CHAPTER 19

# *STARE DECISIS* AND *RATIO DECIDENDI*[1]

## 19.1 DOCTRINE OF *STARE DECISIS*

The maxim *stare decisis et non quieta* movere literally means 'to stand by the decision, and not to disturb the settled matters' i.e. to stick with what has been decided or the like cases should be decided alike. The commonly used term is the doctrine of *stare decisis* or the rule of judicial precedent which dictates that it is necessary for each lower tier to accept loyally the decision of the higher tiers. Thus, a court other than the highest court is obliged generally to follow the decision of the court at a higher or the same level in the court structure subject to certain exceptions. The application of the doctrine from a higher court to a lower court is called the vertical *stare decisis*. Whereas, the notion that a judge is bound to follow or respect the decision of an earlier judge of similar or coordinate jurisdiction is called horizontal *stare decisis*.[2] Further, the rule of judicial precedent shall apply whenever the relevant facts of an earlier case is similar to the facts of a subsequent case, i.e. the relevant facts of the two cases are similar. However, if the facts are not similar then the earlier decision would be distinguished and as such would not be binding on the subsequent case.[3]



As the doctrine has been developed by the English courts and accepted by the Malaysian courts as part of the common law applicable by virtue of s. 3 of the Civil Law Act 1956, hence, it would be worthwhile to refer

---

1 This chapter is contributed by Ashgar Ali Ali Mohamed. Part of this chapter has appeared in a different form as an article entitled 'Civil Claims Involving Motor Vehicle Accidents: Whether Court of Appeal the Apex Court?' [2009] 1 MLJ xxii, 'Rationale For Departing From *Stare Decisis*: A Review of *Re Hj Khalid Abdullah; Ex P Danaharta Urus Sdn Bhd* [2008] 6 MLJ cxxv, and Dissenting opinion: The voice of the future' [2016] 4 MLJ (4) lxxiii and is produced here with the kind permission of LexisNexis Malaysia Sdn Bhd.

2 See *Pengurusan Danaharta Nasional Bhd v. Yong Wan Hoi & Ors* [2007] 9 CLJ 416.

3 See *Chai Kok Choi v. Ketua Polis Negara & Ors* [2008] 1 CLJ 113.

to the application of this doctrine in the courts in England. Before looking into the development of the doctrine in England, it would be worthwhile to briefly note the following terminologies:

(1) **Binding precedent:** A binding precedent is one which a court considers it must follow. For example, in *Pasukhas Construction Sdn Bhd & Anor v. MTM Millenium Holdings Sdn Bhd & Anor*,[4] Mohd Hishamudin Mohd Yunus J while following the Supreme Court's decision in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd*,[5] stated: "In the light of *Esso Petroleum Malaysia Inc and LEC Contractors* I am not at liberty to apply the unconscionability principle as propounded by the Singapore Court of Appeal case of *Bocotra Construction* – although some of our High Court decisions that I have mentioned above have applied that principle. *Bocotra Construction*, being a decision of the Court of Appeal of Singapore, is a persuasive authority; and the principle of unconscionability that it enunciated appears to me to be a sound principle. But, regrettably, I am bound by the doctrine of binding precedents. I am bound by the decision of the Supreme Court in *Esso Petroleum Malaysia Inc* (which applied the *American Cyanamid* principles) or, alternatively, by the decision of the Court of Appeal in *LEC Contractors* (which applied the fraud test)."

(2) **Persuasive precedent:** A persuasive precedent is one which a court is not bound to follow, but which it chooses to follow. An example of this would be the decisions of the superior courts in other parts of the commonwealth jurisdictions or judgment given by the Privy Council while hearing an appeal from a commonwealth country other than Malaysia. For example, in *Re: Ann Joo Steel Berhad*,[6] Kang Hwee Gee J referred to the decision of the Federal Court of Australia in *Re Hunter Resources Ltd*,[7] which was approved in *Nicron Resources Ltd v. Catto*[8] and thereafter stated that these decisions 'should provide a persuasive precedent'.



4 [2009] 6 CLJ 480.

5 [1995] 1 CLJ 283, SC.

6 [2008] 1 LNS 688.

7 (1992) 7 ACSR 436.

8 (1992) 10 ACLC 1.

(3) **Overruling:** The *ratio* of a case is subsequently declared to be wrong by a higher court hearing an appeal in a different case. For example, in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*,[9] the House of Lords overruled the Court of Appeal in *Candler v. Crane, Christmas & Co*.[10] If the House of Lords overrules one of its own earlier decisions, it may use the term 'departing from a previous decision'. Overruling normally has full retrospective effect. It declares what the law always was. If an earlier case is overruled, that does not affect the position of the parties in the overruled case. The court will not entertain a new action by the losing party asking for the case to be reopened. The principle is, once an action has been decided, subject to any appeal which may be available, the cause of action merges with the judgment and becomes *res judicata* (a matter which has been judicially decided). This principle does not apply if the decision was obtained improperly, e.g. by fraud.

(4) **Reversing:** The *ratio* of a case is subsequently declared to be wrong by a higher court hearing an appeal against the decision in that case. For example, in *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors*,[11] the Court of Appeal had reversed the High Court's decision which held *inter alia*, that the applicant had a constitutional right to use the word 'Allah' in the Malay version of its weekly publication. Again, in *Zaibun Sa Syed Ahmad v. Loh Koon Moy & Anor*[12] the Privy Council held *inter alia*, that the Federal Court was entitled to exercise its discretion and was correct in reversing the decision of the trial judge and ordering specific performance of a contract for the sale of land.



9 [1964] AC 465.

10 [1951] 2 KB 164, CA.

11 [2010] 2 CLJ 208, HC; [2013] 8 CLJ 890, CA; [2014] 6 CLJ 541, FC.

12 [1982] CLJ 457, PC.

(5) **Disapproving:** A higher court may 'disapprove' a decision of a lower court, in the sense of casting doubt on the *ratio* of the earlier case while not formally overruling it. Equally, a court may 'disapprove' an *obiter dictum* of a judge in an earlier case. For example, the Supreme Court's decision in *Teh Geok Hock v. PP*[13] was no longer good law having been disapproved by the Federal Court in *Chow Kok Keong v. PP*.[14] Again, in *Koufos v. Czarnikow Ltd (The Heron II)*,[15] the House of Lords disapproved of the foreseeability test propounded by Lord Asquith in the case of *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*.[16] Similarly, the decision of the former Federal Court in the *Damodaran v. Vesudevan*[17] was disapproved by the Privy Council in *T. Damodaran v. Choe Kuan Him*,[18] although not expressly overruled.

(6) **Distinguishing:** Where a court distinguishes an earlier case on its facts, or on the point of law involved, it states some relevant point(s) of difference between the earlier case and the present case, usually in order to conclude that the *ratio* of the earlier case is not binding on it. This could be illustrated with reference to the Federal Court's decisions in the following two cases: *All Malayan Estates Staff Union v. Rajasegaran & Ors*[19] and *Badan Peguam Malaysia v. Kerajaan Malaysia*[20] where in the above cases the Federal Court was faced with the correct interpretation of the phrase 'seven years' and 'ten years' preceding his appointment he has been an advocate and solicitor' in the Industrial Relations Act 1967 (IRA) and the Federal Constitution, respectively. In *All Malayan Estates Staff Union v. Rajasegaran & Ors*, the Federal Court had to consider whether the appointment of the first respondent as Chairman



13 [1989] 2 CLJ 977, SC.

14 [1998] 2 CLJ 469, FC.

15 [1969] 1 AC 350.

16 [1949] 2 KB 528.

17 [1975] 1 LNS 23, FC.

18 [1979] 1 LNS 107, PC.

19 [2006] 4 CLJ 195, FC.

20 [2008] 1 CLJ 521, FC.

of the Industrial Court was in conformity with s. 23A(1) of the IRA, namely, whether the respondent had the requisite seven years standing in practice as an advocate and solicitor preceding his appointment as the chairman of the court. In this case, even though the respondent had been admitted and enrolled as an advocate and solicitor for eight years and one month at the date of his appointment, nevertheless, he was only in active practice for four years, nine months and 22 days. It was contended that in order for a person to be qualified to be a chairman of the Industrial Court, he or she must have been an advocate and solicitor with a valid practising certificate for the seven years preceding his appointment.

Augustine Paul FCJ, delivering the judgment of the court, stated that a person who is entitled to practise as an advocate and solicitor, under the Legal Profession Act 1976, is one with a valid practising certificate. His Lordship further stated that the word 'advocate and solicitor' under s. 23A(1) has to be construed as a reference to an advocate and solicitor who has been in practice under the Legal Profession Act 1976. Further, the seven-year period in s. 23A(1) is closely connected to the qualification of a person as an advocate and solicitor and, therefore, due weight ought to be given to these words in order to determine its purpose rather than brushing it aside as a mere addition.



His Lordship stated:

> Thus, the purpose of the seven-year period in relation to a member of the judicial and legal service can be used to determine the purpose of the same period in the case of an advocate and solicitor. There can be no dispute that the reference to a member of the judicial and legal service is a reference to a person who has been employed as a legal officer. The seven-year period in relation to such an officer is therefore a reference to his working experience in that capacity for the prescribed number of years. Similarly, the need for a person to have been an advocate and solicitor for seven years preceding his appointment is obviously a reference to his practice or experience as such.[21]

21 *Ibid*, at p. 214.

Therefore, to qualify for the appointment as a Chairman, he or she must have been in active practice for seven-years or more preceding his or her appointment to such post.

However, in *Badan Peguam Malaysia v. Kerajaan Malaysia*,[22] the issue before the Federal Court was on the appointment of Dr. Badariah binti Sahamid, who had less than 10 years in active practice as an advocate and solicitor, as a Judicial Commissioner of the High Court of Malaya. The majority decision held that her appointment as Judicial Commissioner was constitutional. The Federal Court's decision in *Rajasegaran*'s case was distinguished on the basis that the Federal Court in *Rajasegaran* considered and construed the words 'advocate and solicitor' in the context of the IRA, an ordinary Act of Parliament, whereas, in the present case, it was a construction of art. 123 of the Federal Constitution. However, the minority decision, by Abdul Hamid Mohamad CJ, stated:

> The requirement that a person must be an advocate for at least ten years is meant to cover advocates and solicitors who practise law. It is not meant to include people who are 'only in name' an advocate and solicitor merely by virtue of being admitted to the bar but spend their lives doing something else, whether teaching law, in business or politics. If they are intended to be included, the Constitution would and should have said so, as in Singapore or, more clearly in India which provides that a 'distinguished jurist' is also qualified to be appointed a judge.[23]



His Lordship, in following *Rajasegaran*'s case, further stated:

> I am unable to find any fault in that judgment to justify me to disagree with it. I am unable to find any justification to depart from it. On the other hand, to hold otherwise would lead to an absurd result in which, a non-practising advocate may not be appointed a Chairman of the Industrial Court but may be appointed a Judicial Commissioner, a judge of the High Court, a judge of the Court of Appeal, a judge of the Federal Court or

22 [2008] 1 CLJ 521, FC.

23 *Ibid*, at p. 543.

> even the Chief Justice. He does not have to practise law even for a day. All he has to do is to get admitted to the Bar, then may be go into business and/or into politics and after ten years he is qualified to be appointed even as a Chief Justice. That is the implication if this court were to rule otherwise.[24]

Again, in *Mohd. Raihan Ibrahim & Anor v. Government of Malaysia & Ors*,[25] the first appellant sustained injuries when he was accidentally struck on the head by a changkol wielded by a fellow pupil in the course of a practical gardening class. Salleh Abas FJ, delivering the judgment of the Federal Court held that the respondents were negligent for failing to take all reasonable and proper steps to prevent the appellant under their care from sustaining the injury and that their teacher did not check the condition of the garden tools nor provided a safe system of holding the gardening class. His Lordship distinguished the present case with their own earlier decision in *Government of Malaysia & Ors v. Jumat bin Mahmud & Anor*.[26] In particular, his Lordship stated:

> This is not a case where the teacher, as in the case of *Government of Malaysia & Ors v. Jumat* ..., had provided sufficient supervision but could not prevent the injury from being inflicted because of the stupidity of a pupil, whose exuberant behaviour was unknown to the teacher. But this is a case where a teacher appreciating that the boys were handling dangerous instruments had not given sufficient warning as to their use nor had she taken steps to see that pupils were positioned within such distance between them as to avoid injuries from being inflicted. There is a world of difference between the use of a changkol and that of a pencil.

(7) **Conflicting decisions:** Where a court decides that the *rationes* of more than one earlier binding cases are inconsistent with one another, it may choose which to follow. For example, there are conflicting decisions of the Federal Court on the issue whether



---

24 *Ibid*, at pp. 543-544.

25 [1982] CLJ 150, FC.

26 [1977] 1 LNS 29, FC.

this Court has the power, inherent or as conferred by r. 137 of the Rules of the Federal Court 1995, to review its own decision. In *Pan Flex Sdn Bhd v. Amalan Tepat Sdn Bhd*,[27] it was held that this Court has no such jurisdiction or power, mainly because neither the Federal Constitution nor the Courts of Judicature Act 1964 confers such jurisdiction or power on this Court. It was further stated that r. 137, being a subsidiary legislation, could not confer such jurisdiction or power on this Court. The Federal Court in Amalan Tepat case had followed the minority view in the case of *Dato' Seri Anwar Ibrahim v. PP*.[28] The opposite view was expressed in *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim*,[29] where it was held *inter alia*, that r. 137 does not confer such jurisdiction, it merely declares that the Federal Court being a court of law, by necessary implication is conferred with such inherent power. Given the conflicting decisions as above, Arifin Zakaria CJ, delivering the judgment of the Federal Court in the recent case of *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors and other applications*[30] stated that "the inherent power of the Court to review its decision as declared in r. 137 is a necessary power which is inbuilt or intrinsic in the court, as the court of justice. This power may be equated to the powers of the courts to dismiss an action for want of prosecution or to the power of court to strike out any pleading or indorsement of any writ in the action under the Rules of Court 2012. This inherent power is derived from the inherent jurisdiction of the court which is to do justice and to prevent any abuse of process. This power springs not from legislation but from the nature and constitution of the court as a dispenser of justice. And this inherent power can only be taken away by express provision in any written law."



27 [2012] 2 CLJ 687, FC.

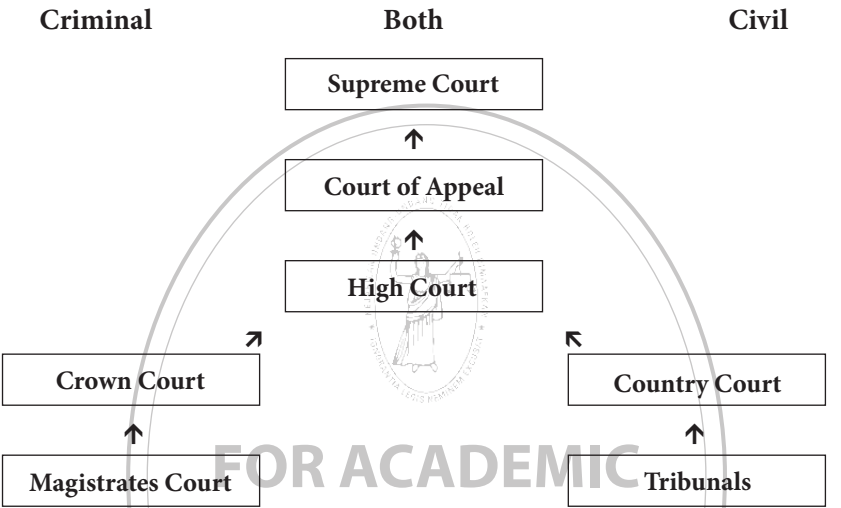
28 [2010] 7 CLJ 397, FC.

29 [2008] 5 CLJ 201.

30 [2013] 4 CLJ 901, FC.

Having noted the above, the following discussion is relation to the working of the doctrine in England and in Malaysia.

### 19.1.1 Application In England






Prior to the Constitutional Reform Act 2005 (2005 Act), the House of Lords was the highest court in England and Wales and its decisions were binding on the courts below and further, the House of Lords was also bound by its own decision. However, pursuant to the 2005 Act, the Supreme Court is the highest appeal court in the UK for civil cases, and for criminal cases from England, Wales and Northern Ireland. The new Supreme Court opened for business in October 2009, at the start of the legal year. Below the Supreme Court is the Court of Appeal which consists of Civil Division and Criminal Division. The High Court functions both as a civil court of first instance and a criminal and civil appellate court for cases from the subordinate courts. The High Court consists of three divisions namely, the Queen's Bench, the Chancery and the Family divisions. The Crown Court is a criminal court of both original and appellate jurisdiction. All criminal cases will start in the Magistrates Court, but the more serious criminal matters are tried in the Crown Court. Appeals from the Crown Court will lie with the High Court, and potentially to the Court of Appeal or even the Supreme Court. Meanwhile, civil cases will sometimes be dealt with

by Magistrates, but may well go to a County Court. Again, appeals will go to the High Court and then to the Court of Appeal – although to different divisions of those courts.[31]

Having stated briefly the hierarchy of courts as above, in relation to the doctrine or rule of judicial precedent, the House of Lords, in *London Tramways v. London County Council*,[32] stated that its decision binds the courts below. Furthermore, it was bound by its own previous decision in the interest of finality and certainty of the law. A previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made *per incuriam*, and that the correction of error was normally dependent on the legislative process.

In fact, prior to 1966, the position was that a decision of the House of Lords on a question of law was conclusive and bound the House in a subsequent case. The law as so stated by the House could be changed only by an Act of Parliament. However, since July 1966, Lord Gardiner, the then Lord Chancellor, announced a departure from this rule which is contained in the Practice Statement (Judicial Precedent) 1966.[33] It provides, *inter alia*:

> While treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House.



31 See http://www.judiciary.gov.uk/about-the-judiciary/introduction-to-justice-system/court-structure.

32 [1898] AC 375.

33 [1966] 2 MLJ xi.

The application of this doctrine in the civil division of the English Court of Appeal can be found in the judgment of the full court consisting of six judges[34] in *Young v. Bristol Aeroplane Co Ltd*.[35] It provides *inter alia*, that the House of Lords decision shall bind the Court of Appeal; that the court is bound by its own earlier decisions except for three situations namely; '(1) the court is entitled and bound to decide which of the two conflicting decisions of its own it will follow; (2) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; and (3) the court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.' Whereas, the application of the doctrine in the criminal division of the English Court of Appeal may be illustrated with reference to the case of *R v. Gould*.[36] In this case, Diplock LJ stated:

> In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of *stare decisis* with the same rigidity as in its civil jurisdiction. If on due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this court, or its predecessor the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in *Young v. Bristol Aeroplane Co., Ltd.*



### 19.1.2 Application In Malaysia

In Malaysia, the superior courts comprises the two High Courts of coordinate jurisdiction and status, namely the High Court of Malaya and the High Court of Sabah and Sarawak; the Court of Appeal and the Federal Court. The subordinate courts are the Magistrates' Courts and the Sessions Court. The Federal Court, effective 24 June 1994, stands at the apex of this pyramid. It is the highest judicial authority and the

---

34 Lord Greene MR, Scott, MacKinnon, Luxmoore, Goddard and du Parcq LJJ.

35 [1944] 1 KB 718.

36 [1968] 2 QB 65.

final court of appeal. Before 1 January 1985, the defunct Federal Court remained the second highest court in the land, whose decisions were further appealable to the Judicial Committee of the Privy Council in London. However, on 1 January 1978, appeal to Privy Council in criminal and constitutional matters was abolished and on 1 January 1985, all other appeals i.e. civil appeals except those filed before that date were abolished. When appeals to the Privy Council were abolished, the defunct Federal Court was renamed as the Supreme Court of Malaysia which became the apex court. Finally, on 24 June 1994, the apex court was once again renamed as the Federal Court of Malaysia. Meanwhile, the Court of Appeal was also set up on 24 June 1994 after the Federal Constitution was amended *vide* Act A885. Further, the Special Court for the Rulers was established on 30 March 1993 *vide* Act A848, now provided for in arts. 182 and 183 of the Federal Constitution. All offences committed by His Majesty the Yang di-Pertuan Agong or the Rulers of the states shall be tried in the Special Court. The Special Court shall also hear all civil cases by or against them.



Having said the above, the application of the doctrine in Malaysia may be illustrated with reference to the case of *PP v. Datuk Tan Cheng Swee & Anor*,[37] where Chang Min Tat FJ said:

> It is however necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the High Court and other inferior Courts in a common law system such as ours, to follow similarly.

Again, in *Kathavarayan v. Ng Sup Moi & Anor*,[38] Siti Norma Yaakob J said:

> The principle of *stare decisis* has long been accepted by our Courts and this was reaffirmed again in the case of ... Datuk Tan Cheng Swee ... where the Federal Court held that 'the principle requires more than lip service'. Being a lower tribunal, I am duty bound to follow the precedent set by the Federal Court.

---

37 [1980] 1 LNS 58, [1980] 2 MLJ 276 at p. 277.

38 [1985] 1 LNS 8, [1987] 1 MLJ 246 at p. 250.

In *The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd*,[39] it was stated that it was necessary for each lower tier to accept loyally the decision of the higher tiers and chaotic consequences would follow should the lower tier fail in his duty.

It is also worthwhile to refer to the Federal Court's decision in *Dalip Bhagwan Singh v. PP*,[40] where Peh Swee Chin FCJ stated:

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal. The said exceptions are as decided in *Young v. Bristol Aeroplane Co. Ltd* [1944] KB 718. The part of the decision in *Young v. Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956, *vide* its s. 3 ... There are of course further possible exceptions in addition to the three exceptions in *Young v. Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the 3 exceptions in *Young v. Bristol Aeroplane* ... In our local context, the Federal Court is to be substituted for the House of Lords with regard to the matter under discussion. In this connection, it is interesting to refer to *Cassell & Co. v. Broome* [1972] AC 1027, 1054. It was held that courts in the lower tiers below the Court of Appeal could not rely on the *per incuriam* rule applied by Court of Appeal for itself, but could choose between two conflicting decisions. We may add that they may so choose, whatever the dates of the conflicting decisions, as such dates do not matter to the Court of Appeal itself ... Experience in the United Kingdom has shown that the power 'to depart from a previous decision when it appears right to do so' has been used very sparingly. In Malaysia, the Federal Court and its forerunner i.e., Supreme Court, after all appeals to the Privy Council were abolished, has never refused to depart from its own decision when it appeared right to do so, see the above-mentioned Federal Court's cases on the question of burden of proof at the close of prosecution case. Though the Practice Statement



39 [1997] 3 CLJ 365.

40 [1997] 4 CLJ 645.

> (Judicial Precedent) 1966, of the House of Lords is not binding at all on us, it has indeed and in practice been followed, though such power to depart from its own previous decision has been exercised sparingly also. It is right that we in the Federal Court, should have this power to do so but it is suggested that it should be used very sparingly on the important reason of the consequences of such overruling involved for it cannot be lost on the mind of anybody that a lot of people have regulated their affairs in reliance on a *ratio decidendi* before it is overruled. In certain circumstances, it would be far more prudent to call for legislative intervention. On the other hand, the power to do so depart is indicated (subject to a concurrent consideration of the question of the consequences), when a former decision which is sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions ... If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict, on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.



Again, in *Kerajaan Malaysia & Ors v. Tay Chai Huat*,[41] Mohd Ghazali Yusoff FCJ, delivering the judgment of the Federal Court, stated:

> The common law tradition is built on the doctrine of *stare decisis* which directs a court to look to past decisions for guidance on how to decide a case before it. This means that the legal rules applied to a prior case with facts similar to those of the case now before a court should be applied to resolve the legal dispute. The use of precedent has been justified as providing predictability, stability, fairness and efficiency in the law. Reliance upon precedent contributes predictability to the law because it provides notice of what a person's rights and obligations are in particular circumstances. It also means that lawyers can give legal advice to clients based on settled rules of law. There is certainty in the law. There is also uniformity in the law. Similar cases will be treated in the same way. The use of precedent also stabilises the law. This Court create precedents. The use of precedent is an indispensable foundation on which to decide what is the law and how it should be applied in individual cases. *Utra Badi* and *Vickeswary* are decisions that settled

41 [2012] 3 CLJ 577, FC.

the law in cases of this genre with finality. I would think that this Court would have need to hesitate long before distinguishing *Utra Badi* and *Vickneswary* on inadequate grounds or on a hypothetical issue raised by appellants in appeals before this Court such as whether there are exceptions to the *ratio decidendi* formulated in both authorities. Such hypothetical issues raised in cases of this genre can have disruptive and seemingly unfair consequences and extremely capricious results. It creates uncertainty in the law and would seriously hinder administration of the General Orders by government departments resulting in administrative confusion.

## 19.2 ADHERENCE TO *STARE DECISIS* IN THE INTEREST OF CERTAINTY AND FINALITY OF LAW

There are numerous judicial pronouncements of the superior courts in Malaysia as well as other common law jurisdictions calling for among others, a strict adherence to this doctrine. The observance of the doctrine is necessary in the interest of finality and certainty in the law and for an orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Any failure to observe the same may create chaos and the misapprehensions in the judicial system.[42] In *Mirehouse v. Rennell*,[43] Baron Parke stated:

> Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.



---

42 'The need for an orderly development of legal rules and certainty of the law requires strict observance of the doctrine of *stare decisis*, and to borrow the words of Chang Min Tat FJ, it requires more than lip service.' Per Balia Yusof J in *Esah Ishak & Anor v. Kerajaan Malaysia & Anor* [2006] 7 CLJ 353.

43 (1833) 1 Cl & Fin 527 at p. 547.

Again, in *Velasquez Ltd v. Inland Revenue Commissioners*,[44] Cozens-Hardy MR stated: "But there is one rule by which, of course, we are to abide – that when there has been a decision of this court upon a question of principle, it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law". Likewise, in the Practice Statement (Judicial Precedent) 1966[45] issued by the then Lord Chancellor, Lord Gardiner, states as follows: "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules."

In *Cassell & Co Ltd v. Broome & Anor*,[46] Lord Diplock said:

> The judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted. The Court of Appeal found themselves able to disregard the decision of this House in Rookes v. Barnard by applying to it the label *per incuriam*. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal. Even if the jurisdiction of the Court of Appeal had been co-ordinate with the jurisdiction of this House and not inferior to it the label *per incuriam* would have been misused.

Lord Hailsham in *Cassell*'s case stated:

> I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v. Barnard* as decided '*per incuriam*' or 'unworkable', they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as



44 [1914] 3 KB 458 at p. 461.

45 [1966] 1 WLR 1234. See also [1966] 2 MLJ xi.

46 [1972] 1 All ER 801 at p. 874.

> driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee the other Lords Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would have not known where they stood. None could have reached finality short of the House of Lords and in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and in legal matters, some degree of certainty is at least as valuable part of justice as perfection.

In an article entitled '*The Judge as Lawmaker*', Lord Reid noted: "judges are human ... if they do not like an existing decision or *ratio* because it will produce an unjust or unreasonable result in the case before them they try to distinguish it. And that is where the trouble starts, and you begin to get an impenetrable maze of distinctions and qualifications which destroy certainty because no one advising on a new case can predict how it will go".[47]



In *Pengurusan Danaharta Nasional Bhd v. Yong Wan Hoi & Ors*,[48] Abdul Malik Ishak J (now JCA) stated:

> Now, although the lower courts are bound in theory by the superior or higher court precedents, in practice judges may sometimes attempt to evade precedents, by distinguishing them on spurious grounds. It is, however, advisable to follow the doctrine of *stare decisis* because it is a wise policy. It is important that the applicable law be settled. There must be certainty in the law.

In *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal*,[49] the Federal Court said:

> it was necessary for each lower tier to accept loyally the decision of the higher tiers and chaotic consequences would follow should the lower tier fail in this duty. It was therefore not open to an intermediate Court

---

47 Lord Reid, 'The Judge as Lawmaker' (1972-73) 12 JSPTL (NS) 22–23.

48 [2007] 9 CLJ 416.

49 [2001] 2 CLJ 525 at p. 562.

> of Appeal, such as the Court of Appeal in this country, to disregard a judgment of a final Court of Appeal such as the Federal Court on the ground that it was given *per incuriam*.

In *Koperasi Rakyat Bhd v. Harta Empat Sdn Bhd*,[50] Gopal Sri Ram JCA for the Federal Court said:

> In an earlier passage in the same judgment, this court made clear the need to observe with rigour the doctrine of *stare decisis* ... Great care must be taken especially in a case as the present which concerns the interpretation of a statutory provision. It should not be done save in the most exceptional of cases. Otherwise it would lead to uncertainty. Men of business must be in a position to organize their affairs in such a fashion that they keep well within the framework of the law. And members of the legal profession must be able to advise their clients with some degree of certainty as to what the law is upon a particular subject matter. Certainty in the law is therefore one of the pillars upon which our justice system rests.

Again, in *Periasamy Sinnappan v. PP*,[51] Gopal Sri Ram JCA said:

> Lastly the learned appellate judge did not sufficiently address his mind to the decision in *Khoo Hi Chiang*. We find the cavalier fashion on which he approached the judgment of a five-member bench of the Supreme Court in a case which was an authority binding upon him to be quite appalling. We are convinced that the learned judge ought not to have brushed it aside as he did. We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well- entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.



---

50 [2000] 3 CLJ 719 at pp. 724-727.

51 [1996] 3 CLJ 187 at pp. 213-214.

In *Tai Chai Yu v. The Chief Registrar of the Federal Court*,[52] Gopal Sri Ram JCA once again said:

> A final decision of the Federal Court, once pronounced, is binding upon the parties thereto and its correctness may only be questioned in a subsequent case where the identical point of law arises for decision.

In *Anchorage Mall Sdn Bhd v. Irama Team (M) Sdn Bhd & Anor*,[53] the court had to consider the submission advanced on behalf of the defendant urging the court not to follow *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors*.[54] Ahmad Maarop JC referred to the statements made in the following judgments namely, *PP v. Datuk Tan Cheng Swee & Anor*,[55] *The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd*,[56] *Cassell & Co Ltd v. Broome & Anor*,[57] and *Miliangos v. George Frank (Textiles) Ltd*,[58] and thereafter made the following observation:

> Indeed, in the light of these authorities, I do not think it is open to me to disregard or refuse to follow the decision in *Alor Janggus* unless and until it is reversed by the Federal Court. In any case I am of the view that even if what was said by the Supreme Court in *Alor Janggus* on O. 18 r. 19 of the RHC was merely *obiter*, being a judicial pronouncement emanating from the highest court in this country then, it deserves the utmost respect and should be followed as a guide as faithfully as possible.

In *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal*,[59] Steve Shim CJ (Sabah & Sarawak) stated:

> The Court of Appeal is bound by the doctrine of *stare decisis* to follow the 'real danger of bias' test for recusal adopted by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 and



52 [1998] 2 CLJ 358 at p. 360.

53 [2001] 7 CLJ 313.

54 [1995] 1 CLJ 461.

55 [1980] 1 LNS 58.

56 [1997] 3 CLJ 365.

57 [1972] 2 WLR 645.

58 [1975] 2 WLR 555.

59 [2006] 1 CLJ 577.

> *Mohamed Ezam bin Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701. It is axiomatic to state that the doctrine of *stare decisis* has become the cornerstone of the common law system practiced in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability ... Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system. This fact was certainly borne in mind by the Court of Appeal in *Periasamy s/o Sinnappan & Anor v. Public Prosecutor* [1996] 3 CLJ 187; [1996] 2 MLJ 557 wherein Gopal Sri Ram JCA said (at p. 582): "We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein". The observation is but a stark reminder to judges of the importance of adhering to the doctrine. That observation, although made in the context of a peculiar factual setting, is, in my view, equally applicable to the particular situation in the instant case where the Court of Appeal has refused, for insufficient reasons, to follow and apply the 'real danger of bias' test for recusal enunciated by the Federal Court in *Majlis Perbandaran Pulau Pinang and Mohamed Ezam*. Until such time when the Federal Court holds otherwise, this test must remain entrenched and binding on all inferior courts including the Court of Appeal. Certainty in the law must prevail.



Justice Abdul Hamid Mohamad FCJ delivering a separate judgment of the court in Dato' Tan Heng Chew's case, referred to the earlier Federal Court's decision in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*[60] and *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara*[61] and said:

---

60 [1999] 3 CLJ 65.

61 [2001] 4 CLJ 701.

These judgments, being judgments of the Federal Court, are binding on the Court of Appeal. Whether the Court of Appeal agrees with them or not, it is incumbent upon it to apply the test. However, if the court thinks that it has good reasons for disagreeing with the judgments, it may, while following them, point out why they should be reviewed by this court. But the review, if it were to be done, should be done by this court. Until it is actually done by this court, they remain binding on the Court of Appeal. So, the Court of Appeal was wrong in not applying the 'real danger of bias' test.

## 19.3 DECISIONS OFFENDING *STARE DECISIS* AND ITS EFFECT: AN ILLUSTRATION

### 19.3.1 Supreme Court's decision in *Chan Chin Min & Anor v. Lim Yok Eng*

It has been noted in some decided cases for example, in *Noraini Omar & Anor v. Rohani Said & Another Appeal*,[62] the Court of Appeal was faced with the question whether the Supreme Court's decision in *Chan Chin Min & Anor v. Lim Yok Eng (Lawful Mother of Gan Swee Hock, Deceased)*,[63] was binding on them. Earlier, the Court of Appeal had, in *Takong Tabari v. Government of Sarawak & Ors & Another Appeal*,[64] and *Teoh Teik Chai v. Muhamad Hashim*,[65] held that they were bound by the majority decision in *Chan Chin Min*'s case. However, in *Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor and Another Appeal*,[66] and *Cheng Bee Teik & Ors v. Peter Selvaraj & Anor*,[67] this court held that *Chan Chin Min* was wrongly decided by the majority and therefore, it ought not to be followed. Gopal Sri Ram JCA, in *Ibrahim Ismail & Anor*, delivering the judgment of the court, stated:



62 [2006] 1 CLJ 895, CA.

63 [1994] 3 CLJ 687, SC.

64 [1998] 4 CLJ 589.

65 (Unreported), Civil Appeal No. P-45 of 1995.

66 [2004] 1 CLJ 797.

67 [2005] 2 CLJ 839.

> *Chan Chin Ming* was decided before the establishment of this court. It was decided at a point of time when the High Court had original jurisdiction over personal injury and fatal accident claims. Appeals were preferred to the Supreme Court which stood at the apex of the judicature. That is not the case today. All personal injury and fatal accident claims are now solely within the jurisdiction of the subordinate courts. Appeals are to the High Court and finally to this court. We therefore now stand at the apex in respect of these claims. If a decision - and more so as here a majority decision - of the former Supreme Court is obviously wrong, then it is our plain duty to say so. It will, with respect, be an abdication of our solemn duty to simply fold our arms in abject submission and permit an erroneous statement of the law to continue to form part of our jurisprudence especially when it results in an injustice to a litigant.

Justice Abdul Aziz Mohamad JCA in *Noraini Omar*'s case stated:

> Notwithstanding that it [*Chan Chin Ming*'s case] was a majority decision, it was a decision of a court of a higher tier, and the apex court at that. That a court has to accept loyally a considered decision of a court of a higher tier and is not entitled to question it was reiterated by Lord Hailsham in ... *Cassell and Co Ltd v. Broome* [1972] AC 1027 ... We have to accept the decisions of the higher court even if we do not agree with them, and as regards the decision in *Chan Chin Ming*, there is no necessity for me in this appeal to say whether I think the decision was right or wrong.



However, the majority comprising of Arifin Zakaria JCA and Nik Hashim JCA held in favour of *Ibrahim Ismail* and *Cheng Bee Teik*. According to Arifin Zakaria JCA:

> We agreed with the decision of this court in *Ibrahim bin Ismail* in that as regard fatal accident and personal injury claims, this court, as the apex court involving such claims, at the present moment, is at liberty to depart from the decision of the Supreme Court if we think that the decision of the Supreme Court was wrong.

Given the fact that the Court of Appeal is now divided on the issue whether the majority decision of the Supreme Court in *Chan Chin Min* is binding on them, the judges in the courts below were placed 'in an embarrassing position, as driving them to take sides.'[68] They had to take sides between *Chan Chin Min* and *Ibrahim Ismail*. The High Court however, still relies on the majority decision in *Chan Chin Min*. For example, in *Marimuthu Velappan v. Abdullah Ismail*,[69] VT Singham J said:

> Under the pressing, peculiar and extraordinary circumstances and the strain which is imposed upon this court, it may by implication be seen as going towards that direction by following the decision of the Supreme Court in ... [*Chan Chin Min*] which seemed to be unavoidable not because of any choices, as both the decisions are binding upon this court but solely and strictly to keep up with the doctrine of *stare decisis* or binding judicial precedent.

Again, in *Esah Ishak & Anor v. Kerajaan Malaysia & Anor*,[70] the majority decision in *Chan Chin Min* was followed. For example, in *Esah Ishak*'s case, Balia Yusof J stated:

> The need for an orderly development of legal rules and certainty of the law requires strict observance of the doctrine of *stare decisis*, and to borrow the words of Chang Min Tat FJ, it requires more than lip service. As judges of the inferior and lower tier courts, our hands are tied and are always bound by this doctrine of *stare decisis*. We are guided and constantly reminded by the strong words of his Lordship Gopal Sri Ram JCA who in *Periasamy s/o Sinnapan & Anor v. PP* [1996] 3 CLJ 187 cautioned in the fashion as follows: "We may add that it does not auger well for judicial discipline when a High Court Judge treats the decision of the Supreme Court with little or no respect in disobedience to the well entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court Judges that they are bound by all judgments of this Court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law ...



---

68 Per Lord Hailsham in *Cassell & Co Ltd v. Broome & Anor* [1972] AC 1027 at p. 1054.

69 [2007] 1 CLJ 436.

70 [2006] 7 CLJ 353.

> In conformity with the above stated principle and reasons, I hold that the learned sessions judge's reliance on the case of *Chan Chin Min* in awarding the multiplier of seven years to the appellants in the instant appeal is faultless. The discretion still lies with her in determining the number of years" purchase (or multiplier) by taking into account the contingencies and circumstances of the case. On the facts of the case presented, there is nothing distinguishable from the facts in *Chan Chin Min* and coincidentally the facts of this appeal are almost if not wholly similar with the facts in *Chan Chin Min*, namely a claim made by a dependent of an unmarried deceased person.

It was only recently that the Federal Court in *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor*,[71] resolved the above issue. Arifin Zakaria FCJ, delivering the judgment of the Federal Court, reiterated his earlier observation in *Noraini Omar*'s case. His Lordship stated:

> As far as fatal accident and personal injury claims arising from motor vehicle accidents are concerned, the Court of Appeal stands as the apex court, as such no further appeal shall lie to this court (see s. 67(1) and s. 96(a) of the Courts of Judicature Act 1964.) That is the intention of the Legislature and it is incumbent upon this court to give effect to it. When the law states that the decision of the Court of Appeal is final then the appeal process should stop at the Court of Appeal; it cannot be allowed to come to this court by way of a review process under r. 137 of the Rules of the Federal Court 1995.



### 19.3.2 Federal Court's Decision In *Adorna Properties Sdn Bhd v. Boonsom Boonyanit*

In *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors*,[72] the Court of Appeal held that the decision of the apex court ought not to be followed when it was given *per incuriam*. Gopal Sri Ram JCA stated *inter alia*, that the courts should no longer treat themselves bound by the Federal Court judgment in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit*,[73] as the said decision was decided *per incuriam*. According

71 [2008] 5 CLJ 1, FC.

72 [2005] 3 CLJ 539.

73 [2001] 2 CLJ 133.

to His Lordship, the Federal Court in *Adorna Properties* had ignored the definition of 'proprietor' and 'purchaser' in s. 5 of the National Land Code and further, did not have regard to the Supreme Court's decision in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor*.[74] In particular, His Lordship stated:

> The Federal Court in the Adorna Properties case did not have regard to the earlier decision of the Supreme Court in *M & J Frozen Foods*. Worse, it did not have regard to s. 5 of the Code. I do not think that I should fall off the proverbial cliff. I think that I must strike out in the right direction ... Accordingly, in my judgment our courts should no longer treat themselves bound by the Federal Court judgment in *Adorna Properties Sdn Bhd* as it was decided *per incuriam*. It follows that this court and the High Courts must now proceed on the basis that the Code provides for deferred and not immediate indefeasibility.[75]

The opinion expressed by Gopal Sri Ram JCA in *Subramaniam NS Dhurai*'s case as above, was however, not concurred by Ahmad Fairuz FCJ. His Lordship stated:

> Saya telah membaca draf alasan penghakiman Gopal Sri Ram HMR dan saya bersetuju dengan penghakiman itu kecuali setakat mana penghakiman itu menyatakan bahawa keputusan *Mahkamah Persekutuan di dalam kes Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 ... adalah *per incuriam* dan oleh itu mahkamah-mahkamah tidak perlu lagi menganggap mereka terikat dengan keputusan itu. Berasaskan prinsip duluan kehakiman mengikat (judicial precedent) saya berpendapat mahkamah ini tidak mempunyai pilihan kecuali menerima dan mematuhi keputusan Mahkamah Persekutuan di dalam kes Adorna Properties Saya berpendapat semua mahkamah yang bidang kuasanya lebih rendah dari Mahkamah Persekutuan hendaklah mematuhi kes ini sehingga ianya ditolak atau digantikan dengan kes perundangan yang lain dari Mahkamah Persekutuan.[76]



---

74 [1994] 2 CLJ 14.

75 *Ibid* at pp. 128-129.

76 *Ibid* at pp. 130-131.

In *Au Meng Nam & Anor v. Ung Yak Chew & Ors*,[77] Gopal Sri Ram JCA once again referred to the Federal Court's decision in the *Adorna Properties* which according to His Lordship was decided *per incuriam* and thus, no court in this country need to follow the said decision. His Lordship said:

> In my judgment, the decision in Adorna Properties is not to be treated as binding precedent because it was decided *per incuriam*. Federal Court ... overlooked the critical words 'to whom it may subsequently be transferred' appearing in s. 340(3)'.

Raus Sharif JCA delivering a separate judgment in *Au Meng Nam & Anor*'s case had disapproved the above observation. His Lordship stated:

> Much criticism had been levelled against the Federal Court's decision in *Adorna Properties Sdn. Bhd*. To some, the Federal Court's decision was plainly wrong and should be disregarded. (See *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539) ... I can understand the learned trial judge's reluctance to depart from the Federal Court's decision. I join his view. To depart would be to go against the doctrine of *stare decisis* ... it is my respectful view that the Federal Court should review its decision in *Adorna Properties Sdn. Bhd*. To me, by virtue of s. 340(2)(b) of the Code, the title of Adorna Properties was not indefeasible as the registration was obtained by forgery. Section 340(3) does not apply to s. 340(2). The proviso states 'Provided that in this sub-section' and this sub-section refers to s. 340(3) and not s. 340(2). Section 340(3)(a) refers to 'to whom it may subsequently be transferred' which means that the intended purchaser is the subsequent purchaser and not the immediate purchaser. Thus, the plaintiffs would have succeeded in this appeal if not for the Federal Court interpretation of s. 340 of the Code in *Adorna Properties Sdn. Bhd*. But for the reasons given earlier, I am not ready to ignore or disregard the Federal Court's decision in *Adorna Properties Sdn. Bhd*.



77 [2007] 4 CLJ 526.

In fact, the Federal Court had to consider whether to review its earlier main judgment in *Adorna Properties Sdn Bhd v. Kobchai Sosothikul*,[78] pursuant to r. 137 of the Rules of the Federal Court 1995. In the above case, as noted earlier, it was alleged that an injustice had occasioned in the main judgment thereby resulting in the rightful owner losing her lands *vide* forged documents. In dismissing the application to review the main judgment, the court stated:

> The consequence and effect of the main judgment might be harsh when viewed without the benefit of the relevant statutory provision. However, this was not a case where grave injustice had occasioned due to clear infringement of law thereby making it permissible for successive application to be made under r. 137. The substance of the main judgment revolved in the interpretation of sub-s. (3) of s. 340 of the National Land Code including the provision thereof. Based on the reasoning given in the main judgment and the words used in the said subsection and proviso, the interpretation given by the court was not patently wrong thereby resulting in grave injustice warranting a successive application under r. 137. There was much force to be given to the contention that there should be finality to any litigation. The main judgment was handed down by the apex court of this country. The application of r. 137 should not be made liberally as that might result in chaos to the system of judicial hierarchy. There would be nothing to prevent any aggrieved litigant from challenging any decision of this court on the ground of injustice *vide* r. 137. If he succeeds in his application there is nothing to bar the other party from making his own application to overturn such success. There would be no end of the matter. This was not the intention of the legislature when promulgating the said rule.



### 19.3.3 Federal Court In *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd*

In *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd*,[79] the Federal Court had to consider, *inter alia*, whether the Court of Appeal has original jurisdiction in respect of granting interim protection

78 [2005] 1 CLJ 565.

79 [2006] 3 CLJ 177, FC.

between the date of the final hearing of the case and the date on which the decision is delivered. Earlier, in *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd*,[80] Gopal Sri Ram JCA held that:

> We are here exercising our original jurisdiction under s. 44 of the Courts of Judicature Act 1964 ... I am aware that in *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769, Dzaiddin FCJ remarked by way of *obiter* that: 'It is trite that the Court of Appeal today no longer has any original jurisdiction'. That, with respect, is too wide and is an incorrect observation. It overlooks the actual wording of s. 44 ... It is important to notice that s. 44(1) uses the words 'in any proceeding'. It does not say 'in any appeal'.

However, James Foong JCA, in the *Fawziah Holdings* case, expressed a different opinion. His Lordship stated:

> By the doctrine of '*stare decisis*' the common law in this country has developed much in line with that inherited from the mother of common law – England. This means that the *ratio decidendi* from a judgment of a more superior court is binding on all later courts under the system of judicial precedent. This is trite law. I therefore feel that the Federal Court's decision in *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* ... and *Capital Insurance Bhd v. Aishah bte Abdul Manap & Anor* [2000] 4 CLJ 1, in declaring that the Court of Appeal has no original jurisdiction, save and except, in the limited scope granted under s. 44 of the Courts of Judicature Act to deal with any proceedings pending before the Court of Appeal is binding on this court.



In *Metramac Corporation Sdn Bhd*, Augustine Paul FCJ, delivering the judgment of the Federal Court, stated:

> Gopal Sri Ram JCA is therefore correct in saying that *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769 and *Capital Insurance Bhd v. Aishah bte Abdul Manap & Anor* [2000] 4 CLJ 1 were wrongly decided. Unfortunately, he is not the right authority permitted by law to express such an opinion. As both cases are judgments of the Federal Court, he is bound to follow them whether he agrees with them or not.

---

80 [2006] 1 CLJ 197, CA.

The stand taken by him is in blatant disregard of the doctrine of *stare decisis* particularly when the need to comply with this fundamental rule of the common law was brought to his attention by James Foong JCA in his separate judgment. In order to appreciate the importance of adhering to the doctrine of *stare decisis* useful references may be made to *Cassell & Co Ltd v. Broome & Anor* [1972] 1 All ER 801 where Lord Hailsham said at p. 809: The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the declaration of 1966 itself where Lord Gardiner LC said: "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules". Gopal Sri Ram JCA himself, in recognising the importance of conforming with the doctrine of *stare decisis*, said in *Periasamy s/o Sinnappen v. Public Prosecutor* [1996] 2 MLJ 557 at p. 582: 'Lastly, the learned appellate judge did not sufficiently address his mind to the decision in *Khoo Hi Chiang*. We find the cavalier fashion in which he approached the judgment of a five-member bench of the Supreme Court in a case which was an authority binding upon him to be quite appalling. We are convinced that the learned appellate judge ought not to have brushed it aside as he did. We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein' ... We can only add that the castigation of a judge of the High Court for not respecting the doctrine of *stare decisis* must apply with greater force to a judge of the Court of Appeal.

## 19.4 ADHERENCE TO PRECEDENT: A RULE RATHER THAN EXCEPTION

The doctrine has attained the 'status of immutability'[81] and the observance of this doctrine is in the interest of finality and certainty in the law. To depart from the doctrine would lead to disarray and judicial indiscipline. It was aptly stated by Benjamin Cardozo, in his treatise *The Nature of the Judicial Process, New Haven*: 'Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice. I still speak reverently of the need to respect precedents'. In *Dato' Tan Heng Chew v. Tan Kim Hor*,[82] Abdul Hamid Mohamad FCJ referred to the earlier judgments of Federal Court in *Majlis Perbandaran Pulau Pinang*,[83] and *Mohamed Ezam Mohd Nor*,[84] and accordingly advised the lower tier courts as follows:

> These judgments, being judgments of the Federal Court, are binding on the Court of Appeal. Whether the Court of Appeal agrees with them or not, it is incumbent upon it to apply the test. However, if the court thinks that it has good reasons for disagreeing with the judgments, it may, while following them, point out why they should be reviewed by this court. But the review, if it were to be done, should be done by this court. Until it is actually done by this court, they remain binding on the Court of Appeal.



The adherence of the above advice by Abdul Hamid Mohamad FCJ may be illustrated with reference to the case of *Thein Tham Sang v. The United States Army Medical Research Unit & Anor*.[85] In *Thein Tham Sang*'s case, the Federal Court held that a claim for reinstatement under s. 20 of the Industrial Relations Act 1967 is personal to the claimant and therefore, his claim for reinstatement expires along with his death. In other words, the maxim *actio personalis moritur cum persona* applies in the sphere of

---

81 See *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577.

82 [2006] 1 CLJ 577.

83 [1999] 3 CLJ 65.

84 [2001] 4 CLJ 701.

85 [1983] 1 CLJ 240, [1983] CLJ (Rep) 417, FC.

industrial law – an action shall abate with the death of the claimant. The *ratio* in *Thien Tham Sang*'s case was recently reaffirmed by the Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor.*[86] In particular, Eusoff Chin CJ stated:

> The claimant is 51 years old and has been jobless for the last seven years. Owing to his unemployment he and his family with school going children are suffering immense hardship. Should we remit this case back to the Industrial Court? To do this will certainly involve continued and prolonged litigation which will do great harm and injustice to the claimant, and were he to die, his claim will abate as was held in *Thien Tham Sang*.

The rationale in *Thien Tham Sang*'s case has been faithfully followed by the Industrial Court Chairmen in the following cases: *Tamil Chelvam Sellaiyah v. CGE Utilities (M) Sdn Bhd*,[87] *Teramaju Sdn Bhd v. Mohamed Abu Bakar*,[88] *Steven Muthu Savarimuthu v. Redza Security Sdn Bhd*,[89] *Labuan Duty Free (M) Sdn Bhd v. Ag Bolkiah Pg Mohd Tajuddin*,[90] *Kee Huat Industries Bhd v. Panjalinggam Munusamy*,[91] *People's Mirror, Bre Sdn Bhd v. Chew Hock Guan*,[92] *Tamura Electronics (M) Sdn Bhd v. Jaya Kumar Jaya Raman*,[93] *Linatex Rubber Products Sdn Bhd v. Paranthaman Moothasamy*,[94] *Plaat (M) Sdn Bhd v. Gohbalan P Tharmalingam*,[95] *Vanto Organisation Sdn Bhd v. Rajendran Arumugam*,[96] and *Syarikat Kenderaan Melayu Kelantan Bhd, Kota Bharu v. Transport Workers' Union*.[97]



86 [1997] 1 CLJ 147, FC.

87 [2006] 4 ILR 2966.

88 [2004] 1 ILR 1000g.

89 [2004] 3 ILR 1051d.

90 [2004] 2 ILR 260b.

91 [2004] 3 ILR 529.

92 [1990] 1 ILR 242.

93 [2004] 3 ILR 556d.

94 [1996] 2 ILR 1734.

95 [1994] 1 ILR 9.

96 [1993] 2 ILR 428.

97 [1990] 2 ILR 16.

However, in *Hotel Istana v. Nor Azam Baharin*,[98] the learned chairman of the Industrial Court had, while following the *ratio* of the Federal Court in *Thein Tham Sang*'s case, went on to give his opinion as to why the above decision ought to be reviewed. In particular, the learned chairman, Dato' Tan Yeak Hui stated:

> Mindful and with respect to the doctrine of *stare decisis* this court is unable to assist the father of the deceased son to make a claim over the alleged unfair dismissal. This court stands bound by the decision of the Federal Court in *Thein Tham Sang v. The United States Army Medical Research Unit & Anor* and with much reluctance struck off the claimant's case as requested by the company's counsel It is the humble opinion of this court that the judges in the Superior Courts may have misread or misconstrued the intention of Parliament. It is hoped the time has come for the social activists, reformers and all concerned parties to prompt Parliament to debate further this matter so that the true intention of Parliament can be ascertained and if appropriate, review and amend the law accordingly. Further it is hoped that the application of the principles of natural justice be encouraged to roam more freely in the Industrial Court and to assert itself in the manner envisaged by the creator of the Industrial Relations Act 1967.[99]



Unfortunately, in *Mulpha International Bhd v. Faizal Abdul Rahman*,[100] the learned chairman of the Industrial Court went against the *ratio* in *Thein Tham Sang*'s case. The learned chairman had allowed the case to proceed for the hearing despite the fact that claimant had predeceased. Rajendran Nayagam, the learned chairman, stated:

The fact that the claimant while awaiting the trial had died, does not cause the reference to be abated. This is because the Industrial Court under s. 30 has discretion to grant the remedy of compensation, as provided by law where reinstatement is not possible. As such, the death of the claimant does not prevent the Industrial Court from granting the relief of compensation, if it finds the dismissal to be unfair.[101]

---

98 [2005] 4 CLJ 241.

99 *Ibid* at p. 256.

100 [2006] 2 ILR 1034.

101 *Ibid.*

He added:

> A personal representative can be appointed by the court to continue with the proceedings. Unlike the Civil Courts, the Industrial Court is bereft of rules providing for the appointment of a personal representative. This omission is deliberate on the part of the draftsman of the Act, as the Industrial Court is to act according to equity and good conscience and not be bogged down by technicalities and legal form.[102]

Undoubtedly, certainty in the law is one of the pillars upon which our justice system rests. However, as seen from the above, some judges of lower-tiers tend to disagree with the *ratio* of the superior court in some cases and recently, in some isolated cases they had gone to the extreme of refusing to apply the *ratio* of the earlier decisions for various reasons. If the courts below are allowed to offend the doctrine of *stare decisis*, there would be uncertainty as far as the finality of the law is concerned. Men of business would be unable to organise their affairs within the framework of the law. Members of the legal profession would not be able to advise their clients with some degree of certainty as to what the law is upon a particular subject matter because they cannot predict how it will be decided, among others. In short, the blatant disregard of the doctrine of *stare decisis* could result in chaotic situation.



## 19.5 *RE HJ KHALID ABDULLAH*: A REVIEW

Having said the above, it would be worthwhile considering the High Court's opinion in *Re Hj Khalid Abdullah; Ex P Danaharta Urus Sdn Bhd*,[103] in relation to the doctrine of *stare decisis*. In the above case, the judgment debtor filed an appeal against the decision of the learned Senior Assistant Registrar who had dismissed the 'Notice By Debtor of Intention to Oppose Petition' filed in accordance with the Bankruptcy Rules 1969, r. 117. The rule provides the manner the creditor's petition should be opposed. 'Where a debtor intends to show cause against a

102 *Ibid* at p. 1044.

103 [2008] 2 CLJ 326.

petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard'. The format of the notice of intention to oppose the petition is given in Form 16 of the Rules, which simply provides that: "I, the above ... do hereby give you notice that I intend to oppose the making of a receiving order as prayed and that I intend to dispute the petitioning creditor's debt (or the act of bankruptcy, or as the case may be)'. Rule 18 of the Rules further provides that except where the rules or the Act provide, every application shall, unless the court otherwise directs, be made by motion supported by an affidavit.

Notwithstanding the above rule, the Supreme Court and the Federal Court in *Datuk Lim Kheng Kim v. Malayan Banking Bhd*,[104] and in *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng*,[105] respectively, held that every application shall, unless the court otherwise directs, be made by motion supported by an affidavit and not merely by filing a notice of intention to oppose the creditors petition. For example, in *Datuk Lim Kheng Kim*, the Supreme Court stated:

> Failure to follow r. 18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the Court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit.



104 [1993] 3 CLJ 324.

105 [1995] 3 CLJ 307.

Again, in *Datuk Ong Kian Seng*'s case, Mohamed Dzaiddin bin Haji Abdullah FCJ, while following the decision of Datuk Lim Kheng Kim stated:

> This Court has no reason to disagree with the decision and will follow it.[106]

The Court of Appeal however, had, in *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd*,[107] stated a contrary view: "When determining an issue under the Act, it is incumbent upon the court to accord its provisions a strict construction ... debtor who opposes a creditor's petition must comply with the procedure prescribed by r. 117 of the Rules. If he does not do so, any challenge he may mount is liable to fail for non-compliance of the Rule". Again, in *Dato' Sri Teong Teck Leng v. Jupiter Securities Sdn Bhd*,[108] the Court of Appeal stated that a notice of intention to oppose the creditor's petition pursuant to r. 117 was sufficient to entitle the debtor to oppose the petition. In other words, if the debtor wishes to oppose the petition, he must act in accordance with r. 117 of the Bankruptcy Rules 1969. He does not have to further file a summons in chambers for the purpose.



Justice Abdul Hamid Mohamad FCJ delivering the judgment of the Court of Appeal in *Dato' Sri Teong Teck Leng* stated:

> In our view, where the judgment debtor only wishes to show cause against the petition, all he has to do is to file a notice in Form No. 16 specifying the statements in the petition which he intends to deny or dispute. That is all he has to do. This has been correctly pointed out by James Foong J in *Re Ngan Chin Wen ex p Moscow Narodny Bank Ltd* [1996] 2 CLJ 943. In that case, the judgment debtor filed a notice to oppose the petition pursuant to r. 117 of the Bankruptcy Rules 1969 followed by an affidavit alleging that he had satisfied the judgment debt by paying a sum of US$200,000 to the petitioning creditor as full and final settlement of the judgment debt. The judgment debtor had not made an application or file an affidavit to set aside the bankruptcy notice

106 *Ibid* at pp. 313-314.

107 [2000] 3 CLJ 104.

108 [2003] 4 CLJ 34.

> within seven days of the service of the bankruptcy notice pursuant to s. 3(1)(i) of the Bankruptcy Act 1967. The learned judge held that by filing a notice to oppose the petition pursuant to r. 117, the judgment debtor had a right to be heard even though he had not complied earlier with s. 3(1)(i) of the Act.[109]

Based on the above conflicting opinions of the superior courts, the High Court in *Re Hj Khalid Abdullah* was placed in an awkward position where the learned judge had to take a stand between the decision of the apex court and that of the Court of Appeal. In fact, all the above authorities were binding on the High Court. The court had to consider, *inter alia*, the issue with regards to the effect of the doctrine of *stare decisis* in relation to r. 117 of the Bankruptcy Rules 1969. In relation to the above, Hamid Sultan Abu Backer JC stated:

> I take the view that it is not an immutable concept having the authority and firmness which is assigned to a fiat of Parliament which is often reflected in statute which does not infringe on any of the Constitutional provisions. *Stare decisis* is nothing more than judge made law, which requires the decision of the apex court to be followed to ensure that there is certainty in the application of law to achieve substantive justice. This principle of *stare decisis* cannot tie the hands of individual judges of His Majesty in administering substantive justice when the decision of the apex court will perpetuate fraud or reward fraud or the decision per se can be said to be abhorrent to notions of justice and fair play or inconsistent with subsequent amendments to Act of Parliament or rules of procedure, etc ... This is so because each and every judge has taken an oath of office individually and not collectively to protect the Constitution. When an apex court decision is fatally flawed and will cause substantive injustice, then the *stare decisis* principle cannot override the constitutional responsibility of a judge, for if he does so, it will be in breach of his oath of his office. When the English Courts were dealing with the sanctity of the principles of *stare decisis*, they were not focused on issues relating to appellate courts' decisions which promote fraud or rewards fraud or the enforcement of the decision of the appellate court will cause substantive miscarriage of justice, the nature of which any courts ought not to condone or entertain. Thus, to apply



109 *Ibid* at p. 41.

> the principles of *stare decisis* to such cases will, in my view, be in breach of sacrosanct oath of the office of the judge. Further, perpetration of illegality is no part of the doctrine of *stare decisis*.

The essence of the quotation that can be extracted from the above passage is the assertion by the learned judge that while the *stare decisis* is binding on the court, in exceptional circumstances however, the decision of the apex court ought not to be condoned. For example, when the earlier decision of the apex court promotes fraud or rewards fraud or that the enforcement of the earlier decision will cause substantial miscarriage of justice (i.e. where the earlier decision was abhorrent to notions of justice and fair play) or was inconsistent with subsequent amendments to an Act of Parliament or rules of procedure, among others. In the aforesaid circumstances, the principle of *stare decisis* cannot tie the hands of individual judges in administering substantive justice. The judicial conscience of the trial judge will not permit him to act in breach of his oath of office. In other words, the *stare decisis* principle cannot override the constitutional responsibility of a judge, for if he does so, it will be in breach of his oath of his office.[110]



His Lordship added:

> In crux, I will assert that the concept of *stare decisis* must be followed unless the exceptional stated applies. That exception must be of such a nature that judicial conscience of the trial judge will not permit him to act in breach of his oath of office. If the exception applies, then it is the duty of the trial court to state in clear terms as to why on the facts of the case, he or she declined to abide by the doctrine of the *stare decisis*. By doing so, it will give another opportunity to the apex court to revisit the decision to regularise the discrepancies, for one must not forget that *stare decisis*, as stated earlier, simply does not apply to a single

110 The Federal Constitution, Sixth Schedule deals with the Oath of Office and Allegiance. A judge before resuming the office is required to take the oath of office as follows: '*I, ..... , having been elected (or appointed) to the office of do solemnly swear (or affirm) that I will faithfully discharge the duties of that office to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution.*' (NOTE - A judge of the Federal Court, other than the Chief Justice, a judge of the Court of Appeal or of a High Court or a Judicial Commissioner shall use the words 'my judicial duties in that office' in place of the words 'the duties of that office').

> decision of apex court which had instantaneously come into force but is based on reliable principles tested by a period of time ... No statute or procedural law or concept of *stare decisis* in its true sense, from the explicit wording of the Federal Constitution, can restrain the court from hearing the merits of the case and dispense justice on the facts and circumstances of the case. Thus, *stare decisis* must not be quoted to defend a wrong, when the employment of the apex court decision will not subscribe to substantive justice ... It must also be emphasised here that *stare decisis* principle does not stand as a universal principle for the administration of justice. There are many faiths of jurisprudence which do not recognise the *stare decisis* concept. For example, Islamic jurisprudence does not recognise *stare decisis* principle.

In arriving at that conclusion, the learned judge relied on the proposition derived from earlier writings and decided cases from other jurisdictions. In Broom's Legal Maxims,[111] it is stated:

> Where a rule has become settled law, it is to be followed, although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason for it is wanting, or although the principle and the policy of the rule may be questioned The judicial rule – *stare decisis* – does, however, admit of exceptions, where the former determination is most evidently contrary to reason. But, even in such cases, subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined.

In *Distributors (Baroda) Pvt Ltd v. Union of India and Ors*,[112] Bhagwati J observed:

> The doctrine of *stare decisis* should not deter the Court from overruling an earlier decision, if it is satisfied that such decision is manifestly wrong or proceeds upon a mistaken assumption in regard to the existence or continuance of a statutory provision or is contrary to another decision



111 (10th edn.) pp. 91-93.

112 AIR [1985] SC 1585 at pp. 1597-1598.

> of the Court. It was Jackson, J. who said in his dissenting opinion in *Massachusetts v. United States* [1947] 333 U.S. 611: "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday". Lord Denning also said to the same effect when he observed in *Ostime v. Australian Mutual Provident Society* [1960] AC 459: "The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff ".

In *IC Golaknath & Ors v. State of Punjab and Anrs*,[113] Wanchoo J observed:

> A final appeal is made to us that we shall not take a different view as the decision in *Sankari Prasad*'s case [1952] SCR 89, 195 held the field for many years. While ordinarily this Court will be reluctant to reverse its previous decision, it is its duty in the constitutional field to correct itself as early as possible, for otherwise the future progress of the country and the happiness of the people will be at stake. As we are convinced that the decision in *Sankari Prasad*'s case [1952] SCR 89, 195 is wrong, it is pre-eminently a typical case where this Court should overrule it. The longer it holds the field the greater will be the scope for erosion of fundamental rights. As it contains the seeds of destruction of the cherished rights of the people the sooner it is over-ruled the better for the country.

In *Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals*,[114] Gopal Sri Ram JCA in impugning the decision in *Adorna Properties*, stated:

> I would take refuge in the following words of the great jurist Sir John Salmond in his *Treatise on Jurisprudence* (12th edn) at pp. 151-2: A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, i.e., delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (*London Street Tramways v. L. C. C.* [1898] AC 375) and for the Court of Appeal it was given as the leading example of a decision *per incuriam* which would not be binding on the Court (*Young v. Bristol Aeroplane Co. Ltd.* (194) KR at 729 (CA)) The rule apparently applies



113 [1967] 2 SCR 762 at pp. 816-817.

114 [2007] 3 CLJ 97 at p. 116.

> even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a Court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such *incuria* as to vitiate the decision. Even a lower Court can impugn a precedent on such grounds.

Having said the above, it is submitted that the observation by the learned trial judge in *Re Hj Khalid Abdullah*'s case, in relation to the doctrine of *stare decisis*, has its merits. Where the earlier decision of the apex court 'will perpetuate fraud or reward fraud or the decision per se can be said to be abhorrent to notions of justice and fair play' or perpetuate 'illegality', among others, that decision ought not to stand. Although this may be the case, a logical analysis by the learned judge, by all means promoting justice, the doctrine as applied by the courts in Malaysia suggests that the courts of lower-tiers are bound to follow an unjust decision unless and until the same is reviewed by the apex court. However, the learned judge highlighted the application of the doctrine elsewhere where it was clearly shown that this doctrine should not apply when earlier decisions were given *per incuriam* or when it would result in injustice to the parties, among others.



In light of the above, it has always been the intention of the doctrine to promote certainty, stability and predictability in the judicial process in relation to the application of the law. It would be worthwhile to heed the following advice by learned judges:

(1) "It is ... advisable to follow the doctrine of *stare decisis* because it is a wise policy. It is important that the applicable law be settled. There must be certainty in the law. If the courts below are permitted to depart from the earlier apex court's decision, it would lead to chaos and judicial indiscipline" per Abdul Malik Ishak J in *Pengurusan Danaharta Nasional Bhd v. Yong Wan Hoi & Ors*;[115]

115 [2007] 9 CLJ 416.

(2) "A final decision of the Federal Court, once pronounced, is binding upon the parties thereto and its correctness may only be questioned in a subsequent case where the identical point of law arises for decision" per Gopal Sri Ram JCA in *Tai Chai Yu v. The Chief Registrar of the Federal Court*;[116]

(3) "It does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein" per Gopal Sri Ram JCA in *Periasamy Sinnappan v. PP*.[117]

Reverting back to *Re Hj Khalid Abdullah*, as rightly pointed out by the learned judge, judges are expected to uphold the Constitution and all the written laws lawfully enacted by the Legislature. To ignore or disregard such laws would offend the doctrine of separation of powers and this may constitute a serious misconduct in which case disciplinary action can be initiated against the individual judge for the violation of his oath of office. It must also be remembered that the judicial system plays a crucial duty in dispensing justice according to law. Judges are constantly involved in the interpretation of statutes. Sometimes they have to reach out beyond the statute to seek to a solution to the problem at hand. At times, when the enacted law may lead to undesirable or unjust results, a judge may be persuaded to add moral or public policy shades to the issue in order to do justice, among others. Undeniably, this is a very delicate yet important task exerted by individual judges. Therefore, where the decision was pronounced by the apex court, the courts below are expected to follow that decision in the interest of finality and certainty of the law.



116 [1998] 2 CLJ 358 at p. 360.

117 [1996] 3 CLJ 187 at pp. 213-214.

In relation to the duty of a judge in the decision making process, it would be worthwhile reproducing the observation by Richard Malanjum CJ (Sabah and Sarawak) in *Public Prosecutor v. Kok Wah Kuan*.[118] His Lordship stated:

> (ii) ... The courts have to remain involved in the interpretation and enforcement of all laws that operate in this country, including the Federal Constitution, State Constitution and any other source of law recognized by our legal system. The jurisdiction and powers of the courts cannot be confined to federal law ...
>
> (v) ... It is now universally recognized that the role of a judge is not simply to discover what is already existing. The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond formal rules to seek a solution to the problem at hand. In a novel situation a judge has to reach out where the light of 'judicial precedent fades and flicker and extract from there some raw materials with which to fashion a signpost to guide the law'. When rules run out, as they often do, a judge has to rely on principles, doctrines and standards to assist in the decision. When the declared law leads to unjust result or raises issues of public policy or public interest, judges would try to find ways of adding moral colours or public policy so as to complete the picture and do what is just in the circumstances.
>
> (vi) Statutes enacted in one age have to be applied in a time frame of problems of another age. A present time-frame interpretation to a past time framed statute invariably involves a judge having to consider the circumstances of the past to the present. He has to cause the statute to 'leapfrog' decades or centuries in order to apply it to the necessities of the times.
>
> (vii) Further, in interpreting constitutional provisions, a judge cannot afford to be too literal. He is justified in giving effect to what is implicit in the basic law and to crystallize what is inherent. His task is creative and not passive. This is necessary to enable the constitutional provisions to be the guardian of people's rights and the source of their freedom (see *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 1 MLJ 697; *Mamat bin Daud & Ors v. Government of Malaysia & Anor* [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197).



---

118 [2007] 6 CLJ 341 at pp. 360-366, [2008] 1 MLJ 1 at pp. 21-23.

(viii) Though there is much truth in the traditionalist assertion that the primary function of the courts is to faithfully interpret and apply laws framed by the elected Legislatures, there are, nevertheless, a host of circumstances in which the role of a judge is not just to deliver what is already there. The role is constitutive and creative and goes far beyond a mechanical interpretation of pre-existing law. It extends to direct or indirect law making in the following ways:

(1) Formulating original precedents

Life is larger than the law and there is no dearth of novel situations for which there is no enacted rule on point. In such situations a judge relies on the customs and traditions of the land and on standards, doctrines and principles of justice that are embedded in the life of the community to lay down an 'original precedent' to assist the court. Admittedly, this fashioning of a new precedent is an infrequent occurrence but its impact on legal growth is considerable;

(2) Overruling earlier precedents

Judicial creativity is fully in play when a previous precedent is overruled and thereby denied the authority of law. The overruling may be retrospective or prospective. In either case a new principle is contributed to the legal system and a new direction is forged;

(3) Constitutional review ...

(4) Statutory interpretation

In interpreting pre-existing law a judge is not performing a mere robotic function. The interpretative task is, by its very nature, so creative that it is indistinguishable from law-making. 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'. (per the American jurist Oliver Wendell Holmes). This is specially so in constitutional law. Even if it is accepted that a judge is bound by the intention of the Legislature, it must be noted that such an intention is not always clearly defined. The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond the statute to seek a solution to the problem at hand (see *Chiu Wing Wa & Ors v. Ong Beng Cheng* [1994] 1 CLJ 313). A judge may scrutinize preambles, headings and extraneous materials like explanatory statements that accompany Bills

and parliamentary debates to help unravel the meaning of statutory formulae. A judge may lean on the interpretation clauses of a statute or on the Interpretation Act 1948/1967 to decipher the intention of the Legislature. Or he may fall back on a wealth of rules of statutory construction to aid his task. So numerous and varied are these rules that judicial discretion to rely on one rule or another cannot be predicted. Sometimes a judge's attention is drawn to foreign legislation and related precedents. He may declare the overseas statute to be in *pari materia* with local legislation and, therefore, relevant to the case. Alternatively, he may pronounce the law to be *sui generis* and therefore to be viewed in local context without aid to foreign decisions.

When the enacted law leads to undesirable or unjust results, a judge may be persuaded to add moral or public policy shades to the issue in order to do justice.

One could also note, for instance, the 'public interest' interpretation of art. 5(3) of the Federal Constitution in *Ooi Ah Phua v. Officer-in-Charge of Criminal Investigation, Kedah/Perlis* [1975] 1 LNS 117 in which the court held that the constitutional right to legal representation can be postponed pending police investigation. In *Teoh Eng Huat v. Kadhi, Pasir Mas & Anor* [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277 the 'wider interest of the nation' prevailed over a minor's right to religion guaranteed by art. 11. In *Halimatussaadiah v. Public Services Commission, Malaysia & Anor* [1992] 1 CLJ 413; [1992] 2 CLJ (Rep) 467 the court subjected a public servant's claim of a religious right to wear purdah at the workplace to the need to maintain 'discipline in the service'.

A judge is not required to view a statute in isolation. He is free to view the entire spectrum of the law in its entirety; to read one statute in the light of related statutes and relevant precedents; to understand law in the background of a wealth of presumptions, principles, doctrines and standards that operate in a democratic society (see *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559). He is justified in giving effect to what is implicit in the legal system and to crystallize what is inherent. Such a holistic approach to legal practice is justified because 'law' in art. 160(2) is defined broadly to include written law, common law and custom and usage having the force of law.

(5) Operation of doctrine of binding precedent

The doctrine of binding judicial precedent exists to promote the principle of justice that like cases should be decided alike. It also seeks to ensure certainty, stability and predictability in the judicial process. There can be no denying that the existence of this doctrine imposes some rigidity in the law and limits judicial choices. But one must not ignore the fact that some flexibility and maneuverability still exist. Though a superior court is generally reluctant to disregard its own precedents, it does have the power 'to refuse to follow' its earlier decisions or to cite them with disapproval. Our Federal Court has, on some occasions, overruled itself. High Court judges occasionally refuse to follow other High Court decisions. An inferior court can maneuver around a binding decision through a host of indirect techniques.

(6) Application of doctrine of *ultra vires*

Whether an agency has acted *ultra vires* is a complex question of law that permits judicial creativity. Some statutes declare that discretion is absolute or that a decision is final and conclusive. Some statutory powers are conferred in broad and subjective terms. To statutory formulae of this sort, contrasting judicial responses are possible. The court may interpret them literally and give judicial sanction to absolute powers. Alternatively, the court may read into the enabling law implied limits and constitutional presumptions of a rule of law society. This will restrict the scope of otherwise unlimited powers (see *R v. Lord Chancellor, Ex p Witham* [1998] QB 575). Subjective powers may be viewed objectively. Purposive interpretation may be preferred over literal interpretation (see *Public Prosecutor v. Sihabduin bin Haji Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82). When procedural violations are alleged, a decisive but discretionary issue is whether the procedure was mandatory or directory. Violation of a mandatory procedure results in nullity. Violation of a directory requirement is curable.

(7) Import of rules of natural justice

Rules of natural justice are non-statutory standards of procedural fairness. They are not nicely cut up and dried and vary from situation to situation. Judges have wide discretion in determining when they apply and to what extent.

## 19.6 DISSENTING OPINION

The minority or dissenting opinion arises when the minority judge(s) disagree with the majority in respect of its reasoning and/or conclusion, and expounds their own views. In *Pendaftar Hakmilik, Pejabat Tanah Dan Galian Negeri Selangor v. Bank Pertanian Malaysia Berhad*,[119] a case dealing with the validity of the registration of title and charge in favour of the respondent, the majority opinion by Abdul Aziz Bin Abd Rahim and Rohana Binti Yusuf JJCA was dissented by Prasad Sandosham Abraham JCA. Again, in *Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors*,[120] a case dealing with the actual commencement of the proceedings for land acquisition under the Land Acquisition Act 1960, the majority opinion was by Richard Malanjum CJ (Sabah and Sarawak), Mohamed Apandi Ali, Abu Samah Nordin and Ramly Ali, FCJJ. The dissenting opinion was penned by Zaleha Zahari FCJ. Likewise, in *Simathari a/l Somenaidu v. Panglima Tentera Laut Diraja Malaysia & Ors*,[121] a case dealing with the validity of the appellant's termination from service under the Queen's Regulations, the majority opinion was by Alizatul Khair and Varghese George, JJCA while the dissenting opinion penned by Abdul Aziz Ab Rahim JCA. Lastly, in *Madlis bin Azid @ Aziz v. Board of Officers & Ors*,[122] a case dealing with right of a third party to challenge a declaration of native status given to the applicant, the majority opinion was by Abdul Aziz Ab Rahim and Abang Iskandar JJCA while Rohana Yusuf JCA gave the dissenting judgment.



The above may be further illustrated with reference to the case of *Majlis Agama Islam Wilayah Persekutuan & Anor v. Victoria Jayaseele Martin*,[123] where the Federal Court *vide* a majority decision by Raus Sharif PCA, Ahmad Maarop and Azahar Mohamed FCJJ, set aside the

---

119 [2016] MLJU 15.

120 [2016] 1 MLJ 200.

121 [2015] 5 MLJ 281.

122 [2015] 5 MLJ 844.

123 [2016] MLJU 40, [2016] MLJU 41; Per Rohana Yusuf J in *Victoria Jayaseele Martin v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2011] 7 CLJ 233.

unanimous decision of the Court of Appeal on the issue of whether a non-Muslim is qualified to practice as a *syarie* lawyer in the Syariah Courts in the Federal Territories. The Federal Court in fact affirmed the High Court's order which held that a non-Muslim is not qualified to practise as a *syarie* lawyer in the Syariah Courts.[124] In particular, the Federal Court stated, *inter alia*, that 'Rule 10 of the Rules the [*Peguam Syarie* Rules 1993] mandating that only Muslims can be admitted as *Peguam Syarie* is not *ultra vires* s. 59(1) of the Administration of Islamic Law (Federal Territories) Act 1993.' It was further stated that the *Majlis*'s rule barring non-Muslims from practising as *Syarie* lawyer in the Federal Territories was constitutional.[125] Such discrimination is allowed, as this would enable the Syariah Courts to effectively act against *Syarie* lawyer who have breached Islamic laws and the enacted rules for instance when contempt was committed by any party.

The minority opinion of the Federal Court by Suriyadi Halim Omar and Zaharah Ibrahim FCJJ were of the view that it was 'never the intention of Parliament to shut the doors to academically endowed non-Muslims having sufficient knowledge of Islamic law to appear in any Syariah Court'. The minority decision was in favour of the unanimous decision of the Court of Appeal that the word 'any person' in s. 59(1) given its natural and ordinary meaning would include a non-Muslim having sufficient knowledge of Islamic law.



It is admitted that the existence of dissenting opinion demonstrates judicial independence and it reiterates the principle of freedom of expression and freedom of conscience among judges. However, a dissenting opinion cannot be underestimated or brushed aside as being

---

124 See *Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin and Another Appeal* [2016] MLJU 40.

125 *Peguam Syarie* or *Syarie* lawyer refers to a person who has been admitted to practice in the Syariah Court pursuant to s. 59 of the Act. Section 59(1) of the Act provides that the *Majlis* may admit any person having sufficient knowledge of Islamic law to be *Peguam Syarie* to represent parties in any proceedings before the Shariah Court. Further, s. 59(4) provides that no person other than a *Peguam Syarie* or a person exempted by the *Majlis* among members of the judicial and legal service of the Federation or any person appointed under s. 3 of the Legal Aid Act 1971 (Act 26) shall be entitled to appear in any Shariah Court on behalf of any party to any proceedings before it.

insignificant. In fact, a dissenting opinion could be adopted in affecting future judgments, pushing for amendment and revision of the existing laws or a basis for the development of legal doctrine, among others.

It is noteworthy that in some cases, dissenting opinion has affected the subsequent court practise by turning into a majority opinion. In relation to the above, the discussion below is based on the New Zealand Court of Appeal decision in *Brighouse Ltd v. Bilderbeck*[126] where the dissenting opinion in *Brighouse Ltd* was subsequently affirmed by another panel of the Court of Appeal in *Aoraki Corporation Ltd v. McGavin*.[127]

In *Brighouse Ltd v. Bilderbeck*,[128] the redundancy payment was awarded despite the fact that there was no express clause in the agreement enabling for such payment. It is noteworthy that the former employment legislation of New Zealand such as the Industrial Relations Act 197, the Labour Relations Act 1987 and the Employment Contracts Act 1991 has no provision on payment of redundancy compensation to a retrenched worker. Likewise, the current Employment Relations Act 2000 contains no such provision and this means that the legislature intended that such a provision be left to the parties to negotiate.[129] In *Brighouse Ltd*'s case, the New Zealand Court of Appeal had invoked the implied term of confidence, trust and fair dealing, to compel the employer pay redundancy compensation to employees made redundant, even though this had not been specifically provided for in the contract of employment.



The brief facts of *Brighouse Ltd*'s case are as follows. As a result of the sale of a company, four employees of the appellant company were made redundant with one month's notice as provided in the contract of employment. However, their contract made no reference to redundancy payment. The central issue before the New Zealand Court of Appeal was whether in the absence of a redundancy agreement calling for such

126 [1994] 2 ERNZ 243, CA; [1993] 2 ERNZ 74, EC; [1992] 2 ERNZ 161, ET.

127 [1998] 3 NZLR 276, CA.

128 [1995] 1 NZLR 158 (CA); [1993] 2 ERNZ 74, EC; [1992] 2 ERNZ 161, ET.

129 W Grills et al (eds), *Mazengarb's Employment Law*, vol 1 (Wellington: Butterworths, 1994), p 1203.

payment, was it open to the court to award redundancy compensation. Both the Employment Tribunal and the Employment Court held, *inter alia*, that fair and reasonable treatment called for the payment of compensation in a redundancy situation.

The Court of Appeal, *vide* a majority opinion of the court[130] upheld the trial court's decision. It was stated that an employer is obliged, under the implied term of confidence, trust and fair dealing, to pay compensation to employees made redundant, even though this had not been specifically provided for in the contract of employment. The court added that if the contract of employment sets out an express exclusion of redundancy compensation, such exclusion shall bind the parties.

The dissenting opinion was penned by Sir Ivor Richardson. His Lordship in dissenting from the majority opinion, stated: 'To impose obligations on the employer to pay redundancy where the parties have chosen not to provide for redundancy in their contract and to do so in the guise of giving effect to the mutual trust requirement would run counter to the statutory intent. It is for the parties to negotiate the content of their employment contract and thereby to create enforceable rights and obligations. Requiring an employer to pay redundancy compensation in those circumstances is to alter the substantive obligations on which they agreed. In short, it is not open to the courts to construe an extra statutory concept of social justice applicable in redundancy situations. In principle, there is no basis for concluding that a dismissal for genuine redundancy reasons which meets any fair procedural requirements is nevertheless unjustifiable.'

The majority decision in *Brighouse Ltd*'s case was disapproved four years later by another panel of the Court of Appeal comprising a panel of seven judges[131] in *Aoraki Corporation Ltd v. McGavin*.[132] In *McGavin*'s case, the respondent along with 95 others, were made redundant in 1994 due



130 Majority decision was by Cooke P, Casey and Sir Gordon Bisson JJ. Dissenting judgment was by Richardson and Gault JJ.

131 P Richardson, Gault, Thomas, Keith, Blanchard, Tipping and Henry JJ.

132 [1998] 3 NZLR 276, CA.

to restructuring of the company arising from its financial difficulties. The Employment Court following the majority decision in *Brighouse Ltd* held, *inter alia*, that the appellant had failed in its duty to act fairly through its failure to pay reasonable redundancy compensation. The Court of Appeal before a seven Judge bench unanimously disapproved their earlier decision in *Brighouse Ltd*. In *Aoraki*'s case, the Court of Appeal following the minority opinion *Brighouse Ltd*, stated, *inter alia*, that redundancy compensation is only payable when there is a specific agreement to pay redundancy compensation in an employment contract. Where the parties to the employment contract have not provided redundancy compensation payment in their contract of employment, there was no obligation on the part of the employer to pay the same. In reaching to this conclusion, the Court of Appeal disapproved and departed from the majority opinion on this point in *Brighouse Ltd.* Instead, the Court in *Aoraki*'s case had adopted the dissenting opinion in *Brighouse Ltd* penned by Sir Ivor Richardson.

In short, the dissenting opinion in *Brighouse Ltd v. Bilderbeck* was followed in *Aoraki Corporation Ltd v. McGavin* which had in fact changed the legal doctrine or position on the payment of redundancy compensation in the absence of an express provision to that effect in the statute or the employment contract. It is reiterated that a dissenting opinion does not create a binding precedent or become part of case law. However, its existence does demonstrate judicial independence and recognition of the principle of freedom of expression and freedom of conscience among judges.

In relation to *Victoria Jayaseele Martin*'s case, it is humbly submitted that unless s. 59 of the Administration of Islamic Law (Federal Territories) Act 1993 is amended to exclude expressly a non-Muslim from applying to be a *Syarie* lawyer, there is always possibility that the subsequent panel of the Federal Court may adopt the minority views in *Victoria Jayaseele Martin* namely, that the said Act had not intended to shut the doors to non-Muslims who have adequate knowledge of Syariah from practising as a *Syarie* lawyer in the Federal Territories. The upper courts, as noted earlier, are bound by the doctrine of *stare decisis* in the interest of finality and certainty in the law and for an orderly development of legal rules.

## 19.7 INHERENT POWER OF THE FEDERAL COURT TO REOPEN, REHEAR AND RE-EXAMINE ITS PREVIOUS DECISION

In civil matters, the Federal Court cannot reopen or review its own earlier decision, save in very exceptional circumstances. An attempt to reopen, rehear and re-examine the same issues which had been heard and finally decided by the Federal Court in the first suit would tantamount to *res judicata*.[133] The doctrine of *res judicata*[134] or 'estoppel by record' is provided in ss. 40 to 44 of the Evidence Act 1950. Under the said doctrine, a judgment of a court that acts within its jurisdiction is conclusive in that it estops a party in the litigation from giving evidence to contradict it, unless it can be shown that judgment was obtained by fraud or collusion.

The question arises as to whether the above rule conferred upon the Federal Court the power to reopen, rehear and re-examine its previous judgment, decision or order on merits. It is noted that pursuant to r. 137 of the Rules of the Federal Court 1995, the Federal Court has the jurisdiction and power to reopen, rehear and re-examine its previous judgment, decision or order on merits. Rule 137 of the Rules of the Federal Court 1995 (the Rules)[135] 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 hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court'. The above exercise is primarily intended to prevent injustice or an abuse of the process of the court.



133 See *Teo Bee Hung v. LJS Resources Sdn Bhd* [2008] 1 ILR 411 at p. 417.

134 *Res judicata* means 'a matter upon which the court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly,' per Lord Romilly, in *Jenkins v. Robertson* [1867] LR 1 HL 117.

135 P.U.(A) 376 of 1995.

In *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun*,[136] it was stated that: "the Federal Court does have the inherent jurisdiction and power which can be invoked in limited circumstances to reopen, rehear and re-examine its previous judgment, decision or order which has been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court". Again, in *Tan Sri Eric Chia Eng Hock v. PP*,[137] the Federal Court was faced with the question whether the inherent power of the court is available only to review its own earlier decision or whether it also extends to reviewing decisions made by the Court of Appeal. In relation to the above, Augustine Paul FCJ stated: "the inherent power of the Federal Court under r. 137 can ... be invoked to prevent an injustice or to prevent an abuse of the process of any court where there is no other available remedy".

What is apparent from the above authorities is that the Federal Court may reopen, rehear and re-examine its previous judgment, decision or order which had been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court. It must however, be noted that the said exercise ought to be undertaken sparingly and only in rare and exceptional circumstances. It is not the intention of the Rules Committee when enacting the above rule that every decision of the Federal Court should be subject to review. 'To do so would be anathema to the concept of finality in litigation'.[138] As noted earlier, the observance of the doctrine of *stare decisis* is important in the interest of finality and certainty in the law and thus, this doctrine has attained the 'status of immutability'.[139]



---

136 [2002] 3 CLJ 577 at p. 590, [2002] 2 MLJ 673 at p. 685. See also *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61, FC; *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645, FC; *Dato' Seri Anwar Ibrahim v. PP* [2004] 4 CLJ 157, FC; *Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Application* [2004] 4 CLJ 350, FC; *Chan Yock Cher v. Chan Teong Peng* [2004] 4 CLJ 533, FC; *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565, FC and *Chu Tak Fai v. PP* [2006] 4 CLJ 931, FC.

137 [2007] 1 CLJ 565, FC.

138 See *Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Application* [2004] 4 CLJ 350, FC.

139 See *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577

In *Dato' Seri Anwar Ibrahim v. PP*,[140] the Federal Court, comprising of Zulkefli Makinudin, Mohd Ghazali Yusoff and Heliliah Mohd Yusof, had considered *inter alia*, the application of r. 137 of the Rules. The applicant, Dato' Seri Anwar Ibrahim, was charged with an offence of voluntarily committing carnal intercourse against the order of nature, an offence under s. 377B of the Penal Code. While awaiting the full trial of the matter, the applicant's request to have access to certain documents and materials was declined by the Public Prosecutor, the respondent herein. Accordingly, an application was made to the court pursuant to s. 51 and/or s. 51A of the Criminal Procedure Code ('CPC') to compel the respondent and/or other persons having custody, care and control, to produce the documents and the materials requested.

The applicant's application was allowed by the High Court where the trial judge ordered the respondent to comply with almost all of the prayers in the application. Dissatisfied with the order, the respondent appealed to the Court of Appeal, while the applicant, cross-appealed against the refusal of the High Court to allow some parts of the applicant's prayers. The Court of Appeal, in allowing the respondent's appeal in part, held that the applicant was not entitled to the production of certain documents, materials and items that he had requested for pursuant to s. 51 of the CPC. The applicant's cross-appeal was dismissed.[141]

Against the said decision, the applicant appealed to the Federal Court. The Federal Court had, on 29 January 2010, dismissed the applicant's appeals and upheld the findings of the Court of Appeal on the ground *inter alia*, that the appellant had not met the dual requirements of necessity and desirability as laid down in s. 51 of the CPC.[142]

*Vide* a notice of motion filed pursuant to r. 137, the applicant had requested the Federal Court to use its inherent powers to review its own judgment given on 29 January 2010. The ground for the said application



140 [2010] 7 CLJ 397.

141 See *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* [2010] 4 CLJ 331.

142 See *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265.

was that the Federal Court had erred in its judgment when it did not adequately consider the applicant's application for the documents and materials applied for as those documents and materials were vital for the preparation of a strong defence. Without the documents and materials, the applicant was severely prejudiced and thus, it had 'occasioned an injustice which needs to be rectified and prevented'. Hence, the only issue before the Federal Court in *Dato' Seri Anwar Ibrahim*'s case was whether this court had the power to review its own judgment given on 29 January 2010.

As the ultimate purpose of litigants when invoking r. 137 was to invite the Federal Court to review its own earlier decision, the Federal Court had, in *Dato' Seri Anwar Ibrahim*'s case, considered the impact of r. 137. The respondent contended that r. 137 of the Rules does not confer new jurisdiction on the Federal Court and consequentially cannot be invoked to review its own decision on merit. The above argument was premised principally on art. 121(2) of the Federal Constitution, the Courts of Judicature Act 1964 ('CJA'), ss. 86 and 87 and r. 137 of the Rules.



The Federal Court had, on 25 February 2010, in a unanimous decision, dismissed the said motion on the grounds that r. 137 does not confer the Federal Court the statutory jurisdiction or new jurisdiction to hear any application to review its own decision. It was stated that r. 137 merely conferred upon the Federal Court limited 'inherent power' or 'inherent jurisdiction' in order to maintain its character as a court of justice to hear any application or to make any order so as to prevent injustice or abuse of the court process. The Federal Court's decision in *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim*,[143] was referred to where Arifin Zakaria FCJ, while making reference to the Rules of the Federal Court 1995, stated:

> As a subsidiary legislation it cannot exceed the powers conferred by the statute pursuant to which it is made, therefore, it cannot purports to confer new jurisdiction where none existed before or enlarge the jurisdiction, or create or alter substantive rights Therefore, it will be *ultra vires* the powers of the Rules Committee to attempt to confer on

143 [2008] 5 CLJ 201.

> the Federal Court the power to deal with a matter which is outside its jurisdiction. This rule must strictly be confined to procedural matter only.

Zulkefli Makinudin FCJ, delivering the judgment in *Dato' Seri Anwar Ibrahim*'s case, stated:

> Notwithstanding that r. 137 does not confer a new jurisdiction or a statutory jurisdiction, I am of the view that the term 'inherent power' used in r. 137 should be taken to mean referring to the judicial powers of the Federal Court itself. On this point I agree with the views expressed by Heliliah Mohd Yusof, FCJ in her judgment that a certain reserve of power intrinsically remains with the Federal Court and as the apex court of the Judiciary it has to be the organ to deal with any 'injustice' or 'abuse of process'. It is in that limited sense that when such an application is made under r. 137 that the Federal Court can be said to be exercising its 'inherent power' or 'inherent jurisdiction' to review its own decision as may be necessary to prevent injustice or to prevent an abuse of the process of the court.



As from the above, the inherent powers of the Federal Court under r. 137 is strictly confined to procedural matters only and thus, could not be invoked to review its own decision on its merits. In relation to the limit of r. 137, His Lordship, Zulkefli Makinudin, cited the following cases:

(1) In *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo (Malaysia) Bhd*,[144] Abdul Hamid Mohamad CJ stated:

> In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion.

144 [2008] 6 CLJ 1 at p. 6.

(2) In *Chan Yock Cher v. Chan Teong Peng*,[145] Abdul Hamid Mohamad FCJ stated:

> On the other hand, no leave to review should be given where the previous order is challenged on its merits, whether on facts or in law. Merely because the panel hearing the application is of the view that an important piece of evidence had not been given sufficient weight or that the current panel disagrees with the interpretation or application of a certain provision of the law is not a sufficient reason for the court to set aside its previous order.

(3) In *Badan Peguam Malaysia v. Kerajaan Malaysia*,[146] Zaki Tun Azmi CJ stated:

> In *Asean Security Paper Mills*' case, I have listed out the circumstances where discretion under r. 137 can be exercised *supra* at p. 15. If one were to go through all the cases, injustice could be clearly seen even before going into the merits of each case. It cannot be applied where a decision of this court is only questioned, whether in law or on the facts of the case.



In *Asean Security Paper Mills* case,[147] Zaki Tun Azmi CJ had, with reference to judicial precedent, succinctly laid out the limited or exceptional circumstances where the Federal Court had exercised its discretion to invoke r. 137. They are as follows:

(a) When there was a lack of quorum eg. the court was not duly constituted as two of the three presiding judges had retired;[148]

(b) The applicant had been denied the right to have his appeal heard on merits by the appellate court;[149]

---

145 [2005] 4 CLJ 29 at p. 45.

146 [2009] 1 CLJ 833 at p. 845.

147 [2008] 6 CLJ 1.

148 See *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61.

149 See *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645.

(c) Where the decision had been obtained by fraud or suppression of material evidence;[150]

(d) Where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the quorum that rendered the impugned decision;[151]

(e) Clear infringement of the law;[152]

(f) It does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel);[153]

(g) Where an applicant under r. 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard;[154]

(h) Where bias had been established;[155]

(i) Where it is demonstrated that the integrity of its earlier decision had been critically undermined e.g. where the process had been corrupted and a wrong result might have been arrived at;[156] and

(j) Where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and Court of Appeal.[157]



150 See *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577.

151 See *Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Application* [2004] 4 CLJ 350.

152 See *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565.

153 See *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29.

154 See *Raja Prithvi Chand v. Sukhraj Rai* AIR [1941] FC 1.

155 See *Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353.

156 See *Re Uddin* [2005] 3 All ER 550.

157 See *Joceline Tan Poh Choo & Ors v. Muthusamy* [2007] 6 CLJ 1.

The lists enumerated above are by no mean exhaustive as the list of circumstances may vary depending on the circumstances of an individual case.

Based on the principles enunciated and the guidelines set out in the earlier decisions of the Federal Court as above, Justice Zulkefli Makinudin, in dismissing the applicant's application in *Dato' Seri Anwar Ibrahim*'s case, stated:

> [I]t is abundantly clear the applicant had intended to move this court to review the issues on their merits. This is clearly outside the purview of r. 137. In the present case the earlier panel of this court had already delivered a judgment and had addressed all the issues canvassed by both parties in the appeal before them. More importantly, it must be observed that the due process of the law had taken its course whereby the notice of motion filed by the applicant at the High Court had gone through a hearing and two appeal processes before the Court of Appeal and finally culminating with the Federal Court. The applicant had exhausted his legal remedies. On this point this court had on many occasion expressed its view that there must be finality to deciding any dispute and it cannot be reviewed *ad infinitum*.



Mohd Ghazali Yusoff FCJ delivering a separate judgment in *Dato' Seri Anwar Ibrahim*'s case noted the word 'review' does not appear either in art. 121(2) of the Federal Constitution nor in CJA, ss. 86 and 87. Neither is the above word found in r. 137 of the Rules. His Lordship then posed the question as to whether the word 'review' could be implied from the words 'to hear any application' in r. 137 above. In relation to the above, His Lordship stated:

> In the light of art. 121(2) of the Federal Constitution and ss. 86 and 87 of the CJA, I am of the view that this court has no power to review its own judgment. It is clear that the Federal Constitution and the CJA have not conferred this court a power to review its own judgment. I am also of the view that the Rules is not federal law within the meaning of the words 'federal law' in the Federal Constitution. The Rules, pursuant to s. 17(5) of the CJA, shall be laid before the Dewan Rakyat at the first meeting after their publication and may be disapproved in whole or in part by a resolution of the Dewan Rakyat. Thus the Rules need to be laid before the Dewan Rakyat for approval but that does not make it an Act of Parliament within the contemplation of art. 160(2) of the Federal Constitution which provides that an 'Act of Parliament' means

> a law made by Parliament. The powers of this Court cannot be enlarged through the Rules. Only an Act of Parliament can do that. I do not think it is correct to say that on an application by a party to an appeal already decided by this court, this court has the power to rehear the appeal and review its earlier decision. Rule 137 of the Rules surely does not confer such a power. The word 'review' is not even there.

On the question whether the applicant was allowed to relitigate the case by questioning the lawfulness of the earlier decision of the Federal Court when the latter had already decided the appeal on its merits and disposed of the same, Mohd Ghazali Yusoff FCJ said:

> [I]t is in the public interest that there is finality. In the instant application, the decision of this court on 29 January 2010 is final and conclusive. I do not think that when the Rules Committee introduced r. 137 in the Rules, it was the intention to allow parties to apply for a review of an earlier decision of this court in the same action by exercising a purported inherent power. It would be unfortunate if this court utilises r. 137 to allow a panel of equal standing to an earlier panel to hear and rule on contentions that the decision of the earlier panel was wrong or incorrect and that the earlier panel had made an erroneous decision.



As the only issue in the instant application was whether the Federal Court had the power to review its own decision, His Lordships answer was in the negative. Thus, in the absence of any power to review, the decision of one panel of the Federal Court cannot subsequently be reviewed, reheard, reopened or relitigated before another panel of the Federal Court. As Mohd Ghazali Yusoff FCJ aptly noted, 'an application purportedly made pursuant to r. 137 of the Rules where it is sought to litigate anew a case which has already been disposed of by earlier proceedings is an abuse of process of court'.

Her Ladyship, Heliliah Mohd Yusof FCJ in *Dato' Seri Anwar Ibrahim*'s case stated that r. 137 may be resorted to only in cases where a procedural injustice has been occasioned. On the issue whether the power of a court to review its own judgment is a common law power under the inherent jurisdiction, Her Ladyship stated:

> [T]his court has no inherent jurisdiction to review its earlier decision save on the very limited ground (i) that it contains clerical mistakes that makes its order unclear to such an extent that it will cause a miscarriage

> of justice; and (ii) that one or more of the parties have suffered procedural unfairness in the sense already discussed in the making of an order, eg, because through no fault of his, he was never heard before the order was made or because decision on an appeal is tainted by a real danger of bias or a reasonable apprehension or suspicion of bias on the part of one or more members of the court who handed down the impugned judgment.

Heliliah Mohd Yusof FCJ added that r. 137 does not confer 'jurisdiction' on the Federal Court. In fact, the word 'jurisdiction' does not appear in the above rule. Therefore, on the issue of jurisdiction of the Federal Court, reference must be made to the Federal Constitution, art. 121(2), the constitutional source of judicial power of the Federal Court. Further, the word 'federal law' in the context of art. 128(3) of the Federal Constitution means the CJA 1964 in particular, ss. 87 and 96, for the purposes of the determining appeals.

In relation to the 'inherent powers' of the Federal Court, Her Ladyship stated:

> [It] refers to the judicial powers of the Federal Court itself. 'Inherent' means it is intrinsic or organic to the judicial powers of the Federal Court and hence being so the Federal Court draws upon it in the limited circumstances prescribed in r. 137 namely to address injustice or abuse of processes. A certain reserve of powers intrinsically remains with the court for the simple reason that the Federal Court is created by the constitution as a judicial organ at the apex of the judiciary. Hence by virtue of being at the apex it is only the Federal Court (and no other non judicial branch) that has to be the organ to deal with 'injustice' or 'abuse of processes'. It is in that limited sense that the jurisdiction itself stems from the inherent powers, for the powers being intrinsic and organic to the judicial powers of the Federal court, those powers may therefore be drawn upon as and when circumstances require. It therefore constitutes a separate exercise and more of a rectifying process. The exercise of that inherent power will only be triggered by an application made to it, upon which the court could be [*sic*] said to become seised of it. In that sense it could be said to exercise an inherent jurisdiction ...
>
> In the matter of the application before us, there is not here a question of jurisdiction as though it is a new jurisdiction as contended. The court cannot confer on itself jurisdiction. We are hearing an application

> where the applicant is applying to this court to draw upon its inherent powers. However, having appraised the judgment of this court dated 29 January 2010, it is found that the applicant has not been able to persuade this court that his complaint falls within the scope of r. 137. The court in arriving of its decision on 29 January 2010 has already evaluated issues of facts and law and arrived at an interpretation. To accede to the issues raised by the applicant is tantamount to permitting a case to be relitigated primarily on account of the applicant disagreeing with certain interpretation of law. The object of r. 137 is not to defeat finality.

As from the case of *Dato' Seri Anwar Ibrahim*, it is clear that a final decision of the Federal Court cannot subsequently be reviewed, reheard, reopened or relitigated before another panel of the Federal Court. No statutory right have been conferred on the Federal Court to review its own decision. The 'inherent power' of the Federal Court under r. 137 could only be invoked in rare and exceptional circumstances for example, where there is no alternative remedy available to prevent an injustice or to prevent an abuse of the process of the court.[158] In other words, such power is limited to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

Situations where the Federal Court may review its own earlier decision is when the court making the order was not properly constituted[159] or on ground of illegality or lack of jurisdiction,[160] among others. Where, if every Federal Court's decision could be subject to review, it would create chaos to the countries judicial hierarchy system in the sense that it would open flood-gates to litigation and thus, would certainly defeat the concept of finality of a judgment. 'Certainly, it cannot be



158 See *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833 at pp. 843-844; *Chu Tak Fai v. PP* [2006] 4 CLJ 931.

159 See *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61; *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577.

160 See *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586, FC; *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, FC.

the intention of the legislature when promulgating r. 137 that every decision of this court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final'.[161] Therefore, save on very exceptional circumstances as enumerated in *Asean Security Paper Mills* case, an attempt to relitigate and/or reopen the same issue which had been previously decided in respect of the same proceedings and between the same parties would be an abuse of the process of the court.

## 19.8 *RATIO DECIDENDI*

As noted earlier, *ratio decidendi* of higher courts are binding on lower courts by virtue of the common law doctrine of precedent.[162] *Ratio decidendi* is a Latin phrase which lexically means 'the reason for the decision'.[163] In pragmatic sense, it is a principle of law adopted by the court in deciding a case. According to Salmond, it is 'the rule of law applied by and acted on by the court, or the rule which the court regarded as governing the case'.[164] Lord Simonds defined the *ratio decidendi* as 'a reason given by a judge for his decision'.[165] 'The *ratio* is the minimum general principle derived from the judge's decision on the material facts of the case'.[166] 'A *ratio* is a ruling expressly or impliedly given by a judge which is sufficient to settle a point of law put in issue by the parties' arguments ... '.[167] 'The *ratio decidendi* of a case is any ruling on a point of law expressly or impliedly treated by the judge as a necessary step in



161 Per Alauddin Mohd Sheriff FCJ in *Dato' Seri Anwar Ibrahim v. PP* [2004] 4 CLJ 157.

162 *Deakin v. Webb* (1904) 1 CLR 585.

163 Osborn's Concise Law Dictionary (8th Ed).

164 L. B. Curzon, *Jurisprudence* (Macdonald & Evans Ltd, 1979), p. 244.

165 See *Jacobs v. London County Council* [1950] AC 361, HL.

166 Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge University Press, 1931).

167 McCormick, 'Why Cases have *Rationes* and What These Are', L. Goldstein ed *Judicial Precedent* (1987) p. 170.

reaching his conclusion having regard to the line of reasoning adopted by him or a necessary part of his direction to the jury'.[168] In *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor*,[169] Mohd Ghazali FCJ stated: 'the term *ratio decidendi* means the legal reasons of the judge in reaching a finding in a case before him and it is a fundamental part of establishing precedents that is binding on lower courts. It brings about consistency to the application of case law. Setting out the reasons for a judgment is a fundamental part of the administration of justice. The term *obiter dictum* in Latin means remarks or comments in passing. These remarks or comments are judicial observation and are not binding. In other words, they are remarks or comments made by judge in a decision that do not form part of the legal reasoning in reaching the decision.' In *Bank Islam Malaysia Bhd v. Azhar Osman & other cases*,[170] Rohana Yusuf J defined *ratio decidendi* of a case as 'the principle of law on which the court reaches its decision. It has to be deduced from the facts and the reasons that the court gives for reaching its decision as well as the decision itself.'



When it is said the decision of a case binds others, it does not literally mean that the whole decision is binding as it is. Only the rule of law, i.e. the *ratio decidendi*, contains in the decision will be binding upon the relevant cases. In addition, every statement of law in a decision of a case cannot be considered as a *ratio decidendi*.[171] A statement of law which is not part of the *ratio decidendi* is called an *obiter dictum* (something said in passing). Thus, it is very crucial to identify the correct *ratio decidendi* in the decision of a decided case.

It must be admitted that determining the *ratio decidendi* is not an easy task because there is no single test to do so. According to Cross, it is impossible to develop a sole formula to determine the *ratio decidendi*

168 Cross and Harris, Precedent in English Law, 4th edn (Oxford: Clarendon Press, 1991), p. 72).

169 [2012] 1 CLJ 448, FC.

170 [2010] 5 CLJ 54.

171 *Ibid.*

in a decided case.[172] This is because the formulation of it by a judge in any particular case is not always apparent.[173] Again, nowhere in the judgment will it clearly indicate or mention the term *ratio* of the case.[174] More to the point, a *ratio decidendi* is open for further interpretation. Consequently, later judges might express the *ratio decidendi* of a case in different perceptions and react to it in different ways.[175] Of course, it does not also mean that there can be no attempt at all to define it or to identify it in a case. The question herein is: how do we perceive the *ratio decidendi*?

Despite the aforementioned difficulties, jurists have developed some methods in determining the *ratio decidendi* and these have been applied in many cases. The following discussions focus on two most commonly used methods, i.e. 'reversal method' and 'facts and decision method'. Eugene Wambaugh, an American legal scholar, propounded the 'reversal method' in which he suggests that in order to determine whether a judicial statement is a *ratio decidendi* or *obiter*, one should ask the question whether the decision would have been different had the statement been omitted. If so, the statement is crucial and is therefore a *ratio*. If however it is not crucial, it is an *obiter*.[176] For example, in *Bridges v. Hawkesworth*,[177] a customer found some money on the floor of a shop and the court decided in favour of the finder by applying the 'finders-keepers' principle.[178] The above principle is considered as the *ratio decidendi* in this case because the decision of the case will also change if the legal proposition is reversed to mean that the finder is not regarded as the keeper. Nonetheless, the problem with this method



172 James Holland and Julian Webb, *Learning Legal Rules: A Students' Guide to Legal Method and Reasoning*, 6th edn. (Oxford University Press, 2006), p. 162.

173 *Ibid.* at p. 166.

174 *Ibid.* at p. 161.

175 *Ibid.* at p. 165.

176 See Eugene Wambaugh at http://en.wikipedia.org/wiki/Eugene_Wambaugh

177 [1851] 21 LJQB 75.

178 *Bridges v. Hawkesworth* [1851] 21 LJQB 75.

is that it may not be simple to apply cases with more than one *ratio decidendi* and reversal of each legal proposition does not affect the decision.[179]

Arthur Lehman Goodhart, a professor of jurisprudence, propounded the 'material facts' theory in which he suggests that the *ratio decidendi* can be determined through the material facts of the case and the decision made in relation to those facts. According to him, the principle of the case can be found by determining the following: (i) the facts treated by the judge as material, and (ii) his decision based on them. He added that the decision of a previous case could be applied in latter cases in which the relevant facts of the case ascertained by the court are the same as in the previous one.[180] For example, the 'finders-keepers' principle applied in the case of *Bridges v. Hawkesworth*,[181] was not applicable in the case of *South Staffordshire Water Company v. Sharman*,[182] where the defendant found two gold rings in a private place belonging to the plaintiff.[183] In these two cases, the material facts were not the same because the customer found some banknotes in a public place in Bridges case and the defendant found two gold rings in a private place in Sharman case. Thus, the court decided that the finder can be regarded as a keeper only when he found something in a public place. The facts and decision method is well applicable in this example if the defendant found the said gold rings in a public place as in *Bridges* case.



Lastly, Lord Halsbury explained the phrase '*ratio decidendi*' as 'it may be laid down as a general rule that that part alone of a decision by a Court of Law is binding upon Courts of coordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined.

---

179 Abdul Haseeb Ansari, 'Judicial Precedents: An Expository Study of Civil Judicial System and Shari'ah Court System', *Journal of Islamic Law Review*, vol. 3, (2007), p. 145.

180 *Ibid.* at pp. 145-146.

181 [1851] 21 LJQB 75.

182 [1896] 2 QB 44.

183 *South Staffordshire Water Company v. Sharman* [1896] 2 QB 44.

This underlying principle which forms the only authoritative element of a precedent is often termed the *ratio decidendi*'.[184] According to Lord Halsbury, 'it is by the choice of material facts that the court create law.'[185]

In *All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd*,[186] Abdul Malik Ishak J stated:

> The use of precedent is an indispensable tool in a court of law. It is an indispensable foundation upon which the judge is to decide what is the law and what is its application to individual cases. The only thing that I can see in a judge's decision binding as an authority is the principle upon which the case was decided (see *Osborne v. Rowlett* (1880) 13 Ch. D. 774 at page 785). In my considered view, judicial authority belongs not to the exact words used nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision (see *Close v. Steel Co of Wales Ltd* (1962) AC 367; (1962) 2 ALL ER 953 (HL)). Thus, the enunciation of the reason or principle upon which a question before the court has been decided is said to be binding as a precedent. What constitutes binding precedent is the *ratio decidendi* and this is ascertainable by an analysis of the material facts of the case. It is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the *ratio decidendi* of the case (see *Monk v. Warbey* (1935) 1 KB 75 at page 78 (HL)). It is germane to mention that mere passing remarks of a judge are known as '*obiter dicta*', whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the *ratio decidendi*, have been termed as 'judicial dicta' (see *Richard West & Partners (Inverness) Ltd v. Dick* (1969) 2 Ch 424 at page 413; (1969) 1 ALL ER 289 at 292).



184 Saeesh Naik, '*Ratio Decidendi*: Wambaugh's Test, Goodhart's Test, Lord Halsbury's Test' at http://www.grkarelawlibrary.yolasite.com/resources/FM-Jul14-LT-2-Saeesh.pdf

185 *Ibid.*

186 [1996] 4 MLJ 533.

The table below describes the examples of the *ratio decidendi* in some selected decided cases.

| No. | Case | Material Facts and Legal Issues | *Ratio Decidendi* | Decision |
|---|---|---|---|---|
| 1. | *Donoghue v. Stevenson* [1932] AC 562 | Mrs Donoghue consumed a drink of ginger-beer before her friend discovered a decomposed snail in the bottle. She was not aware of the dead snail because the bottle was made of dark glass. Then, she sued the manufacturer fo negligently causing her nervous-shock and gastroenteritis. The issue before the court was whether the manufacturer is liable for its defective products that caused harm to the consumer. | A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care. | As there was an owed duty, the defendant failed to practise the appropriate standard of care and in turn, the negligent act had caused the injuries to the plaintiff. Hence, the defendant was liable for the negligence. |
| 2. | *Pharmaceutical Society of Great Britain v. Boots Cash Chemist Ltd* [1953] 1 QB 401 | The defendant introduced a self-service system in which the customers had to choose the goods from the shelf and take it to the cashier for payment. The Pharmaceutical Society of Great Britain brought an action against the defendant as the self-service system appeared to be in violation of s. 18 of the Pharmacy and Poisons | Display of a product in a store with a price attached is not sufficient to be considered an offer, but rather it is an invitation to treat. The customer makes an offer to purchase the goods at the cashier and the shop assistant has to decide whether to accept the offer. | The display of goods was not an offer. Instead, the customer by placing the goods into the basket was making the offer to buy the goods and the said offer could either be accepted or rejected by the pharmacist at the cash desk. The contract is concluded in the presence of a pharmacist at the cashier's desk and thus, there was no violation of the Act. |

| | | | | |
|---|---|---|---|---|
| | | Act 1933 which required selling certain poisons with the supervision of a pharmacist. The issue before the court was whether the contract came into existence when the customers selected the items. | | |
| 3. | *Carlill v. Carbolic Smoke Ball Co* [1893] 1 QB 256 | Carbolic Smoke Ball Co advertised in the newspapers that it was offering a £100 reward to any person who still succumbed to influenza after utilising its smoke ball as instructed. The advertisement went on to explain that the company had deposited £1,000 with the Alliance Bank, London as a sign of its sincerity in the matter. Mrs Carlill bought the smoke ball and used it as directed but she still contracted influenza. Later, the defendant refused to make payment when the plaintiff claimed for the reward. The issue was whether an advertisement to the general public promising to pay money to anyone who does something creates a binding contract between the parties. | "Where a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification" per Bowen LJ in *Carlill*'s case. | An offer, to be capable of acceptance, must involve promise by the offeror that he will bind himself if the exact terms specified by him are accepted. In this case there was a legally enforceable agreement, a contract, between Mrs Carlill and the company and accordingly, the plaintiff was entitled to recover the £100 reward. |

| | | | | |
|---|---|---|---|---|
| 4. | *Adams v. Lindsell* [1818] 1 B & Ald 681; (1818) 106 ER 250 | The defendant sent an offer letter dated 2 September to the plaintiff in order to sell fleece at a certain price and requested an answer "in due course of post". The letter was incorrectly addressed and the plaintiff did not receive it until 5 September. On receiving the letter the plaintiff posted a letter of acceptance the same day. This acceptance was received by the defendant on 9 September. However, on 8 September the defendant had sold the goods to a third party.<br>The plaintiff sued the defendant for breach of contract and the issue before the court was: the time in which mutual assent to an agreement occurs in the particular circumstance of a mail contract. | A valid contract came into existence the moment the letter of acceptance was placed in the mail box. | The defendants had therefore breached the contract by selling the fleece to a third party and therefore, were liable for the breach of contract. |
| 5. | *Bridges v. Hawkesworth* [1851] 21 LJQB 75 | The plaintiff who found banknotes on the floor of the defendant's shop had entrusted the cash into the defendant's hand in order to return them to the rightful owner. When the notes were unclaimed after three years, the plaintiff asked that | The money was found in a place which is open to the public and thus the founder of the banknotes had the better title than that of the owner of the shop, against the whole world except the real owner. | The defendant was not entitled to keep the money |

| | | | | |
|---|---|---|---|---|
| | | the notes be given to him, a request which the defendant refused. The issue before the court was whether the finder or the owner of the premises on which the banknotes were found has a superior right to possession of the found property. | | |
| 6. | *South Staffordshire Water Company v. Sharman* [1896] 2 QB 44 | The plaintiff hired the defendant to clean up a pool on their private land. While cleaning, the defendant found two gold rings in the pool. Although the plaintiff had requested for the rings, the defendant refused to hand it over to the plaintiff. The issue before the court was whether the possession of such objects was maintained by the landowner. | "Where a person has possession, of a house or land, with a manifest intention to exercise control over it and the thing which may be upon or in it, then if something is found on the land whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*": per Lord Russel G.J. | Although the defendant was the first to obtain possession of the items, he obtained them for his employer and could claim no title for himself. |
| 7. | *Southern Portland Cement Ltd v. Cooper* [1972] 1 LNS 141, [1974] 1 MLJ 194, PC | The respondent trespassed the appellant's land and while playing on the sandhill, sustained severe injuries by coming into contact with the electric cable buried underneath supplying power to the quarry. In an action for damages, the respondent alleged *inter alia*, breach of duty by the appellants in their capacity as occupiers of the land upon which there was an allurement to children and that he was so allured. | The duty owed to trespassers arises when the occupier knows facts which show a substantial chance that they may come to a place where there is a danger which he has created or knows about, and the duty is discharged by the occupier taking such steps in accordance with the dictates of common humanity and in the light of his own circumstances and financial limitations. | The appellants knew that the children were likely to trespass on the land and the proximity of the cable to the sandhill was highly dangerous to human life and safety. They owed a duty to take reasonable steps to prevent the respondent from being injured and accordingly since no steps had been taken to remove the danger, the appellants were liable. |

| | | | | |
|---|---|---|---|---|
| 8. | *Scott v. Shepherd* 96 Eng. Rep. 525 | Shepherd tossed a lit squib into a crowded market. Willis, a bystander, grabbed the squib and threw it across the market. The squib landed in the goods of Ryal. Ryal grabbed the squib and tossed it away, accidentally hitting Scott in the face and blinded Scott in the eyes. Whether the injury received by the plaintiff arose from the force of the original act of the defendant, or from a new force by a third person. | He who does the first wrong is answerable for all the consequential damages. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. | The defendant was the person who gave the mischievous faculty to the squib. He is therefore liable to answer for the consequences, be the injury mediate or immediate. |
| 9. | *Government of Malaysia & Ors v. Jumat bin Mahmud & Anor* [1977] 1 LNS 29, [1977] 2 MLJ 103, FC | A pupil in primary school age 11, pricked the respondent's thigh with a pin which produced a shock causing the latter to turn round and his eye came in contact with the sharp end of a pencil which the pupil was holding. The issue before the Federal Court was whether there was evidence on which the court could conclude that the injury to the respondent was causally related to any negligence on the part of the appellants. | By reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil. The duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take of his own children. It is not a duty of insurance against harm but only a duty to take reasonable care for the safety of the pupil. | It could not be concluded in this case as a matter of evidence and inference that more probably than not constant vigilance in the classroom would have prevented the injury which the respondent in fact received. |

| | | | | |
|---|---|---|---|---|
| 10. | *Mohd. Raihan Ibrahim & Anor v. Government of Malaysia & Ors* [1982] CLJ 150, [1981] 2 MLJ 27, FC | The first appellant sustained injuries when he was accidentally struck on the head by a hoe (*changkol*) wielded by a fellow pupil in the course of a practical gardening class. The court was faced with the issue whether the respondents were guilty of negligence for not providing proper supervision and for failing to give proper instruction as to the use of agricultural tools. | A school teacher is under a duty to exercise supervision over his pupils when they are in the school premises, either in the classroom or the playground. The degree of supervision depends on the circumstances of each case, such as the age of the pupils and what they are doing at the material time. If the teacher knows that the pupils are engaged in doing acts which are likely to cause injuries to one another, the teacher is under a duty to take steps to ensure the safety of their acts. | The respondents were negligent for failing to take all reasonable and proper steps to prevent the appellant under their care from sustaining the injury and that their teacher did not check the condition of the garden tools nor provided a safe system of holding the gardening class. |

## 19.9 *OBITER DICTA*

'*Obiter dicta*' is a Latin phrase which means something said 'by the way'. According to Salmond, *obiter dicta* are the statements of law which lay down rules that are not significant to the case before the court. These have no connection with the material facts as well as the decision of the case.[187] In this regard, Vaughan CJ observed in the case of *Bole v. Horton*,[188] that: 'An opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary had been broached, is no judicial opinion but a mere gratis dictum.'[189] 'An *obiter dictum* is a conclusion based on a fact the existence of which has not been determined by the court'.[190] 'An *obiter dictum* is a statement of law in the opinion which could not logically be a major premise of the selected facts of the decision.'[191] 'An *obiter dictum* is a statement of law that does not form part of the *ratio decidendi*.'[192]

In a written judgment, the judge may describe a number of situations in which the final judgment would have been different. These statements, however, are *obiter dicta*, or by-the-way or an aside. Sometimes the word *obiter* is used on its own for convenience. For example, if a previous judgment states that a decision would have been different 'if such-and-such had been the case', this is probably *obiter*, and this is not a binding precedent on the current case even if such-and-such is the case now. Therefore, an *obiter dictum* may generally be understood as a



187 Abdul Haseeb Ansari, 'Judicial Precedents: An Expository Study of Civil Judicial System and Shari'ah Court System', *Journal of Islamic Law Review*, vol. 3 (2007), p. 137.

188 [1673] Vaugh 360.

189 L. B. Curzon, *Jurisprudence*, (Macdonald & Evans Ltd, 1979) p. 245.

190 Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge University Press, 1931).

191 (Patterson, 1982).

192 Cross and Harris, Precedent in English Law, 4th edn (Oxford: Clarendon Press, 1991).

statement of law made by a judge on an issue which is not necessary to decide in a case.[193] The decision of the case will still remain unchanged even when it is deleted from the case.

Fundamentally, an *obiter dictum* does not have any binding effect as in the case of a *ratio decidendi*.[194] In fact, only the *ratio decidendi* – the real facts and the real decision – are relevant when applying a binding precedent. A judge can refuse to follow anything in a case except the *ratio decidendi*. Nevertheless, it should be noted that there are some situations where *obiter dicta* carry great value and have considerable weight as persuasive authority.[195] In the case of *Brunner v. Greenslade*,[196] Megarry J referred to 'judicial dicta' and stated that their authority stood somewhere between a *ratio decidendi* and *obiter dictum* as these had a weight nearer to each other.[197]



193 See *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300, FC where the court described *obiter dicta* as 'comment made in passing and without the benefit of mature argument' and a pure *obiter dictum* lacks even persuasive authority.

194 In *William Singam Raja Singam v. Meeriam Rosaline Edward Paul & Ors* [2007] 1 LNS 669, Balia Yusof J stated: "A mere *obiter dicta* of a higher court is not binding upon this court."

195 In *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577, FC, Mohd Ghazali Yusoff FCJ stated: "The *ratio decidendi* of a case is the principle of law on which a decision is based. When a judge delivers judgment in a case he outlines the facts which he finds have been proved on the evidence. Then he applies the law to those facts and arrives at a decision, for which he gives the reason (*ratio decidendi*). The judge may also go on to speculate about what his decision would or might have been if the facts of the case had been different. This is an *obiter dictum*. The binding part of a judicial decision is the *ratio decidendi*. An *obiter dictum* is not binding in later cases because it was not strictly relevant to the matter in issue in the original case. However, an *obiter dictum* may be of persuasive (as opposed to binding) authority in later cases."

196 [1971] Ch 993.

197 L. B. Curzon, *Jurisprudence* (Macdonald & Evans Ltd, 1979), pp. 245-246.

In fact, the *obiter dicta* made by the superior courts are being followed frequently in a number of occasions. A good example is the 'neighbourhood principle' propounded by Lord Atkin in *Donoghue v. Stevenson*.[198] In this case, Lord Atkin made numerous observations with regard to the liability for negligent conducts. One of these was the setting up of the neighbourhood principle by stating that: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'.[199] The word neighbour is further defined in his judgment as '[P]ersons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'[200]

These statements are neither directly related to the material facts nor the decision of the case. On the basis of this principle, however, latter judges develop legal rulings pertaining to negligence cases such as industrial accidents, road accidents and so forth.[201]

Another example is the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union*,[202] where the then newly established Court of Appeal took a 'radical' move to depart from the Privy Council's decision in *South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors*,[203] on the grounds that that decision does not represent good law. The Court of Appeal in fact chose to enforce the *obiter* of the Supreme Court in *Enesty Sdn Bhd v. Transport Workers Union & Anor*,[204] that, 'if there is an error



198 [1932] AC 562.

199 *Ibid.*

200 *Ibid.*

201 James Holland and Julian Webb, *Learning Legal Rules: A Students' Guide to Legal Method and Reasoning*, 6th edn, (Oxford University Press, 2006), pp. 168-169.

202 [1995] 2 CLJ 748 at p. 765, CA.

203 [1980] 1 LNS 71.

204 [1985] 1 LNS 148.

of law on which the award of the Industrial Court is founded, such an error, whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction. Any decision in any award based on an invalid interpretation or construction of the law must surely be a nullity.'

Gopal Sri Ram JCA who delivered the judgment of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan*, succinctly stated the judicial guidance on jurisdictional error, 'An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or a purely administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not ... It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error of law are not closed. But it may be safely said that an error of law would be disclosed when the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed as *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law ... Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted'.[205] The Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor*,[206] accepted the observation in *Syarikat Kenderaan Melayu Kelantan* as setting the correct principles of law. Therefore, an award resulting from an error of law, if committed by the Industrial Court, whether within or outside the parameters of its jurisdiction, may be quashed by an order of *certiorari*.



---

205 [1995] 2 CLJ 748 at p. 765, CA.

206 [1996] 4 CLJ 687, FC. See also *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, FC; *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541, FC.

## 19.10 CONCLUSION

The doctrine of binding precedent has attained the 'status of immutability'.[207] Strict adherence to precedent of the apex court is required so as to ensure certainty, stability and predictability in the judicial process. The courts below are bound by the *ratio* of the apex court irrespective of whether the earlier decision was given *per incuriam*. Therefore, with reference to the observation by the learned judge in *Re Hj Khalid Abdullah*'s case that '*stare decisis* must not be quoted to defend a wrong, when the employment of the apex court decision will not subscribe to substantive justice', it is submitted that the above observation cannot hold in light of the discussion above and further, with reference to the observation of the apex court in *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal*.[208]

In *Dato' Tan Heng Chew*'s case, Abdul Hamid Mohamad FCJ had, while referring to the earlier decisions of this court in *Majlis Perbandaran Pulau Pinang*,[209] and *Mohamed Ezam Mohd Nor*,[210] provided a valuable advice to the courts below: "These judgments, being judgments of the Federal Court, are binding on the Court of Appeal. Whether the Court of Appeal agrees with them or not, it is incumbent upon it to apply the test. However, if the court thinks that it has good reasons for disagreeing with the judgments, it may, while following them, point out why they should be reviewed by this court. But the review, if it



207 See *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577.

208 [2006] 1 CLJ 577.

209 [1999] 3 CLJ 65.

210 [2001] 4 CLJ 701.

were to be done, should be done by this court. Until it is actually done by this court, they remain binding on the Court of Appeal". Again, in *Periasamy Sinnappan v. PP*,[211] Gopal Sri Ram JCA stated:

> They [the High Court judges] are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

From the above, the apex court is suggesting that the courts below may, while following the earlier decision, state the reasons why the apex court should review their own earlier decision. Further, the same matter may be referred on appeal to the upper court for them to reconsider their own earlier decision. This is the solution available to the courts below and certainly the preferred method rather than offending the doctrine. Lastly, Augustine Paul FCJ, in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd*,[212] delivering the judgment of the Federal Court, reminded the judges of the court below that they must strictly adhere to the doctrine. His Lordship stated:

> Gopal Sri Ram JCA is therefore correct in saying that *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769 and *Capital Insurance Bhd v. Aishah bte Abdul Manap & Anor* [2000] 4 CLJ 1 were wrongly decided. Unfortunately, he is not the right authority permitted by law to express such an opinion. As both cases are judgments of the Federal Court, he is bound to follow them whether he agrees with them or not'.

His Lordship added: "We can only add that the castigation of a judge of the High Court for not respecting the doctrine of *stare decisis* must apply with greater force to a judge of the Court of Appeal."



211 [1996] 3 CLJ 187 at pp. 213-214.

212 [2006] 3 CLJ 177, FC.