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APPEALS TO THE HIGH COURT UNDER ORDER 49 RULE 6 OF THE SUBORDINATE COURTS RULES 1980

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Introduction

Victor Hugo wrote: ‘Words can be liars, we must not blindly believe what they say.' (Les MisÉrables, VII, *The Wisdom of Tholomye's*). If words used by the legislature are construed in a way capable of defeating their actual and ordinary meaning, then, Victor Hugo's description cannot be far from the truth.

Rules of court are made to ensure the smooth conduct and speedy disposal of cases. And specific rules are introduced from time to time to keep in line with the new developments that occur in courts. Those rules are aimed at avoiding the accursed delay. Unfortunately, some of these rules are far from realizing the objective they were set to achieve. Confusion abounds.

The aim of the rules of court and the approach of the courts should be to minimize confusion and uncertainty, thus enabling practitioners to advise their clients effectively with the consequent result of avoiding delay and, at least, reducing the risk of incurring unwarranted expenditure.

Background to the Subordinate Courts Rules 1980

The Subordinate Courts Rules 1980 (‘the SCR') came into force on 1 June 1981, substituting the Subordinate Courts Rules 1950. The 1980 rules were substantially modelled along the Singapore Subordinate Courts Rules 1970[1] with appropriate modifications consistent with the Malaysian situation.

The writer and Dato Hamid bin Mohamed,[2] in the course of writing the Subordinate Courts Practice 1981 based on the new rules, found some of the Singapore rules to be unsuitable for the Malaysian legal system. It was felt that the appeal provisions of O 49 reproduced from the Singapore rules were not workable within the Malaysian context; and the uncomfortable feeling was brought home to the Rules Committee which saw our point. As a result, the whole of O 49 reproducing the Singapore provisions was repealed and in its place the entire repealed O XXXIX of the Subordinate Courts Rules 1950 was re-introduced.

The singular and most unique aspect of the SCR was the introduction of the summary judgment procedure as it is in the High Court. This was achieved by incorporating the whole of O 14 of the Rules of the High Court 1980 (‘the RHC') in the form of O 26A with certain modifications.

Those familiar with O 14 of the RHC would be quick to realize that O 26A is a special provision which does not deprive a defendant from defending a claim, but gives the plaintiff a swift remedy

if he can show to the satisfaction of the court that the defendant has no answer to his claim and that his is a straightforward case.[3]

In the High Court, there are special procedures governing appeals from decisions of the deputy registrar to a judge in chambers.[4] The procedure was simple, fast and less expensive.

It must be confessed that it did not at that point of time occur how to deal speedily with appeals arising from the decisions of the subordinate courts on summary judgment applications, in which, although the plaintiff may succeed, he could be, generally speaking, denied the fruits of judgment should there be an appeal. As a result of this lapse, no specific provisions were thought of at that stage.

The unsatisfactory feature surfaced because an appeal in any matter or cause in a subordinate court could only be had in accordance with the provisions of O 49 r 2, and there were already endless problems and the procrastination of the disposal of appeals by the High Court came to be a fact of litigation life. These problems were raised in an earlier article by the writer.[5]

The rules pertaining to appeals after the cause or matter had been disposed of by trial were not helpful for appeals from decisions arising from summary judgment applications or for that matter any decision made at an interlocutory stage. This was obviously a loophole advantageous to the defendant especially, but a tremendous disadvantage to the plaintiff. If the plaintiff failed in his summary judgment application, he had to appeal in the ordinary way and it would take a few years before the appeal could be heard. Similarly, if the defendant failed and appealed the rules helped him to see that he gained time.

In the absence of special provisions in relation to appeals emanating from decisions other than decisions made after trial, particularly when they concerned summary judgments, the objective of speedy disposal came to nought. The effect of the principles underlying summary judgment was in fact nullified. The scandalous delay persisted much to the chagrin of plaintiffs who had straightforward claims. Seeing the difficulties that had reached a frightening stage, the writer discussed and suggested various alternatives in an article in 1982.[6]

Subsequently, Singapore substituted the SCR 1970 with the SCR 1986. The new rules contained provisions identical to that of O 14 of the RHC. The Singapore legislature must have realized the difficulties faced by Malaysian plaintiffs and their legal advisers. The Malaysian experience must have given the Singapore legislature the impetus to look hard and find ways to speed up appeals arising from summary judgments in the subordinate courts. A new procedure was devised for appeals to the High Court from summary judgment applications. In order to avoid complication and confusion, the rules applicable to appeals to the High Court from the subordinate court in summary judgment applications were made part of O 14 itself. The relevant rule reads as follows:

> (1) An appeal shall lie to a Judge of the High Court in Chambers from any judgment, order or decision of the Court made in pursuance of this Order.
>
> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 140 to attend before the Judge of the High Court on the day specified in the notice.

(3) Unless the Court otherwise orders, the notice must be filed within 14 days after the judgment, order or decision was given or made and served on all other parties within 7 days from the date of filing.

(4) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

This rule has been retained in the Singapore Rules of Court 1996.

Order 55 of the Singapore Rules of Court 1996 deals with appeals generally; but for the purpose of appeals from summary judgment applications under O 14, special procedures were prescribed to avoid confusion.

This was a useful innovation in the Singapore rules first introduced in 1986 and retained in 1996. And our Rules Committee could have looked at it hard to see how effectively it could be introduced into our legal system albeit with necessary modifications as our legal system is far larger than Singapore; administratively speaking, the movement of the files from the subordinate courts to the High Court would not be that easy and could generate different kinds of problems.

New procedure in respect of appeals from decisions other than decisions made after trial

The Rules Committee must have realized that the absence of special provisions in respect of appeals, particularly those arising from summary judgment applications, were causing havoc. Therefore, the Rules Committee introduced a new procedure by inserting r 6 to O 49 of the SCR. This was an ambitious rule and it envisaged that with its introduction, the scandalous delay in appeals arising from O 26A of the SCR would be a thing of the past.

Order 49 r 6 of the SCR reads:

(1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

(2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.

(3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of —

(a) the application for the decision;

(b) the statement of claim, and where defence has been filed, the statement of defence;

(c) all affidavits filed in support or in opposition to the application; and

(d) the decision appealed from,

but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

A procedure with precious simplicity would speed up the hearing of the appeals falling within that rule. However, much to the vexation of practitioners and their clients, different kinds of problems have emerged.

Objective of O 49 r 6 of the SCR

Rule 6 was inserted into O 49 by PU(A) 193/93 and came into force on 1 August 1993. Mahadev Shankar JCA delivering the judgment of the Court of Appeal in *Yupaporn Seangarthit v Neil Allan Campbell Webb*[7] ('*Yupaporn*') which touched on the particular rule said (at p 709):

> Its objective was to reduce the delay caused in the registration of appeals by the non-availability of the grounds of decision and notes of evidence which can take a long time in the lower courts. So for orders obtained before trial, parties were allowed to compile the record by merely including the pleadings, affidavits and the decision appealed from, together with the written application thereto.

In *Vong Ban Hin v Laksamana Realty Sdn Bhd*,[8] Augustine Paul JC (as he then was) touching on the object of the same rule pointed out (at p 854):

> This Order [O 49 r 6] was introduced … with the object of allowing litigants to appeal against interlocutory orders made by magistrates and sessions court judges. Prior to this an appeal may lie only against a final decision. In view of the large number of appeals that may arise under the new provision thereby resulting in increased workload for the subordinate court officers the Rules Committee, in its wisdom, found it unnecessary for the notes of evidence, grounds of judgment and the memorandum of appeal to be filed in such appeals.

Had the rule been dealt with in an ordinary manner no problem would have arisen. In fact, the first case to deal with O 49 r 6 was *Kemajuan Hunda Kredit (Kuching) Sdn Bhd v Titus Chuo Mui Ing*.[9] In that case, the plaintiff obtained summary judgment on 6 February 1990 against the second defendant under O 26A of the SCR. The seconddefendant successfully applied to set aside the judgment. The plaintiff filed a notice of appeal on 2 August 1993, ie a day after the coming into force of O 49 r 6. On 28 April 1994, he filed a record of appeal in accordance with O 49 r 3A(3). The record of appeal included the items specifically excluded by O 49 r 6. The second defendant raised a preliminary objection to the effect that the plaintiff had included those items that had been specifically excluded by O 49 r 6(3) and that the appeal record had been filed out of time.

Abdul Kadir Sulaiman J explained (at p 545):

> This new O 49 r 6 is akin to O 56 of the Rules of the High Court 1980 … where an appeal would lie to a judge in chambers from any judgment, order or decision of the registrar. The hearing before the judge in chambers pursuant to O 56 of the RHC is by way of a rehearing and for that reason the new O 49 r 6(3) of the Rules is tailored in such a way that the notes of evidence, the grounds of judgment and memorandum of appeal are not required to be included in the record of appeal.

The learned judge held that the inclusion of additional information had not prejudiced the second defendant.

Having overruled that preliminary objection, he then proceeded to deal with the second objection, ie the appeal record had been filed out of time. His Lordship pointed out (at p 547):

> Order 49 r 6(3) requires that the record of appeal must be filed within three weeks after the filing of the notice of appeal. In this case, the notice of appeal was filed on 2 August 1993 whilst the record of appeal was filed only on 28 April 1994, which is clearly outside the time frame of three weeks allowed by the rule. The learned counsel for the plaintiff in reply submitted that O 49 r 6(3) does not apply in the instant case because the order appealed against was made before the coming into force of r 6. The procedure to follow is O 49 r 3A(3) notwithstanding the amendment. Under O 49 r 3A(3), the appeal record is required to be filed within six weeks of the receipt of the notification from the court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready. In this case, the learned counsel says, the notification from

the court appealed from of the availability of the certified copies of the notes of evidence and the grounds of judgment was received only on 18 April 1994 and he had six weeks from that date to file the record under O 49 r 3A(3) of the Rules. Hence the filing of the record on 28 April 1994 was well within time. I think the submission lacks merit because the nature of the appeal in this case with effect from 1 August 1993, as stated earlier, was no longer governed by O 49 r 3A but by O 49 r 6(3) because the appeal was against the decision 'other than a decision made after trial' which in this case was a decision made in summary proceedings. Under r 6(3), the notes of evidence and the grounds of decision no longer form part of the record of appeal.

It will be observed that the learned judge patently interpreted O 49 r 6 of the SCR as a special provision and the need to look into other rules did not arise.

Looking at O 49 r 6, the immediate reaction would be that it is so simple a rule that it does not require any mental gymnastics. However, this was not to be the case. Judicial thoughts varied: as a result, the practical solution behind r 6 got buried in the heap of conflicting judicial pronouncements. Decisions which came from the High Court indeed clouded the spirit of r 6. Sharp controversy arose in relation to the interpretation of O 49 r 6, resulting in a division of judicial opinions. Mahadev Shankar JCA had aptly put it 'as a trap for the unwary'.[10] It has become necessary to look at the various decisions and distil the principles and see which is the correct approach.

Two judicial thoughts

At one end of the scale is the decision in *Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd*[11] in which Richard Malanjum J gave a somewhat startling nuance to O 49 r 6 of the SCR. The Court of Appeal in *Yupaporn* approved the interpretation of O 49 r 6 by Richard Malanjum J in *Sykt Kayu Bersatu*. The effect of these decisions is that notwithstanding the express provisions to exclude notes of evidence, grounds of decision and the memorandum of appeal as spelt out in O 49 r 6(b), they insist on their inclusion. The blessing of the Court of Appeal in *Yupaporn*'s case was heavily relied upon by subsequent cases such as *Tan Ah Tee & Anor v Paimon bin Kasiran*[12] and *Perdana Finance Bhd v Azmi Ahmad & Ors*.[13] At the other end of the scale are cases led by *Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd*[14] which went in the opposite direction saying that the exclusion spelt out in r 6(3) ought to be given effect.

Abdul Kadir Sulaiman J who had earlier decided against the inclusion of the documents spelt out in O 49 r 6(3) found himself in abject dilemma. His Lordship had to, albeit his strong misgivings about Yupaporn's case, abdicate from his reasoned construction of r 6(3) in *Kemajuan Honda Credit*, and reluctantly followed the Court of Appeal's decision in *Yupaporn* on the basis that that decision 'binds the High Courts and the subordinate courts'.[15]

The hallmark decision of Abdul Kadir Sulaiman J was never considered in the case of *Sykt Kayu Bersatu*, nor its practical effect appreciated in both cases, ie *Sykt Kayu Bersatu* and *Yupaporn*. This was rather unfortunate.

There are unreported cases where High Court judges have, when exercising their appellate jurisdiction, dealt with appeals strictly in accordance with O 49 r 6 and not as stated in *Yupaporn*. This may be a relief but is not a solution. The legal profession is in a quandary for it cannot with certitude advise clients which way the High Court in exercising its appellate jurisdiction will go.

Analysis of Sykt Kayu Bersatu

Sykt Kayu Bersatu was a case where the plaintiff claimed for recovery of the sum of RM50,402 overdue interest, interest and costs arising from a hire-purchase transaction. In the sessions court, the parties agreed that there were only three issues to be determined, ie whether:

(i) the hire-purchase agreement was void for non-registration under the Hire Purchase Registration Ordinance (Sarawak Cap 71);

(ii) the guarantee could be assigned to a third party without the consent of the guarantors; and

(iii) the guarantee was also an indemnity.

The hearing proceeded under O 28 r 9 of the SCR and pursuant to O 28 r 10, the sessions court judge gave judgment for the plaintiff. The defendant appealed.

The most important features that emerged from the decision of *Sykt Kayu Bersatu* are:

(1) the sessions court judge had acted under O 28 r 9 to try the issues and under r 10 entered judgment for the plaintiff;

(2) no memorandum of appeal had been filed when the appeal came before the learned appellate judge;

(3) the submission by counsel for the appellant relying on O 49 r 6; and

(4) Form 141 had not been issued.

The intriguing question is: what was the actual status of the appeal before the High Court? Was it an appeal against an order on a summary or interlocutory application? Or, was it an appeal from the full determination of the issues or question agreed and posed by both parties? This is where the actual problems lies. A misunderstanding of O 26A and O 28 r 9 and 10 of the SCR had indeed occurred and all the parties and the court had proceeded on a wrong footing.

Therefore, it becomes important to look at O 28 r 9 to find out its effect. That rule reads:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

We must not gloss over the words ‘to be tried before, at or after the trial of the course or matter …'. The literal approach of interpretation would support the view that a question or issue may be tried at or before the trial. The use of the word ‘trial' is significant because it is indicative of a situation where the questions or issues may be tried in order to bring a swift end to the dispute. So, what happens when the questions or issues having been answered one way or the other? We will have to seek aid from O 28 r 10 of the SCR which reads:

> If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from

> the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

The important words to which special regard must be had are '… the decision of any question or issue arising in a cause or matter and tried separately …'. The emphasis is on the words 'tried separately' and the words following are 'from the cause or matter substantially disposes of the cause or matter or renders the trial … unnecessary …'.

Therefore, in the case of *Sykt Kayu Bersatu* it is apparent that the learned sessions judge having determined — or to put it in the words used by O 28 rr 9 and 10 of the SCR — tried the 'question or issue' posed for his determination, gave judgment for the plaintiff thus obviating the necessity of going into full trial. The quality of the appeal against the decision that was initiated was not one which qualified under O 49 r 6, but under O 49 r 2 because there had been a trial of questions or issues inviting the determination by the learned sessions judge, which he did.

Rules 9 and 10 of O 28 of the SCR use the word 'tried' and O 49 r 6 specifically refers to a 'decision … other than a decision made after trial'. One cannot fail to see the clear distinction between the 'question or issue … to be tried' and 'a decision' other than a decision made after trial.

It is rather unfortunate that this useful distinction was not brought home in the case of *Sykt Kayu Bersatu*. Had the appeal and the preliminary objection been dealt with based on rr 9 and 10 of O 28, the necessity to rely upon O 49 r 6 would not have arisen at all. This was the most sad aspect of *Sykt Kayu Bersatu*, and which was the source of acute confusion in that area of adjectival law.

Issues or questions tried under O 28 rr 9 and 10 of the SCR

Rules 9 and 10 of O 28 of the SCR are identical to O 33 rr 2 and 3 of the RHC. In so far as these rules are concerned, the principles are very clear. Where parties have agreed on issues or questions to be determined by the court, the court is empowered to have those issues or questions 'tried' separately. Once a decision is reached on those preliminary issues or questions, the matter comes to an end. Either there will be a judgment for the plaintiff or the action will be dismissed. Or, the court may make any such other order.

In *Palaniappa Chettiar v Sithambaram Chettiar & Ors*,[16] the Federal Court agreed with the conclusion of Wan Hamzah J (as he then was) by quoting a passage from the learned judge's decision which was as follows:

> If the defence's contention is upheld this would conclude the whole proceedings, and it would not be necessary to try the other issues … .[17]

In *SI Rajah & Anor v Dato Mak Hon Kam & Ors (No 1)*,[18] Lim Beng Choon J after having reviewed the decided cases under O 33 r 3 of the English RSC 1965 — which is in pari material with O 33 r 2 of the RHC — formulated the following propositions (at p 212):

> (1) As a general rule, the court will exercise its power under O 33 r 2 to order a preliminary question to be tried if and only the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go on trial as a whole.

(2) Notwithstanding the general rule, an order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit.

(3) Preliminary points of law have been described as too often treacherous short cuts but where it is a trial of so-called preliminary issues of fact, the justification to allow the trial of such issues is even harder to discern.

(4) In any event, a preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue … .

His Lordship went on to add (at the same page):

To my mind the trial of the preliminary question as framed by me presently may well result in the saving of considerable time and expense.

Mohd Ghazali JC (as he then was) took the view in the case of *Kumarasamy & Ors v Revathy Development (M) Sdn Bhd*[19] that if the questions or issues posed by the plaintiffs were to be answered affirmatively by the court, that would have the effect of granting the declarations sought at that preliminary stage and it is likely to be decisive of the litigation and may well result in the saving of considerable time and expense.

In *Abdul Rashid Abdul Majid v Island Golf Properties Sdn Bhd*,[20] Wan Adnan J (as he then was) dealt with the preliminary issue posed and gave judgment for the plaintiff.

Similarly, VC George J (as he then was), having dealt with the preliminary issues or questions on the whole action, decided that the disposal of the preliminary issues or questions substantially disposed of the case and rendered the trial unnecessary.[21] The rationale behind O 28 rr 9 and 10 is that once the court has tried the preliminary issue and comes to a decision, it acquires a character of finality, unless the court makes some other orders.

Reverting to *Sykt Kayu Bersatu*'s case, it could be gleaned from the judgment of Richard Malanjum J, that the learned sessions judge had answered the issues or questions agreed upon by the parties in favour of the plaintiff and entered judgment pursuant to O 28 r 10 of the SCR. The effect of the learned sessions court judge's decision is that it is an order after the issue or question having been tried, a finality has been reached and it is not a decision under O 26A or for that matter a decision from an interlocutory application.

Characteristic differences between O 28 rr 9, 10 and O 26A

The distinct characteristic features of O 28 rr 9 and 10 and O 26A are there for us to see, and it would be helpful to look at them. This is necessary to ascertain, in the event there is an appeal, which of the two modes needs to be complied with as prescribed by O 49.

Order 28 r 9 accepts the position that there are triable issues or questions necessitating a trial; but, if they could be dealt with as preliminary points then those issues or questions could be tried separately and at the end of the trial of those issues or questions the court could act under r 10 and proceed either to dismiss the claim or to give judgment for the plaintiff.

Order 26A provides a mode whereby the plaintiff could apply for summary judgment on the specific ground that the defendant has no defence to his claim, or there are no triable issues. In

other words the plaintiff's claim is straightforward and there are no issues or questions to be tried. However, if the defendant can raise a defence either in law or in fact or both, then the action has to go on for full trial. There is no doubt about it.

So, the most important question that begs an answer is this: Is a judgment under O 28 r 10 a judgment after the issue or question has been tried? The answer to this question would provide the key to unravel the intrigues surrounding the two modes of appeal under O 49 of the SCR.

A decision made under O 28 r 10, it is submitted, is a decision after the court has tried the issues or question posed. And when an aggrieved party wants to appeal he has to follow O 49 r 2 and the entire procedures prescribed by the rules of the respective courts to bring the appeal for hearing have to be complied with. The pleadings, the issues or questions formulated, the notes of evidence, the grounds of decision all have to be before the appellate court for it to understand the background of the case, the issues or questions involved and the way the trial court had approached the issues or questions and the reasons for the decision so made. The reasoning process of the trial court would be material. And the party appealing would have to show in his memorandum of appeal why he is aggrieved and where and how the trial court has erred in law or in fact or both.

The position under O 26A is different. The court, once satisfied that there are no triable issues, has no choice but to enter judgment for the plaintiff. If the court is of the opinion that there are triable issues, then it has to dismiss the application for summary judgment and set down a date for trial of the action.

Sadly, the appellate court in the case of *Sykt Kayu Bersatu* does not seem to have appreciated this all-important difference and went down the wrong path and got lost. In so far as *Sykt Kayu Bersatu* is concerned, the necessity to comply with r 2 of O 49 was unavoidable because it was a case where the issues or questions had been tried; but, the reference and reliance on r 6 was unfortunate.

Primarily, the High Court sitting as an appellate court to hear appeals from the decisions of subordinate courts when it is not clear what sort of decision is being appealed from has to decide whether it is a decision after trial or otherwise. If this had been done in *Syarikat Kayu Bersatu*'s case, the mist of uncertainty that descended on the interpretation of O 49 r 6 could have been avoided.

Order 55 of the RHC

Order 55 of the RHC prescribes the procedures to be followed when an appeal is brought from subordinate courts and statutory bodies. In other words, the purpose of O 55 is to facilitate the reception of the appeal into the High Court and how it should be disposed of.

As was pointed out earlier, prior to the incorporation of r 6 into O 49 of the SCR the relevant provisions in regard to appeals from the subordinate courts to the High Court, ie the RHC and SCR, did not have a specific, speedy method for the disposal of appeals arising from summary judgment applications and other interlocutory applications. Rule 6 of O 49 was introduced to overcome this lacuna.

The learned judge in the case of *Sykt Kayu Bersatu* took the view that there is no reference to r 6 in O 55 of the RHC. This is what his Lordship said:

> It is pertinent to note that there is no reciprocal provision for O 49 r 6 of SCR 1980 to be found, in particular, under O 55 of the Rules of the High Court 1980 (hereinafter called 'the RHC 1980'). Order 55 deals with appeals to the High Court from subordinate courts and statutory bodies. But the reasons I can think of for such a situation is that in view of the wordings of O 49 r 6 of SCR 1980 there appears to be no necessity to have such a reciprocal provision in the RHC 1980. But the flaw of that reasoning is that there is no legal basis to allow the provisions of the SCR 1980 to govern the proceedings in the High Court. After all the SCR 1980 is intended for the proceedings in the subordinate courts.[22]

In a sense, the learned judge could not be faulted. The Rules Committee could have avoided this Tower of Babel by inserting r 6 in O 26A instead of in O 49. Since the objective of the Rules Committee was to avoid delay, such a course would have been effective. But the Rules Committee must have had other thoughts, for such a course would still leave appeals on interlocutory matters to the same fate of confusion and dilatoriness. It is perhaps to provide a solution to appeals generally arising out of interlocutory matters that the Rules Committee thought it would be convenient to have such a rule under O 49. The thoughts of the Rules Committee were well intended but the positioning was misplaced.

The learned judge in *Sykt Kayu Bersatu*'s case took the view that O 55 is silent as to how to deal with appeals contemplated by r 6. There may be substance in this reasoning. It is true that O 55 of the RHC spells out what the High Court could do in exercise of its appellate jurisdiction conferred by s 27 of the Courts of Judicature Act 1964. The lapse of the Rules Committee is too obvious. It could have inserted a provision to say that an appeal under O 49 r 6 of the SCR shall be dealt with pursuant to the provisions thereof. Such a course would have prevented unnecessary division of judicial opinions.

To fortify his reasonings, the learned judge said that there is no legal basis to allow provisions of the SCR to govern proceedings in the High Court; but what he overlooked was the fact that when rules are made with specific purpose in mind, those rules cannot be ignored. It may be true that the rules of the lower courts could not govern the proceedings in the High Court; but, the judicial line of reasoning would go to show that when a specific provision is made, then that specific provision shall have overriding effect which ought to be followed.

If the learned judge's view is correct, that is, there are no reciprocal provisions in the RHC for the reception of O 49 r 6, then O 55 of the RHC has to be strictly complied with. This view seems to suggest that since the RHC had not made any provisions to receive and hear appeals in matters covered by O 49 r 6, then the High Court has no jurisdiction to hear appeals on interlocutory matters altogether. It follows, therefore, that the only appeals that could be heard in the High Court are those satisfying the conditions in O 55 of the RHC and since there are no specific provisions relating to appeals in interlocutory matters, then, O 49 r 6 is otiose and of no effect. The tenor of the learned appellate judge's contention is that an aggrieved party could appeal pursuant to O 49 r 6 of the SCR but has to comply with all the provisions of orders of the RHC to invoke the appellate jurisdiction of the High Court. One could see the strength of this argument, but it is fraught with fallacies because: (i) it ignores the intention of the legislature; (ii) the High Court is vested with the jurisdiction to hear appeals from the subordinate courts;[23] (iii) the effect of O 1 r 2(2) of the RHC has been overlooked and (iv) failure to take into consideration the inherent powers conferred by O 92 r 4 of the RHC.

Ignores the intention of the legislature

The legislature in formulating and introducing r 6 of O 49 had in mind the scandalous delay that is being experienced when appeals stem from the decisions on interlocutory applications, especially applications for summary judgments. If the appeals were to proceed under O 49 r 2 read in conjunction with O 55 of the RHC the very purpose underlying the introduction of O 26A would be defeated.

An easy, speedy mode was needed, and the legislature did go about prescribing a simple procedure, ie r 6. The legislature knew, and it is deemed to know, the adjectival law in the High Court. Following that, it enacted r 6. By this, it specifically excluded notes of evidence, grounds of decision and memorandum of appeal. And the reason for doing so was apparent in that the appeal under r 6 of O 49 being a rehearing, all that the appellate court has to do is, in the case of a summary judgment application, to look at the plaintiff's claim to see whether it is a straightforward case and then to consider in the face of the defence filed whether it discloses any triable issues.

The exclusion of the notes of evidence and the grounds of decision was deliberate, because their preparation could take considerable time. This too would defeat the objective of speedy conclusion of a matter where there are no triable issues at all.

One can see the plain intention of the legislature and it is the court's duty to give effect to that intention.

Bowen CJ said in the case of *Curtis v Stevin*:[24]

> The rules for the construction of statutes are very like those which apply to the construction of other documents … . If possible, the words of an Act of Parliament must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat*.

The Lord Justice went on to add:

> If we were to hold that under s 65 the judge has no power to order that an action which, as regards the amount claimed, might have been commenced in a county court, we should be making nonsense of the section. We must avoid such a construction, if the language will admit of our doing so.

Lord Radcliffe in the case of *Attorney-General for Canada v Hallet & Carey Ltd*[25] has said:

> There are so many so-called rules of construction that courts of law have resorted to in their interpretation of statutes, but the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention.

Per Gopal Sri Ram JCA:

> Prime facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases.[26]

Statutory instruments have the same effect as statutes and the principles of construction do not differ.

In *Pacific Centre Sdn Bhd v United Engineers (M) Bhd*,[27] Edgar Joseph Jr J (as he then was) stated:

> The Rules of the High Court 1980 were enacted in exercise of the powers conferred by s 70 of the Courts of Judicature Act 1964, with the consent of the Chief Justices of Malaya and Borneo and the Rules Committee and are comprised in PU(A) 50 which is clearly subsidiary legislation within the meaning of s 3 of the Interpretation Act 1967. The Rules in my opinion, therefore, have statutory force and are not mere rules of practice.

The Subordinate Courts Rules Committee was established under s 3 of the Subordinate Courts Rules Act 1955. Section 4(b) of the Act of 1955 provides that the Rules Committee may regulate and prescribe the procedure in proceedings by way of appeal from a subordinate court to the High Court.

In the light of the foregoing, it is submitted that r 6 of O 49 of the SCR has statutory force as it has been properly enacted and complied with s 8 of the Act of 1955. The High Court sitting in an appellate capacity has no choice but to hear the appeal as provided for in r 6 according to the procedures regulated therein and ought not to travel outside the boundary delineated by the said rule.

Appellate jurisdiction of the High Court

Section 27 of the Courts of Judicature Act 1964 provides that:

> … appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from Subordinate Court … .

This is a general provision and it must be pointed out that the High Court derives its jurisdiction from this particular section and no rules of court can limit or circumscribe that jurisdiction.

Sections 33 and 35 of the Act of 1964 give revisionary powers and general supervisory and revisionary jurisdiction to the High Court.

The High Court when exercising its supervisory or revisionary jurisdiction need not call for notes of evidence or grounds of decision or memorandum of appeal. The High Court could, if it is desirable in the interest of justice, do everything that is necessary to achieve that objective. The High Court is obliged to make any order as may be necessary to prevent injustice. It is, therefore, unimaginable that the High Court which is vested with so much power and jurisdiction could be shackled by purely subsidiary legislation.

Effect of O 1 r 2 of the RHC

Order 1 r 2 is pertinent. It says:

> (1) Subject to the following provisions of this rule, these rules shall have effect in relation to all proceedings in the High Court, including any pending proceedings therein.
>
> (2) These rules shall not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

(3) In the case of the proceedings for which rules have been made, nothing in paragraph (2) shall be taken as affecting any provision of any rules (whether made under the Act or any other written law) by virtue of which the Rules of the High Court 1980 or any provisions thereof are applied in relation to any of those proceedings.

The terms of r 2(2) are very clear for it says that the RHC shall not have effect in relation to proceedings in respect of which rules have been made or may be made under any written law.

Rule 6 of O 39 of the SCR is a written law made by the Rules Committee pursuant to s 3(b) of the Act of 1955 for a specific purpose.

The appellate court has to carry into effect the specific procedures spelt out in r 6 without the aid of the provisions of O 55 of the RHC.

Another way of looking at it is, if the legislature had intended that the whole of the provisions of O 55 of the RHC should apply, it would have said so in unequivocal terms. Such an intention cannot be discerned from r 6 of O 49 of the SCR. On the other hand, it is consistent with the intention of the legislature that r 6 and the procedures prescribed therein should stand by themselves. It is a complete procedure.

Inherent powers of the High Court under O 92 r 4 of the RHC

Order 92 r 4 of the RHC provides:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The effect of this rule cannot be lightly treated. It is a general power. When the High Court exercises its appellate jurisdiction, it has to act in a manner to prevent injustice or prevent abuse of the process of the court. It is also a clear declaration that nothing in the RHC shall be deemed to limit or affect the inherent powers of that court.

Per Lord Morris of Borth-y-Gest:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers … in order to enforce its rules or practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.[28]

In *Loo Chay Meng v Ong Cheng Hoe*,[29] VC George J (as he then was) had to deal with a situation of a lacuna in the face of the rules which caused procedural injustice and his Lordship said in that kind of situation and if there is injustice, the court is not only entitled to but is obliged to make any order as may be necessary to prevent injustice.

Muddled judicial stream

We have seen that the decision in *Sykt Kayu Bersatu*, which received approval in the Court of Appeal in *Yupaporn*'s case, caused hiatus in the judicial approach to O 49 r 6.

The case *Kemajuan Hunda Kredit* has been dealt with. It was decided before *Sykt Kayu*

Bersatu and *Yupaporn*. Abdul Kadir Sulaiman J subsequently abdicated from his well-founded reasoning and followed the strong current of stare decisis of the Court of Appeal decision in *Yupaporn* with a plea that the Rules Committee should have a second look at the rule.

In *Tan Ah Tee & Anor v Paimon bin Kasiran*,[30] Abdul Malik Ishak J was faced with an identical problem. The learned judge must have realized the problem and did not dismiss the appeal but exercised his powers to allow the appellant to file an application for extension of time. This what his Lordship said (at p 320):

> *In view of the grey areas surrounding the interpretation of O 49 r 6(3)(a), (b), (c) and (d) of the SCR, I do not propose to proceed to hear the present appeal. I would adjourn the present appeal to enable the solicitors for the appellants/defendants to file an application for an extension of time to file the memorandum of appeal after receipt of the notice in Form 141.* In the meantime, the learned magistrate should proceed to write his grounds of judgment and supervise the preparation of the notes of proceedings to enable Form 141 to be issued. There shall be no order as to costs. (Emphasis added.)

Apparently, justice was done.

In *Perdana Finance Bhd v Azmi Ahmad & Ors*,[31] Hishamudin Yunus J appreciated the difficulty that had surfaced and joined the judicial sentiments expressed by Abdul Kadir Sulaiman J.

Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd[32] was the first case to take a different line from that of Richard Malanjum J in *Sykt Kayu Bersatu* and the Court of Appeal in *Yupaporn*. This was no easy task. Abdul Kadir Musa JC (as he then was) felt the weight of stare decisis bearing upon him. If it was only Richard Malanjum J's decision in *Sykt Kayu Bersatu* the learned judge could have taken the obviously safe route and proceeded on the basis that the decision of a judge of concurrent jurisdiction was not binding on him. In this context, he would have found support from the decision of Abdul Kadir Sulaiman J in *Kemajuan Hunda Kredit*.

Since the Court of Appeal in *Yupaporn* had ruled that the issue ie O 49 r 6 had been ‘admirably covered' by Richard Malajum J in *Sykt Kayu Bersatu* and endorsed his reasonings, the doctrine of stare decisis became the stumbling block.[33]

To overcome the hurdle of stare decisis, Abdul Kadir Musa JC (as he then was) took the stand that it was not the decision of the Court of Appeal which was being distinguished but his task was to find out whether *Sykt Kayu Bersatu* was properly decided.[34]

Having crossed the Rubicon, the learned judicial commissioner went on to say (at p 1046):

> He [Richard Malanjum J] did not discuss, for example, at least briefly, which ‘other (relevant) provisions (of O 55) of RHC 1980' that should not be ignored. Without that benefit, other than what was expressed by his Lordship … to accept and adopt his view ... .

His Lordship then proceeded to consider the status of the subsidiary legislation and held that they have statutory force. Having done so, the learned judicial commissioner concluded that the SCR had to be strictly complied with.

After an elaborate review of the relevant rules, the learned judicial commissioner went on to

deal with the words '... other than a decision made after trial' and pointed out that they could only have reference to interlocutory matters.[35]

> ... it is important to appreciate the distinction between an 'interlocutory decision', as in the appeal before me, and that made 'after a full trial' as contemplated by r 2(4) or 3(2) of O 49, referred to by O 55 r 2(1) RHC. Only by fully appreciating that distinction can the procedure provided and to be followed strictly, as explained earlier, be correctly synchronized with the legislative intention of effectively introducing O 49 r 6 on 1 August 1993, vide PU(A) 193/93 in respect of any appeal against O 26A SCR decision.

Having examined the differences between decisions after full trial and those arising out of interlocutory stages, the learned judicial commissioner then went on to deal with the question of the issue of Form 141 (at p 1050):

> That 'special mode of procedure' prescribed by r 6 clearly dispenses the need to issue the notice in Form 141, and hence the requirement to file the memo as reflected by sub-r (3) of the said r 6 of the SCR. All an appellant has to do is to comply strictly with all the requirements stipulated in sub-rr (2) and (3) of r 6 of O 49 for his appeal to be heard by a judge in chambers under sub-r (1) of the same rule.

Calling in aid the maxim generalibus specialia derogantAbdul Kadir Musa JC (as he then was) said:

> … if one were to apply the cardinal principle of interpretation found in the maxim of 'generalibus specialia derogant', it would be obvious that the legislative intention in r 6 of O 49 must necessarily, after 1 August 1993, exclude the operation of either r 2(4) or 3(2) of the same rule. The said rule of construction was clearly stated by Gopal Sri Ram JCA, in the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 2 AMR 969at p 1013, the following:
>
> '... the rule of construction expressed in the maxim 'generalibus specilia derogant', that is, where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are found in the same or different statutes, the special or specific provision excludes the operation of the general provision.'

The learned judicial commissioner then concluded that there was no need to file a memorandum of appeal in respect of any appeal arising from an O 26A application after August 1993.

The next case is *Vong Ban Hin v Laksamana Realty Sdn Bhd*[36] in which Augustine Paul JC (as he then was) had the opportunity to consider the effect of O 49 r 6. His Lordship was in agreement with the decision of Abdul Kadir Musa JC, but the line of argument took a different course.

The uneasiness caused by the doctrine of stare decisis must have troubled the learned judge. To shrug it away the learned judge had to discover whether the Court of Appeal's decision was in fact binding or whether the reference to O 49 r 6 of the SCR was mere obiter dicta. The learned judge said (at pp 858–859):

> The erudite ratiocination of the issues involved by Abdul Kadir Musa JC (as he then was) followed by his logical conclusion that in an appeal under O 49 r 6 of the SCR the need to file a memorandum of appeal does not arise compels me to concur with his Lordship wholeheartedly. However, it may not be out of place for me to refer, with respect, to the doctrine of stare decisis which appeared to have caused some uneasiness. It must be realized that the observations made by the Court of Appeal in *Yupaporn* were not made in the course of hearing an appeal but while dismissing an application for leave to

appeal. In *Re Craic & Anor, ex p Zietsch* [1944] SR (NSW) 360Jordon CJ said that where the High Court made no order except to refuse leave to appeal in an application for leave to appeal it is open to question whether, in strictness, any observation made by the court as to any question of law or fact involved amounts to more than dicta. Furthermore, refusal of leave to appeal against a decision of the High Court by the Court of Appeal, as in *Yupaporn*'s case, gives the High Court judgment the same authority as any other unappealed judgment of the High Court.

Support for this proposition flows from the House of Lords where Lord Diplock in delivering his speech in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195said at p 214:

'Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appealed against. The judgment carries the same authority as any other unappealed judgment of the Court of Appeal — neither more nor less.'

It therefore follows that the *Syarikat Kayu Bersatu* decision and the decision made in *Yupaporn*'s case at the High Court level do not enjoy any elevated status as a result of the observations made by the Court of Appeal. Accordingly, I am of the opinion that the views expressed by Abdul Kadir Musa JC (as he then was) in the *Pembinaan Nadzri Sdn Bhd* decision that in an appeal under O 49 r 6 of the SCR there is no need to file a memorandum of appeal do not impinge upon the doctrine of stare decisis in any way. As *Pembinaan Nadzri Sdn Bhd* has declined to follow Syarikat Kayu Bersatu which is a decision of a court of co-ordinate jurisdiction, the former must be taken to be the law with which I am in full agreement.

Augustine Paul JC (as he then was) was once again faced with a similar question in *Hong Kong Bank Malaysia Bhd v Sereedevi (t/a as SD Rest House)*.[37] The learned judicial commissioner in referring to O 49 r 6 of the SCR and O 55 r 2 of the RHC said that O 49 provides two modes of appeal from a decision of a subordinate court to the High Court, one under r 2(1) and the other under the new r 6. And as to the words that the appeal record 'shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal …', the learned judicial commissioner concluded that 'The meaning of these words in O 49 r 6 is too plain to be reasoned.'

As to the conflict of r 6 with r 2 of O 49, he relied on the words 'Notwithstanding anything contained in this Order' to mean 'those requirements inapplicable to an appeal under O 49 r 6 thereby making the rule a separate and independent provision'.[38]

Augustine Paul JC went on to deal with the practice and the difficulty that had emerged (at p 614):

Indeed, the practice has been that the subordinate courts, in matters of appeal pursuant to O 49 r 6 of the SCR, do not provide the appellants with the notes of evidence and grounds of decision because of the understanding of the exclusive clause in O 49 r 6(3) itself and following the practice in the High Court where the registrar is not required to supply the notes and the grounds in interlocutory appeals. But alas, all these have changed with the decision of the Court of Appeal in *Yupaporn Seangarthit v Neil Allen Campbell Webb* [1995] 3 MLJ 705 which binds the High Courts and the subordinate courts. …

… Owing to this binding decision upon courts subordinate to the Court of Appeal, up to now, many appeals in the High Court pursuant to O 49 r 6 of the SCR are stalled because of the absence of notice in Form 141 from the subordinate courts and the memorandum of appeal. The hearing of appeal cannot proceed until a supplementary record of appeal is filed enclosing the notes of evidence, and the grounds of judgment and the filing of the memorandum of appeal which greatly depend on the speed the Form 141 is issued.

The learned judicial commisssioner also considered the decision of Hishamudin Yunus J in *Perdana Finance Bhd v Azmi Ahmad & Ors*[39] and decided that he was not prepared to depart from the views he had expressed in *Vong Ban Hin*.

Then came the case of *Worldwide Laser Service Corp v Excel Electronics & Industrial Suppliers Sdn Bhd*[40] in which Abdul Wahab Patail J was posed with the same difficulty as that faced by Abdul Kadir Musa JC and Augustine Paul JC discussed earlier. Finding himself unable to follow the decision in *Yupaporn*'s case, Abdul Wahab Patail J said (at p 562):

> It is trite that the ratio decidendi of a case is limited to the legal principle enunciated and applied to the factual situation of a case. That situation could be specific or general. But legal principles discussed or stated in the course of reasoning, but not necessary to the factual situation of that case, are only obiter dicta. Prima facie the dicta of a superior court is persuasive and must be considered. The ratio decidendi of *Yupaporn Seangarthit* if applied too generally would contradict the reason for introduction of O 49 r 6 of the SCR which was specifically recognized by *Yupaporn Seangarthit* itself. It would be a misreading of the judgment of the Court of Appeal that it would contradict itself. The only consistent reading is that where Form 141 has been served on the appellant's solicitors, they should follow up with obtaining the notes of evidence, grounds of decision and filing the same with a memorandum of appeal, and applying for extension of time if necessary to do so.
>
> *Yupaporn Seangarthit* did not have to consider the case where the subordinate court had notified it will not issue Form 141 and that there would be no notes of evidence and grounds of decision prepared. If indeed *Yupaporn Seangarthit* intended to deal with such cases, its pronouncements are only obiter dicta. In this I regret I must humbly differ from *Perdana Finance Bhd* in this aspect.
>
> Persevering with the ponderous language in which he endeavoured to render his reasons for his conclusions, I would venture the following as a summary of the essential reasons given by Abdul Kadir Musa JC in *Pembinaan Nadzri Sdn Bhd* ... .

The effect of Abdul Wahab Patail J's decision is that O 49 r 6 could stand by itself without the aid of O 55 of the RHC.

In *Subran @ Subramaniam a/l Kunhikuttan v Aladath Putham Veetal Moidutty*,[41] Azhar JC declined to follow *Sykt Kayu* and *Yupaporn*. Identical problems surfaced before Low Hop Bing J in *Natural Art Materials Industries Sdn Bhd & Anor v Oriental Top Ltd*[42] and it could be seen that the learned judge was faced with the same dilemma. The doctrine of stare decisis was the stumbling block and he got rid of it by saying (at p 319):

> However, in the application of the doctrine of stare decisis, it is essential to look at the actual decision of the higher court based on the facts of the case. Hence, where the facts are on all fours in the previous decision of the higher court and the case in the court below, then the decision of the higher court is binding on the lower court. However, where as in the case before me, the facts are fundamentally different and distinguishable, then the doctrine of stare decisis does not apply. As stated above, the facts in *Yupaporn* reveal that Form 141 was served on the appellant's solicitor, the facts in the instant case have no such feature at all.

His Lordship favoured the decision of Abdul Kadir Musa JC in *Pembinaan Nadzri Sdn Bhd*, Augustine Paul JC in *Vong Ban Hin* and Azhar JC in *Subran @ Subramaniam a/l Kunhikuttan v Aladath Putham Veetal Moidutty*.[43]

The learned judge was also at pains to point out (at p 320):

> In view of the continuing problem arising from the above sets of decisions, it is my wish that the party aggrieved by my decision herein do file an appeal against my decision so that the Court of Appeal and, if the necessity arises, the Federal Court can resolve this problem once and for all in which case the principle enunciated by the Court of Appeal or the Federal Court would become settled law.

All these cases show consistency in not following the decisions in *Sykt Kayu Bersatu* and *Yupaporn*. They were correct in their reasoning that O 49 r 6 of the SCR ought to be treated separately. Those decisions which apparently followed *Sykt Kayu Bersatu* and *Yupaporn* cases should now be regarded as not reflecting the true spirit of O 49 r 6 of the SCR and it is unsafe to follow them.

In *Thye Ye Ind Sdn Bhd v Malaysia Coconut Coir Industrial Co*,[44] Abdul Kadir Sulaiman J suggested that:

> … the Rules Committee have a second look at the provisions of O 49 r 6 of the SCR and if necessary, amend the provisions to clearly express the intention of the legislature in relation to appeals against the decision given by the subordinate courts, other than a decision made after trial.

Conclusion

It is worth reminding ourselves that when two statutory instruments are being considered no fruitful result can be achieved by engrafting the provisions of one into another. Although the RHC, especially O 55, deals with appeals generally from the subordinate courts, a specific provision has been made by way O 49 r 6 in the SCR to cater for appeals on interlocutory matters. Both have to be dealt with separately and kept apart. In *Chop Soon Hoe v Tan Kee*,[45] the landlord had obtained judgment for possession of a controlled premises in the sessions court which judgment was affirmed by the High Court. The tenant appealed to the Federal Court and one of the grounds was that he should have been served with a notice under s 235 of the National Land Code 1965. Suffian LP (with whom Lee Hun Hoe CJ and Wan Suleiman FJ concurred) held that s 235 of the Code deals with tenants generally, whereas the Control of Rent Act 1965 deals specially with controlled premises and therefore s 235 of the Code cannot apply to controlled premises regulated by the Control of Rent Act 1966.

One can see that the court was not willing to engraft the provisions of one Act into another when the objectives were different, or, where although the Acts might be dealing with identical problems, they distinctly distinguish the purposes and their applicability. If the argument canvassed by the tenant in *Chop Soon Hoe* had been upheld, one could see the apparent conflict that would have emerged. For example, the Act of 1966 specifically provides a remedy to a landlord to recover possession on the ground of arrears of rent.[46] The tenant could seek relief under s 16(5) of the Act of 1966 which empowers the court to suspend execution if certain conditions are fulfilled, and to discharge or rescind any order or judgment for possession. The Code of 1965 is silent about this kind of remedies.

It is therefore submitted that since r 6 was inserted by the legislature for a specific purpose, it would not be a prudent course to look into the general provisions and place the new rule in a procrustean bed. This was not intended by the legislature. Any course which deviates from the intention of the legislature could render the new rule nugatory and useless. The interpretation

given by Richard Malanjum J and seemingly endorsed by the Court of Appeal would appear to render r 6 ineffective and, indeed, defeat the intention of the legislature.

It is indeed distressing to note that the Rules Committee had not taken the initiative of introducing a much simpler procedure in so far as appeals from subordinate courts are concerned and it cannot be said that the present rules are easy to follow and they do not in any way help the disposal of the appeals in a speedy manner, especially those arising from interlocutory applications.

Order 49 r 6 of the SCR is formulated in a manner to govern appeals arising from summary judgment applications, or most other applications which do not have the character of ultimately deciding the rights of the parties, but are interlocutory in nature, for example an application to strike out pleadings, or an application to add or substitute a party; or an application to amend pleadings. This is not an exhaustive list and there may be various kinds of applications made which do not affect the rights of the parties but done in the course of proceedings to the action for full trial. All these different kinds of applications strictly come within the ambit of O 49 r 6.

Perhaps it is not out of place to refer to the Singapore Rules of Court 1996, especially O 55B which provides a special manner in which an appeal could be had before the district judge. That order (O 55 r 1) reads:

> Appeals from decision of Registrar to District Judge in Chambers
>
> (1) Except where Order 14 Rule 14 is applicable, an appeal shall lie to a District Judge in Chambers from any judgment, order or decision of the Registrar.
>
> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made in Form 114 to attend before the District Judge on a day specified in the notice.
>
> (3) Unless the Court otherwise orders, the notice must be issued within 14 days after the judgment, order or decision appealed against was given or made and served an all other parties within 7 days of it being issued.
>
> (4) Except so far as the Court may other direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

And r 3 reads:

> This Order shall only apply to proceedings in the Subordinate Courts.

The Rules Committee could look into this order and adopt it with modifications.

On the other hand, we must not overlook the fact that the High Court may find it difficult to receive appeals on the basis that there is no provision in the RHC to receive, register and hear appeals from subordinate courts save and except as laid down in O 49, read together with O 55 of the RHC. This point needs to be addressed. One way of overcoming this problem will be to add to O 55 of the RHC a specific rule stating that the order shall not apply to appeals brought against decisions in interlocutory applications.

The present position in regard to an appeal in an interlocutory application covered by O 49 r 6 and the omission of any reference to it in O 55 of the RHC remind us of George Bernard Shaw's

description of the English law: 'The cat and mouse principle … is a part of the law of England'. Are we far from it, or are we in the process of developing our own 'hide and seek' principle?

One would wonder whether this is an exercise like breaking a butterfly on a wheel — directing disproportionate energy to a simple rule. The answer seems to lie in the problem that the legal profession, the subordinate courts and the High Courts are languishing in a predicament which ought to be addressed urgently.

[1] This body of rules was superseded by the Subordinate Courts Rules 1986 and subsequently by the Rules of Court 1996 applicable to both the High Court and subordinate courts.

[2] Now a judge of the High Court of Malaya at Penang.

[3] See *Thompson v Marshall* (1879) 41 LT 720; *Jones v Stone* [1894] AC 122; *Lloyd's Banking Co v Ogle* 1 Ex D 262 at p 263.

[4] See O 56 of the RHC.

[5] KS Dass, 'Appeal from Subordinate Court: When to File Memorandum of Appeal?' [1982] 2 MLJ xxxv.

[6] 'Summary Judgment in Subordinate Courts and the Problems' [1982] 1 MLJ lxxxvi.

[7] [1995] 3 MLJ 705.

[8] [1996] 4 CLJ 852.

[9] [1995] 2 MLJ 542.

[10] *Yupaporn*, supra n 7 at p 707.

[11] [1995] 1 CLJ 113.

[12] [1996] 3 CLJ 313.

[13] [1997] 2 CLJ 325.

[14] [1996] 2 CLJ 1038.

[15] See *Thye Ye Ind Sdn Bhd v Malaysia Coconut Coir Industrial Co* [1996] 3 AMR 3908 at p 3914.

[16] [1982] 1 MLJ 186.

[17] Ibid, at p 188.

[18] [1994] 1 CLJ 207.

[19] [1994] 3 MLJ 681.

[20] [1989] 3 MLJ 376.

[21] See *Bumuputra Merchant Bankers Bhd v Supreme — QBE Insurance Bhd* [1990] 2 MLJ 247 at p 250.

[22] Supra n 11 at p 115.

[23] Section 27 of the Courts of Judicature Act 1964.

[24] [1889] 22 QBD 512 at p 517.

[25] [1952] AC 427 at p 449.

[26] *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 at p 100.

[27] [1984] 2 MLJ 143 at p 148.

[28] *Connelly v DPP* [1964] AC 1254 at p 1301.

[29] [1990] 1 MLJ 445 at p 447.

[30] Supra n 12.

[31] Supra n 13.

[32] Supra n 14.

[33] *Yupaporn*, supra n 7 at p 708.

[34] See p 1044.

[35] See pp 1048 and 1049.

[36] Supra n 8.

[37] [1997] 3 MLJ 605.

[38] Ibid, at p 613.

[39] Supra n 13.

[40] [1998] 1 AMR 554.

[41] [1997] 3 MLJ 342.

[42] [1998] 6 MLJ 313.

[43] Supra n 41.

[44] Supra n 15 at p 3915.

[45] [1976] 1 MLJ 172

[46] Section 16(a) of the Control of Rent Act 1966.

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