The Public Authorities Protection Act 1948 – A Case for Repeal†

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I. Introduction

The Public Authorities Protection Act 1948 (Act 198)(Revised 1978) is a short Act containing only three sections. Its main provision is s 2 which prescribes a short limitation period of 36 months if an intended defendant is a public authority, and if the act, neglect or default complained of was done in the execution or intended execution of any written law or of a public duty or statutory duty or authority.

In this paper, the writer attempts a critical examination of the 1948 Act with the purpose of highlighting its anomalies and deficiencies and to put forward a case for its repeal.

II. Background

The Public Authorities Protection Act 1948, a Federal statute which applies throughout Malaysia, is a progeny of the (now repealed) Public Authorities Protection Act 1893 of England. Legislation based on the English Act of 1893 was first introduced in the Straits Settlements in 1912 as the Public Authorities Protection Ordinance (Straits Settlements Cap 14). Likewise, legislation in almost similar form was enacted in the Federated Malay States as a Federated Malay States Enactment

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(Cap 30) in 1929. State Enactments based on the legislation in the Straits Settlements and the Federated Malay States were passed separately by stages in each of the Unfederated Malay States. After the formation of the Federation of Malaya in 1948 the enactments which applied in the various states of Malaya were consolidated and enacted as the Public Authorities Protection Ordinance 1948. In the East Malaysian state of Sabah, a Public Authorities Protection Ordinance was enacted as Sabah Ordinance Cap III in 1952. Similar legislation was enacted in Sarawak and brought into force in 1965.[1] The English Act of 1893 provided for a limitation period of only six months. In 1939 this period was increased to one year when the substantive parts of the 1893 Act were repealed and reenacted as s 21 of the Limitation Act 1939. In 1954 the special protection enjoyed by public authorities in England was abolished by the Law Reform (Limitation of Actions *etc*) Act 1954. Thus in England today public authorities and their servants are subject to the same limitation periods as ordinary individuals.

In Malaya the analogous legislation enacted before 1948 provided for a very short limitation period of three months. This was subsequently raised to 12 months when the various state legislation were consolidated and passed as the Public Authorities Protection Ordinance 1948 of the Federation of Malaya.[2] In 1974, the limitation period was increased to 36 months[3] and this is the limitation period applicable throughout Malaysia today. The Act was revised and reenacted in 1978 as the Public Authorities Protection Act 1948 (Act 198). Unlike its English ancestor, the present Malaysian Act, the Public Authorities Protection Act 1948, continues to enjoy a healthy and salubrious existence. Although the present limitation period of 36 months is a great improvement, the Act is still capable of creating difficulties for a plaintiff.

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[1] See *Baltim Timber Sdn Bhd v Director of Forests & Ors* [1996] 4 MLJ 103.
[2] See *Proceedings of the Federal Council 1948*, at p B401.
[3] By the Public Authorities Protection (Amendment) Act 1974.

The purpose behind the passing of the English Act of 1893 can be seen from its long title which read – "An Act to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and public duties". This broad effect is also the purpose of the Malaysian Public Authorities Protection Act 1948 in that it gives a "public authority" and its servants the benefit of a short limitation period of 36 months and certain advantages denied to ordinary defendants, when they are sued in connection with an act, neglect or default which falls within a vaguely drafted s 2. Although the Act's purpose is to protect public authorities, it contains no definition for the term "public authority". The term is also not defined in the Interpretation Acts 1948 and 1967 of Malaysia. The result of this is that the term has to be construed in the light of the language of s 2 of the Act.

The main provision of the Malaysian Act is s 2, which is materially similar to s 1 of the English Act of 1893. Section 2 reads as follows:

> Protection of persons acting in execution of statutory or other public duty
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> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect -
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> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complaint of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

(b) whenever in any such suit or action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client;

(c) where the proceeding is a suit or action for damages, tender of amends before the suit or action was commenced may be pleaded in lieu of or in addition to any other plea;

(d) if the suit or action is commenced after the tender or offer in writing, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered, offered or paid, he shall not recover any costs incurred after the tender, offer or payment, and the defendant shall be entitled to costs to be taxed as between solicitor and client as from the time of the tender, offer or payment, and the costs up to the time of such tender, offer or payment shall be in the discretion of the court:

Provided that this provision shall not affect costs on any injunction in the suit or action.

Over the years the courts have experienced much difficulty in construing this provision. It is sometimes difficult to draw a clear line between cases which fall within s 2 and those which do not.[4] Speaking of the English Act of 1893 Viscount Haldane bemoaned in *Bradford Corporation v Myers* – "It yields no precise definition of the kind of act in respect of which protection is given".[5] McCardie J in *Venn v Tedesco* described the words of the 1893 Act to be "as broad as words can be".[6] Lord Kilbrandon in the Privy Council decision of

[4] See the observations of Viscount Maugham in *Griffiths v Smith* [1941] AC 170 at p 184.
[5] [1916] 1 AC 242 at p 251.
[6] [1926] 2 KB 227 at p 228.

Government of Malaysia v Lee Hock Ning expressed his opinion of the 1893 Act in the following words – "It must be said at once of the Public Authorities Protection Act 1893 that from the first it was a statute which, 'there was none to praise and very few to love'."[7]

It is significant to note that the corresponding English legislation, before its repeal in 1954 by the Law Reform (Limitation of Actions *etc*) Act, was the subject of active litigation and elaborate case law. This article makes repeated reference to English authorities on the repealed legislation (some of them are more than 100 years old) as they are relevant in Malaysia because of s 3 of the Civil Law Act 1956.[8]

III. Defendants Protected by the Act

The first and perhaps the most vital question is as to who are the defendants that enjoy the special protection of the Act. As has been seen, there is no statutory definition of the term public authority and the persons who came within its protection have to be determined by looking at the act, neglect or default complained of and by determining whether it fell within the vague language of s 2. This factor (as will be seen in later parts of this article) has given rise to many difficult problems of construction.

The use of the term "any person" indicates that the Act's protection is not restricted to only "public authorities". In fact it applies to the acts, omissions, neglect, or default of an individual provided he comes within the language of s 2. This is so even if he is a private

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[7] [1974] AC 76 at p 81.

[8] Briefly, s 3 of the Civil Law Act 1956 provides that English common law and equity which was in force in England on the respective cut-off dates specified in the Act shall apply in Malaysia, subject to local statutes and subject to their suitability for local inhabitants and local circumstances. For details, see Ahmad Ibrahim & Ahilemah Joned, *The Malaysian Legal System* (Dewan Bahasa dan Pustaka, 1997) Ch 4.

person on whom a public duty is imposed, as seen in *Salisbury v Gould*.[9] This case involved a medical practitioner who was under a statutory duty to notify cases of infectious diseases to the authorities. It was held that he could rely on the English Act of 1893 when sued in respect of an erroneous notification of an infectious disease. As the Act can apply to individuals, the name and short title of the Act appears to be a misnomer.

Subject to the nature of the act, omission, neglect or default complained of, the Government of Malaysia,[10] State Governments, city, municipal and town councils[11] and local authorities created by statute and their officers and servants, come under the Act. In cases of doubt whether a person or body enjoys the benefit of the Act, one must determine whether the act, neglect or default of the person or body falls within the nebulous words of s 2. It is plain that an officer or servant of a public authority may claim the benefit of the Act if his act, neglect or default comes within the ambit of s 2.[12] In England it has been held that an independent contractor appointed by a public authority to carry out one or more of its statutory duties is not protected by the Act, even if the contractor itself is a public body.[13] In Malaysia, some Acts of Parliament specifically enacted for the purpose of setting up a body corporate have, by an express provision, adopted the Public Authorities Protection Act 1948 for the protection of the new corporate body. As will be shown in a later part of this paper, some of these provisions are expressed in language that appear to be contrary to the

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[9] (1904) 68 JP 158.

[10] By virtue of s 38 of the Government Proceedings Act 1956 (Act 359) (Revised 1988), which provides that any written law relating to the limitation of time for bringing proceedings against *public authorities* may be relied by the Government (which includes State Governments) as a defence in civil proceedings.

[11] See *Beacon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors* [1999] 2 MLJ 385.

[12] See *The Danube II* [1920] P 104; [1921] P 183.

[13] *Tilling Ltd v Dick, Kerr & Co Ltd* [1905] 1 KB 562; *Drake v Bedfordshire CC* [1944] KB 620.

spirit of the 1948 Act and may be construed to include protection which is beyond that which is envisaged by the Act.

IV. Act, Neglect or Default Protected by the Act

It is clear from s 2 that not all acts, neglect or default of a public body or its officers and servants are protected by the Act. Protection is only afforded where the act, neglect or default is in *pursuance or execution or intended execution of any written law or of any public duty or authority*. The words italised above were considered by the House of Lords in two significant decisions, *Bradford Corporation v Myers*[14] and *Griffiths v Smith*.[15]

In the first case, the Bradford Corporation had a statutory power to operate a gasworks and a statutory duty to supply gas to the residents of the district. It also had a statutory power to dispose of the gasworks' by-products. It entered into contract to sell coke, a by-product, to Myers. Damage was caused to Myer's shop window whilst the coke was being delivered to his premises. Unfortunately Myers sued after the expiry of the short limitation period under the Public Authorities Protection Act 1893. However the House of Lords held unanimously that the Corporation could not seek the protection of the Act. It was pointed out the suit arose out of a private transaction which the Corporation was not obliged to enter into for the purpose of performing a public duty. In an oft-quoted passage Lord Buckmaster LC said:[16]

> In other words, it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute,

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[14] [1916] 1 AC 242.
[15] [1941] AC 170.
[16] *Supra* n 14 at p 247.

> or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply.

Although the passage remains a valuable guide, it is not, it is respectfully submitted, free of ambiguities. For example what did his Lordship mean by "direct execution of statute"? Does it include a direct execution of an important empowering power where no public duty or public benefit is involved? It is interesting to note his Lordship concluded his opinion in this case by saying:[17]

> I am conscious that this opinion does not establish as clear and distinct a line as I should like to see.

The views expressed in this case were expressly approved by the House of Lords in the second case, *Griffiths v Smith*. Viscount Maugham in supporting the decision in the *Bradford Corporation* case said further that it was not *essential* that a public authority seeking to rely on the 1893 Act should show that the particular act or default in question was done or committed in the discharge or attempted discharge of a positive duty imposed on the public authority. His Lordship widened the scope of application of the English Act of 1893 by saying:[18]

> It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority *or* a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are "public duty or authority", and the latter word must be taken to have its

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[17] *Supra* n 14 at p 250.
[18] *Supra* n 15 at p 185.

ordinary meaning of legal power or right, and does not imply a positive obligation.[19]

Thus Viscount Maugham would include the execution of a non-incidental statutory power within the ambit of the Act if the power was exercised for the public benefit. It will be seen that no clear guiding principle emerges from these cases. Further, adding to the ambiguity is the heading[20] of s 2 of the present Malaysian Act which reads - "Protection of persons acting in execution of statutory or *other public duty*".[21] This extends the bounds of s 2 by implying that there may be public duties which are not based on a statute, which are protected under s 2.

In Malaysia, a fair number of cases which involved the application of the 1948 Act have been reported and the most important of them will be dealt with in later parts of this article. An examination of the Malaysian cases will show that some of them indicate an inclination to assume that the Act applied if the defendant was a public authority.[22] It must be emphasised that the Act applies to a public authority only if the public authorities' act, default or neglect is covered by s 2. It is submitted that the court must undertake an initial exercise of determining whether the facts alleged by the defendant fell within the ambit of s 2.[23]

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[19] Emphasis added.

[20] Headings have been relied on as an aid to interpretation of statutes in a number of cases and these are summarised in Cross, *Statutory Interpretation* (Butterworths, 1976) at pp 112-113.

[21] Emphasis added.

[22] See for instance *Phua Chin Chew v KM & Ors* [1987] 2 MLJ 604; *SR Katherine Lim Kit v Ketua Pengarah Perkhidmatan Malaysia* [1997] 2 MLJ 538; and *Selvaraju v Suruhanjaya Perkhidmatan Awam* [2006] 2 MLJ 585.

[23] See the caution of Suffian LP in *Government of Malaysia v Ooi Kheng Kee* [1976] 1 MLJ 171 at p 172.

V. Application of S 2 to Contracts

A significant feature of the modern era is that many contracts are entered into between public authorities and private persons. Some of these contracts are made by a public body in order that it shall fulfill a statutory obligation. Some others may have either an incidental or an indirect link to a statutory obligation. Over the years the courts have grappled with the question of whether the Act applied to a contract made by a public authority with a private person and, it is submitted, have come to no clear and helpful answer.

Early English cases were against the application of the 1893 Act to contracts made by a public authority. In 1902, in *Clarke v Lewisham Borough Council*[24] Bingham J declined to apply the Act in a suit for breach of contract brought against the Council. Two years later Farwell J made a similar decision in *Sharpington v Fulham Guardians*.[25] This case involved an independent contractor who sued the guardians for breach of contract. The most significant feature of this case was that the independent contractor was engaged to do works which the guardians were under a duty to perform. In holding that the 1893 Act did not apply Farwell J said[26] that he could not see "where to draw the line" between a breach of contract protected by the Act and one which was not.[27]

It is submitted that the English courts could have easily taken the position that the words "act, neglect or default" indicated Parliament's intention to apply the Act of 1893 to torts only and not to contracts. Unfortunately, they did not do so and soon after

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[24] (1902) 1 LGR 63.
[25] [1904] 2 Ch 449.
[26] *Id* at p 456.
[27] See also *Milford Docks Co v Milford Haven Urban District* (1901) 65 JP 483 at pp 483-484 where Romer LJ expressed that view that the Act of 1893 "does not apply to actions for the price of goods sold and delivered and for work and labour done".

Sharpington the courts began to take the stand that if a public authority enters into a contract for the carrying out of a public duty, the protection of the Act may apply. Lord Porter put it succinctly in *Griffiths v Smith*[28] when he said – "I think it is true to say that a private contract even if entered into in pursuance of an Act of Parliament is not thereby protected but *an act which is done in performance of a public duty is still done in the execution of a public duty though it is performed through the medium of a contract.*"[29]

The principle that a public authority would be protected by the 1893 Act if on the facts it was performing a public duty "through the medium of a contract" was applied in a number of English cases. In *McManus v Bowes*[30] a public authority was under a statutory duty to employ a medical officer. It was also given a statutory power to dismiss him. In a suit by the medical officer for breach of contract of service it was held that the appointment and dismissal of the medical officer were acts carried out in the execution of the authority's public duty. *Crompton v West Ham County Borough Council*[31] and *Bennet v Stepney Borough Council*[32] were two other cases where a public authority sought the protection of the Act when it was sued for a breach of a contractual obligation. The first case involved a claim for salary by a relieving officer from a public authority. The public authority was bound by statute to make the appointment of relieving officers. The second case involved a claim by a plaintiff for his superannuation contributions from a public authority. Statute required the public authority to repay the plaintiff's superannuation contributors. In both cases, the failure by the public authority to fulfill its obligation was held to be a breach of a public duty which was protected by the 1893 Act. However, a contract made to perform an enabling power as opposed to an obligation, may not enjoy the protection of the Act. Thus, in the

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[28] *Supra* n 15
[29] Emphasis added.
[30] [1938] 1 KB 98.
[31] [1939] Ch 771.
[32] (1912) 107 LT 383.

Bradford Corporation[33] case, discussed above, the fact that the corporation had an ancillary or subsidiary power to dispose of the coke produced as a by-product by its gasworks, would not make its contract to sell the coke a transaction protected by the Act.

Finally, reference may be made to two Privy Council decisions on appeals from Singapore and Malaysia. They serve to illustrate the difficulties and uncertainties in this area of the law. The first is *Firestone Tire and Rubber Co v Singapore Harbour Board.*[34] The case appears to decide that a public authority exercising a permissive power as (opposed to an obligatory function) to bestow a benefit on a section of the general public may seek the protection of the Act. In this case a local statute empowered the Singapore Harbour Board to carry out a number of activities including the carrying on of the business of wharfingers and warehouseman. The Board lost some tyres which had been delivered to them in one of its warehouses. The Privy Council held that the Board was entitled to rely on the Public Authorities Protection Ordinance that applied to Singapore, even though the Board was exercising a permissive function, by saying:[35]

> The board were exercising their permissive powers to perform a normal function of a harbour board and in so doing were providing a service essential to the shipping and commercial community of Singapore and accordingly were entitled to the protection of the Public Authorities Protection Ordinance.

While the decision can be supported on the ground that it satisfies the requirements stated by Viscount Maugham in *Griffiths v Smith*[36] the decision is clearly an unfair consequence of the legislation to a party who had entered into a commercial transaction with a public authority.

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[33] *Supra* n 14
[34] [1952] AC 452
[35] *Id* at p 464.
[36] See Part III of this paper.

The second case, *Government of Malaysia v Lee Hock Ning*[37] involved contracts entered into by the government with a contractor to build classrooms at primary schools. The contractor sued for a sum of money which had fallen due but unfortunately his writ was issued after the expiry of the limitation period contained in the Public Authorities Protection Ordinance 1948. Under the Education Act 1961 it was "the duty of the Minister to secure the provision of primary education in (a) national primary schools and (b) national type primary schools". The Minister had engaged an independent contractor to carry out the statutory duty which he was required to perform, as in *Sharpington v Gulham Guardians*[38] (referred to earlier). The Privy Council held, affirming the decision of the Federal Court,[39] that the contract in question was a private contract with a private individual and therefore was not protected by the Ordinance. The Privy Council held the facts "were virtually indistinguishable"[40] from *Sharpington* and adopted the reasoning of Farwell J in that case, a reasoning approved by the House of Lords in *Bradford Corporation v Myers*.[41] Farwell J had stressed that the complaint in that case was not made by a number of children or a member of a public in respect of a public duty owed to them. It was a complaint by a private individual in respect of a private injury done to him. In Farwell J's view:[42]

> The only way in which public duty comes in at all is, as I have pointed out, that if it were not for the public duty any such contract would be *ultra vires*.

It is submitted with respect that *Government of Malaysia v Lee Hock Ning* does not help to establish any general principle or remove the uncertainties on the application of the Act. It was noted that after *Sharpington* a principle emerged that a public authority's

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[37] [1974] AC 76.
[38] *Supra* n 25
[39] [1972] 2 MLJ 12.
[40] *Supra* n 37 at p 81.
[41] [1916] 1 AC 242.
[42] *Supra* n 25 at p 456.

contract could fall within the ambit of the Act if the contract could be construed as a medium by which it was carrying out its public duty. One may argue with equal force that in the instant case (and also in *Sharpington*) that the public authorities' breach of contract should have been protected because the contract in each case was the "vehicle" by which the authority was performing its public duty.

VI. Continuance of Injury or Damage

Where the act, neglect or default of a public authority comes within the ambit of the second limb of s 2 of the 1948 Act and it results in "a continuance of injury or damage", s 2(a) provides that the limitation period that is applicable is "thirty-six months next after the ceasing thereof". English case law decided under the 1893 Act[43] provide good illustrations of what is meant by continuance of injury or damage. In *Earl of Harrington v Derby Corporation*[44] the continuance of injury or damage was the continuous act of polluting a river whilst in *Boynton v Commissioners of the Ancholme Drainage and Navigation*[45] it was the continuous failure of the public authority to carry out its statutory obligations of drainage in a proper manner. However the rule that time will not run until the ceasing of the injury or damage has its limits. It has been held that continuance of the injury or damage refers to the continuance of *the act* which caused the damage.[46] Thus where the act which is complained of was completed or had come to an end the rule does not apply even though the *completed act* may cause additional or new damage or injury. It is irrelevant that the extent of the injury or damage could not be assessed until the act

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[43] The leading cases are dealt with in Preston and Newsom, *Limitation of Actions* (The Solicitors Law Stationery Society Limited, 3rd ed, 1953) at pp 211–213.

[44] [1905] 1 Ch 205.

[45] [1921] 2 KB 213.

[46] *Carey* v *Metropolitan Borough of Bermondsey* (1903) 20 TLR 2.

causing it was complete or that, despite the completion of the act, damage or pain and suffering was still continuing.[47]

In the Malaysian Court of Appeal case of *Ronald Beadle v Hamzah HM Saman*[48] the appellant's passport was seized as a result of a certificate issued by the Inland Revenue Department. This seizure was made under s 104 of the Income Tax Act 1967. The passport was not returned to the appellant until sixteen years had passed. It was held that for limitation purposes the seizure and retention of the passport was a continuous injury within the second limb of s 2(a). Similarly, in *Ibrahim bin Mohamad Kutty v Timbalan Menteri Dalam Negeri*[49] Low Hop Bing J held that the second limb applied where the plaintiff was detained in September 1998 and kept in detention until January 2000. His Lordship in applying the second limb of s 2(a) held that time did not run until the date of his release.[50]

On the other hand in *Baltim Timber Sdn Bhd v Director of Forests*,[51] a case which concerned a revocation of the plaintiff's timber license by the Director of Forests Sarawak, a different approach was taken. The plaintiff commenced its action about 72 months after the revocation of its timber license. Elizabeth Chapman JC held that the injurious effects of the revocation relied on by the plaintiff arose as a result of a single act of revocation of the license and came under the first limb of s 2(a) of the 1948 Act.

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[47] See *Spittal v Corporation of the City of Glasgow* (1904) GF (Court of Sessions) 828; *Freeborn* v *Lemming* [1926] 1 KB 160.
[48] [2007] 2 MLJ 201.
[49] [2003] 5 MLJ 294.
[50] The second limb of s 2(a) was also applied in *Ahmad Tajuddin v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241 (Court of Appeal), and *Mak Koon Yong v Municipal Councillors, Malacca* [1967] 1 MLJ 256 (Wan Suleiman J).
[51] [1996] 4 MLJ 103.

VII. Time May Begin to Run Even Though the Cause of Action Has Not Accrued

It will be seen from an examination of s 2(a) of the Act that the limitation period is computed not from the date the cause of action accrued but from the date of "the act, neglect or default complained of". It departs from the common law in that time does not commence from the date damage or injury was suffered. In many cases the date of the act, neglect or default complained of, and the date of damage or injury, will be identical but there may be a case where the damage may occur after the lapse of a considerable period of time. This unfavourable provision for the plaintiff found today in the Malaysian Act, has its origin in the English Act of 1893. It may be noted that the English position was changed in 1939 when the relevant provision in the 1893 Act was repealed and re-enacted in s 21 of the Limitation Act 1939. From 1939, s 21 expressly provided that time ran from the date "the cause of action accrued". It was unfortunate that a similar change was not made in the Malaysian legislation when it was consolidated in 1948 or when it was revised and reenacted in 1978 as a federal statute.

Another shortcoming (also shared generally with other areas of limitation laws in Malaysia) is that the plaintiffs' lack of knowledge that he has suffered injury or loss is irrelevant. Although there is no case on this point it appears fairly certain that the harshness of the rules regarding latent injury and latent damage[52] also apply to suits under the 1948 Act.

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[52] See *Cartledge v Jopling & Sons Ltd* [1963] AC 758; [1963] 1 All ER 341 (HL) and *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] AC 1; [1983] 1 All ER 65 (HL). Reforms in England to alleviate these rules (*eg* the Limitation Act 1963 and subsequent developments regarding personal injury and the Latent Damage Act 1986 regarding latent damage) have not been adopted in Malaysia.

VIII. The Malaysian Act Has No Express Provisions on Exceptions

Malaysian legislation has faithfully followed the deficiencies of the Act of 1893 from the time the English Act was first introduced in the Straits Settlements in 1912. The English Act of 1893 was enacted without exceptions. It contained no provisions which extended time in the event of disability or which postponed the commencement of the limitation period in case of fraud, concealment of a right of action or mistake. In 1935 the English Court of Appeal in *Jacobs v London County Council*[53] held that the 1893 Act was absolute and not subject to exceptions. The case involved an infant who sued after the expiry of the limitation period under the 1893 Act. The fact that the claimant was an infant was considered irrelevant. In England the situation changed when the substantive provision of the 1893 Act was repealed and reenacted in s 21 of the Limitation Act 1939. Needless to say, as s 21 was a part of the 1939 Act, it became subject to the provisions in that Act which extended or postponed time. Unfortunately this development was not taken into account by the local legislature when the Public Authorities Protection Ordinance 1948 of the Federation of Malaya was enacted in 1948, or when the Ordinance was revised and reenacted as the Public Authorities Protection Act 1948 (to apply throughout Malaysia) in 1978.

This writer submits that the Malaysian legislature should have inserted a suitably framed provision in the Malaysian Act (when it was revised in 1978) that the provisions extending or postponing limitation periods in the Limitation Act 1953 should apply to a suit under the Public Authorities Protection Act 1948 filed in West Malaysia, and that similar provisions under Limitation Ordinance of Sabah (Cap 72) and the Limitation Ordinance of Sarawak (Cap 49) should apply to suit filed under the 1948 Act in the respective state.

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[53] [1935] 1 KB 67.

The absence of provisions extending or postponing time in the 1948 Act has prompted plaintiffs in West Malaysia to pursue a somewhat perilous argument that the provisions extending or postponing time in the Limitation Act 1953 should be applied to an action under the 1948 Act. In this matter it is pertinent to begin by referring to ss 3 and 33(1) of the Limitation Act 1953 of West Malaysia. Section 3 reads as follows:

> Saving for other limitation enactments
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> *This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other written law* or to any action or arbitration to which the government or the government of any State is a party and for which if it were between subjects a period of limitation would have been prescribed by any other written law. (Emphasis added.)

The relevant part of s 33(1) reads as follows:

> Application to the Government
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> (1) *Save as in this Act otherwise provided and without prejudice to the provisions of section 3 of this Act*, this Act shall apply to proceedings by or against the Government ... (Emphasis added.)

These provisions were judicially considered in *Phua Chin Chew v KM*[54] by the Supreme Court and by the High Court in *Ban Guan Hin Realty Sdn Bhd v Sunny Yap Chiok Sai*.[55] In *Phua Chin Chew*'s case, the respondent KM, a Government employee, was at all material times suffering from schizophrenia (a mental illness). While labouring under this mental illness he wrote a letter to the Government

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[54] [1987] 2 MLJ 604.

[55] [1989] 1 MLJ 131. The case was heard before *Phua Chin Chew* but reported late in 1989.

to resign from his post. His resignation was accepted and his service with the Government was terminated. After the period under the Public Authorities Protection Act 1948 had expired, the respondent's committee, appointed for the respondent by the court under the Mental Disorders Ordinance 1952, filed a suit on his behalf to set aside the resignation. The appellants contended the suit should be struck out on the ground that it was time-barred under the 1948 Act. Both parties and the court appear to have assumed that the Act applied to the suit. The sole question before the Supreme Court was whether s 24 of the general limitation statute in West Malaysia, the Limitation Act 1953[56] which provides for extension of time in cases of disability could be applied in this case, despite the fact that the case was one which came under the 1948 Act. The Supreme Court referred to s 33(1) of the Limitation Act 1953 which provides that the said Act shall apply to any proceedings by and against the Government. It held that by virtue of that section, s 24 of the same Act should be applied when construing s 2(a) of the Public Authorities Protection Act 1948. The Supreme Court's decision seems to have been somewhat influenced by the fact that the English Limitation Act of 1939 had altered the legal position by enacting in its s 21 the substantive part of the 1893 Act. As a result, after 1939, the protection of public authorities in England was

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[56] The material parts of s 24 reads as follows:

> If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years, or in the case of actions to which section 6 (4) or section 8 of this Act applies, one year from the date when such person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation had expired:
>
> Provided that in any case to which the provisions of section 29 of this Act apply, this subsection shall apply as if the date from which the period of limitation begins to run were substituted for the date when the right of action accrued.

subject to the exceptions in the 1939 Act. Syed Agil Barakbah SCJ who delivered the judgment of the Supreme Court said:[57]

> We agree with respect with the learned counsel for the respondent that the decision of *Jacobs & Others v London County Council & Another*[58] relied on by the SFC[59] is obsolete and that the Limitation Act 1939 modified the drastic provisions of the Act of 1893 by safeguarding the position of persons under disability so that the period of limitation commences from the date when the person ceased to be under disability or died, whichever event first occurred. Since our Limitation Act is modelled on the lines of the English Limitation Act and taking into consideration the purpose of the said Act, our view is that in so far as this appeal is concerned, the relevant provisions of our Limitation Act should also apply when construing s 2(a) of the Act. The provisions of ss 24 and 33(1) of the former should be read subject to s 2(a) of the latter by virtue of s 3 of the former. Section 3 deals with the period of limitation presented by any written law. Section 2(a) of the Act provides the required period of three years. It does not oust the application of the Limitation Act where the Government is a party by virtue of s 33(1) which says the Act shall apply to proceedings by and against the Government in like manner as it applies to ordinary proceedings.

This writer submits with the greatest respect to the Supreme Court, that *Jacob*'s case should not have been considered obsolete. This is because the modification to the "drastic provisions" of the Act of 1893 by the English Limitation Act of 1939, which affected the status of *Jacob*'s case, is not relevant in Malaysia even though the Limitation Act 1953 of West Malaysia was modelled on the English

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[57] *Supra* n 54 at p 609.
[58] *Supra* n 53.
[59] Senior Federal Counsel.

Act of 1939. As has been seen, the English position changed in 1939 because the substantive part of the 1893 Act was repealed in 1939 and re-enacted (with some modifications) as *part and parcel* of the Limitation Act 1939 making it subject to exceptions contained in that Act.[60] In Malaysia, the progeny of the 1893 Act, the Public Authorities Protection Act 1948, stands firmly by itself, absolute, without exceptions. It is "other written law" by reason of s 3 of the Limitation Act 1953. It is also respectfully submitted that s 33(1) cannot override the clear and unequivocal words of s 3.

Another part of the judgment of *Phua Chin Chew* must be noted. Although s 24 of the Limitation Act 1953 was imported it was held that the six year period of extension found therein was held to be inapplicable. Instead a three year extension, based on the limitation period of 36 months in the 1948 Act, was applied from the date the respondent's committee was constituted.

Reference must now be made to *Ban Guan Hin Realty Sdn Bhd v Sunny Cheok Sai*.[61] This High Court case was decided before the Supreme Court's judgment in *Phua Chin Chew* was delivered but was not reported until 1989. In *Ban Guan Hin Realty*, George J held that where a case fell under the Public Authorities Protection Act 1948, the Limitation Act 1953 had no application. His Lordship's views on the application of ss 3 and 33(1) of the Act of 1953 were expressed as follows:[62]

> Section 33 of the 1953 Act does state that "the Act shall apply to proceedings by or against the government in like manner as it applies to proceedings between subjects". But those words in the section are prefaced by "save in this Act otherwise provided and without prejudice to the provisions of s 3 of this Act". Section 3 does indeed provide

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[60] See ss 21 and 22 of the 1939 Act.
[61] [1989] 1 MLJ 131.
[62] *Id* at p 133.

> otherwise. It takes cases for which a period of limitation is provided by any written law out of the Limitation Act of 1953.

Although the views of George J may cause hardship to a plaintiff under disability, it is submitted that they are a more convincing interpretation of s 3 and s 33 of the Act of 1953. However, *Phua Chin Chew*, being a Supreme Court decision will continue as a binding authority for all the courts below the Federal Court until it is (if ever) overruled by the Federal Court.

Another feature of *Phua Chin Chew* is that its fulcrum is s 33(1) which provides that the Limitation Act of 1953 "shall apply to proceedings by or against the Government". It should be noted that s 33(1) does not say that the 1953 Act shall apply to proceedings by or against "a public authority". It is submitted the term "the Government" refers to the Federal Government and State Governments and that other statutory bodies are not included in that term.[63] Thus the usefulness of *Phua Chin Chew* as a means to overcome the drastic provisions of the 1948 Act may be restricted to cases where either the Federal or a State Government is a party.

IX. Costs

Section 2(b) of the Public Authorities Protection Act 1948 creates another disadvantage for a private person who sues a public authority. The effect of s 2(b) is that if his action is unsuccessful, the judgment obtained by the public authority will carry costs to be taxed as between solicitor and client. Thus the public authority will be entitled to a generous and lenient form of taxation[64] of its bill of costs. The advantage to the public authority and the disadvantage to the ordinary

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[63] See s 33(3) which states that for the purposes of s 33 the expression "the Government" "shall be deemed to include Governments of any state".

[64] As to the bases of taxation, see the case of *EMI Records v Wallace* [1982]

litigant can be appreciated when it is realised that if s 2(b) had not been enacted, the public authority's bill of costs would normally be taxed on a party and party basis, a strict form of taxation.[65] Lindley MR referred to a similar provision in the English Act of 1893 in *Feilding v Morley Corporation*[66] and said that the intention behind the provision was "to protect public authorities from expense when they are unsuccessfully sued". That may be so, but in this writer's opinion, the provision is unfair to a losing plaintiff in a suit against a public authority. The losing plaintiff is made to pay more costs to a winning public authority than what he would have to pay an ordinary winning defendant. On the other hand, if he is the winning plaintiff or a winning defendant in a suit involving a public authority, his bill of costs may be taxed strictly on a party and party basis.

X. Interaction of S 7(1) of the Civil Law Act 1956 with the Public Authorities Protection Act 1948

By virtue of s 7(1) of the Civil Law Act 1956 ("CLA 1956") where the death of a person was wrongfully caused by another person, the dependants of the deceased (as defined in s 7(2) together with s 7(4)) may claim from the person who caused the deceased death, any loss of support that they will suffer resulting from the deceased's death. This important statutory cause of action is based on the Fatal Accidents Act 1846 of England (Lord Campbell's Act). In England, Lord Blackburn once described this cause of action as "new in its species, new in its quality, new in its principle, in every way new".[67]

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2 All ER 980 and Order 59 rules 27 & 28 of the Rules of High Court 1980 and Order 48 rules 46 & 47 of the Subordinate Court Rules 1980.

[65] Megarry VC in *EMI Records v Wallace* [1982] 2 All ER 980 at p 983 called it "the strictest form of the normal heads of taxation".

[66] [1899] 1 Ch 1.

[67] In *Seward v The Vera Cruz* (1884) 10 App Cas 59 at pp 70-71.

In some fatal accident claims under s 7(1) of the CLA 1956 the defendant may be a public authority or its servant. In such a case there is a strong likelihood that the act, neglect or default which forms the cause of action for a claim under s 7(1) of the CLA 1956 may also fall within s 2 of the Public Authorities Protection Act 1948. It was noted that s 2 of the 1948 Act provides a limitation period of thirty-six months if the Act applies. For a claim under s 7(1) of the CLA 1956, s 7(5) of the same Act provides a similar limitation period of three years. But the definition of the date from which time is computed under s 2 of the 1948 Act is different. The 36 months under s 2 are computed from the occurrence of "the act, neglect or default complained of". Under s 7(5) of the CLA 1956, the three year limitation is reckoned from "the death of the deceased". Where death follows on the same day of the injury that was its cause there can be no conflict between s 7(5) of the CLA 1956 and s 2 of the 1948 Act. But where there is an interval between injury and death the limitation period under s 2 of the 1948 Act would expire at an earlier date because it is computed from the time of the occurrence of the injury.

Assume that A is injured as a result of a negligent act of a public authority. Assume also that A remains in a coma from the date of the injury and dies just after three years of the date of the accident without filing any action against the public authority. If s 2 of the 1948 Act is the prevailing provision, any claim brought by the dependants would be time-barred and this is so even though the limitation period under s 7(5) of the CLA 1956 has just began to run. To counter the application of the 1948 Act one may argue that a claim under s 7(1) of the CLA 1956 should not be subject to any other limitation period other than that provided under s 7(5) of the CLA 1956. This is because the claim is a unique action created by statute for a special purpose of protecting a deceased person's dependants (which in many cases in Malaysia, would be the deceased's widow and minor children) with its own limitation period. There is no Malaysian decision[68] which

[68] *Venn v Tedesco* [1926] 2 KB 227 contains a useful summary of the English cases on this matter decided before 1926.

deals with the situation where both s 2 of the 1948 Act and s 7(5) of the CLA 1956 have interacted in a fatal accident claim. But there is a possibility that where the limitation period under s 2 of the 1948 Act has set in during the deceased's lifetime, a Malaysian court may hold that a connected claim under s 7(1) of the CLA 1956 is also time-barred. This is because of the way s 7(1) of the CLA 1956 is constituted. The dependants are only entitled to sue in respect of a wrongful act, neglect or default which caused the deceased's death if such act, neglect or default "is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages thereof ... ". Thus an action under s 7(1) of the CLA 1956 would not lie unless the deceased person was capable of suing in respect of the injury at the time of his death, if the injury had not caused death.

It is pertinent to look at English decisions on the inter-relationship between the corresponding provisions in England. In *Williams v Mersey Docks and Harbour Board*,[69] the Court of Appeal held that where the deceased's cause of action was time-barred under the Public Authorities Protection Act 1893 during his lifetime, an action under the Fatal Accidents Act 1846 would not lie for the benefit of his dependants. It must be noted that the statutory provisions involved in this English case were similar[70] to the present Malaysian provisions. However, in *Venn v Tedesco*,[71] McCardie J held that if the period of limitation under the Act of 1893 was running against the deceased before his death, its completion after his death would not act as a bar for a claim under the Fatal Accidents Act. The learned judge held that *Williams* (above) was not adverse to a deceased if time was still running against him at the time. McCardie J applied the Privy Council decision in *British Columbia Electric Railway v Gentile*[72] which involved legislation in British Columbia that corresponded to the English Acts of

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[69] [1905] 1 KB 804.
[70] Except for that the duration of the limitation period under the Act was six months.
[71] [1926] 2 KB 227.
[72] [1914] AC 1053.

1893 and 1846. In this case, a widow's claim was filed within the limitation period under British Columbia legislation corresponding to the English Act of 1846 but after the expiry of the limitation period protecting public authorities in a local statute corresponding to the English Act of 1893. The Privy Council held that her action was not time-barred. The decision appears to have been based on the reasoning that the Fatal Accidents Act 1846 and the corresponding British Columbia Act gave a new cause of action to the widow. The stand taken by the Privy Council[73] in *Gentile*'s case is praiseworthy and it is hoped that Malaysian courts will follow suit in all cases where there is an interaction between s 2 of the 1948 Act and s 7(5) of the CLA 1956, even where a three year interval had passed between death and injury.

In England the cases mentioned are no longer relevant as special protection enjoyed by public authorities was abolished by the Law Reform (Limitation of Actions *etc*) Act in 1954 and claims under the current Fatal Accidents Act 1976 are regulated by a common limitation period found in the Limitation Act 1980. In Malaysia, the 1948 Act continues to enjoy a prominent place in the country's law of limitation and is capable of causing hardship to claimants for loss of support under s 7(1) of the CLA 1956. On the bright side, the likelihood of it arising today to a plaintiff has been reduced now that the limitation period under the 1948 Act has been increased to three years but the probability of it occurring cannot be obliterated until the 1948 Act is removed from the statute book.

XI. Extensions of the 1948 Act

As was indicated earlier the 1948 Act was made applicable to newly created bodies by express and broad provisions in the statutes which

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[73] McCardie J pointed out in *Venn*'s case that theoretically the Privy Council decision was not binding on him but he was in favour of following it as it was approved by another Privy Council in *Union Steamship Co of New Zealand v Robin* [1920] AC 654 and treated by the Court of Appeal in *Nunan v Southern Rly Co* [1924] 1 KB as an authority to be acted on by them.

had created such bodies. Examples of such statutes are s 29 of the Majlis Amanah Rakyat Act 1966 (Act 489), s 24B of the University and University Colleges Act 1971 (Act 30) s 97 of the Railway Act 1991 (Act 463), s 51 of the Malaysian Communications and Multimedia Commission Act 1998 (Act 589), s 27 of the Companies Commission of Malaysia Act 2001 (Act 614), s 183 of the Water Services Industry Act 2006 (Act 655) and s 51 of the Iskandar Regional Development Authority Act 2007 (Act 664). An example of a provision in a State Enactment is s 14 of the Johore State Islamic Economic Development Corporation Enactment 1976.[74] Due to constraints of space only two of the provisions will be discussed in this article. Section 29 of the Majlis Amanah Rakyat Act 1966 (Act 489) reads:

> Public Authorities Protection Act 1948
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> The Public Authorities Protection Act 1948, shall apply to *any* action, suit, prosecution or proceedings against the Majlis or against any member, officer, servant or *agent* of the Majlis or of *any* corporation in respect of *any act*, neglect or default done or committed by him in such capacity. (Emphasis added.)

It is submitted that the language adopted by the draftsman in extending protection to persons other than the Majlis creates several ambiguities. The use of the phrase "agent of the Majlis" is an example. These words can prompt the argument that the 1948 Act applies to a suit against a commercial agent or an independent contractor appointed by the Majlis to carry out one of its statutory functions. Another unclear and vague expression is the phrase "of any corporation". Is the corporation mentioned in the section a corporation formed and controlled by the Majlis? Does it include an independent external corporation appointed by the Majlis for the purpose of discharging one of its statutory obligations? No clear answer can be given for these

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[74] The Enactment was applied in *Goh Joon v Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 621.

questions until they are judicially considered and the meaning of the section is settled in the future. In this writer's opinion, a more serious criticism can be leveled at the words "*any* act, neglect or default done or committed by him in such capacity".[75] It is submitted that these words can motivate the argument that they provide greater protection beyond that which is contemplated by the 1948 Act. Thus it may be argued that the 1948 Act would apply to fix the limitation period for an act, neglect or default even though the act, neglect or default is not "in pursuance or execution or intended execution of any other written law or of any public duty or authority".

Similar criticism can be raised in respect of s 97 of the Railway Act 1991 (Act 463) which reads:

> Public Authorities Protection Act 1948 (Act 198)
>
> The Public Authorities Protection Act 1948 shall apply to any action, suit, prosecution or proceeding against the Corporation or against any officer or servant of the Corporation in respect of any act, neglect or default done or committed by him in such capacity.

This provision[76] restricts the protection of the Act to the Railway Corporation and any officer or servant of the Corporation but the use of the words "any act, neglect or default" appears to be a contradiction as they seem to extend the protection of the 1948 Act to an act, neglect or default which is outside the scope of s 2 of the 1948 Act. Like in the case of s 29 of the Majlis Amanah Rakyat Act 1996, s 97 of the Railway Act 1991 appears to allow the Railway Corporation to plead the 1948 Act even if its act involves no statutory or public duty or authority or public benefit. It is also submitted that the Railway

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[75] Emphasis added.

[76] Applied in *S Veerasingham v Keretapi Tanah Melayu Bhd* [1999] 5 CLJ 467.

Corporation is in essence a commercial entity.[77] Although it is owned by the government, one of its principal objectives is the earning of profits from its operations. In this writer's view, the Railway Corporation has no special claim to enjoy the protection of the 1948 Act.

XII. Conclusion

In the past the English Public Authorities Protection Act 1893 has been defended as legislation that protects public authorities from belated claims and as that which enables them to plan and secure effective management of their finances.[78] Even if this is true today of the Malaysian Act of 1948, this writer has no hesitation to recommend its repeal because the disadvantages created by the Act for an ordinary litigant far outweigh the advantages it provides for public authorities.[79]

The present limitation period of 36 months in the Malaysian Act is an improvement of the very short limitation periods prescribed when the legislation was first introduced in 1912 in the Straits Settlements but this has not removed the inherent unfairness of the Act. This element of unfairness can be seen from the fact that it confers a double benefit for a public authority whilst at the same time

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[77] In this connection, see *Palmer v Grand Junction Rly Co* 4 M& W 749, where a railway sought the protection of a special Act of Parliament that contained provisions somewhat similar to that of the English Act of 1893. Parke B refused to apply the Act saying: "The Act does not compel them to be common carriers; it only enables them to do so, so far as they shall think fit; and when they have elected to become so, they are liable in that character, in the same way that other common carriers are."

[78] See Lord Shaw of Dunfirmline's views on the benefit of the 1893 Act in *Bradford Corporation v Myers* [1916] 1 AC 242 at p 260.

[79] Recently, in England, the Law Commission in its Final Report on Limitation Periods in Civil Proceedings (LC Report 270) recommended that no special protection should be given to public authorities and that its recommendation of a knowledge based core limitation period of three years should apply to all defendants. (See pp 159-160 of the Report.)

creating a double disadvantage for an ordinary litigant. When a public authority is sued it enjoys the short limitation of the Act, if the Act applies to the suit. When it sues it is entitled to rely on the longer limitation periods and the exceptions found in a general statute of limitation, like the Limitation Act 1953 of West Malaysia. In addition, it is entitled to costs taxed on a solicitor and client basis if it is a successful defendant in an action to which the Act applies. As pointed out earlier in Part IX of this article, an ordinary litigant whether he is a successful plaintiff or a winning defendant in a suit to which the Act applies will normally have his costs taxed on a strict party and party basis.

As has been seen, one of the major defects of the Act is that it is difficult to extract a comprehensive principle which would serve as a complete guide on its application. It is sometimes difficult for an ordinary litigant who wants to sue a public authority to determine whether his or her case fell within or without the Act. The nebulous language of the Act has been criticised more than once by the highest courts.[80]

The application of the Act to contracts made by a public authority calls for comment. The legal position would have been ideal if the English Act of 1893 and its progeny, the Malaysian Act of 1948 had expressly provided that it does apply to all contracts made by a public authority. In the absence of such a provision the courts have developed the rule that a public authorities' contract falls within the Act where it is performing its obligations to the public through the medium of a contract. Case law has shown that this has produced some harsh results.[81] Another problem is that sometimes it is difficult to draw the line between a contract within the Act and a private

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[80] See for instance the House of Lords in *Griffiths v Smith* [1941] AC 170 at pp 176 & 184, *Bradford Corporation v Myers* [1916] 1 AC 242 at pp 250-251 and the Privy Council in *Government of Malaysia v Lee Hock Ning* [1974] AC 76 at 81.

[81] See Part V of this paper.

bargain. It was pointed out in Part V above that a case like *Government of Malaysia v Lee Hock Ning*[82] (where it was held that the contract was a private bargain) could easily have gone the other way.

A serious defect of the 1948 Act is that it does not provide for extension of time in cases of disability and postponement of time in cases of fraud,[83] deliberate concealment and mistake. As has been seen in *Phua Chin Chew & Ors v KM*,[84] the Supreme Court held that the provision in the Limitation Act 1953 on disability could be applied to an action under the Public Authorities Protection Act 1948 where the government is a party. This writer has pointed out that the decision may not affect all public authorities as s 33(1) of the Limitation Act 1953 (on which *Phua Chin Chew* rests) uses the word "Government" and not the phrase "public authority". This writer has (with respect) attempted to show the weaknesses in the Supreme Court judgment. The future of *Phua Chin Chew*, if it is attacked in the Federal Court, is uncertain.

Another disadvantage for a plaintiff suing a public authority in Malaysia is that time under s 2 of the Public Authorities Protection Act 1948 may run even though the plaintiff's cause of action has not accrued. It was pointed out that this odd and unfavourable position was corrected in England but in Malaysia the position remains the same.[85]

Finally, the adoption of the 1948 Act by statutes creating new statutory or corporate bodies is another matter for criticism. As has been seen the provisions adopting the Act for the benefit of the Majlis Amanah Rakyat and the Railway Corporation are expressed in wide

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[82] *Ibid.*

[83] It may be noted that *Pearson & Son Ltd v Dublin Corporation* [1907] AC 351 appears to decide that the English Act of 1893 did not apply where a public authority is sued for deceit.

[84] See Part VII of this paper.

[85] See Parts VII and X of this paper.

and vague language which can be construed as extending the protection of its short limitation period to matters outside the ambit of its s 2.[86]

In this writer's opinion, the Public Authorities Protection Act 1948 has outlived its purpose. She submits that it should be repealed and that the Government and all public authorities should be made subject to the same limitation laws as ordinary private individuals.

[86] See Part XI of this paper.

The Red-Ink Grant:
Tracing Legitimacy in History

Bashiran Begum Mobarak Ali*

> The Malay Reservation Enactment is nothing but small token of love from our grandfather handed down to us with a trust that we shall hand it down to our children and their children. Malay Reservation Land is a land under a Trust. We are the trustees of the Malay Reservation Land.
>
> – Nik Abdul Rashid.[1]

I. Introduction

The most unusual feature of the Federal Constitution, according to Harding, is the way it entrenches special rights and privileges reserved to a racially defined group of the Malaysian population, namely the Malays.[2] The special rights and privileges of the Malays constituted the central and most sensitive issue in the formation of Malaysia, and their adoption into the Constitution was justified by the fact that the Malays were, although numerically in the majority, a historically disadvantaged race.

This article aims at scrutinising the extent to which the Malays' claim on land is protected and preserved in Malaysian Law. The focal

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[1] Nik Abdul Rashid, "Malay Reservation Land: Concepts", Seminar on Malay Reservation Land: Development Perspective, *Bulletin INSPEN*, Jilid 8, Bil 4, 1993, 1.

[2] Harding, A, *Law, Government and the Constitution in Malaysia* (Kuala Lumpur: MLJ, 1996) at p 229.