Class Actions in Malaysia: Principles and Procedural Obstacles

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1. Malaysia's Civil Litigation System

Malaysia's legal system is based on the common law. A parallel Shari'ah Law system exists alongside the civil justice system. However, Islamic Law, as applied and enforced in the Shari'ah Courts, only applies to those matters involving Family Law and Inheritance. In addition, only those professing the Islamic religion are subject to the jurisdiction of the Shari'ah Courts.

A civil action may be initiated in the Magistrates' Court, the Sessions Court or the High Court. The monetary jurisdiction of the Magistrates' and Sessions Courts are limited to RM25,000 and RM250,000 respectively.[1] Be that as it may, the Magistrates' and Sessions Court do not have jurisdiction over certain matters, regardless of the monetary claim involved.[2] Conversely, there are certain matters where the Sessions Court has unlimited monetary jurisdiction.[3] In relation to class actions, it is particularly significant that the Magistrates' and Sessions Courts cannot grant declarations and injunctions, which is a common remedy sought in class actions. There are two High Courts in Malaysia, namely the High Court of Malaya and the High Court of Sabah and Sarawak. Both High Courts are of coordinate jurisdiction. There is no limit on their jurisdiction as far as the monetary amount and subject matter are concerned. The jurisdiction of both these High Courts is territorial in nature.

Civil proceedings in Malaysia are governed by the Subordinate Courts Rules 1980 and the Rules of the High Court 1980. The former applies to civil proceedings both in the Magistrates and Sessions Courts while the latter applies to civil proceedings in the High Court.

These rules of court have their roots in the former English Rules of the Supreme Court. Although the rules of court in many Commonwealth jurisdictions, including

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[1]. 1 Sterling Pound is equivalent to approximately 7 Malaysian Ringgit.
[2] . For example, to grant an injunction or make an order for specific performance.
[3] . For example, in an action involving motor vehicles accidents.

England and Wales, have been revamped, particularly in the last decade, the rules of court in Malaysia remain primarily unchanged. Despite claims that changes have been introduced, such as the introduction of pre-trial case management procedures, these changes are merely very superficial in nature. Hence, the procedural aspects of the civil justice system in Malaysia remain outmoded.

Small claims proceedings are heard in the Magistrates' Court. Small claims are those where the amount in dispute or the value of the subject matter do not exceed RM5,000. The applicable procedure for small claims proceedings is in the form of Order 54 of the Subordinate Courts Rules 1980. Order 54 was introduced in 1998.

There is also a Tribunal for Consumer Claims, established under the Consumer Protection Act 1999. According to section 98 of the Consumer Protection Act 1999, the Tribunal shall have jurisdiction where the total amount in respect of which an award of the Tribunal is sought does not exceed RM25,000. Section 98 is however subject to sections 99 and 100. According to section 100, the Tribunal shall have jurisdiction to hear and determine the claim if the parties have entered into an agreement in writing that the Tribunal shall have jurisdiction to hear and determine the claim. As in the case of the Magistrates' and Sessions Courts, the Tribunal for Consumer Claims does not have the jurisdiction to hear certain claims.[4]

In addition, there is a Tribunal for Homebuyer Claims which was recently established under section 16B of the Housing Development (Control and Licensing) Act 1966. A homebuyer may lodge with the Tribunal a claim for a loss suffered or any matter concerning his interests as a homebuyer under the Act. Section 16M states that the Tribunal has jurisdiction to determine a claim where the total amount in respect of which an award of the Tribunal is sought does not exceed RM50,000. Section 16M is subject to sections 16N and 16O of the Act. Pursuant to section 16N, the Tribunal has no jurisdiction in respect of any claim for (a) the recovery of land or any estate or interest in land and (b) in which there is a dispute concerning the entitlement of any person under a will or settlement, or on intestacy (including partial intestacy), goodwill, any chose in action, or any trade secret or other intellectual property right. Section 16O provides that notwithstanding that the claim exceeds RM50,000, the Tribunal shall have jurisdiction to hear and determine the claim if the parties have entered into an agreement in writing that the Tribunal shall have jurisdiction to hear and determine the claim.

In this paper, the focus shall be on representative actions in the High Court.

2. Formal Rules For Representative Or Non-Representative Group Litigation In Malaysia

[4]. The limitation of jurisdiction is provided for in Section 99 of the Consumer Protection Act 1999.

Class action is generally known as representative action in Malaysia. The formal rules that apply to a representative action in Malaysia is Order 15 rule 12 of the Rules of the High Court 1980. Order 15 rule 12 is in *pari materia* with Order 15 rule 12 of the former English Rules of the Supreme Court 1965. Order 15 rule 12 has not been amended since the coming into force of the Rules of the High Court 1980 in 1980.

In discussing the rules governing representative actions in Malaysia, it is pertinent to note that *other* rules may have to be invoked, either together with or in place of Order 15 rule 12. This would depend on whether the parties involved in the suit include the government or any public authority.

In an action that does not involve the government or any public authority, a party seeking to bring a representative action would not only have to comply with the conditions set out in Order 15 rule 12, but also would have to ensure that proper endorsement is made on the writ as required by Order 6 rule 3 of the Rules of the High Court 1980. In addition, there may be a need to add, drop or substitute parties in the course of proceedings. This would entail invoking Order 15 rule 6 of the Rules of the High Court 1980, concerning misjoinder and non-joinder of parties.

What is more significant is Order 53 of the Rules of the High Court 1980. This is a separate and independent procedure for Judicial Review. Order 53 must be invoked when the defendant or one of the defendants in the representative action is the government or a public authority.

Order 53 was introduced in 2000. It has been said that the purpose of Order 53 is "to provide certain protections to the public body or authority when their public act or decision is being challenged".[5] According to the High Court in *TR Lampoh AK Dana & Ors v Government of Sarawak*,[6] it would be an abuse of process if a number of plaintiffs in a representative action, as they did in that case, were to proceed to challenge the act or decision of the public body or public authority under a public law by resorting to a writ action under Order 15 rule 12 instead of an action for judicial review under Order 53. On that ground, the representative action in that case was struck out.

As far as non-representative group litigation is concerned, Malaysia does not have any procedure which is similar to section III in Part 19 of the English Civil Procedure Rules. Since the test in Part 19.10 is similar to the test for consolidation of actions in Order 4 of the Rules of the High Court 1980, reference will be made to Order 4 when non-representative group litigation is discussed in this report.

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[5]. See *TR Lampoh AK Dana & Ors v Government of Sarawak* [2005] 6 Malayan Law Journal 371, 390.
[6]. [2005] 6 Malayan Law Journal 371.

3. Process Contemplated By The Formal Rules For Representative Action And Non-Representative Group Litigation In Malaysia

The formal rules for non-representative group litigation and for representative action are discussed separately below.

Non-Representative Group Litigation Under Order 4

The formal rules for non-representative group litigation in Malaysia take the form of Order 4 of the Rules of the High Court 1980. Order 4, known as consolidation of proceedings, is in *pari materia* with Order 4 rule 9 of the old English Rules of Supreme Court 1965.

Order 4 provides as follows:

> Order 4 Consolidation of Proceedings.
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> (1) Where two or more causes or matters are pending, then, if it appears to the Court -
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> (a) that some common question of law or fact arises in both or all of them; or
> (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
> (c) that for some other reason it is desirable to make an order under this rule.
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> the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.
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> (2) An order for consolidation must be in Form 1 and shall direct that the cause or matter in which the application is made shall thence forward be carried on in such other cause or matter and that the title of such other cause or matter be amended by adding thereto the title of the cause or matter in which the application is made.
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> (3) Upon such order being made, the file of the cause or matter in which the application is made shall be transferred to and added to the file of such other cause or matter, and the copy of the order shall be left in place of the file so transferred, and a memorandum of the transfer shall be entered in the cause book against the cause or matter so consolidated

This Order has remained in its original form since the introduction of the Rules of the High Court 1980 in 1980.

A reading of Order 4 rule 1 will show that whether two or more causes or actions that are pending are to be consolidated or not is a question to be decided by the court. As long as the court is satisfied that any one of the three circumstances as outlined in Order 4 rule 1(a) – (c) exists, the court may then make any one of the following orders, that is:

(i) order those causes or matters to be consolidated on such terms as it thinks just; or
(ii) order those causes or matters to be tried at the same time; or
(iii) order those causes or matters to be tried one immediately after another; or
(iv) order any of those causes or matters to be stayed until after the determination of any other of them.

The language used in Order 4 seems to suggest that Order 4 is to be invoked by the court on its own motion. However, it is usually the parties to the action who make an application urging the court to exercise its discretion under Order 4. In fact, the reported cases show that an application is, almost without exception, made by one of the parties in the action to the court.

Needless to say, Order 4 must have been enacted for the purpose of convenience, that is, to save costs and time for the parties and the court.[7]

As would be expected, there are occasions when the courts have disallowed an application for consolidation under Order 4 while there are other occasions when the courts have invoked Order 4. Cases where the courts had found Order 4 to be inapplicable include *Mayban Trustee Bhd v Amalan Tepat Sdn Bhd*,[8] *Demak Motor Corporation Sdn Bhd v Moi Fong*,[9] *MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 6),*[10] *Dato V Kanagalingam v Tommy Thomas & Anor and Other Cases*[11] and *OCBC Bank (M) Bhd v Star Edge Sdn Bhd*.[12]

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[7]. *Del E Webb International Hotel Co v Hotel Merlin (Penang) Sdn Bhd* [1973] 1 Malayan Law Journal 31. The application for consolidation in this case was made pursuant to the provisions under Order 49 rule 8(1) of the Rules of the Supreme Court 1957. The Rules of the Supreme Court 1957 was replaced in 1980 with the Rules of the High Court 1980.
[8]. [2006] 5 Current Law Journal 43.
[9]. [2005] 7 Current Law Journal 352.
[10]. [1998] 3 Current Law Journal Supplementary 390.
[11]. [1998] 3 Current Law Journal Supplementary 429. This case is related to *MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 6)*.
[12]. [2003] 7 Current Law Journal 196.

Cases that had successfully invoked Order 4 include *Bongsor Bina Sdn Bhd v Manzer Medical Sdn Bhd & Ors*,[13] *Kumpulan Emas Bhd v Dato Lim Teng Lew & Anor*[14] and *Sivarasah & Ors v Yeoh Eng Huat Andrew & Ors*.[15]

A number of comments may be made in relation to the above reported cases.

First, these cases are by no means "class actions" as envisaged in the project on Globalization of Class Actions. The cases that had or attempted to invoke Order 4 were cases involving (i) a single plaintiff who has more than one cause of action against a single defendant arising out of one transaction or breach of contract or duty or; (ii) a plaintiff suing a number of defendants for defamation; or (iii) the same plaintiffs and defendants in more than one action.

Second, the courts have interpreted Order 4 in a more restrictive rather than liberal way. There were references to the need for "the same parties" and "in the same court" before the different actions could be consolidated.

Third, the High Court in *MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 6)*, also alluded to the fact that once separate actions are pending in different courts, no court has the power "to order that another proceeding in any other court be transferred to it". This is because "it would be an affront for one judge to order that a case be taken away from another judge of equal and concurrent jurisdiction".

It is submitted that the courts in these cases have read additional conditions that are not obligatory under Order 4 and in the process have undermined the usefulness and value of Order 4.

Order 4 as it stands, does not prevent separate actions by several or many plaintiffs against a single defendant, that is, a non-representative group action, from being consolidated. However, the application of Order 4 has not been tested in such a non-representative group action.

Representative Action Under Order 15 rule 12

The applicable rule for a representative action in Malaysia is Order 15 rule 12 of the Rules of the High Court 1980. Its origin can be traced to the former English Rules of the Supreme Court 1965.

Order 15 rule 12(1) reads as follows:

> Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may

[13]. [2004] 7 Current Law Journal 306.
[14]. [2004] 2 Malayan Law Journal 614.
[15]. [1994] 3 Malayan Law Journal 271.

be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.[16]

Although a class or representative action is recognised in Malaysia, parties intending to initiate or continue with such an action must ensure that the requirements of not only Order 15 rule 12 are complied with, but also other rules that are to be read together with Order 15 rule 12.

Proper Indorsement

A party commencing a representative action must ensure that a statement of the representative capacity in which he sues must clearly be indorsed on the writ or originating summons, as the case may be. Failure to comply with this requirement as laid down in Order 6 rule 3 of the Rules of the High Court 1980 may result in the action being struck out. Be that as it may, the courts in Malaysia have demonstrated a readiness to adopt a liberal approach when confronted with an application to strike out an action on failure to comply with Order 6 rule 3 of the Rules of the High Court 1980.[17]

Hence, the above condition is not a real impediment to a representative action.

The Test Under Order 15 rule 12

The next requirement would be to satisfy the test under Order 15 rule 12.

Essentially, three conditions must be fulfilled in order to successfully maintain a representative action under Order 15 rule 12. These conditions are:

(1) the plaintiffs are members of a class;

(2) they have a common grievance or interest; and

(3) the relief sought is in its nature beneficial to all whom the plaintiffs represented.

These requirements as laid down and explained by the English courts in cases such as *Duke of Bedford v Ellis*,[18] *Smith & Ors. v Cardiff Corporation* [19] and *Markt & Co. Ltd. v Knight Steamship Co. Ltd* [20] have been adopted by the courts in Malaysia. Two such cases are *Palmco Holding Bhd v Sakapp Commodities (M)*

[16]. Order 15 rule 13 concerns the representation of interested persons who cannot be ascertained.
[17]. See eg, *Mohd Haniff & Anor v Chin Ah Bah* [1974] 1 Malayan Law Journal 128, *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 Malayan Law Journal 427 and *K Muthulagu v Lembaga Pelabuhan Klang* [1995] 3 Malayan Law Journal 157.
[18]. [1900] AC 1.
[19]. [1954] QB 210 CA.
[20]. [1910] 2 KB 1021.

Sdn Bhd & Ors[21] and *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors*.[22]

The above requirements are trite and their application does not require extensive elaboration or commentary.

Misjoinder And Non-joinder

It is also settled law that in instances where there is a misjoinder or non-joinder of parties, Order 15 rule 6 of the Rule of the High Court 1980 can be invoked to ensure that the proper parties are before the court and misjoinder or non-joinder is not a ground to defeat a representative action.[23]

Derivative Actions

As to the question of whether a derivative action may be commenced pursuant to Order 15 rule 12 of the Rules of the High Court 1980, Gopal Sri Ram JCA in delivering the majority decision in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors*[24] explained that "the derivative action … is a mere variation of the representation rule as applied in the environment of company law". His Lordship in that case also gave an account of how the procedure concerning representative action had developed. This was what his Lordship said:

> Historically, the common law adopted an extremely rigid procedure. Only immediate parties to a dispute were permitted access to the Common Law Courts. It did not matter that there were other persons interested in the proceedings. Each person had to commence his own action. It mattered not that this would result in a multiplicity of suits. The Court of Chancery tried to alleviate this. But the rule it introduced produced equal injustice. The rule in Chancery was that all parties must be brought before the court to do complete justice. This was sometimes a physical impossibility as the plaintiffs or defendants were too numerous to be added as parties to an action. The rule was therefore relaxed and one or more persons were permitted to represent all those who shared a common interest with him in the subject matter of the action either as plaintiffs or as defendants. So you find Jessel MR in *Commissioners of Sewers v. Gellatly* [1876] 3 ChD 615 saying that he understood:
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> > the rule of the Court of Chancery, ever since Lord Hardwicke's time, to have been this, that where one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right – and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number – some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim,

[21]. [1988] 2 Malayan Law Journal 624.
[22]. [2006] 5 Malayan Law Journal 60
[23]. See *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 Malayan Law Journal 60.
[24] [2005] 5 Malayan Law Journal 60

> and the right might be finally decided as between all parties in a suit so constituted.

It is this relaxation which the Master of the Rolls referred to that was eventually housed in Order XVI r. 9 of the 1883 Rules and is now O. 15 r. 12 RHC 1980. It deals with representative actions. In *John v. Rees* [1970] ChD 345, Megarry J, after referring to the oft-quoted passage in the speech of Lord Macnaghten in *Duke of Bedford v. Ellis* [1901] AC 1 said:

> This seems to me to make it plain that the rule (meaning O. 15 r. 12) **is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice**. Such an approach is, I think, at least consistent with cases such as *Bromley v. Smith* [1826] 1 Sim., *Wood v. McCarthy* [1893] 1 QB 775, and *Wyld v. Silver* [1963] Ch. 243; and in *Harrison v. Marquis of Abergavenny* [1887] 3 TLR 324, Kay, J, described that rule as being 'a rule of convenience only'. The approach also seems to be consistent with the language of RSC, O. 15 r. 12(1). This provides that 'Where numerous persons have the same interest in any proceedings ... the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.'
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> By r. 12 (3)-(6), ample provision is made for protecting those who, being bound by a judgment against a person sued on their behalf, nevertheless wish to dispute personal liability. The language is thus wide and permissive in its scope; yet it provides adequate safeguards for the substance. I would therefore be slow to apply the rule in any strict or rigorous sense: and I find nothing in the various passages cited to me from *Daniell's Chancery Practice* (8th Edn., 1914) which makes me modify this view. (emphasis added).

Now, where you have a flexible rule of court like O. 15 r. 12, it is unsafe to locate an exact precedent to determine the applicability of that rule to a particular case. For that would be doing the very thing that Lord Macnaghten spoke against in *Duke of Bedford v. Ellis*, namely, permitting the rule to become rigid.[25]

It may be noted that the Rules of the High Court 1980 does not contain any specific provision relating to the applicable procedure for derivative actions.

Consent, Identities Of Parties etc

The representative action procedure is indeed flexible. The courts in Malaysia had on a number of occasions allowed Order 15 rule 12 to be invoked even though: (i) there were two rival factions purporting to represent a group of potential litigants; or (ii) where the plaintiff in a representative action cannot state the exact identities of each and every person that he or she is representing; or where the plaintiff is unable to obtain the consent of the other persons whom he or she purports to represent. Three cases that may be cited here are *EH Riyid v Eh Tek*,[26] *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors*[27] and *Vellasamy Ponnusamy & Ors v Gurbachan Singh Bagawan Singh & Ors*.[28]

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[25]. [2006] 5 Malayan Law Journal 60, 73-75.
[26]. [1976] 1 Malayan Law Journal 262.
[27]. [1990] 3 Malayan Law Journal 427.

The above description of the process contemplated by the formal rules may suggest or lead one to conclude that there are hardly any forms of obstacles to thwart a class action from being instituted and maintained in Malaysia.

The Procedure Under Order 53: Applications For Judicial Review

A completely different procedure applies in the case of class actions that are instituted against the government or a public authority. The relevant procedure that applies in cases such as these is Order 53 of the Rules of the High Court 1980. The procedure under Order 53 applies to actions or applications for judicial review and this procedure includes representative actions that are instituted against the government or a public officer or a public authority. It was held in *TR Lampoh AK Dana & Ors v Government of Sarawak*,[29] that the procedure under Order 53 is mandatory when a representative action is instituted against the government or a public officer or a public authority. The plaintiff or plaintiffs in the representative action cannot proceed under Order 15 rule 12 of the Rules of the High Court 1980. It will be deemed to be an abuse of process if a plaintiff (or plaintiffs) in a representative action proceeds (or proceed) under Order 15 rule 12 and not under Order 53.

The current Order 53 came into effect on 21 September 2000. There is no corresponding rule in the former English Rules of the Supreme Court 1965. It has been said that the new Order 53 was introduced to cure the mischief of its precursor, which was much narrower and more restrictive.[30] In addition, it has also been noted that the creation of Order 53 in the Rules of the High Court 1980 is to provide certain protections to the public body or authority when their public act or decision is being challenged, for example, the time limit within which the challenge to the public act or decision must be made.[31]

Regardless of the reasons for its introduction, it was rightly observed, inadvertently or otherwise, by the High Court in *TR Lampoh AK Dana & Ors* v *Government of Sarawak*, that there are "stringent mandatory requirements" under the new Order 53.

One such additional requirement, as noted above and not found in Order 15 rule 12, is the fact that a plaintiff representing a group of persons seeking judicial review and any form of relief from the court is required to make the application "promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant".[32]

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[28]. [2006] 1 Current Law Journal 805.
[29]. [2005] 6 Malayan Law Journal 371.
[30]. *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 Malayan Law Journal 413.
[31]. *TR Lampoh AK Dana & Ors* v *Government of Sarawak* [2005] 6 Malayan Law Journal 371, 390.
[32]. Order 53 rule 3(6) of the Rules of the High Court 1980.

Although the court has the discretion to extend the period of 40 days, it can only do so if the court "considers that there is a good reason for doing so".[33] This requirement poses as an obstacle to a potential representative action against the government or any public authority. Thus, in *TR Lampoh AK Dana & Ors* v *Government of Sarawak*, a representative action brought by a group of natives alleging that their native customary rights over certain communal native customary lands had been impaired and abridged by the act of the defendant was struck out on the ground that the plaintiffs were out of time.

Besides the limitation period of 40 days, a plaintiff intending to commence a representative action is also required to obtain leave from the court in accordance with the requirement in Order 53 rule 3(1). The application must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.[34]

The plaintiff is also required to give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statements and affidavits.[35]

Another barrier faced by potential plaintiffs is the fact that in granting leave, the Judge may impose such terms as to costs and as to the giving of security as he thinks fit.[36]

Finally, the plaintiffs in the representative action must also be able to demonstrate to the satisfaction of the court that they are "adversely affected by the decision of the public authority". As explained by the Court of Appeal in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor*,[37] there is a single test of threshold *locus standi* for all the remedies that are available under Order 53. The issue of threshold or substantive *locus standi* is discussed below.

4. Issues Concerning "Representation", "Circumstances" And "Opting In" In Representative Litigation

One of the positive features of a representative action under Order 15 rule 12 is that it does not make it mandatory for *every* person who is a member of the class and having a common grievance or interest to come forward or consent to be represented in the representative action. It also does not matter that the relief sought is in its nature beneficial to these persons who have not come forward or

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[33]. *Id.*
[34]. Order 53 rule 3(2) of the Rules of the High Court 1980.
[35]. Order 53 rule 3(3) of the Rules of the High Court 1980.
[36]. Order 53 rule 3(4) of the Rules of the High Court 1980.
[37]. [2006] 3 Malayan Law Journal 164.

consented to be represented. The rationale for this flexibility has been alluded to above by Gopal Sri Ram JCA in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors*.

The decision as to who will represent the persons in the class having a common grievance or interest lies with this group of persons. Typically, in representative actions commenced by natives claiming theirs rights and other reliefs based on native customary rights, the person or persons who represent the affected members in the group would be the elderly members of the tribe or heads of families.[38]

In these cases, both lawyers and non-governmental organisations have acted for the claimants. Prominent non-governmental organisations include the Consumer Association of Penang (CAP), Friends of the Earth, Malaysia (Sahabat Alam Malaysia or SAM) and the Borneo Research Institute of Malaysia (BRIMAS).

In cases affecting members of clubs, associations or employees, a "leader" will eventually emerge amongst the members in the group. The number of members who will agree to be plaintiffs in such representative actions will differ from case to case. In these types of cases, the involvement of non-governmental organisations is not apparent. In general, the plaintiffs in these representative actions are represented by lawyers.

The circumstances leading to the commencement of a representation action are varied. It may arise out of a decision by the government or certain public body or authority that affects the rights of certain groups of members in society or the society at large.[39] A representative action may also be commenced as a result of certain acts or omissions by certain parties, such as employers, companies or the office bearers of clubs and societies that infringed the rights of a group of members in those organizations, companies, or clubs and societies.

If a member of a class is not represented by the plaintiff, such a member may opt-in by making an application pursuant to Order 15 rule 6 to be added as a co-plaintiff. Conversely, if a member of a class represented by the plaintiff disagrees with the plaintiff or wishes to challenge decisions made by the plaintiff, it is almost certain that the courts in Malaysia will follow the English authority on this point and permit that member to be joined as a defendant.[40]

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[38]. This is evident in cases such as *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 Malayan Law Journal 418, *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 Malayan Law Journal 23, *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 Malayan Law Journal 241; and *TR Lampoh Ak Dana & Ors v Government of Sarawak* [2005] 6 Malayan Law Journal 371.

[39]. In such cases, it has been noted that the representative action must proceed under a separate procedure, namely, Order 53 of the Rules of the High Court 1980.

[40]. See *Watson v Cave (No 1)* [1910] 2 KB 1021.

Members of the class not named as plaintiffs in the action are not liable to costs. However, by estoppel and *res judicata* they will be bound by the result of the case. Be that as it may, Megarry J in *John v Rees*[41] reminded us that by Order 15 rule 12(3) – (6), "ample provision is made for protecting those who, being bound by a judgment against a person sued on their behalf, nevertheless wish to dispute personal liability".

Does The Civil Litigation System Facilitate Or Deter Representative Litigation?

The question as to whether the civil litigation system facilitates or deters representative action is not an easy question to answer. Despite the prerequisites demanded by the procedure in Order 15 rule 12, which, it is submitted, is fair by all accounts, the procedure is not rigid. On a balance, it can be said that the features of Order 15 rule 12 facilitates rather than deters representative litigation.

However, the above is only true or applicable in cases that do not involve the government or any public authority as a defendant or respondent in a representative action. As noted earlier, class or representative actions against the government or any public authority must proceed under a separate procedure, namely, Order 53 of the Rules of the High Court 1980. When compared with Order 15 rule 12, Order 53 imposes more stringent requirements.[42] These requirements may not *deter* representative litigation but they may have the effect of derailing a meritorious representative action.

In addition, the courts in Malaysia have also invoked the concept of *locus standi* to thwart representative actions from proceeding beyond the leave stage. This aspect is discussed under the heading of "Judicial Attitudes" below.

Barriers To Individuals And Groups Using The Representative Mechanism?

Individuals or groups bringing a class or representative action, whether under Order 15 rule 12 or Order 53, must always be consciously aware of the element pertaining to costs. Regardless of whether it is a representative action or not a representative action, the issue of costs is a significant factor in all forms of litigation. The possibility of costs being awarded against a party is always a factor that every potential plaintiff takes into account when considering whether or not to commence a civil action.

In the context of representative actions, it has been noted that persons consented to be named as plaintiffs in a representative action bear the risks of costs being awarded against them. As in many other jurisdictions, the Malaysian

[41]. [1970] ChD 345, 370.
[42]. Two examples of such stringent requirements are the 40-day limitation period to file the action for judicial review and the order for security that may be imposed by the court on applicants who invoke Order 53.

courts adhere to the general rule which prescribes that costs shall follow the event.

In Malaysia, the contingency fee is illegal. Hence, it may be more difficult for potential plaintiffs to readily find lawyers who may be willing to accept cases where the plaintiffs may not have sufficient funds to maintain the action.

While funding problems may be a genuine concern or barrier experienced by most litigants, some litigants are assisted by non-governmental organizations. Although the general rule is that the award of costs is made against the parties named in the action, it is in all likelihood that the questions concerning funding and costs are absorbed by these organizations. It is also interesting that in two cases, namely, *United Engineers (M) Bhd v Lim Kit Siang*[43] and *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals*,[44] no order as to costs was made in relation to costs in the High Court and in the Supreme Court and Court of Appeal respectively. This was despite the fact that the respondents in both cases were held to have no *locus standi* and had had their actions dismissed by the Supreme Court and Court of Appeal respectively. These two cases are discussed below.

Judicial Attitudes And The Concept Of Locus Standi

A preliminary issue of considerable importance in civil litigation is the concept of *locus standi*. How the courts interpret and apply the concept of *locus standi* in a given case may lead to the dismissal of an action without the matter being adjudicated on its merits. The issue concerning whether a plaintiff (or plaintiffs) in a representative action has the standing to sue in that representative capacity is more profound when Order 53[45] is invoked or when the representative action, by its nature, is a public interest litigation.

Over the years, Malaysia has witnessed the concept of *locus standi* being interpreted and applied from the narrowest possible sense to a broad liberal approach.

It is generally accepted that the decision of the Federal Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail*[46] represents the high-water mark in the law of *locus standi* in Malaysia. In this case, the respondent and 183 other persons had applied for the alienation of State land to him but were kept waiting on the side-lines for some 8 years with no response whatsoever. However, during that period, land in the same area had been parceled out to others including the

[43]. [1988] 2 Malayan Law Journal 12.
[44]. [1997] 3 Malayan Law Journal 23.
[45]. In order to proceed beyond the leave stage, an applicant seeking judicial review under Order 53 of the Rules of the High Court 1980 is required to show that he is a "person who is adversely affected by the decision of any public authority".
[46]. [1982] 2 Malayan Law Journal 177.

appellant who was the *Menteri Besar* (Chief Minister) of the State and some members of the State Executive Council which constituted, in effect, the approving authority for the alienation of State land. As noted by Abdoolcader J, who delivered the judgment of the Federal Court, the respondent was alleging an abuse of power. The respondent thereby sought to impugn the validity of the alienation of the land in question to the appellant. On the issue of whether the respondent had the *locus standi* to institute and maintain those proceedings, the Federal Court held in the affirmative.

Abdoolcader J referred to *Boyce v Paddington Borough Council*[47] and *Gouriet and Ors v Union of Post Office Workers*[48] and adopted the approach enunciated in *Boyce v Paddington Borough Council*. His Lordship said that a plaintiff in proceedings for a declaration need do no more than establish that he has a "real interest" in the suit. In *Boyce v Paddington Borough Council*, Buckley J had laid down the conditions which must be satisfied before a private person can claim an injunction to protect a public statutory right in the following terms:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with …; and, second, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. [49]

Abdoolcader J elucidated the above passage as follows:

> The first limb of the exposition in *Boyce* [1903] 1 Ch 109, 114 simply means that the availability of injunctions and declarations at the instance of an individual to protect private rights is not diminished where the threat to the private right also constitutes a threat to a public right. The second limb to the extent that it is read liberally would appear to include everyone with a legitimate grievance.[50]

The Federal Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* also endorsed the concept of liberalizing the scope of individual standing. On this point, Abdoolcader J said:

> Even if the law's pace may be slower than society's march, what with increased and increasing civic-consciousness and appreciation of rights and fundamental values in the citizenry, it must nonetheless strive to be relevant if it is to perform its function of peaceful ordering of the relations between and among persons in society, and between and among persons and government at various levels. It would not perhaps be inapt to aphorize that the idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom. In the United States of America, where standing rules are relatively lax, it has been found that although the gates have been open there has been no flood.[51]

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[47]. [1903] 1 Ch 109.
[48]. [1978] AC 435.
[49]. [1903] 1 Ch 109, 114.
[50]. [1982] 2 Malayan Law Journal 177, 178.
[51] [1982] 2 Malayan Law Journal 177, 179.

Unfortunately, the judicial attitude concerning the issue, scope and interpretation of individual standing in public interest litigation and class actions took a turn for the worse in *United Engineers (M) Bhd v Lim Kit Siang*[52] (commonly referred to as the *UEM* case) and *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals*[53] (commonly referred to as the *Bakun Dam* case). The judgments in these cases, also by the apex court, were delivered in 1988 and 1997 respectively.

In the *UEM* case, the respondent, a Member of Parliament and the Leader of the Opposition, had applied for a declaration that the letter of intent issued by the Malaysian government to United Engineers (M) Bhd in respect of the North and South Highway project was invalid and for a permanent injunction to restrain United Engineers (M) Bhd from signing the contract with the government. The respondent had filed his suit in the Penang High Court on 18 August 1987 and on the same day he applied by way of *ex parte* summons-in-chambers for an interim injunction against United Engineers (M) Bhd to restrain it from signing the contract. Edgar Joseph Jr. J, who heard the application, refused it.[54] On appeal to the Supreme Court, the Supreme Court, in an oral judgment on 25 August 1987, ordered the interim injunction to be issued with liberty to apply and at the same time directed an early trial of the suits.[55]

United Engineers (M) Bhd and the government applied to the High Court to have the interim injunction set aside and the suits struck out on the ground that they disclosed no reasonable cause of action and also for lack of *locus standi*, in addition to being frivolous, vexatious and an abuse of the court's process. The applications were heard by VC George J who dismissed them.[56] Both United Engineers (M) Bhd and the government appealed to the Supreme Court.[57]

By a majority decision of 3 to 2, the Supreme Court held, *inter alia*, that the respondent did not have *locus standi*. Salleh Abas LP, who delivered the majority judgment, did not object to the approach adopted by the Federal Court in *Tan Sri Haji Othman Saat's* case. However, he refused to accept the contention that the respondent had *locus standi* on the basis that he was the Leader of the Opposition, a frequent road and highway user and a taxpayer. He expressed the view that the court should be slow to respond to a politically motivated litigation unless the claimant could show that his private rights as a citizen were affected. On the frequent and road user argument, Salleh Abas LP said:

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[52]. [1988] 2 Malayan Law Journal 12.
[53]. [1997] 3 Malayan Law Journal 23.
[54]. [1988] 1 Malayan Law Journal 35.
[55]. [1988] 1 Malayan Law Journal 50, 53.
[56]. [1988] 1 Malayan Law Journal 50.
[57]. The Federal Court was reconstituted as the Supreme Court when appeals to the Privy Council were abolished in 1985. Since 1994, the Supreme Court was again reconstituted as the Federal Court.

> I cannot see how he could be different from other road and highway users. There is nothing to show that he would be prevented from using roads and highways, already constructed or proposed to be constructed. If he objects to the tolls that are to be imposed for using the proposed NSH highway, he has, like any other users, an option either to use the highway or to use old or other roads. Thus, as a road and highway user, he also has no *locus standi*.[58]

Finally, on the contention that the respondent was a taxpayer, Salleh Abas LP had this to say:

> I now come to the question whether as a taxpayer the respondent has *locus standi* to bring this suit against the Government. According to Smedley's case a taxpayer has *locus standi*, but that case like many other cases I referred to earlier was decided under the new procedure of judicial review introduced by RSC Order 53 which enlarged the meaning of *locus standi* to "sufficient interest". But we have not adopted this new procedure in our High Court Rules. Therefore, the question whether or not the respondent as a taxpayer has *locus standi* to interfere in the NSH contract must, in my judgment, be answered in the negative.[59]

Salleh Abas LP also highlighted the relationship between the concept of *locus standi* and a relator action. The relationship was explained as follows:

> In a public law litigation, the rule is that the Attorney-General is the guardian of public interest. It is he who will enforce the performance of public duty and the compliance of public law. Thus when he sues, he is not required to show *locus standi*. On the other hand, any other person, however public spirited he may be, will not be able to commence such litigation, unless he has a *locus standi*, or in the absence of it, he has obtained the aid or consent of the Attorney-General. If such consent is obtained, the suit is called a relator action in which the Attorney-General becomes the plaintiff whilst the private citizen his relator. I will deal with this aspect in the later part of this judgment. In the instant appeal, since this is not a relator action the respondent must show that he has the necessary *locus standi* to commence and maintain the suit.
>
> …
>
> *Locus standi* is inseparable from, and indeed intertwined with, relator actions because if a private citizen, wishing to complain that a public authority has not legally performed its function or has failed to perform it altogether, has no *locus standi*, he must obtain the consent of the Attorney-General in order to commence a relator action. Without *locus standi*, he cannot proceed on his own. In cases where the Attorney-General has given his consent, there is, of course, no problem, because no *locus standi* needs to be shown since the Attorney-General is constitutionally regarded as the guardian of public right. The difficulty arises where the necessary consent is not obtained before a private citizen launches a suit. In a few cases involving matters of general public interest, which were started by a private citizen, the Attorney-General did intervene in the proceedings either by subsequently giving his consent or even by his personal appearance, thereby dispensing with the requirement of *locus standi* of the applicant. Yet there are cases in which he made no such intervention at all. In such cases, the applicant must show *locus standi*.[60]

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[58]. [1988] 2 Malayan Law Journal 12, 25.
[59]. *Id.*
[60]. [1988] 2 Malayan Law Journal 12, 20.

Abdul Hamid CJ (Malaya) also held that the respondent did not have standing. However, Abdul Hamid CJ did suggest and said that "the time is now ripe for us to restate our position on the law of standing". However, the basis of Abdul Hamid CJ's decision on the *locus standi* point can be traced to the following paragraphs in his judgment.

> But in Malaysia, there is no provision in our Rules of the High Court equivalent to Order 53 rule 3(7) of the English Rules of the Supreme Court. Thus, in my view, there shall be a stringent requirement that the applicant, to acquire *locus standi*, has to establish infringement of a private right or the suffering of special damage: see *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70; [1978] AC 435, and also *Boyce's* case [1903] 1 Ch 109 and this I consider to be the relevant test to apply when determining the question of standing.
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> …
>
> In all the circumstances, I would treat the *Fleet Street Casuals* case [1982] AC 617; [1981] 2 All ER 93 as one based upon a unique rule of court which has no counterpart in this country. This point is a crucial factor which does not appear to have been taken into consideration by the judge in *Tan Sri Haji Othman Saat's* case [1982] 2 MLJ 177.[61]

Abdul Hamid CJ had also said in his judgment that "where the private plaintiff relies on an interest in the enforcement of a public right and not of a private right, standing will be denied unless the Attorney-General consents to a relator action", or the plaintiff can demonstrate some special interest beyond that possessed by the public generally".[62]

The third judge who ruled that the respondent did not have *locus standi* was Hashim Yeop Sani SCJ. The raison d'être for dismissing the respondent's suit can be traced to the following passages in Hashim Yeop Sani's judgment:

> … Looking at the basis of his claims and the nature of the reliefs sought, it is quite obvious on the law as it now stands that Mr. Lim Kit Siang can come only with the consent of the Attorney-General or by means of a relator action.
>
> The principle that the jurisdiction of the court can be invoked by one who seeks to protect a legal right or to obtain a declaration of legal rights as between him and some other person or authority has been extended to permit the institution of proceedings by the Attorney-General on behalf of the public. The Attorney-General represents the public in this regard. The intervention of the Attorney-General is founded on the principle that the Crown is parens patriae and that the Attorney-General appears for and represents the public interest.
>
> Traditionally, it has been held to be basic that if the Attorney-General does not sue ex officio or allow someone else to sue ex relatione no one else can claim to represent the public interest.

[61]. [1988] 2 Malayan Law Journal 12, 31.
[62]. [1988] 2 Malayan Law Journal 12, 27.

> It is a fundamental principle that private rights can be asserted by individuals, but public rights can only be asserted by the Attorney-General as representing the public. The courts have no jurisdiction in any circumstances to clothe a plaintiff with the right to represent the public interest.
>
> Therefore, however much one may admire Mr. Lim Kit Siang for being public-spirited to raise in court a subject which he thinks is of national importance, one must not be blind as to what is the proper law to apply to see whether he has the qualifications in law to do so. To shut out from our minds what is the proper law to apply just to enable him to ventilate his grievance would be an abdication of our duty as interpreters of the law.[63]

Hashim Yeop Sani SCJ concluded that the rights and interests of the respondent had not been adversely affected over and above that of "the ordinary taxpayer, motorist and frequent user of highways".

Seah SCJ in his dissenting judgment first said that "the rule as regards "*locus standi*" or "standing in courts" is not governed by any statutory enactment but is a rule of practice and procedure laid down by the judges in the public interest. Like all rules of practice, they are liable to be altered by the judges to suit the changing times".[64] His Lordship then alluded to the fact that as an elected Member of Parliament the respondent had a duty not only to the electorate of his constituency, but also to Parliament and the peoples of this country. According to his Lordship:

> If, as a Member of Parliament, the respondent brings this suit bona fide, alleging government wrongdoings in about to award a contract in the construction of the proposed North-South Highway to UEM where an enormous sum of public moneys running into billions of ringgit would be spent illegally, I think I would be abdicating my duty if I were to hold that the respondent had no standing to institute this proceeding and that the suit was not properly brought and should not be entertained.[65]

Commenting on the issue regarding a relator action, Seah SCJ said that a relator action has no application in a public interest litigation brought to test the legality of a governmental act in a court of law.

The fifth judge on the panel, Abdoolcader SCJ, among others, had this to say in his dissenting judgment.

> The contention of the appellants is that in matters such as that before us it is only the Attorney-General himself moving *suo motu* or by the grant of a fiat for a relator action who has the right to challenge and can take action and no other. I would think it would be too much to expect process of this nature involving the ventilation of a public grievance to proceed only through this channel, given even the fortitude the incumbent of the office would presumably be endowed with, in view of the rebound where the complaint is against the Government itself and the Attorney-General is its legal adviser, as it would surely be expected that if the complaint merited action by the Attorney-General or by his fiat to a relator, he would himself in the first instance have had the cause of complaint

[63]. [1988] 2 Malayan Law Journal 12, 39-40.
[64]. [1988] 2 Malayan Law Journal 12, 38.
[65]. [1988] 2 Malayan Law Journal 12, 34.

> aborted before its overt manifestation. For the Attorney-General to have to proceed himself or by relation in such a case would only be a deplorable and intolerable reflection as in the normal course of events such a situation would and should never be allowed to arise, and so the question of a relator action must necessarily remain attractive as a theoretical possibility with no conceivable hope generally for practical purposes of advancing to concrete action beyond that. This appears to be the rationale in granting standing in such circumstances in other jurisdictions and perhaps explains why Slade L.J. said in *Ex parte Smedley* 1985] 1 All ER 589; [1985] 1 QB 657 in the passage I have cited that he could not think that any such right of challenge belongs to the Attorney-General alone.
>
> I am not therefore impressed that the road to relief in regard to public law issues can be travelled only with the permission of the Attorney-General. To deny *locus standi* in the instant proceedings would in my view be a retrograde step in the present stage of development of administrative law and a retreat into antiquity.[66]

The majority decisions in the *UEM* case have left a blotch in the field of public law litigation in Malaysia.

Some ten years later, the issue on standing to sue once again came into the limelight in the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals*[67] (commonly referred to as the *Bakun Dam* case). The *Bakun Dam* case saw three natives from the State of Sarawak in Malaysia filling an action to stop the construction of the Bakun Hydroelectric Project based on numerous grounds, one of which being that the project would not only deprive them of their livelihood and their way of life but that the customary rights of all the natives in the affected area (totaling about 10,000 natives) would be extinguished. One of the pertinent issues that had to be decided by the Court of Appeal was whether the three natives had *locus standi* to bring the action.

Gopal Sri Ram JCA explained in his judgment that in public law, there are two kinds of *locus standi*. The first is the initial or threshold *locus standi*. The second is the substantive *locus standi*. His Lordship elucidated the principal differences between these two kinds of *locus standi* as follows:

> Threshold *locus standi* refers to the right of a litigant to approach the court in relation to the facts which form the substratum of his complaint. It is usually tested upon an application by the defendant to have the action struck out on the ground that the plaintiff, even if all that he alleges is true, cannot seek redress in the courts.
>
> Although a litigant may have threshold *locus standi* in the sense discussed, he may, for substantive reasons, be disentitled to declaratory relief. This, then, is substantive *locus standi*. The factors that go to a denial of substantive *locus standi* are so numerous and wide ranging that it is inappropriate to attempt an effectual summary of them. Suffice to say that they range from the nature of the subject matter in respect of which curial intervention is sought to those settled principles on the basis of which a court refuses declaratory or injunctive relief.

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[66]. [1988] 2 Malayan Law Journal 12, 45.
[67]. [1997] 3 Malayan Law Journal 23.

> As regards subject matter, courts have — by the exercise of their interpretative jurisdiction — recognized that certain issues are, by their very nature, unsuitable for judicial examination. Matters of national security or of public interest, or the determination of relations between Malaysia and other countries as well as the exercise of the treaty making power are illustrations of subject matter which is ill-suited for scrutiny by the courts. Jurisdiction is declined, either because the supreme law has committed such matters solely to either the Executive or the Legislative branch of Government — which is termed as 'the political question' by jurists in the United States — or because the court is entirely unsuited to deal with such matters. Substantive relief is denied in such cases on the ground that the matters complained of are non-justiciable.[68]

The Court of Appeal refused to express an opinion on whether the three natives (respondents) had threshold *locus standi* because the appellants had not made any application to have the action struck out. Nevertheless, the Court of Appeal declined relief to the respondents on the ground that they lacked substantive *locus standi*. There were four bases on which *locus standi* was denied.

The first basis was that the respondents were, in substance, attempting to enforce a penal sanction. According to the Court of Appeal, such a matter is entirely reserved by the Federal Constitution to the Attorney General of Malaysia in whom resides the unquestionable discretion whether or not to institute criminal proceedings.

As for the second basis, the Court of Appeal held that the complaints advanced by the respondents amounted to deprivation of their life under Article 5(1) of the Federal Constitution. However, since such deprivation was in accordance with law, the respondents had, on the totality of the evidence, suffered no injury. There was therefore no necessity for a remedy.

The third basis for denying the respondents *locus standi* was because, according to the reasoning by the Court of Appeal, there were persons, apart from the respondents, who were adversely affected by the project. There was no special injury suffered by the respondents over and above the injury common to all others. The action commenced by the respondents was not representative in character and the other affected persons were not before the court.

The Court of Appeal held that the trial judge had not taken into account relevant considerations when deciding whether to grant or to refuse declaratory relief. In particular, the Court of Appeal was of the view that the trial judge did not have sufficient regard to public interest. Additionally, the trial judge did not consider the interests of justice from the point of view of both the appellants and the respondents. Those reasons formed the fourth basis of the Court of Appeal in refusing to grant the respondents *locus standi*.[69]

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[68]. [1997] 3 Malayan Law Journal 23, 40-41.

[69]. For a critique of this decision, see Gurdial Singh Nijar, "The *Bakun Dam* Case: A Critique" [1997] 3 Malayan Law Journal ccxxix.

In both the *UEM* case and the *Bakun Dam* case, we see that the pendulum of *locus standi* had swung to one extreme, far away from a lenient stance or liberal approach. Whether these two cases signaled retrogression in the field of public law litigation is unclear. For the optimist, it may be argued that these two cases were based on their own peculiar facts and circumstances. Hence the insistence on a strict and pedantic, as opposed to a more enlightened and creative approach on the issue of *locus standi* in public law litigation. Perhaps, Gopal Sri Ram JCA in the *Bakun Dam* case did imply that we need not despair and that all is not lost in the field of public law litigation. Gopal Sri Ram JCA did say that *locus standi* is a matter of pure practice that is entirely for the court to decide and whether the strict or lenient approach is to be adopted really depends upon the economic, political and cultural needs and background of individual societies within which the particular court functions. His Lordship further said that "views upon standing in public law actions for declaratory or injunctive relief vary according to peculiar circumstances most suited to a particular national ethos" and that these views "fluctuate from time to time within the same country".

Indeed, the view or approach has fluctuated and the pendulum of *locus standi* has now swung away from the strict and pedantic approach as adopted in the *UEM* case and the *Bakun Dam* case. In a recent case, *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor*, [70] the Court of Appeal had to look at the requirement of "adversely affected" under Order 53 rule 2(4) of the Rules of the High Court 1980. According to Gopal Sri Ram JCA, there is a single test of threshold *locus standi* for all the remedies that are available under Order 53. That test requires an applicant seeking judicial review under Order 53 to demonstrate that he or she will be "adversely affected by any decision of any public authority". His Lordship said that the phrase "calls for a flexible approach" and clarified what he meant by that as follows:

> It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'. At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned (see *Finlay v Canada* [1986] 33 DLR 421). This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261) has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing. See, for example *Thorson v Attorney General of Canada* [1975] 1 SCR 138.
>
> At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as *de minimis*. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v Narendra Dadhich* AIR 1999 SC 3211, where, when granting leave, it was said:
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> > [P]ublic interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest.

[70]. [2006] 3 Malayan Law Journal 164.

> The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

In an ordinary case, if on a reading of the application for leave to issue judicial review the court is satisfied that the applicant has neither a sufficient personal interest in the legality of the impugned action in the sense already discussed, nor is the application a public interest litigation, then leave may safely be refused on the ground that the applicant is not a person 'adversely affected'. In this context, the court must bear in mind what Lord Diplock said in *Inland Revenue Commissioners v National Federation of Self-employed & Small Businesses Ltd* [1982] AC 617:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.[71]

Therefore, public interest litigation will now be regarded as falling in the middle of the spectrum as outlined in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor*.

5. Non-Representative Group Litigation: Who May Initiate Group Litigation And In What Circumstances?

The process contemplated by the formal rules for non-representative group litigation in Malaysia has been outlined under heading 3 above.

Although it is contemplated in the procedure that Order 4 is to be invoked by the court on its own motion, the reported cases show that an application is, almost without exception, made by one of the parties to the court. In two out of the eight cases discussed in this paper, the applications for consolidation were made by the defendants.

Types Of Cases

The types of cases that have attempted to invoke Order 4 include defamation claims,[72] claims based on different causes of actions,[73] claims based on an agreement[74] and claims seeking declarations.[75]

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[71]. [2006] 3 Malayan Law Journal 164, 171-172.

[72]. See *MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 6)* [1998] 3 Current Law Journal Supplementary 390 and *Dato V Kanagalingam v Tommy Thomas & Anor and Other Cases* [1998] 3 Current Law Journal Supplementary 429.

MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 6) and *Dato V Kanagalingam v Tommy Thomas & Anor and Other Cases* were related cases and both these cases involved claims for damages in defamation. The defendants in both cases had applied for a number of suits (totaling five) that had been instituted against them to be consolidated. In *MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 6)*, the High Court expressed the view that once separate actions are pending in different courts, no court has the power "to order that another proceeding in any other court be transferred to it." It is submitted that such a view is not supported by authorities nor envisaged by the terms used in Order 4 of the Rules of the High Court 1980. In *Dato V Kanagalingam v Tommy Thomas & Anor and Other Cases*, the High Court held that since the Defamation Act 1957 applied to the case, the court ought to apply section 17 of the Defamation Act 1957. Section 17 of the Defamation Act 1957 only provides for consolidation in libel actions and does not cover actions which are both slander and libel such as the present suits. Hence, the application for consolidation under Order 4 of the Rules of the High Court 1980 failed.

In *Mayban Trustee Bhd v Amalan Tepat Sdn Bhd*, the application for consolidation was made by the defendant. The High Court held that the only subject matter common to the two originating summonses filed by two separate plaintiffs against the defendant related to the same lands but that *per se* did not bring the application within the ambit of Order 4. In this case, the first originating summons concerned the plaintiff's claim against the defendants for alleged breach of trust and damages incurred thereby, on the basis of a trust deed dated 9 November 1993. The second originating summons was a charge action brought by a completely different plaintiff, that is, Bank Pertanian Malaysia for an order for sale under Order 83 of the Rules of the High Court 1980 pursuant to Bank Pertanian Malaysia's right as a registered chargee.

In *Demak Motor Corporation Sdn Bhd v Moi Fong*, it was once again the defendant who had attempted to invoke Order 4. The plaintiff had brought two separate actions against the defendant. The first action involved a claim for goods sold and delivered while the second action involved an allegation of fraud on minority shareholders. The High Court held that the cause of action and relief of both the actions were completely different and thus rejected the application by the defendant to consolidate the actions.

Unlike the other cases, the refusal by the court to invoke Order 4 in *OCBC Bank (M) Bhd v Star Edge Sdn Bhd* was not based on the fact that the application failed to fulfill one of the requirements in Order 4 rule 1(a)-(c). In this case, the

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[73]. See *Mayban Trustee Bhd v Amalan Tepat Sdn Bhd* [2006] 5 Current Law Journal 43, *Demak Motor Corporation Sdn Bhd v Moi Fong* [2005] 7 Current Law Journal 352 and *OCBC Bank (M) Bhd v Star Edge Sdn Bhd* [2003] 7 Current Law Journal 196.

[74]. See *Kumpulan Emas Bhd v Dato Lim Teng Lew & Anor* [2004] 2 Malayan Law Journal 614.

[75]. See *Sivarasah v Yeoh Eng Huat Andrew* [1994] 3 Malayan Law Journal 271.

plaintiff had instituted foreclosure proceedings for an order under section 148(2)(c) of the Sarawak Land Code (Cap 81) pursuant to a memorandum of charge given by the defendant as security for an overdraft facility and a civil suit against the defendant together with the three guarantors. The defendant thereby sought an order under Order 28 rule 8(1) of the Rules of the High Court 1980 that the foreclosure proceedings therein, commenced by way of originating summons be converted into a writ and an order under Order 4 rule 1 of the Rules of the High Court 1980 to consolidate the said foreclosure proceedings with the said suit to be carried on as one action. The High Court dismissed the defendant's application on the ground that to order the said foreclosure proceedings to be converted into a writ action and to be consolidated with the said suit would be contrary to the principles of a statutory right of a chargee, being a right *ad rem*, against the right of a creditor to sue on a breach of agreement, being a right *in personam.*

Role Of Judges In Conferring Group Litigation Status On Cases

Although Order 4 empowers the judges to act on their own motion, it is extremely unlikely that the judges will take it upon themselves to consolidate the actions that are pending before the courts. Case management in the Malaysian civil litigation process is nowhere like those practiced in jurisdictions such as England and Wales. To all intents and purposes, case management in Malaysia is merely a replacement for a former pre-trial stage known as summons for directions.

Barriers To Parties/Lawyers Using The Group Litigation Mechanism?

As in the case of representative actions, the issue of costs is a significant factor. Since the contingency fee is illegal and lawyers are not permitted to advertise, many potential claims in the form of group litigation may not have made it into the civil justice system.

6. Lawsuits In Each Litigation Form Over The Past 5 Years

No actual statistics are available to indicate the number of representative actions and non-representative actions that have been filed in the courts. Hence the percentage of these representative actions:

(i) that have succeeded in fulfilling the requirements of Order 15 rule 12; or
(ii) that have obtained leave from the court (where the class actions are required to proceed under Order 53); or
(iii) that have obtained leave for consolidation under Order 4

is not available.

The reported cases in the last five years show that there is a fair share of cases that have succeeded in invoking the procedure in Order 15 rule 12 of the Rules of the High Court 1980. As for representative actions against the government or public authorities, the procedure in Order 53 of the Rules of the High Court 1980 appears to be a formidable obstacle. In terms of consolidation of actions pursuant to Order 4 of the Rules of the High Court 1980, the cases that have attempted to invoke this procedure are few and far between.

7. Notification Process In Representative Litigation

The civil litigation process in Malaysia strictly adheres to the adversarial system of litigation. Since the courts play a very passive role in the civil litigation process, there is no evidence to show that they play any role in the notification process. This is further compounded by the fact that Order 15 rule 12 does not make it mandatory for members of the class in a representative action to be informed. Be that as it may, there is nothing to prevent the court from raising the issue concerning notification at the pre-trial case management conference. In all likelihood, members of the class will be kept informed by the plaintiffs in the representative action. The nature as to how class members are kept informed will vary from case to case.

As a general rule, as long as the court is satisfied that the requirements in Order 15 rule 6 – concerning joinder of parties – are met, any person can be added as co-defendant in a representative action. However, no person can be forced or coerced into becoming a plaintiff in an action unless that person gives his or her consent. This is because once the person is added as a plaintiff in a representative action, he or she will be bound by any order as to costs.

8. Notification Process In Non-Representative Group Litigation

By the very nature of the procedure in Order 4 of the Rules of the High Court 1980, the opposing party is at liberty to oppose an application to consolidate the actions that are pending in the court or courts. Therefore, parties will be informed if the court makes an order for the actions to be consolidated.

9. Case Management Procedures

At present, case management procedures in Malaysia apply to all types of actions begun by writ. There are no special rules of case management relating specifically to group litigation. In Malaysia, the procedures relating to case management are prescribed in Order 34 of the Rules of the High Court 1980, which provides for Pre-trial Cases Management. However, it may be noted that as the judge presiding over a case management has wide powers to make directions, he may use his discretion as necessary in a group litigation to ensure a just and fair process. Order 34 empowers the judge to “make such orders and

give such directions as to the future conduct of the action to ensure its just, expeditious and economic disposal."

With regard to whether or not there are features in the Malaysian civil litigation system that either hinder or facilitate the development of cases in group litigation, this issue has already been discussed at length under heading 4 above.

10. Proportion Of Group Litigation Cases Resolved Through Negotiation And Settlement

The reported cases on group litigation in Malaysia are litigated throughout and resolved through judicial decisions. We are unable to provide data on group litigation cases that were resolved through settlement or negotiation.

11. Remedies

All general remedies are available in representative and non-representative group litigation, namely, damages, injunctions, specific performance, declarations, rectification and rescission.

Equitable Remedies

In the case of equitable remedies such as specific performance, injunctions, declarations, rectification and rescission, it must be noted that they are partly regulated by the Specific Relief Act 1950 and are subject to the provisions in the Act and the court's discretion. For instance, such remedies may not be granted where hardship will be caused to the defendant or where the plaintiff is guilty of undue delay. The element of discretion in decreeing specific performance is embodied in section 21 of the Specific Relief Act 1950. Section 21 states as follows,

> The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

Further, section 50 of the Specific Relief Act 1950 provides that preventive relief (such as injunctions) is only granted at the discretion of the court.[76]

On the question of injunction, section 29 of the Government Proceedings Act 1956 is of particular interest in cases where litigation, including group litigation, is commenced against the Federal Government or a State Government. Section 29 of the Act states as follows,

[76]. Section 50 of the Specific Relief Act 1950 states as follows, "Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual."

(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that-

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

(2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

The extreme view regarding this section is found in the case of *Government of Malaysia v Lim Kit Siang*[77] which held that no injunction, temporary or permanent can be issued against the government or a government officer or against a third party if it would affect the government.

In a more recent case, *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors*,[78] the Malaysian Court of Appeal held that section 29(2) did not bar an injunction against a third party even though it would affect the government. The Court of Appeal also addressed the question whether the High Court had jurisdiction to grant an injunction against government servants. In dealing with this issue, the court made reference to Commonwealth authorities[79] which had considered provisions that were similar to section 29. The Court of Appeal interpreted these authorities as stating a principle that the provision did not prevent interim injunctions from being granted against officers of the Crown. The Court of Appeal went on to rule,

> In our judgment, the effect of current authority is that our courts have jurisdiction to grant interim and permanent injunctions against any servant of the Government. Accordingly,

[77]. [1988] 2 Malayan Law Journal 12.
[78]. [2005] 3 Malayan Law Journal 325.
[79]. Principally, the House of Lords decision of *M v Home Office* [1994] 1 AC 377 and the Court of Appeal of Nova Scotia in *Smith v Attorney General of Nova Scotia* [2004] NSCA 106.

> there was no jurisdictional bar to the High Court granting the instant appellant the injunction it sought ...[80]

The Court of Appeal also dealt with the point on whether the government itself can be restrained by an injunction. It was held that section 29 did not prohibit the grant of a *temporary injunction* against the government. The Court of Appeal stated as follows,

> It has been settled since at least 1978 that s 29 of the 1956 Act does not prohibit the grant of temporary injunctions against the Government. In *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 it was held that the section 'does not take away therefore the right of the court to grant an interlocutory injunction'. This court in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 treated the ratio in *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 as settled law…Accordingly, it is too late in the day to argue that s 29 bars the grant of an interlocutory or even an interim injunction against the Government.[81]

The principles established in *Sabil Mulia* await the consideration of the Malaysian Federal Court.

Damages

In Malaysia, an award of damages for breach of contract is subject to the principles found in section 74 of the Contracts Act, 1950, which provides for the normal measure of damages that may be obtained by a party upon breach of a contract. Section 74, which is regarded as the statutory enunciation of the rule in *Hadley* v *Baxendale*,[82] provides that upon breach of a contract, the aggrieved party is entitled to receive damages which naturally arose from the breach or which the parties knew to be likely to result from the breach. With regard to damages for tort, the common law principles are applicable, namely, the tort must have caused some loss or damage to the plaintiff and the loss/damage must be foreseeable by the defendant.

There are no statutory provisions or case law in Malaysia regulating the appropriation of monetary damages among claimants. Such matters are left to the discretion of the judge.

12. Funding Of Group Litigation

Generally, it is the plaintiffs or the claimants themselves who fund group litigation. Where an organization is behind a group litigation, the organisation usually bears the cost of the litigation. As has been mentioned earlier, prominent non-governmental organisations that have been involved in group litigation are the Consumer Association of Penang (CAP), Friends of the Earth, Malaysia

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[80]. [2005] 3 Malayan Law Journal 325, 336.
[81]. *Id.*
[82]. [1854] 9 Ex 341.

(Sahabat Alam Malaysia or SAM) and the Borneo Research Institute of Malaysia (BRIMAS)

13. Costs And Benefits

There are no special rules relating to payment of costs in representative and non-representative group litigation. The general principles relating to costs which pertain to an ordinary civil litigation apply to all types of actions. The formal rules that relate to costs in Malaysia are found in Order 59 of the Rules of the High Court 1980. Order 59 is in *pari materia* with Order 59 of the former Rules of the Supreme Court 1965 of England. The fundamental rule is that costs are in the discretion of the court.[83] The second fundamental principle is, as has been noted earlier, that generally costs follow the event, or in other words, the winner is entitled to costs from the loser.[84] The party receiving costs is entitled only to "taxed costs". The bases on which costs may be taxed are set out in Order 59 of the Rules of the High Court 1980.[85] It may be noted that although not expressly stated in Order 59, the court may order costs on an indemnity basis, which is a more generous basis and which may be useful in group litigation involving public interest. Furthermore, as has been mentioned earlier, in the *UEM* case and the *Bakun Dam* case, both of which may be regarded as public interest litigation cases, no order as to costs was made by the court despite the fact that the respondents in both cases had their actions dismissed by the Supreme Court and Court of Appeal respectively.

14. Burden Placed On The Courts

Group litigation forms a minor percentage of the cases filed, heard and disposed off in the Malaysian courts. It is difficult to ascertain whether the burden that group litigation places on the court is the same, or less, than in non-group litigation cases. Needless to say, the time taken to dispose off a group litigation case depends on the complexity of the issues involved. At present, we are unable to provide any quantitative data on comparative court costs and time take to dispose of the cases.

15. Current Debates On Group Litigation Rules And Procedures

At present, there are no serious debates in Malaysia over the application of the present group litigation rules and their consequences. The relevant authority responsible for bringing about changes, the Rules Committee created under section 17 of the Courts of Judicature Act 1964, has not indicated that any deliberations are being carried out to reform this area of the law. However, it is submitted that there are a number of matters that should be addressed by the

[83]. See Order 59 rule 2 of the Rules of the High Court 1980.
[84]. See Order 59 rule 3(2) of the Rules of the High Court 1980.
[85]. See Order 59 rules 27(2) (party and party basis), 27(4) (common fund basis), 28(1) (solicitor and client basis), and 30(1) – (2) (trustee basis)

Rules Committee. In particular, the separate rules and procedure applicable to representative actions that are brought against the government and public authorities (under Order 53 of the Rules of the High Court 1980) ought to be looked into. As noted earlier, Order 53 imposes stringent requirements over and above that prescribed in Order 15 rule 12. These requirements may cause injustice as they have the propensity of derailing a meritorious action. Hence a relaxation of these rules is one of the matters that should be addressed.

Another area which should be addressed pertains to derivative actions. It has been noted that there is no specific provision in the Rules of the High Court 1980 dealing with derivative actions. As such, there are no clear rules as to the procedure applicable.

16. Evaluation Of Success In Achieving Changes In Behaviour

Unlike other jurisdictions, Malaysia has not taken active steps to introduce specific rules and procedures to facilitate and promote group litigation. This can be seen from the fact that there are no special rules and procedures to cater for class actions in consumer protection, competition law, unfair commercial practices, derivative actions etc. There are also no special procedures dealing with case management and the payment and allocation of costs and benefits for group litigation.

Hence, until such measures are introduced and implemented in Malaysia, the question of evaluating any success in changes relating to behaviour, activities or policy does not arise.