NATIONAL LITIGATION CONFERENCE 2019

OPENING ADDRESS

BY THE RIGHT HONOURABLE

TAN SRI TENGKU MAIMUN BINTI TUAN MAT,

THE CHIEF JUSTICE OF MALAYSIA

30 NOVEMBER, 2019

SALUTATION

(i) YA Dato' Rohana binti Yusuf, FCJ exercising the powers and duties of the President of the Court of Appeal;

(ii) Brother and sister Judges;

(iii) Mr S. Saravana Kumar, Organising Chairman of the National Litigation Conference 2019;

(iv) Mr. Jacky Loi, Secretary of the Kuala Lumpur Bar Committee;

(v) Members of the Bar;

(vi) Ladies and gentlemen.

OPENING ADDRESS

INTRODUCTION

Assalamualaikum warahmatullahi wabarakatuh and a very good morning to everyone.

[1] It gives me great pleasure to be here this morning. I would like to begin by congratulating the Kuala Lumpur Bar Committee for organising this inaugural National Litigation Conference and by expressing my thanks for inviting me to deliver the opening address.

[2] I am pleased to observe the presence of several distinguished speakers comprising members of the Judiciary and the Bar who will be speaking on several topics relating to civil litigation.

[3] I am certain that the diverse backgrounds and experience of the speakers will result in a meaningful exchange of their respective knowledge and experience on these subjects and that it will be an enriching and rewarding experience for all participants.

[4] In any discussion on litigation, one cannot avoid the subject of the duties and roles of the main players in the civil litigation process. These main players constitute the judge or the court and the lawyers be it from the Bar or the Attorney General's Chambers.

THE IMPORTANCE OF ADVOCACY IN THE ADMINISTRATION OF JUSTICE

Distinguished participants, ladies and gentlemen,

[5] Allow me to share my thoughts on the importance of advocacy in the administration of justice and I shall start by citing a remark made by Sir Jack Jacob, who was an outstanding British exponent of civil court procedure during the 20th century on the civil justice system. He said:

> "the system of civil justice is of transcendent importance for the people of this country just as it is for people in other country…"[1]

[6] Sir Jack Jacob defined the civil justice system as the substantive law, machinery and procedures for vindicating and defending civil claims – in effect, the entire system of the administration of justice in civil matters.

[7] The House of Lords in *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corp.*[2] echoed a similar sentiment. Lord Diplock said as follows:

> "Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant."

[8] Adopting this broad definition, the machinery of civil justice provides the processes for the peaceful resolution of civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system also provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of

[1] Sir Jack Jacob, 'The Fabric of English Civil Justice' (Sweet & Maxwell, 1987), at page 1.
[2] *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corp* [1981] AC 909, at page 976.

government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, and the civil courts resolve disputes when they arise.[3]

[9] The civil justice system is arguably more varied and more complex than its criminal counterpart, but undoubtedly, the strength and efficiency of any litigation system is to a large extent the product of the contribution, joint effort and cooperation of its judiciary and its legal profession. More so, in an adversarial system of justice practiced in Malaysia.

[10] In *Ashmore v Corporation of Lloyd's*,[4] the English Court of Appeal through Lord Templeman said:

> "The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of the counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of 10 bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination. In *Banque Keyser Ullman S.A. v Skandia (U.K.)*

[3] Professor Dame Hazel Genn, 'Judging Civil Justice', 2008 Hamlyn Lectures Cambridge University Press <http://assets.cambridge.org/97805211/18941/excerpt/9780521118941_excerpt.pdf>.

[4] *Ashmore v Corporation of Lyold's* [1992] 1 WLR 446, at page 453.

Insurance Co. Ltd [1991] 2 A.C. 249, 280, I warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result. I also said that the appellate court should be reluctant to entertain complaints about a judge who controls the conduct of proceedings and limits the time and scope of evidence and argument. So too where a judge, for reasons which are not plainly wrong makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by an appellate court unless the judge was plainly wrong. … the control of the proceedings rests with the judge and not with the plaintiffs. An expectation that the trial would proceed to a conclusion upon the evidence to be adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge and accepting his rulings.".

[11] The lawyer's role and duty to the court is well explained in a number of statements of high authority. If I may echo what Lord Denning MR, said in 1966:

> "(Counsel) … has a duty to the Court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants, or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice".

[12] It is on this premise that Lord Diplock in *Saif Ali v Sydney Mitchell* further emphasised that an advocate's prime duty is to the Court even if it entails overriding the duty to his client. He cannot, in any given circumstance, mislead the Court on either the law or the facts.[5] So arduous and dignified is this duty that an advocate must not only direct the Court to authorities or facts which favour his client but also to those that disfavour him and how the Court ought to factor those points in to arrive at a just and fair decision.[6] So, do not be misled by the unpopular adage that 'all lawyers are liars' because that could not be any further from the truth.

[13] You would have guessed at this point that the entire system of administration of justice is centred on trust. Reposed in the lawyers is the trust of the Courts that the facts of the case will be adequately highlighted and the law appropriately applied. Lawyers in turn trust the Court to sift arduously through the evidence and the law to arrive at a decision which conforms to logic and foremost, justice. That, I must say, is specifically within the context of the courtroom.

[14] But as we are all aware, justice and trust are not just confined to the four walls of the courtroom. Central to the notion of justice is public confidence in the Judiciary. In fact, this is what the Federal Court recently held in *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd*:[7]

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[5] *Saif Ali v Sydney Mitchell* [1980] AC 198.

[6] *Arthur Hall v Simons* [2002] 1 AC 615, at page 692. See also: *Giannarelli v Wraith* (1988) 165 CLR 543, at page 556.

[7] *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd* [2019] 6 CLJ 1, at paragraphs 41-42.

> "The courts of justice are the bulwark of a nation. Alexander Hamilton famously recognised, in the doctrine of the separation of powers, that the Legislature controls money, the executive controls force and the Judiciary controls nothing. It is on public confidence that the Judiciary depends, for the general acceptance of its judicial decisions, by both citizens and the Government. The public conforms to the decisions of the Judiciary, because they respect the concept of judicial power and the judges who exercise such power. Therefore, the trust and confidence of the people in the judicial system to deliver impartial justice comprises the very foundation of the Judiciary."

[15] As you are indeed aware, the Judiciary is not a political institution. We do not and cannot lobby to garner support. We do not typically make press statements to defend ourselves. Judges are judged entirely on our work and our judgments. But of course there are times the Judiciary is the subject of attack. Who would have thought that an institution meant to protect the liberty of a subject from tyranny is itself quite defenceless?

[16] It is at such times the support from the Bar becomes indispensable. And, you will note that this is a crucial aspect of advocacy. Lawyers must remind their colleagues and their clients of the need to respect the decisions of the Courts. And should they not agree, there will always be other avenues for legal redress. Mocking or spreading vitriol on the Judiciary is no different from cutting off one's nose to spite the face. Once public perception is undermined, the public lose confidence in the Judiciary and the administration of justice, of which lawyers are part of,

collapses. So, advocacy is as crucial in the courtroom inasmuch as it is outside it.

THE OVERRIDING DUTY OF LAWYERS TO THE COURT

[17] At this juncture, may I state that justice is often limited by time and resources. We often hear many asking the question: when will the Judiciary return to its heyday? You will recall that back then, there was no social media and the volume of cases in that era was exponentially smaller. For example, recent statistics, from my office, indicate that the pending number of applications for leave to appeal to the Federal Court alone is about 400. The rise of technology and social media has also been a significant boon to justice. But greater access comes with a greater stress on the Courts and surely on the lawyers too. The result of this is that cases have become increasingly more complicated. And, complicated cases necessarily require more time for deliberation and result in longer judgments. So it is no surprise therefore that you will no longer find apex Court judgments of only five to six pages like we used to, before.

[18] Flowing from this, I have two points to make insofar as civil litigation is concerned. My first point is this. Judges are neither omniscient nor omnipresent. We cannot humanly be expected to know everything and be everywhere at once. Premised on what I said earlier, judges and lawyers must work hand in hand.

[19] If I may be permitted to cite a real example. It has been said that judges approaching retirement ought not to hear cases so that reserved judgments may be delivered with a full coram. The theory in that is very

attractive and one which I support. The sheer workload and volume of cases however paints an entirely different picture. Given our limited coram and resources, even judges venturing off to retirement may not always be spared from the demands of judicial office.

[20] Further, if lawyers do not adequately guide judges on the law and the facts, we, being human, are inevitably bound to make mistakes. It is here that the role of lawyer in advocacy cannot be understated. It is not about advising your client that one can surely win a case; only for the lawyer to come to Court and prioritise his client's own interest over and above that lawyer's bounden duty to the Court. The duty far exceeds that. It requires the lawyer to tell his client what needs to be said in accordance with his or her overriding duty to the Court.

[21] My second point is inescapably tied to the first. Advocacy is not just an art, but a heavy responsibility. It is starting to become an unhealthy norm for some lawyers to file application upon application no matter how unmeritorious or how trivial it is. The result is the diversion of valuable but limited judicial time away from good work. Take again the example of applications for leave to appeal to the Federal Court. Not only do lawyers file leave applications knowing full well that the threshold of section 96 of the Courts of Judicature Act 1964 has not been met, but it is also becoming increasingly obvious that leave questions are becoming increasingly long and repetitive to the extent that they become rather perplexing. I myself have been through leave applications with at least twenty questions with each one worded substantially the same as the previous one.

[22] Why does this happen? I can only assume at the worst that it is an underhanded litigation tactic. Again, the art of advocacy includes the ability of the lawyer to tell his or her client what actually needs to be appealed and the actual questions of law that need the Federal Court's pressing attention. If the lawyer files a complicated leave application with the intention of sneaking his or her way past section 96 of the Courts of Judicature Act, it leaves us with one conclusion: that he did that to impress or enthral his client without due regard to his overriding duty to the Court. Not only does that drown out the cases that actually deserve leave to appeal, it unnecessarily curtails invaluable judicial time and resources.

[23] Of course I am aware that it may not necessarily be an underhanded manoeuvre and that it might just be reminiscent of an overzealous or overly careful lawyer intending not to leave any stone unturned. But again, this is where I would respectfully advise that a healthy balance ought to be achieved between cautiousness on the one side, and the confidence of the lawyer in his own ability, on the other. Thus, I can only say that lawyers ought to keep their eye on the ball and focus foremost on what the law requires and not what any given client craves beyond what justice demands. Lawyers do not fuel disputes at the expense of the Courts, but are key catalysts of their resolution. As aptly put by Justice O'Connor of the United States Supreme Court in a speech to students and alumni of Oklahoma University Law School: *"when lawyers themselves generate conflict... it undermines our adversarial system and erodes the public's confidence that justice is being served*".[8]

[8] Sandra Day O'Connor, 'Professionalism: Remarks at the Dedication of the University of Oklahoma's Law School Building and Library, 2002, 55 OKLA.L.Rev. 197, 198 (Summer 2002)

[24] Many of the duties expected of lawyers have been codified in the Legal Profession (Practice and Etiquette) Rules 1978 such as the duty to maintain a respectful attitude towards the court,[9] the duty to uphold interest of client, justice and dignity of profession[10] and the duty to not practice any deception on the court.[11] Lawyers therefore, have an immensely important role in the pursuit of justice. To borrow the words of the Chief Justice of Singapore:[12]

> "[lawyers] form the rungs of the ladder that bridges the gulf between the public and justice. Lawyers are the pathway to justice for most litigants."

[25] Ultimately, it all boils down to integrity. As Jerome Facher, a renowned American lawyer once said:[13]

> "Personal integrity is at the heart of every law career. You can't get it out of a computer – or from a law book – or from a commencement speaker. You have to live it and practice it every day with every client, with every other lawyer, with every judge and with every public and private body. And if your reputation for integrity is alive and well so will your career and so will your well being..."

[9] Legal Profession (Practice and Etiquette) Rules 1978, rule 15.

[10] Legal Profession (Practice and Etiquette) Rules 1978, rule 16.

[11] Legal Profession (Practice and Etiquette) Rules 1978, rule 17.

[12] Opening Address of the Honourable the Chief Justice of Singapore at the Litigation Conference 2013 organised by the Civil Practice Committee of the Law Society of Singapore, 31 January 2013

[13] Jerome Facher, Washington Lee Law School Commencement Speech, May 14 2000.

[26] As such, a key aspect of advocacy, I would say is for lawyers to remember their overriding duty to the Court and to also be mindful of the ancient, tried and tested rules of ethics in this august profession.

UNDERSTANDING THE ROLE OF THE COURT IN ADVOCACY

Distinguished guests, Ladies and gentlemen,

[27] Another significant aspect of litigation and advocacy is knowing and understanding your audience. That knowledge and understanding allows one to better appreciate the approach that one ought to take in his or her advocacy.

[28] In the perspective of civil litigation, the judge or court maintains a pivotal role in managing the progress of the case and the sequence of addressing and resolving issues, as well as a general managerial role in setting each single hearing[14] in order to ensure that they proceed as efficiently and justly as possible. In the past, you will remember that litigation was largely lawyer-driven. Civil cases would proceed upon lawyers filing summons for directions and all the other party would have to do is remain idle with the hopes that everyone would simply forget about the case. That no longer holds true.

[29] With the advent of the Woolf Reforms in the United Kingdom, we too have amended our Rules of Court and now with the present Order 34 of the Rules of Court 2012, litigation has become largely judge-driven. Case

[14] Geoffrey C. Hazard Jr & Angelo Dondi, 'Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits', Yale Law School 2006

management is now the central feature of civil litigation. This is now another key distinguishing factor between the Judiciary of today and the yesteryears.

[30] That said, the traditional role of the judge remains the same. In relation thereto, judges do not merely sit as umpires in a game to see that neither side commits fouls. Judges must direct and control the trial according to recognised rules and procedure and ensure that justice is not only done but is manifestly seen to be done.

[31] Judges must also strive to ascertain the truth in all cases which come before them. In order to find out the truth, trial judges are entitled and, indeed, are duty bound to question the witnesses to clarify points that are unclear in their testimony. They must not, however, take over the examination in chief or cross-examination of witnesses. They must refrain from questioning in a manner and to an extent which gives the impression that they are no longer impartial. They should not engage in prolonged questioning of witnesses. If they do intervene to an excessive extent in a trial, they will eliminate or impair their ability to assess the evidence independently and impartially or to adjudicate upon the evidence.[15]

[32] The independence, impartiality and integrity of judges are critically important in the administration of justice. A judge should always act with dignity and perform his duties to the highest standards to uphold and maintain the integrity of his office. A judge also has to decide a matter before him without fear or favour and impartially by giving all the parties an opportunity to be heard and by treating them fairly. If he has personal

[15] *Jones v N.C.B* [1957] 2 Q.B. 55, at page 64.

knowledge of the disputed facts, or connections to either of the parties or an interest in the outcome, a judge should refrain from determining that matter. In any of these instances, the ethical judge will withdraw from the case.

[33] Indeed, these are amongst the duties established under the Judges' Code of Ethics 2009 such as the duty of a judge to uphold the integrity and independence of the judiciary,[16] avoid impropriety in judicial activities,[17] performing judicial duties fairly and efficiently[18] and minimising risk of conflict arising from extra-judicial activities.[19]

[34] The lay person is understandably unaware of the finer details of our system of administration of justice. In this context, lawyers are expected to play a larger role in the dissemination of this knowledge to the public, in particular to their clients and witnesses.

CONCLUSION

Distinguished participants, Ladies and gentlemen,

[35] Civil litigation is an area that requires the collaboration and co-operation between the courts and the legal profession for an effective and meaningful administration of civil justice system. The cooperation and collaboration are not only confined to the conduct and management of the cases but also to the behaviour and manners of the lawyers and the judges in conducting the cases. As described by Edmund Burke,

[16] Judges' Code of Ethics 2009, paragraph 5.
[17] Judges' Code of Ethics 2009, paragraph 6.
[18] Judges' Code of Ethics 2009, paragraph 7.
[19] Judges' Code of Ethics 2009, paragraph 8.

"*[m]anners are what vex or sooth, corrupt or purify, exalt or debase, barbarize or refine us, by constant, steady, uniform, insensible operation, like that of the air we breathe in*".[20]

[36] With that, it gives me great pleasure to declare the National Litigation Conference 2019 officially open.

Thank you.

[20] George Weigel, 'The Member from Bristol", Commentary, June 1993 at 54, 56 (reviewing Conor. C O' Brien, The Great Melody, A Thematic Biography of Edmund Burke (1992) - (Cited by Marc C. Hebert & Jones Walker, 'Ethics & Professionalism' presented at the Greater New Orleans Barge Fleeting Association 2006 River and Marine Industry Seminar, April 26-28, 2006).