Singapore Journal of Legal Studies
[1997] 1 – 49

THE INHERENT POWERS OF THE COURT[1]

This article examines the source, nature and scope of the inherent powers of the court, as well as the relationship between these powers and the court's procedural mechanism. It has often been the view that the inherent jurisdiction of the English court is applicable in Singapore without qualification. This assumption must be considered in the light of the jurisdictional developments which have occurred since the 1960s. The article also focuses on the willingness of the court to use its inherent powers to ensure a fair and effective process of litigation, and the justification of such a role in the absence, or even in the face, of statutory provision.

I. Introduction

OFTEN the subject of conjecture, assumption and incidental attention in Singapore, the doctrine of the inherent powers of the court, fundamental though it is, has not received the focus which it warrants. Although Sir Jack Jacob's article, 'The inherent jurisdiction of the court',[2] is an important work which has been cited in Singapore[3] and Malaysia,[4] it is a general account of the English position. The inherent powers (more commonly referred to as 'inherent jurisdiction') of the English courts have always been an integral, albeit distinctive, part of their self-created general jurisdiction at common law. In Singapore, the courts are established, and their jurisdiction governed, by statute.[5] The operation of the doctrine here must be considered in the

[1] Although this article is primarily concerned with the inherent powers exercised by the High Court in civil cases, these powers may be applied by the Court of Appeal (see *Jeyaretnam Joshua Benjamin* v *Lee Kuan Yew* [1991] 2 MLJ 135; *R Rama Chandran* v *The Industrial Court of Malaysia* [1997] 1 MLJ 145; *Aviagents* v *Baltravast Investments Ltd* [1966] 1 WLR 150; *Burgess* v *Stafford Hotel Ltd* [1990] 1 WLR 1215), by the subordinate courts (see O 92, r 4 of the Rules of Court (RC), which is considered *infra*, at note 30 and from note 110 and the accompanying main text), and in criminal proceedings (see *PP* v *Ho So Mui* [1993] 2 SLR 59; *Connelly* v *DPP* [1964] AC 1254).

[2] (1970) Current Legal Problems 23. It is reprinted in *The reform of civil procedural law*, London: Sweet & Maxwell, (1982).

[3] See *Heng Joo See* v *Ho Pol Ling* [1993] 3 SLR 850.

[4] See *Tan Beng Sooi* v *Penolong Kanan Pendaftar* [1995] 2 MLJ 421; *R Rama Chandran* v *The Industrial Court of Malaysia*, *supra*, note 1.

[5] The relevant provisions are considered *infra*.

context of indigenous factors such as the severance of a long established link with the jurisdiction and authority of the English courts, the development of the High Court's own statutory powers and the character of its procedural apparatus. These matters raise difficult questions concerning the source, nature and scope of the inherent powers of the court, as well as the relationship between this doctrine and the rules of procedure. This article is an attempt to answer these questions.

II. The Source of the Inherent Powers of the Court

It is necessary to commence by examining, albeit briefly, the English link and the development of the High Court's powers. The first court – the Court of Judicature at Prince of Wales' Island, Singapore and Malacca – was established by Letters Patent (commonly referred to as the 'Second Charter of Justice') issued on the 27 November, 1826. It was vested with:

> such jurisdiction and authority as our Court of King's Bench and our Justices thereof, and also as our High Court of Chancery and our Courts of Common Pleas and Exchequer, respectively, and the several judges, justices, and Barons thereof respectively, have and may lawfully exercise within that part of our United Kingdom called England, in all civil and criminal actions and suits …[6]

This 'jurisdiction and authority' clause was maintained[7] by successive statutes[8] until 1963, when Singapore gained independence from Britain and

6 See the marginal note 'Jurisdiction of the Court defined'.

7 Subject to changes in terminology.

8 The Third Charter, 1855; s 23 of the Courts Ordinance, 1868 (Ordinance V of 1868); s 44 of the Courts Ordinance, 1873 (V of 1873); s 10 of the Courts Ordinance, 1878 (III of 1978); s 9(1) of the Courts Ordinance, 1907 (XXX of 1907); s 8 (a) of the Courts Ordinance, 1926 (101 of 1926); s 11(1) of the Courts Ordinance, 1934 (17 of 1934); and s 17(a) of the Courts Ordinance, 1955 (Cap 3, 1955 Rev Ed). The terminology of these provisions varied according to the times. S 10 of the Courts Ordinance, 1878 reflected the fusion of the courts of common law and equity: 'The Supreme Court shall have such jurisdiction and authority as Her Majesty's High Court of Justice in England, and the several judges thereof, respectively, have and may lawfully exercise in England, in all civil and criminal actions and suits…'. S 9(1) of the Courts Ordinance, 1907 and s 11(1) of the Courts Ordinance, 1934 referred to the jurisdiction formerly exercised by the Courts of Chancery, Queen's Bench, Common Pleas and Exchequer and the contemporary jurisdiction exercised by the High Court of Justice. S 17(a) of the Courts Ordinance, 1955 referred to the 'jurisdiction and authority of a like nature and extent as are exercised by the Chancery and Queen's Bench Divisions of the High Court of Justice in England'.

immediately joined the Federation of Malaysia.[9] The last appearance of the clause took the form of section 17(a) of the Courts Ordinance, 1955,[10] which provided that the High Court had: 'jurisdiction and authority of a like nature and extent as are exercised by the Chancery and Queen's Bench Divisions of the High Court of Justice in England.'

Therefore, prior to 1964, the Singapore courts would merely refer to section 17(a) of the Courts Ordinance, 1955, and exercise the 'jurisdiction and authority' of the English courts. The provision was repealed by the Courts of Judicature Act, 1964[11] and replaced by specific powers. With regard to Singapore, the High Court had 'all the powers which were vested in the High Court of Singapore immediately prior to Malaysia Day by any written law until the same is repealed'.[12] This provision did not preserve section 17(a) because it was repealed by the Courts of Judicature Act itself.[13] Therefore, the 'jurisdiction and authority' of the English High Court was no longer a resource for the Singapore High Court after 1964. The new powers conferred by the Courts of Judicature Act were limited to those specified in the First Schedule to the Act[14] and vested in the court by written law.[15] The Supreme Court of Judicature Act of 1969[16] adopted a similar scheme. The High Court continued to have the powers conferred on it by statute pursuant to section 18(1) of the SCJA.[17] The powers in the First Schedule to the CJA were extended and incorporated in section 18(2). Section 18(3) provided that the powers referred to in section 18(2) had to be exercised 'in accordance with any written law or rules of court relating to them'.

A significant feature of the new Act was that there was no longer any reference to powers vested in the court prior to Malaysia Day or even before 1969. The position may be contrasted with that in Malaysia, where the current section 25(1) of the CJA provides that the High Court in that country has '…all the powers which were vested in it immediately prior to Malaysia Day[18] and such other powers as may be vested in it by any written law…'.

9 See *infra*.
10 *Supra*, note 8.
11 Hereinafter referred to as the 'CJA'.
12 CJA, s 25(1)(d).
13 Part IV of the Courts Ordinance, 1955, which contained section 17, was expressly repealed by s 80 of, and the Second Schedule to, the CJA, 1964.
14 CJA, s 25(2).
15 *Ibid,* s 25(1)(a).
16 Act 24 of 1969, and subsequently Cap 322 of the 1985 Revised Ed (hereinafter referred to as the SCJA).
17 SCJA, s 18(1).
18 *Ie*, the date of Independence: 16 September, 1963.

Therefore, in Malaysia a separate source of powers exists beyond statute law which enables the courts there to grant substantive reliefs established before 16 September, 1963. The significance of this distinction between the two countries will be examined in the context of the different approaches of the Singapore and Malaysian courts to situations which call for the exercise of a power not specifically conferred by current legislation.

The statutory structure remained substantially the same after the amendments to the SCJA in 1993.[19] Section 18(1) continues to provide that the High Court 'shall have such powers as are vested in it by any written law for the time being in force in Singapore'. The additional powers of the High Court referred to in section 18(2) (which were extended by the amendments) are now set out in the First Schedule. Section 18(3) again provides that the powers referred to in section 18(2) are to be exercised 'in accordance with any written law or rules of court relating to them'. These provisions should be read in the context of Article 94(1) of the Constitution,[20] which provides: 'The Supreme Court shall consist of the Court of Appeal and the High Court with such jurisdiction and powers as are conferred on those courts by this Constitution or any written law'.

Accordingly, two conclusions may be drawn from the statutory scheme after 1964. First, the powers of the English High Court, which were in force in Singapore prior to 1964 pursuant to section 17(a) of the Courts Ordinance, 1955, were no longer exercisable by the High Court.[21] Secondly the High Court has no powers beyond those conferred by the Constitution, written law and the paragraphs of the First Schedule to the SCJA. Yet, in spite of these perimeters, one finds constant reference to the term 'inherent jurisdiction' in the cases. Certainly, the court did have an inherent jurisdiction prior to 1964 as the general jurisdiction and powers of the English High Court were vested in it by the 'jurisdiction and authority' clause in section 17(a) of the Courts Ordinance, 1955.[22] As explained by Sir Jack Jacob in his article, 'The inherent jurisdiction of the court',[23] in the context of the English position:

[19] S 264/93.

[20] The Constitution of the Republic of Singapore (1992 Ed).

[21] But note the contrary arguments of Tan Yock Lin in his article, 'In personam jurisdiction of the Singapore courts', [1989] 3 MLJ xli. See, now, para 14 of the First Schedule to the SCJA, which was incorporated in 1993 (see note 19 and note 240).

[22] And by the corresponding provisions in previous Courts Ordinances. See, for example, *Karupaya* v *Ramasamy Chetty* (1922) XV SSLR 3 (amendment of record to bring it into conformity with court's judgment); *Motor Emporium* v *Arumugam* [1933] MLJ 276, at 278 (application of rules of equity administered by Court of Chancery).

[23] *Supra*, note 2.

> To understand the nature of the inherent jurisdiction of the court, it is necessary to distinguish it first from the general jurisdiction of the court…. The term inherent jurisdiction of the court does not mean the same thing as the jurisdiction of the court used without qualification or description: the two terms are not interchangeable, for the inherent jurisdiction of the court is only a part or an aspect of its general jurisdiction. The general jurisdiction of the High Court as a superior court of record is, broadly speaking, unrestricted and unlimited in all matters of substantive law, both civil and criminal, except in so far as that has been taken away in unequivocal terms by statutory enactment…. Its general jurisdiction thus includes the exercise of an inherent jurisdiction.[24]

What then of Singapore? Since 1964, it no longer has an unlimited and general jurisdiction of the kind which engendered the inherent jurisdiction of the English High Court. As already shown, the SCJA did not expressly preserve this jurisdiction,[25] and in this respect it differs from comparable legislation in other common law-based countries or states. For example, section 23 of the Supreme Court Act of New South Wales,[26] providing that the Supreme Court has 'all jurisdiction which may be necessary for the administration of justice', has been held to confirm the inherent powers of the court.[27] The inherent power of the English Court of Appeal and High Court to stay proceedings when 'it thinks fit to do so' is preserved by section 49(3) of the Supreme Court Act, 1981.[28] And in New Zealand, section 16 of the Judicature Act, 1908 provides that the courts have '… all judicial jurisdiction which may be necessary to administer the laws of New Zealand'. In contrast, the inherent powers of the Singapore courts are assumed by subsidiary legislation. Order 92, rule 4 of the Rules of Court[29] provides: 'For the removal of doubt it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.'[30]

Although the doctrine of inherent powers has been deemed applicable in numerous cases in Singapore, its source has yet to be appropriately

[24] *Ibid,* at 23-24. Also see See *Halsbury's Laws*, 4th ed, vol 10, paras 845-847.
[25] Although see what is said about Article 93 of the Constitution, *infra*.
[26] Supreme Court Act, 1970 (NSW).
[27] See *Riley McKay Pty Ltd* v *Mc Kay* (1982) 1 NSWLR 264, at 269-270.
[28] C 54.
[29] Hereafter referred to as 'RC'.
[30] This rule is considered *infra* in the text following note 109.

examined by the courts in the context of Singapore's statutory scheme, no doubt due to the absence of argument on the part of the parties necessary to bring such a fundamental issue to the core.[31] A survey of the relevant statutory provisions will reveal difficulties in this respect. Section 18(1) of the SCJA states that the High Court 'shall have all such powers as are vested in it by any written law for the time being in force in Singapore'. Although 'subsidiary legislation', (and, therefore, the rules of court) is within the Interpretation Act's generic definition of 'written law',[32] the obvious purpose here is to indicate its statutory nature rather than its equality with primary statute law.[33] Furthermore, the reference to 'written law' in section 18(1) of the SCJA ought not to be construed as including subsidiary legislation made pursuant to the Act itself.[34] Even if the reference to 'written law' in section 18(1) could encompass the rules of court, and therefore Order 92, rule 4 (RC),[35] this provision is not a vesting source; it merely recognises the existence of inherent powers and states that they are not affected by the rules. As the first few words of the rule indicate ('For the removal of doubt'), its purpose is to remind the courts and the profession of these powers, rather than confer them.[36]

Furthermore, the rules of court have a limited function under section 80 of the SCJA, which is to regulate and prescribe procedure and practice. The rules are not intended to create the unlimited range of amorphous powers which constitute the inherent jurisdiction of the court. More significantly, one finds a number of traditional inherent powers in the First Schedule to the SCJA such as the power to stay proceedings in paragraph 9 and to extend or abridge time in paragraph 7. *A fortiori*, if there was to be a general or residuary vesting source for inherent powers, a saving clause would more appropriately have been included in the First Schedule itself. With regard to the Civil Law Act,[37] section 3 (which was first enacted

[31] See *Shiffon Creations (S) Ptd Ltd* v *Tong Lee Co Pte Ltd* [1988] 1 MLJ 363 (*Shiffon*); *Emilia Shipping Inc* v *State Enterprises For Pulp and Paper Industries* [1991] 2 MLJ 379 (*Emilia Shipping*); *Antonius Welirang* v *Bank of America National Trust and Saving Association* (*Antonius Welirang)* (suit no 296 of 1979, dated 6/10/92), which are considered in various parts of the text.

[32] Cap 1.

[33] The statutory nature of the rules has been constantly emphasised. See *SS Hontestroom* v *SS Sagaporack* [1927] AC 37, at 47; *Donald Campbell Co* v *Pollack* [1927] AC 732, at 804; *Dato Mohamed Hashim Shamsuddin* v *A-G, HK* [1986] 2 MLJ 112, at 113.

[34] See SCJA, s 80, which empowers the Rules Committee to make rules of court.

[35] The rule has been set out above, and is considered *infra* in the text following note 109.

[36] In *Heng Joo See* v *Ho Pol Ling* (*supra*, n 3), Coomaraswamy J said that the rule does 'not define or give the jurisdiction. It merely states that the Rules of the Supreme Court shall not limit or affect the inherent powers which are common law powers'.

[37] Cap 43, 1994 Rev Ed.

as section 1 of the Civil Law Ordinance of 1878),[38] refers to a variety of equitable and legal rights and interests which had already been established as part of the general jurisdiction of the 'court on its equity side' prior to fusion by the Civil Law Ordinance of 1878.[39] The purpose of the Ordinance was, as indicated by the title, to enable law and equity to be administered concurrently. The objective of the Civil Law Act is 'to consolidate certain provisions of the civil law'[40] rather than create additional or inherent powers.[41]

The enigma of identifying the source of the court's inherent powers is aptly illustrated by the process of staying proceedings on the ground of *forum non conveniens*. Although this is a doctrine which has never been doubted judicially in a reported case,[42] its basis in Singapore's legal process until 1993 (when an express power was included in the First Schedule to the SCJA),[43] was not entirely clear. For a long time the Singapore courts regarded themselves as having the power to stay proceedings brought within the jurisdiction where Singapore was not the appropriate forum. Prior to 1964 the courts could certainly apply the 'jurisdiction and authority' clause in section 17(a) of Courts Ordinance, 1955, and import the English jurisdiction to stay proceedings in these circumstances.[44] Once section 17(a) was repealed, the courts could no longer tap this source, leaving open the question of whether the power to stay in these circumstances continued to operate after 1964. Paragraph 11 of the First Schedule to the CJA and, its successor, section 18(2)(j) of the SCJA, provided that the court could 'dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued'.

Such a clause was obviously intended to check the abuse which could otherwise have resulted where a party sought to re-litigate a case or issue

[38] Ordinance IV of 1878.

[39] The operative date being the first day of January, 1879. See *Shiffon* (*supra*, note 31), in which s 3(h) was considered not to have conferred new powers.

[40] See the preamble to the Act.

[41] For a closer examination of these aspects, see Soh Kee Bun, 'Jurisdiction to award equitable damages in Singapore' (1988) 30 Mal LR 79, at 99-101.

[42] Although doubts were expressed in an article by Mohan Gopal, 'The original civil jurisdiction of the Singapore High Court: some issues', [1983] 2 MLJ lxiv at lxxi.

[43] See para 9, which was modified by the Supreme Court of Judicature (Amendment) Act, 1993 (No 16 of 1993) in order to include *forum non conveniens* as a separate basis for stay.

[44] See, *eg*, *Ong Kin Hong* v *Ong Cho Teck* [1935] MLJ 142. Also see the decision of the Penang High Court in *Joshi* v *Indian Overseas Bank* [1953] MLJ 83 in which the common law principles established by the English Court of Appeal in *St Pierre* v *South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382 were applied.

[45] See, *eg*, *The Lung Yung* [1984] MLJ 29.

which had already been adjudicated, or was in the process of being judicially determined by a different court. Although the latter part of the clause may well have contemplated *lis alibi pendens* (assuming that 'any court or courts' encompassed existing proceedings in foreign courts),[45] there was no reference to the situation in which the court might grant a stay of the local action in favour of a foreign forum in the absence of multiple proceedings. Indeed, it was not until the reforms of 1993 that specific wording was incorporated in the paragraph to indicate the power of stay in the normal *forum non conveniens* situation.[46] Section 3(f) of the Civil Law Act, which is a current provision, does not vest the power to stay an action on the basis of *forum non conveniens*, but rather provides that the court is not deprived of any existing power that it may have had to stay proceedings in the circumstances indicated.[47] Therefore, section 3(f) is not the vesting source. Although this provision was put forward in the unreported case of *Singapore Flour Mills Pte Ltd* v *Thong Yik Animal Feed Sdn Bhd*[48] as one of several bases for an application to stay proceedings, no issue was taken as to its legal purport.[49]

It has been suggested that Order 18, rule 19 (RC) empowers the court to stay proceedings on this basis. [50] This provision enables the court to order a pleading or endorsement on a writ (or part of the pleading or endorsement on a writ) to be struck our or amended, inter alia, on the ground that it is an abuse of the process of the court.[51] In England, the right of the court to stay proceedings on the basis that they should be conducted in another

46 See para 9 of the First Schedule to the SCJA. Whether this provision clarified that there was an existing power or extended the provision to include such a power is open to the arguments expressed in this paragraph.

47 This sub-section provides that 'nothing in this Act shall disable the court from directing a stay of proceedings in any cause or matter pending before it, if it thinks fit; and any person, whether a party or not to any such cause or matter, who would have been entitled if the Civil Law Ordinance 1878 had not been passed, to apply to the court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, may apply to the court, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as is necessary for the purpose of justice; and the court shall thereupon make such order as is just.'

48 Suit no 201 of 1992 (judgment dated 25/1/96).

49 The other grounds were inherent jurisdiction and *forum non conveniens*.

50 See RH Hickling and Wu Min Aun, 'Stay of Action and Forum Non Conveniens' [1994] 3 MLJ xcvii in which it is stated, without argument, that Ord 18, r 19 (RHC), the corresponding Malaysian rule, is a source of the court's discretion to grant stay. The short article is concerned with certain conflict of law aspects rather than the legal basis for the power to grant a stay, which appears to be assumed.

51 This is ground (d) of rule 19(1).

52 For examples of the use of this general inherent jurisdiction in relation to stay, see the cases

forum is normally exercised pursuant to that court's common law inherent jurisdiction rather than within the context of Order 18, rule 19 (RSC), which is merely a specific expression of that jurisdiction.[52] If it is accepted that since 1964 the Singapore High Court no longer has the 'jurisdiction and authority' of the English High Court, and that the Singapore statutes do not confer the power to stay in *forum non conveniens* cases, then any purported vesting of power by the rule beyond the legislative provisions would be *ultra vires* and ineffective.

Section 18(3) of the SCJA makes the limitation of the scope of the rules of court clear by providing that the powers of the High Court are to be exercised in accordance with the rules of court, which are made for '…regulating and prescribing the procedure…and the practice to be followed…'.[53] Furthermore, the inclusion of what may be characterised as traditional inherent powers of the court in the SCJA – such as the power to 'dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued' in section 18(2)(j) of the SCJA – raises the specific issue of whether other circumstances in which the court might stay proceedings (such as *forum non conveniens*) were deliberately excluded. And the general reference to the inherent powers of the court in the rules of court[54] begs the more general question of their nature and scope in the context of the 'additional powers' conferred by section 18(2) of the SCJA.[55]

Suffice it to say that the courts prior to 1993 *did* regard themselves as having the inherent power to stay proceedings in these circumstances. In the *'The Blue Fruit'*,[56] Wee Chong Jin CJ, in the course of delivering the judgment of the Court of Appeal, said: 'The authorities are clear that even though an action is well founded within the jurisdiction of the court there is always an inherent jurisdiction vested in the court whether to entertain such an action or not'.[57] And in *Emilia Shipping Inc* v *State Enterprises*

cited in The Supreme Court Practice, 1997, vol 1, para 18/19/18-22. The inherent power of the English Court of Appeal and High Court to stay proceedings when 'it thinks fit to do so' is preserved by s 49(3) of the Supreme Court Act, 1981.

53 SCJA, s 80(1). Also see 18(3) which distinguishes between written law and the rules of court.

54 O 92, r 4, *supra*, note 30 and *infra*, note 110.

55 *Ie*, before 1993, when the powers were listed in the s 18(2) and not the First Schedule.

56 [1979] 2 MLJ 279.

57 *Ibid*, at 281. Also see *Star-Trans Far East Pte Ltd* v *Norske-Tech Ltd* [1996] 2 SLR 409, at 421, where the Court of Appeal declared that it had the inherent jurisdiction to order a stay of court proceedings in favour of arbitration.

58 [1991] 2 MLJ 379.

For Pulp and Paper Industries,[58] Chan Sek Keong J indicated that the court must, as 'the master of its own process',[59] have inherent power to refuse to entertain proceedings which constitute an abuse of process. However, in the absence of adequate argument the learned judge did not decide the point.[60] In a series of cases the power to stay proceedings has been regarded as being firmly established.[61] The position has now been put beyond any doubt by the Supreme Court of Judicature (Amendment) Act, 1993[62] which specifically includes *forum non conveniens* as a separate basis for stay in paragraph 9 of the First Schedule.[63]

If the inherent powers of the court are not, as has been argued, engendered by statute, is there a basis for their operation at all? The clue to the source of the inherent powers of the Singapore courts lies in the terminology itself. The word 'inherent' suggests that the powers arise from the status and role of the court itself rather than from an external vesting source such as statutory law. This conclusion can be justified on the basis that the court must have a general or residuary source of powers beyond the confines of procedural rules to ensure that it has the appropriate authority to deal effectively with the abuse of its process, and that justice is never compromised by the inadequacy of written law. As Lord Morris put it in *Connelly* v *DPP*,[64] it is a jurisdiction within a jurisdiction:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are

59 *Ibid*, at 381.

60 *Ibid*. His Honour stated that the assumed power to set aside proceedings would not be exercised in the circumstances of the case.

61 *Brinkerhoff Maritime Drilling Corp & Anor* v *PT Airfast Services Indonesia* [1992] 2 SLR 776; *Sea Breeze Navigation Co SA* v *Owners of Hsing An* [1974[1 MLJ 45; *The Carl Offersen* [1979] 2 MLJ 55; *The Vishva Apurva* [1992] 2 SLR 175. The power has also been applied in relation to contracts which specify other jurisdictions for the hearing of disputes. See, for example, *Amerco Timbers Pte Ltd* v *Chatsworth Timber Corp Pte Ltd* [1977] 2 MLJ 181. As this article is concerned with the basis of the court's power to stay proceedings rather than the principles governing the exercise of that power, the judgments have not been considered.

62 No 16 of 1993.

63 The clause now reads: Power to dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts *or by reason of a court in Singapore not being the appropriate forum* the proceedings ought not to be continued. I have italicised the new words. For a post-1993 case, see *Eng Liat Kiang* v *Eng Bak Kern* [1995] 1 SLR 577 (HC); [1995] 3 SLR 97; (CA).

64 *Supra*, note 1.

65 *Ibid,* at 1301.

66 *Supra*, note 2, at 27-28. Note that although this description is limited to a superior court,

> 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.[65]

Sir Jack Jacob identified and characterised the source of the inherent jurisdiction of the English courts in the following manner:

> … the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such a jurisdiction has been called 'inherent'…. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner.[66]

He went on to say that:

> … the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.[67]

Constitutional provisions may be interpreted to support the existence of the court's inherent powers in this respect. Article 93 of the Constitution provides that 'the judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written

in Singapore, the subordinate courts are also deemed to be vested with inherent powers. See Ord 92, r 4 (RC), which applies to the subordinate courts as well.

67 *Ibid,* at 51. Coomaraswamy J adopted this definition in *Heng Joo See* v *Ho Pol Ling* (*supra*, note 3). Also see *Tan Beng Sooi* v *Penolong Kanan Pendaftar* (*supra*, note 4, at 431).

68 [1981] AC 909.

69 *Ibid,* at 977.

law for the time being in force'. If the words 'as may be provided by any written law...' are construed so as to concern the establishment of the subordinate courts rather than to restrict the term 'judicial power', then such power may be interpreted as the court's unrestricted entitlement to govern and regulate its own process to ensure that justice is achieved. In *Bremer Vulkan Schiffbau und Maschinenfabrik* v *South India Shipping Corporation Ltd*,[68] Lord Diplock said of the court's jurisdiction in this regard: 'Such a power is inherent in its constitutional function as a court of justice',[69] and that: '... 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'.[70] It is only in Article 94, which states that the Supreme Court has 'such jurisdiction and powers as are conferred ... by this Constitution or any written law', that the scope of the court's specific powers are limited to those set out in the statutes. Therefore, it is suggested that the 'judicial power' referred to in Article 93 connotes a font of undefined powers which enables the court to function effectively.

III. The Nature and Scope of the Inherent Powers of the Court

The nature and scope of the court's inherent powers is best understood in an historical context. For centuries, the English courts have exercised a self-created and unchallenged authority to ensure the proper functioning of the system of justice. This 'inherent jurisdiction' has been applied in a variety of ways and circumstances to achieve this end.[71] Hence, the jurisdiction in contempt, now a separately established field of law, protects the dignity of the courts and ensures that the due process of litigation is free from improper influence, interference and obstruction.[72] The courts also asserted an authority to provide the necessary protection for certain classes of persons such as infants,[73] and the appropriate control over persons having

70 *Ibid.*

71 *Supra*, note 2, at 31 *et seq*.

72 See now SCJA, s 8 and SCA, s 8.

73 *Eg*, in relation to wardship and settlements of disputes. Such protection now takes statutory form. In the case of Singapore, see The Guardianship of Infants Act (Cap 122) and O 76 (RC) respectively.

74 In Singapore, control of the conduct of advocates and solicitors is now governed by the Legal Profession Act (Cap 161). For a case which illustrates the court's inherent power

official functions in the court process (including the safeguarding of their duties).[74] The concern of this article is not with these areas but with the broader context of the inherent power of the court to make appropriate orders to ensure the achievement of justice and the efficacy of its administration. This essentially involves the appropriate control of the conduct of proceedings, compliance with its orders, and the related principle that its process must not be abused (by frivolous, vexatious or otherwise improper conduct).[75]

The inherent jurisdiction was based not only on the fact that the court, by virtue of its immediate control of its own process (given that it hears the suit), is in the best position to make orders to effectively resolve disputes, but also on the fact that it must have the standing to protect its own process in the interest of the administration of justice. Over the years, the courts exercised their power in innumerable circumstances as the particular occasion demanded, resulting in an abundance of rulings. The significance of the doctrine of inherent jurisdiction lay in its flexibility, for the courts could extend it to any instance which required its intervention in the absence of precise statutory regulation, or where injustice or abuse might otherwise result. However, this historical flexibility means that it is difficult to define the scope of the doctrine and its relationship with statutory law (particularly the rules of court) in the specific context of the Singapore process, a subject which will be considered subsequently.[76] The doctrine has never been expressly limited by Parliament, presumably on the assumption that, in the traditional mold of case law, it would operate subject to the authority of written law. As will be seen, questions have arisen as to the validity of this supposition.[77] Even though subject to restriction by written law,[78] the scope of the doctrine has provoked the comment that it is '…so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits'.[79]

to control its officers, see *Re Lau Liat Meng* [1992] 2 SLR 1114.

75 For an early case on abuse, see *Veale* v *Warner* (1669) 1 Wms Saund 575. Also see *Tidd's* Practice, 9th ed, 1828, p 515, where the concept of abuse is considered. See now, O 18, r 19(1)(b)-(d) which set out specific categories of abuse and enables the court to make a variety of orders.

76 *Infra,* at text following the paragraph in which note 190 appears, 'B. *Do the courts have an inherent power to modify procedure prescribed by statutes?*'.

77 *Infra*, at text following note 106, 'IV. The relationship between the inherent powers of the court and the rules of procedure'.

78 *Ie*, in relation to matters which are precisely regulated by statute. See *infra*, at text following the paragraph in which note 190 appears, 'B. *Do the courts have an inherent power to modify procedure prescribed by statutes?*'

79 *Supra*, note 2.

80 See *Tidd's* Practice (*supra*, note 75), Introduction, p lxxi. There is evidence of Chancery orders issued in 1388. See Jenks, *A Short History of English Law* 4th ed, 1928; GW Sanders,

One of the most important ways in which the Superior Courts of Common law and Chancery exercised their inherent jurisdiction was to make general rules to govern their respective processes, a practice which was said to be the 'law of the court' and therefore the 'law of the land'.[80] The practice of the Common Law Courts was sanctioned by legislation when, in 1833, the Civil Procedure Act[81] conferred powers on the judges to make specific rules.[82] The Rules of the Hilary Term, 1834[83]were the first rules of court to operate by law. Statutory powers to make rules for the Court of Chancery were conferred by the Chancery Amendment Acts of 1850 and 1858[84] pursuant to which the Consolidated Chancery Orders of 1860 were promulgated. Although the power to make rules was eventually vested in a statutory rules committee as part of the reforms introduced by the Judicature Acts of 1873-1875,[85] judges continued their rule-making function in this body.[86] In present day Singapore, of the eleven persons that form the Rules Committee (which, since 1996 makes rules for both the Supreme Court and subordinate courts), eight members are from the judiciary.[87]

Therefore, the rule-making powers of judges, at one time the product of the court's own jurisdiction, are now statutorily established. In the same vein, the judge-made rules have largely been codified by statute. The rules which were contained in the schedule to the Judicature Act of 1873, and then in the First Schedule to the Judicature Act, 1875,[88] were replaced by

Orders of the High Court of Chancery (1845), pp 109-22. Other compilations of these rules include: Sweet and Maxwell's *Legal Bibliography of the Commonwealth of Nations*, vol 1*: English Law to 1800* (1955) pp 280-282, 342-344 and vol 2: *English Law from 1801-1954* (1957); Lintot, *The Rules and Orders of the Common Pleas from 1457-1742* (1745); DEC Yale, *Lord Nottingham's 'Manual of Chancery Practice'* (1965).

81 (3 & 4Wm IV, c 42).

82 Certain rule-making functions had been put on a statutory basis by the Law Terms Act 1830 (11 Geo IV & 1 Wm IV, c 70) and the Uniformity of Process Act 1832, ss 10 and 11 (2 & 3 Wm IV, c 39)

83 They may be found at 2 Cr & M 1. For a consideration of these new provisions, see WS Holdsworth, 'The New Rules of Pleading of the Hilary Term 1834' (1923) Cambridge LJ 261 and *Roffey* v *Smith* (1834) 6 Car & P 662; 172 ER 1409.

84 (13 & 14 Vict, c 35, ss 30-32) (21& 22 Vict, c 27, ss 11-12) respectively.

85 36 & 37 Vict, C 66 and 38 & 39 Vict, c 77 respectively.

86 Sir Jack Jacob notes that it was only in 1904 that the practising lawyers were included in the rules committee. *Supra*, note 2, at 34.

87 They are: the Chief Justice, a maximum of 5 judges of the Supreme Court, the Senior District Judge and another district judge. See SCJA, s 80(3) and SCA, s 69 as amended by the Supreme Court of Judicature (Amendment) Act 1996 (2/96) and the Subordinate Courts (Amendment) Act 1996 (3/96) respectively.

88 36 & 37 Vict, C 66 and 38 & 39 Vict, c 77 respectively.

89 *Edmeades* v *Thames Board Mills* [1969] 2 QB 67.

90 So that, presumably, non-compliance with such an order would amount to contempt of court

the Rules of the Supreme Court in 1883 which were, in turn, superseded by the Rules of the Supreme Court in 1965 on which Singapore's first Rules of the Supreme Court (1970) were largely based. Other aspects of the inherent jurisdiction have become part of primary statute law. For example, Section 8 of the SCJA and SCA empower the Court of Appeal, the High Court and the subordinate courts to punish for contempt of court. Section 9 of the SCJA and section 7 of the SCA allow the courts to hear proceedings in camera. Paragraph 9 of the First Schedule to the SCJA provides that the court may 'dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts or by reason of a court in Singapore not being the appropriate forum the proceedings ought not to be continued'. Certain powers have been strengthened by statute. For example, the authority of the court to stay a personal injury suit until the reluctant plaintiff makes himself available for a reasonable medical examination[89] has been transformed into a specific statutory power to order a party to undergo a medical examination in any proceedings.[90]

Most of the circumstances in which the courts were historically prepared to exercise their inherent power now correspond to the rules of court, so that in a variety of instances the court has authority to act both under the rules and pursuant to its own authority. This cumulative jurisdiction is illustrated by an abundance of case law. For example, the court may cure irregularities or allow amendments of errors;[91] extend time for the required action of a party;[92] strike out a pleading or endorsement on a writ which is an abuse of process (and stay or dismiss the action or enter judgment);[93] dismiss an action for want of prosecution;[94] stay proceedings until the party

and render the party liable to, *inter alia*, imprisonment and fine. See para 19 of the First Schedule to the SCJA.

91 See O 2 (RC) and *Official Administrator KL* v *China Insurance Co Ltd* (1955) 21 MLJ 138; *Tai Choi Yu* v *The Government of Malaysia* [1993] 2 MLJ 311; *Mohamed bin Ismail* v *Tan Sri Haji Othman Saat* [1982] 2 MLJ 133. Also see O 20 (RC) generally.

92 See O 3, r 4 (RC); *Singapore Aviation & General Insurance Co Pte Ltd* v *Chan Chian Kim* [1994] 2 SLR 681; *Ng Teck Seng* v *Ong Lay Hong* (OS 450/95, judgment dated 10 May, 1996).

93 See O 18, r 19(b)-(d) and *Re Singapore Souvenir Industry (Pte) Ltd* [1986] 1 MLJ 14; *Low Fong Mei & Anor* v *Ko Teck Siang & Ors* [1989] 3 MLJ 140 (HC); [1992] 1 SLR 454 (CA)

94 There are various provisions here. See, *eg*, O 25 r 1(4)-(6), O 19 r 1, O 34 r 2(2) (RC). Also see *Wee Siew Noi* v *Lee Mun Tuck* [1993] 2 SLR 232.

95 See O 23 (RC) and *Pray* v *Edie* (1786) 1 TR 267; 99 ER 1087.

96 See *Tan Leh Eng* v *Ang Choo Hock* (Divorce Petition No 2833 of 1993, SIC 3017 of 1996),

concerned provides security for costs;[95] hear an application where no provision is made by the rules;[96] correct its own defective orders[97] or set them aside;[98] and impose appropriate penalties against a party who fails to comply with its orders.[99]

Despite the statutory regulation of many of areas of procedure which were formerly within the sole domain of the court's inherent jurisdiction, the authority of the court to make orders pursuant to the latter source remains significant. This is particularly evident in the court's practice of issuing directions relating to procedure. Paradoxically, this aspect of the court's inherent jurisdiction has particular importance in the context of modern day litigation, which requires a more precise and detailed structure of procedure. The rules are already so complex and convoluted that further proliferation by the constant introduction of new material would surely be unwelcome. The advantage of practice directions is that they can be issued regularly with little difficulty compared with the more formal procedure of introducing subsidiary legislation. Their flexibility lies in the ability of the court to give guidelines and instructions at any time to explain any procedure. Practice directions supplement the rules of court in various ways. They explain the proper practice under the rules and show how those rules are to be complied with.[100] They provide the details which may not be included in a particular rule.[101] Furthermore, a more recent trend, they are often the

in which the Singapore High Court was willing to hear an application for the variation of a consent order in the interest of justice. Also see *Hongkong and Shanghai Banking Corporation* v *Goh Su Liat (TAS)* [1986] 2 MLJ 86 (application by the judgment debtor to apply to set aside certain garnishee orders even though no provision was made in the rules for this process), *P Vijandran* v *Karpal Singh* [1993] 3 MLJ 94 (court permitted application to seek the determination of the court regarding party's entitlement to costs).

97 See *Pearlman (Veneers) SA (Pty) Ltd* v *Bernhard Bartels* [1954] 1 WLR 1457; *Hotel Ambassador (M) Sdn Bhd* v *Seapower (M) Sdn Bhd* [1991] 1 MLJ 221; *Hatten* v *Harris* [1892] AC 560. Also see O 20, r 11 (RC).

98 See *United Oveseas Bank Ltd* v *Chung Khiaw Bank Ltd* [1968] 2 MLJ 85; *Mitchell Cotts & Co Ltd* v *Bryanne* (1948-49) MLJ Supp 127; *Wee Bong Neo and Tan Jee Tee* (1940) 9 MLJ (FMSR) 294. Also see O 2, r 1(2) (RC), which makes such provision for the setting aside of judgments and orders in the circumstances set out in r 1(1) (RC).

99 Including committal. See O 45, r 5 and O 52 (RC) generally. Also see *Cartier International* v *Lee Hock Lee* [1993] 1 SLR 616; *Davey* v *Bentinck* [1893] 1 QB 185.

100 See, *eg,* O 56, r 2(1) (RC) (which concerns the further arguments before a judge in chambers) and PD No 3 of 1995 (which concerns the procedure to be followed in relation to the rule). It is contained in the Supreme Court PD (1997), Part X, para 51.

101 See, *eg*, PD No 7 of 1991 (as modified by PD No 1 of 1996), which sets out details concerning the preparation of affidavits and exhibits not included in Ord 41. It is contained in the Supreme Court PD (1997), Part IV, and the Subordinate Courts PD (1997), Part IV.

102 See PD No 2 of 1995 ('The Technological Court'). It is contained in the Supreme Court PD (1997), Part VII.

appropriate source of procedure for new technological processes which involve a variety of procedural elements.[102]

Although practice directions may not have the force of substantive law,[103] non-compliance may result in adverse orders against the defaulting party. First, the court has a general power to order that costs be paid by the defaulting party, or even the advocate.[104] Secondly, the new rules 2A and 3 of Order 92 (RC), which were introduced in recognition of the importance of this source of procedure, are specifically concerned with compliance with practice directions.[105] Practice statements are like practice directions to the extent that they are written instructions issued by the courts. Usually, practice statements declare a procedure or announce changes in procedure. A recent practice statement of great importance in Singapore concerned the doctrine of precedent after the abolition of appeals to the Judicial Committee of the Privy Council.[106]

IV. The Relationship between the Inherent Powers of the Court and the Rules of Procedure

The rules of court are made for the purpose of 'regulating and prescribing the procedure and practice…in all causes and matters whatsoever…'[107] and for this reason they constitute the primary source of procedure. Nevertheless, no body of rules, no matter how comprehensive, can cater to the unlimited variety of circumstances which may arise in the course of litigation. Although cases may have common elements, the particularity of the facts which arise may require special consideration. The rules may not contemplate the

[103] See *Hume* v *Somerton* (1890) 25 QBD 239, at 243; *Barclays Bank International Ltd* v *Levin Bros (Bradford) Ltd* [1977] QB 270; *Jayasankaran* v *PP* [1983] 1 MLJ 379 (concerning a practice note).

[104] See Ord 59, rr 7 and 8 (RC).

[105] R 2A requires all documents to '…comply with such requirements and contain such information and particulars of parties or other persons as may be laid down by or specified in any practice directions….' The court is at liberty to reject any document submitted for filing for any default in this respect (O 92, r 3(1)(RC). Additionally, the rejected document will only be treated as having been filed on the date on which it is subsequently accepted for filing by the court (O 92, r 3(2)(RC)). Thirdly, the practice direction may itself contain provisions governing non-compliance. *Eg*, an affidavit which does not comply with PD No 7 of 1991 (as modified by PD No 1 of 1996) may be rejected, and lead to a penalty in costs. See Supreme Court PD (1997) and the Subordinate Courts PD (1997), Part IV.

[106] This was read at the sitting of the Singapore Court of Appeal on 11 July 1994.

[107] SCJA, s 80(1).

[108] *Supra*, note 2 at 50.

[109] *Ie*, O 34A, r 1 (RC).

particular circumstances of the case and there may therefore be no available procedure. A strict application of procedural law may lead to injustice in a certain situation, an outcome which the court may regard as not having been foreseen by the statutory machinery. It is here that the doctrine of inherent jurisdiction has an important role to play by virtue of its flexibility and permeability. As Sir Jack Jacob put it: '...where the usefulness of the powers under the rules ends, the usefulness of the powers under inherent jurisdiction begins'.[108]

A series of vital questions arises concerning the relationship between the rules and the court's inherent powers and, therefore, the scope of the latter. Is the inherent power of the court merely to be exercised to fill '*lacunae*' in the rules? Does it go beyond this to override or qualify a rule the strict application of which would lead to injustice? Do the courts have an inherent power to modify procedure prescribed by primary (as opposed to subsidiary) legislation in these circumstances? Does the inherent power of the court extend to proceedings governed by their own specific rules rather than the general Rules of Court? Are the courts entitled to use this power to establish or alter the substantive rights of a party? These questions will be examined, and then a comparative analysis will be offered of the distinctions between the inherent power of the court and the court's role to make 'just, economic and expeditious' orders pursuant to a new and controversial rule.[109]

A. *May the inherent power only be exercised when the rule does not extend to a situation so as to fill a lacuna, or does it go beyond this to override or qualify a rule the strict application of which would lead to injustice?*

The only statutory provision which makes express reference to the court's inherent powers is a rule of court. Order 92, rule 4 (RC) provides:

> For the removal of doubt it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. [110]

[110] Note that the Malaysian rule is the same except that in the first line the word 'doubts' appears instead of 'doubt'. The Malaysian subordinate court rules include a corresponding rule in O 53, r 11 (SCR).

[111] No such clause appeared in the Civil Procedure Code of 1878.

[112] The clause was retained until Civil Procedure Code was replaced by the RSC, 1934. See

The rule can be traced back to Civil Procedure Code of 1907 in which section 5 (the saving clause) stated:

> 5. Subject to the provisions of any statute relating thereto, nothing in this code shall:
>
> (a) ... .
>
> (b) affect the existing jurisdiction or powers further or otherwise than is herein expressly enacted in that behalf.[111]

The effect of this provision was to save the courts' established jurisdiction and powers subject to revision by written law.[112] In Singapore's RSC of 1934, the saving clause in the 'preliminary rules' does not refer to jurisdiction and powers of court. The reason for this may have been that the jurisdiction and powers of the English courts were assumed on the basis that they had been expressly preserved by the Courts Ordinance of that year.[113] A clause similar to Order 92, rule 4 appeared in the Civil Procedure Code of Federated Malay States (enacted in 1918):

> Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as *may be necessary for the ends of justice*[114] or to prevent abuse of the process of court.[115]

This is also the clause found in section 151 of the Indian Civil Procedure Code, 1908[116] and section 839 of the Ceylon Civil Procedure Code of 1921.[117] In the Singapore RSC of 1970 and the Malaysian RHC of 1980, the clause

s 5(b) of the Civil Procedure Code, Ordinance 102 of 1926 (Laws of the Straits Settlements).

113 *Ie*, s 11 of Courts Ordinance, 1934 (No 17 of 1934).

114 The words are emphasised to distinguish them from the terminology of O 92, r 4 (RC), a matter which will be considered.

115 The Laws of the Federated Malay States (FMS), No 15 of 1918, s 612, which was re-enacted in The Laws of the Federated Malay States, Cap 7 (1934) as s 597. There was no such saving provision in the Malaysian Rules of Court, 1957. However, the present Malaysian Rules of the High Court (RHC) include the same O 92, r 4 (RC) as Singapore, except that the Malaysian rule uses the word 'doubts' rather than 'doubt' in the first line.

116 'Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court'.

117 Ordinance No 42 of 1921.

118 The provision is set out *supra*, text at notes 114 and 115.

119 See, *eg*, *Nainsingh* v *Koonwarjee* 1970 SC 997; *Sarwan* v *Amar* 1980 P & H 162; *Mohamed*

is re-instated in its present form, as rule 4 of Order 92. The opening words, 'For the removal of doubt', indicate its purpose; namely to remind the courts and the profession of the continuing operation of the court's inherent powers. The terms '…nothing in these rules shall be deemed to limit or affect the inherent powers of the court' would indicate a broad discretion to override the rules of court. However, they appear to be limited by the latter part of the rule the purport of which is that the court is only to exercise its inherent powers as a preventive measure against injustice or abuse; or, in other words, when the rules fail to avoid injustice or abuse.

An interesting comparison may be made with the corresponding provision in the former Civil Procedure Code of Federated Malay States, 1918 (which is the same as the present section 151 of the Indian Civil Procedure Code, 1908 and section 839 of the Ceylon Civil Procedure Code, 1921).[118] As evident from the citation of the provision above, it appears on a literal construction to adopt an active rather than preventive approach by enabling the court to make any order '…as may be necessary for the ends of justice…' (in contrast to Order 92, rule 4 which uses the terms: '…as may be necessary to prevent injustice…'). However, the Indian and Sri Lankan courts have preferred not to accept this construction, choosing to apply the provision restrictively so that they have only exercised their powers when the rules remain silent.[119] Those who advocate this trend would argue that this limitation on the exercise of inherent power is even more justified under the more restrictively phrased Singapore and Malaysian provision. A clearer understanding of Order 92, rule 4 may be gained by a comparison between it and Order 34A, rule 1, a novel rule in the RC which enables the court to make any order for the just, expeditious and economical disposal of the cause or matter notwithstanding the rules.[120]

The construction of Order 92, rule 4 creates difficulties, as borne out by the uncertainty and inconsistency in the relevant case law. Can the powers be used to prevent injustice and abuse even to the extent of overriding the rules which cause this outcome? Or must their operation be limited to circumstances where the rules do not provide any procedure and the omission would lead to injustice or abuse unless remedied by these powers? One might conclude from a restrictive construction of the wording – '…nothing in these rules shall be deemed to limit or affect the inherent

Manjura Haque v *Bissesswar Banerjee* AIR 1943 Cal 361, at 367; *Padam Sen* v *State of UP* AIR 1961 SC 218, at 219; and *Hukum Chand* v *Kamalanand Singh* 33 Cal 927, at 931.

[120] *Infra*, at text following note 272, 'E. *The inherent power of the court compared to the court's role to make just, economic and expeditious orders under Order 34A, r 1*'.

[121] SCJA, s 80.

[122] This practice is considered *supra*, at text commencing after note 79.

powers of the court' – that it is only in the event of a *casus omissus* in the rules that the powers may be exercised, but that the rules themselves cannot be overridden, notwithstanding the injustice or abuse which emanates from them. Such an interpretation is supported by the fundamental principle that rules of court are statutory and therefore intended to be applied strictly.

As it is only the Rules Committee which has statutory authority to make rules to regulate practice and procedure,[121] there is a strong basis for contending that judges should not be seen to override those rules and, in effect, make new rules of procedure on an *ad hoc* basis. Such a route would involve a return to the time before the establishment of the Rules Committee when judges made rules pursuant to their inherent jurisdiction.[122] Nevertheless, in the *Siskina*,[123] Lord Denning MR advocated a more flexible approach so that the interests of justice could be preserved in circumstances which may be beyond the scope of the rules. The case involved an application for service out of the jurisdiction pursuant to Order 11, rule 1(1)(i) (RSC). To bring themselves within the rule, the claimants sought to rely on their claim for a *Mareva* injunction.[124] Although the rule was later held by the House of Lords not to apply in the circumstances,[125] Lord Denning was prepared to exercise the court's inherent juridiction and grant the relief sought:

> It was suggested that this course is not open to us because it would be legislation: and that we should leave the law to be amended by the Rule Committee. But see what this would mean: The shipowning company would be able to decamp with the insurance moneys and the cargo-owners would have to whistle for any redress. To wait for the Rule Committee would be to shut the stable door after the steed had been stolen. And who knows that there will ever again be another horse in the stable? Or another ship sunk and insurance moneys here: I ask, why should the judges wait for the Rule Committee? The judges have an inherent jurisdiction to lay down the practice and procedure of the courts: and we can invoke it now to restrain the removal of

[123] [1979] AC 210.
[124] The cargo owners claimed a *Mareva* injunction to prevent the dissipation by the shipowners of their insurance proceeds which had been obtained as a result of the sinking of the vessel.
[125] The House ruled, *inter alia*, that to come within this rule the injunction sought in the action had to be part of the substantive relief to which the plaintiff's cause of action entitled him and that he had an legal or equitable right which was enforceable by a final judgment for an injunction.
[126] *Supra*, note 123, at 236-237.
[127] *Ibid*, at 262.

> these insurance moneys. To the timorous souls I would say in the words of William Cowper:
>
> > 'Ye fearful saints, fresh courage take,
> > The clouds ye so much dread
> > Are big with mercy, and shall break
> > In blessings on your head.'
>
> Instead of 'saints', read 'judges'. Instead of 'mercy', read 'justice'. And you will find a good way to law reform.[126]

The House of Lords disagreed and advocated self-control. Lord Hailsham of Marylebone stated:

> The jurisdiction of the rules committee is statutory, and for judges of first instance or on appeal to pre-empt its functions is, at least in my opinion, for the courts to usurp the function of the legislature. Quite apart from this and from technical arguments of any kind, I should point out that the Rules Committee is a far more suitable vehicle for discharging the function than a panel of three judges, however eminent, deciding an individual case. Even if such a usurpation were legitimate, which in my view it is not, it would, in my judgment be highly undesirable.[127]

More recently, the English Court of Appeal emphasised in *Condliffe* v *Hislop*[128] that the court's inherent jurisdiction would not be exercised to make an order for security for costs in circumstances beyond the categories of Order 23 (RSC). It accepted the following statements of Dillon and Millet LJJ respectively in *Bowring CT & Co (Insurance) Ltd* v *Corsi Partners Ltd*:[129]

> To add a new category, not covered by any enactment, to those listed in rule 1(1) in which a plaintiff can be ordered to give security would now be a matter for the Rule Committee, and not for the discretion, as a matter of inherent jurisdiction, of the individual judge in the individual case.[130]

[128] [1996] 1 WLR 753.
[129] [1994] 2 Lloyd's Rep 567.
[130] *Ibid*, at 571.
[131] *Ibid*, at 580. At p 577 Millet LJ said: 'O 23 represents a codification of the case law dealing with the power of the court to order security for costs'. Recent English cases concerning

> In my judgment, Order 23 must be regarded as a complete and exhaustive code. I agree with Dillon LJ that if there should emerge a need for a new category of case in which it is desirable that the court should have power to order security for costs, that will have to be dealt with by Parliament or the Rule Committee.[131]

The court is more amenable to exercising its inherent powers where to do so would ensure the more effective operation of its orders. In *Bekhor (AJ)* v *Bilton*,[132] the Court of Appeal was concerned, *inter alia*, with the jurisdiction to order discovery in aid of a *Mareva* injunction. Ackner LJ stated:

> In so far as counsel for the plaintiffs contends that there is inherent jurisdiction in the court to make effective the remedies that it grants, this seems to me merely another way of submitting that, where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective.[133] This I have accepted. However, if and in so far as he contends that the courts have a general discretion to make any order necessary to ensure that justice be done between the parties, then in my judgment that is too wide and sweeping a contention to be acceptable.

Stephenson LJ commented in the same vein:

> In my judgment a judge has the duty to prevent his court being misused as far as the law allows, but the means by which he can perform that duty are limited by the authority of Parliament, of the rules of his court and of decided cases. Those means do, however, include what is reasonably necessary to performing effectively a judge's duties and exercising his powers. In doing what appears to him just or convenient

the exercise of the court's inherent jurisdiction in other areas of procedure include *Dubai Bank Ltd* v *Galadari (No 6)* Times Law Reports, October 14, 1992 (whether party could be required to obtain documents); *Panayiotou* v *Sony Music Entertainment (UK) Ltd* [1994] 2 WLR 241 (issue of letter of request for production of documents); *Associated Bulk Carriers Ltd* v *Koch Shipping Inc* [1978] 2 All ER 254 (whether interim payment could be ordered beyond the scope of the rules); *Abu Dhabi National Tanker Co* v *Product Star Shipping Ltd* [1992] 2 All ER 20 (use of stay process to obtain documents from non-party).

132 [1981] QB 923, at 942-943.

133 In this case, discovery in aid of a *Mareva* injunction.

134 [1981] QB 923, at 954. Also see *United Overseas Bank Ltd* v *Thye Nam Loong (S) Pte Ltd* (S 413/1994), in which the Singapore High Court considered this approach in relation

> he cannot overstep their lawfully authorised limits, but he can do what makes their performance and exercise effective. He has a judicial discretion to implement a lawful order by ancillary orders obviously required for their efficacy, even though not previously made or expressly authorised. This implied jurisdiction, inherent because implicit in powers already recognised and exercised, and so different from any general or residual inherent jurisdiction, is hard to define and is to be assumed with caution. But to deny this kind of inherent jurisdiction altogether would be to refuse to judges incidental powers recognised as inherent or implicit in statutory powers granted to public authorities, to shorten the arm of justice and to diminish the value of the courts.[134]

The scope of the court's inherent powers in the context of its relationship with the rules of court has been raised frequently in both Malaysia and Singapore. It is appropriate to commence with the case of *Yomeishu Seizo Co Ltd* v *Sinma Medical Products (M) Sdn Bhd*,[135] in which VC George J strongly affirmed the pre-eminence of the rules:

> The court has always had an inherent jurisdiction to regulate its own proceedings. Order 92 r 4 of the Rules of the High Court 1980 recognizes this to be the position. However, that is not to mean that the judge may ignore express rules of court and make his own rules of practice and procedure inconsistent with written rules and time-honoured practices. There is no doubt that from time to time, established rules and practices become outdated. For instance, there are rules and practices that make for extended trials. Some of these rules and practices could perhaps be done away with or at least streamlined. New rules could be brought in. However, it is not open to individual judges or even for the conference of judges to take it upon himself or itself to do away with or streamline or adopt innovative procedures. However well- intentioned, that sort of thing, if permitted, could lead to a form of anarchy! If changes are called for, what has to be done is to have the rules committee – the members of which are carefully selected from the Bench and from members of the Bar and includes

to disclosure of information by the judgment debtor in aid of execution. For other cases concerning discovery in this context, see *A & Anor* v *C & Ors*, [1980] 2 All ER 347; *Bankers Trust Co* v *Shapira & Ors* [1980] 1 WLR 1274.

135 [1996] 2 MLJ 334.

136 *Ibid*, at 347.

137 [1989] 2 CLJ 584, at 587.

> the Attorney General or his representative and which is headed by none other than the Chief Justice – give due consideration to the new ideas and have the rules duly amended. And until such amendments are effected, the old rules and practices cannot be ignored and new procedures may not be implemented. However, where there is a lacuna in the rules and practice, then and only then, may the aforesaid inherent jurisdiction be invoked.[136]

In the circumstances, the absence of a rule concerning the appointment of a non-court official to act as an interpreter was a basis for the court to allow this procedure to take place pursuant to its inherent power. Similarly, in *Che Wan Development Sdn Bhd* v *Cooperative Central Bank Bhd*,[137] NH Chan J said: 'it seems to me to be plain that the court has no general inherent jurisdiction to grant a stay of execution beyond the jurisdiction given … by the rules of court'.[138] This principle was also observed in *Marychristine Knittel-Hanks* v *Kenneth G Hanks*,[139] in which Punch Coomaraswamy J refused to exercise his inherent powers to waive the requirements of certain rules concerning the affidavit procedure.[140] And in *Mitchell Cotts & Co Ltd* v *Bryanne*,[141] Willan CJ was only willing to set aside a decree pursuant to the court's inherent jurisdiction because, unlike under the Indian Civil Procedure Code, there was no specific rule to cover the situation.[142]

If the approach in these cases is that the court will only exercise its inherent powers when there are no rules to govern the situation before it, then there is an underlying assumption that the *casus omissus* was not intended by the Rules Committee. For example, in *Yomeishu Seizo Co Ltd*, it was open to argument that the rules do not provide for the appointment of a non-court official as an interpreter because the presence of only court officials at hearings is necessary to ensure that the evidence is, and is seen to be, unaffected by the parties' interests.[143] The issue of whether the court

[138] *Cf Ramalingam Naykavadiar* v *Ganapathy* (1942) 10 MLJ (FMSR) 114.

[139] OS 294/1990 (26/12/1992).

[140] Also see *Dynacast (S) Pte Ltd* v *Lim Meng Siang* [1989] 3 MLJ 456 (considered *infra*, text at note 187).

[141] (1948-49) MLJ Supp 127.

[142] *Ie*, O 37, r 4 of the Indian Rules had no counterpart in the Federated Malay States Civil Procedure Code. See O 2, r 1(2) (RC) which makes such provision for the setting aside of judgments and orders in the circumstances set out in r 1(1) (RC).

[143] Although, there may be exceptions to this rule, as when the language in question is not spoken by any official.

[144] *Supra*, note 1.

[145] *Ibid,* at 218-219.

will exercise its inherent power in circumstances not regulated by the rules gave rise to controversy in *R Rama Chandran* v *The Industrial Court of Malaysia*,[144] a case which epitomises the difficulty facing the courts when determining the operation and scope of the doctrine. The question for the Federal Court in that case was whether it had the power to grant relief provided for by the Industrial Relations Act, 1967 when quashing an award of the Industrial Court or whether it was merely required to remit the case to the Industrial Court for its action. The statute provided that it was for the Industrial Court to determine the matter of relief.[145] Both Eusoff Chin CJ and Edgar Joseph Jr FCJ were of the view that the Federal Court had inherent power to grant the statutory relief. Eusoff Chin CJ declared that the court could exercise its inherent powers in the absence of express statutory provision.[146] Wan Yahya FCJ, dissenting, was only prepared to use the doctrine 'in cases where Parliament has omitted to provide in the Act something so glaring which obviously ought to have been there'.[147] Put another way, a *casus omissus* would not, in his opinion, justify the operation of the court's inherent powers unless it were obvious that the omission was unintended. Edgar Joseph Jr FCJ did not accept this route, preferring to apply the broader principle that a court should only refrain from exercising its inherent powers when to do so would result 'in violation of a statutory provision'.[148]

In the context of the rules of court, this means that the inherent powers of the court may be exercised whenever the rules do not make provision for particular circumstances irrespective of any underlying intention or assumption on the part of the Rules Committee. Wan Yahya FCJ's approach requires the court to ascertain whether the Rules Committee intended to leave out provisions in respect of certain matters or whether there is a genuine *lacuna* which must be filled through the use of the court's inherent powers. Order 92, rule 4 refers to the 'state' of the rules which connotes the absence of rules as much as their inclusion. It is suggested that it is not productive for the court to assume what the Rules Committee intended. This can often be an impossible task. Furthermore, it is not appropriate to assume that

[146] *Ibid,* at 181.
[147] His Lordship also stated (at 217): '…the inherent powers of the court…must not only be exercised subject to other express provision of the Rules but [they] must also not be in conflict with the intention of the legislature to be found in the rules or other substantive legislation'.
[148] *Supra*, note 1, at 237.
[149] Also see *Loo Chay Ming* v *Ong Cheng Hoe* [1990] 1 MLJ 445, at 446-447.
[150] [1994] 2 SLR 621.

the Rules Committee would deliberately omit to prescribe rules where such omission would lead to injustice or abuse.

In such circumstances, it is the court which is in the most favoured position to determine whether the omission would lead to this outcome and to take the necessary action to prevent it.[149] Hence, in '*The Nagasaki Spirit*',[150] Karthigesu JA, sitting in the High Court, ruled that a person or entity may be allowed to intervene in admiralty proceedings involving the arrest of a ship even if that person or entity did not have an interest in that property as required by O 70, r 16 (RSC).[151] In this case, the intervener, who owned the shipyard at which the arrested vessel was berthed, claimed that it was suffering hardship as a result of the congestion caused by the ship's presence. His Honour agreed with the following principle espoused by Brandon J in '*The Mardina Merchant*':[152] '... the rule[153] is not exhaustive of the powers of the court to do justice in particular cases. I am of the opinion that there must be an inherent jurisdiction in the court to allow a party to intervene if the effect of an arrest is to cause that party serious hardship or difficulty or danger.'[154] The issue of whether the Rules Committee intended to exclude persons or entities who have no interest in the property under arrest does not appear to have been raised by the parties in the two cases. Indeed, Brandon J in '*The Mardina Merchant*' expressed the view,[155] with which Karthigesu JA also agreed,[156] 'that the court must have power to allow the party who is affected by the working of the system of law used in admiralty actions in *rem* to apply to the court for some mitigation of the hardship or the difficulty or the danger.' This proposition would support the court's use of its inherent powers to provide relief as the justice of the case demands (where the rule makes no provision for the particular circumstances) notwithstanding the assumption (*ie*, whether the omission is intended or not) on which the rule may be based.

Returning to the statement of VC George J in *Yomeishu Seizo Co Ltd* v *Sinma Medical Products (M) Sdn Bhd*,[157] it is necessary to point out that the case represents one end of the *stratum*, a role limited to the *casus omissus* situation. The different approaches which a court might take in these

[151] The same rule in the RC.
[152] [1974] 3 All ER 749, at 750.
[153] The corresponding rule in Singapore is O 70, r 16 (RC).
[154] *Supra*, note 150, at 626.
[155] *Supra*, note 152, at 750-751.
[156] *Supra*, note 150, at 626.
[157] *Supra*, note 135.
[158] [1994] 2 MLJ 789 (*Kumagai Gumi Co Ltd*).
[159] *Ibid*, at 827.
[160] The court ruled that it could entertain a cross-petition in the circumstances of the case even

circumstances have just been considered. Other cases reveal a more intrusive role. In *Kumagai Gumi Co Ltd* v *Zenecon-Kumagai Sdn Bhd,*[158] Anuar J commented that the court may exercise its inherent powers 'where the rules do not contain provisions making available sufficient remedies'.[159] If this statement was intended to mean that the court has a complete jurisdiction to grant any remedial relief unrestrained by the rules then the inherent power of the court clearly extends beyond a residuary role of the kind contemplated in *Yomeishu*.[160] This approach was advocated in the earlier case of *Permodalan MBF Sdn Bhd* v *Tan Sri Datuk Seri Hamzah bin Abu Samah*,[161] in which the Supreme Court of Malaysia said of Order 92, rule 4: 'We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies the court will not invoke its inherent powers.'[162]

A worrying aspect of *Permodalan MBF Sdn Bhd* and *Kumagai Gumi Co Ltd* is that the scope of the term 'remedies' is not defined, leaving in doubt the nature of the orders which the court might make pursuant to its powers. It should not be forgotten that numerous remedies which are available under the rules are actually authorised by primary statute law. The rules merely regulate the procedure by which these remedies may be obtained.[163] Therefore, the supposition that the inherent power of the court extends to granting any remedy not expressed in the rules involves an underlying assumption that the court may make any order which establishes or affects substantive rights, a jurisdiction which, as has been seen, may only be provided by statute.[164] Abdul Malik Ishak J's acceptance of counsel's submission in *Abdul Razak Ahmad* v *Majlis Bandaraya Johor Bahru*[165] that

though the rules did not provide for such a procedure.

161 [1988] 1 MLJ 178 (*Permodalan MBF Sdn Bhd*).

162 *Ibid,* at 181. Also see *MBf Finance Bhd* v *Sri-Hartamas Development Sdn Bhd* [1992] 1 CLJ 160, at 169; *Delcont (M) Sdn Bhd* v *Motor Sport International Ltd* [1996] 5 MLJ 51, at 62, which support the *Permodalan* approach.

163 *Eg*, the power to order interim payments, provisional damages, discovery, to award interest, to enforce judgments and various other powers are vested in the courts by the First Schedule to the SCJA pursuant to which rules of court have been made. Also see the Civil Law Act generally.

164 *Supra*, text from note 6, 'The source of the inherent powers of the court'.

165 [1995] 2 MLJ 287, at 293.

166 The court was concerned with an application to strike out an originating summons. The court concluded that such powers must be 'sparingly used'.

167 *Infra*, text after note 215, 'D. *Is the court entitled to use its inherent power to establish or affect the substantive rights of a party*?'

Order 92, rule 4 involved 'very drastic powers' certainly does not make ascertainment of its scope any easier.[166] As will be seen under a separate heading,[167] a vital concern is whether the inherent power of the court can be used to affect the substantive rights of the parties. A certain gloss appears to have been put on *Permodalan MBF Sdn Bhd* by VC George J in *Loo Chay Meng* v *Ong Cheng Hoe*,[168] in which his Lordship equated the situation in which the rules do not provide 'sufficient remedies' with 'a lacuna in the face of the rules which causes a procedural injustice'.[169] The wording suggests a more passive approach reminiscent of *Yomeishu*.[170]

If the Supreme Court in *Permodalan MBF Sdn Bhd* is regarded as having endorsed too broad an approach, issue can certainly taken with the decision of the Court of Appeal in *Arab-Malaysian Credit Bhd* v *Tan Seang Meng*,[171] in which the express terms of the rule for the renewal of a writ were ignored and supplanted by the court's inherent powers. The plaintiff had obtained an order for substituted service and entered judgment in default of appearance. More than six years later the defendant applied to set aside the judgment. As the order for substituted service was determined to be flawed, the judgment in default was set aside *ex debito justitiae*. Subsequently, the plaintiff attempted to resuscitate the writ by making eight separate *ex parte* applications (for eight extensions of 12 months). The defendant applied to set aside the writ. The High Court ruled that there was no jurisdictional basis under the rule for the eight extensions obtained by the plaintiff. The Court of Appeal disagreed. Gopal Sri Ram JCA, who delivered the judgment of the court, declared: 'Even the restriction of granting more than one extension of 12 months expressed in Order 6, rule 7 may, in appropriate cases, be overcome by having resort to Order 92, rule 4'. His Lordship added: 'Surely, this principle may be invoked to overcome any technical obstacles in the way of achieving substantial justice in a case where a pedantic approach to a rule of court will result in injustice'.

It must be said that it is one thing to construe the rules of court in an

[168] [1990] 1 MLJ 445.

[169] *Ibid*, at 446

[170] *Supra*, note 135.

[171] [1995] 1 MLJ 525.

[172] *Ibid*, at 536. See *Sim Seoh Beng* v *Koepasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292 in which it was said that the rules of court must not be construed in a manner which would cause injustice.

[173] See the comments of Lord Hailsham in the *Siskina* [1979] AC 210, at 262 and Ackner LJ in *Bekhor (AJ)* v *Bilton* [1981] 2 All ER 565, at 577 in response to a similar approach taken

appropriate manner so as to achieve justice,[172] and quite another for the court to supplant the authority of the Rules Committee by introducing its own notions of justice in direct contravention of a rule of court.[173] In *Suppuletchimi* v *Palmco*,[174] the Malaysian High Court went further by ignoring the prohibition against the introduction of affidavit evidence in respect of an application to strike out a writ under Order 18, rule 19(1))(a) (RHC). The court ruled that it could act pursuant to its inherent power to override this restriction.[175] Even assuming that this is a correct approach, it is not entirely clear from the circumstances of the case how a consideration of the evidence would have helped the determination of whether the plaintiffs had a reasonable cause of action. It is noteworthy that in *Ibrahim bin Mohamad* v *Ketua Polis Daerah Johor Bahru*,[176] Abdul Malik Ishak J thought that the issue in *Suppuletchimi* was decided contrary to precedent.[177]

by Lord Denning MR in the former case. The relevant extracts of the judgments in these cases are cited *supra*, text at notes 123-134. Also see *The Official Receiver, Liquidator of Jason Textile Industries Pte Ltd* v *QBE Insurance (International) Ltd* [1989] 1 MLJ 1, in which the Singapore Court of Appeal refused to allow an extension in similar circumstances. This case concerned an application in 1985 (56 months after the writ was issued) to extend the validity of the writ for five successive 12-month periods from December 1981 to December 1986. The plaintiffs were granted the order they sought and the writ was served. The defendants' application to set aside the writ was allowed. The plaintiffs' appeal was dismissed by the High Court and Court of Appeal. The Court of Appeal held that the court's power is limited to extending the validity of the writ for a maximum of 12 months at any one time. Accordingly, an application for renewal had to be made at the latest within 12 months of the expiry of the writ. The court could not grant two or more successive renewals to bring the writ up to date. The plaintiffs argued that even though the order for the renewal of the writ should not have been granted, and therefore its service was irregular (as the writ by then had expired), the irregularity was curable under Order 2, rule 1. The Court of Appeal accepted that this amounted to an irregularity but held that the discretion of the court to cure the irregularity could not be exercised in these circumstances. The discretion could only be exercised if the court could have properly granted the order in 1986. It would not have done this because more than 12 months would have elapsed since the validity of the writ last expired (1981), and because the plaintiffs failed to show any good reason why the validity of the writ ought to be extended. In *Leal* v *Dunlop Bio-Processes* [1984] 1 WLR 874, at 885, Slade LJ said: 'a party who 'cannot properly enter through the front door of Order 6, rule 8, [the English renewal rule] should not be allowed to enter through the back door of Order 2, rule 1'. It could similarly be argued that the court should not exercise its inherent power to grant relief where this is expressly prohibited by the rules.

174 [1994] 2 MLJ 368 (*Suppuletchimi*).

175 *Ibid*, at 380. The restriction is in O 18, r 19(2) (RHC). Also see *Khaw Kok Sin* v *Khaw Gim Leong Co Sdn Bhd* [1974]1 MLJ 180, at 181 to the same effect.

176 [1996] 5 MLJ 15.

177 *Ibid*, at 22.

178 See, *eg*, *BBMB Kewangan Bhd* v *Attan bin Abu Bakar* [1996] 1 MLJ 709.

179 *Eg*, in *Hongkong and Shanghai Banking Corporation* v *Goh Su Liat (TAS)* [1986] 2 MLJ

There is certainly less controversy over the admission of affidavits in interlocutory proceedings pursuant to the court's inherent power where there has been a mere procedural irregularity such as delay in its filing (rather than the specific exclusion of the document by a rule of court).[178] Similarly, the courts have shown a greater willingness to hear applications for procedural relief where no provision has been made by the rules, and such indulgence would not involve a contravention of the latter.[179] No doubt, the admonition by George J, as his Lordship then was, in *Koh Siak Poh* v *Perkayuan OKS Sdn Bhd*, that there is 'a lamentable prevalence for solicitors to ignore the requirements of the procedural rules and to lean heavily on the court's inherent powers…'[180] continues to be relevant ten years on. The trend is likely to continue unless the courts are firm about the use to which this rule can be put. What appears to be clear, at least in Singapore, is that if new rules are created to establish a procedure which was hitherto governed by the inherent jurisdiction of the court, the rules must be regarded as superseding the former practice. In *Singapore Press Holdings Ltd* v *Brown Noel Trading Pte Ltd*,[181] the Court of Appeal ruled that the High Court had been wrong to apply English cases concerning the court's inherent jurisdiction to alter a judgment before it is entered and perfected[182] as, in the circumstances, the rule-based procedure for hearing of further arguments applied.[183]

More often than not, issues concerning the relationship between the court's inherent powers and the rules of court are raised incidentally and without full argument. This trend, which promotes uncertainty in an area of law which demands clarification, has been noted by the courts.[184] In *Re Baring Futures (Singapore) Pte Ltd; Director of the Serious Fraud Office*

86, Chua J allowed an application by the judgment debtor to apply to set aside certain garnishee orders even though no provision was made in the rules for this process. Also see *P Vijandran* v *Karpal Singh* [1993] 3 MLJ 94 (court permitted application to seek the determination of the court regarding party's entitlement to costs).

[180] [1986] MLJ 238, at 240.

[181] [1994] 3 SLR 151.

[182] See, *eg*, *Pearlman (Veneers) SA (Pty) Ltd* v *Bernhard Bartels* [1954] 1 WLR 1457.

[183] *Ie*, pursuant to O 56, r 2 (RC).

[184] By the Singapore Court of Appeal in *Shiffon Creations (S) Ptd Ltd* v *Tong Lee Co Pte Ltd* [1991] 1 MLJ 65, at 68 and by the Singapore High Court in *Emilia Shipping Inc* v *State Enterprises For Pulp and Paper Industries* [1991] 2 MLJ 379, at 381. These cases will be considered *infra* at text following note 215, 'D. *Is the court entitled to use its inherent power to establish or affect the substantive rights of a party*?'

[185] [1996] 2 SLR 89.

[186] *Ibid*, at 95.

[187] [1989] 3 MLJ 456.

v *Judicial Managers of Baring Futures (Singapore) Pte Ltd*,[185] the Director of the Serious Fraud Office applied to be given access to certain documents in the possession of the judicial managers of the company. One of the arguments raised in this respect involved the extension of the pre-action discovery process under Order 24, rule 7A (as the conditions of the rule appeared not to have been satisfied). Having been referred to Order 92, rule 4, the High Court concluded that 'no question arose about any injustice or any abuse…'.[186] It is not entirely clear from the judgment whether discovery would have been allowed beyond the scope of the rule if injustice or abuse would have otherwise resulted. Similarly, in *Dynacast (S) Pte Ltd* v *Lim Meng Siang*,[187] in response to the argument of counsel that the court had inherent power to accept affidavit evidence which contravened the rules of court,[188] the High Court responded that it did not think that the rule 'carried the case of the plaintiffs any further'. Either the court meant that, as in *Re Baring Futures,* there was no abuse or injustice to bring the court's inherent powers into play, or that these powers could not be used to circumvent the rules of court in any event. The more recent decision of the High Court in *Lee Kuan Yew* v *Vinocur*[189] is also of interest in this respect. The court concluded that a witness could give oral evidence at trial to amplify his affidavit evidence pursuant to Order 38, rule 2(4)(RC) 'or' the court's inherent power.[190] The use of 'or' suggests that the court could have made such an order pursuant to its inherent power even in the absence of Order 38, rule 2(4). If this is a correct interpretation, it subjects the provisions of rule 2 (which govern the affidavit process at trial) to the inherent powers of the court, an outcome which may not accord with the cases espousing a non-interventionist role. Nevertheless, might it not be said in support of this outcome that a responsible exercise of these powers would ensure that the spirit of the rules is upheld rather than vanquished? Perhaps it is time for litigants to suggest, in appropriate cases, how the inherent powers of the court might be applied in unison with, rather than counter to, the rules of court to establish a more effective system of procedure.

B. *Do the courts have an inherent power to modify procedure prescribed by statutes?*

[188] *Ie*, O 41, r 5(2) (RC).
[189] [1995] 3 SLR 477.
[190] *Ibid*, at 485.
[191] *Supra*, text following note 63.
[192] [1993] 1 SLR 272

Although the rules of court are a primary source of procedure in general litigation, statutes often contain provisions which regulate the process by which substantive rights are determined. The issue for consideration here is whether the interrelationship between the inherent powers of the court and the rules applies in same vein to primary legislation. If it is accepted that the inherent powers of the court can be exercised to provide a source of procedure beyond the scope of the rules of court, do they have the same effect in relation to statutory provisions which govern procedure? On the premise that the foundation of the doctrine of inherent powers is that the court must have overall control over its own process to prevent injustice and abuse, it is certainly arguable that these powers extend to any procedure in the course of litigation even if its source is primary statute law. It might be contended that as Order 92, rule 4 is part of the rules of court, the inherent powers which the rule declares should only affect procedure generally governed by rules of court and other subsidiary legislation. However, such an argument fails to take into account the fact that the rule is not a vesting source for the inherent powers which exist as part of the institutional role of the courts.[191] Accordingly, the significance of Order 92, rule 4 is that it points out the inherent powers in the context of the rules of court but does not exclude their application to other legislation, whether primary or subsidiary. Whether the court will exercise its inherent power in relation to the procedure prescribed by primary statutes depends on the interpretation of the relevant provisions and legislative intention.

A classic instance of the use of inherent power to limit rather than broaden the scope of statutory procedure is afforded by *Attorney-General, Singapore* v *Joo Yee Construction Pte Ltd.*[192] In this case it was successfully argued as a preliminary point that section 34 of the SCJA does not state exhaustively the circumstances in which no appeal lies to the Court of Appeal. The Singapore Court of Appeal ruled that it had the inherent jurisdiction to refuse to entertain an appeal, even if it was not excluded by the section, which did not involve 'live' issues: '…a court will not undertake to decide on issues, which if decided in the appellant's favour, will not gain him something which he would not gain if he lost, and will not decide on issues simply to have a decision that will be useful for similar cases in the future'.[193]

The court is more likely to act pursuant to its powers in the absence of statutory restriction, but even in such circumstances caution must be

[193] *Ibid*, at 276 (*per* Karthigesu J, as his Honour then was).
[194] [1995] 2 MLJ 105.
[195] *Ie*, ss 103(1) and 106(2).
[196] *Ibid*, at 117.
[197] S 103(1) provided: 'Subject to this section, tax payable under an assessment or a composite

exercised. In *Kerajaan Malaysia* v *Jasanusa Sdn Bhd*,[194] the Malaysian Supreme Court ruled that provisions in the Income Tax Act, 1967[195] regarding the procedure for the payment of corporation tax could be subject to the inherent powers of the court to grant a stay of process against the taxpayer. The court justified its position on the basis that the provisions did not expressly bar such interference.[196] This approach may be problematic because it demands an express prohibition which is often assumed, but not stated in the statute. In the case itself, the provisions appeared to be peremptory in nature by requiring payment of tax before any appeal.[197] It is evident from the case that the court's exercise of its inherent powers went beyond procedural matters and affected the substantive entitlements conferred by the statute on the Government. It is also noteworthy that the court did not consider NH Chan J's general statement in *Che Wan Development Sdn Bhd* v *Co-operative Central Bank*:[198] 'It seems to me to be plain that the court has no general inherent jurisdiction to grant a stay of execution beyond the jurisdiction given by certain statutes…. No authority can be produced showing that such a jurisdiction exists outside the power conferred by … statute'.

The court is more cautious when a statutory restriction is imposed. In *Chia Ah Sim* v *Ronnie Chong*,[199] Judith Prakash JC, as her Honour then was, ruled that the prohibition imposed by section 122(2) of the Legal Profession Act[200] on an order for taxation (beyond the prescribed period of one year from the payment of the bill of costs), prevented the court from exercising its inherent jurisdiction to make such an order. The case may be compared to *Perusahaan Petanda Bintang Sdn Bhd* v *Asbir, Hira Singh & Co*,[201] in which Vincent Ng J stated that the court could invoke its inherent jurisdiction to make an order for taxation of costs beyond the prescribed period where the facts disclose serious misconduct on the part of a lawyer in respect of overcharging or fraud. The court exercised its

assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be. S 106(1) provided: 'In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(3),(5) or (5A)'.

198 [1989] 2 CLJ 584, at 587.

199 [1993] 2 SLR 564.

200 Prior to its amendment by the Legal Profession (Amendment) Act 1993.

201 [1995] 2 MLJ 455.

202 *Ibid*, at 463. This aspect of the court's inherent powers is discussed *supra*, text at note 72.

203 (1952) 18 MLJ 187.

204 See *Mohamed v Mohaideen* (FM Civil Appeal No 20 of 1952). Also see *Connelly* v *DPP*

powers 'as watchdog over the conduct of solicitors' who are officers of the court.[202] The primary distinguishing factors between *Perusahaan Petanda Bintang Sdn Bhd* and *Chia Ah Sim* are that firstly, no statutory restriction against extension applied; and secondly, the court was concerned with its role of safeguarding the integrity of the legal process. *Perusahaan Petanda Bintang Sdn Bhd* raises the incidental but important point of whether the court would have extended time in the face of a statutory bar because of the mockery which would have resulted had the lawyer's misconduct been ignored by the court. In these circumstances, it could be suggested with some force that the legislative intention does not contemplate such an abuse of process, and that, accordingly, the provisions must be read to avoid mischief. If so, the inherent powers of the court may operate in such circumstances but, it must be re-emphasised, in relation to procedural issues.

This principle was not adhered to in *Mohaideen* v *Mohamed*,[203] where Whitton J decided to use his inherent powers to override the right of a lessor to possession of premises under the Control of Rent Ordinance, 1948. The lessor had been in breach of his contract with the lessee by failing to perform an ancillary agreement relating to the latter's hire of furniture. The lessor took advantage of his own breach by applying to recover possession of the premises, an action which could not ordinarily be undertaken without submission of his case to the rent assessment board. Whitton J sought to use his inherent powers to prevent the injustice and abuse of process which would result from the strict application of the statute. The Court of Appeal, in an unreported judgment, reversed the ruling, holding that the statute could not be subjected to the court's inherent powers notwithstanding the unfortunate result.[204]

C. *Does the inherent power of the court extend to proceedings governed by their own specific rules rather than the general Rules of Court?*

The point has been made that the court may exercise its inherent powers in areas of procedure governed by primary statutes (and not merely by the

(*supra*, note 1, at 1347), where Lord Devlin stated: '…the judges of the High Court have in their inherent jurisdiction, both in civil and criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides. And see further, *Tham Sai Mooi* v *Thaver* (1954) MLJ 187.

[205] *Supra*, at text following the paragraph in which note 190 appears, 'B. *Do the courts have an inherent power to modify procedure prescribed by statutes*?'

[206] *Ie*, bankruptcy proceedings, proceedings relating to the winding up of companies, proceedings under Part IV of the Parliamentary Elections Act , proceedings under Part I of the Mental

general rules of court) on the basis that the court must have overall control over its own process to prevent injustice and abuse.[205] It would seem on principle that the same approach should apply to rules of procedure created for particular proceedings. However, Order 1, rule 2(4) (RC) provides that the general rules of court are not to have any application to the proceedings to which it refers.[206] This provision raises the question of whether Order 92, rule 4 can apply to these particular proceedings in the absence of a corresponding provision in the rules which govern them.[207] If one considers that Order 92, rule 4 is not essentially a rule of procedure which prescribes a specific practice, but operates as a reminder of the existence of the court's inherent powers, then these powers must be contemplated as transcending the rules of court.[208] If so, the restriction in Order 1, rule 2(4) does not bar the court's exercise of its inherent powers in any of the proceedings mentioned in Order 1, rule 2(4).

Several cases validate the approach advocated. In *Cheong Kim Seah* v *Lim Poh Choo*,[209] Karthigesu J, as his Honour then was, held that the petitioner's application to strike out the respondent's answer in matrimonial proceedings (governed by the Matrimonial Proceedings Rules, 1981) was sustainable under the inherent jurisdiction of the court. In *Heng Joo See* v *Ho Pol Ling*[210] (which also involved matrimonial proceedings), a *decree nisi* was rescinded and a petition for nullity dismissed by Punch Coomaraswamy J pursuant to Order 92, rule 4 (RSC) for deception which constituted an abuse of the court's process. And in *Re Lo Siong Fong*,[211] VC George J declared that he had the inherent jurisdiction to permanently stay a petition to wind up a company[212] as it had been brought for a collateral purpose which amounted to an abuse of process. It is significant that the learned judge was willing to exercise his inherent powers and at the same time rule that Order 18, rule 19 (RHC) did not apply to winding up proceedings

Disorders and Treatment Act and proceedings under Part IX of the Women's Charter (except appeals to the Court of Appeal), and criminal proceedings.

207 There is no provision in these particular proceedings which corresponds to O 92, r 4 (RC).

208 The matter of the source of the inherent powers of the court is considered *supra,* at text following note 6, under 'II. The source of the inherent powers of the court'.

209 [1993] 1 SLR 172.

210 [1993] 3 SLR 850.

211 [1994] 2 MLJ 72.

212 Brought pursuant to the Companies (Winding Up) Rules, 1972.

213 There was no corresponding provision in the Companies (Winding Up) Rules, 1972. Also see *Kuah Kok Kim* v *Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129, where the Court of Appeal ruled that although the general rules of court and the company winding up rules were mutually exclusive in their operational effect, O 2 of the former RSC (the same Order in the current RC) could apply to cure an irregularity in winding-up proceedings.

because of the restriction in Order 1, rule 2(2) (RHC) (which is similar to the Singapore Order 1, rule 2(4) (RC)).[213] It may be implied from this short part of the judgment that the inherent powers of the court, though declared in a rule of court (ie, Order 92, rule 4), are not constituted by that rule, a matter which has been considered extensively.[214] Another significant factor is that Order 1, rule 2(4) (RC) provides that the rules do not apply to criminal proceedings. If this provision were to be construed to exclude the operation of the court's inherent powers in criminal cases on the basis that the powers are declared in Order 92, rule 4, the result would be contrary to existing case law, which establishes that the court has the same power to govern and regulate its process in order to prevent injustice and abuse in criminal cases as it has in civil cases.[215]

D. *Is the court entitled to use its inherent power to establish or affect the substantive rights of a party?*

The distinction between substance and procedure is not always easily made and may depend on the purpose of the exercise and the characterisation of the law or rule. For example, a statute may have to be characterised as procedural or substantive to determine whether it has retrospective effect. Where a case involves private international law circumstances, the law which applies often depends on whether the issues are classified as substantive or procedural. For the purpose of the present enquiry, the distinction to be adopted is that which differentiates between a party's legal or equitable entitlements or remedies and the process by which these entitlements or remedies are achieved, or put another way, the difference between the product and the machinery which creates it.[216] Such a definition, though neat, is not foolproof. Take, for example, the *Mareva* injunction.[217] This remedy is substantive in the sense that the party to whom it is granted acquires a legal entitlement in the form of security for his potential judgment. Correspondingly, the opposing party's legal rights are affected as he is prevented from freely disposing of his property. The relief is also procedural in the sense that it is a process by which the claimant hopes to ensure his

[214] The matter of the source of the inherent powers of the court is considered *supra*, at text following note 6, under 'II. The source of the inherent powers of the court.'

[215] See, *eg*, *PP* v *Ho So Mui* (*supra*, note 1); *Connelly* v *DPP* (*supra*, note 1, at 1301 and 1347).

[216] So put by Lush LJ in *Poyser* v *Minors* (1881) 7 QBD 329, at 334.

[217] SCJA, First Schedule, para 5(c).

[218] This has not always been the position in Malaysia. The case law is considered in the text from note 254.

ultimate remedy in damages. In situations such as this it is necessary to consider precedent to determine how the remedy is classified. For example, in Singapore, as will be seen, the courts have generally treated the *Mareva* injunction as a substantive power conferred by statute rather than a procedural relief within the compass of the rules of court.[218]

Statute provides for the making of rules of court for the purpose of 'regulating and prescribing the procedure and practice....'[219] Although the rules have the force of statute,[220] their purpose is not for creating or modifying substantive rights established by statute or case-law. As Lord Herschell LC said in *The British South Africa Co* v *The Companhia de Mozambique*:[221] 'It has more than once been held that the rules ... are rules of procedure only, and were not intended to affect, and did not affect the rights of parties'.[222] Nor do the the Rules of court have the status to create or alter jurisdictional grounds.[223] The use of a rule of court (Order 92, rule 4 (RC)) rather than a provision in the SCJA (or other power-vesting statute) as a reference point for the inherent power of the court is also indicative of its procedural nature. This argument is further advanced by part of the wording of the rule: '…nothing in these rules shall be deemed to limit or affect the inherent powers of the court'. The suggestion here is that there is a concurrent jurisdiction with the rules of court over matters generally governed by those rules; that is, matters of procedure, not substantive law.

It would certainly appear from the cases considered in the first three categories discussed[224] that the inherent power of the court is essentially

[219] SCJA, s 80(1).

[220] See The Interpretation Act (Cap 1), s 2; *SS Hontestroom* v *SS Sagaporack* [1927] AC 37, at 47; *Dato Mohamed Hashim Shamsuddin* v *A-G, HK* [1986] 2 MLJ 112, at 113; *Donald Campbell Co* v *Pollack* [1927] AC 732, at 804; *Re Young; Ex parte Young* (1881) 19 Ch 124; *McCheane* v *Gules* [1902] 1 Ch 287, at 301; *Smyth* v *Wiles* [1921] 2 KB 66; *Kayley* v *Hothersall* [1925] 1 KB 607, at 612.

[221] [1893] AC 602, at 628.

[222] Also see *Britain* v *Rossiter* (1882-3) 11 QBD 123, at p 129; *R* v *Inland Revenue Commissioners; ex p Federation of Self-Employed and Small Businesses Ltd* [1981] 2 WLR 722, at 734; *A-G* v *Sillem* (1864) 11 ER 1200; *Re Grosvenor Hotel, London (No 2)* [1965] 1 Ch 1210; *Mitchell* v *Harris Engineering Co Ltd* [1967] 2 QB 703.

[223] *The British South Africa Co* v *The Companhia de Mozambique* [1893] AC 602; *Guaranty Trust Company of New York* v *Hannay & Co* [1915] 2 KB 536.

[224] *Ie*, *supra:* 'A. *May the inherent power only be exercised when the rule does not extend to a situation so as to fill a lacuna, or does it go beyond this to override or qualify a rule the strict application of which would lead to injustice?*' 'B. *Do the courts have an inherent power to modify procedure prescribed by statutes?*' 'C. *Does the inherent power of the court extend to proceedings governed by their own specific rules rather than the Rules of Court?*'

[225] *Supra*, note 2, at 24. Also see *Sarwan* v *Amar* 1980 P & H 162 to the same effect in relation to s 151 of the Indian Civil Procedure Code (considered *supra,* text following note 118).

procedural in nature, for it concerns the authority, in addition to that which it has under the rules, to govern and regulate the process of litigation. As Sir Jack Jacob has pointed out: 'The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation.[225] In *Connelly* v *DPP*,[226] Lord Devlin declared: '…the judges of the High Court have in their inherent jurisdiction, both in civil and criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides.'[227] In *Emilia Shipping Inc*,[228] Chan Sek Keong J recognised the inherent jurisdiction of the court as being based on its position as '…ultimately master of its own process…'.[229] Selvam JC, as his Honour then was, stated in *Antonius Welirang*[230] that 'The inherent jurisdiction of the court in this context [an application for dismissal for want of prosecution] is a procedural power reasonably necessary for the administration of justice'. And in *Heng Joo See* v *Ho Pol Ling*,[231] Coomaraswamy J was prepared to exercise these powers to rescind a *decree nisi* and dismiss the petition for nullity as the order had been granted on the basis of untrue facts and the court's process had been generally abused. His Honour adopted the proposition that that court has a '…residual source of powers' which it could '…draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law….'[232]

Despite these pronouncements, the nature and scope of the inherent power of the court has not always been understood in Singapore and Malaysia. The elements of this doctrine have rarely been argued so that the courts have had limited opportunity for precise examination. The confusion[233] results from the failure to distinguish between these powers and the general jurisdiction of the English court. The inherent jurisdiction of the English court was never synonymous with its general jurisdiction at common law,

[226] *Supra*, note 1.
[227] *Ibid*, at 1347.
[228] *Supra*, note 31.
[229] *Ibid*, at 383.
[230] *Supra*, note 31.
[231] *Supra*, note 3.
[232] From Sir Jack Jacob (s*upra*, note 2, at 51).The full proposition is cited above.
[233] Which is evident from the few cases to be referred to, and more generally in the Legal Profession.
[234] See *Halsbury's Laws*, 4th ed, vol 10, paras 845—847 and Sir Jack Jacob, *supra*, note 2, at 23-24 (cited *supra* and repeated here for convenience): 'To understand the nature of the

but constituted part of that general jurisdiction. *A fortiori*, its general jurisdiction includes the exercise of an inherent jurisdiction which constitutes a specific source of authority.[234] Nevertheless, certain cases reveal an assumption that the doctrine of inherent jurisdiction can be used to tap the English court's substantive powers in the same vein as section 17(a) of the Courts Ordinance, 1955, which, as has been seen, conferred the 'jurisdiction and authority' of the English courts on the Singapore courts prior to 1964.[235]

A case which dramatically illustrates the temptation to rely on the doctrine of inherent powers in the absence of an express statutory power is afforded by *Shiffon*.[236] Here, the plaintiffs urged the High Court to grant damages in lieu of specific performance (of the contract for the sale of property to the plaintiffs) in the exercise of its 'inherent jurisdiction'. (Common law damages were not available as they had been excluded by an exemption clause.) They argued that the Court of Chancery had the jurisdiction to award damages in these circumstances, and that, therefore, the High Court had the same power based on its inherent jurisdiction. Thean J, as his Honour then was, found that the Court of Chancery did not have the general jurisdiction to grant the remedy of damages in addition to or in lieu of an injunction or specific performance and that the power had only been conferred in 1858 by section 2 of the Chancery Amendment Act of that year (commonly referred to as Lord Cairns' Act).[237] From Singapore's perspective, the 'jurisdiction and authority' clause in section 17(a) of the Courts Ordinance would have applied this statutory jurisdiction to Singapore prior to 1964, the year when the statute was repealed. Accordingly, the High Court had no power to award damages in equity. In making his determination, Thean J pointed out the remedy was not part of the court's inherent jurisdiction.[238]

It is not clear from the judgment whether the court would have accepted

inherent jurisdiction of the court, it is necessary to distinguish it first from the general jurisdiction of the court…. The term inherent jurisdiction of the court does not mean the same thing as the jurisdiction of the court used without qualification or description: the two terms are not interchangeable, for the inherent jurisdiction of the court is only a part or an aspect of its general jurisdiction. The general jurisdiction of the High Court as a superior court of record is, broadly speaking, unrestricted and unlimited in all matters of substantive law, both civil and criminal, except in so far as that has been taken away in unequivocal terms by statutory enactment… Its general jurisdiction thus includes the exercise of an inherent jurisdiction.'

235 *Supra*, text from note 11.

236 *Supra*, note 31.

237 And later by s 50 of the Supreme Court Act, 1981.

238 *Supra*, note 31, at 370.

239 [1991] 1 MLJ 65, at 68.

240 The paragraph empowers the court 'to grant all reliefs and remedies at law and in equity,

that it had the inherent jurisdiction to grant the remedy if it had been established as part of the Court of Chancery's general jurisdiction before the passing of Lord Cairn's Act. In the absence of more considered argument, the Court of Appeal was 'not inclined to express any firm view…' on the issue of whether 'the power to award damages in lieu of specific performance is part of the inherent jurisdiction of the High Court'.[239] The case leaves unanswered the question of the scope of the inherent jurisdiction of the court and the distinction between it and the general jurisdiction of the English courts. It is suggested that even if the Court of Chancery had a non-statutory jurisdiction based on case law to award damages in lieu of specific performance this would have constituted its broad general jurisdiction, not the procedure-based inherent jurisdiction which arises out of that general jurisdiction. As the Singapore High Court does not have a case-law based general jurisdiction, it cannot be said that the power to award damages in equity is subsumed under the doctrine of inherent jurisdiction. Indeed, paragraph 14 of the First Schedule to the SCJA, which was introduced in 1993, assumes that the Singapore High Court had no such power (inherent or otherwise) by specifically conferring it on that court.[240]

The confusion on the part of plaintiffs in *Shiffon* was again evident in *Antonius Welirang* v *Bank of America National Trust and Saving Association*.[241] Here a different plaintiff argued on the basis of *Shiffon* that the court had no inherent power to dismiss his action for want of prosecution. This approach failed to distinguish between the substantive jurisdiction which is vested in a court to grant remedies in law and equity (*ie*, its general and/or statutory jurisdiction), and the procedural jurisdiction pursuant to which the court controls its own process (*ie*, its inherent jurisdiction). Referring to *Shiffon*, Selvam JC, as His Honour then was, pointed out: 'It is evident that Thean J and the Court of Appeal were considering the Singapore court's jurisdiction in respect of a new remedy. That decision has no relationship to the inherent jurisdiction of the court in procedural matters'. Again, the argument that the courts of Singapore have not had power to decline jurisdiction (for example, on the basis of *forum non conveniens*) since the repeal of the Courts Ordinance, 1955[242] (in 1964)

including damages in addition to or in substitution for, an injunction or specific performance.

241 Suit No 296 of 1979 (dated 6/10/92).

242 Specifically the 'jurisdiction and authority' clause in section 17(a), as to which see *supra*, text from note 6.

243 See Mohan Gopal, *supra*, note 42, at lxxi.

244 *Ie*, the appropriate words were included in para 9 of the First Schedule to the SCJA by the SCJ (Amendment) Act, 1993.

wrongly assumes that this inherent power is synonymous with the general substantive jurisdiction of the English courts which was hitherto applicable.[243] Although this power was put on a statutory footing in 1993,[244] it was well-established before then.[245] The argument was rejected by Chan Sek Keong J in *Emilia Shipping*[246] on the basis that the court must have a residuary jurisdiction to govern its own process for the purpose of guarding against injustice and abuse.[247]

Misinterpretation of the nature of the court's inherent powers was also evident in *Re ABZ (an infant)*,[248] where it was assumed by a party that a legal status established under statute could be cancelled by a mere application of Order 92, rule 4. An application was made to the court to set aside an adoption order on the basis that it had become 'inimical to the infant's welfare'.[249] Clearly, any remedy that the applicant might have lay under the Adoption of Children Act[250] and case law concerning the statute and the issue. Appropriately, Chan Sek Keong J ruled that he was not empowered to set aside the adoption order in the circumstances because it had not been made without jurisdiction and had not been obtained on the basis of false representation[251] or mistaken identity of the child. Furthermore, a remedy was available under the Act.[252] The application to set aside the order pursuant to Order 92, rule 4 was misconceived because it assumed that the inherent powers of the court can be exercised to affect the legal status established by statute on the premise that the order granting the status is no longer in the interest of the child. If such a view were taken to its logical extreme every order of court establishing or affecting substantive rights would be subject to the inherent powers of the court pursuant to Order 92, rule 4. Although the significance of the rule does not appear to have been argued

245 See the cases concerning *forum non conveniens* cited in text from note 42 to note 49.

246 *Supra*, note 31.

247 *Ibid*, at 383. Extracts from the judgment in *Emilia Shipping* are set out *supra*, text at note 58 and note 228.

248 [1992] 2 SLR 442.

249 The adopted child had acquired a Japanese name which caused him to be 'humiliated' by other students.

250 Cap 4.

251 If the order had been obtained through the abuse of the court's process, this would have been a ground for exercising inherent powers to set aside the order. See *Heng Joo See* v *Ho Pol Ling* (*supra*, note 3).

252 The applicant could apply under s 9 of the Act to re-adopt the child under a new name.

253 So it would seem from the report.

254 [1984] 2 MLJ 143 (*Pacific Centre Sdn Bhd*).

255 *Supra*, note 2, at 27 and 28.

or considered,[253] it would seem that the court was not prepared to use its inherent powers to act in a manner which it was not authorised to do under statute and case law.

However, in Malaysia, Order 92, rule 4 (RHC) has been used to confer or affect substantive rights in a number of cases. In *Pacific Centre Sdn Bhd* v *United Engineers (Malaysia) Bhd*,[254] Edgar Joseph Jr J, as his Lordship then was, decided that the rule conferred jurisdiction on the court to grant *Mareva* injunctions. His Lordship reasoned that as a *Mareva* injunction is intended to avoid abuse and injustice which would otherwise result from defendants avoiding the enforcement of a judgment through the dissipation of their assets, it could be granted pursuant to the rule. Citing Sir Jack Jacob,[255] the learned judge said: '… the inherent jurisdiction of the court includes all the powers that are necessary to fulfill itself as a court of law; …to uphold, to protect, and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner'.[256] It appears that his Lordship was of the view that the power was not to be limited to the court's regulation of its process in a procedural context and could be used to establish or affect substantive rights. This interpretation is contrary to that espoused by the author of the statements cited by the learned judge.[257] Moreover, if the learned judge is saying that the court may, through its inherent powers, establish or affect any legal or equitable rights, this would not only contravene the express terms of the statute (which limits the powers of the High Court to those conferred by legislation and vested in it prior to 'Malaysia Day'[258]), but would also make the powers conferred by statute largely redundant.[259] With regard to the powers vested in the Malaysian High Court prior to 'Malaysia Day', these correspond in principle to the general jurisdiction of the English courts at the time and must not be confused with the court's inherent powers which are merely an aspect of that jurisdiction.[260] The approach in *Pacific Centre Sdn Bhd*

[256] [1984] 2 MLJ 143, at 147.

[257] Sir Jack Jacob states: 'The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation'. *Supra*, note 2, at 24

[258] *Ie*, 16 September, 1963. This is, the date of Independence. See *supra*, text at note 19.

[259] As the court would then have unlimited authority to create its own power basis. See CJA, s 25 and the schedule to the CJA.

[260] The general jurisdiction and the inherent powers of the court have been distinguished.

[261] SCJA, s 18 and the First Schedule.

[262] [1982] 1 MLJ 260.

[263] This was the provision on which the English courts based their jurisdiction to grant the

would also be contrary to the statutory scheme in Singapore which provides that that the High Court's substantive powers are those conferred upon it by statute.[261]

Malaysia's higher-tier courts have not treated Order 92, rule 4 as the basis for the *Mareva* injunction. In *Zainal Abidin Bin Haji Abdul Rahman* v *Century Hotel Sdn Bhd*,[262] the Federal Court, which considered the power for the first time, concluded that its basis lay in statute; namely paragraph 6 of the schedule to the CJA which substantially corresponded to section 45 of English Supreme Court of Judicature (Consolidation) Act, 1925.[263] No reference was made to Order 92, rule 4 or the inherent powers of the court. In *Aspatra Sdn Bhd* v *Bank Bumiputra Malaysia Bhd*,[264] the Supreme Court agreed but went on to say that the rule '… would appear to give further support to the existence rather than non-existence of the courts' jurisdiction and power to grant the remedy'.[265] The courts have also used their inherent powers pursuant to the rule to grant specific performance,[266] interlocutory mandatory injunctions,[267] and to determine substantive issues in judicial review proceedings.[268] This trend may have been arrested by the case of *Tan Beng Sooi* v *Penolong Kanan Pendaftar*,[269] where Low Hop Bing JC said: '… the inherent jurisdiction of the court under Order 92, rule 4 cannot be used to deny the plaintiff of any legal right that may be vested in him'[270] and that it 'is not intended to alter substantive rights'.[271] Further on, his Lordship stated: '… the inherent jurisdiction of the court must be applied to do justice to the parties and to secure fairness in a trial

Mareva injunction. See *Mareva Cia Nav* v *International Bulkcarriers* [1975] 2 Lloyd's Rep 509.

264 [1988] 1 MLJ 97.

265 *Ibid*, at 100.

266 *United Malayan Banking Corporation Bhd* v *Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352. This case was also decided by Edgar Joseph Jr J.

267 *Tan Lay Soon* v *Kam Mah Theatre Sdn Bhd* [1992] 2 MLJ 434; *Hamzah TR & Yeang Sdn Bhd* v *Lazar Sdn Bhd* [1985] 2 MLJ 45.

268 *Viking Askim Sdn Bhd* v *National Unition of Employees in Companies Manufacturing Rubber Products* [1991] 2 MLJ 115, at 118. This case was also decided by Edgar Joseph Jr J.

269 *Supra*, note 4.

270 *Ibid*, at 430.

271 *Ibid*.

272 *Ibid*, at 431.

273 See the former O 3A, which was initiated by the Rules of the Subordinate Courts (Amendment) Rules, 1994.

between them, but not for any other purpose such as taking away the substantive rights [of a litigant]'.[272]

E. *The inherent power of the court compared to the court's role to make just, economic and expeditious orders under Order 34A, r 1.*

Order 34A, rule 1 (RC) enables the court, at any time after the commencement of proceedings, to direct any party to appear before it (whether personally or by representation) so that it may 'make such order or give such direction as it thinks fit, for the just, expeditious and economical disposal of the cause or matter'. Most significantly, the court may make this order 'nothwithstanding anything in the rules'. The rule, first introduced to the subordinate court process in 1994,[273] is a key reform intended to transfer control over the pace of proceedings from the parties to the courts. It is different from the traditional rule of court for it is not limited to a specific procedure or circumstance; it confers a general power to make any order in any situation when the conditions of the rule are met. It is a legitimate provision because it concerns the regulation of practice and procedure, a matter which is within the purview of the Rules Committee pursuant to section 80 of the SCJA. Its uniqueness lies in the power which the court is given to overrule other rules of court in the interest of justice, expedition and economy. It is comparable to the inherent power of the court for it can also be characterised as 'amorphous' and 'ubiquitous' (in the sense that the court may make any order in any circumstances, if the conditions are fulfilled).[274]

Both the rule and the inherent power share the common purpose of enabling the court to control its own process in the interest of the administration of justice. Indeed, it is perhaps because the courts have not utilised their inherent powers to interfere with the course of the adversarial process – so often dominated by the parties' readiness or willingness to progress from one stage to another – that Order 34A, rule 1 was introduced. If the general inherent power of the court is not seen 'as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice',[275] Order 34A, rule 1 certainly is. It could be contended that this new rule

[274] These adjectives are used by Jacob to characterise inherent power. *Supra*, note 2.
[275] *Ibid*, at 52.
[276] *Eg*, O 18, r 19 (RC) (application to stay or strike out proceedings in certain circumstances).
[277] The issue is considered *supra*, following note 109, under 'A. *May the inherent power only be exercised when the rule does not extend to a situation so as to fill a lacuna, or does*

formulates an inherent power to act against abuse and in the interest of justice in clearly definable terms, a development which is not without precedent.[276] If the courts were not willing hitherto to exercise their inherent powers in a manner which would override the rules,[277] Order 34A, rule 1, if it does in fact encapsulate the inherent power of the court, brushes aside such restraint. This is the essential difference between the new rule and the inherent power of the court, for there is no question that the court may make an order which has the effect of overriding another rule of court if the conditions of Order 34A, rule 1 are satisfied.

While the new rule should be hailed for giving 'teeth' to the court regarding the control of its proceedings, some concern must be voiced over the apparent latitude extended to court intervention in a civil suit. The rule certainly goes beyond empowering the court to spur the parties on, for it entitles the court to act in an inquisitorial capacity as and when appropriate. The court might, for instance, require the parties to redefine or reformulate the issues according to its directions. It might make a pre-emptive order such as disallowing a future application for security for costs or an injunction. It might take a direct role in the evidence to be produced by giving directions as to the witnesses to be called and the documentation to be tendered. It might limit or extend the scope of legal argument by indicating the legal authority which it wants the parties to submit on. Such direct intervention would involve a fundamental shift in the roles of the court and the parties. It would also negate the adversarial principle that litigants properly advised by counsel are in the most favourable position to control the substance and direction of their cases. The rationale underlying this principle is that the parties generally know much more than the court about the facts of the case by virtue of their closer and continuing association with it. They are better situated for the purpose of deciding on the scope of the issues, the scope of legal argument and matters of evidence. If the court were to take an active role in these matters it would have to become sufficiently cognisant of all aspects of the case (at least as sufficiently cognisant as the parties) to be in a position to give the appropriate directions for its disposal. The additional judicial time that this would require would counter the current policy of ensuring that the courts make maximum use of their resources to avoid delays in the administration of justice. Furthermore, the power of the court to intervene in these matters raises the danger of uncertainty in the sense that the party's course of action might be changed at any time. Again, delay might result. The party's position might be jeopardised if his

it go beyond this to override or qualify a rule the strict application of which would lead to injustice?'

[278] O 34A, r 1 (RC).

[279] The first Rules of the Supreme Court (UK), which came out in 1883, consolidated many

lawyer were to lose his initiative to the court. As the lawyer becomes less of a player he might feel that his role is less significant with the result that his commitment to his client's cause might be compromised. Most importantly, the rules of court contemplate that initiatives concerning the substance and direction of cases are the province of the parties, not the court.

Although an order may be made under Order 34A, rule 1 (RC) 'nothwithstanding anything in the rules'[278] (and therefore all the rules), it is submitted that the Rules Committee could not have intended to introduce a system of court intervention which would operate against the *substratum* of the rules. Moreover, these rules – which embody the accumulated wisdom of the judges over the centuries[279] – create a reliability and certainty of process on which litigants can rely. No doubt, the rules of court do have their weaknesses (particularly in relation to the problem of delay).[280] However, they set the framework of the civil process which should not be compromised by an indiscriminate application of Order 34A, rule 1 (RC). The rule should be seen as a means of enhancing the position of the court as the overseer of the civil process, and empowering it to intervene when necessary. In this system the parties continue to have control over the formulation of issues, investigation of facts and presentation of their cases. However, these privileges are subject to the power of the court to ensure that the parties are proceeding expeditiously and not abusing the court process. In a nutshell, Order 34A, rule 1 should not be seen as supplanting the adversarial process, but rather as promoting its efficiency.

The potential of the court to act pursuant to Order 34A, rule 1 reveals the very different scope between the rule and the inherent power of the court referred to in Order 92, rule 4. Whereas Order 92, rule 4 only operates when there is injustice or abuse, or when the ordinary rules of court fail to achieve these objectives, Order 34A, rule 1 enables the court to intervene whenever it is appropriate in the interest of expedition and economy. Although any order or direction made or given under Order 34A, rule 1 must be just, injustice is not, as it is in the case of Order 92, rule 4, a pre-condition for its operation. As the exercise of inherent power under Order 92, rule 4 ultimately depends on, and therefore is incidental to, a fundamental failure of the rules to provide the necessary procedure, it is

procedures which had been established by the courts pursuant to their inherent power to make rules. This matter is considered *supra,* text from note 88.

[280] See *Review of Judicial and Legal Reforms in Singapore between 1990 and 1995*, Butterworths Asia, 1996, pp 6-12.

[281] *Supra*, note 123.

[282] *Ibid*, at 236-237.

a residuary process which applies in relatively rare circumstances. In contrast, the Order 34A, rule 1 pre-conditions of expedition and economy are now the primary and prevalent objectives throughout the course of civil proceedings. The provision underlines the current policy of the courts to monitor and, if necessary, intervene in proceedings to ensure the appropriate progress of the case. Unlike the doctrine of inherent powers, the source and scope of which have yet to be clarified, the specific powers formulated by the Rules Committee in Order 34A, rule 1 are likely to characterise the court's more active role.

V. Conclusion

Lord Denning MR's question in the *Siskina*[281] –'I ask, why should the judges wait for the Rule Committee?'[282] – and Lord Hailsham's retort in the same case that even 'legitimate usurpation' of the Rules Committee's functions would be 'highly undesirable'[283] mark extreme approaches to the doctrine of inherent powers. The terminology 'legitimate usurpation' suggests that there might be circumstances in which the court should act on its own initiative to uphold standards in the administration of justice (to prevent injustice or abuse) despite the absence of express rules to empower the courts in a particular situation. In Lord Hailsham's view, the possible legitimacy of such an approach is overriden by the principle that it is for the Rules Committee to make rules to govern procedure, and that even if those rules are imperfect it is not for the court to encroach upon the regulation of its own process. As has been seen, this view is not reflected in the cases in which the courts have exercised their inherent powers. Certainly, it would be pointless to have a provision such as Order 92, rule 4 (RC) to enable the court to exercise 'powers' beyond the rules (which are stated not 'to limit or affect' those powers), if such a role is not permitted.

Lord Denning's conviction that the courts have a broad licence 'to lay down the practice and procedure of the courts'[284] apart from the Rules Committee would seem to prioritise the particular needs of each case over and above general principles of justice and considerations of policy. It is in the nature of the common law system that the court must have some

[283] *Ibid*, at 262.
[284] *Ibid*, at 236-237.
[285] See *Review of Judicial and Legal Reforms in Singapore between 1990 and 1995*, *supra*, note 280, at pp 17-23.

* LLB (L'pool); LLM (Cantab); Barrister (MT); Advocate & Solicitor (Singapore); Assoc Professor, Faculty of Law, National University of Singapore.

flexibility to enable it to operate effectively within the parameters of statutory regulation. Certainly, procedural developments in recent years have emphasised the courts' more active role.[285] The cases which have been considered reflect a range of approaches from the restrictive to the intrusive. It is not practical, and perhaps not possible, to identify specifically the ideal role of the court in areas not clearly or appropriately regulated by the rules. The court should always consider the state of the rules (which are usually the primary source of procedure), the circumstances of the case, and the abuse or injustice which would result if it did not exercise its inherent powers.

JEFFREY D PINSLER*