Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NOS 02–11 OF 2011(W) AND 02–12 OF 2011(W)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG AND ZAINUN ALI FCJJ
22 MAY 2013

Civil Procedure — Inherent powers — Federal Court — Inherent power to review own decision under r 137 of the Rules of the Federal Court 1995 — Instances when power exercisable — Whether substantial plagiarism of contents in judgment in itself sufficient ground for judgment to be set aside under r 137 — Whether evidence of actual bias or real danger of bias shown either in grounds of judgment or conduct of judges — Whether court had absolute discretion to decide whether to answer one or more or none of questions of law posed to it

The applicants in the four notices of motion herein moved the Federal Court to review and set aside its decision to allow the respondents' appeal against a decision of the Court of Appeal. The applicants, who were the respondents in that appeal, sought to seek relief under r 137 of the Rules of the Federal Court 1995 ('r 137') and/or the inherent jurisdiction of the court. They contended that there was alleged copying or plagiarism in the Federal Court's judgment in the appeal in that: (i) the background facts set out in the judgment were substantially copied from the judgment of the trial judge; and (ii) the paragraphs numbered 9 to 55 under the heading of 'Decision' in the judgment were copied verbatim from the submissions of counsel for the first and second respondents without attribution. Whilst conceding that plagiarism per se or substantial copying of a party's submissions — unlike the issue of bias — had never been a ground upon which the Federal Court had previously allowed a review application under r 137, the applicants moved the court to hold that such 'copying' was sufficient ground for the decision to be reviewed. Further or alternatively they contended that the substantial copying was evidence of bias on the part of the court. The applicants submitted, inter alia, that the substantial copying gave the impression the court did not apply its own reasoning process in the determination of the appeal; that it displaced the presumption of judicial integrity, which encompassed impartiality and that it did not show that justice had been done and thereby undermined public confidence in the integrity of the judicial system. The applicants said the reasons for the judgment did not meet the functional requirement of public accountability and raised legitimate concerns about whether there had been miscarriage of justice. They also said the court's failure in its grounds of

judgment to address any of the issues raised in the submissions and arguments of the applicants was strong prima facie evidence of the real danger of bias and/or real likelihood of bias. Apart from the above issues the applicants pointed out that the court had also failed to answer the 22 questions of law that were posed to it when leave to appeal was granted.

Held, dismissing the motions with costs:

(1) The adoption of counsel's submissions as the court's grounds of judgment in itself was not a sufficient ground for the court to set aside the judgment under its inherent power under r 137. It must, however, be added that such practice was not encouraged as it had a tendency to invite a negative perception which went against the presumption of judicial impartiality and accountability. It would also avoid any misapprehension by counsel and litigants (see para 34).

(2) Upon scrutiny of the grounds of judgment of the court it was clear that not all the submissions of the first and second respondents' counsel were adopted by the court. Out of 189 paragraphs of the submissions, only 70 paragraphs were adopted by the court and in so doing the Court inserted its own words in parts of the judgment. All these could not be done without the Judges in fact applying their minds to the issues raised in the appeal. The court did not just blindly adopt the submissions as their judgment (see para 33).

(3) It was settled law in this country that a judgment might only be challenged on the ground of actual bias or real danger of bias and not on the ground of apparent bias. There was no evidence whatsoever, either in the grounds of judgment or in the conduct of the judges, to substantiate the applicants' contention that there existed a real danger or real likelihood of bias on the part of any members of the court (see paras 38 & 41).

(4) The Federal Court was clothed with inherent jurisdiction to remedy any injustice arising from procedural unfairness due to coram failure, breach of the rules of natural justice or if the decision was tainted by actual bias or a real danger of bias on the part of one or more members of the panel. The court's inherent power to review its decision under r 137 was inbuilt or intrinsic in the court as a dispenser of justice and necessary for the proper and complete administration of justice. The power, resident in all courts of superior jurisdiction and essential to their existence, was derived from the inherent jurisdiction of the court to do justice and prevent abuse of process but it could only be exercised in special or exceptional circumstances (see paras 10–12, 19).

(5) The fact that the court at the hearing of the appeal did not answer all of the questions of law that were posed to it did not mean the court had

failed in its duty. Nothing in law or practice required the court to answer all of the questions posed. It was a matter of discretion for the court to decide whether it was necessary to answer all or any of the questions posed. The court might even decide not to answer any of the questions posed if they did not help resolve the issues in the case (see paras 43–45).

[Bahasa Malaysia summary

Pemohon-pemohon dalam empat notis usul telah memohon Mahkamah Persekutuan untuk mengkaji semula dan mengetepikan keputusannya untuk membenarkan rayuan responden terhadap keputusan Mahkamah Rayuan. Pemohon-pemohon yang merupakan responden-responden dalam rayuan tersebut memohon untuk mendapatkan relief di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('k 137') dan/atau bidang kuasa sedia ada mahkamah tersebut. Mereka menegaskan bahawa terdapat dakwaan peniruan atau plagiarisme dalam penghakiman Mahkamah Persekutuan dalam rayuan tersebut bahawa: (i) fakta latar belakang yang ditetapkan dalam penghakiman telah banyak ditiru daripada penghakiman hakim perbicaraan; dan (ii) perenggan-perenggan bernombor 9 hingga 55 di bawah tajuk 'Decision' dalam penghakiman telah ditiru kata demi kata daripada penghujahan-penghujahan peguam bagi pihak responden-responden pertama dan kedua tanpa atribusi. Semasa mengakui bahawa plagiarisme per se atau peniruan ketara penghujahan satu pihak —tidak seperti isu berat sebelah — tidak pernah menjadi alasan yang mana Mahkamah Persekutuan telah pun membenarkan sebelumnya satu permohonan kajian semula di bawah k 137, pemohon-pemohon telah memohon mahkamah ini memutuskan bahawa 'copying' sebegini adalah alasan mencukupi untuk keputusan tersebut dikaji semula. Selanjutnya atau secara alternatif mereka menegaskan bahawa peniruan yang cukup banyak adalah bukti berat sebelah di pihak mahkamah. Pemohon-pemohon berhujah, antara lain, bahawa peniruan yang banyak memberikan tanggapan yang mahkamah tidak menggunakan proses taakulan dalam menentukan rayuan tersebut; bahawa ia telah menggantikan andaian integriti kehakiman, yang melingkungi sifat tidak berat sebelah dan bahawa ia tidak menunjukkan bahawa keadilan telah dilaksanakan dan oleh itu menjejaskan keyakinan awam dalam integriti sistem kehakiman. Pemohon-pemohon tersebut menyatakan sebab-sebab penghakiman yang tidak memenuhi keperluan kebertanggungjawaban awam dan menimbulkan kekhuatiran sah tentang sama ada terdapat kegagalan berlaku keadilan. Mereka juga menyatakan kegagalan mahkamah dalam alasan-alasan penghakimannya untuk mengemukakan mana-mana isu yang ditimbulkan dalam hujah dan alasan pemohon-pemohon adalah bukti prima facie yang kukuh tentang bahaya sebenar berat sebelah dan/atau kemungkinan sebenar berat sebelah. Selain daripada isu-isu di atas pemohon-pemohon menegaskan bahawa mahkamah juga telah gagal menjawab 22 soalan perundangan yang dikemukakan kepadanya apabila kebenaran rayuan diberikan.

Diputuskan, menolak usul-usul dengan kos:

(1) Penerimaan hujah-hujah peguam sebagai alasan-alasan penghakiman

dengan sendiri bukan alasan yang mencukupi bagi mahkamah mengetepikan penghakiman di bawah kuasa sedia adanya di bawah k 137. Walau bagaimanapun, adalah perlu ditekankan bahawa amalan sebegini tidak digalakkan kerana ia mempunyai kecenderungan untuk memberi persepsi negatif yang bercanggah dengan andaian tentang keadilan dan kebertanggungjawaban kehakiman. Ia juga boleh mengelakkan apa-apa salah faham oleh peguam dan litigan-litigan (lihat perenggan 34).

(2) Setelah meneliti alasan-alasan penghakiman mahkamah maka adalah jelas bahawa bukan semua hujah-hujah peguam responden-responden pertama dan kedua diterima oleh mahkamah. Daripada 189 perenggan dalam penghujahan tersebut, hanya 70 perenggan telah diterima oleh mahkamah dan dengan berbuat demikian mahkamah telah memasukkan perkataannya sendiri di beberapa bahagian penghakiman itu. Kesemua berikut tidak boleh dilakukan tanpa hakim-hakim menumpukan minda mereka kepada isu-isu yang ditimbulkan dalam rayuan tersebut. Mahkamah tidak hanya menerima hujah-hujah tersebut sewenang-wenangnya sebagai penghakiman mereka (lihat perenggan 33).

(3) Adalah undang-undang tetap dalam negara ini bahawa penghakiman mungkin hanya dicabar atas alasan berat sebelah sebenar atau bahaya sebenar dan bukan atas alasan yang kelihatan berat sebelah. Tiada keterangan apapun, sama ada dalam alasan-alasan penghakiman atau dalam perilaku hakim-hakim, untuk mengukuhkan hujah pemohon-pemohon bahawa terdapat bahaya sebenar atau kemungkinan sebenar berat sebelah di pihak mana-mana ahli mahkamah (lihat perenggan 38 & 41).

(4) Mahkamah Persekutuan telah diberikan bidang kuasa sedia ada untuk meremedikan apa-apa ketidakadilan yang timbul daripada ketidakadilan prosedur akibat kegagalan korum, pelanggaran rukun keadilan asasi atau jika keputusan dicemari oleh berat sebelah sebenar atau bahaya sebenar di pihak satu atau lebih ahli panel. Kuasa sedia ada mahkamah untuk mengkaji semula keputusannya di bawah k 137 adalah intrinsik dalam mahkamah sebagai pelaksana keadilan dan adalah perlu untuk pelaksanaan keadilan yang teratur dan lengkap. Kuasa, yang terdapat dalam semua mahkamah yang mempunyai bidang kuasa atasan dan penting demi kewujudannya, yang diperoleh daripada bidang kuasa sedia ada mahkamah untuk melakukan keadilan dan mengelakkan penyalahgunaan proses tetapi ia hanya boleh dilaksanakan dalam keadaan khas atau luar biasa (lihat perenggan 10–12, 19).

(5) Fakta bahawa mahkamah semasa perbicaraan rayuan tidak menjawab semua soalan perundangan yang dikemukakan tidak bermakna mahkamah telah gagal dalam kewajipannya. Tiada apa-apa dalam

undang-undang atau amalan mengkehendaki mahkamah menjawab semua persoalan yang dikemukakan. Ia adalah perkara mengenai budi bicara untuk mahkamah memutuskan sama ada ia adalah perlu untuk menjawab semua atau mana-mana persoalan yang dikemukakan. Mahkamah mungkin ingin memutuskan untuk tidak menjawab mana-mana persoalan yang dikemukakan jika mahkamah tidak membantu untuk menyelesaikan isu-isu dalam kes tersebut (lihat perenggan 43–45).]

Cases referred to

Amalan Tepat Sdn Bhd v Panflex Sdn Bhd [2012] 2 MLJ 168, FC (refd)
Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLJ 137; [2008] 6 CLJ 1, FC (folld)
Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285; [2009] 1 CLJ 833, FC (refd)
Cassell & Co Ltd v Broome and another (No 2) [1972] 2 All ER 849; [1972] AC 1136, HL (refd)
Celcom (M) Bhd v Mohd Shuaib Ishak [2011] 3 MLJ 636; [2010] 7 CLJ 808, CA (distd)
Cojocaru (Guardian Ad Litem) v British Columbia Women's Hospital and Health Centre [2011] 7 NWR 82, CA (distd)
Dato' Seri Anwar bin Ibrahim v PP [2010] 6 MLJ 533; [2010] 7 CLJ 397, CA (refd)
Datuk Syed Kechik bin Syed Mohamed v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257, FC (refd)
Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications [2012] 2 MLJ 149, FC (refd)
Harcharan Singh a/l Piara Singh v PP [2011] 6 MLJ 145; [2011] 6 CLJ 625, FC (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 All ER 65, CA (refd)
Medicaments and Related Classes of Goods (No 2), Re [2011] 1 WLR 700 (refd)
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (distd)
MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673; [2002] 3 CLJ 577, FC (refd)
Mohamad Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321, FC (refd)
Nina Kung v Wong Din Shin [2005] HC CU 1254, CA (distd)
R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577; [2000] 1 AC 119, HL (refd)
Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 5 CLJ 201, FC (refd)
Sorger v Bank of Nova Scotia 160 DLR (4th) 66 (refd)
Taylor v Lawrence [2002] EWCA Civ 90, CA (refd)

Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25; [2011] 1 CLJ 51, FC (refd)
Uddin (a child) (serious injury: standard of proof, Re [2005] EWCA Civ 52, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 87, 96(a)
Rules of Court 2012
Rules of the Federal Court 1995 r 137

R Thayalan (VK Lakshmi and Dinesh Nandrajog with him) (VK Lingam & Co) in encl 27(a) of Civil Application No 02–11 of 2011(W) for the first to 14th applicants.
T Gunaseelan (David Gurupatham and Pradeep Kumar with him) (David Gurupatham and Koay) in encl 30(a) of Civil Application No 02–11(W) of 2011 for the first to 11th applicants.
R Thayalan (VK Lakshmi and Dinesh Nandrajog with him) (VK Lingam & Co) in encl 20(a) of Civil Application No 02–12 of 2011(W) for the first to 14th applicants.
T Gunaseelan (David Gurupatham and Pradeep Kumar with him) (David Gurupatham and Koay) in encl 22(a) of Civil Application No 02–12 of 2011(W) for the first to 11th applicants.
Cecil Abraham (Saheran Suhendran and Sunil Abraham with him) (Kadir, Andri & Partners) in encl 27(a) of Civil Application No 02–11 of 2011(W) for the first and second respondents.
Porres P Royan (T Sudhar with him) (Shook Lin & Bok) in encl 27(a) of Civil Application No 02–11 of 2011(W) for the third respondent.
Cecil Abraham (Saheran Suhendran and Sunil Abraham with him) (Kadir, Andri & Partners) in encl 30(a) of Civil Application No 02–11 of 2011(W) for the first and second respondents.
Porres P Royan (T Sudhar with him) (Shook Lin & Bok) in encl 30(a) of Civil Application No 02–11 of 2011(W) for the third respondent.
Cecil Abraham (Saheran Suhendran and Sunil Abraham with him) (Kadir, Andri & Partners) in encl 20(a) of Civil Application No 02–12 of 2011(W) for the first and second respondents.
Porres P Royan (T Sudhar with him) (Shook Lin & Bok) in encl 20(a) of Civil Application No 02–12 of 2011(W) for the third respondent.
Cecil Abraham (Saheran Suhendran and Sunil Abraham with him) (Kadir, Andri & Partners) in encl 22(a) of Civil Application No 02–12 of 2011(W) for the first and second respondents.
Porres P Royan (T Sudhar with him) (Shook Lin & Bok) in encl 22(a) of Civil Application No 02–12 of 2011(W) for the third respondent.

Arifin Zakaria Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] The applicants filed four notices of motion pursuant to r 137 of the Rules

of the Federal Court 1995 ('r 137') and/or under the inherent jurisdiction of the court ('inherent jurisdiction') to review and set aside the decision of the Federal Court dated 5 January 2012, which allowed the respondents' appeal against the decision of the Court of Appeal dated 24 June 2010. The applicants also applied for several consequential orders, other reliefs and costs.

[2] The notices of motion are in encl 27(a) ('the first application') and encl 30(a) ('the second application') in Civil Appeal No 02()–11 of 2011(W) and in encl 20(a) ('the third application') and encl 22(a) ('the fourth application') in Civil Appeal No 02()–12 of 2011(W). They were supported by affidavits of Dato' See Teow Chuan in encl 27(b) and See Tiau Kee in encl 30(b) in Civil Appeal No 02()–11 of 2011(W) and affidavits of Dato' See Teow Chuan in encl 20(b) and See Tiau Kee in encl 22(b) in Civil Appeal No 02–12 of 2011(W).

JURISDICTION UNDER R 137 AND/OR THE INHERENT JURISDICTION OF THE COURT

[3] First, let us consider the jurisdictional issue. These applications were made pursuant to r 137 which provides:

> r 137 Inherent powers of the Court.
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> 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.

[4] There are conflicting decisions of this court on the issue whether this court has the power, be it inherent or as conferred by r 137, to review its own decision. It is hoped that this case will put that issue to rest for good. The respondents in the present case did not seriously challenge the jurisdiction of this court to review its earlier decision, however, they contended that the jurisdiction is very restrictive and is only exercisable in rare and exceptional cases, in order to prevent any injustice arising out of procedural failure.

[5] Except in two instances, this court had consistently held that it possesses such inherent or intrinsic jurisdiction. The divergent view is found in *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2012] 2 MLJ 168. In that case, it was held that this court has no such jurisdiction or power, for the reason that neither the Federal Constitution nor the Courts of Judicature Act 1964 confers such jurisdiction or power on this court, and r 137, being a subsidiary legislation, could not confer such jurisdiction or power on this court. This court, in *Amalan Tepat*, followed the minority view in the case of *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 533; [2010] 7 CLJ 397.

[6] The opposite view is found in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201, there it was said that r 137 does not confer such jurisdiction, it merely declares that this court being a court of law, by necessary implication is conferred with such inherent power, and this inherent power which is derived from the court's inherent jurisdiction must be distinguished from the jurisdiction as conferred by the constitution or by statute (statutory jurisdiction).

[7] Similar view was echoed by Zulkefli Makinudin FCJ (as he then was) in *Dato' Seri Anwar bin Ibrahim*. In that case, he drew a distinction between statutory and inherent jurisdiction, where he said:

> The source of the statutory jurisdiction of the court is the statute itself which will define the limits within which such jurisdiction is to be exercised, whereas the source of inherent jurisdiction of the court is derived from its nature as a court of law and the limits of such jurisdiction are not easy to define.

[8] The above view found support in several English authorities. In *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [1999] 1 All ER 577; [2000] 1 AC 119, where Lord Browne-Wilkinson stated:

> … it must be that Your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of the House. There is no relevant statutory limitation on the jurisdiction of this House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v Broome (No 2)* [1972] 2 All ER 849; [1972] AC 1136 Your Lordships varied an order for costs already made by the House in circumstances where the parties had not had fair opportunity to address argument on the point. However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong (see [1999] 1 All ER 577 at pp 585–586, [2000] 1 AC 119 at p 132).

[9] Similar view was expressed by Lord Woolf CJ in *Taylor v Lawrence* [2002] EWCA Civ 90 where he stated:

> [51] As to these powers, Lord Diplock, who perhaps speaks on a subject of this nature with the greatest authority of any judge, has dealt with the inherent power conferred on a court, whether appellate or not, to control its own procedure so as to prevent it being used to achieve injustice.
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> [52] We would give an illustration of Lord Diplock's approach. It is taken from his speech in *Bremer Vulcan v South India Shipping* [1981] AC 909 at p 977:

> The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiffs choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute. The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.

[53] In our judgment the final words of Lord Diplock, 'the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice' express the situation here under consideration exactly. If more authority is required, reference may be made in a very different context to the speech of Lord Morris of Borth-Y-Gest in *Connelly v DPP* [1964] AC 1254, 1301 where Lord Morris said:

> There can be no doubt that a court which is endowed with particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

[10] Following the above authorities, we are of the considered view 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.

[11] The inherent power may be described as the power which is necessary for the proper and complete administration of justice and such power is resident in all courts of superior jurisdiction and essential to their existence, (see P Ramanatha Aiyar, *The Law Lexicon*, (2nd Ed), Reprint 2010). The rationale behind this inherent power is to safeguard the integrity of earlier litigation process and the correction of injustice.

[12] However, this power can only be exercised in special or exceptional circumstances (per Dame Elizabeth Butler-Sloss P in *Re Uddin (a child) (serious injury: standard of proof* [2005] EWCA Civ 52).

[13] This inherent jurisdiction goes against the principle of finality in the order of court. Lord Woolf CJ in *Taylor v Lawrence* spoke of the tension that exists between this inherent jurisdiction and the principle of finality in litigation. He observed:

> … There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.
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> [55] One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extend to which the complaining party is the author of his own misfortune will also be importance consideration. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave.

[14] Following the above authorities, this court had in a number of cases,

consistently held that this court is vested with such inherent jurisdiction or power (see *Sia Cheng Soon v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 6 MLJ 533; [2010] 7 CLJ 397; *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137; [2008] 6 CLJ 1; *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2009] 1 CLJ 833; and *Harcharan Singh a/l Piara Singh v Public Prosecutor* [2011] 6 MLJ 145; [2011] 6 CLJ 625).

[15] In all these cases, the court is mindful of the fact that this inherent jurisdiction must be exercised with circumspection in order to prevent any abuse of the same. We could not express this better than by adopting the words of Abdul Hamid CJ in *Asean Securities* which reads:

> [4] 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 earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken upon another appeal in a similar case. That is what is usually called 'revisiting'. Certainly, it should not be taken up in the same case by way of review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts. See:
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> (1) *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd Ors* [1986] 1 MLJ 166; [1985] 2 CLJ 423; [1985] CLJ (Rep) 196.
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> (2) *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 CLJ 565.
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> (3) *Allied Capital Sdn Bhd v Mohd Latiff Bin Shah Mohd. & Another Application* [2005] 3 MLJ 1; [2004] 4 CLJ 350, in particular the dissenting judgment of Abdul Hamid Mohamad, FCJ.
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> (4) *Tai Chai Yu v The Chief Registrar of the Federal Court* [1998] 2 MLJ 474; [1998] 2 CLJ 358.

(5) *Chan Yock Cher v Chan Teong Peng* [2005] 1 MLJ 101; [2005] 4 CLJ 29.

(6) *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931.

[5] Coming back to r 137 of the RFC 1995, I have dealt at length on the effect of the rule in *Abdul bin Ghaffar Md Amin v Ibrahim Yusoff & Anor* [2008] 3 MLJ 771; [2008] 5 CLJ 1 and in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201. In the former case I concluded:

> In other words, r 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act and other statutes.

[6] However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused …

In short, in no circumstances whatsoever, this jurisdiction should be used as an avenue of further appeal.

[16] In *Harcharan Singh a/l Piara Singh v Public Prosecutor* [2011] 6 MLJ 145; [2011] 6 CLJ 625, Richard Malanjum (CJSS) expressed similar view where he observed:

[16] Simply put, the rule is nothing more than to declare the obvious that is the inherent power of this court being the apex court of this country 'to prevent injustice or to prevent an abuse of the process of the court'. A court of final instance must be equipped with residual jurisdiction to rehear and reopen its own earlier decision in a fit and proper case (see *Taylor v Lawrence* [2002] 2 All ER 353, and *Re Uddin* [2005] 3 All ER 550). But the rule does not create or provide additional power or new jurisdiction to this court. (See *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137; [2008] 6 CLJ 1). Such must be the legal position as there should be finality in any decision of this court. (See *Allied Capital Sdn Bhd v Mohd Latiff Shah Mohd & Another Application* [2005] 3 MLJ 1; [2004] 4 CLJ 350; *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2005] 1 CLJ 565; *Public Prosecutor v Denish Madhavan* [2009] 5 MLJ 192; [2010] 5 CLJ 635).

[17] Accordingly, where the Court of Appeal is the apex court of any particular case in view of s 87 of the Courts of Judicature Act 1964 ('CJA') then it is also clothed with such inherent power (see *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215; [2009] 6 CLJ 55). And if the High Court is similarly positioned it too has the inherent power (see *Public Prosecutor v Abdullah bin Idris* [2009] 5 MLJ 192; [2009] 5 CLJ 445).

A [18] With respect we are not inclined to agree with some of the earlier views expressed in some judgments of this court and those of the Court of Appeal on the futility of the rule. In our considered view it has its function in view of its declaratory effect.

B [19] Having said the above we hasten to add that in exercising such power this court must be extremely cautious and to do so only in rare and exceptional cases (see *Raja Petra Raja Kamarudin v Menteri Dalam Negeri* [2009] MLJU 194; [2010] 4 CLJ 25; *Lim Lek Van v Yayasan Melaka* [2009] 4 CLJ 665 and *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931). Each application must be scrutinised carefully and thoroughly to C determine if indeed there is any issue to be considered under the rule or for the exercise of the inherent power of the court (see *Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd* [2010] 4 MLJ 483; [2010] 3 CLJ 779).

D **[17]** Zaki Tun Azmi PCA (as he then was) in *Asean Securities* laid down some of the circumstances in which this discretion may be exercised. However, he intimated that the list is not intended to be exhaustive and it is open to the court to determine such application on a case by case basis.

E **[18]** From the authorities, it would appear that an application may be allowed on the grounds of:

(a) bias (*Taylor v Lawrence*);

(b) coram failure (*Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications* [2012] 2 MLJ 149); F

(c) fraud or suppression of material evidence (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577; *Re Uddin*); or

G (d) procedural unfairness (*Cassell & Co Ltd v Broome and another (No 2)* [1972] 2 All ER 849; [1972] AC 1136).

[19] From the above, we can briefly summarise that this court as a court of law is clothed with inherent jurisdiction to remedy any injustice arising from H procedural unfairness due to coram failure, breach of the rule natural justice or that the decision was tainted by actual bias or a real danger of bias on the part of one or more members of the panel. With this as background, we will now proceed to consider the applications before us.

I *The present applications*

[20] The applications before us are premised principally on the ground of the alleged copying or as the applicants put it 'plagiarism' by the court in its grounds of judgment. The applicants in the first and third applications

contended that the alleged 'copying' is a sufficient ground for the decision to be reviewed under r 137. In the event that 'copying' does not in itself constitute a ground on which a challenge under r 137 could be mounted, then the applicants in the first and third applications seek to rely on bias in support of their applications. Counsel for the second and fourth applicants, chose to rely solely on bias in support of their applications.

Plagiarism

[21] The alleged 'copying' or 'plagiarism' complained of by the applicants are in the judgment of the court which they contended is substantially copied from background facts of the learned judicial commissioner and the entirety of the reasons for the 'decision' and every single paragraph of the 'decision' comprising of paras 9–55 were copied word for word from the first and second respondents' counsel submissions without attribution.

[22] To demonstrate the point, the applicants tendered 'Annexure A' containing the grounds of judgment of the court highlighted in pink, green and yellow (pink being the words of the first and second respondents' counsel submissions, green being the words taken from learned judicial commissioner's grounds of judgment and yellow being the words of the court). The applicants advanced ten reasons why this court should reject the earlier judgment of the court, namely:

(1) The reasons for the judgment must be rejected because they cannot be taken to represent the judge's analysis of the issues or the reasoning for his conclusions.

(2) The reasons for judgment do not meet the functional requirement of public accountability.

(3) They cannot satisfy the public that justice has been done.

(4) If such a judgment is accepted, it would undermine support for the legitimacy of the justice system.

(5) When one closely examines the judge's published reasons, laid side-by-side with the respondents' written submission, one is left with indelible impression that the judge could not have applied his own reasoning process to the case.

(6) It is itself cogent evidence displacing the presumption of judicial integrity, which encompasses impartiality.

(7) The reasons are not transparent and persuasive and would risk undermining the confidence of the public in the administration of justice.

(8) Apart from the legal obligation on a judge to give reasons, the form of the judgment is an important factor in the apprehension left by the trial.

(9) When a judge adopts verbatim a brief written by one of the parties, he creates the appearance that he has relinquished his judicial authority to that party.

(10) It raises legitimate concerns about miscarriage of justice.

[23] In support, the applicants referred us to a number of cases from other jurisdictions for our consideration, where the appellate courts criticised the trial judges in the wholesale copying of the submissions of the counsel in their grounds of decisions. One such case is *Cojocaru (Guardian Ad Litem) v British Columbia Women's Hospital and Health Centre* [2011] 7 NWR 82 ('Cojocaru'), the decision of the British Columbia Court of Appeal, the majority judgment per Levine, Kirkpatrick JJA expressed their disapproval of the trial judge's method in arriving at his decision. It reads:

> Despite this hardship for the parties, we are, with great respect, unable to agree with our colleague's fundamental conclusion that the trial judge independently and impartially considered the law and the evidence and arrived at his own conclusions on the complex issues before him. We conclude that the reasons for judgement must be rejected because they cannot be taken to represent the trial judge's analysis of the issues or the reasoning for his conclusions.
>
> On our analysis, the reasons for judgment do not meet the functional requirement of public accountability. They cannot satisfy the public that justice has been done, and would, if accepted, undermine support for the legitimacy of the justice system. On those bases, the reasons do not allow for meaningful appellate review.
>
> When one closely examines the trial judge's published reasons, laid side-by-side with the respondents' written submissions, one is left with the indelible impression that the trial Judge could not have applied his own reasoning process to the case.

[24] The Columbia Court of Appeal in that case allowed the appeal and ordered a new trial. However, the dissenting view of K Smith JA is highly relevant for our consideration where in paras 29–30 he said:

> 29 The question, then, is whether a reasonable and informed person, considering all the circumstances, would apprehend that the trial judge failed to independently and impartially consider the evidence and the law and to arrive at his own conclusions on the issues. Such an allegation must be given careful consideration since it calls into question not only the personal integrity of the judge but the integrity of 'the entire administration of justice', and therefore 'cogent evidence' will be required to rebut the presumption of integrity: *R v S (RD)* [1997] 3 SCR 484 at paras 113, 117, 151 DLR (4th) 193 (SCC). An informed person, in these circumstances, is one who is taken to know all the relevant circumstances of the case and is familiar on a realistic and practical level with the work of trial judges and with the values underlying the presumption of integrity: *R v S (RD)* at paras 111, 134. In my view, such a person would not infer from the reasons in this case that the trial judge to his decision has not been displaced.

> 30 I would add that there is nothing inherently wrong with adopting the submissions of a party in whole or in part as reasons for judgment so long as those submissions truly and accurately reflect the judge's own independent analysis and conclusions. Trial judges are busy, and there can be cases, of which Gaudet and Ni-Met Resources Inc are examples, where a party's submissions so accurately reflect the trial judge's — reasoning that nothing would be gained by postponing other pressing work in order to rewrite the reasoning and conclusions in the judge's own words. However, judges who are tempted to prepare reasons for judgment in this way should be acutely aware they may create a perception that they did not reach their decisions independently. Such a perception would tend to undermine public confidence in the impartiality and independence of the judiciary generally and would bring the administration of justice into disrepute: *R v S (RD)* at para. 111.

[25] The approach taken by K Smith JA is that, it does not follow that where the trial judge was found to have adopted the submissions of a party, the judgment should automatically be set aside. We need to consider further, whether on its proper analysis the judgment truly and accurately reflects the judge's own independent analysis and conclusions.

[26] In *Sorger v Bank of Nova Scotia* 160 DLR (4th) 66 (CA), the Ontario Court of Appeal likewise allowed the appeal and ordered a new trial on the ground of substantial copying by the trial judge. The material facts in that case from the head notes briefly are as follows:

> Plaintiffs brought an action against their former solicitor, bank and bank manager claiming breach of fidicuary duty, breach of contract and negligence in relation to a mortgage loan on which a primary debtor had defaulted. Without a request from the defendants, the trial judge directed the plaintiffs to begin their case by calling evidence to demonstrate efforts taken to recover their money from the primary debtor. The trial judge subsequently rescinded this direction. The trial judge also made adverse comments during the trial concerning the plaintiffs' credibility. He also directed the plaintiffs' counsel to proceed more expeditiously. The trial judge dismissed the action and his reasons for judgment contained no analysis of the evidence or consideration of the relevant jurisprudence. The plaintiffs appealed.

[27] This is what the court observed in relation to the findings by the trial judge, at paras 27 and 30–32 of the judgment:

> [27] The final factor for consideration springs from the reasons for judgment. This was a lengthy trial. The reasons for judgment are 128 pages. The first one and one-quarter pages simply identify the parties and set out the issues. The following 124 and three-quarter pages simply reproduce the written submissions of the parties. In the final two pages, the trial judge enumerates twenty-nine bald findings of fact, all taken verbatim from the respondents' material.
>
> [30] The trial judge then concludes his reasons as follows:

'I make these findings because I preferred the evidence of the defendants' witnesses and the arguments by counsel for the defendants were the more persuasive.

Accordingly, the action is dismissed against all defendants.'

[31] The judgment ends without any analysis of the evidence and with no consideration of any relevant jurisprudence. There is nothing to indicate that the trial judge attempted to grapple fairly and impartially with the case presented by the plaintiffs or decide it independently. Apart altogether from the legal obligation, if any, on a trial judge to give reasons, the form of the judgment here is an important factor in the apprehension left by the trial.

[32] Taking the factors we have referred to together, the cumulative effect is, in our view, unfortunately clear. A reasonable and informed observer would have a reasonable apprehension that the mind of the trial judge was closed to a fair and impartial consideration of the appellants' case. There is a reasonable apprehension of bias. The appellants' primary ground of appeal must succeed.

[28] The other case cited to us by the applicants' counsel is *Nina Kung v Wong Din Shin* [2005] HC CU 1254. This case involved a challenge on the validity of a will. After a full trial, the trial judge held that the will together with three other documents were forgeries. The Court of Appeal by a majority upheld the decision. On appeal to the Hong Kong Court of Final Appeal, the decision of the trial judge was reversed. In that case, Ribeiro PJ noted that 95% of counsel's submissions were copied by the trial judge and the court made the following observation as regard the approach adopted by the trial judge in arriving at his decision:

453. Legitimate concerns as to whether Yam J did bring an independent mind to his judicial function do arise in the present case. Two instances which have been examined above in some detail illustrate the grounds for such doubt.

(a) It will be recalled that Yam J inexplicably reversed himself when, reproducing verbatim a submission to such effect, he called the appellant's concerns causing her to resist opening of the sealed envelope 'daft and illogical' whereas he had previously fully accepted those concerns as legitimate in a ruling made prior to the start of the trial (see s K 1 above).

(b) It will also be recalled that, again copying verbatim from Mr Chan's submissions, he once more reversed himself, going so far as to accuse Professor Jia of dishonesty when he had in the course of the hearing secured acknowledgement from Mr Chan that Professor Jia's rejection of a suggestion would be 'an end of the matter' (see s 0.4 above).

454. The point about these examples is that they suggest that the judge

reproduced the copied material without giving any genuine thought to the issue at hand. If in each of these cases Yam J had thought independently about the issue rather than merely copying the respondent's submissions, he would surely not have made findings wholly incompatible with considered positions he had previously taken unless he was able to articulate grounds for changing his stance.

455. It is therefore my view that the extent of the copying in such circumstances gives rise to doubts as to whether Yam J did bring an independent mind to bear on his judicial decision-making, this being a ground of complaint which the Court of Appeal did not sufficiently acknowledge.

456. The point is, however, academic. Even accepting that the appellant had legitimate grounds for doubting whether she had received a fair trial at first instance, those grounds disappeared after the 28 day hearing in the Court of Appeal. It was accepted on both sides that the Court of Appeal was in as good a position as the trial judge to draw the necessary inferences and to come to the ultimate conclusion of fact. There is no question of any lack of independent judicial thought in the Court of Appeal as the three separate judgments, one dissenting, make clear. Moreover, in this court, the complaint is academic for the additional reason that the appeal succeeds on substantive grounds.

In that case, the court went on to hold that the issue of plagiarism was academic as the appeal was reversed on substantive grounds.

[29] A similar issue was raised before our Court of Appeal in the case of *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636; [2010] 7 CLJ 808. In that case, the issue of wholesale copying of counsel submissions was raised as a point of appeal. Abdull Hamid Embong JCA (as he then was) approached the issue in the following manner:

[4] Learned counsel for the appellant in the opening remarks of his submission criticised the judge for almost totally adopting the submission of the respondent as his grounds of judgment. A comparative table of the judgment matching with the parallel passages in the respondent's submission was presented to us to press home the point that the learned judge had completely ignored the submission of the appellant. While we do not approve of the method adopted by the learned judge in producing his judgment, we say that this itself cannot be a basis to strike down that judgment, although it was strongly urged by the appellant, that judgment was flawed in not considering the counter arguments of the appellant. These flaws were presented to us as the grounds of this appeal which we now consider.

[30] The Court of Appeal expressed its disapproval of the method adopted by the trial judge in substantially copying the submissions of counsel but held that that in itself cannot form the basis to strike down the judgment. The court then went on to allow the appeal on substantive merit.

[31] In the present case, counsel for the applicants submitted that the substantial copying as stated earlier amounts to the court not applying its mind at all to the issues before it. It did not critically analyse the issues raised by the applicants and in substantially adopting the submissions of counsel for the first and second respondents it failed in its duty to do justice to the applicants. In his submissions, learned counsel in the first and third applications conceded that 'plagiarism' per se or substantial copying of one party's submissions does not constitute a ground upon which this court had previously allowed a review application under r 137. But it was contended that, as stated in *Asean Securities* the list as set out therein is not exhaustive and he accordingly urged this court that, in the circumstances of this case, the applications ought to be allowed on this new ground. Learned counsel in the second and fourth applications on the other hand, contended that substantial copying by the court of the first and second respondents' written submissions shows that the court was biased in favour of the respondents. Counsel in the first and third applications also seeks to rely on bias as an alternative ground in the event that the court is not with him on 'plagiarism' issue.

[32] Having given the issue anxious consideration, we are of the view that this case must be distinguished from the cases cited to us by the applicants' counsel. It must be emphasised that the applications before us are review applications. They are not appeals. The appeals are already over. The cases had gone through the full appeal process at two levels: before the Court of Appeal and the Federal Court. At the Court of Appeal, the finding of the High Court was reversed and the Court of Appeal had rendered its grounds of judgment. Both the grounds of judgments of the High Court and the Court of Appeal were before the Federal Court. The hearing before the Federal Court stretched over a period of two days and the applicants were given full liberty to make their submissions. Written submissions were also filed by the parties. In fairness to the panel, we have to assume that they must have considered the judgments of the courts below and the submissions of the parties, both oral and written, before arriving at their decision. In short, there has been due process.

[33] Further, upon scrutiny of the grounds of judgment of the court, it is clear that not all the submissions of the first and second respondents' counsel were adopted by the court. Out of 189 paragraphs of the submissions, only 70 paragraphs were adopted by the court. And in so doing, the court inserted their own words in parts of the judgment. All these could not be done without the learned judges in fact applying their minds to the issues raised in the appeal. In short, we would say that the court did not just blindly adopt the submissions of the first and second respondents' counsel as their judgment. As was said by K Smith JA in *Cojocaru* 'there is nothing inherently wrong with adopting the

submissions of a party in whole or in part as reasons for judgment so long as those submissions truly and accurately reflect the judge's own independent analysis and conclusion'.

[34] For those reasons, we are of the view that the adoption of counsel's submissions as the court's grounds of judgment in itself is not a sufficient ground for us to set aside the judgment under our inherent power as declared in r 137. However, we must add that, we do not encourage such practice as it has a tendency to invite a negative perception, which goes against the presumption of judicial impartiality and accountability. This is to avoid any misapprehension by counsel and litigants.

Bias

[35] The next issue raised is that of bias. It is settled law that bias is one of the grounds accepted by the court as a basis for a review under r 137. This is founded on the simple reason that if the court's decision is tainted by bias, there can be no justice and as such the decision ought to be vitiated. In England, bias has been classified into two broad categories namely: actual bias and apparent bias. In *Pinochet* (No 2), Lord Browne-Wilkinson spoke of these two categories, he observed:

> As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.
>
> The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

[36] Similarly, Lord Philips MR in *Re Medicaments and Related Classes of Goods (No 2)* [2011] 1 WLR 700 at paras 38–39 of the judgment said:

38. The decided cases draw a distinction between 'actual bias' and 'apparent bias'. The phrase 'actual bias' has not been used with great precision and has been applied to the situation

(1) where a judge has been influenced by partiality or prejudice in reaching his decision and

(2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party.

'Apparent bias' describes the situation where circumstances exist which give rise to a reasonable apprehension that the judge may have been, or may be, biased.

39 Findings of actual bias on the part of a judge are rare. The more usual issue is whether, having regard to all the material circumstances, a case of apparent bias is made out.

[37] It is commonly accepted that a finding of actual bias is rare, not only because the court will not allow an accusation of actual bias to be made against it, but more importantly it would be extremely difficult to prove it (see *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65).

[38] In the present applications before us, both the counsel conceded that they are not relying on actual bias as such, but instead on apparent bias arising out of the contents of the judgment, which was substantially copied from submissions of counsel for the first and second respondents. They contended that the content of the judgment is evident of the apparent bias on the part of the court. It is settled law that, in this country a judgment may only be challenged on the ground of actual bias or real danger of bias and not on the ground of apparent bias (see *Mohamad Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501). In *Metramac*, the court held that there was a real danger of bias as apparent from the content of the judgment of the court. At para 98 the court stated:

[98] We are therefore inclined to agree with the submission of learned counsel for the appellant that the remarks and findings found particularly in the main judgment of the Court of Appeal are not supported by evidence 'yet they 'make use of injudicious, unfair and extravagant language' in such extreme, outspoken and unbalance terms in that they were 'out of all proportion to or not commensurate with the circumstances before the court' and they excite an apprehension that the Court of Appeal might not bring an unprejudiced mind to the resolution of the matter before it. There is indeed a real danger that the appellant's case had been unfairly regarded with disfavour, and its argument were not addressed by the Court of Appeal although they were either submitted or apparent from the record of appeal.' In short the element of real danger of bias is present especially in the main judgment of the Court of Appeal.

On that ground, the court in *Metramac* allowed the appeal and set aside the decision of the Court of Appeal and restored the decision of the High Court.

[39] In the present case, counsel for the applicants contended that the substantial copying which occurred here, is evident of the lack of impartiality on the part of the court in arriving at its decision. Much reliance was placed on what was said in *Cojocaru* which reads:

> … The form of the reasons, substantially a recitation of the respondents' submissions, is in itself 'cogent evidence' displacing the presumption of judicial integrity, which encompasses impartiality. We have concluded that a reasonable and informed observer could not be persuaded that the trial judge independently and impartially examined all of the evidence and arrived at his own conclusions.

Further, the applicants contended that the failure of the court to address any of the issues raised in the submissions and arguments of the applicants in its grounds of judgment is a factor pointing to a strong prima facie evidence of the real danger of bias and/or real likelihood of bias as in the case of *Metramac*.

[40] Having considered the submissions of counsel for the applicants, we are of the view that the present case must be distinguished from *Metramac*, as in that case the court found the Court of Appeal had made such 'injudicious and unfair' remarks, which the court concludes, could give rise to an apprehension that the Court of Appeal did not bring an unprejudiced mind to the case and hence there was indeed a real danger of bias.

In the present applications, the applicants relied solely on the substantial copying of the submissions of the counsel for the first and second respondents in support of their contention. We find, that alone is not sufficient to support such a serious allegation levelled against the court.

[41] Further, it is our finding that there is no evidence whatsoever, be it in the grounds of judgment or conduct of the judges, to substantiate the applicants' contention that there exists a real danger or real likelihood of bias on the part of any members of the court. For those reasons, this ground also fails.

Questions of law

[42] The other issue raised by the applicants is the failure of the court to answer the questions as framed and approved by the leave panel. In this case, there were a total of 22 questions posed to the court. Under s 96(a) of the Courts of Judicature Act 1964 ('the CJA'), an application for leave to appeal will have to be supported by an affidavit containing the proposed questions of law for the court to answer (see *Datuk Syed Kechik bin Syed Mohamed v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999]

A 1 MLJ 257; and *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25; [2011] 1 CLJ 51).

[43] It is the task of the applicants' counsel to frame the questions of law based on particular facts of the case. This is by no means an easy task. Out of
B caution, counsel tends to frame as many legal questions as they could possibly come up with and at the end of the day, it is for the court to determine whether the questions pass the threshold of s 96(a) of the CJA or not, and if so, which of the questions merit consideration of the court. Once leave is granted, the matter is then set down for the hearing on the appeal proper. At this juncture,
C it is really a matter for the court to determine whether it is necessary to answer all or any of the questions posed. The court may even decide that the questions as posed would not help to resolve the issues in the case and decide not to answer the questions at all. That is perfectly within the discretion of the court.

D **[44]** In the event that the court decides to answer the questions, there is nothing in law or practice requiring the court to answer all the questions. It may for instance find that the answer to one or more of the questions is sufficient to dispose of the appeal.

E **[45]** In the present case, we noticed that not all the questions were answered by the court, but that does not mean that the court has failed in its duty. As we said earlier, this is a matter of discretion for the court to decide. It is not open to us in an application under r 137 to consider whether the court had acted
F correctly or not as it did, because that would tantamount to going into the merit of the case.

This answers the issue raised by counsel for the applicants on the failure of the court to answer the questions raised by them in the appeal.

G CONCLUSION

[46] For the above reasons, we find that there is no merit in the applications and accordingly we dismiss the same with costs. We now invite parties to address us on the quantum of costs.

H

Motions dismissed with costs.

Reported by Ashok Kumar

I