decision. All it requires is for me to tell you my decision and in the event of an appeal to write my judgment. But before I pronounce my decision I take this opportunity to appeal to both sides to reconsider your positions."

Application For Stay Of Federal Court And Court Of Appeal Matters

On the day fixed for the hearing of the substantive matter, the defendants applied through Enclosure 71, that all further proceedings in this suit be stayed pending the hearing and final determination of the two leave applications to the Federal Court (W-07-64-00 and W-07-63-00) referred to earlier, and also for the hearing of an appeal in the Court of Appeal against one of my judgments in this matter. I drew Encik Malik's attention to his prayers (a) and (b) seeking a High Court order to stay proceedings in the Court of Appeal and in the Federal Court.

Whilst section 43 of the Courts of Judicature Act 1964 (the CJA) is quite clear, I asked Encik Malik why the application for stay had not been filed and asked for in the Court of Appeal since my decision was given on 5.9.00. Encik Malik's answer was that he would be breaching section 43 of the CJA if he had applied to the Court of Appeal first, before applying to the High Court. Then, to my question why the defendants had not sought a stay before me on the day I gave my decision or soon thereafter, his candid answer was "I have no answer to that except that this Court is at liberty to take that

factor into consideration in the exercise of this Court's discretion perhaps in the context of delay. Court will have to look at the balance of prejudice." On the issue of prejudice Mr. Bhaskaran for the defendants referred me to the case of *Airport Restaurants Ltd v. Southend-On-Sea Corporation* [1960] 2 All ER 888 CA. In that case tenants who had been given statutory notice in the form prescribed by the Landlord and Tenant Act 1954, to terminate their tenancy whose rateable value did not exceed £500 applied to the County Court for a new lease. On being advised that the notice issued to them might be invalid, they filed a writ in the High Court seeking a declaration that the notices were invalid in law. They then applied to the County Court to adjourn the hearing until determination of the High Court matter. The Country Court refused the adjournment. On appeal the Court of Appeal ordered an adjournment of the Country Court proceedings because otherwise there would be a grave risk of injustice to the tenants who, if they were forced to prosecute their application for a new lease and failed thereon, might be held in the High Court to have thereby estopped themselves from contending that the notice to terminate the tenancy was invalid.

Ormerod LJ said at page 890:

> "So far as the balance of prejudice is concerned, I find it hard, and I have found it hard throughout the hearing, to understand why there should be any considerable prejudice against the landlords if this adjournment is allowed."

With respect, I could not see the relevance of this case to the one before me. Whilst Encik Malik correctly conceded that in the exercise of my discretion I ought to consider delay on their part, Mr. Bhaskaran, on the other hand, submitted that 'delay is not an issue in this case'.

Mr. Vijandran pointed out that on 5.9.00 the defendants made an oral application for stay on the twin grounds that the grounds of judgment of the Court of Appeal have not been received and also that leave applications have been made to the Federal Court. There was no appeal against my order of refusal.

On the question of delay, Mr. Vijandran relied on *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman* [1987]

2 MLJ 633. Zakaria Yatim J (as he then was) said at page 635 as follows:

> "I now turn to his application for stay of proceedings on the ground that the Courts in Hong Kong being the natural forum. In my opinion his applications for stay in both C138 and C438 were made far too late. He should have filed his applications at the early stages of the proceedings. In the circumstances the Court has the discretion to refuse his applications for stay. See *Coupland v. Arabian Gulf Petroleum Co* ([1983] 2 All ER 434, 437 & 442). Mr. Ross-Munro submitted that the period of delay was one of four months between November 1985 and March 1986. According to him in *Coupland's* case, the delay was eight months. In my view even a four months period was a long delay for the purpose of applying for a stay. Lorrain had the services of his own solicitors in this country all the time and if he was serious in applying for a stay, I fail to understand why he did not file his applications much earlier."

I made the order appealed against on 5.9.00 and immediately fixed dates after consulting counsel who took time to refer to their diaries to give me their free dates. The notice of appeal was filed on 18.9.00 and served on the plaintiffs solicitors on 22.9.00 just 3 days before this case was set for hearing. Clearly the defendants had delayed in filing this application for stay. In any case it is my judgment that the defendants cannot file this second application before me after I had dismissed their oral application.

However, even if I were to consider the application, the affidavit in support (Enclosure 70) merely states ‘good prospects of success for the reasons submitted on 5.9.00’. I find that this by itself is insufficient. The deponent must specifically set out the grounds, as many issues were raised on 5.9.00 and state which are the ones the defendants are relying on. There were no specifics in the affidavit in support. I therefore had no hesitation, after considering all issues, in dismissing Enclosure 71 with costs.

The substantive matter

Finally, parties were ready and both sides agreed not to call any witness although Encik Malik qualified the agreement by stating

that the reason he was not calling any witness was because of the appeal against my decision. I put him on notice that his appeal did not preclude him from calling witnesses if he so required.

In order to assess Mr. Vijandran's submission it is necessary to reproduce the notice of the EGM of the Bar scheduled to be held on 20.11.99 at 10.00 a.m. at the Grand Ballroom, Renaissance Hotel, Kuala Lumpur:

"*NOTICE*

Extraordinary General Meeting Of The Malaysian Bar

Notice is hereby given that an Extraordinary General Meeting of the Malaysian Bar will be held on Saturday, 20th November, 1999 at 10.00 a.m. at the Grand Ballroom, Renaissance Hotel, Kuala Lumpur to consider and, if approved, to adopt the Motion proposed by the Bar Council as follows:-

Whereas:

(1) The Malaysian Bar recognises:

(a) that freedom in any democratic state is not only economic well-being and the absence of

aggression but also the presence of justice and the rule of law;

(b) and is committed, to the principle that the Judiciary is a vital and fundamental organ of a democratic state and the final arbiter of justice according to the rule of law; and

(c) that vitally important and inherent to the role of the Judiciary is the ability to command confidence in its independence, integrity and competence;

(2) The Malaysian Bar:

(a) understands that serious allegations of impropriety have been made against certain members of the Judiciary; and

(b) is gravely concerned with judicial developments and pronouncements in certain important branches of law such as the law of contempt and the law of defamation, and with the administration of justice generally.

(3) It is the grave concern of the Malaysian Bar that by reason of these allegations, developments and pronouncements confidence in the independence, integrity and competence in the Judiciary has been undermined to the detriment of the rule of law in Malaysia.

It is hereby resolved:

That the Bar Council is to forthwith bring to the attention of the appropriate authorities all relevant instances of controversy that have undermined confidence in the Malaysian Judiciary and to do all that is necessary to pursue the appointment of a Royal Commission of Inquiry to make such inquiries and recommendations as may be appropriate to ensure that confidence in the Malaysian Judiciary is fully restored.

Dated: 12th October, 1999

Sgd.

Roy Rajasingham
Secretary

Note

1. Members are kindly requested to make every effort to attend the meeting punctually to ensure that the quorum, which is 1/5 of the total number of [8,563] members of the Malaysian Bar, is reached within half an hour, that is by 10.30 a.m.;
2. Registration counters will be opened as from 8.30 a.m. when light refreshments will be served;
3. In order for the motion to be carried, two-thirds of the members present and voting should support it;
4. Accommodation is available at the Renaissance Hotel at RM200 nett for deluxe room exclusive of breakfast and RM230 nett for deluxe room inclusive of breakfast or at the New World Renaissance at RM170 nett for superior room. Please book directly with the Hotels at Tel. No. 2622233 ext. 3350 (Cik Norma: Reservations).
5. *Pupils* can attend but shall not vote and shall be seated only at a designated area."

Mr. Vijandran split the Notice and Resolution and attacked it according.

With regard to 1(a) of the Notice, counsel argued that the 1st defendant was transgressing the very essence thereof by acting *ultra vires* the LPA. Whilst agreeing with the contents of 1(b) he likened 1(c) to Brutus stabbing Caesar. His interpretation of 1(c) was that if the Judiciary is to be what it is to be, then what it needs is independence, integrity and competence.

But 2(a) Mr. Vijandran says, is the stab by Brutus. In a glib statement worthy of crafty lawyership he alleges that the Bar had descended into a nebulous and uncertain position by using the word 'understands'.

To my mind, the language used seems to suggest that it was a fact that serious allegations of impropriety have been made against certain members of the Judiciary. However, by using the word 'understands' it is clear that the defendants, whilst insidiously suggesting a fact, yet are not taking responsibility for asserting such a fact.

As for 2(b) and the use of the words 'gravely concerned' Mr. Vijandran says that the very exalted position the Bar holds in the eye

of the public should have prevented it from using such words. He argued that in Malaysia the Bar Council has been given statutory recognition unlike countries like the U.K., Australia, U.S.A. and India where there is no such statutory recognition.

The defendants did not reply to this issue. In any case it is a fact that the LPA sets out the Bar as a corporate statutory body given recognition by the Government. It is therefore imperative that the Bar recognises this fact and acts with concern when making statements, because of its unique position.

Further, referring to the words 'has been undermined' referred to in 2(c), counsel submitted that by devious suggestions the defendants have finally concluded that the Judiciary 'has been undermined'. Again, there is no response to this from the defendants. However, it seems clear that from a position that it 'understands' and that this is of 'grave concern', the defendants have now decided on a conclusive statement that the Judiciary 'has been undermined'.

Contempt

After such a decision, Mr. Vijandran states the words 'It is hereby resolved' are supposed to be a panacea offered by the defendants, to correct the alleged wrongs. It is the plaintiff's submission that the wordings of the Resolution is a pernicious attack against the Judiciary done under the guise of being concerned and constitutes contempt of Court. Counsel relied on the case of *Attorney General v. Fred Zimmerman & Ors* [1986] 2 MLJ 89. Contempt proceedings were initiated against the publishers/printers of The Asian Wall Street Journal for having said the following in a publication, namely:

> "(1) 'We don't know if Mr. Jeyaretnam is guilty.
>
> (2) But even if he were, many Singaporeans wouldn't believe it.
>
> (3) … court actions, and especially libel suits, have long been used in Singapore against opposition politicians.

(4) Mr. Jeyaretnam's convictions... [has] outraged many Singaporeans, who believe that the government is deliberately trying to wipe out the opposition leader and his party.

(5) The fact that the magistrate who originally found Mr. Jeyaretnam innocent has been demoted buttresses their case.

(6) One prominent political scientist ... believes that the government is keeping a close eye on the public reaction to Mr. Jeyaretnam's conviction and will have it overturned if it becomes a political hot potato.

(7) That doesn't say much for Singaporeans' faith in the independence of their judiciary."

The Court said as follows at page 91:

"The statements that I have enumerated are without doubt irresponsible and offensive statements calculated to

bring the Judiciary of Singapore into contempt or to lower its authority. The statements in so many words question the integrity and impartiality of the Courts. The outrageous allegation made in them is that our Courts are not independent, that they do not decide on the evidence, the law and the arguments openly placed before them, and that they are influenced by outside considerations, in particular that the Courts can be dictated to by the Government. The statements are clearly calculated to undermine public confidence in the proper functioning of our Courts.

... In the context of these proceedings, anyone who attacked the integrity or impartiality of a Court or a Judge commits contempt of Court. The reason is simple. It undermines public confidence in the administration of justice."

Mr. Vijandran also relied on a passage from *Gallagher v. Durack* [1983] ALJR 191 at 193 which reads as follows:

"... The statement by the applicant that he believed that the actions of the rank and file of the Federation had been the

main reason for the court changing its mind can only mean that he believed that the court was largely influenced in reaching its decision by the action of the members of the union in demonstrating as they had done. In other words, the applicant was insinuating that the Federal Court had bowed to outside pressure in reaching its decision. It is fundamental that a court must decide only in accordance with the evidence and argument properly and openly put before it, and not under any outside influence. What was imputed was a grave breach of duty by the court. The imputation was of course unwarranted. In considering whether this statement was calculated to lower the authority of the court, and whether it was necessary in the interests of the ordered and fearless administration of justice to fine or imprison the applicant, the Federal Court was entitled to consider, as it did, the fact that the applicant is a union leader, very well known to the Australian public, holding an important office in a large national trade union, and the fact that some members of the public might have been the more ready to accept the assertions of the applicant as true because of their awareness that on some occasions employers and even governments are

influenced by the pressure which trade unions are able to bring to bear."

In ***Gallagher*** therefore the Court considered the position and standing of the person making the statement. I see no reason to disagree with the rationale behind this case. Similarly, the Malaysian Bar must accept the fact that it is a voice that is heard by the public. It acts as a regulator. It must also act as a moderator.

Independence of the Judiciary is the cornerstone of judicial functions. If this is attacked then the system of administration of justice is destroyed. In words synonymous, Mahejan J who gave the judgment of the Supreme Court of India said in *Aswini Kumar Ghose & Anorv Arabinder Bose & Anor* [1953] 40 AIR 75 at 76 as follows:

"No objection could have been taken to the article had it merely preached to the Courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the Judges, it not only transgressed the limits of fair and '*bona fide'* criticism but had a clear tendency to affect the

dignity and prestige of this Court. The article in question was thus a gross contempt of Court. It is obvious that if an impression is created in the minds of the public that the Judges in the highest Court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined."

Sub-Judice

At the time the Resolution was to be presented, the *Raphael Pura* case was still pending in Court. There is no doubt that it was this case, and the affidavits affirmed in relation to this case, that sparked the said Resolution of the Bar. This is clear from the evidence of Dato' Rajasingam who testified at the behest of the plaintiff. Dato' Rajasingam, a senior member of the Bar was especially requested by the Chairman of the Bar Council to intercede and to deal with the plaintiff. Dato' Rajasingam testified that when the plaintiff pointed out to him during their conversation, that the *Raphael Pura* case would no doubt be discussed at the EGM if the Resolution is to be put to the members, and questioned whether it

was *sub-judice,* as the matter was still pending in the Court, Dato' Rajasingam testified that he told the plaintiff, "Well done, you have a point". Dato' Rajasingam therefore must have accepted the fact that any discussion of the *Raphael Pura* case was *sub-judice.* Dato' Rajasingam managed to persuade the plaintiff to agree to attend the full Council meeting, and to give his reasons for threatening to injunct the Council from holding the EGM.

Mr. Chelvarajah, the Chairman, informed Dato' Rajasingam that he could not on his own decide this issue of allowing the plaintiff to meet with the full Council and informed Dato' Rajasingam to raise this with the full Council. On the day of the meeting, Dato' Rajasingam informed the full Council that the plaintiff was willing to meet them and to explain his reasons. What transpired was indeed shocking. Dato' Rajasingam informed the Court that by a majority the members were in favour of inviting the plaintiff to address the full Council. What transpired next is best reproduced verbatim as recorded by me:

"Q: What was the majority?

Encik Malik: I object to the relevance.

Mr. Vijandran.: It will become relevant because that fact was conveyed to my client. There is a rationale for him not attending the meeting.

Court: Objection overruled.

Witness to answer the question.

A: It was a majority by a single vote. The votes were 11 to 10. There were no absentations.

Q: So I take it there were 21.

A: The full Council consists of 36 members.

I came out of the meeting and looked for Raja Segaran. He was not around. Then I called him on his hand-phone and told him “I managed to get the Council to agree by a single vote majority. Can you please come now?”

> Mr. Raja Segaran informed me, “You people don’t seem to respect members who want to assist” or words to that effect. “I am sorry; I am not attending.” and then he switched off.
>
> I returned to the meeting and informed them that Raja Segaran was not attending.”

It is clear that the Bar was bent on proceeding with the Resolution. It is inconceivable that elected representatives of the Bar of senior rank, would not even agree to listen, to their member’s plea. He was there to give his reasons. He could have been persuaded to change his mind to object to the Resolution. At least he ought to have been heard. Accepting the fact that the situation was tense, the plaintiff was humble enough to have been prepared to venture into the cloistered confines of the Council meeting and to face a hostile environment. Instead of pacifying him, ten members arrogantly executed their vote against even listening to the plaintiff whereas the other absent fifteen members of the full Council could not even care less as to what happened. To my mind, this callous treatment of the plaintiff exhibited a clear intention to bring this Resolution to the meeting.

How The Resolution Itself Came To be Proposed

Dato' Rajasingam readily conceded that the allegations of impropriety, etc., as referred to in the Resolution, were as contained in the affidavit filed in the *Raphael Pura* case. This issue was raised at the Bar Council meeting held on 2.10.99. When the question as to who raised it was asked, Encik Malik objected to it on the grounds of relevancy and that the Bar had been sued collectively. Mr. Vijandran's response was to refer to the defence and he pointed out that all the Committee members were being addressed in this case and that the role of the individual members, was relevant. I therefore overruled the objection.

It is clear that Mr. Chelvarajah is named as representing the entire Council. In the circumstances, the role played by each individual Council member is relevant. After all, if the witness could not remember who it was, he could say so. What transpired, according to Dato' Rajasingam, was that it was an unanimous decision of all the twenty one members including himself, to call for the EGM. Dato' Rajasingam informed the Court that it was Raja Aziz who informed the Council of the contents of the affidavit

containing serious allegations against the Judiciary. However, Dato' Rajasingam could not remember if the affidavit or a copy of it was shown to the members that day. After checking the minutes of the meeting which he had with him, Dato' Rajasingam informed the Court that the minutes did not reflect if a copy of the affidavit was indeed shown to the members.

However Dato' Rajasingam was able to remember that copies of the said affidavit were indeed circulated but that he did not look at it. When asked if he was taking the word of Raja Aziz that there were allegations without he himself looking into the affidavit, Dato' Rajasingam conceded that on hindsight and in view of the seriousness of the allegations, it was his shortcoming not to have seen or read the affidavit personally. He also conceded that on that day that was the only issue raised, that is, the allegation as contained in the affidavit in the *Raphael Pura* case. Dato' Rajasingam also added that with the affidavit there were some other documentary evidence that had been tendered. Dato' Rajasingam then asked the Council if they had sufficient evidence to support that allegation. However, there was no answer from any individual member to his question. He however conceded that although there

was no such documentary evidence tendered, and based only on the affidavit, which he had not seen, the Council unanimously decided to convene the EGM.

The prying questions of counsel for the plaintiff showed that this allegation was made in an *inter partes* action by one party which the other had refuted. Subsequently, a sub-committee headed by Raja Aziz was formed to draft the Motion for the EGM and to report back to the Council. Encik Malik did not cross-examine Dato' Rajasingam. The evidence of Dato' Rajasingam therefore remained unchallenged, as led by the plaintiff.

The next witness called was the Chairman, Mr. Chelvarajah, who was cross-examined on his affidavit. He confirmed that he chaired the meeting held on 2.10.99. On that day Raja Aziz had a copy of that affidavit together with a proposed amended defence which were passed around. Mr. Chelvarajah readily conceded that since he was chairing the meeting he did not have the opportunity to go through the affidavit page by page, nor the proposed amended defence. He also agreed as reflected from the minutes that the only allegation based on why the EGM was to be called, was the

allegation as contained in the affidavit in the *Raphael Pura* case. Whilst there were some other allegations arising from the proposed defence, he agreed that the other allegations were not recorded in the minutes.

Mr. Chelvarajah was straight forward, frank and honest in his evidence. He conceded that as the President of the Bar Council he did not take it upon himself to enquire if there was sufficient evidence to sustain the allegations. However, when there was a formal proposal that an EGM should be called and when duly seconded, he said he had no choice but to put it to a vote. He also maintained that it was his habit when conducting a meeting not to participate in the voting. He also admitted under cross-examination that he did not ask the members if there was sufficient evidence to call for the EGM. As the Chairman of the Bar Council he did not see the defence before it was filed since the Council had appointed Raja Aziz to nominate solicitors and to instruct them on the defence. Reflecting his true honesty Mr. Chelvarajah admitted that the defence of justification as pleaded was based on hearsay evidence.

Referring to the comment made by the Lawyers' Committee for Human Rights that Paul J (as his Lordship then was), a relatively newcomer to the Bench, was hearing the *Anwar Ibrahim* case, Mr. Chelvarajah agreed that normally the said case would be heard only in the Sessions Court and that Paul J had more than six years' experience as a Sessions Judge. In fact, Mr. Chelvarajah even added that Paul J served the longest as a Sessions Judge in Malacca, which was Mr. Chelvarajah's hometown. He therefore agreed that the conduct of that case was eminently within his capabilities. Although he did not know if this truth was within the knowledge of foreigners, he agreed that both he and the Bar were fully aware of this fact. When asked why then the Bar had to put the allegation that Paul J, a new comer to the Bench, was to hear the *Anwar Ibrahim* case as a justification for its Resolution, Mr. Chelvarajah was unable to give a pointed reply. He side-stepped the question by suggesting that a report of a Royal Commission of Enquiry would enhance the image of the Judiciary. However, Mr. Chelvarajah admitted that neither he nor the Bar had told the world at large that in their view, Paul J was eminently qualified to hear the *Anwar Ibrahim* case.

Under further cross-examination Mr. Chelvarajah agreed that since matters raised in the Resolution were the subject matter of an appeal and thus *sub-judice,* he would have given a second thought to supporting the Resolution if he had only known that 'it was a pending matter', that is, that it was on appeal. To another pointed question that all the particulars the Bar had put forward in its defence were completely hearsay and based on unverified bare allegations, Mr. Chelvarajah's answer was 'I have never denied that.'.

It is further necessary to reproduce part of the evidence as recorded during the said cross-examination of Mr. Chelvarajah:

"Q: Why did you not require that there was sufficient evidence or why did you not ask for the evidence?

A: It was the collective decision at the Council and the Chairman himself does not play a dominant role. After highlighting and discussing the Council unanimously decided to hold the EGM.

Q: Why did the Council decide to call for the EGM if there was no evidence?

A: They relied on Raja Aziz and the various matters in this document were highlighted and based on the ensuing discussion.

Q: Were you concerned with the truth of the allegation?

A: We were not concerned with the truth of the allegation.

Q: Why?

A: These were allegations. We do not have the power to investigate these allegations.

Q: Ought not the Council have been concerned with the truth of the allegation?"

To my mind such callous indifference to the truth or otherwise of the allegations is totally unacceptable when coming from an august

body such as the Bar Council. This is a clear abrogation of its duty to the general public as its watchdog. Since members of the Bar take the oath of their calling to fight for justice and to uphold truth, this flagrant disregard to verify the truth of the allegations before calling for an EGM and thus drawing unto itself the attention of the world at large, falls far short of the aspirations of a noble Bar.

K.J. Aiyar in The Law of Contempt of Court, Legislatures and Public Servants' 6th Ed says at pages 323/324 as follows:

> "Comments in regard to the merits of a pending case, whether they be made in newspaper articles or through leaflets or pamphlets, or criticisms offered on public platforms, or by way of resolutions, etc., should be scrupulously avoided. The fundamental reason behind it is, that the court having seisin of the case will arrive at a conclusion, on the basis of the evidence and materials that will be placed on record by the parties to a litigation. Extraneous comments, based mostly on surmises or unauthorised versions furnished by interested parties, are of no avail, when the matter is to be adjudicated upon in a court of law. Such extraneous comments may have

the mischief of harming a party to a case if the comments have a tendency to prejudice mankind in favour of one party and against the interests of the rival party to the case which is already in court for disposal of merits."

Since there is clear evidence that what was the subject matter of an appeal was to form, *inter alia,* one of the grounds for the Resolution, this matter is *sub-judice* and the Council, being proponents of the law themselves, ought to uphold the sanctity of the law in this regard.

In the case of *The Crown v. A. Rafique & Others* AIR (37) 1950 Sind 1 a resolution was passed by a Bar Association. It was asserted that by inflicting undeserved insults and persistently treating the members of the Bar in general and the displaced lawyers in particular in a contemptuous manner, the Chief Judge was making it impossible for the advocates to present their cases adequately and that if there was a further repetition of this behaviour, the Association would be forced to take measures which it sincerely wished to avoid and the resolution was communicated to the Press and also to several persons by the Bar Association. The

Full Bench of India held that the passing of the resolution at the meeting of the Bar Association and the publication of the resolution were acts which constituted a contempt of Court.

***Ultra Vires* The Act**

Since the Bar Council and the Malaysian Bar are creatures of statute, their conduct must be confined within the provisions of the Act. The Malaysian Bar has a compulsory membership and compulsory subscription (section 46 of the LPA requires annual subscription and section 32(d) requires the Sijil Annual). It is the plaintiff's case that he has no choice but to be a member if he intends to practice at the Bar. So, being aware of the fact that such a Resolution is contemptuous he writes a beseeching letter urging the Bar to call off the meeting. When even his attempt to meet them and to explain to them his intention was rebuffed, he looked at the choices open to him. Either he resigns as a member of the Bar or he could take the Bar to Court. Practice at the Bar is his livelihood. So why should he resign. He took the next option. He filed this suit and prayed for the injunction.

In searching for the power behind the Resolution it would seem from the affidavit of Mr. Chelvarajah that the Bar was relying on section 42(1)(a), (e) or (g) of the LPA. Section 42(1)(a) deals with 'to uphold cause of justice' and (e) 'to protect, etc., in any proper manner the interests of the Bar'. Mr. Vijandran's reply to this is, how could the Bar be said to be upholding the cause of justice or to uphold in a proper manner the interest of the Bar, when the Resolution itself constitutes contempt, is seditious, unconstitutional and is an attack on the Judiciary. As for 42(1)(g) which deals with protecting and assisting the public, the plaintiff contended that far from protecting the public the conduct of the Bar was nothing short of undermining public confidence in the Judiciary by relying on hearsay and unsubstantiated evidence. Counsel for the plaintiff questioned whether there was any evidence at all that the public confidence in the Judiciary has been eroded. There was no evidence that the people had boycotted the Courts or have stopped filing suits in the Courts. The irony is that there is a surge in suits filed in the Courts so much so that the Judiciary is looking at ways and means to resolve the backlog.

When Encik Malik objected at this juncture by stating that there was no affidavit evidence by the plaintiff alleging confidence or lack of it, Mr. Vijandran expressed surprise. He pointed out that it was the Bar that was alleging there is no confidence in the Judiciary. So the burden of proof was upon the Bar to show such lack of confidence. At this juncture, Mr. Vijandran referred the Court to a very important section, that is, section 42(1)(d). This sub-section strictly confines the Bar to express its views on matters affecting the administration of law *only if requested so to do* (emphasis provided). As to the meaning of the words 'administration of law' various decided cases have dealt with this matter. In *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 235 Raja Azlan Shah Ag. LP (as His Highness then was) said at page 236 as follows:

> "Consistency makes for certainty, and this Court being in the centre of the legal system in this country, is responsible for the stability, the consistency and the predictability of the administration of the law."

I agree with this submission. Since the Bar has not been requested to give its views on the state of the Judiciary, the Resolution and the motion are clearly in breach of section 42(1)(d) of the LPA. It is pertinent to note that for reasons best known to the legislators the sub-section (d) is an amendment brought about by the Legal Profession (Amendment) Act 1983. The full sub-section (d) reads as follows:

> "(d) where requested so to do, to express its view on matters affecting legislation and the administration and practice of the law in Malaysia;"

Unconstitutionality Of The Defendants' Act

The plaintiff contended that if you do an act which renders a provision in the Constitution ineffective or illusory, then your act is unconstitutional. The plaintiff referred the Court to Articles 125(3) and 127 of the Constitution. They read as follows:

Article 125(3):

> "If the Prime Minister or the Chief Justice after consulting the Prime Minister, represents to the Yang Di Pertuan Agong

that a judge of the Federal Court ought to be removed on the ground of any breach of any provision of the code of ethics prescribed under Clause (3A) or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office, the Yang Di Pertuan Agong shall appoint a tribunal in accordance with Clause (4) and refer the representation to it; and may on the recommendation of the tribunal remove the judge from office."

Article 127:

"The conduct of a judge of the Federal Court, the Court of Appeal or a High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State."

It seems to me that Parliament, although supreme, is unable to discuss the conduct of a Judge unless a provision to Article 127 applies. It is with this in mind that R.H. Hickling in his Malaysian Public Law said at page 42 as follows:

> "The independence of the judiciary is one of the foundations of the Constitution. It is sought to be ensured by complex rules relating, first to the appointment of judges, next to criticism of their behaviour as judges, then to the power of a Court to punish any contempt, and finally, in relation to the removal from office of a judge."

Whilst on the need to protect and uphold the independence of the Judiciary, it must be seen to be manifest that no external pressure is exerted against the Judiciary either from the executive or from any other sources including the Bar. In this context the case of *C. Ravichandran lyer v. Justice A.M. Bhattacharjee & Ors* [1995] 5 SCC 457 needs to be looked into. The petitioner, a practising advocate, initiated the present public interest litigation under Article 32 of the Constitution seeking an appropriate writ, order or direction restraining permanently the Bar Council of Maharashtra and Goa (BCMG), Bombay Bar Association (BBA) and the Advocates' Association of Western India (AAWI), respondents 2 to 4 respectively, from coercing Justice A.M. Bhattacharjee (the 1st respondent), Chief Justice of Bombay High Court, to resign from the

office as Judge. The basis of the action by the Bar Council and Bar Associations was financial irregularities alleged to have been reflected in the disproportionate amount of royalty received by respondent 1 from a foreign publisher that was kept confidential and not properly explained, the apprehension being that that would influence the decisions of respondent 1. In delivering the judgment of the Supreme Court of India, K. Ramaswamy J said as follows at page 468:

> "The diverse contentions give rise to the question whether any Bar Council or Bar Association has the right to pass resolution against the conduct of a Judge perceived to have committed misbehaviour and, if so, what is its effect on independence of the judiciary."

His Lordship continued at page 287 as follows:

> "... In *S.P. Gupta v. Union of India* (1981 Supp SCC 87) (SCC p. 221, para 27) this Court held that if there is one principle which runs through the entire fabric of the Constitution it is the principle of the rule of law, and under the Constitution it is the

judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. Judicial review is one of the most potent weapons in the armoury of law. The judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizens and the State as a bulwark against executive excesses and misuse or abuse of power by the executive. It is, therefore, absolutely essential that the judiciary must be free from executive pressure or influence which has been secured by making elaborate provisions in the Constitution with details. The independence of judiciary is not limited only to the independence from the executive pressure or influence; it is a wider concept which takes within its sweep independence from any other pressure and prejudices. It has many dimensions, *viz.*, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong."

His Lordship went on at page 472:

"Our Constitution permits removal of the Judge only when the motion was carried out with requisite majority of both the Houses of Parliament recommending to the President for removal. In other words, the Constitution does not permit any action by any agency other than the initiation of the action under Article 124(4) by Parliament. In *Sub-Committee on Judicial Accountability v. Union of India* (3 (1991) 4 SCC 699; 1991 Supp (2) SCR 1) this Court at p. 54 held that the removal of a Judge culminating in the presentation of an address by different Houses of Parliament to the President, is committed to Parliament alone and no initiation of any investigation is possible without the initiative being taken by the Houses themselves. At p. 71 it was further held that the constitutional scheme envisages removal of a Judge on proved misbehaviour or incapacity and the conduct of the Judge was prohibited to be discussed in Parliament by Article 121. Resultantly, the discussion of the conduct of a Judge or any evaluation or inferences as to its merit is not permissible elsewhere except during investigation before the Inquiry Committee constituted under the Act for this purpose.

Articles 124(4) and 121 would thus put the nail squarely on the projections, prosecutions or attempts by any other forum or group of individuals or Associations, statutory or otherwise, either to investigate or inquire into or discuss the conduct of a Judge or the performance of his duties and on/off court behaviour except as per the procedure provided under Articles 124(4) and (5) of the Constitution, and Act and the Rules."

Finally, the Supreme Court of India said at page 476 as follows:

"... Article 121 of the Constitution prohibits discussion by the members of Parliament of the conduct of any Judge of the Supreme Court or of High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as provided under Article 124(4) and (5) and in the manner laid down under the Act, the Rules and the rules of business of Parliament consistent therewith. By necessary implication, no other forum or fora or platform is available for discussion of the conduct of a Judge in the discharge of his duties as a

> Judge of the Supreme Court or the High Court, much less a Bar Council or group of practising advocates. They are prohibited to discuss the conduct of a Judge in the discharge of his duties or to pass any resolution in that behalf."

It is clear that the highest Court of India which so rigidly and possessively protects freedom of the individual and freedom of speech has castigated in strong words attempts to muzzle Judges by threats of resolutions. Such unrestrained and unbridled conduct can actually lead to abuse. It is time therefore that rather than trumpeting the so-called inadequacies of the Judiciary by way of resolutions, the Bar takes heed of the salutary advice of the Supreme Court of India. This is what it said at page 479 in the *Ravichandran Iyer* case:

> "The threat of action on vague grounds of dissatisfaction would create a dragnet that would inevitably sweep into its grasp the maverick, the dissenter, the innovator, the reformer - in one word the unpopular. Insidious attempts pave way for removing the inconvenient. Therefore, proper care should be taken by the Bar Association concerned. First, it should

gather specific, authentic and acceptable material which would show or tend to show the conduct on the part of a Judge creating a feeling in the mind of a reasonable person doubting the honesty, integrity, impartiality or act which lowers the dignity of the office but necessarily, is not impeachable misbehaviour. In all fairness to the Judge, the responsible office-bearers should meet him in camera after securing the interview and apprise the Judge of the information they had with them. If there is truth in it, there is every possibility that the Judge would mend himself. Or to avoid embarrassment to the Judge, the office-bearers can approach the Chief Justice of that High Court and apprise him of the situation with material they have in their possession and impress upon the Chief Justice to deal with the matter appropriately."

I am happy to see that this is what many State Bar Committees are doing whereby the State Chairman with some of its Committee members see the Judge concerned in his chambers to sort out issues over a cup of tea. It is time the Bar Council emulates and adopts the conduct of the State Bar Committees.

In the light of the case of the Indian Supreme Court it is manifestly clear that in the present case the call for the Resolution on admitted hearsay evidence is far from the requirement of 'proved misbehaviour'. It is therefore absolutely essential that people who hold high office must be fair and just in their criticisms and not open themselves and the organisations they represent, to criticisms. It is clear therefore that the Bar has no power to discuss the conduct of the Judiciary and that any attempt to do so is contrary to Article 127 of the Constitution, which article has been reproduced earlier:

The call for a Royal Commission is also clearly contrary to Article 125 of the Constitution which provides for the mode of removal of a Judge.

Seditious

It was the case of the plaintiff that the Resolution and the meeting to discuss it would be seditious under section 3(1)(a) and (c) of the Sedition Act 1948. The said sub-sections are reproduced herewith for ease of reference:

"3. Seditious tendency.

(1) A 'seditious tendency' is a tendency -

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

…

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;"

I have thoroughly discussed this heading in my earlier judgment (see *Raja Segaran a/l S. Krishnan v. Bar Council Malaysia & Ors* [2000] 1 MLJ 1 at page 25). The unreported judgment of the Court of Appeal upheld my earlier views.

The Defendants' View

Encik Malik submitted that in striving towards democratic ideals, the clash of ideas and opinion is fundamental and essential. He contended that it is only through this clash that there can be this synthesis of rational and coherent thought and action. He therefore was of the view that for there to be this clash of opinion, a proposed

point of view has to be expressed. Urging me that the Resolution was just a motion for debate amongst lawyers and not within the public realm, he submitted that the Resolution contained no definitive statement. What was contained was a proposed point of view solely for the purpose of academic debate in a closed-door meeting.

It was also his submission that there was no evidence from the plaintiff that the motion would have been carried and so there is therefore no certainty of success. Encik Malik referred me to the then Supreme Court case of *Attorney General Malaysia v. Manjeet Singh Dhillon* [1991] 1 MLJ 167 SC. He compared what Manjeet Singh Dhillon had averred in an affidavit to the resolution and submitted that the phraseology employed in the overall context of the motion is extremely reasonable because it is a fact that allegations have been made. If one reads the *Manjeet Singh Dhillon* case it is clear that Manjeet Singh Dhillon spelt out in his affidavit in paragraphs the specific acts which he considered as misdeeds of the then Lord President. In other words, the Judge was identified and the acts were specified. That is not the case before me. On his own submission, Encik Malik concedes they are

allegations. Of course there is no dispute that there are such allegations; but fundamental to the core issue is the fact that they remain as allegations.

In an attempt to save the Resolution Encik Malik submitted that para 3 should actually read, '... competence in the Judiciary may have been undermined' and not as stated in the Resolution, which is, '... competence in the Judiciary has been undermined'. At this juncture, Mr. Vijandran interjected by pointing out that even in their defence at para 9 the defendants had pleaded the words 'have undermined' and that having pleaded their case as such, the defendants ought not to be allowed to wriggle out of their pleaded defence. However, Encik Malik did point out that the words used were, 'have undermined and/or would tend to undermine'. Encik Malik referred the Court to section 2(1)(d) of the Commissions of Enquiry Act 1950. The said sub-section reads as follows:

> "2. (1) The Yang Di Pertuan Agong may, where it appears to him to be expedient so to do, issue a Commission appointing one or more Commissioners and authorising the Commissioners to enquire into -

...

(d) any other matter in which an enquiry would, in the opinion of the Yang Di Pertuan Agong, be for the public welfare, not being -

(i) a matter involving any question relating to the Muslim religion or the Malay custom; or

(ii) in relation to Sabah or Sarawak, a matter specified in item 10 of the State List:

Provided that where any federal officer into whose conduct it is proposed to enquire, was, at the time of committing such conduct, serving in a department of the public service of a State, such commission shall only be issued with the concurrence of the State Authority."

Encik Malik argued that by calling for a Royal Commission, the defendants have not acted unreasonably because the said Commission could identify the Judges involved. In raising this argument it is apparent that Encik Malik has failed to address his mind to the two relevant articles of the Constitution earlier referred to

that make it clear how a Judge's conduct is to be acted upon. In rebutting the plaintiff's submission that the burden of disproving the allegations referred to in the motion was on the defendants, Encik Malik took the simplistic approach by saying that the Royal Commission if appointed would be able to ascertain the truth or falsity of the said allegations. His argument was that so long as allegations were there, that was sufficient for the purpose of appointing a Royal Commission. I do not agree. The appointment of a Royal Commission is an onerous task governed by the Commissions of Enquiry Act 1950. Such a trivial approach as has been suggested by the defendants would lead to Commissions of Enquiry being set up for every issue and would set a dangerous precedent.

On the next issue, Encik Malik questioned whether this Court could make findings of contempt or sedition. It was his submission that a civil Court cannot grant a declaration as to criminality. He relied on *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals* [1997] 3 MLJ 23 CA also known as the *Bakun* case. In that case there was a clear finding of the Court that the respondents had no *locus standi.* In the case before me,

the plaintiff contends that he is a member of the Bar and if the Bar is guilty of contempt or sedition, he too, as a member of the Bar, could be guilty of the same. What the plaintiff is attempting to do is to show that if the meeting is held to consider the Resolution, the participants, including he, can be found guilty of such an offence, and he wants to avoid that. The principle laid down in the *Bakun* case is distinguishable. This fact is clearly shown in the case of *Tengku Jaffar bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 156 where the Court held that to possess *locus standi*, the applicant should be seeking to protect or vindicate an interest of his own. So long as the plaintiff has shown that he has the *locus* to make the application and so long as he can show that the conduct of the defendants is such as to put him, the plaintiff, in peril of such similar prosecution that the defendants could face if the defendants' act is allowed to be consummated, the plaintiff need not wait to see the outcome, before acting. To protect his own interest he can take out an injunction to restrain the defendants and if the Court is satisfied that the act complained of could give rise to the plaintiff facing criminal prosecution, the plaintiff ought to be allowed to use injunctive measures to stop the defendants.

Encik Malik referred to *Gouriet v. Union of Post Office Workers* [1978] LR 435. This was a case where an individual applied to restrain by an injunction the Union of Post Office Workers from refusing to handle mails to and from South Africa because of the 'apartheid' policy. Gouriet had sought the consent of the Attorney General to prosecute but such consent was refused. He then filed the writ on his own. The House of Lords held that only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs and that a private individual could not do so on behalf of the public, though he might be able to do so if he would sustain injury as a result of a public wrong, for the Courts had no jurisdiction to entertain such claims by a private individual who had not suffered and would not suffer damage.

I would have thought that the *Gouriets* case clearly showed that the plaintiff in this case has a right to apply for an injunction because even in the *Gouriets* case, by sections 38 and 68 of the Post Office Act 1953 and section 45 of the Telegraph Act 1863, as amended, it is an offence punishable by imprisonment or fine for persons engaged in the business of the post office wilfully to delay or omit to deliver postal packets and messages in the course of

transmission and for any person to solicit or endeavour to procure any other person to commit such an offence.

In addressing the issue of contempt Encik Malik asked whether the plaintiff could move the Court for a declaration for a criminal contempt, and relied upon the decision of the House of Lords in *Attorney General v. Times Newspapers Ltd* [1974] LR 273. I could not see how this case could assist the defendants. In fact at page 308, Lord Diplock said:

> "To constitute a contempt of Court that attracts the summary remedy, the conduct complained of must relate to some specific case in which litigation in a Court of law is actually proceeding or is known to be imminent."

Since it has already been established earlier that the *Raphael Pura* case, which was still pending in the Courts, was the subject of the Resolution, clearly there was sufficient evidence to show that there was always the possibility that if the Attorney General so desired, he could prosecute the defendants and which included the plaintiff, and this apprehension of fear was what motivated the

plaintiff to file for this injunction. Encik Malik, I could see, had in fact jumped the gun. He was arguing on the basis that this was the hearing of the criminal contempt. The question of the plaintiff first having to obtain leave of the Attorney General as submitted by Encik Malik, was as yet not in issue.

Encik Malik then took the issue that looking at it from the prospective of a member of the Bar taking out an action against the Malaysian Bar and the Bar Council, the mere fact that the plaintiff is a member of the Bar does not automatically confer any private law rights and even if there were such rights they would have to be discerned from the statute, that is, the LPA, and made the foundation of the action and in support he relied on the House of Lords decision in *Swain & Anor v. The Law Society* [1983] AC 598. Since this case has been referred to it is necessary to narrate just the relevant facts.

Under section 37 of the Solicitors Act 1974 the Council of The Law Society was empowered with the concurrence of the Master of the Rolls, to make rules concerning professional indemnity insurance for solicitors. In a circular issued in 1975 the Society gave details of

a proposed compulsory professional indemnity insurance scheme, and all solicitors were subsequently asked by letter whether they were in favour of the proposed scheme. The Society indicated in the circular and in the letter that it intended to apply any brokerage commission accruing to the Society for the benefit of the profession, rather than to pay it out to individual solicitors. A majority of solicitors replied to the letter that they were in favour of the scheme. The Society accordingly made the Solicitors' Indemnity Rules 1975, which provided for a master policy to be taken out with insurers and for certificates to be issued to solicitors, who would pay the premiums. After September 1, 1976, the scheme was regarded as compulsory and every solicitor to whom the Rules applied had to produce a certificate of insurance before receiving an annual practising certificate. The plaintiffs, two practising solicitors, were dissatisfied with the scheme, but they did not formally challenge it in correspondence with the Society until January 1979. In October 1979 they took out an originating summons seeking, *inter alia*, determination of the question whether the Society was entitled to retain the commission received by it from the brokers or was accountable for it to solicitors. Slade J held that the Society was not

accountable for the commission. On appeal by the first plaintiff, the Court of Appeal reversed that decision.

However in allowing the appeal by the Society, the Court held that the power given to The Law Society by section 37 of the Solicitors Act 1974 was a power to be exercised in the public interest as well as in the interests of the solicitors' profession and in exercising the power the Society was performing not a private duty to premium-paying solicitors but a public duty for breach of which there was no remedy in breach of trust or equitable account, and that on the true construction of the master policy the Society had not expressly or by implication constituted itself a trustee of the contract for the benefit of premium-paying solicitors, nor had it become a constructive trustee of the commission received. Accordingly, it was not liable to account to the solicitors for the commission received.

The case seems to suggest that The Law Society in the performance of its functions acts in two distinct capacities, namely, a private capacity and a public capacity. When acting in its private capacity, the Society is subject to private law alone. Lord Diplock said at page 608 as follows:

"When acting in its private capacity the Society is subject to private law alone. What may be done on behalf of the Society by the Council in whom the management of the Society is vested by the charter must fall within the wide description in the charter of the general purposes of the Society, *viz*. 'promoting professional improvement and facilitating the acquisition of legal knowledge'. Subject to this limitation, however, the Society acting in its private capacity can do anything that a natural person could lawfully do, with all the consequences that flow in private law from doing it; and in deciding how to act on behalf of the Society in this capacity the Council's only duty is one owed to the Society's members to do what it believes to be in the best interest of those members; and for the way in which it performs that duty the Council is answerable to those members alone. Membership of the Society by solicitors is voluntary; it does not comprise the whole of the profession; your Lordships were informed that some 10 per cent of practising solicitors are not members and over these the Society, acting in its private capacity, can exercise no coercive powers."

His Lordship went on:

> "It is quite otherwise when the Society is acting in its public capacity. The Act of 1974 imposes upon the Society a number of statutory duties in relation to solicitors whether they are members of the Society or not. It also confers upon the Council of the Society, acting either alone or with the concurrence of the Lord Chief Justice and the Master of the Rolls or of the latter only, power to make rules and regulations having the effect of subordinate legislation under the Act. Such rules and regulations may themselves confer upon the Society further statutory powers or impose upon it further statutory duties. The purpose for which these statutory functions are vested in the Society and the Council is the protection of the public or, more specifically, that section of the public that may be in need of legal advice, assistance or representation. In exercising its statutory functions the duty of the Council is to act in what it believes to be the best interests of that section of the public, even in the event (unlikely though this may be on any long-term view) that those public interests

should conflict with the special interests of members of the Society or of members of the solicitors' profession as a whole. The Council in exercising its powers under the Act to make rules and regulations and the Society in discharging functions vested in it by the Act or by such rules or regulations are acting in a public capacity and what they do in that capacity is governed by public law; and although the legal consequences of doing it may result in creating rights enforceable in private law, those rights are not necessarily the same as those that would flow in private law from doing a similar act otherwise than in the exercise of statutory powers."

Therefore, it is the case of the defendants that similarly they have acted in a public capacity and that the interest of the plaintiff herein must therefore take a back seat as compared to the public interest. But is that what has been propounded by this case. Lord Diplock in no uncertain terms had said that what constitutes the protection of the public and in particular <u>'that section of the public that may be in need of legal advice, assistance or representations'</u> (emphasis provided). Clearly, the defendants have misunderstood the rationale behind this case and have been acting on ill-founded

belief. In resolving this motion as spelt out, the public needs no legal advice, assistance or representations. Besides, the defendants have not been able to show which section of the public in particular they intend to protect.

Whereas, in *The Law Society* case, the intention was to indemnify and cover not only the solicitors but includes their employers and former employees whether qualified or not. The act of giving indemnity is a noble deed. It protects clients who have been cheated by their solicitors or who have suffered loss as a result of their solicitors' negligence. But what is most fundamental to *The Law Society* case is the fact that, as stated in the quote of Lord Diplock, their power to set up the indemnity scheme was done under the power given by the Act of 1974 'to make rules and regulations having the effect of subordinate legislation under the Act'. But is that the case here. The defendants have been specifically prohibited from giving advice unless asked for, based on the amendment to the LPA as stated earlier in the judgment. Therefore, contrary to the argument of Encik Malik, *The Law Society* case cannot assist the defendants. It, on the other hand, shows that their act of moving the Resolution and having the meeting for that purpose are both *ultra*

vires the Act. Therefore, the argument that if the plaintiff did not attend the meeting, he could not be sued or punished and that he could have chosen not to attend, is unacceptable.

At this stage, Mr. Vijandran pointed out that these issues raised by Encik Malik had already been canvassed at the Court of Appeal stage, and that the said Court had rejected them. Encik Malik admitted to personally raising the same arguments but it was his view that that decision was at the interlocutory stage. It is trite law that if a point of law has been decided by a superior Court, whether the same decision was at an interlocutory stage or at the final stage is immaterial. The issue has been put to rest by the Court of Appeal and ought not to have been regurgitated, unless any fresh cases, subsequent to the decision of the Court of Appeal, could be cited to distinguish the said case. Encik Malik's descent into the same arena of arguments which had been put to rest by the Court of Appeal is akin to an attempt to have a second bite at the forbidden fruit.

In the light of my decision following *The Law Society* case, Encik Malik's reference to *Boyce v. Paddington Borough Council*

[1903] 1 ChD 109 seems meaningless. In that case the Chancery Division held that a plaintiff can sue without joining the Attorney General in two instances, (a) where an interference with a public right involves interference with some private right of the plaintiff; and (b) where no private right of the plaintiff is interfered with, but he, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. Whilst agreeing that the *Boyce* case did not define what special damage is, Encik Malik pointed out that the *Bakun* case did. With due respect, other than merely referring to the *Boyce* case as a quote in the case of *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12, which stated the two principles in the *Boyce* case as I have related above, there was no explanation by the Court of Appeal as to what special damage is. In fact to be fair to the Court of Appeal there was no reference to 'special damage' at all. What the Court of Appeal said was:

> "... the declarations sought ought not to be made because the harm complained of by the respondents was not peculiar or special to them."

As there is no necessity for me to venture into the definition of the meaning of 'special damage' as referred to in ***Boyce*** and as accepted in the *Bakun* case, I shall not do so in the light of my findings arising out of *The Law Society* case.

During the course of his submission, Encik Malik said, and I quote verbatim from my notes (page 48), "Please record me as stating that there is no evidence that the proposed meeting was premised on the allegations on the ***Pura*** matter." I was rather taken aback by this because the defendants' Council member, Dato' Rajasingam, himself confirmed that the motion was based on the *Raphael Pura* case.

However, much later in the proceedings, page 56 of my notes reads as follows:

"Court to Encik Malik:

What is the foundation for calling for this meeting?

Encik Malik:

The allegation as set out in the *Pura* case."

This equivocation by lead counsel for the defendants clearly showed the uncertainty of the defendants' case and their cause.

Secrecy

Section 76(2) of the LPA reads as follows:

> "(2) Except and in so far as may be necessary for the purpose of giving effect to any resolution passed or decision made, secrecy shall be maintained in all proceedings conducted by the Bar Council, the State Bar Committee, the Inquiry Committee and their staff."

The question is whether this provision prevents any witness from giving evidence in Court as to any proceedings of the Bar Council and producing documents relating to proceedings of the Bar Council. Mr. Vijandran referred to section 123 of the Evidence Act 1950 which reads as follows:

> "No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any

evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Government of Malaysia, and of the Chief Minister in the case of a department of a State Government."

It was his case that even regarding affairs of State the section allows for evidence to be produced and the Courts go to great length to preserve and to ensure that all available relevant evidence is placed before them to enable the Courts to have all relevant facts to be able to arrive at a just decision.

In any case, I have dealt exhaustively on this issue (see *Raja Segaran a/l S. Krishnan v. Bar Council Malaysia & Ors (No. 3)* [2001] 5 MLJ 305 at pages 311 - 316). My said decision is also the subject matter of an appeal and there is nothing more to add on this issue of secrecy.

I am fortified in the views I have held in respect of this case after reading a copy of the unreported judgment of the Court of

Appeal (see *Majlis Peguam Malaysia & 2 Lagi v. Raja Segaran a/l S. Krishnan,* Dalam Mahkamah Rayuan Malaysia, Rayuan Sivil No. W-02-47-00 dan Rayuan Sivil No. W-02-48-00). In that appeal the defendants appealed against two of my judgments, namely, (a) where I granted the plaintiff an interim injunction restraining the defendants from holding the EGM, and (b) where I dismissed the defendants' application to strike out the plaintiff's amended writ of summons and statement of claim.

I am in receipt of this judgment of the Court of Appeal after having completed my judgment in respect of this case. I note that the defendants have in fact relied heavily on *Gouriet*s case before the Court of Appeal by arguing that the plaintiff was seeking to enforce criminal law by civil proceedings. However, counsel for the plaintiff objected to the defendants relying on this issue on the basis that they had not raised it in their memorandum of appeal. The Court of Appeal was however urged by the defendants that since an appellate Court has discretion to consider new points not earlier raised, the Court of Appeal ought to allow the defendants the right to raise this issue before them. The Court of Appeal, whilst acknowledging the fact that it could consider new points, however,

referred to the case of *Keng Soon Finance Bhd v. M.K. Retnam* [1989] 1 MLJ 457 wherein the Privy Council had held that 'very exceptional circumstances must be shown' before an appellate Court would permit the raising for the first time in an appeal of points which had not been previously raised and argued. The Court of Appeal thus upheld the plaintiff's objection and held that the defendants had not come within the test provided by the Privy Council. Although I have earlier in this judgment considered and decided on this issue, having read the judgment of the Court of Appeal, I hold the view that the defendants ought not to have been allowed to raise this issue a second time before me on the basis of issue estoppel. Having neglected to raise this issue on appeal, the defendants ought to have been found to have abandoned this issue and thereby ought to have been prevented from taking a second bite of the proverbial cherry.

In considering another aspect of my judgment in relation to the interim injunction, the Court of Appeal, whilst referring to the Resolution and the view of the Bar that it wished to ensure that 'confidence in the Malaysia Judiciary is fully restored' had this to say at page 9 of the said judgment:

"As to the use of the word 'restored' therein we are of the view that the learned judge was right when he said:

> 'I also accept the argument of Mr. Vijandran when he suggested that one can only restore something that is lost and when the first defendant called for a Royal Commission of Inquiry to fully restore the confidence in the Malaysian Judiciary it is axiomatic that the inference is that such confidence has indeed been lost."

On the issue as to whether the preamble and the Resolution 'constitute possible contempt', this is what the Court of Appeal said also at page 9 of the judgment:

"... For this, he [the learned Judge] referred to several cases from India, Singapore and Australia and then concluded thus:

> To my mind such utterances as contained in the resolution are clearly contemptuous. It is obviously an attempt to erode public confidence in the Judiciary ...

We agree with the learned judge."

Having cited three decisions from India the Court of Appeal said at page 13 as follows:

> "We referred to the three above-mentioned cases as we feel that they would further support the correctness of the learned judge's conclusion that the resolution is clearly contemptuous."

On the question of my finding that the allegations made in the affidavit related to a pending civil suit (the *Raphael Pura* case) and as such the matters were *sub-judice,* the Court of Appeal agreed with my findings and concluded that it had 'nothing to add'.

On the issue of *ultra vires* this is what the Court of Appeal said at page 15:

> "The respondent also argued that the proposed EGM and the proposed resolution are ultra vires the powers conferred to the

appellants pursuant to the Legal Profession Act 1976 (LPA). The learned judge agreed with the respondent. He stated his reasons for agreeing so. He cited authorities that go to support his conclusions. We find that the learned Judge had not erred in law and facts on this 'ultra vires' issue. We would, however, go a step further to say that this act of the Bar in trying to convene the EGM to discuss that proposed resolution is in fact an illegality. This is because the LPA does not contain any provisions to enable them to do that act. And Article 127 of the Federal Constitution clearly empowers the Parliament to discuss the conduct of judges."

On the claim by the plaintiff that the holding of the said EGM and/or the adoption of the said Resolution would also constitute an offence under section 3(1)(c) and 4(1)(a) of the Sedition Act 1948, the Court of Appeal said at page 15 as follows:

"... we are of the opinion that the wording of both the sections are so simple and clear that no reasonable man could ever disagree with the respondent's view."

To my mind, with such clear conclusive enunciation from the Court of Appeal which declared the conduct of the Bar in convening the EGM to discuss the proposed Resolution as illegal and with the Federal Court refusing leave on this application, the matter ought to have ended. It is totally unacceptable for those who propound the law to flout it by ignoring the principle of *res judicata* and reagitating the same issues *albeit* on the main trial, since a ruling from a superior Court had already been made on points of law relating to the same issues.

The issue formulated by the Court upon the plaintiff's application on 5.9.00 under O. 33 for trial was as follows:

> "Whether the proposed Resolution dated 12.10.99 as contained in the Notice dated 12.10.99 and the purported Extraordinary General Meeting of the Malaysian Bar to be held on 20.11.99 were *ultra vires* the powers and objects of the Malaysian Bar under the Legal Profession Act 1976 in that:
>
> (a) the Resolution and Extraordinary General Meeting are not within the powers and/or objects

of the Malaysian Bar under the Legal Profession Act 1976; and

(b) the Resolution and the Meeting and the participation of both Council and Ordinary Members therein constitute contempt of Court and/or are seditious and/or are unconstitutional.

Having considered the volumes of submissions and the volumes of authorities submitted by both parties the answer of this Court to the issue formulated is in the affirmative on both (a) and (b). The plaintiff will thus have the reliefs prayed for in the statement of claim, namely:

(a) A declaration that the said EGM and the said proposed Resolution are *ultra vires* the Legal Profession Act 1976.

(b) A declaration that the said EGM and the said proposed Resolution constitute contempt of Court.

(c) A declaration that the said EGM and the said proposed Resolution constitute offences under the Sedition Act 1948.

(d) Interim injunction earlier granted on 17.11.99.]

(e) A permanent injunction to restrain the Defendants either by themselves and/or through their servants and/or their agents from holding and/or causing to be held any further similar meetings with the same or similar purposes.

(f) Damages to be assessed by the learned Deputy Registrar.

(g) Costs.

Dated the 10th day of November 2003

DATO' KAMALANATHAN RATNAM
HAKIM
MAHKAMAH TINGGI PULAU PINANG

Counsel

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(Messrs Sivananthan)

Encik Ahmad Kamal b. Mohd Shahid holding watching brief for Attorney General
(Attorney General's Chambers)