

## THE JUDICIAL COMMITTEE (AMENDMENT) ACT 1989

*Introduction*

THE constitution and power of the Judicial Committee of the Privy Council to hear appeals from Her Majesty's Commonwealth are set out in the Judicial Committee Act 1833<sup>1</sup> and by this Act, appeals from Commonwealth countries which retain the right of appeal to Her Majesty's Privy Council are heard by a committee called the Judicial Committee of the Privy Council.<sup>2</sup> This committee consists of the Lord President of the Council, the Lord Chancellor, ex-Lord Presidents, the Lords of Appeal in Ordinary and such other members of the Privy Council as from time to time hold or have held high judicial office.<sup>3</sup> Singapore retained the right to have appeals heard by the Judicial Committee by the enactment of the Judicial Committee Act.<sup>4</sup>

*The 1989 Amendments*

The Judicial Committee (Amendment) Bill was introduced in Parliament on 28 March 1989.<sup>5</sup> It was passed by Parliament on 7 April 1989<sup>6</sup> (the "Amendment Act"). The amendments provided in this Act ("the 1989 Amendments") to the Judicial Committee Act<sup>7</sup> essentially restrict the right of appeal to the Judicial Committee. This Amendment Act came soon after two other Acts were passed also restricting the right of appeal to the Judicial Committee.<sup>8</sup> The restriction imposed in these two earlier Acts is absolute in that there shall be no appeal against the decision of the Court of Appeal in matters covered by the said two Acts, namely, cases involving detention of persons under the Internal Security Act,<sup>9</sup> and disciplinary actions against advocates and solicitors under the Legal Profession Act.<sup>10</sup> The Amendment Act affects appeals in criminal as well as civil cases.

<sup>1</sup> 3 & 4 Will. 4. c.41.

<sup>2</sup> Hereafter referred to as the "Judicial Committee".

<sup>3</sup> The positions considered "high judicial office" are set out in section 5 of the Appellate Jurisdiction Act 1876, namely, Lord High Chancellor of Great Britain, member of the Judicial Committee of the Privy Council, Lord of Appeal in Ordinary, judge of the Supreme Court of England or Northern Ireland or of the Court of Session in Scotland.

<sup>4</sup> No. 37 of 1966.

<sup>5</sup> Bill No. 25 of 1989.

<sup>6</sup> Act No. 21 of 1989.

<sup>7</sup> Cap. 148, 1985 Rev. Ed., Singapore Statutes.

<sup>8</sup> The Internal Security (Amendment) Act, No. 2 of 1989 and the Legal Profession (Amendment) Act, No. 12 of 1989.

<sup>9</sup> See the Internal Security (Amendment) Act, No. 2 of 1989.

<sup>10</sup> This Act came into force on 21 April 1989.

*Criminal Matters*

The right of appeal to the Judicial Committee in criminal matters was subject to some debate as to whether it is available in all criminal matters.<sup>11</sup> That debate notwithstanding, prior to the Amendment Act, all criminal matters which are heard in the High Court may proceed by way of appeal to the Court of Criminal Appeal and from that court to the Judicial Committee. Where a criminal matter is heard in the subordinate courts it may proceed by way of appeal to the High Court<sup>12</sup> and if the Public Prosecutor is dissatisfied with the decision of the High Court he may appeal against that decision to the Court of Criminal Appeal and thence to the Judicial Committee. Where, however, the accused is dissatisfied with the decision of the High Court he must obtain leave from that court to appeal to the Court of Criminal Appeal. Leave will generally not be granted unless the applicant accused can show that the appeal involves some "question of law of public interest which has arisen in the course of the appeal the determination of which by the judge has affected the event of the appeal".<sup>13</sup> If he fails to obtain leave from the High Court he may seek special leave from the Court of Criminal Appeal itself but if he is refused such leave he may not proceed to the Judicial Committee.<sup>14</sup> Attempts have been made with no success by asking for the special leave of the Judicial Committee.<sup>15</sup> The Judicial Committee has stated *ad nauseum* that it is not a Court of Appeal in criminal matters and will exercise its jurisdiction sparingly and only in very clear cases where the rules of natural justice have not been followed.<sup>16</sup> There was therefore no restriction as to the type of offences which may be heard by the Judicial Committee on appeal before the 1989 Amendments. The Amendment Act now provides that with respect to criminal matters there shall be no appeal to the Judicial Committee unless the offence in question involves the death penalty or life imprisonment and that the decision of the Court of Criminal Appeal was not unanimous.<sup>17</sup> It should be noted that the Court of Criminal Appeal will ordinarily deliver only one judgment unless the presiding judge directs otherwise.<sup>18</sup> This presumably covers cases when there is a dissenting judgment.<sup>19</sup> In addition to these two conditions, the previous conditions restricting appeals on matters concerning questions of law of public interest presumably still apply as section 60 of the Supreme Court of Judicature Act has not been repealed or amended in this respect.

<sup>11</sup> See the exchange of letters between the Public Prosecutor and David Marshall reported in [1969] 2 MLJ ixv; [1970] 1 MLJ xiii; and [1970] 1 MLJ xxiv.

<sup>12</sup> See section 19 of the Supreme Court of Judicature Act, Cap. 322, 1985 Rev. Ed., Singapore Statutes.

<sup>13</sup> See section 60(1) of the Supreme Court of Judicature Act.

<sup>14</sup> *J B Jeyaratnam v. Law Society of Singapore* [1988] 3 MLJ 425 at p. 430.

<sup>15</sup> As in the *Jeyaratnam* case.

<sup>16</sup> Practice Direction (1932) 48 TLR 224 PC.

<sup>17</sup> See section 3(3) of the Judicial Committee Act as amended by the Amendment Act.

<sup>18</sup> Section 56(2) of the Supreme Court of Judicature Act.

<sup>19</sup> Section 56(2) of the Supreme Court of Judicature Act appears to encourage the delivery of a single judgment where there is unanimity in the result of the appeal.

*Civil Matters*

The right to appeal to the Judicial Committee is set out in section 3 of the Judicial Committee of the Privy Council Act<sup>20</sup> and one of the main criteria is that the appeal must involve a sum of \$5,000 or more.<sup>21</sup> In *Lopez v. Valliappa Chettiar*,<sup>22</sup> the Judicial Committee held that if the conditions stated in the Judicial Committee Act are satisfied the appellant has a right of appeal and notwithstanding the requirement of obtaining leave (which implies a discretionary power of refusal) leave must be given. The decisions of a District Court in civil claims are subject to appeal to the High Court and from there to the Court of Appeal and finally, to the Judicial Committee. Appeals against a Magistrate's decision may also go to the Judicial Committee because the jurisdiction of the Magistrates Courts in civil matters was increased to \$10,000 in 1986.<sup>23</sup>

*The 1989 Amendments*

The prohibitions in the 1989 Amendments when they come into force will apply to all pending civil as well as criminal cases. Appeals, applications for leave or applications for special leave made before the commencement of the Act are not affected by the 1989 Amendments and such cases are the only exceptions to the applicability of the Act. This may cause anxiety in some litigants who have already commenced proceedings and who may have harboured hopes of having their lost causes regained through the Judicial Committee. Indeed, shortly after the passing of the Act but before the Minister had appointed the date for the operation of the Act, the Asian Wall Street Journal (which had by counsel submitted arguments before the Court of Appeal and was awaiting the reserved judgment of the Court) made an application by counsel for an immediate judgment on the ground that it had invested large sums of money in commencing action because of the prospect that it may have its case argued before the Judicial Committee if need be.<sup>24</sup> The Court of Appeal rejected the plea for an immediate judgment.<sup>25</sup> The Amendment Act was in fact brought into force by notification on 21 April 1989.<sup>26</sup>

There is no provision in the Amendment Act to allow parties to consent after the Court of Appeal has delivered judgment. The party in whose favour the appellate judgment is given will sensibly not wish to give his consent but some judgments may not please all parties concerned and each may wish to appeal on different aspects and for different reasons. It may be argued that the refusal to give consent is a benefit which the parties may waive. On the other hand it may be said that the right to consent is a statutory right and cannot therefore be embellished in any way. It will

<sup>20</sup> Cap. 148, 1985 Rev. Ed., Singapore Statutes.

<sup>21</sup> See section 3(1)(a) of the Judicial Committee of the Privy Council Act, Cap. 148, 1985 Rev. Ed., Singapore Statutes.

<sup>22</sup> [1968] 1 MLJ 224.

<sup>23</sup> See section 52 of the Subordinate Courts Act Cap. 321, 1985. Rev. Ed., Singapore Statutes.

<sup>24</sup> *The Straits Times*, 11 April 1989.

<sup>25</sup> *The Straits Times*, 12 April 1989.

<sup>26</sup> Singapore Government Gazette, Subsidiary Legislation S.172/89.

be noted that Form 46 in Appendix A of the Rules of Supreme Court 1970 (hereafter referred to as the "RSC") sets out the orders which the parties require at a summons for directions under Order 25 of the RSC. Item 27 of Form 46 states that "By Consent, (the right of appeal may be excluded) (any appeal be limited to the Court of Appeal) (any appeal be limited to questions of law only)". The current practice is that if both parties do not wish to limit their right of appeal this item is crossed out. If the parties cannot agree the court will make such order as it may think fit. Item 27 has not been a problem so far. The Court is loathe to cut off any avenue of appeal if it is available. However, as a party can now withhold his consent his preference must necessarily prevail. One pitfall is that a party may indicate (by omission) in his contract that he does not wish to have the Judicial Committee as the final Court of Appeal but on the application for summons-for-direction he omits to indicate on item 27 accordingly. This may well be argued as a waiver and a change of position.<sup>27</sup>

There are some other problems. Section 11(1) of the Civil Law Act,<sup>28</sup> which in essence, reproduces a provision in the Law Reform (Married Women and Tortfeasors) Act<sup>29</sup> of England permits a tortfeasor to claim contribution against a fellow or joint tortfeasor in such proportion as the court may adjudicate. This right applies whenever two or more persons are adjudicated joint tortfeasors in any claim founded in tort. After the Amendment Act there may well be cases involving two or more defendants where the Court of Appeal holds that the plaintiff has failed to prove his case. If only one of say, two defendants had agreed beforehand to have the Judicial Committee as the final court of appeal, and the Judicial Committee in its judgment holds that both defendants are equally liable, how will the one defendant claim any contribution from the other?<sup>30</sup> The Amendment Act<sup>31</sup> states that the party that does not consent to go before the Judicial Committee will only be bound by the decision of the Court of Appeal. It may be that the Civil Law Act has to be amended. There are similar problems in other areas of law. An example is the instance of a guarantor being sued together with the principal debtor and the Court of Appeal holds that they are not liable to the plaintiff creditor because the principal debtor is not in default.<sup>32</sup> In this situation, on appeal to the Judicial Committee, the Committee may disagree and take the view that the principal debtor was in default and, accordingly, the guarantor must be liable. This may even have the effect of blurring the distinction between a contract of guarantee and a contract of indemnity.<sup>33</sup> A similar anomaly

<sup>27</sup> There is no equivalent to form 46 in the Subordinate Courts Rules 1986 but any lacuna is filled by adopting the corresponding provision in the RSC (see Order 1 Rules 2(4) Subordinate Courts Rules 1986).

<sup>28</sup> Cap. 43, 1985 Rev. Ed., Singapore Statutes.

<sup>29</sup> See section 6(1) of the Law Reform (Married Women and Tortfeasors) Act (25 & 26 Geo. 5, c.30).

<sup>30</sup> The Judicial Committee may apportion liability even if the other defendant is not subject to its order but the enforcement and claim for contribution are separate issues.

<sup>31</sup> See the new section 3(3) of the Judicial Committee Act, Cap. 148, 1985 Rev. Ed., Singapore Statutes.

<sup>32</sup> *Becharvaise v. Lewise* (1872) L.R. 7 C.P. 372.

<sup>33</sup> In the latter case the person who gives the indemnity can be liable to the creditor as long as the creditor has suffered loss and need not wait till the principal debtor has committed an act of default.

will arise if the Court of Appeal holds that the contract between the principal debtor and the plaintiff creditor is void and unenforceable<sup>34</sup> while the Judicial Committee on appeal holds the contract to be valid and binding. Further examples may be multiplied in other areas of law.<sup>35</sup>

This leads to a related difficulty. If there is a difference in view between the Court of Appeal and the Judicial Committee, will a lower court accept the decision of the Court of Appeal in the hope that the parties will not consent to go before the Judicial Committee or will it accept the Judicial Committee's decision as binding on the ground of *stare decisis*?

### Conclusion

It has sometimes been said that the retention of the Judicial Committee is to bolster the confidence of investors. Another view is that the most desirable form of confidence is confidence in the local courts. Indeed, a great number of Commonwealth countries have already abolished the right of appeal to the Judicial Committee entirely.<sup>36</sup> The mechanism of "consent" under the 1989 Amendments is double-edged. It may encourage confidence in the Court of Appeal and Court of Criminal Appeal if sufficient numbers of corporate bodies decline to give their consent to have the Judicial Committee as the final court of appeal but this leaves the invidious decision to businessmen who must know that an inclusion of a "consent" clause in their contractual documents is an indication of shaky confidence in the Court of Appeal.<sup>37</sup> If the Judicial Committee is to be retained at all, no matter how big or small a role it will play, an alternative to the concept of "consent" by the parties is the abolition of all civil appeals to the Judicial Committee except cases involving commercial law. After all, Section 5 of the Civil Law Act provides that the law applicable in England is the law applicable in Singapore in mercantile matters. This may be the ideal interim solution since an important consideration in support of the restriction on appeals to the Judicial Committee is that the British judges who sit in the Judicial Committee have little or no knowledge of local conditions and are thus not best placed to handle cases from Singapore.<sup>38</sup> One reason advanced for the introduction of the "consent" concept is that parties need not be forced to bear additional costs of appeal against their wishes.<sup>39</sup> This may be true but there is normally the consolation that a large part of costs may be recovered if the party succeeds in his appeal — if his case is undeserving then surely it is equally undeserving of him to save costs.

<sup>34</sup> See *Coutts & Co. v. Browne-Lecky* [1947] K.B. 104.

<sup>35</sup> Such as disputes involving a consignee, a shipper and a carrier.

<sup>36</sup> For example, Aden, Botswana, Burma, India, Canada, Cyprus, Pakistan, Sri Lanka, Malta, Malaysia, Kenya, Tanzania, Uganda, Sierra Leone, Somaliland, Ghana, Nigeria, Lesotho and Guyana.

<sup>37</sup> This is particularly so where one party is a big corporate body and the document is one of its standard contract forms.

<sup>38</sup> See the report on the speech in Parliament by the Law and Home Affairs Minister, Professor S. Jayakumar in *The Straits Times* of 8th April 1989.

<sup>39</sup> See the report on the speech in Parliament by the Law and Home Affairs Minister, Professor S. Jayakumar in *The Business Times* of 8th April 1989.

The difficulties of the 1989 Amendments may not be easy to resolve and a sound solution may be to abolish the right to appeal to the Judicial Committee entirely. There must come a time when reliance on a foreign tribunal is no longer necessary nor justifiable. The Amendment Act may be an indication that that time is near.

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