PSEUDO-RULES FOR PSEUDO-DIRECTORS : THE PROBLEM OF RULES AND STANDARDS IN *YAP SING HOCK* v *PUBLIC PROSECUTOR*

In *Yap Sing Hock* v *Public Prosecutor*,[1] the Supreme Court has delivered a judgment that invites critical scrutiny on two levels: that of substance and that of form. The key substantive rulings were that (1) *particulars* of an offence alleged in criminal charges are to be strictly construed 'in favour of liberty' - a rule formerly applied only to the *elements* of statutory offences, and (2) accordingly, when faced with two plausible definitions of the word 'director' in a criminal charge, the Court had no choice but to pick the one that invalidated the appellants' convictions - even though being a 'director' was not an element of the crime.

In *dicta*, the Court also opined that the corporate veil cannot under any circumstances be lifted in order to preclude the conviction of a sole shareholder/director for criminal breach of trust in connection with company property.

I will argue that each of these substantive pronouncements was wrong, and that, despite their superficial diversity, each resulted from a single *formal* error: namely, the Court's dogmatic preference for clear, inflexible 'rules' as opposed to vague, situation-specific 'standards'.

A firm rule is appropriate in construing the statutory elements contained or referred to in a charge. Ambiguous statutory language must be construed narrowly in order to avoid criminalising acts which were legal when committed. Moreover, it is practical to hold the prosecution's proof to a narrow statutory construction because it is relatively easy for the prosecution to 'predict' before pressing charges whether it will be able to prove the elements of a generally-worded statute.

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[1] [1992] 2 MLJ 714.

However, charges contain not only statutory elements but also nonstatutory 'particulars' setting forth the facts in greater detail. Particulars alleged in criminal charges perform the more subtle and finely-calibrated function of providing the defendant with enough notice of the facts in issue to prevent 'prosecution by ambush', but not nearly as much notice as a civil litigant can obtain through pre-trial discovery. The requirement that a criminal charge 'descend to particulars' reflects a compromise between these two positions. Moreover, since particulars constitute, in effect, a more specific prediction of which facts will be proven at trial, their greater specificity entails an inherently greater risk that the prediction will be wrong - i.e., that some aspect of the charge will fail to be proven. Therefore, there is an inevitable trade-off between the amount of detail contained in the charge (specificity) and the likelihood that all the specific details can be proven at trial (accuracy).

If the particulars contained in a charge are to provide the defendant with an optimal degree of fair notice, they simply *cannot* be subjected to an inflexible rule which demands near-perfect accuracy of prediction - yet this is what *Yap Sing Hock* effectively holds. Such a rule confronts prosecutors with the Hobson's choice of losing many of their cases because some inconsequential allegation inevitably fails to be proven, or drafting charges so barren of detail that no such failure is possible. A rational prosecutor obviously would choose the latter option. Thus, the strict construction rule in *Yap Sing Hock* ironically undermines its own purpose, because any increase in the accuracy of the charge comes at the expense of its specificity. Previously, the law had long applied an appropriately vague 'standard' of reasonable specificity and accuracy under which the court in its discretion evaluated, in light of all the circumstances of the case, whether the charge gave the defendant sufficient notice of the allegations against him.

Once the strict construction rule falls, the second holding tumbles with it. The Court was perfectly free to employ any definition of 'directors' that would have saved the convictions so long as the use of that definition would not have sanctioned a variance between charge and proof that actually misled the defence.

Finally, the Court's *dicta* regarding the corporate veil ignored the fact that this 'standard'-like exception to the 'rule' of limited shareholder liability might be used to screen out criminal prosecutions that serve no social purpose, as where the defendant's defalcation injured no third party. The Court's unqualified rejection of this possibility in all future cases, although substantively 'pro-prosecution', was nevertheless of a piece with the other 'pro-defendant' rulings in failing to take account of the proper role of standards in criminal law.

This article will argue that vagueness has its place in the law - even in the criminal law - and that an appreciation of the role played by fuzzy legal 'standards' could have prevented the judgment in *Yap Sing Hock* from going so far off the mark. To put it another way: there are good, practical reasons why the 'rule of law' cannot always be a 'law of rules'.[2]

I. THE KEY RULINGS

A. The Holdings Below

The facts were as follows: the two appellants had been directors of Yap Sing Hock Holdings Sdn Bhd ('Holdings'), a company wholly owned by the first appellant. At a meeting convened in order to complete Holdings' purchase of Lien Hoe Sawmill Co Sdn Bhd ('Lien Hoe'), the appellants arranged to be appointed as Lien Hoe's new directors and then authorised Lien Hoe to loan Holdings RM12 million in order to finance the acquisition.[3] This loan was in flagrant disregard of Companies Act

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[2]The phrase is taken from Scalia, "The Rule of Law as a Law of Rules" (1989) 56 *U Chi L Rev* 1175.

[3]Subsequently, the appellants transferred more than RM2.5 million of the illegally-borrowed funds from Holdings to the first appellant for the purpose of acquiring a third company. For this they were convicted in the Sessions Court on a second count of criminal breach of trust for wrongful exercise of dominion over Holdings' property. On appeal to the High Court, the first appellant claimed that the diversion of RM2.5 million from Holdings to himself was a 'loan' that he would have repaid by selling Lien Hoe 'at a handsome profit'. *Supra* n 1 at p 732. The High Court dismissed the argument on the ground that the illegal means by which Holdings initially obtained the funds from Lien Hoe infected the subsequent 'loan' as well. The Supreme Court, allowing the appeal on this point, held that since the RM2.5 million 'loan' was not itself illegal and since the charges in issue were framed in terms of a criminal breach of trust against Holdings' property, not Lien Hoe's, the convictions could not stand. This aspect of the judgment merits no further discussion.

section 67, which prohibits a company from financially assisting the purchase of its own shares.[4].

In the Sessions Court, each of the appellants was convicted on three counts:

> two counts of criminal breach of trust under Penal Code section 409[5] for wrongful exercise of dominion over the property of Lien Hoe and Holdings, respectively; and
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> one count under Companies Act section 67(3)[6] for causing Lien Hoe to finance the purchase of its own shares.

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[4]S 67(3) is based on the 'maintenance of capital' principle. That principle reflects the concern of the law to see that those who take shares in a company do, in fact, contribute the subscription or issue price of their shares in money or money's worth, and that this sum or its equivalent is as far as possible maintained in the company's hands (consistently with all the risks associated with any business venture), and in particular that it is not returned to the members themselves directly or indirectly except through some statutory procedure, such as a reduction of capital . . . which provides proper safeguards for creditors and others who might be prejudiced by the diminution of the company's assets. In this way, the law does its best for the corporate creditor, who is denied any direct recourse against the members by the principle of limited liability.

L Sealey, *Cases and Materials in Company Law* (5th ed 1992) at p 341.

[5]Penal Code s 409 provides in relevant part:

> Whoever, being in any manner entrusted with property, or with any dominion over property, . . . in the way of his business as a[n] . . . *agent*, commits *criminal breach of trust* in respect of that property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine. (Emphases added).

Penal Code s 405 defines 'criminal breach of trust' as follows:

> Whoever, being in any manner entrusted with property, or with any dominion over property, *dishonestly* misappropriates or converts to his own use that property, or *dishonestly* uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust". (Emphases added).

Penal Code s 23 defines 'dishonestly' as follows:

> Whoever does anything with the intention of causing *wrongful gain* to one person, or *wrongful loss* to another person, is said to do that thing 'dishonestly'. (Emphases added).

Penal Code s 24 defines 'wrongful gain' and 'wrongful loss' as follows:

> "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.
>
> "Wrongful loss" is the loss by unlawful means of property to which a person losing it is legally entitled. A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

[6]Companies Act s 67(1) provides in relevant part:

> Except as is otherwise expressly provided by this Act no company shall give . . . any financial assistance for the purpose of . . . a purchase . . . of . . . any shares in the company[.]

B. 'Pseudo-Directors' are not 'Directors'

The chief legal controversy in *Yap Sing Hock* turned on the phrasing of the Penal Code charges relating to Lien Hoe's RM 12 million, which characterised the appellants as '*agents* of [Lien Hoe,] to wit, *directors*'.[7] The word 'agent' appears in Penal Code section 409; the word 'director' appears nowhere in the Code and was merely an elaboration by the prosecutor.

In their High Court appeal,[8] the appellants had argued that they could not be charged under the Penal Code as Lien Hoe's directors because they had failed to file various statutory declarations required for the appointment of new directors under sections 123(4) and 125(1) of the Companies Act.[9] The High Court disregarded the technicality on the ground that the overwhelming evidence of their control over Lien Hoe brought them within the broad, functional definition of 'director' contained in Companies Act section 4. That section encompasses what I shall refer to as a 'pseudo-director', i.e.,

> any person occupying the position of director of a corporation by whatever name called . . . includ[ing] a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act[.]

Companies Act s 67(3) provides in relevant part:

> If there is any contravention of this section, . . . each *officer* who is in default shall be guilty of an offence against this Act.
>
> Penalty: Imprisonment for five years or one hundred thousand ringgit or both. (Emphasis added).

Companies Act s 4 defines 'officer' as including 'any *director* . . . of the corporation' (emphasis added) and states that the term 'director' includes

> any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act[.]

[7] *Supra* n 1 at p 720 (emphases added). The Supreme Court construed the words 'to wit' to mean 'namely or that is to say' and thus as excluding any form of agency other than that of a being a director. *Supra* n 1 at pp 723-24 (quoting the *Shorter Oxford Dictionary* (3d ed)).

[8] The High Court's judgment in the case, reported at [1991] 2 MLJ 334, was discussed in Hirsch, 'Company Law' in *Survey of Malaysian Law 1991* (1993) at pp 122-23.

[9] Companies Act s 123(4) requires 'every person . . . before he is appointed a director . . . [to] make and lodge with the Registrar [of Companies] and the Official Receiver a statutory declaration . . . that he will not be acting in contravention of' (*inter alia*) s 125, which forbids an undischarged bankrupt from being a director.

The Supreme Court, purportedly applying the rule of strict construction 'in favour of liberty', held that the High Court should not have 'borrowed' the Companies Act definition in order to interpret charges preferred under the Penal Code (or for that matter, charges preferred under any penal provisions other than those of the Companies Act itself).[10] Because the Penal Code charges could not be construed as referring to pseudo-directors and the prosecutor had failed to establish that the appellants were actual directors, the Lien Hoe-related Penal Code convictions were invalid.[11]

C. *Dean* v *Hiesler*: Only 'Directors in Fact' are 'Directors'

In reaching this result, the Court placed particular reliance on *Dean* v *Hiesler*.[12] In that case, the King's Bench Division upheld a magistrate's dismissal of an information against an individual charged under the Defence (General) Regulations, reg. 91, a penal provision imposing vicarious liability on a director of a company found guilty of violating the Regulations 'unless he proves that the offence was committed without his knowledge'.[13] The magistrate had determined that the respondent 'had never been appointed a director of the company', as no meeting had been held to receive his predecessor's resignation nor any resolution passed regarding his appointment. Accordingly, the magistrate had held that he fell outside the definition of 'director' contained in section 380 of the Companies Act 1929 (the English forerunner of Malaysia's section 4), which included anyone 'in the position of' a director.

The King's Bench Division agreed with the result but not the reasoning. Rather than finding the respondent to be outside the scope of the Companies Act definition, Viscount Caldecote LCJ viewed that definition as being inapplicable in a criminal pro-

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[10]*Supra* n 1 at p 724.

[11]The Court declined to exercise its discretion either to disregard the putative defect in the charges under Criminal Procedure Code s 422 or to amend the charges on appeal, as was done in *Public Prosecutor* v *Yeoh Teck Chye* [1981] 2 MLJ 176. This aspect of the judgment will not be discussed further because this article takes the position that the charges were not defective and therefore need not have been excused or amended.

[12][1942] 2 All ER 340. The High Court had held, with little discussion, that *Dean* v *Hiesler* was of 'no relevance', [1991] 2 MLJ 334 at p 340.

[13][1942] 2 All ER 340.

secution under regulation 91. Rather, what mattered was 'whether the man was a director in fact':

> I observe, first of all . . . that we are not construing the language of the definition section of the Companies Act, 1929. What has to be decided is whether, following the terms of the Defence (General) Regulations, this respondent was a director of Wooltex Co., Ltd. It is quite true, of course, that this man usurped or performed some of the duties of a director, and it may be that, to that extent, he was in the position of a director, but I think that what the court here has to determine is *whether the man was a director in fact*, and has not to consider what is the precise meaning of the definition contained in the Companies Act, 1929. . . . [I]n spite of the fact that he performed some of the duties of a director and even described himself as director, he was not in fact a director of the company. That seems to me all that is necessary to decide this case.[14]

This is a perplexing ruling. If the Companies Act definition did not apply, by what measure did Viscount Caldecote determine that the respondent was not a 'director in fact'? The concurring judgment of Tucker J provides the answer:

> In this penal statute the words in question are "every person who, at the time of the commission of the offence, was a director". In my view, this must mean every person who, at the material time, held the office of director, that is, *who had been validly appointed in accordance with the provisions of the Companies Act, 1929*. The interpretation which we are invited to put upon this regulation by counsel for the appellant is that, for the purpose of the regulation, a "director" must be held to include a person who is acting as a director or purporting to fill that office. If it had been thought necessary or desirable to include such persons within the purview of this regulation, appropriate words could have been used to effect that purpose, but, in my view, such words not having been used, the natural and restricted interpretation is the only one which can be put upon it, and I agree that the magistrate came to a correct decision.[15]

Thus, the King's Bench held, in effect, that the word 'director', as used in the penal regulation, incorporated only so much of the Companies Act as governed the formal appointment of di-

[14] *Supra* n 12 at p 341 (emphasis added).
[15] *Ibid* (emphasis added).

rectors, but not the Act's broad definition of directors, which included pseudo-directors.[16]

Fifty years later this was the holding relied upon in *Yap Sing Hock*. However, unlike *Dean* v *Hiesler*, the picture was complicated by the presence of Companies Act charges premised on the same transaction. Significantly, the Court held that pseudo-directors could be prosecuted under section 67(3) of the Companies Act. Accordingly, it upheld the convictions on those charges:

> Dealing with the third charge, both appellants were charged under [section 67(3) of the Companies Act] and not under the Penal Code so that the strict proof of directorship required for an offence under the Penal Code . . . has been modified by the Act's s 4 wherein the definition of director includes a non-director who occupies the position of a director by whatever name called, in order apparently to avoid any evasion of compliance with the provisions of the Act. Such being the case the conviction under the third charge should remain undisturbed.[17]

The paradoxical result of these rulings was not lost upon the Supreme Court. How could the same persons, acting in the same transaction, be 'directors' of a company for purposes of the Companies Act (which is the only Malaysian statute that defines the word 'director') but not for purposes of the Penal Code (which does not even contain that word)? The Court tried to explain the inconsistency as following ineluctably from its adherence to the rule of strict construction in favour of liberty:

> This [upholding of the Companies Act convictions] could be regarded as a curious result by some quarters as both appellants were also charged as directors of Lien Hoe in the third [Companies Act] charge as in the first [Penal Code] charge, but such result has to be so reached when a court has to give force to any fundamental and important principle of law in the administration of criminal justice . . . where expediency of any kind would have to give way.[18]

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[16]The third judge in *Dean* v *Hiesler* indicated agreement but issued no judgment.
[17]*Supra* n 1 at p 732.
[18]*Ibid.*

II. A THEORY OF CRIMINAL CHARGES

A. Elements versus Particulars

Much of the substantive confusion in *Yap Sing Hock* can be traced to the following paragraph, in which the Court purported to explain the policy underlying its reversal of the Penal Code charges:

> As we have stated elsewhere, the principle of the duty of the prosecution to prove beyond a reasonable doubt every *ingredient* of a charge, is a principle too plain to require any authority to support it; it is also a principle of great and fundamental importance at the same time.[19]

From this it would appear that the Court believed the phrase 'to wit, directors' should be treated as if it was a statutory 'ingredient'. This fundamental misperception undermined the Court's entire treatment of the Penal Code charges.

The Court failed to appreciate that every criminal charge contains two distinct types of averment: (1) a recitation of or reference to the elements (or 'ingredients') of the underlying statutory offence, and (2) 'particulars' which are not themselves elements of the underlying offence but which 'flesh out' the details of the alleged crime.[20] The first sort of averment, as the Court correctly pointed out, is subject to the rule of strict construction in favour of liberty.[21] That rule states that where ordinary methods of statutory construction fail to assist the court in choosing between two plausible interpretations, one of which would sustain a criminal conviction and one of which would not, the court must adopt the latter interpretation.[22] It was this rule, of course,

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[19]*Ibid* at p 723 (emphases added).

[20]See Note, "Indictment Sufficiency" (1970) *Colum L Rev* 876 at p 884 (distinguishing between parts of charge which inform defendant of statutory elements and parts informing him of particulars).

[21]*Supra* n 1 at p 724.

[22]As stated by Lord Simon in *National Dock Board* v *British Steel Corporation* [1973] 1 All ER 305 at p 317:

> [T]he rule enjoining a restrictive construction of penal statutes is a secondary rule, to be applied only if the court is left in doubt as to the meaning - for example, where the Parliamentary intention is not clear, or there is a true residual ambiguity, or the rule of

that was applied in *Dean* v *Hiesler*, and which applies as well to those parts of a criminal charge which recite or incorporate[23] the elements of the underlying statutory offence.

Here, however, the case turned not upon the meaning of any statutory element recited in the Penal Code charges, but upon the meaning of the word 'director', which was a mere particularisation of the statutory term 'agent'. Although the appellants' citation of *Dean* v *Hiesler* was completely inapposite on this point,[24] the Court inexplicably accepted their argument that the rule of strict construction invoked in that case also governs the interpretation of criminal particulars in Malaysia. This holding, if taken seriously, has no parallel or precedent in the common law world. It represents a dramatic and wholly impractical de-

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construction according to 'plain words' is not of primary force because in all probability the draftsman did not envisage the forensic situation with which the court is actually concerned . . .

Moreover, it is not enough that the point of construction is a difficult one or one which respectable minds might answer differently; before applying any special rule relating to the construction of penal provisions, there must remain in the mind of the court of construction a genuine doubt as to the meaning intended by Parliament[.]

See also 44 *Halsbury's Laws of England* (4th ed 1983) para 910 at p 560 (strict construction rule takes effect only if ambiguity remains 'after the ordinary rules of construction have first been applied') (quoted in *Liew Sai Wah* v *Public Prosecutor* [1968] 2 All ER 738 at p 741 (per Viscount Dilhorne)); *Chapman* v *US* (1991) 114 L Ed 2d 524 at p 537 (1991) (same). For a discussion of the 'primary' methods of statutory construction used by Malaysian courts, see A Ibrahim & A Joned, *The Malaysian Legal System* (1987) at pp 151-69.

[23]Criminal Procedure Code s 152(v) states that the charging of an offence is equivalent to stating that all of its elements have been fulfilled. Presumably, this allows the prosecutor to incorporate the elements by reference in the charge.

[24]*Dean* v *Hiesler* also was inapposite because of the vastly different nature of the penal provision in that case. Regulation 91 was a strict liability statute under which a company director, no matter how peripheral his involvement in the company's offence, could be held criminally liable and even imprisoned unless he managed to prove his own lack of knowledge (no doubt confronting him with all the difficulties that 'proving a negative' normally entails). Viscount Caldecote LCJ adverted to this fact in the first paragraph of his judgment, and Tucker J left no doubt that he considered this a pivotal aspect of the case:

In this case we are being asked to interpret the Defence (General) Regulations, reg 91. That regulation has the force of a penal statute, and, in my view, should be construed strictly. It shifts the onus in cases where the person convicted is a body corporate. In those cases it shifts the onus on to every person who, at the time of the commission of the offence was a director or officer of the body corporate to prove his innocence, and if he fails to do so, he renders himself liable to the penalties imposed by the regulation, including, in certain cases, imprisonment.

Supra n 12 at p 341.

Since simply being a 'director' of an offending company was enough to create *prima facie* criminal liability under the penal provision in *Dean* v *Hiesler*, small wonder that the King's Bench refused to equate pseudo-directors with directors. However, Penal

parture from the standard normally applied to the interpretation of particulars.

That standard - and I use the word advisedly - is altogether different from the strict construction rule governing penal statutory elements. 'Particulars of an offence [are] *not* like the words of a statute such that a failure of the facts to fall precisely within them [is] fatal.'[25] As will be explained in much greater detail below, particulars are governed by a vague 'standard' under which the court evaluates whether the charge was sufficiently specific and accurate to give the defendant fair notice of the allegations against him. Whether or not the standard has been satisfied is an inherently discretionary determination left in the hands of the court.

B. Rules versus Standards

Why should ambiguous statutory elements be strictly construed in the defendant's favour while particulars are left largely to the court's discretion? The difference can be described in terms of the distinction between 'rules' and 'standards'. Simply put, a 'rule' is a 'bright line' separating the permissible from the impermissible, while a 'standard' is a 'fuzzy' test which may involve the court in determinations of 'reasonableness' or 'fairness' or the 'balancing' of various interests. The proposition that 'ambiguity in a penal statutory element is to be resolved in the defendant's favour' is essentially 'rule'-like;[26] the proposition that 'particulars alleged in a criminal charge must be reasonably specific and sufficiently accurate' is a 'standard'.

Code s 409 is not a strict liability statute; nor does it shift the burden on the issue of *mens rea* to the defendant. Rather, it incorporates by reference the term 'criminal breach of trust', which, as defined in Penal Code s 405, requires that the wrongful exercise of dominion over entrusted property be done 'dishonestly'.

[25] *Regina* v *Moses* [1991] Crim LR 617 (emphasis added) (upholding convictions for conspiracy to defraud despite variation between proof and indictment's description of how crime was committed).

[26] That is, it occupies a spot toward the 'rule' end of the 'rule-standard' spectrum. An even more rule-like rule would be: 'It is illegal to drive faster than 70 kilometres per hour on this road.' But see n 29, *infra*.

The relative advantages and disadvantages of rules and standards have been analysed at length in the literature[27] and may be very simply summarised as follows: 'standards' sacrifice ease of administration and certainty of application in favour of faithfulness to their underlying policy rationales; rules do the opposite. A judge can use the discretion granted by a vague 'standard' to 'tailor' the result in a given case to serve the underlying policy; a firm 'rule', by depriving the judge of that discretion, achieves greater certainty of application but risks absurdity of result in particular cases which the rule could not have anticipated.[28]

'Rules' operate prospectively by creating firm guidelines for future behaviour, while 'standards' operate retroactively by permitting courts to 'rescue' those whose failure or inability to observe a guideline exposes them to a disproportionate penalty. An additional relevant distinction is that 'rule'-bound adjudication — in the common law world - tends to create binding precedent, whereas 'standard'-based adjudication is so fact-specific that it creates only the minimum amount of new law necessary to decide the immediate case.

C. A Common Policy Rationale: Fair Notice

What, then, are the underlying policies which the rule regarding elements and the standard regarding particulars seek to implement? Both are generally understood as implementing a single, overarching policy: that the state shall not deprive a citizen of

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[27]For summaries of that literature, see Sullivan, "The Supreme Court 1991 Term — Foreward: The Justices of Rules and Standards" (1992) 106 *Harv L Rev* 22 at pp 57-69; M Kelman, *A Guide to Critical Legal Studies* (1987) pp 15-63. See also Scalia, *supra* n 2; Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 *Harv L Rev* 1685; Rose, "Crystals and Mud in Property Law" (1988) 40 *Stan L Rev* 577; R Posner, *Economic Analysis of Law* (4th ed 1992) s 20.3 at pp 542-47; Ayres, "Making a Difference: The Contractual Contributions of Easterbook and Fischel" (1992) 59 *U Chi L Rev* 1391 at pp 1397-98 & pp 1405-06 (book review).

[28]M Kelman, *supra* n 27 at p 15:

> For example, if the purpose of establishing a voting age is to screen out immature or imprudent voters, directing the voting registrar to allow only those who are older than eighteen to vote will screen out some who are mature and entitle some who are immature, but at the same time it will reduce occasions for the registrar to exercise arbitrary power and discretion.

liberty without giving him fair notice of how to avoid that deprivation. The 'rule' as to elements implements this 'fair notice' policy with respect to unaccused citizens by permitting them to conform their behaviour to the law's requirements; the 'standard' implements it with respect to citizens who stand accused of crimes by permitting them to mount an effective defence.

By preventing courts from extending the reach of penal statutes through creative interpretation, the strict construction rule protects the ordinary, unaccused citizen from the *ex post* criminalisation of his actions. The judge is directed in no uncertain terms to resolve the ambiguity in the defendant's favour.[29] If the court is an appellate court, any application of the rule is likely to create a binding precedent regarding interpretation of the statute. Thus, the rule makes it possible, in theory at least, for the citizen to know in advance what he can and cannot do. 'A man is

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[29]It may be objected that the strict construction rule is not a 'rule' at all because it first requires the identification of a statutory ambiguity which cannot be eliminated by application of the 'primary' standards of statutory construction. See n 22, *supra*. Three answers are offered to this objection:

(1) The rules-and-standards literature recognises that rules may be of varying generality in the sense of attempting to 'cover' a wider or narrower class of cases. Compare, for instance, a generally applicable rule that 18 is the age of legal majority with a narrower rule that 18 is the age of capacity to contract. Kennedy, *supra* n 27 at pp 1689-90. The literature also notes that a rule whose scope of application is unclear or discretionary is to that extent less rule-like. *Ibid* at p 1690. It is readily admitted that the strict construction rule, as traditionally formulated, is one of narrow application which comes into play only after vague primary standards of statutory construction have been exhausted, and that to that extent its scope of application is unclear and discretionary.

(2) However, the strict construction 'rule' was applied in a bizarre manner in *Yap Sing Hock* that rendered it significantly more rule-like. Essentially, the Court treated the non-statutory modifier 'to wit, directors' as limiting and thus *supplanting* the statutory term 'agent'. It therefore saw no reason to construe the statute at all - e.g., by considering whether or not the appellants were 'agents' of Lien Hoe - and made no attempt whatsoever to apply the 'primary' standards of statutory construction. Rather, it treated the strict construction rule as though it were a 'primary' rule and immediately proceeded to consider which definition of 'director' that rule required. Accordingly, the scope of application of the strict construction rule as applied to particulars in *Yap Sing Hock* is clear and rule-like: As between any two plausible interpretations of words appearing in a criminal charge, choose the one which defeats the penal sanction.

(3) Finally, it is indisputable that, even in its traditional formulation as a 'secondary' rule of uncertain scope, the strict construction rule governing elements is more 'rule'-like than the 'standard' governing particulars. As long as this is understood, the central thesis of this article - that an unreflective preference for rule-like adjudication led to pervasive substantive error in *Yap Sing Hock* - remains unaffected.

not to be put in peril upon an ambiguity, however much or little the Act appeals to the predilection of the court.'[30]

Like most rules, this one creates firm guidelines in order to influence behaviour prospectively - in this case, the behaviour of legislators and prosecutors. The former are told, in effect, that they must make their statutory intention clear; the latter that there should be a 'realistic prospect'[31] of establishing the elements of the statutory offence before the charge is issued. Dismissal of borderline cases is the harsh sanction which the prosecution and, in a larger sense, society must pay for transgressing the guidelines.

While the rule as to elements enables citizens to order their affairs so as to avoid entanglement in the web of the criminal law, the standard governing particulars allows those already ensnared to focus their legal resources on a few fairly specific factual allegations, thus lowering the cost of mounting an effective defence.[32]

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[30]*Liew Saih Wah* v *Public Prosecutor* [1968] 2 All ER 738 at p 741 (quoting *London and North-Eastern Railway Co* v *Berriman* [1946] 1 All ER 255 at p 270; [1946] AC 278 at pp 313-14 (per Lord Simonds)). Glanville Williams has put the point in similar fashion:

> Suppose [your lawyer told you] that he thought [your] conduct did not fall within [a penal] statute, but that there was some possibility that a court might hold otherwise? Are we to say that [you] must refrain not only from acts clearly forbidden by statute but also from the wider class of acts that the courts may possibly (but not certainly or even probably) stretch the statute to include? Is there not a public interest that laws restricting liberty should be drafted as precisely as possible and interpreted without bias?

G Williams, "Statute Interpretation, Prostitution and the Rule of Law" in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981) at p 80 (prostitute who solicited from balcony and window overlooking street should not have been convicted under statute forbidding soliciting '*in* a street or public place')(emphasis added).

[31]Crown Prosecution Service Code of Conduct para 4 (quoted in J Sprack, *Emmins on Criminal Procedure* (5th ed 1992) para 3.3.1. at p 17).

[32]Professor Mimi Kamariah Majid has explained that

> [a]s long ago as 1842, it was decided that:
>
> > If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged and may be prepared to answer the charge in the best way.
>
> The charge must also convey to the suspected person with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself.

"Administration of Criminal Justice" in *Survey of Malaysian Law 1984* (1985) at p 15 (quoting *Lim Beh* v *Opium Farmer* (1842) 3 Ky 10 at p 12) (footnotes omitted).

Similarly, in the United States, Constitutional due process requires that an indictment (1) contain the elements of the offence intended to be charged, (2) provide sufficient additional

The standard as to particulars is primarily retrospective in effect: it allows the court to 'rescue' the prosecution by permitting amendments to the charges or by overlooking variances between the particulars and the proof where doing so serves the interests of justice. For reasons discussed below, however, giving the court that flexibility ultimately serves the fundamental policy of 'fair notice' to the accused better than a harsh rule would.

D. Particulars: Why a Standard, Not a Rule?

1. Particulars as a Form of Criminal Discovery

Fair notice provides a reasonably complete justification for the rule regarding statutory elements. Clearly, the *ex post* criminalisation of conduct is so obnoxious to liberty that it simply should not be permitted. Fair notice is a less obvious justification for the standard governing particulars, however, because it fails to explain the limited degree of notice furnished by criminal charges. For example, there is far less pre-trial discovery in criminal trials, where liberty is at stake, than in civil trials; and for the most part such discovery as exists lies within the sole discretion of the trial judge.[33]

The reasoning behind this, although sometimes criticised,[34] has been summarised as follows:

> Traditionally, the narrow scope of discovery in criminal litigation is justified by three considerations which are said to be peculiar to criminal law. First, there has been a fear that broad disclosure of the essentials of the prosecution's case would result in perjury and manufactured evidence. Second, it is supposed that revealing the identity of confidential government informants would create the opportunity for intimidation of prospective witnesses and would

particulars to apprise the defendant of the allegations he must be prepared to meet, and (3) reveal enough about the alleged crime to enable him to plead 'double jeopardy' in case any other proceedings are taken against him for the same offence. *Hamling* v *US* (1974) 418 US 87 at p 117; *Russell* v *US* (1962) 369 US at pp 763-64.

[33]See Winslow, "Discovery in Criminal Cases: Disclosure by the Prosecution in Singapore and Malaysia" (1989) 31 *Mal L Rev* 1. See also n 52, *infra*.

[34]See Winslow, *ibid*. See also US Federal Rule of Criminal Procedure 16, 1966 amendment, advisory committee's note (citing numerous law review articles 'most of which ha[ve] been in favour of increasing the range of permissible discovery' in criminal trials).

> discourage the giving of information to the government. Finally, it is argued that since the self-incrimination privilege would effectively block any attempts to discover from the defendant, he would retain the opportunity to surprise the prosecution whereas the state would be unable to obtain additional facts. This procedural advantage over the prosecution is thought to be undesirable in light of the defendant's existing advantages.[35]

The criminal charge therefore reflects an accommodation between 'fair notice' and the special policy concerns regarding perjury, witness intimidation and lopsided procedural advantage in criminal trials.

2. The Accuracy/Specificity Trade-Off

Although special policy concerns set an outer limit on criminal pre-trial disclosure, they only begin to define what 'fair notice' means in the context of particulars. Rather, it is the simple, human inability to predict precisely what will be proven at trial that sets the ultimate limit on the degree of fair notice which can be provided by criminal charges. Indeed, relative ease of prediction goes a long way toward explaining the disparate treatment of elements and particulars.

a. *Criminal Charges as 'Predictions'*

Both the rule regarding elements and the standard regarding particulars implement the 'fair notice' policy by holding the prosecution to a prediction - namely, its prediction as to which facts can be proven at trial. The 'rule' governs the prosecution's prediction of whether the bare elements will be proven at trial; the 'standard' governs the prosecution's prediction of whether the nonstatutory particulars alleged in the charge will be proven at trial.

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[35] "Developments in the Law - Discovery" (1961) 74 *Harv L Rev* 940 at p 1052 (1961); accord Traynor, "Ground Lost and Found in Criminal Discovery" (1964) 39 *NYU L Rev* 228 at pp 228-29.

As with any prediction, the more detail is demanded of the prosecutor in predicting the proof, the more likely the prediction is to be wrong in some respect.[36] Increasing specificity implies decreasing accuracy, and vice versa. This explains the characteristically vague language in which newspaper horoscopes are written - e.g.: 'Things are looking up for you in most of your endeavours.'

It is therefore much easier to predict whether the bare elements of the offence will be established than to predict whether the particulars alleged in the charge will be proven. Because a penal statute is written before the occurrence of the facts to which it will be applied, it is necessarily couched in rather general terms. Accordingly, it is relatively easy for the prosecution to satisfy itself, while framing the charge, that every element of the crime can be established. Balancing this low burden on the prosecution against the very high reputational, emotional and financial costs to the defendant of being falsely accused, the scales tip strongly in favour of holding the prosecution to a strict interpretation of the statutory elements recited in the charge rather than allowing it to 'patch up' its case *ex post* by obtaining an expansive judicial interpretation (which, in our common law world, would also make new law).

In contrast, the task of drafting adequate criminal charges is a far more subtle and demanding one which involves a more detailed prediction. Particulars describe facts which came into existence after the statute was drafted and which constitute a specific violation of that statute. If the charge is to recite particulars, the legal standard governing the prosecution's prediction must be flexible enough to take into account the inevitable trade-off between specificity and accuracy.

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[36]Writers in the tort field have observed that a potential accident becomes less and less 'foreseeable' under the negligence standard as its description becomes more and more detailed. This trade-off between specificity and foreseeability involves a phenomenon known to statisticians as 'the paradox of continuous probability distributions': namely, that as the number of attributes by which a possible future event is described goes up, the probability of that precise event occurring goes down, eventually reaching zero once the event is 'perfectly' specified. Rizzo, "Law Amid Flux: The Economics of Negligence and Strict Liability in Tort" (1980) 9 *J Legal Stud* 291 at pp 304-05; P Atiyah, *Accidents, Compensation and the Law* (3d ed 1980) at pp 49-50 ('An event may be said to be more or less foreseeable according to the detail in which the event is described'). Similarly, the 'foreseeability' of the precise manner in which a statutory element will be established at trial declines to zero at the point of complete specificity.

b. *Historical Evidence Regarding the Trade-Off*

History confirms this intuition regarding the accuracy/specificity trade-off. Until the late nineteenth century, an English common law doctrine known as the 'requirement of special venue' required that 'every fact, that is every fact which formed an ingredient in the offence, had to be alleged to [have] be[en] done at a particular place and time'.[37] Other criminal pleading rules then in force required, for example, that a murder indictment 'set out in minute detail all the circumstances of the crime'[38] and that certain words be chosen with exquisite care:

> As an illustration, written instruments had to be set out verbatim, and chattels had to be described correctly. If a man were charged with stealing a sheep, that would be held to be a living sheep and not the dead body of a sheep. A boot must not be called a shoe, and money originally had to be described as so many pieces of the current gold or silver or copper coin of the realm called sovereigns, shillings, or pence, as the case may be.[39]

These rules might be viewed as imposing a requirement of 'near-perfect specificity'.[40] Of course, the inevitable result was that the particulars often failed to be proven:

> The effect of the two rules that an indictment must contain certain averments [i.e., near-perfect specificity], and that each averment must be proved as laid [i.e., near-perfect accuracy], was . . . to introduce into the administration of justice an element of arbitrary uncertainty not unlike that which the Roman augurs introduced into Roman public affairs by their supposed knowledge of the omens.[41]

In order to avoid the invalidation of charges due to inaccuracy, it became necessary to plead a multiplicity of counts describing the crime in every conceivable way. Indictments became voluminous and hyper-technical: the 1844 indictment in *O'Connell's*

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[37] J Stephen, 1 *A History of the Criminal Law of England* (1883) at p 281.

[38] *Ibid* at p 287.

[39] *Ibid* at p 282.

[40] 'Perfect' specificity would require disclosure not only of every 'material' fact but of every fact known to the prosecution. The law has never required this, as we have already seen.

[41] Stephen, *supra* n 37 at p 283.

case 'was said to have been one hundred yards long'.[42] Of a murder indictment, Sir James Stephen wrote:

> I have been informed that in the case of Daniel Good, who murdered a maidservant at Roehampton and burnt her body afterwards so as to leave the precise manner in which the crime was committed uncertain, the indictment contained nearly seventy counts, the last averring (which was no doubt true) that the woman was murdered by means to the said jurors unknown.[43]

Naturally, this sort of 'defensive pleading' is less than useless to a defendant. What good is a 100-yard-long indictment filled with wholly inaccurate specifics? Indeed, charges that are 'specific' but wrong could be as prejudicial to the defendant as charges that are completely non-specific.[44]

By the same token, if 'perfect accuracy' were required - as the Court in *Yap Sing Hock* evidently believed to be the case - then the criminal justice system would be left with only two unappealing choices: throw out most prosecutions, or relax the other constraint by permitting charges to plead with only a bare minimum of specificity. The logical limit would be a charge that furnished nothing more than the defendant's name and the section number of the statute he allegedly violated. Again, this would undermine the whole point of demanding 'perfect accuracy' by eliminating the facts required to be accurate. What good is perfect accuracy when the charge contains no facts?

E. Summary: The Standard Governing Particulars

We can now attempt to summarise the distinctive law of particulars. In regulating the drafting of particulars, the law should strive to effectuate the policy of 'fair notice' by giving the defendant

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[42]Sikk, "Repairing Defective Charges of Summary Offences" (1983) 7 *U Tasmania L Rev* 233 at p 235 (citing C Kenny, *Outlines of Criminal Law* (15th ed 1936) at p 547).

[43]Stephen, *supra* n 37 at p 287 n 1. Sir Stephen added: "It must be remembered in reference to this that the clerks of assize and other officers who drew indictments were paid by fees, and that each count in an indictment was charged for separately." *Ibid.*

[44]Cf Rose, *supra* n 27 at p 597 ('the overly precise contract may wind up being just as opaque as - and perhaps even more arbitrary than - the one that leaves adjustment to the contingencies of future relations') (footnote omitted).

enough notice to avoid 'prosecution by ambush' but not so much as to facilitate perjury or witness intimidation or confer an unfair procedural advantage upon him. The appropriate degree of notice is roughly achieved by adjusting the inversely-related values of specificity and accuracy of particulars while denying the defendant the right to complete disclosure.

Does the law actually impose a standard such as the one described above? More or less, it does.[45] Thus, as to specificity, the courts advise prosecutors not to depart unnecessarily from the words of the underlying penal statute,[46] but they also caution that those words by themselves are not sufficiently specific: the charge must 'descend to particulars'.[47] A 'reasonably sufficient' amount of detail must be provided in order to facilitate preparation of the defence,[48] but prosecutors should not include gratuitous de-

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[45]See generally Mimi Kamariah Majid, "Administration of Criminal Justice, 1972-1991" in *Developments in Malaysian Law: Essays to Commemorate the Twentieth Anniversary of the Faculty of Law, University of Malaya* (1992) at pp 104-108.

[46]See 11(2) *Halsbury's Laws of England* (4th ed reissue 1990) para 929 at p 791 ('The courts have emphasised the desirability in settling indictments of following the words of the statute creating the offence and not departing from them when it is unnecessary to do so') (footnote omitted). Accord *Public Prosecutor* v *Syed Bakri* (1955) MLJ xvii; *Abdul Salam* v *Public Prosecutor* (1955) MLJ 116 at p 117; *Public Prosecutor* v *Low Ah Sang* (1962) MLJ 13 at p 15; *Public Prosecutor* v *Margarita B Cruz* [1988] 1 MLJ 539. But see *Wong Poh Ching* v *Public Prosecutor* (1957) MLJ 160 (upholding charge which was 'forensic monstrosity' inasmuch as it tracked language from statute other than those allegedly violated).

[47]*Russell* v *US* (1962) 369 US 749 at p 756 (quoting *US* v *Cruikshank* (1876) 92 US 542 at p 558); *Lim Gais Khee* v *Reg* (1959) MLJ 206 at p 207 ('it is not sufficient, as a general rule, merely to copy out the words of the [statutory] section'). But see *Loh Thye Choon* v *Public Prosecutor* [1967] 2 MLJ 252 (not necessary to particularise charge of negligent driving).

[48]Criminal Procedure Code s 153(i) requires the charge to 'contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged'. S 154 requires the inclusion of further information regarding 'the manner in which the alleged offence was committed' where necessary to 'give the accused sufficient notice of the matter with which he was charged'. See *Yoh Meng* v *Public Prosecutor* [1970] 1 MLJ 14 (charge of sedition under Internal Security Act invalid for failure to specify which statutory 'seditious tendency' was implicated). See also the English Indictments Act 1915 (5 & 6 Geo 5 c 90) s 3(1) (reprinted in 12 *Halsbury's Statutes of England and Wales* (4th ed 1989 reissue) 185 at p 186 (indictment is 'sufficient' if it contains 'a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge'); US Federal Rule of Criminal Procedure 7(c)(1) ('The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offence charged . . . It may be alleged in a

tails which they may not be able to prove[49] or which do more to obscure the case than to reveal its essentials.[50] With few exceptions,[51] the prosecution has no obligation to disclose the precise evidence by which it plans to establish the material facts pled in the charge.[52]

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single count that the means by which the defendant committed the offence are unknown or that the defendant committed it by one or more specified means').

[49]*Re Lim Yong Eng* (1956) MLJ 79 at p 79 ('[i]n most cases of assisting and carrying on of a public lottery . . . the date is quite sufficient, without specifying the exact time, to make it clear to the accused what charge he has to meet'); *Public Prosecutor* v *Ahmad bin Din* (1956) MLJ 235 at p 236 (charge should not have alleged defendant drove 'in a negligent manner, to wit, by knocking into a cyclist', as this act might not be proven negligent). See also *Ho Huan Chong* v *Public Prosecutor* [1980] 2 MLJ 289 at pp 289-90 (prosecution should not state precise quantity of illegal drugs in charge because estimates are often too high and result in denial of bail). Difficulty of proof is also the probable rationale behind Criminal Procedure Code s 153(ii) (charge of criminal breach of trust need not 'specify[] particular items [misappropriated] or exact dates').

[50]*Ang Chaing Lock* v *Public Prosecutor* [1968] 1 MLJ 207 at p 208 ('it was . . . wrong in a charge of giving false evidence to attach the whole trial record wherein the false evidence was alleged to have been given').

[51]See Winslow, *supra* n 33 at pp 39-40 (accused in Malaysia has right to First Information Reports and his own cautioned and uncautioned statements). See also *Oh Keng Seng* v *Public Prosecutor* [1980] 2 MLJ 244 at p 246 (Internal Security Act sedition provisions required charge to indicate allegedly seditious passage of speech).

[52]As stated by Hashim Yeop A Sani SCJ in *Public Prosecutor* v *Raymond Chia Kim Chwee* [1985] 2 MLJ 436 at p 439:

> The entitlement of the accused under section 51 of the Criminal Procedure Code to any document or copies of document[s] or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as the requirement is satisfied the law is satisfied.

Accord *Public Prosecutor* v *Teoh Choon Teck* [1963] MLJ 34 at p 35 (accused person not entitled to know 'the means by which the prosecution proposes to prove the facts alleged in the charge'). Even in the United States, where the prosecution has a constitutional obligation under the rule in *Brady* v *Maryland* ((1963) 373 US 83) to volunteer to the accused any evidence which 'creates a reasonable doubt that did not otherwise exist' (*United States* v *Agurs* (1976) 427 US 97 at p 112), the Supreme Court has consistently 'rejected the suggestion that the prosecutor has a constitutional duty to deliver his entire file to defense counsel'. *Ibid* at 111. Accord *Arizona* v *Youngblood* (1988) 488 US 51 at p 55; *Weatherford* v *Bursey* (1977) 429 US 545 at p 559 (there is 'no general constitutional right to discovery in a criminal case'). Although US Federal Rules of Criminal Procedure 15 (depositions) and 16 (discovery and inspection) confer a limited non-constitutional right to pre-trial discovery in federal criminal trials, such discovery nevertheless remains far less extensive than in civil trials. See, e.g., *US* v *Carrigan* (10th Cir 1986) 804 F 2d 599 at pp 602-03 (observing that Rule 15 'does not contemplate use of depositions of adverse witnesses as discovery tools in criminal cases' and Rule 16 does not require pre-trial disclosure of names and addresses of witnesses).

As to accuracy, a defect in the charge is not material unless it 'in fact misled' the defendant[53] (or, to use another common formulation, unless it 'prejudiced or embarrassed' him).[54] The court can remedy the defect by an appropriate amendment at any point in the trial[55] or even on appeal,[56] or it may disregard the defect so long as there is no 'failure of justice' (meaning, again, no 'prejudice or embarrassment').[57] To summarise the net effect of these doctrines: indictments must be reasonably spe-

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[53]Criminal Procedure Code s 156 states:

> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was *in fact misled* by such error or omission.

(Emphasis added). See *Public Prosecutor* v *Oie Hee Koi* [1968] 1 MLJ 148 at p 155 (misdescription of detonators as 'ammunition' rather than 'explosives' in charges preferred under Internal Security Act immaterial under s 156); *Law Kiat Lang* v *Public Prosecutor* [1968] 1 MLJ 215 at p 216 (wrong date immaterial unless an essential part of the offence); *Ho Ming Siang* v *Public Prosecutor* [1966] 1 MLJ 252 (same). Accord *US* v *Miller* (1985) 471 US 130 at pp 136-37 ('[a] part of the indictment unnecessary to and independent of the offence proved may normally be treated as "a useless averment" that "may be ignored"') (quoting *Ford* v *US* (1927) 273 US 593 at p 602).

[54]As Lord Bridge of Harwich stated in *Regina* v *Ayres* [1984] AC 447 at pp 460-61:

> [I]f the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed . . . must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have *prejudiced or embarrased* the defendant.

(Emphasis added). See also J Sprack, *supra* n 31 para 6.8 at p 75 ('[E]ven a serious mistake [in the charge] will not automatically result in a successful appeal . . .There is a strong tendency for their Lordships to hold that there has been no . . . *prejudice*' to the defendant) (emphasis added).

[55]See Criminal Procedure Code ss 158 and 173(h).

[56]See *Public Prosecutor* v *Yeoh Teck Chye* [1981] 2 MLJ 176 at p 180 (amending charges on appeal pursuant to Courts of Judicature Act s 60(1) where it would not 'occasion any injustice' because the defence offered at trial 'if believed would be a complete defence to . . . the charges as amended by us').

[57]*Wee Hui Hoo* v *Public Prosecutor* [1987] 1 MLJ 498 at p 500 (construing Criminal Procedure Code s 422); *Pie bin Chin* v *Public Prosecutor* [1985] 1 MLJ 234 at p 237 (same).

Criminal Procedure Code s 167, which permits a conviction to be obtained on a charge which could have been preferred, given the facts known prior to trial, but was not, would appear to create ample opportunities for 'prejudice or embarrass[ment]'. Fortunately, its application is said to be subject to the limitation that 'the evidence by the defence would have been substantially similar had the offence been placed in a charge'. In other words, s 167 can be invoked only if 'the accused will not be prejudiced'. Mimi Kamariah Majid, "Administration of Criminal Justice 1983" in *Survey of Malaysian Law 1983* (1984) at pp 18-19.

cific so as to give the defendant fair notice of what he is being accused of and allow him to prepare his defence and be sufficiently accurate so as not to 'in fact mislead' him; but the prosecution is under no obligation to plead its supporting evidence. The determination of what is 'reasonable' and 'sufficient' is an inherently discretionary one left for the court to resolve on a case-by-case basis in a manner that creates little in the way of generally applicable precedent.

Yap Sing Hock's 'rule' of strict construction ignores the accumulated wisdom of the existing standards by imposing a regime of near-perfect accuracy on the particulars alleged in criminal charges. If taken seriously, the rule it propounds will have one of two effects: (1) many desirable convictions will be thrown out due to variances which inevitably arise between the proof and the particulars; or (2) the courts will be forced to reduce the amount of specificity required in criminal charges, thus undermining the 'fair notice' policy the rule evidently was intended to serve. The rule therefore displays an insensitivity to its own underlying policy rationale which is characteristic of rules in general. Indeed, it is worse than most rules in this respect because it is difficult to identify a 'core' of cases in which the rule will serve its own policy effectively (unlike, for instance, a speed limit or minimum voting age).

III. THE SUPREME COURT'S 'RULE FETISH'

In view of the manifest impracticality of the 'rule' announced in *Yap Sing Hock*, the question naturally arises: How could the Court have gone so far wrong? The balance of this article will attempt to explain *Yap Sing Hock* as resulting from the Court's 'rule fetish' - that is, from its dogmatic preference for 'rules' over 'standards' in criminal law.

A. The 'Pseudo-Director Test' as a 'Standard'

Assume for the moment that the Court was motivated by a strong but misguided belief that 'standards', due to their inherent vagueness, are so repugnant to the policy of 'fair notice' that they should play no role whatsoever in the administration of criminal justice. Such a belief would explain many things. First, it would

go a long way toward explaining how the Court managed to convince itself, in the face of contrary authority, that particulars must be strictly construed in favour of liberty. It was this misperception that lent *Dean* v *Hiesler* an undeserved relevance; and once that case was accepted as persuasive, it automatically followed that the Companies Act definition encompassing 'pseudo-directors' had to be excluded from consideration when construing the Penal Code charges.

Even without *Dean* v *Hiesler*, the Court's prejudice against standards would have made the 'pseudo-director' definition inherently unattractive. After all, the 'pseudo-director' definition is itself a rather vague standard calling for an individualised assessment of the facts of the case and entailing a great deal of judicial discretion. In contrast, the 'director in fact' test approved in *Dean* v *Hiesler* simply requires the Court to ascertain whether or not the proper appointment procedures have been followed, a simple 'yes or no' determination. Therefore, the Court probably felt that the concept of 'pseudo-directors' should be avoided in construing a criminal charge, except where the legislature had directly required its use - i.e., in prosecutions under the Companies Act itself.[58]

This aversion to the 'pseudo-directors' standard, however, ignores the plain fact that the word 'agent' appearing in Penal Code section 409 and in the charges preferred thereunder is if anything even more vague and sweeping. Indeed, the prosecution's invocation of Companies Act section 4 should be viewed as an attempt to limit the potentially vast scope of the word 'agent' to 'an agent who behaves like a director'. It is unlikely that any legal challenge could have been raised had the prosecution used only the vague term 'agent' in framing the charges. Clearly the appellants were 'agents' of Lien Hoe and thus within the scope of the Penal Code, whether regarded as directors or pseudo-directors.[59] Why, then, should the prosecution be penalised for

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[58]See Scalia, *supra* n 2 at p 1183 (recognising that the legislature sometimes requires the courts to apply a standard).

[59]A director is, in effect, an 'agent' hired by the shareholders to hire and discipline subordinate agents called 'managers'. Fama, "Agency Problems and the Theory of the Firm" reprinted in R Posner & K Scott, *Economics of Corporation Law and Securities Regulation* (1980) at pp 59-60; accord *Yap Sing Hock*, *supra* n 1 at p 724 ('a director [is] normally regarded *ipso facto* as an agent of the company').

favouring the defence with a bit more detail? Apparently, none of these considerations suggested themselves to the Court, in part because its 'rule' of strict construction of particulars made the underlying statutory language irrelevant.[60]

B. A Clash of Rules: The Companies Act Convictions

Moreover, the rigidity of the Court's 'rule fetish' made it particularly difficult for it to rationalise upholding the Companies Act convictions. Here the absolutism of the Court's strict construction rule ran up against an even more absolute rule: that of deference to the legislature. By including pseudo-directors in section 4 of the Act, the legislature had clearly expressed its intention as to the scope of that Act. Therefore it was not open to the Court to take its strict construction rule to the logical limit and overturn the Companies Act convictions. Absent the rule of deference, the Court might have held (for example) that the Companies Act itself appears to create two different 'tests' for whether someone is a 'director' - that contained in section 4 (encompassing pseudo-directors) and that implied by its procedural formalities (encompassing only what Viscount Caldecote called 'directors in fact') - and that in criminal proceedings under the Act, where liberty is at stake, only the more stringent test should be adopted.[61] But under the rule of deference, the Court felt it had no choice but to throw up its hands and accept the apparent contradiction as the price of rule-bound adjudication:

> This could be regarded as a curious result by some quarters . . . but such result has to be so reached when a court has to give force to any fundamental and important rule of law in the administration of criminal justice.[62]

Whether or not the appellants were directors, the High Court found that an '*ad hoc* agency' had existed with respect to the challenged transactions, thus bringing the appellants within the scope of Penal Code s 409. [1991] 2 MLJ 334 at p 341.

[60]See n 29, *supra*.

[61]This interpretation still would have left a role for s 4 in civil actions brought under the Act.

[62]*Supra* n 1 at p 732.

The necessary implication is that the Court's decision to uphold the Companies Act convictions was compelled by the rule of deference despite the opposing pull of the Court's own strict construction rule. Thus, the clash of absolutisms left a yawning gap between the Court's stated inclinations and the legislative will.[63] A proper 'standard', on the other hand, would have permitted the use of any definition of 'director' which would not have 'in fact misled' the appellants - including the Companies Act definition - and would have avoided this unnecessary collision with the legislature.

This is not merely an aesthetic matter. One measure of the success of a judicial interpretation - and one which I find compelling - is whether it comprises 'the best interpretation of our legal practices as a whole, that it [tells] a narrative story that makes of these practices the best they can be'.[64] Thus, the interpretation should exhibit some degree of 'fit' with existing authority even if it is not completely constrained by that authority. Although it is not always possible to make a common law ruling 'fit' with existing statutes, an interpretation that did so would, all other things being equal, be preferable to one that did not. If Malaysian legal practice (as reflected in the Companies Act) permits pseudo-directors to be treated as directors, an interpretation of the Penal Code charges that accorded with that practice and made of it 'the best it can be' would have been preferable to one that implicitly condemns that practice.

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[63]The 'gap' does not appear to have been compelled by any special legislative purpose underlying the Companies Act definition. The closest the Court came to articulating such a purpose was its remark that the legislature had 'modified' the definition of 'director' in *s* 4 'apparently to avoid any evasion of compliance with . . . the Act' [1992] 2 MLJ 714 at p 732. Since the legislature doubtless wished to 'avoid any evasion of compliance' with the Penal Code as well (what statute is meant to be evaded?), why not 'carry over' the s 4 definition to interpret the Penal Code charges? The fact that the Penal Code contains no similar language is of course irrelevant, since it was the charges, not the Code, that required interpretation.

[64]R Dworkin, *Law's Empire* (1986) at p vii. Cf Sullivan, *supra* n 27 at pp 67-69 (standards require judges to explain and justify their holdings, while rules undermine judicial deliberation by allowing the judge to say 'sorry, my hands are tied').

C. Rules, Standards and the Corporate Veil

The reversal of the Lien Hoe-related Penal Code convictions is one manifestation of the pervasive rule fetish in *Yap Sing Hock*, albeit the most important one. Another such manifestation - and one less easily referable to any underlying policy rationale - is to be found in the Court's *dicta* on 'lifting the corporate veil'.

Although the holdings previously analysed would have sufficed to dispose of the appeal, the Court, *ex obiter*, speculated upon the question whether the corporate veil ever should be lifted in order to preclude the criminal conviction under Penal Code section 409 of a director who misappropriates funds from a company of which he is the sole shareholder.[65] Put another way, can a director and sole shareholder ever be regarded as the company's 'mind' so that in harming the company he harms only himself?

This question pitted the famous 'rule' in *Salomon's* case[66] that the corporate form is not to be disregarded even as regards a sole-shareholder company against the 'standard' contained in the doctrine of lifting the corporate veil.[67] Not surprisingly, the

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[65]In addition to the fact that its discussion of lifting the corporate veil amounted to nothing more than inconclusive *dicta*, it is not even clear that the Supreme Court had jurisdiction to consider the issue. The case reached the Supreme Court by way of s 66(1) of the Courts of Judicature Act 1964 (Act 91) (see *supra* n 1 at p 720), which states in relevant part:

> When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court, the Supreme Court . . . may on the application of any party . . . grant leave for the determination by itself of any question of law of public interest which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal.

Since the High Court's judgment makes no reference whatsoever to lifting the corporate veil, it would appear that the issue had neither 'arisen in the course of the appeal' from the Sessions Court nor 'affected the event of the appeal' in the High Court. Accordingly, the Supreme Court's treatment of the matter defies explanation.

[66]*Salomon* v *A Salomon & Co Ltd* [1897] AC 22; [1895-9] All ER Rep 33.

[67]The Court observed that Malaysian law recognises five instances in which the corporate veil can be lifted: (1) where required by statute; (2) to detect trading with the enemy; (3) to ascertain tax liability or detect tax evasion; (4) to foil some illegal or improper course of conduct against a third party; and (5) for equitable reasons, a category which is 'never closed'. *Supra* n 1 at p 726. In Malaysia as elsewhere, the doctrine is a 'standard' which represents an equitable departure from the otherwise iron-clad 'rule' in *Salomon's* case:

> The principle of separate corporate personality as established by *Salomon's* case and emphatically reasserted in later cases . . . forms the corner-stone of company law. The authority of these cases is unshakeable; and yet exceptionally in some instances the law *is* prepared to disregard or look behind the corporate personality and have regard to the 'realities' of the situation.

Court took the view that the 'rule' always prevails unless established precedent or legislation commands otherwise:

> The consent or knowledge of a sole shareholder and director of even a one-man company can *not* be treated as the knowledge and consent of the company itself when the company is a victim of fraud or of any illegal deprivation of its assets. . . . We are prepared to say without hesitation that the said primary principle applies *inviolably* in cases in which a company is a victim of fraud or wrongful deprivation and in criminal offences against the company.[68]

Once again, the Court evinced a willingness to over-extend a firm rule to cases in which it would serve no discernible purpose. In its treatment of the 'pseudo-director' issue, one can at least postulate an underlying commitment to the policy of 'fair notice'. Here, however, no policy rationale is apparent. Why was the Court willing to speak so categorically without regard to the possibility that its words might founder on some future set of unanticipated facts? For example, what if the facts of some future case disclose that no third parties, such as trade creditors or debenture holders, have suffered injury?[69] What harm is there in robbing one's own piggy bank when no one else has any claim on it? And why should society wish to expend resources on prosecuting such a 'crime'?

The Court put forward essentially three reasons for its position:

L Sealy, *Cases and Materials in Company Law* (5th ed 1992) at p 46 (emphasis in original; footnotes omitted).

[68]*Supra* n 1 at p 729 (first emphasis in original, second added). However, the Court cautioned that the result in each case will turn on the presence or absence of *mens rea* as defined in the relevant Penal Code provisions. *Ibid* at pp 729-31. The Court did acknowledge that the first appellant's sole ownership of Lien Hoe and of Holdings by relation would have been a factor in mitigation of the sentence had the Penal Code charges been upheld. *Supra* n 1 at pp 732-33.

[69]Richard Posner argues that the corporate veil should be lifted in order to impose civil liability on a sole shareholder only where separate incorporation misleads creditors into thinking that a company has more assets with which to satisfy their claims than it actually has. R Posner, *supra* n 27 s 14.5 at pp 406-07. By the same token, if no creditors have been misled, why should the veil not be lifted in order to preclude criminal prosecution of a sole shareholder?

(1) It adopted the reasoning of an English case, *Attorney General's Reference (No. 2 of 1982)*[70] without taking note of the fact that the company funds stolen in that case were owed to various lending institutions.[71]

(2) It apparently viewed the *mens rea* requirement of the criminal breach of trust statute[72] as inevitably and always encompassing the situation under discussion[73] - a needlessly broad, prospective ruling of the sort favoured by 'rules' enthusiasts, who tend to disdain the slow, incremental tradition of common law decision-making.[74]

(3) Perhaps most significantly, the Court appeared to believe that any further weakening of the 'primary principle' in *Salomon's* case would wreak economic havoc:

> [I]f the primary principle were not to apply to criminal cases under the Penal Code . . ., it would mean that the primary principle would be replaced by a good deal of awesome uncertainty of great magnitude; awesome because of the tremendous number of limited liability companies nowadays playing such a predominant role in the commercial life of any country.[75]

The reasoning is superficially plausible, but ultimately unpersuasive. The Court had already acknowledged that liability for criminal breach of trust in such circumstances would 'depend on the facts of the surrounding circumstances of each particular case' because of the need to prove the statutory element of *mens rea*.[76]

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[70][1984] 2 All ER 216.

[71]*Ibid* at p 219.

[72]Penal Code s 405 requires that the misappropriation be done 'dishonestly' within the meaning of Penal Code s 73. See n 5, *supra*.

[73]*Supra* n 1 at pp 730-31.

[74]See Scalia, *supra* n 2 at pp 1178-79 ('rule'-bound adjudication favours broad judicial pronouncements that provide guidelines for future conduct; 'standard'-based adjudication favours narrow judgments that create as little precedent as possible).

[75]*Supra* n 1 at p 727.

[76]*Ibid* at p 729. The Court's observation on this point should not be taken as an implicit acknowledgement of 'standards'; rather, it signalled adherence to the 'rule' that every statutory element must be proven.

If each case already entails an inquiry into all the surrounding circumstances, the chief advantages of adopting a 'rule' against piercing the corporate veil - i.e., ease of administration and avoidance of individualised adjudication - are substantially undermined.

The Court's *dicta* on lifting the corporate veil provide striking confirmation that *Yap Sing Hock* is a decision pervasively driven by formal as opposed to substantive commitments. Note that, unlike the reversal of the Lien Hoe-related Penal Code convictions, which was substantively 'pro-defendant', the Court's statements on lifting the veil are substantively 'pro-prosecution'. Yet, the two are consistent on the formal level in their insistence on rule-bound adjudication.

IV. CONCLUSION

The overall consistency of approach in *Yap Sing Hock* suggests that the Court, consciously or unconsciously, was following what might be called a 'meta-rule' which forbade the adoption of 'standards' in the criminal law context (except where the legislature commands otherwise). Like most rules, the meta-rule had the virtue of making the Court's formal choices between rules and standards much easier - i.e., adopt no standards - but only by sacrificing fidelity to any underlying policy rationale.

Ironically, the Court's rule fetish undermined its substantive commitment to the policy of 'fair notice'. The practical effect of *Yap Sing Hock* is to create perverse incentives for prosecutors to withhold valuable information from defendants and for courts to adjust the standard of specificity downward to the most minimal level permitted by law. The big losers will be criminal defendants and in a larger sense, all who value the liberty interest embodied in the right to be adequately informed of alleged offences.

To the extent that the 'meta-rule against standards' in *Yap Sing Hock* was meant to bolster respect for the 'rule of law' in some general sense, it failed in this respect as well.[77] The case

[77]See Scalia, *supra* n 2 at p 1178 ('rules' enhance public respect for the legal system because they make no exceptions and are therefore perceived as treating people equally).

actually erodes the legitimacy of the criminal justice system, however imperceptibly, by fostering the unfortunate impression that courts sometimes will allow a wrongdoer to profit from his own malfeasance. After all, the immediate result in the case was to reward the appellants' non-compliance with the Companies Act formalities by quashing their convictions for criminal breach of trust.[78]

Whether or not the decision in *Yap Sing Hock* has much of an impact upon criminal justice in Malaysia,[79] its deficiencies serve as a warning to judges that form should be the servant of substance, not its master, and that insisting on rules is no substitute for understanding them.

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[78]The practical result of the Court's rulings, taken together, was to reverse the appellants' three-year prison sentences under the Penal Code and leave standing a mere RM2,500 fine under the Companies Act.

[79]For a practical proposal for limiting the damage done by the case, see Hirsch, "*Yap Sing Hock* v *Public Prosecutor*: Time for a Quick and Decent Burial" [1993] 3 MLJ (forthcoming, November 1993).