existence?

Despite the rather unsatisfactory ground on which the decision of the case was based, the attitude of the court towards the question of personal liberty before it was encouraging, and in ordering Dato' James Wong to be released on his successful habeas corpus application, the principle of judicial independence was again manifested in Malaysia. But the applicant was most dramatically rearrested outside the court house. This somewhat indelicate use of executive power might have been necessitated by the emergency situation in Sarawak, but in the absence of explanation it was most unfortunate and appears to call into question some very broad constitutional issues.

Mohd. Ariff Yusof.

ISSUES OF SHARES

Baldev Singh v. *Mahima Singh*[1]

Many of us have heard the phrase "Ali Baba system of business" or variations thereof many a time. But it is submitted that few of us can match and give it as precise a definition of what it means as Hashim Yeop A. Sani J. ably did in the High Court in *Baldev Singh* v. *Mahima Singh*. The learned judge prefaced his judgment by aptly defining it as "business which carry Malay names but in actual fact is under the absolute control of non-Malays."[2] From the legal point of view, this case is worthy of comment in that it covers two rather difficult areas of company law. In the High Court action, the judgment dealt mainly with the position of a conflict between the minds of the directors of a company and the members in general meeting. In the Federal Court, the main question was whether a purported issue of new shares to certain employees of a company was "an invitation to the public to subscribe for shares" and thus violating one of the articles in the Articles of Association of a private limited company. It is submitted that both judgements pose some difficulty in terms of accurately stating the controlling law. Consequently, it is suggested to traverse the respective judgments beginning first with the High Court's judgment.

The facts of this case are interesting enough. They illustrate, albeit somewhat indirectly, some of the attendant legal problems that private

[1] [1974] 2. M.L.J. 206 (H.C.); [1975] 1 M.L.J. 173 (F.C.)

[2] *Ibid.*, (H.C.) p. 206 – 207.

limited companies and public companies may face in their endeavour to implement the Government's New Economic Policy. In fact this case seems to be the first of its kind in which the Government's New Economic Policy has permeated to the Courts.

The plaintiff is a shareholder in the Seremban Town Service Limited (hereinafter referred to as "the Company')[3]. The defendants, five in number, are members of the Board of Directors of the Company. The Company is engaged in the running of a public transport service with membership in the Negri Sembilan Passenger Transport Operators Association, a voluntary association apparently formed to promote the interests of the members. Sometime in 1971, the Negri Sembilan Passenger Transport Operators Association held a meeting or series of meetings to discuss the Government's New Economic Policy and it was finally decided that member companies allocate 30% of their shares at par to the Negri Sembilan State Development Corporation.

On 7th April, 1971 the Company held its Annual General Meeting. The members unanimously resolved, *inter alia*, to incorporate Malay participation in the Company. But it appears from the report of the case that nothing was done to effect this resolution. At another Annual General Meeting held on the 29th November 1972, about one and a half years after the previous one, some members being dissatisfied with the slowness in incorporating Malay participation rescinded the previous resolution and substituted instead the following resolution:

> "It is unanimously resolved that the resolution by the General Meeting dated 7th April, 1971 as set out in paragraph IX of the Minutes of the said meeting be and is hereby rescinded and that the Malay participation in the shareholding of the Company be restricted to 30% of the issued and paid-up capital of the company at the time of entry of Malay shareholders, as approved by the Negri Sembilan Transport Operations' Association."[4]

It is not clear from the report whether this resolution was passed unanimously. Vague as this resolution was, it undeniably worried the Board of Directors. The topic of Malay participation in the company was hotly debated "among the defendants."[5] Except for the first defendant, it appears from the report that the rest of the defendants were not keen to allot 30% of the Company's shares to the Negri Sembilan State Development Corporation. Instead, particularly through the initiative of the

[3]Unless otherwise stated, page references to the facts are from the report of the High Court decision.

[4]*Ibid.*, p. 207.

[5]*Ibid.*

second defendant, they drew up a list of the "low level employees of the company"[6] (a phrase used by the plaintiff) who were bumiputras and decided to allot to them 31,500 shares.

The majority of the defendants seemed to have kept their decision secret. On the 5th May, 1973, the plaintiff wrote to the Secretary of the Company asking whether it was true that the Board of Directors had issued shares to members of the public. His reply, dated 14th May 1973 was that, "the directors . . . had resolved to issue 31,500 shares at par to members of the public".[7] Whereupon the plaintiff took out an interim injunction which was granted to restrain the defendants' action.

In this main action, the plaintiff sought a declaration that the decision of the defendants to issue the 31,500 shares were void and *ultra vires* the Memorandum and Articles of Association of the Company. The plaintiff also sought a declaration that the defendants be ordered to offer the impugned shares to the existing shareholders and upon default of acceptance to the Negri Sembilan State Development Corporation. The plaintiff attempted to show at the trial that the defendants were acting in bad faith, that the second defendant was only interested in his own welfare and that the defendants were just concocting another "Ali Baba" system of business. His Lordship, Hashim Yeop A Sani J., held that the issues were (i) whether the act of the defendants to allot the 31,500 shares was permitted by the Articles of Association and (ii) if that act was permitted, whether there was evidence of bad faith.[8]

The first issue put in broader terms is to what extent can the Board of Directors be controlled by the General Meeting. Here we have the General Meeting passing a resolution directing the Board of Directors to implement the New Economic Policy in a specific manner, namely to allot new shares only to those Malay shareholders who are approved by the Negri Sembilan Transport Operators Association. It is arguable whether the resolution on the 29th November 1972 spoke in such clear terms. It appeared from his Lordship's approach that he presumed the resolution was clear. In 'any' event, for the present purpose of further explaining the main issue, we shall presume that the resolution was a clear positive direction to the Directors. On the other hand, the Board of Directors have acted in defiance of the General Meeting's resolution. They decided to allot the impugned shares to persons of their own choice.

To resolve this issue of the Board versus the General Meeting, his Lordship correctly, it is submitted with respect, relied on the general principle established by *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame*[9] that the division of powers between the board and the

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*, p. 208.

[9] [1906] 2 Ch. 34.

company in general meeting depended on the construction of the Articles of Association. His Lordship examined the Articles of Association of the Company and found four articles that were relevant, namely, Articles 1, 6, 40 and 46. Article 1(c) provides that any invitation to the public to subscribe for any shares or debentures or debenture stock is prohibited. On this Article, his Lordship found that what the Directors had purported to do was not to invite members of the public to subscribe for shares in the Company. His Lordship relied on *Rattan Singh and Ors* v. *Managing Director of Moga Transport Company*[10] to say that the prospective shareholders were not members of the public.

Turning to Articles 6 and 46, Article 40 dealing merely with the question of registration of transfers and suspension of registration, his Lordship concluded that these two articles, especially Article 46, showed that "once the members in general meeting of the company resolve on the manner of allotment it will not be open to the Directors to act contrary to the resolution subsequently."[11] Therefore, the Directors (defendants) had acted in contravention of Article 46 and their acts were *ultra vires*.

It is respectfully submitted that his Lordships' conclusion is doubtful for two reasons: firstly, that Articles 6 and 46 are also capable of being interpreted as vesting the powers of allotment of shares in the Directors, and secondly, and more seriously, that even if the General Meeting has power to control the Board as to allotment of shares, they had not in actual fact resolved to allot the unissued shares and consequently the Directors could not be said to have acted against its resolution.

The marginal note of Article 6 reads, "Allotment of shares." Article 6 itself says:–

> The shares taken by the subscriber to the Memorandum of Association shall be duly issued by the Directors. Subject as aforesaid the shares shall be under the control of the Directors who may allot and issue the same (subject always to Article 1, 40 and 46 hereof) to such persons on such terms and conditions and at such times as the Directors think fit and with full power to give to any person the call of any shares either at par or at a premium, and for such time and for such consideration as the Directors think fit."

Article 46, whose marginal note is "Unissued original and new shares to be offered to members in proportion to their holdings" reads:

> Unless otherwise determined by the Directors or by the resolution authorising an increase of capital any original shares for the time being unissued and any new shares from time to time to be created, shall before they are issued, be offered to the members in proportion as nearly as may be to the number of shares held by them. Such offer shall

[10] A.I.R. 1959 Punjab 196.

[11] *Op. Cit.* n. 1 (H.C.) at p. 209.

be made by notice specifying the number of shares to which the member is entitled and limiting a time within which the offer if not accepted will be deemed to be declined, and after the expiration of such time or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered the Directors may, subject to the provisions of these presents dispose of the same in any manner which they think beneficial to the Company. The Directors may in like manner dispose of any such new or original shares as aforesaid which, by reason of the ratio borne by them to the number of persons entitled to such offer as aforesaid or by reason of any other difficulty in apportioning the same, cannot in the opinion of the Directors be conveniently offered in manner hereinbefore provided."

The key phrase governing the interpretation of Articles 6 and 46 relevant to the issue at stake is therefore the phrase "Unless otherwise determined by the Directors or by the resolution authorising an increase of capital ..." in Article 46. *Prima Facie*, it would seem that this phrase confers a concurrent and parallel power on "either the Directors *or* members in general meeting by resolution [to] determine how any original unissued shares or any new shares may be allotted."[12] In this conflict of powers, His Lordship seems to have relied on a statement in Hahlo *Casebook on Company Law* to conclude that Article 46 confers a residual power of allotment in the members in general meeting. The passage cited was as follows:—[13]

"Allotment is the appropriation of shares to a person by the company. Usually allotment is entrusted by the articles to the board of directors, who must act in the best interests of the company and cannot delegate this power: *Howard's case* (1866) L.R. 1 Ch. App. 561. In *Bamford* v. *Bamford* [1968] 3 W.L.R. 317, it was held that the members in general meeting have residual powers of allotment and that, unlike the directors, who are always subject to the fiduciary duty to act in the best interest of the company, they may exercise these powers in their own interests. . . ."

It is submitted that the passage cited above is like a two-edged sword and does not resolve the issue. In the first place, *Howard's* case would support the Directors' actions. Furthermore, Hahlo's reference to *Bamford* v. *Bamford* is only towards the judgment of Plowman J. Although the Court of Appeal affirmed Plowman's J. decision, it is quite clear that Harman L.J. as well as Russell L.J. did not approve of Plowman's J. dictum about

[12] *Per* Hashim Yeop A. Sani J., *op. cit.* n. 1 (H.C.) at p. 209. Emphasis added.

[13] *Op. Cit.* n. 1 (H.C.) at p. 209. Hahlo, p. 231.

"residual powers."[14] But if the *Bamford* case can in any event be interpreted as conferring power on the general meeting to issue shares[15] it is submitted that this is because the relevant article, namely Article 53, in that case permitted the general meeting to do so. Article 53 in that case was as follows:—[16]

> "The Company may by ordinary resolution direct that the new shares or any of them shall be offered in the first instance to the then members or any class thereof for the time being in proportion to the number of share or shares of the class held by them respectively or make any other provisions as to the issue of the new shares."

But the introductory words in our Article 46 are different. Instead of "The Company . . ." we have "Unless otherwise determined by the Directors or by the resolution authorising an increase of any original shares . . ." It would seem therefore that the difference in wording makes our case not susceptible to the analysis or *ratio* of *Bamford's* case. It is respectfully submitted therefore that the conclusion arrived at by the learned judge cannot be supported by the passage in Hahlo.[17] It remains to be determined whether his Lordship's conclusion can be based on the mere interpretation of the words introducing Article 46.

We have seen earlier that his Lordship's conclusion was that once the members in general meeting of the company resolve on the manner of allotment it will not be open to the Directors to act contrary to the resolution subsequently. It is submitted that this conclusion based on a time-basis would not clarify the law for companies having articles similar to Article 46. The reason is that Boards of Directors may in future resolve the manner of allotment *before* the members in General Meeting have had an opportunity to pass any resolution at all. In such a situation it would seem that the members in general meeting would be powerless to control the Board. Indeed it is submitted that the introductory words of Article

[14]The Appeal decision is also reported at [1969] 1 All. E.R. 969. At p. 976, Harman L.J. describes the use of the 'residual power' concept as "a curiously inapt process." At the next page (p.974) he says "that to talk of 'residual' power is entirely beside the mark, with all respect to those who think otherwise." Similarly, at p. 975, Russell L.J. says, "A great deal of discussion below and here has centred on the question whether the company has some residual power to allot shares. I do not myself see the problem in this light."

[15]Cf. Harman L.J. *ibid.*, at p. 974.

[16]See [1968] 2 All E.R. 655 at p. 658.

[17]Lest the writer is accused of ignoring one further authority cited by the learned judge, namely, pp. 17 and 21 of Gower, *Modern Company Law* (3rd ed.), the writer's submission is that these two passages cited are in conflict to Gower's further elucidation at p. 133.

46 are capable of being so interpreted. The use of the disjunctive "or" implies that both primary organs of the Company have the power to issue shares and it is then a question of which organ does it first. Hence if we take away the concept of "residual powers" residing in the general meeting because of a lack of authority supporting it, the judgment of his Lordship would amount to this: that in a company with an article like Article 46, the primary organ viz., the Board or the General Meeting, which acts first would be secured in its action provided, of course, that the Directors have acted *bona fide* in the interests of the company as a whole. It is submitted that this is the limit to which *Baldev Singh* v. *Mahima Singh* can be stretched and that the case cannot be authority for the proposition that a residual power rests on a company in general meeting to issue shares.

A more serious point which does not seem to have been argued in this case is that the resolution passed by the members in the Annual General Meeting cannot clearly be interpreted as a "resolution authorising an increase of capital" within the meaning of Article 46. What the resolution says was clearly to restrict bumiputra participation in the Company to 30% of the issued and paid up capital. By implication too, the resolution may be interpreted as stating a policy to admit bumiputra participation. But where is the resolution "authorising an increase of capital"?. It is submitted that from the case as reported, there was no such resolution. Consequently, Article 46 cannot be invoked to say that the Directors have breached it. If Article 46 is inapplicable because of the absence of any resolution to increase capital, then the Directors would seem to have acted within their own powers.

But of course, it is open to a shareholder to attack the Board of Directors on the basis of breach of their fiduciary duty to act *bona fide* in the interests of the company as a whole. This doctrine is discussed in most textbooks.[18] The phrase *"bona fide* in the interests of the company as a whole" is difficult to define. Since the Privy Council has now pronounced its dislike for the phrase in *Howard Smith Ltd.* v. *Ampol Petroleum Ltd.*[19] future discussion of this doctrine may have to be modified. *Howard Smith's* case can be taken to establish the proposition that in a situation where the exercise of a power is challenged, the substantial purpose for which that power was exercised must be examined to see whether that purpose was proper.[20] What is a proper purpose would seem to have been

[18] For example, *Palmer's Company Law* (21st ed.) p. 527 *et. 'seq;* Gower, *The Principles of Modern Company Law* (3rd ed.) p. 516 *et seq;* Brown & Grogan, *Company Directors* (3rd ed.) p. 153 *et seq;* Afterman, *Company Directors & Controllers* (1970) p. 144 *et seq.*

[19] [1947] 48 A.L.J.R. 5 at p. 9.

[20] *Ibid.* p. 9.

left open by the Privy Council and would depend on the context of each particular set of facts. In *Howard Smith's* case itself, it was held that to issue shares purely for the purpose of creating voting power is an improper purpose.

The learned judge in our case did not find it necessary to examine the *bona fides* of the Board of Directors since he had already found against them on the issue of having acted *ultra vires*. But if the learned judge had not conclusively so found on the first issue, it would have been difficult to find for the plaintiff on the alternative issue. On the facts as reported, it would be difficult to say that the Directors exercised the power to issue shares for an improper purpose. The Directors argued that the substantial purpose for their decision to issue some 31,500 shares to certain low level employees was merely to put into effect the Government's New Economic Policy.[21] The plaintiff's argument that the Directors were merely attempting to concoct another Ali Baba system of business seems untenable. It was said by one witness[22] that the money to purchase the shares would be provided by the Company. If there was in fact a scheme devised for this purpose, and this is not clear from the report, and if this scheme is not caught by s. 67(1) of the Companies Act, 1965 but rather comes under s. 67(2)(c) of the Act, then it is submitted that the actions of the Directors would not necessarily and substantially be for the purpose of tightening their control over the company. But of course it may be argued that since the prospective shareholders are the employees of the Company, they would have to toe the line of the Employers (Directors) and as such the Directors were acting to control the Company. Two points may be made in reply. Firstly, even if the impugned shares were issued to the Negri Sembilan State Development Corporation on default of acceptance by the existing shareholders, it would not follow that the Negri Sembilan State Development Corporation would be able to do better *vis-a-vis* the low level employees in terms of control. After all, both of them would have at most a 30% shareholding in this primarily family private limited Company. In this modern age of labour consciousness, it may be assumed that the employees would be as capable of voting *en bloc* as would a corporation. Secondly, the Government's New Economic Policy at present *vis-a-vis* small private enterprises would seem to be to encourage bumiputra participation rather than control. Indeed, such a policy would be most conducive to social harmony. Hence, it is submitted that if the substantial purpose of the Directors was only to implement the Government's New Economic Policy, then they could not be held to have exercised their power of issuing shares for an improper purpose.

[21] *Op. Cit.* n. 1 (H.C.) p. 207.

[22] *Op. Cit.* n. 1 (H.C.) p. 208.

The above analysis so far relates to a review of the High Court's judgement. In broad terms, the writer's main thrust was to submit that in this case, the way in which Article 46 was drafted posed difficulties for the shareholders in general meeting to assert that they have a power conferred by Article 46 to direct by resolution the members of the board of directors to issue new shares of the Company in a specific manner. In contrast, the decision of the Federal Court (delivered by Ong Hock Sim F.J. with Ali and Raja Azlan Shah F.JJ. concurring) appears to have taken a less satisfactory approach. Their Lordships' judgment may be divided into two parts, firstly, a disagreement with the High Court's approach and secondly, the formulation of the correct approach to the issue at stake.

In the first part, the Federal Court asserted that the High Court's framing of the issue as to whether there was a contravention of the resolution passed by the Annual General Meeting on the 29th November 1972 was an error and that the question is one of contravention of the Articles rather than the November resolution.[23]

The Federal Court then proceeded to show that there was a contravention of the Articles of the Company. To do this, it examined those articles "which we believe relevant"[24] and found two, namely, Article's' 1 and 46[25] which are set out in full in the judgment. Article 1 (c) is as follows:– "(c) any invitation to the public to subscribe for any shares or debentures or debenture stock of the Company is prohibited." The Federal Court then embarked on a discussion as to whether the defendants (Directors) had made an invitation to the public to subscribe for shares in the Company.

The Federal Court seem to hold by necessary implication that the Indian case of *Rattan Singh* v. *Managing Director of Moga Transport*[26] was no authority for saying that "selected persons" are not members of the "public". Consequently, Hashim Yeop A. Sani J. "was misled by the assurance of counsel that the case was on all fours with the instant case, as he also contended before us."[27] Having disposed of the *Rattan Singh* case,

[23] Their Lordships said, "In our view, that is not quite correct as the question is one of contravention of the Articles rather than the November resolution": *op. cit.* n. 1 (F.C.) p. 174. With respect, it is submitted that this is a misinterpretation of Hashim A. Sani J.'s judgment. At p. 209, the learned trial judge said, "It follows that the decision of the Directors is in contravention of Article 46 and is therefore *ultra vires*," *op. cit.* n. 1 (H.C.).

[24] *Op. Cit.* n. 1. (F.C.). p. 175.

[25] For Article 46, see *supra*, p. 194.

[26] A.I.R. 1959 Punjab 196.

[27] *Op. Cit.* n. 1. (F.C.) p. 175.

the Federal Court then went on to cite at length *Palmer's Company Law* (21st ed.) page 150. The passage in this book discusses s. 55 of the English Companies Act 1948 which deals with construction of references to offering shares or debentures to the public. Commenting upon this passage with a one sentence remark in brackets his Lordship then proceeded to set out our s. 4(6)[28] of the Companies Act 1965 and concluded thus:[29]

> "There can be no doubt that the offer to the nine named Bumiputras is not within categories (a) to (d). The word "public" is not defined in the Act and except where otherwise expressly provided should be given its ordinary meaning. *We would respectfully disagree and hold that the decision of April 7, 1973 is in contravention of Article 1(c).*
>
> It also follows therefrom that it is not enough for the Appellants merely to claim acceptance of the New Economic Policy. The decision must also be in accord with the Article and it has not been shown to be. *There is the admitted failure to offer or give notice to the respondent and other shareholders in contravention of Article 46.* We therefore dismiss the appeal with costs here and in the court below." (emphasis supplied).

There appear therefore two grounds for the Federal Court's decision, namely, a contravention of Article 1(c) and a contravention of Article 46.[30] It should be recalled that Article 1(c) of the Company deals with the question of prohibition of issue of shares to the public while Article 46

[28] "Any reference in this Act to offering shares or debentures to the public shall, unless the contrary intention appears, be construed as including a reference to offering them to any section of the public, whether selected as clients of the person issuing the prospectus or in any other manner; but a bona fide offer or invitation with respect to shares or debentures shall not be deemed to be an offer to the public if it is –

(a) an offer or invitation to enter into an underwriting agreement;

(b) made to a person whose ordinary business it is to buy or sell shares or debentures whether as principal or agent;

(c) made to existing members or debentures holders of a corporation and relates to shares in or debentures of that corporation; or

(d) made to existing members of a company within the meaning of section 270 and relates to shares in the corporation within the meaning of that action."

[29] *Op. Cit.* n. 1. (F.C.) p. 176.

[30] Consequently, it is submitted that the headnote in the case reported in the Malayan Law Journal is inaccurate as it implies that the Federal Court based its decision only on one ground, namely, a contravention of Article 46 only in that "the appellants had failed to offer the shares or given notice to the respondent and other shareholders as required by the Articles of Association of the Company". It is submitted that the only relevant article which deals with the question of a pre-emptive offer is Article 46 and no other.

deals with the question of giving the present members of the Company a pre-emptive offer of the shares before being disposed of as the Directors "think beneficial to the company."

However, it may be argued from the conclusion of the Federal Court's decision that the second ground of its decision (contravention of Article 46) is inextricably tied up with the contravention of Article 1(c). As can be seen from the passage cited, the second paragraph begins with "It also follows therefrom . . . ." But it is respectfully submitted that the second paragraph cited above "does not follow" from the previous paragraph. A contravention of Article 1(c), namely that there has been an offer or invitation to the public, need not necessarily imply a contravention of Article 46, the pre-emptive clause. There could well be cases in which the pre-emptive article has been properly complied with and yet the issue of shares may contravene the article prohibiting issue of shares to the public. Such an instance may be found in *Rattan Singh* (*supra*) itself, although in this particular case, it was held that the new shares were not offered to the public. It is submitted therefore that the Federal Court was in fact providing an *additional* ground for its decision when it referred to Article 46. Therefore, the comments following will proceed on the assumption that there are two distinct grounds for the Federal Court's decision.

With respect to the first ground, namely, that there was an invitation to the public to subscribe for shares of the Company contrary to Article 1(c), it respectfully submitted that the issue is not as clear as the Federal Court considered it to be. In the first place, the Federal Court while citing the rather long passage from *Palmer's Company Law* pp. 150–1, overlooked the paragraph immediately following it which reads:

> "Of greater importance is the first half of subsection (2): these provisions makes it clear that the issue is not to the public if (a) it is directed to specified persons; and (b) it is not 'calculated to result' in the shares or debentures becoming available to other persons; or, as the subsection phrases it happily, if the issue is the 'domestic concern of the persons making and receiving the offer or invitation'.[31]

On this test alone, it is submitted that the defendants (directors) purported invitation to the nine named Bumiputra workers would not be an invitation to the public. The workers were selected persons.[32] It would seem further that the allegation of "Ali Baba" system is partly based on the fact that the workers were carefully selected. In addition, nowhere in the High Court's or the Federal Court's decision was it found as a fact that the purported invitation would become "available to other persons."

[31] *Ibid.*, Format of paragraph rearranged by the writer.

[32] See p. 207 of the High Court's judgement. *Op. cit.* n. 1. (H.C.)

But of course it may be argued that Schmitthoff and Thompson in *Palmer's Company Law* are only discussing s. 55 of the English Act. Consequently, we must also examine the Malaysian equivalent of s. 55 which is s. 4(6).[33] The first point to note about s. 4(6) is that the paragraphs (a), (b), (c) and (d) cannot be interpreted as exhaustive of the categories of the public or "any section of the public". The second sentence of s. 4(6) begins with the word "but". This word can only mean that the categories (a)(b)(c) and (d) are to be specifically excluded by the general proposition laid out in the first sentence without defeating the effect of the first proposition.[34] Consequently, it is respectfully submitted that the Federal Court's finding that "There can be no doubt that the offer to the nine named Bumiputras is not within categories (a) to (d)"[35] is based on an erroneous interpretation of s. 4(6).

Therefore we have to consider whether the invitation to the nine named Bumiputras was an invitation "to any section of the public . ..." contrary to the first part of s. 4(6). Two learned writers commenting on s. 5(6) of the N.S.W. Act 1961, the identical counterpart of the Malaysian s. 4(6) have this to say:[36]

> "All the authorities and textbooks indicate that the meaning of 'public' (and hence of 'any section of the public') is incapable of precise definition and is a question of fact to be determined in the circumstances of each case."

But this is not to say that "the authorities" have not attempted to define "the public" altogether. In particular, it is submitted that there exists one often-cited dictum from which fruitful light may be derived in ascertaining what "the public" or "any section of the public" may mean. This is the dictum of Lord Sumner in *Nash v. Lynde*[37] in which

[33] S. 4(6) is set out in supra, fn. 28. The marginal note of s. 4(6) is not "unlimited company" as described by the F.C. but rather "As to what constitutes an offer to the public," s. 4(6) is not in *para materia* with s. 55 (U.K.). But one writer has called it the equivalent "of" s. 55: R. Baxt, *Second Australian Supplement to the Third Edition of Gower's Modern Company Law*, p. 153. Another writer has pointed out that it lacks its detail in particular with references to renunciation of rights: Wallace and Young, *Australian Company Law and Practice* (1965) p. 35.

[34] See Purvis, *Proprietary Companies* (1973) p. 6; R. Baxt. *op. cit.* 153 and Wallace and Young, *op. cit.*, 35.

[35] *Op. Cit.* n. 1. (F.C.) p. 176.

[36] Wallace and Young, *Australian Company Law and Practice* (1965) p. 35. See also, Purvis, *op. cit.* n. 6.

[37] [1929] A.C. 158 at 169.

discussing the meaning of "the public" in the English Companies (Consolidation) Act, 1908, he said:

> "Anything from two to infinity may serve: perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole. The point is that the offer is such as to be open to any one who brings his money and applies in due form, whether the prospectus was addressed to him on behalf of the Company or not."

In *Rattan Singh* itself (*supra*), the case relied upon by the trial judge the above dictum was adopted as a matter of course.[38] In the High Court, Hashim Yeop A. Sani J. also accepted the dictum when he concluded, "The transaction in question does not in my view amount to an offer which was open to anyone to bring his money and apply for the shares."[39] The Australian High Court in *Lee* v. *Evans*[40] also accepted the effect of this dictum.[41] Barwick C.J. accepted the dictum in full[42] whereas Kitto J. preferred his own definition but nevertheless still within the purport of the dictum. At page 277, he said:

> "... the distinction must not be overlooked between the case of an invitation which itself is open to acceptance by any member of the public who may be interested and the case of an invitation which itself is open to acceptance by a specific individual only but, if declined by him, is likely to be followed by similar invitations to other specific individuals in successsion until an acceptor is found. The first of these is a case of an invitation to the public; the second, in my opinion is not."

Even the dissenting judge in this case, Windeyer J., provided a test which is very near to Lord Summer's test. At page 279, the learned judge said:

> "The essence of an invitation to the public is not in the manner of its communication or in the number of the persons to whom it is communicated. The criteria are rather, are the recipients of the

[38] *Op. Cit.* n. 10. p. 198.

[39] *Op. Cit.* n. 1. (H.C.) p. 208.

[40] [1964-5] 38 A.L.J.R. 273.

[41] Although this case deals with the meaning of "invitation to the public" within the context of the Registration of Business Names Act, 1928–1961 (S.A.) the consideration there seems to have been accepted as applicable to s. 4(6) of the Companies Act, 1965 (Malaysia). See, R. Baxt, *op. cit.* p. 153, Wallace and Young, *op. cit., Third Cumulative Supplement* (1970) p. 2, Afterman and Baxt, *Cases and Materials on Corporation and Associations* (1972) p. 245.

[42] *Op. Cit.* n. 40 p. 276 and 277.

> invitation persons chosen at random, members that is of the general public, the public at large, all and sundry: or are they a select group to whom and to whom alone the invitation is addressed, so that if an outsider sought to respond to it he would be told that he was not one of these invited to come in."

Therefore, although the above statements do not positively define "the public" or "section of the public", they have at least shown which ingredients do not constitute members of the public and that is when the invitation is directed to specific persons *and* no persons other than these can "bring his money and apply in due form". If this meaning is given to our s. 4(6) of the Companies Act 1965, and it is respectfully submitted that it should be, then the meaning of "the public" and "section of the public" is the same as that found in s. 55 of the English Act 1948. The limitation placed on these two phrases in s. 55(2) of the English Act 1948 and as further emphasised by *Palmer's Company Law* cited above[43] is strikingly similar to the test laid down by Lord Sumner in *Nash* v. *Lynde* (supra).

It is therefore submitted that the Federal Court has erroneously applied the test to the facts in this case for the reasons discussed above.[44]

The second ground of the Federal Court's decision can be criticised on the basis that it did not take into account the phrase "Unless otherwise determined by the Directors or by the resolution authorising an increase of capital . . ." in Article 46. This phrase featured importantly in the High Court.[45] But it was completely ignored by the Federal Court. It is submitted that on a proper interpretation of this phrase, there is clearly a power given to the defendants (Directors) to override the pre-emptive rights of the shareholders. The words in the phrase glaringly confer such a power, albeit a concurrent power shared with the members in general meeting. As the members in general meeting did not decide to override the pre-emptive rights of the shareholders but the defendants (Directors) had done so, it is submitted that the Directors had not acted contrary to Article 46.

By way of a summing up, it is the writer's humble opinion that the High Court's as well as the Federal Court's approach to this case have left much to be desired.

M.H.K. Lim

[43] See *supra*, p. 202.

[44] *supra* p. 203.

[45] See *supra* p. 209 of High Court's judgement and the writer's discussion above on this judgement.

A REFORMULATION OF THE *RES GESTAE* RULE

Ratten v. *R*[1]

Section 6 of the Malaysian Evidence Act, 1950[2] states the *res gestae* rule in these terms:—

> Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

Despite its apparent clarity, the term *res gestae* has occasioned many vexed problems. Most of these problems arise because there is no consistent usage of this term. Lord Wilberforce in the recent Privy Council decision of *Ratten* v. *R* enumerated three situations to which the term *res gestae* is applicable. It is proposed to review this area of the law of evidence by reference to these different uses of the term.

First, a question may arise, when does the situation begin and when does it end. The doctrine of *res gestae* is invoked to admit evidence which is so interwoven with the act in issue that its dissociation from it would render the act unintelligible. Thus when a situation of fact (e.g. a killing) is being considered, if the evidence is to be confined merely to the insertion of the knife, without more, it may often render the whole transaction unintelligible and hamper the discovery of truth. The facts in *R.* v. *Ellis*[3] make this patent. A shopman was charged with stealing 6 shillings from the till. These shillings had been marked. They were removed together with other unmarked coins throughout the course of the day. The removal of the unmarked coins was not a fact in issue nor indeed relevant. The court held that as it was inextricably intertwined with the fact in issue (i.e. the taking of the coins) it could nevertheless be proved as *res gestae*. Similarly in *Kanapathy* v. *R*[4] the appellant an Inspector of Police was charged with accepting $50.00 without consideration from the complainant against whom a charge of attempted rape was withdrawn. Since the complainant's arrest the appellant had made various overtures to him to obtain his watch, wrist band and glass cutter. Only when he was informed by the complainant that the articles had been pawned did the appellant substitute his earlier demands to one for cash. Could the earlier demands

[1] [1972] A.C. 378 (PC).

[2] Laws of Malaysia, Act 56 (Revised 1971). Hereafter referred to as the Act.

[3] (1826) 6 B. & C. 145.

[4] (1960) M.L.J. 26.