

COPYRIGHT, CENSORSHIP AND *EX TURPI CAUSA*

The doctrine of binding precedents has no application to judgments at first instance. One High Court judge is not bound by the judgment of another.¹ However, such decisions are followed as a matter of judicial courtesy.² There are some instances both in England³ and Malaysia⁴ where one High Court refused to follow another. However, if a High Court has refused to follow an earlier High Court decision after referring to it, subsequent judges have to follow the later decision and not the earlier one unless the third judge is convinced that the second decision was wrong, e.g. some binding or persuasive authority had not been referred. Third judges have no general right to review.⁵

And more recently the High Court came to opposite conclusions in two cases on the question whether copyright subsists in a film in the absence of censorship approval. The earlier decision, *Television Broadcasting Ltd. & Ors. v. Mandarin Video Holdings Sdn. Bhd.*⁶ was decided on 19.5.83 by N.H. Chan J. He ruled that the absence of the censorship certificate was not fatal.

Almost three months later, Ajaib Singh J. in *Asia Television Ltd., & Anor. v. Viva Video Sdn. Bhd.*⁷ held that no copyright could exist in a film which had not been approved by the Censor Board. There appears

¹ *Sundralingam v. Ramanathan Chettiar* [1967] 2 MLJ 211 (FC). In the court below MacIntyre J. had followed a decision of Storr J. even though he thought that it was wrong. In *P.N. Mohd. Ibrahim v. Yap Chin Hock* (1950) 20 MLJ 127 Wilson J. held that a decision of Buhagiar J. was binding on him. The editorial note to the report in the MLJ points out quite correctly that this view is wrong.

² *Hock Hin Bros. Sdn. Bhd.*, *infra* per Edgar Joseph Jr. J.

³ See *In Re Islington Metal and Plating Works Ltd.* [1983] 2 All E.R. in which Harman J. refused to follow Vinelott J. in *In Re Berkely Securitles (Property) Ltd.* [1980] 1 WLR 1589. Paul Baker, Q.C., sitting as a deputy Judge delivering judgment in *Jones v. Barnett* [1984] 3 All E.R. 129 refused to follow Scott J. in *Di Palma v. Victoria Square Property Co. Ltd.* [1984] 2 All E.R. 92. He gave his judgment quickly because the Court of Appeal could consider it when hearing the appeal in *Di Palma* or the landlord may appeal and both appeals heard together. Scott J. was upheld by the Court of Appeal (see *The Times*, May 7, 1985).

⁴ See *Nair v. Chidambaram* (1961) 27 MLJ 260 refusing to follow Rigby J. in *Evelyn Saw Hee Li v. Gan Tit Sun* (1959) 25 MLJ 146; *Khaw Joo Heang v. Koay Seng Chye* (1960) 26 MLJ 203 and *Mayor Singh v. Lau Geok Swee* (1960) 26 MLJ 285. The judge later reversed his own views in *Verrapillai v. Ooi Swee Hoe* (1961) 27 MLJ 264. Wan Hamzah J. in *Govt. of Malaysia v. Preston Corporation Sdn. Bhd.* [1982] 1 MLJ 23 refused to follow *Govt. of Malaysia v. Ng Song Choon* [1975] 1 MLJ 31, and more recently in *Hock Hin Bros Sdn. Bhd. v. Low Yat Holdings Sdn. Bhd.* [1983] 2 CLJ 263 Edgar Joseph Jr. J. refused to follow *Hong Keow Tee v. Alkhared & Khoo* [1982] 2 MLJ 42.

⁵ *Colchester Estates v. Carlton Industries Plc.* [1984] 2 All E.R. 601.

⁶ [1983] 2 MLJ 346. This case is also reported at [1984] F.S.R. III.

⁷ [1983] 2 CLJ 132; [1983] 2 MLJ 409.

to be no reference in the judgment to any authority, not even to *Television Broadcasts Ltd.*, *supra*. It is unlikely that this case was not cited to Ajaib Singh J.⁸ But the cases on illegal contracts were cited.⁹

Copyright

Both plaintiffs were foreigners and claimed the protection afforded under the Copyright Act, 1969 and had sought *Anton Piller* Orders. In the *Asia Television* case the defendants had applied to dissolve the order and in *Television Broadcasts Ltd.* the plaintiffs had applied *inter partes* to continue the *ex parte* order granted earlier.

The question was: are the plaintiffs entitled to copyright and can they enforce their alleged right by an action? Copyright has always been treated as property — even at common law.¹⁰ Section 3 of the Copyright Act provides that copyright can only subsist by virtue of the provisions of that Act. To be eligible for copyright under the Act publication is essential.¹¹ There is no definition of “publication” except for a deeming provision¹².

... a copy or copies . . . have been made available with the consent of the author in a manner sufficient to satisfy the reasonable requirements of the public

and where the first publication occurred abroad then the local publication must occur within thirty days of the original publication.¹³

The Facts

In both *Television Broadcasts Ltd. supra*, and *Asia Television Ltd. supra* the first publication of the film occurred in Hong Kong. The films were shown in Hong Kong and such *showing* or screening was held, at any rate, in the *Television Broadcasts Ltd.*, as the earlier publication.¹⁴

Neither plaintiff had obtained the approval or certificate of the Board of Film Censors under the Films (Censorship) Act, 1952 (“the Censorship Act”). Both N.H. Chan J.¹⁵ and Ajaib Singh J.¹⁶ held that the Censor-

⁸ Junior Counsel who appeared for the Plaintiffs in *Television Broadcasts Ltd.*, *supra*, also appeared in *Asia Television Ltd.*, *supra*. The same solicitors represented the plaintiffs in both suits.

⁹ See the editorial note at [1983] 2 MLJ 409.

¹⁰ See *Millar v. Taylor* (1769) 4 Burr. 2303; *Donaldson v. Beckett* (1774) 4 Burr. 2408.

¹¹ See Section 2(2), Copyright Act, 1969.

¹² Section 2(2)(a), Copyright Act, 1969.

¹³ Section 2(2)(c), Copyright Act, 1969.

¹⁴ [1983] 2 MLJ at 363F, (“since all the films in this case were first shown in Hong Kong. . .”).

¹⁵ *Television Broadcasts Ltd.*, *supra*, at 358—359.

¹⁶ *Asia Television Ltd.*, *supra* at 133.

ship Act also applied to imported films and it was an offence to exhibit a film without a certificate.¹⁷

The object of the Censorship Act is set out quite correctly by Ajaib Singh J.¹⁸

... Public interest requires that the public at large do not gain access to immoral, subversive or undesirable films and it is for this purpose that the films are subject to censorship before they are released for public viewing.¹⁹

The Censorship Act is nowhere referred to in the Copyright Act 1969, a later Act.

The Issue

Is a Censorship Certificate a condition precedent to constitute "publication" of a film in this country under the Copyright Act, 1969? Or put another way, does the absence of such a certificate render the film ineligible for or deprive the owner the protection of copyright? On the effect of the Censorship Act on copyright N.H. Chan J. stated the test as follows:²⁰

The true test is: has the [Censorship] Act of 1952 impliedly forbidden the enforcement of the plaintiff's copyright in the films.

The Decision

The answer provided by *Television Broadcasts Ltd.*, *supra*, is in the negative whilst *Asia Television Ltd.*, *supra*, answered in the affirmative. Both seem to have given different reasons.

N.H. Chan J. followed the reasoning in *St. John Shipping Corporation v. Joseph Rank*²¹ and *Shaw v. Groom*,²² both are cases in contract. The penalty imposed for breach of the Censorship Act was minimal when compared to what the plaintiffs would lose in financial terms.²³ The certificate

¹⁷Section 25 (1)(d), Censorship Act, 1952.

¹⁸*Asia Television Ltd.*, *supra*, at 133 para. 12.

¹⁹The viewing is deemed to be "public" when shown to eight or more persons -- Sec. 12(2)(a), Censorship Act. This led Counsel to argue in *Television Broadcasts* at 359 that the cassettes were meant for home viewing and the "average household size in this country [was] 5.63 persons . . ." and therefore no public exhibition! The judge disagreed with this submission.

²⁰[1983] 2 MLJ at 363.

²¹[1957] 1 KB 267.

²²(1970) 2 Q.B. 504.

²³"[The plaintiff], because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it. It is questionable how far this contributes to public morality." -- per Devlin J. in *St. John Shipping Corpn. v. Joseph Rank Ltd.* [1957] 1 Q.B. 267, 288.

had been applied for and was expected to be issued. "Governmental machinery being what it is some delay is inevitable." There was publication of the film when cassettes were delivered to dealers.²⁴ The fact that the public did not receive them was immaterial.²⁵

The *Asia Television Ltd. case* proceeded on the basis that "there was no valid publication" in the absence of a certificate and to recognize a valid publication would be to condone an illegality. "As a matter of public policy the publication ought not be held valid within. . . the Copyright Act unless the film is first approved by the Board of Film Censors."²⁶

The appeal in *Mandarin Video* was struck-off by the Federal Court.²⁷ However the Plaintiff appealed to the Federal Court in the *Asia Television Case*. The Court allowed the appeal and gave its reasons later.²⁸ The Federal Court set out the issue as

. . . the effect of non-compliance with the provisions of the Films (Censorship) Act on the question of acquisition of copyright under the Copyright Act.

The Federal Court held that there was no nexus between the two statutes. The finding was that "non-compliance with the provisions of the Films (Censorship) Act does not affect the acquisition of copyright under the Copyright Act."²⁹ As will be shown later the reasons advanced by the Federal Court are quite similar to that of N.H. Chan J. in *Television Broadcasts* though no reference is made by the Federal Court to his judgment.

The *Ex turpi causa* rule

Both the High Courts had considered the maxim *ex turpi causa non oritur actio* even though it is not mentioned by its proper name.³⁰ The Federal Court did not expressly refer to this maxim; but it had referred to the cases that illustrate the application of this maxim. The cases cited were all con-

²⁴Following *Francis Day & Hunter v. Feldman & Co.* [1914] 2 Ch. 728 where 6 copies were exposed for sale on the counter and this was held to be publication.

²⁵Relying on Laddie, Prescott & Victoria, *Modern Law of Copyright* (1980) 169 para 4.31.

²⁶[1983] 2 CLJ at 133 paras 11, 12.

²⁷See the Editorial note at [1983] 2 MLJ 346. This normally occurs when the appellant has failed to take steps to prosecute the appeal. The common reason is the failure to file the record within time.

²⁸*Asia Television Ltd. v. Viwa Video Sdn. Bhd.* [1984] 2 C.L.J. 80 (FC).

²⁹*Ibid.*, at 82.

³⁰*Television Broadcasts Ltd.*, *supra*, at 359 ("Mr. Wong [Counsel for the defendants] said that since they [the plaintiffs] have contravened the law on censorship the plaintiffs could not come to this court to have their rights enforced"); *Asia Television Ltd. case*, *supra* at 133 ("The plaintiffs having blatantly contravened the censorship laws of Malaysia show no qualms whatsoever in now seeking redress for something which is tainted with illegality. . .").

tract cases³¹ except for *Batu Pahat Bank Ltd. v. O.A. of the Property of Tan Keng Tin*, a bankrupt³² and *Cate v. Devon & Exeter Constitutional Newspaper Co.*³³ The maxim has been translated to read "an action arises not from a base cause" but the word "causa" in Latin is not equivalent to cause of action.³⁴ According to Windeyer J.³⁵:

The maxim *ex turpi causa non oritur actio* can be given a place in our law of contract if it be taken as meaning that an illegal or immoral consideration will not support a contract or that a contract entered into to give effect to an unlawful or immoral purpose will not be enforced.

After quoting the following words of Lindley L.J. in *Scott v. Brown Doering McNab & Co.*³⁶

. . . No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. . .

he explained that the phrase emphasised "obviously refers to contracts or other transactions between parties. It does not refer to an action arising simply *ex delicto*."³⁷

Applicability to torts

The Federal Court in *Asia Television* made no comments at all on whether the application of the maxim solved the problem presented by the facts in both the cases. The maxim has its limits. The maxim can have no application to torts. A breach of statutory obligation did not debar a workman from bringing an action against his employer for the negligence of another workman.³⁸ One's own breach may constitute contributory

³¹ *Curragh Investments v. Cook* [1974] 1 W.L.R. 1559, 1563, ("... there must be a sufficient nexus between the statutory requirement and the contract"); *St. John Shipping Corpn. v. Joseph Rank* [1957] 1 Q.B. 267; *Shaw v. Groom* [1970] 2 Q.B. 504; *London & Harrogate Securities v. Pitts* [1976] 1 W.L.R. 1063.

³² [1933] 2 MLJ 237; [1933] AC 691 (security not invalidated for breach of S. 111 of the Companies Ordinance).

³³ (1889) 40 Ch. D. 500 (proprietor of newspaper permitted to sue for infringement of copyright even though the name and address nor title of paper registered under statute). Cf. *Marchant v. Evans* (1816) 8 Taunt. 142; 129 E.R. 337.

³⁴ *Smith v. Jenkins* (1969-70) 119 CLR 397, 410, 414, per Windeyer J.

³⁵ *Ibid.*, at 411-12.

³⁶ [1892] 2 QB 724, 728.

³⁷ *Smith v. Jenkins*, *supra* at 412.

³⁸ *National Coal Broad v. England* [1954] AC 403. For a recent study on this subject see Debattista, *Ex turpi Causa Returns to the English Law of Torts: Taking advantage of a wrong way out*, (1984) 13 Anglo-American Law Review 15.

negligence "or being the author of his own misfortune" but this "is very different from saying that simply because a man was a wrongdoer, he can have no remedy at law for harm done him. That proposition cannot possibly be sustained".³⁹

Public policy has however denied a cause of action to persons who were injured whilst engaged in an illegal act. A trespasser who was shot while engaged in the act of breaking-in was denied recovery.⁴⁰ A person who drives a car that he had stolen and is knocked into by the negligence of a truck driver can sue the truck driver in negligence. "The illegal use of the car plays no part in the cause of action save as a *sine qua non*."⁴¹ Damages are recoverable if the injury was unconnected with the criminal offence.⁴²

Where there is a direct connection between the injury and the crime the action will be dismissed. In *Smith v. Jenkins*,⁴³ the claim for damages by the plaintiff caused by the defendant was dismissed because both were at that time unlawfully using the car and were engaged in the joint enterprise.⁴⁴ Similarly in *Godbolt v. Fittock*⁴⁵ both the plaintiff and defendant were travelling in the vehicle with the cattle they had stolen and the plaintiff was injured when the vehicle ran off the road causing injuries to the plaintiff. Recovery was denied.

These cases had been followed in England in *Ashton v. Turner*.⁴⁶ After a boozing session by three persons, two of them committed burglary and sought to escape in a car belonging to the third. There was a collision in which the plaintiff was badly injured. Ewbank J. held public policy did not recognize the existence of a duty care by one participant in a crime to another in relation to the act done in the course of the commission of the crime. The subsequent flight from the scene of the crime was a continuation of the commission of the crime.

Thus in tort public policy prevents the cause of action arising if both parties were participants in a crime and one was injured in the course of the commission of the crime by the act or omission of the other.

The reasoning of the Federal Court seems to be consistent with the cases. The word used is "nexus". However the Court could have arrived at their conclusion without referring to or relying on any of the contract cases.

³⁹*Smith v. Jenkins, supra*, at 416.

⁴⁰*Shaw v. Hackshaw*, [1983] 2 V.R. 65 (Full court).

⁴¹*Smith v. Jenkins, supra* at 421 quoting the trial judge.

⁴²See *Hanson v. Jackson* (1977) 16 SASR 182.

⁴³*Supra*.

⁴⁴See also *Fleming Law of Torts* (6th Edn.) pp. 276-78 (1983).

⁴⁵(1963) 63 SR (NSW) 617.

⁴⁶[1981] QB 137.

Reliance on Illegal Act

Be it contract or tort public policy would only constitute a defence, where the illegality is relied upon as part of the cause of action i.e. "the plaintiff's claim cannot be established without going into proof of that [illegal] transaction."⁴⁷ Two local cases provide the contrast. In *Palaniappa Chettiar v. Arunasalam Chettiar*⁴⁸ the father could not recover the property he had transferred to the son. To do so he had to rebut the presumption of advancement. The facts relied on to rebut the presumption "disclosed that he made the transfer for a fraudulent purpose, namely, to deceive the public administration."⁴⁹

The Privy Council had earlier given relief in *Sajan Singh v. Sardara Ali*.⁵⁰ The transfer, though illegal, entitled the owner to recover the lorries in trespass. Lord Denning in *Palaniappa Chettiar*⁵¹ explained the difference.

In *Sardara Ali v. Sarjan Singh* the plaintiff founded his claim on his right of property in the lorry and his possession of it. He did not have to found his cause of action on an immoral or illegal act. He was entitled to recover. But in the present case the father has of necessity to put forward, and indeed, assert, his own fraudulent purpose, which he has fully achieved. He is met therefore by the principle stated long ago by Lord Mansfield, "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act," see *Holman v. Johnson*⁵² at page 343. Their Lordships are of opinion that the courts should not lend their aid to the father to obtain a re-transfer from the son.

Applicability to Copyright

The owner of a copyright need not rely on his illegal act to found his cause of action as illustrated by *Cate v. Devon & Exeter Constitutional Newspaper*.⁵³ He claims to be the owner. In the case of a film, publication is not necessarily limited to the screening or showing of the film in public. The delivery to press reviewers and the placing of copies on counters to be accessible and available to the public is sufficient.⁵⁴ The sale by an

⁴⁷*Simpson v. Bloss* 129 ER 99, 100 (1816); *Marles v. Phillip Trant & Sons Ltd.* [1954] 1 QB 29, 38 per Denning L.J.

⁴⁸(1962) 28 MLJ 143 (PC).

⁴⁹*Ibid.*, at 146.

⁵⁰(1960) 26 MLJ 52 (PC).

⁵¹(1962) 28 MLJ at 146.

⁵²(1775) 1 Cowp. at 343. See also *Kiriri Cotton Co. Ltd. v. Dewani* [1960] AC 192, 202-203.

⁵³See *l.n.* 33.

⁵⁴This seems to be the view of Chan J. on *Television Broadcasts Ltd.*, *supra*, at 363-4.

author of a manuscript⁵⁵ and the distribution among dealers for intended hire or sale⁵⁶ would be publication.

Therefore, it is submitted, that Ajaib Singh J. has read into the Copyright Act what is not there. Take the case of books. Copies have to be deposited with the libraries set out in the Schedule to the Preservation of Books Act, 1966. The failure to do so is an offence.⁵⁷ Does it mean that there is no copyright when there is a failure to deposit the books with the scheduled libraries? The owner can have a copyright without a public exhibition of the film. There is much force in the argument of N.H. Chan J. that the delay in the grant of the censorship certificate should not deprive the owner of his copyright when the local publication should take place within 30 days of the foreign publication.

The Federal Court accepted this approach.⁵⁸ There was no time limit specified in the Censorship Act. Publication was the pre-requisite for the acquisition of copyright. If the certificate was a pre-requisite

. . . then it may well be unlikely that in the vast majority of cases any copyright can accrue under the provisions of S. 6(1)(a) of the Copyright Act, as the vitiating effect of any delay on the part of the Board of Film Censors would redound on the heads of innocent claimants of copyright under the Copyright Act.

Infringement is a tort

It is clear that *ex turpi causa non oritur actio* can apply to contracts. Copyright is property and infringement *per se* is not a breach of contract. Even before the statutes copyright was protected at common law by the appropriate forms of action.⁵⁹ Even though the development of the law of tort has moved towards the system of obligations both contract and tort have not been assimilated; they remain as distinct as ever.⁶⁰ Infringement of copyright do not appear in the books on contract but are dealt with in the books on torts.⁶¹

No doubt Section 14 defines the infringement and confers a cause of action. This right so conferred does not arise out of or forms part of the law of contracts. A breach of a statute that gives an individual a cause of action is properly part of the law of torts — actions for breach of

⁵⁵ *White v. Geroch* 1 Chitt. 26.

⁵⁶ *Cf.* S. 13(10), Copyright Act, 1956 (U.K.).

⁵⁷ S. 4(3).

⁵⁸ [1984] 2 C.L.J. at 82.

⁵⁹ P.F. Carter Ruck and E.P. Skone James, *Copyright, Modern Law & Practice* (1965) 20.

⁶⁰ See Holyoak, "Torts & Contracts After *Junior Books* (1983) 99 LQR 591. For a previous article see Poulton, "Tort or Contracts" (1966) 82 LQR 346.

⁶¹ See e.g. Anand & Sastra, *Law of Torts* (4th Edn.) 619 (1980); *Clerk & Lindell on Torts* (15th Edn.) 1306 *et. seq.* (1982).

statutory duties. In *American Express Co. v. British Airways Board*⁶² the court had ruled that the cause of action assumed to have been created by Article 18 of the Warsaw Convention was "a proceeding in tort" within the meaning of S. 29 of the Post Office Act, 1969. "Breach of statutory duty is normally treated as being part of the general law of tort. . . The fact that the breach of statutory duty cannot be equated with any particular tort, for example negligence, does not prevent it coming under the same general heading".⁶³ The Copyright Act was legislation passed to protect the copyright for the benefit of its owners and licensees. Breach of such legislation gives a cause of action.⁶⁴

Illegality when relevant

When the plaintiffs sued in *Asia Television Ltd.* they did so relying on their right of property in the copyright. They did not, and need not, rely on any illegality on their part. The fact that they are guilty of offences is not relevant — if they are guilty they can be punished for them. There is nothing in the Censorship Act which says or implies that the breaches of the Act deprives the owner of a copyright. Publication in breach of the Act is still publication under the Copyright Act. A consignee cannot refuse to pay the transport company simply because the latter company used trucks that were not licensed under the Road Traffic Act or had no third party cover or the driver broke the speed limits.⁶⁵

Except in the case of an obscene film or work the Censorship Act does not affect the acquisition of copyright. The Censorship Act, though an earlier Act deals with a particular subject matter — censorship of films whereas the Copyright Act is a general Act dealing with the acquisition and protection of copyright of every work including films. One cannot argue that the Copyright Act impliedly repeals the Censorship Act.⁶⁶

Obscene and immoral films are in a different position. Copyright cannot subsist in such works.⁶⁷ The Plaintiff who seeks to protect such works must necessarily have to rely on an illegality against public policy. Criminal

⁶²[1983] 3 All ER 551 (Lloyd J.).

⁶³*Ibid.* at 563, relying on *Salmond on The Law of Torts* (18th Edn. 1981) at 231; and *Clerk & Lindell op. cit.* at 39.

⁶⁴See *Ex parte Island Records Ltd.* [1978] Ch. 122; *Lonrho v. Shell Petroleum (No. 2)* [1982] AC 173 at 186 per Lord Diplock.

⁶⁵See *Archbalds (Freightage) Ltd. v. Spanglett Ltd.* [1961] 3 All ER 417 (CA).

⁶⁶See *Lancashire Asylum Board v. Manchester Corpn.* [1900] 1 QB 458, 471, AL Smith L.J. ("There is a well known rule. . . which is that a subsequent general Act does not affect a prior special Act by implication").

⁶⁷*Halsbury's Laws* (4th Edn.) 531 para 833. The point was also made by N.H. Chan J. in *Television Broadcasts Ltd., supra.*

sanctions are also available under the Penal Code.⁶⁸ The doubt raised by the editors of *Halsbury's*⁶⁹ that

... it is not clear whether there is no copyright in such works or whether copyright exists, but will not be afforded protection by the courts

does not affect the thesis of this note. There was no allegation either in *Television Broadcasts* or *Asia Television* that the films were obscene or immoral. If there had been proof of such allegations then the Plaintiffs would lose either way — no copyright or no assistance by the court. The point is made conclusive by illustration (S) to S. 52 of the Specific Relief Act, 1950 that a plaintiff can obtain an injunction to restrain infringement "unless the work in which copyright is claimed is libellous or obscene."

Wider Questions of Policy

These two decisions at first instance raise much broader questions of policy. Is justice done by allowing works to be pirated with impunity simply because censorship approval had not been obtained even though applied for? The problem is not new. Tan Sri H.T. Ong, a former Chief Justice, whose decisions are always respected, said⁷⁰

A judge's dominant concern must be to see that justice is done, although this is not possible at all times because there are occasions when the enacted law makes unjust decisions inevitable, regardless of how we feel about it.⁷¹

... Unjust decisions cannot but detract from the respect the rule of law and respect as well, for the good sense of the Bench in the public opinion.⁷²

He is not alone in the crusade.⁷³

What then is justice? Though the root word "just" has many meanings and is used in many senses, the meaning for our purpose is clear. It means no more than "fair."⁷⁴ "Justice is concerned with not doing people down."⁷⁵ That, of course, means damaging the rights or interests of another. All judgments must appeal to the man in the street as sensible

⁶⁸Sections 293-294 Penal Code.

⁶⁹*Halsbury's, op. cit.* p. 531 para 833 f.n. 1.

⁷⁰Tan Sri H.T. Ong, "Law And Justice Through the Cases" [1973] 2 MLJ xxxv.

⁷¹*Idem.*

⁷²*Ibid.*, at p. xxxvi.

⁷³*Idem.* He quotes Tan Sri Salleh Abas (then Solicitor-General): "Technicalities, therefore, should be observed only when they serve the cause of justice and ignored when they become an obstruction or engine of oppression. ... it is justice and not technicality which is the end of the law."

⁷⁴See J.R. Lucas, *On Justice* (1980) 1-2 (Clarendon Press).

⁷⁵*Ibid.*, 20.

and just.⁷⁶ Lord Devlin, speaking extra judicially,⁷⁷ summed up the problem:

. . . The judicial qualities which the public singles out for praise are common sense and humanity; devotion to the law is less admired than a willingness to strait it. It is not surprising, therefore, that from the earliest times the English legal system has accommodated various devices designed to enmesh the legal result with the justice of the case.

There are many examples that illustrate the use of common sense and fairness to do justice. The *High Trees Case*⁷⁸ is a familiar reminder from the days of the law school. By the same token the courts have brushed aside absurdities which would be the result when a strict or literal compliance was adhered to or insisted upon. Idleness and fiction have no place.⁷⁹ The same common sense has been applied in a recent case⁸⁰ concerning the sale and purchase of palm oil in a circle where the physical delivery of the goods would be absurd and the plaintiff was allowed to recover the difference in prices.

Does not the law recognize and protect contingent rights? Take the case of contracts for sale of property subject to the approval of the ruler-in-council. Before the ruler approves is not the contract valid — even specific performance has been ordered subject to that approval.⁸¹ When the contract did not so provide the term was implied.

If censorship approval is a necessary precondition and if it has been applied for would it not be proper to grant the interim injunction? When would the copyright be deemed to exist or come into being — from the date of the censorship approval or would the approval relate back to the day the films were brought into the country? If it is the former then it makes

⁷⁶*Ingram v. Little* [1960] 2 WLR 337.

⁷⁷Patrick Devlin, *The Judge* 90 (O.U.P. 1981).

⁷⁸*Central London Properties Trust Ltd. v. High Trees House Ltd.* [1947] KB 130. A tenancy agreement for life in Chinese, though not in statutory form was given effect as a permanent tenancy for the maximum duration the Land Code allowed: *Siew Soon Wah v. Yong Siew Tong* [1973] 1 MLJ 133 (PC) affirming [1971] 2 MLJ 105. Justice would have been denied had Ong C.J. not noticed a material error in the "rough translation". A tenant who had vacated rent-controlled premises and re-entered after it was rebuilt was accorded security of tenure even though the premises was no longer controlled: *Bank Negara Malaysia v. Phillip Hoalim* [1973] 2 MLJ 3 (PC) reversing [1972] 1 MLJ 233 (CA). Oral assurances in direct conflict with the written deed have been held to supersede it: *Tan Swee Hoe Co. Ltd. v. Ali Hussain & Ors.* [1980] 2 MLJ 16 (PC).

⁷⁹*Karupiah v. Gulwanti Singh* [1965] 2 MLJ 59 (FC), a case of renewal of loan by a moneylender, the borrower argued that no money had passed and therefore the contract for repayment was unenforceable under the Moneylenders Ordinance, 1951. The Federal Court rejected it, following Greer L.J. in *B.S. Lyle v. Chappel* [1932] 1 KB 691, 704 (CA) that it was "unnecessary that the parties should go through the idle form of passing the cheque forwards and backwards.

⁸⁰*F.C. Cornelius & Co. Ltd. v. Central Oil Palms Sdn. Bhd.*, unreported, K.L. High Court C.S. No. C4 of 1979 decided on 19.12.83.

⁸¹*Chin Thai v. Siow Shiew & Ors.* [1971] 1 MLJ 67 (FC); *Mohd. Eanu v. Patimah bte. Mar* (1972) 4 MC 205.

no sense — someone else who is clearly underserving of it would have obtained the spoils and made his profits before the true owner acquires any rights. If it is the latter — relation back — then his rights must be protected in the meantime.⁸² If the approval is ultimately refused then the injunction will lapse and the undertaking in damages can be enforced.⁸³ Otherwise the plaintiff would be left remediless — he may not find the defendant after censorship approval has been obtained. Would not the refusal of an injunction in such circumstances enforce a wrong than a right?

True, the courts would not assist a plaintiff who founds his cause of action on an illegality. Was not the defendant in *Asia Television* relying on an illegality to defeat the plaintiff's claim?⁸⁴ He himself had breached the Censorship Act 1952 in hiring out the infringing copies. Do not infringing copies also require censorship approval? The answer is clear: the Censorship Act is not concerned with the quality of the films — genuine or pirated as this is a matter to be determined by private law i.e. between the owners of the copyright and the pirates. Censorship essentially belongs to public law.⁸⁵

In the case of the copyright owner who is denied protection is there not a sense of unfairness?

"... [T]o any judge who sits in what is called The Commercial Court, it must be a matter of special concern. This court was instituted more than half a century ago so that it might solve the disputes of commercial men in a way which they understood and appreciated, and it is a particular misfortune for it if it has to deny that service to any except those who are clearly underserving of it."⁸⁶

A pirate is allowed to mint on someone else's film which has cost the producer millions. It is unthinkable that the copyright owner gets no protection because his publication has breached some statute which has nothing to do with the copyright of his film. The Federal Court has now put it right:

... if [the breach] was also to result in defeating the appellant's rights under the Copyright Act the implications in the matter of economic loss would far exceed the penalty imposable for contravening the censorship requirements. . .

⁸²The *Mareva* injunction developed in the same way. Hetherington (ed.) *Mareva Injunctions* (1983) 4 *et. seq.*, "The Angel Bell" [1980] 1 All ER 480, 486-87, per Robert Goff. J.; *Hunt v. B.P.* [1980] 1 NZLR 104, 108, per Barker J.

⁸³It is difficult to see how the undertaking can be enforced. Would not the profits expected to have been made be illegal too?

⁸⁴See *Petherperumal Chetty v. Muniandy Servai* (1908) LR 35 Ind. App. 98, 103 (PC): ("It is the defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it. . .").

⁸⁵See *Davy v. Spelthorne B.C.* [1983] 3 ALL ER 278. Lord Wilberforce is cautious on the use of these terms, *ibid.*, at 285-286.

⁸⁶*St. John Shipping, supra*, 289, per Devlin L.J.

Conclusion

What then are the conclusions to be drawn from the decisions? Until the ruling of the Federal Court it was open to judges to choose between N.H. Chan J. and Ajaib Singh J. Injunctions in these matters are urgent. Delay would be disastrous. How many foreign owners of copyright did not resort to the law and lost in silence during the interval?

Judges at first instance have to deal with so many problems — particularly outside Kuala Lumpur. How much could they do to keep abreast with the development and be in the know of all areas of the law? Perhaps centralizing the administration of justice may not be a bad idea — judges going on circuit or assize. In case of urgency any litigant should be able to reach a judge assigned to deal with a particular matter. Even though it may involve additional and increased expense to the litigant, at least, they are certain that an expert has dealt with their problem.

After all in practice litigants often resort to Counsel and in some cases to Queen's Counsel in England who are specialists in the particular field of the law. Why should not the judges and courts proceed and be organized on the same basis? With the march and development of the law coupled with the increase in the volume of litigation specialisation is not only inevitable but seems to be the answer.

Judges are not sometimes referred to the most relevant authorities. Should the Courts employ clerks whose job is to place before the Court the authorities which are relevant? This method may be more useful in trials than in the case of urgent applications for the grant or dissolution of the interim relief. Perfection and certainty, though essential in the quest for justice, are hard to obtain in practice.

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