

A Review on Irrevocable Power of Attorney: Malaysia and United Kingdom Compared

Nurazlina Abdul Raof, Nuraisyah Chua Abdullah

Faculty of Law, Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia

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Abstract: An irrevocable power of attorney is an exception to the general rule that a power of attorney is revocable. It is applicable if granted in the interest of a donee or a third party for instance, where the donor owes an obligation to the donee. Many statutes, including Malaysia provide for the irrevocability of powers of attorney where termination is only possible with the donee's consent. It will not be revoked by the death, incapacity or bankruptcy of the donor. One of the issues relating to the irrevocable powers of attorney is its practicality, i.e. to what extent that it will be strictly complied with. As an example, whether the donor or his successors-in-title, in the event of the death or incapacity of the donor, will comply with the arrangement. Using the doctrinal approach, this paper examines the concept of the irrevocable powers of attorney under the POA Act and analyses its application in Malaysia in comparison with the United Kingdom ("UK") as the POA Act originates from the UK. This paper finds that irrevocable powers of attorneys are indeed practical but only when the donee's interest is still subsisting, to protect the interest of the donee and/or purchaser.

1 INTRODUCTION

A power of attorney is a written delegation of powers to another to act (*Sidambaram a/l Torosamy v Lok Bee Yeong* (MLJU 1828, 2016)). It is an instrument normally resorted to by men in order to ensure matters are being attended to when they do not have the time, knowledge or expertise to perform themselves. Considerable time and energy can undeniably also be saved in this way. It is said that the law relating to powers of attorney forms part of the general law of agency (Charles Lim Aeng Cheng *et al.*, 2009). Under the agency concept, an agent is a person who acts for a principal whether by express or implied consent. Under the power of attorney, the extent of the delegated power and authority of the agent will be clearly stipulated. It authorises the agent to act for the principal, who will be liable to third parties, if the agent acts within the scope of his authority (S. Parmeswaran, 1999). When the power is given for a valuable consideration and expressed to be irrevocable, the power of attorney is protected from revocation by the principal without the concurrence of the agent, or by the death, disability or bankruptcy of the principal. The powers of attorney legislations in some jurisdictions, for instance, England, New

South Wales, Tasmania and Hong Kong provide for the irrevocability of particular types of power of attorney. West Malaysia also adopts a similar stance, as can be seen in Section 6 and 7 of the Powers of Attorney Act 1949. Section 6 provides for the irrevocable nature of power of attorney given for valuable consideration and expressed in the instruments creating the powers to be irrevocable. Until and unless the agent or donee concurs to terminate the power of attorney, the power of attorney continues to subsist. Under Section 7, the power of attorney is irrevocable for a fixed time and can either be given with or without consideration. An irrevocable power of attorney is neither determined by the death, marriage, mental disorder, unsoundness of mind or bankruptcy of the principal, nor, where the principal is a body corporate, by its winding up or dissolution. One of the relevant issues which concerns the irrevocable power of attorney is its practicality, namely to what extent that the irrevocable powers of attorney instrument will be strictly complied with. Under both Sections, the agent and the purchaser will not, at any time, be injuriously affected by the facts of the act or event which would, but for this clarification, give rise to a revocation (S. Parmeswaran, 1999). Most literatures discuss on the availability of irrevocability of powers of attorney

and there is lack of comprehensive discussion on the practicality of the irrevocability of powers of attorney in Malaysia which warrants for the discussion of this article.

2 MATERIALS AND METHODS

This paper adopts a doctrinal approach and seeks to examine the concept of the irrevocable powers of attorney under Sections 6 and 7 of the Powers of Attorney Act 1949 and analyses the extent of its application in West Malaysia in comparison with Section 4 of the United Kingdom (“UK”) Powers Of Attorney Act 1971 and Sections 126 and 127 of the UK Law of Property Act 1925. This comparison is made because Sections 6 and 7 appears to be modelled after Sections 126 and 127 of the UK Law of Property Act 1925 with slight modifications and the latter have since been replaced by the UK Powers Of Attorney Act 1971 as a result of a comprehensive review by the Law Commission for England and Wales pursuant to the Working Paper on Powers of Attorney (Working Paper No 11, June 1967) (Charles Lim Aeng Cheng *et al.*, 2009), where Section 4 (together with Section 5(3)) of the Powers of Attorney Act 1971 was enacted to replace Sections 126 and 127 of the UK Law of Property Act 1925 with modifications (Charles Lim Aeng Cheng *et al.*, 2009).

3 RESULTS AND DISCUSSION

3.1 Power of Attorney—Scope and Extent of Power

The Kuala Lumpur High Court in *Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors (Dato'Jeyaraj a/l V Ratnaswamy, intervener)* [2017] MLJU 2047 quoted the definition of power of attorney in the case of *Wee Tiang Peck v Teoh Poh Tin 1* (MLJ 446, 1995) where it was stated that a 'power of attorney' is defined as a formal instrument by which one person empowers another to represent him or act in his stead for certain purposes. Such instrument must be strictly construed according to well recognized rules. Once a power of attorney is created, the relationship of principal and agent arises between the donor and the donee of the power. In no case could the authority of the donee exceed the power of the donor to act on his own behalf. In all cases, the donee of the power owes the donor duties

of a fiduciary character, for example to keep accounts of all transactions that transpired and must also be prepared to produce them to the donor at all times, to disclose any conflict of interest and not to receive any secret commission or bribe. If a person is acting under the power of attorney, he should as a general rule, act in the name of the donor of the power and likewise if he is authorised to sue on the donor's behalf, the action should be brought in the donor's name. As regards the authority of the agent, it cannot exceed the limit of authority granted by the principal to the agent.

An attorney cannot question the actions of its principal. It is very clearly stated that the authority of the agent whether given by power of attorney, or informally, even if for consideration, and whether or not expressed to be irrevocable, is revocable without prejudice to the fact that such revocation may be wrongful as between principal and agent. An agent has no locus standi to take action against the principal save for instances of wrongful revocation of authority and even then the action is only for breach of contract (*Affluent Sdn Bhd v Sumathi K Appukuttan Pillai & Anor* 8 (CLJ 71, 2001). A Power of Attorney can be by a document by itself or Power of Attorney clause found in an agreement (*Kenanga Investment Bank Bhd v Swee Joo Bhd & Ors and another appeal* (MLJU 2095, 2017). A donor may choose to grant a revocable or irrevocable power of attorney but should he desire to create an irrevocable power of attorney that desire should be expressly provided for within the deed itself (*Sidambaram a/l Torosamy v Lok Bee Yeong* (MLJU 1828, 2016).

3.2 Irrevocable Powers Of Attorney In West Malaysia

Section 6 and Section 7 of the Powers of Attorney Act 1949 are relevant when discussing irrevocable power of attorney. Section 6, which provides for the irrevocable nature of powers of attorney given for valuable consideration and expressed in the instruments creating the powers to be irrevocable, is modelled after the repealed Section 126 of the UK Law of Property Act 1925 (Charles Lim Aeng Cheng *et al.*, 2009). Section 7, which provides for the irrevocable nature of powers of attorney given for valuable consideration or not and expressed in the instruments creating the powers to be irrevocable for a fixed time, resembled the repealed Section 127 of the UK Law of Property Act 1925 except that the latter provides for the irrevocability of not more than one year. The irrevocability of the power of attorney exists in both Section 6 and Section 7, with few differences. In Section 6, the power of attorney must

be given for valuable consideration. This is not so under Section 7 as in that Section, the power of attorney can be with or without consideration. Further, the irrevocability of the power of attorney in Section 6 must be present at all times whereas the power of attorney must only be irrevocable for a specific timeframe pursuant to Section 7.

The special status of a power of attorney given as security, for valuable consideration and expressed to be irrevocable is sometimes also termed a power coupled with an interest or an irrevocable power (*Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor 1* (MLJ 486, 2011)). While the interest of the donee subsists, the donor cannot revoke the power without the donee's consent, and the power will continue in full force and effect notwithstanding events, which would otherwise cause the power to terminate. Authority coupled with an interest being irrevocable is where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, therefore such an authority is irrevocable.

The rationale for the principle that such an irrevocable authority is neither cancelled or revoked by the death, mental capacity or insolvency of the principal, nor, where the principal is a body corporate, by its winding up or dissolution rule is that what is in issue is a proprietary right, which once granted, is unaffected by loss of capacity of the grantor (Bowstead and Reynolds on Agency, 2006). Here, the agent uses the authority actually not for the benefit of the principal but also for his own benefit. His own interests are also paramount. Both parties have interests in the power of attorney. An example is a power given to a creditor to sell land and to retain the proceeds to repay himself (*Gausson v Morton* (1830) 10 B&C 731). As long as the interest of the agent subsists, the power of attorney will remain irrevocable. This in fact is to the benefit of the agent/donee and indeed different from the concept of agency in the normal sense, where the agent must act in the interests of the principal only, unless otherwise agreed (Bowstead and Reynolds on Agency, 2006). This is because an agent acting under a power of attorney is in a fiduciary relationship that imposes the obligations and duties of a trustee upon the attorney (Nasser Hamid and Pushpa Menon, 2013). An irrevocable power of attorney is void, invalid and ineffective in two circumstances, firstly, when it is expressed to be irrevocable where there is no valuable consideration, which contravenes Section 6 of the Powers of Attorney Act 1949 and secondly, when it is expressed to be irrevocable without any fixed

period of time being stated therein for its applicability (*Affluent Freight Sdn. Bhd v Sumathi K Appukuttan Pillai 8* (CLJ 71, 2011) & *Peringkat Istimewa Sdn Bhd v Pua Kim An & Ors* (MLJU 1263, 2016)). This is indeed so, as it runs counter of what is irrevocable power of attorney as stated under either Section 6 or Section 7. Thus, if the agent was just a gratuitous agent of the principal and had never paid any consideration to the principal for the authority given to him, a power of attorney is actually a revocable one (*Peringkat Istimewa Sdn Bhd v Pua Kim An & Ors* (MLJU 1263, 2016)).

3.3 Judicial Decisions on Irrevocability of Power of Attorney

3.3.1 What Is “valuable consideration”

Valuable consideration has been defined as some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration. It is sufficient if the promisee does some act from which a third person benefits, and which he would not have done but for the promise' (*Tan Chong Keat Sdn Bhd v Pintar Pintar Sdn Bhd 4* (MLJ 201, 2005) and *Malaysia Building Society Bhd v Johore Mining and Stevedoring Company Sdn Bhd & Anor 5* (CLJ 82, 2004)). The Court in *Hj Fauzi Hj A Majid v Kenangan Erat Sdn Bhd 8* (CLJ 230, 2005) held that upon a proper construction of Section 6(1) (a) of the Powers of Attorney Act 1949, valuable consideration is an essential element in order to sustain the irrevocability of a power of attorney. The basic feature of the requirement of consideration lies in the idea of reciprocity in that 'something of value in the eye of the law' must be given for a promise in order to make it enforceable as a contract. In so far as irrevocability of power of attorney given for valuable consideration expressed to be irrevocable is concerned, authorities has held that it cannot be revoked without the concurrence of the donee (*Liew Mok Poh @ Liew For Chen & Chong Yat Min v Balakrishnan a/l Muthuthamby 1* CLJ 993, 1990). In order to determine the irrevocable nature of the power of attorney, the High Court in the case of *Sidambaram a/l Torosamy v Lok Bee Yeong* (MLJU 1828, 2016) scrutinised all evidence of debts of the deceased as donor to the plaintiff as a donee and came to a conclusion that although the plaintiff did give consideration, that consideration was insufficient to

render the power of attorney given by the deceased to the plaintiff irrevocable.

Therefore, in order for a power of attorney to be irrevocable, the agent must provide valuable consideration to the principal under Section 6 of the Powers of Attorney Act 1949. Nevertheless, this is not the position under Section 7 of the Powers of Attorney Act 1949 as under the Section, valuable consideration is merely an option. Under the Section, the irrevocability is also only for a fixed time, where once the period of irrevocability has expired, the power continues as a revocable power of attorney. What this means is that the irrevocable powers of attorney can be given without any valuable consideration at all from the agent but the operation of the irrevocability is limited to a certain time frame only. It can be revoked by the principal without the consent of the agent once the irrevocability period expires. The Law Commission for England and Wales in their Working Paper on Powers of Attorney (Working Paper No 11, June 1967) ("the Law Commission") in reviewing the amendment to Section 126 and Section 127 of the United Kingdom Law of Property Act 1925 (*similar to Sections 6 and 7*) stated that where the power was not given for valuable consideration, the irrevocability was merely a conveyancing device to protect a purchaser from the donee. The Law Commission in the process of deliberation stated that it should be redrafted to make it clear that the powers of attorney granted by way of security could be made irrevocable in the truest and fullest sense either indefinitely or for a period; and in other cases, no question of irrevocability would arise as between donor and donee, but in the interests of conveyancing if a power of attorney is expressed to last for a fixed period not exceeding one year, those having dealing with the donee during that period should be entitled to assume that the power has not been revoked (Charles Lim Aeng Cheng *et al.*, 2009).

3.3.2 Donee

Section 6(1)(c): In Relation to Interest of Purchaser. In *Tai Swee Kian v Tay Boo Thiah @ Tai Boo Ting & Ors* (MLJU 1013, 2011) the donor granted an irrevocable power of attorney to the donee to sell shares of donor in several companies. The power of attorney specified that it was given for valuable consideration. The donor then sold the shares specified under the power of attorney to third party. The donee argued that under the power of attorney, he had the right to sell the said shares. Hence, the sale transaction between the donor and the third party was void as it was entered into

notwithstanding the existence of the power of attorney and without the concurrence of the Plaintiff as the donor. The High Court analysed Section 6(1)(c), "(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser -neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.", and stated that the section appears to be aimed at according protection to a purchaser who has purchased or obtained property pursuant to an irrevocable power of attorney given for valuable consideration. This means that if the Plaintiff, as the donee having the power of sale of the subject shares, had in fact sold the same to a third party, and then that sale having been effected pursuant to an irrevocable power of attorney for valuable consideration, it cannot be set aside or affected by any subsequent purported sale by the donor without the consent of the donee. In other words, the equity of the third party would prevail over any purported sale by the donor without the express consent of the donee. However, in this case, the donee as Plaintiff did not, and has not, since the grant of the power of attorney exercised the power of sale under the power of attorney. In other words, the Plaintiff as the donor has not sold the subject shares to any third party. There was nothing in the power of attorney that prohibits the principal from conducting a sale of the subject shares too, as the power of attorney is not drafted so as to divest the donor completely of the power to sell the subject shares. Section 6(1)(c) does not prescribe that the effect of an irrevocable power of attorney given for valuable consideration has the effect of divesting completely the right of the donor to deal with the subject property in any way. What the section prescribes is that when a power of attorney has been exercised and a third party has acquired the subject property, such a transaction will not be vitiated by any act of the donor purporting to sell the property without the consent of the donee. In this case, there has been no exercise of the right of sale by the donee, thus section 6(1)(c) does not come into play.

Thus, it can be seen that the irrevocable power of attorney relates to the purchaser, namely if the donee has sold to a purchaser the said shares, then the interest of the donee is protected, so as the interest of the purchaser from him. But in this case, the donee has not exercised the power and the donor at the same time did not expressly state that only the donee has

the right to sell the said shares to the exclusion of the donor. This means the donor can still exercise his right to sell his own shares. Therefore, even though the power of attorney is irrevocable, it does not mean that the donor relinquishes his rights as regards the shares. But, if the third party purchaser has bought the said shares from the donee, the irrevocability of the power of attorney will have to be strictly complied with. Another similar principle can be seen in the judgment of the Court in *Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors (Dato'Jeyaraj a/l V Ratnaswamy, intervener)* (MLJU 2047, 2017) where unless the power of attorney expressly provides that the principal as donor has divested completely all rights of sale to the agent as donee, the existence of the irrevocable Power of Attorney which states that the agent has the authority to deal with the property of the principal does not preclude or prohibit the principal from exercising the power of sale of his property. There is also no issue of a third party acquiring the property from the donee under the irrevocable Power of Attorney given for valuable consideration.

The Law Commission stated that subsection (1)(iii) of both Sections 126 and 127 of the UK Law of Property Act 1925 (*similar to Sections 6(1)(c) and 7(1)(c)*) appeared to afford protection to the donee even though he was not a purchaser. He is one who has an authority coupled with an interest. The Law Commission found this to be absurd. The Law Commission stated *inter alia*:

Can it be suggested that if X can persuade a gullible millionaire to sell him his 'irrevocable' power of attorney for £100, X can then continue to operate as his attorney notwithstanding his attempts to revoke any authority or notwithstanding his death or insanity? If a solicitor is appointed attorney of his client under a power expressed to be irrevocable for a period of one year, can it be suggested that the solicitor is entitled to ignore the client's revocation, death, disability or bankruptcy during that year? Such a suggestion runs contrary to professional belief and practice which assume that the so-called 'irrevocability' under section 127 is a conveyancing device to enable the attorney to operate the power during the year without having to produce evidence that the power has not been revoked. Any suggestion that it entitles the attorney to continue to act notwithstanding revocation by the donor is quite contrary to what most solicitors have told their clients.

Interest of Donee *per se*. In dealing with the issue as to whether the donee in *Muniandy a/l Nadasan &*

Ors v Dato' Prem Krishna Sahgal & Ors (Dato' Jeyaraj a/l V Ratnaswamy, intervener) (MLJU 2047, 2017) has legal interest in the property of the donor, pursuant to the argument of the donee that the Power of Attorney and the Letter of Acknowledgment of Debt executed by the donor gives absolute discretion to the donee to deal (sell, transfer, redeem) with the property, and it was given with valuable consideration and irrevocable, the Court stated that there was no charge or debenture created over the property in favour of the donee. Thus, the Letter of Acknowledgment of Debt and the Power of Attorney do not confer any legal and beneficial interest to the donee as regards the property. This is unlike *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corporation & Anor* 9 (CLJ 637, 2010) where here, a borrower as the donor executed a charge and debenture that incorporated an irrevocable power of attorney in favour of the bank as the donee as security for the loan given by the bank to the borrower. A charge and debenture being a registered interest under the National Land Code confers beneficial interest on the bank which gives the bank the right to sell the land and to carry out the sale, the bank exercised its power given under the power of attorney to sell the land. The bank derives the right to sell the land pursuant to the creation of the charge and debenture over the land which was registered under the National Land Code. Here, it appears that the irrevocable power of attorney will be upheld when the donee in fact has interest in the land and the interest must be valid and recognized by law.

In *Hanizah binti Sulaiman lwn Abdul Kadir bin Sulaiman dan lain-lain* (MLJU 467, 2018) the deceased during her lifetime as donor had granted an irrevocable power of attorney to the plaintiff as donee where two of the clauses therein stated that the donor had given $\frac{1}{4}$ of land and house to the donee. The Court stated that the transfer, in order to be valid, must be subject to the dealings under Section 206 of the National Land Code. But, this was not done, unlike the transfer of property to the third and fourth defendants which was dealt with straight away. There was no evidence that the deceased had signed Form 14A to transfer the $\frac{1}{4}$ of land and house to the donee. Thus, the power of attorney was not irrevocable. In analysing the judgement of the Court, it is obvious that the donee did not have any legal or beneficial interest over the property as there was no dealing between the parties subsequent to the irrevocable power of attorney. This means that, if there exists legal interest for the donee pursuant to the National Land Code, the irrevocable power of attorney will be held to be valid, example can be seen in *Lian Lee*

Construction Sdn Bhd v Joyous Seasons Sdn Bhd & Anor 8 (MLJ 387, 2008), where an irrevocable power of attorney was given by the first defendant as the donor to the plaintiff as a security for the payment of the contract price for the performance of renovation works. The power of attorney conferred rights on the plaintiff as the donee to sell, transfer, charge or otherwise deal with the land. The Court held that the power of attorney was not a limited power to deal with the land in a limited manner as submitted by the defendants. Once the attorney is given an irrevocable power of attorney for valuable consideration to enable the attorney as the donee to sell, assign or charge to any person any land and for that purpose to sign and execute all assignment transfers and other necessary instruments, the said power of attorney gives the attorney a caveatable interest on the land. Under Section 6(1)(c), the first defendant as the donor was not entitled to deal with the land without the consent of the plaintiff.

The above illuminates the point that the irrevocability of the power of attorney protects the donee when the donee has interest over the subject matter, and the interest must be a valid interest under the law. Apparently one of the interests is also as a purchaser. It means that the donee and the purchaser can be the same person, which is obviously not apparent from the wordings of Sections 6 and 7. This is because the Sections seem to suggest that the donee and the purchaser must be different people (the Law Commission). The Court in *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corporation & Anor* 9 CLJ 637 (2010) had to refer to the purposive approach enacted in Section 17A of the Interpretation Acts 1948 and 1967 (with effect from 25 July 1997 vide Act A996) and stated that the purchaser and the donee are in fact the same entity in that case, which is the bank. The bank as the first respondent had given valuable consideration in the form of the loan which the borrower has obtained from the bank and has no doubt utilised, enjoyed and benefited from it. The bank is indeed the purchaser of the power of attorney in which the borrower is the donor and the bank, as purchaser, subsequently becomes the donee.

Purchaser. In essence, Section 6(1)(c) and Section 7(1) of the Powers of Attorney Act 1949 provides that if a power of attorney, given for valuable consideration, is expressed to be irrevocable (Section 6 situation), or irrevocable for a fixed period (Section 7 situation), then in favour of a purchaser, neither the donee of the power, nor the purchaser shall be prejudicially affected by notice of anything done by the donor of the power without the concurrence of the

donee. The High Court in *Tai Swee Kian v Tay Boo Thiah @ Tai Boo Ting & Ors* (MLJU 1013, 2011) stated that the section appears to be aimed at according protection to a purchaser who has purchased or obtained property pursuant to an irrevocable power of attorney given for valuable consideration. The word 'purchaser' is wide enough to accommodate the party who has procured or obtained the benefit for valuable consideration under the instrument in issue. In such circumstances, namely where a third party purchaser has acquired property from a donee pursuant to an irrevocable power of attorney given for valuable consideration, then neither that third party purchaser nor the donee will be prejudicially affected by anything done by the donor without the concurrence of the donee. When a power of attorney has been exercised by the donee and a third party has acquired any subject property, such a transaction will not be vitiated by any act of the donor purporting to sell the property under the power of attorney without the consent of the donee. This means that the interest of the donee that relates to the interest of the purchaser from him will be safeguarded.

In *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corporation & Anor* 9 (CLJ 637, 2010) the appellant, as a registered proprietor of seven parcels of land executed a charge under the National Land Code over the land in favour of the first respondent to secure an overdraft facility of RM1.5million. The overdraft facility was also secured by a debenture, which contained an irrevocable power of attorney in favour of the first respondent, for valuable consideration. When the appellant defaulted in its repayment, the first respondent bank gave notice to the appellant that it would sell the land under the debenture. The first respondent as attorney under the power of attorney entered into a sale and purchase agreement ('the SPA') with the second respondent for the sale of the land at RM1.9m. The benefit of Section 6 is here given to the second respondent as the purchaser under the Sale and Purchase Agreement executed pursuant to the irrevocable power of attorney under the debenture. The Court stated that Section 6 (and Section 7) of the Powers of Attorney Act 1949 are clearly meant to protect those who purchase property from a donee of a power of attorney. A purchaser, having satisfied himself/itself that the seller has the power under an irrevocable power of attorney given for valuable consideration, should not be constantly worrying that the sale could become frustrated because the power of attorney is revoked or renounced by the donor, or the donor dies, marries, becomes unsound of mind or mentally

disordered or bankrupt. In that context, it is true that the benefit of Section 6 (and Section 7) is given to purchasers. In other words, the sale of the land by the first respondent (the donee) would continue to be valid in the second respondent's favour notwithstanding anything done by the appellant (the donor) without the concurrence of the first respondent.

It is to be noted that the Powers of Attorney Act does not define 'purchaser'. The phrase was however defined in Section 205(1) of the UK Law of Property Act 1925 as follows:

(xxi) 'Purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property ...; and valuable consideration includes marriage but does not include a nominal consideration in money.

In relation to the definition, the Law Commission submitted that the mere fact that a person had in good faith given valuable consideration did not make him a purchaser so defined and under Sections 126 and 127 of the UK Law of Property Act 1925. He must also have acquired "an interest in property". However, someone who had acquired for value and in good faith any property, real or personal, from or under the donee of the power would receive the protection of Sections 126 and 127.

It appears that the definition of 'purchaser' in Section 205(1) of the UK Law of Property Act 1925 is in line with the phrase 'purchaser' as deliberated by the Malaysia Courts in the course of delivering judgements.

3.4 Irrevocable Powers of Attorney at Common Law

A power of attorney coupled with an interest is irrevocable at common law while that interest subsists (Trevor M Aldridge, 2007). In *Oldham v Oldham* (1867) LR Eq 404 at 407 Lord Romilly MR referred to "the ordinary case of a power of attorney given for value, which, as everybody is aware, is not revocable". An irrevocable authority is not determined by the death, mental capacity or insolvency of the principal, nor, where the principal is a body corporate, by its winding up or dissolution (Bowstead & Reynolds on Agency, 2006). This rule is justified on the general basis that what is in issue is a property right, which once granted, is unaffected by loss of capacity of the grantor (Bowstead & Reynolds on Agency, 2006).

3.5 Irrevocable Power of Attorney: Features of Sections 6 and 7 of the Powers of Attorney Act 1949, Sections 126 and 127 of the UK Law of Property Act 1925 and Section 4 of the UK Powers Of Attorney Act 1971

The table below lays down the comparative table of the essence of the provisions of the irrevocability of power of attorney in Sections 6 and 7 of the Powers of Attorney Act 1949, Sections 126 and 127 of the UK Law of Property Act 1925 and Section 4 of the UK Powers Of Attorney Act 1971.

Table 1. comparative table of the essence of the provisions of the irrevocability of power of attorney

Powers of Attorney Act 1949	UK Law of Property Act 1925 (relevant provisions were repealed on 1 October 1971)	UK Powers Of Attorney Act 1971 (with effect 1 October 1971)
As a general rule, a donor may revoke a power of attorney expressly stated to be "irrevocable" unless that power of attorney is intended to secure an interest of the attorney, as Section 6 provides that if a power of attorney which is given for valuable consideration and expressly stated in the power to be irrevocable, then, in favour of a purchaser, the power: (1) cannot be revoked unilaterally by the donor without	As a general rule, a donor may revoke a power of attorney expressly stated to be "irrevocable" unless that power of attorney is intended to secure an interest of the attorney, as Section 126 provides that if a power of attorney which is given for valuable consideration and expressly stated in the power to be irrevocable, then, in favour of a purchaser, the power:	There is no requirement that the power of attorney be given for valuable consideration. Instead, the donee must have a proprietary interest, or some obligation must be owed to him. As long as the donee has the proprietary interest or the obligation to him remains undischarged, the power cannot be revoked by the donor unilaterally. The death, incapacity or bankruptcy of the donor also

<p>the consent of the donee; and (2) will not be revoked by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor.</p>	<p>(1) cannot be revoked unilaterally by the donor without the consent of the donee; and (2) will not be revoked by the death, disability or bankruptcy of the donor of the power.</p>	<p>does not affect the power, as the power is exercisable for the attorney's own protection. Similarly, a power granted by a corporation is not revoked by the donor being wound up or dissolved.</p>
<p><i>(Section 6 Powers of attorney given for valuable consideration)</i></p>	<p><i>(Section 126 Effect of irrevocable power of attorney for value)</i></p>	<p><i>(Section 4(1) Powers of attorney given as security)</i></p>
		<p>A power of attorney given to secure a proprietary interest may be given to the person entitled to that interest and to the persons deriving title under him and those persons will be duly constituted donees or attorneys. In other words, s 4(2) provides that such a power may be given to a donee and his successor in title. The effect of this, is that the transfer of the secured interest will not cause the power to end or become revocable; so long as the interest remains in the successors, the power of attorney needed to protect it will remain</p>

		<p>irrevocable. <i>(Section 4(2) Powers of attorney given as security)</i></p>
<p>A Power of Attorney is irrevocable for a fixed period of time. Therefore, during such period, the power: (1) cannot be revoked unilaterally by the donor without the consent of the donee; and (2) will not be revoked by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor.</p>	<p>A Power of Attorney is irrevocable for a fixed period, not exceeding one year from the date of the instrument. Therefore, during such period, the power: (1) cannot be revoked unilaterally by the donor without the consent of the donee; and (2) will not be revoked by the death, disability or bankruptcy of the donor of the power.</p>	<p><i>(Section 7 Powers of attorney expressed to be irrevocable for a fixed time)</i></p> <p><i>(Section 127. Effect of power of attorney irrevocable for a fixed time)</i></p>

As highlighted above, Sections 6 and 7 of the Powers of Attorney Act 1949 resembles the repealed Sections 126 and 127 of the UK Law of Property Act 1925. The irrevocability of powers of attorney is now stated in Section 4 of the UK Powers Of Attorney Act 1971, which was enacted as a result of the recommendations of the Law Commission, which recommended the repeal of Sections 126 and 127 of the UK Law of Property Act 1925 and the enactment of Sections 4 and 5(3) of the UK Powers Of Attorney Act 1971 to replace Sections 126 and 127 with modifications (Charles Lim Aeng Cheng *et al.*, 2009). Section 4 of the UK 1971 Act was enacted to address the difficulties arising from Sections 126 and 127 of the UK Law of Property Act 1925. Section 4 neither

requires that the power be given for valuable consideration. Nor does the death, incapacity or bankruptcy of the donor affect it. Instead, the donee must have a proprietary interest, or some obligation must be owed to him. So long as the donee has the proprietary interest or the obligation to him remains undischarged, the power cannot be revoked by the donor unilaterally. Similarly, a power granted by a corporation is not revoked by the donor being wound up or dissolved. The Law Commission identified two main problems with Sections 126 and 127, firstly, there was no reason why a distinction should be drawn between powers given for valuable consideration and other powers, and secondly, it was not clear what exactly was achieved by these sections in providing “irrevocability” “in favour of a purchaser”. In relation to ‘valuable consideration’, the Law Commission studied the position at common law where the distinction is between authority “coupled with an interest” and other types of authority. The former cannot effectively be revoked because in reality they are not cases of agency at all but of proprietary interest given by way of security. The so-called “agent” is not acting as a fiduciary in the interests of his principal but in his own interests. Section 4(2) provides that a power of attorney given to secure a proprietary interest may be given to the person entitled to that interest and to the persons deriving title under him and those persons shall be duly constituted donees or attorneys.

An example of the application of Section 4 of the UK Powers of Attorney Act 1971 can be seen in the UK Supreme Court of *Bailey v Angove* (UKSC 47, 2016), where, in dealing with an issue of whether a wine distribution agent could continue to collect the price of wines it had sold before the insolvency proceedings and deduct from it their commission after the wine maker had terminated the agency and distribution agreement between them because their authority to do so was irrevocable, the Court referred to Section 4(1) of the UK Powers of Attorney Act 1971 and held that for the Section to apply, two conditions must be satisfied, firstly, there needs to be an agreement that the agent's authority is irrevocable; and secondly the authority must be given to secure an interest of the agent, being either a proprietary interest (for example a power of attorney given to enable the holder of an equitable interest to perfect it) or a liability (generally in debt) owed to him personally, well as the third party in transactions, but the wordings of the Section should perhaps be relooked to make it more transparent, akin to Section 4 of the UK Powers of Attorney Act 1971, where the power of attorney continues as long as the other party has

In these cases, the agent's authority is irrevocable while the interest subsists.

Both conditions are now reflected in s 4(1) of the Powers of Attorney Act 1971, as regards authority conferred by a Power of Attorney. Significantly, an agreement that an agent's authority is irrevocable can be inferred and need not be expressly stated. The Supreme Court rejected the agent's case, as the conditions were not met.

4 CONCLUSIONS

It appears that Sections 6 and 7 of the Powers of Attorney Act 1949 derived from the repealed Sections 126 and 127 of the UK Law of Property Act 1925. The UK Powers of Attorney Act 1971 has since adopted what is now Section 4 in place of the repealed Sections for the purpose of clearly indicating that as long as the donee has ownership interest or the obligation to him remains undischarged, the donor cannot revoke the power of attorney unilaterally. It also avoids the confusion as regards the term ‘purchaser’, and ‘valuable consideration’, which have been deleted altogether. The word ‘secure’ is incorporated to indicate that the power of attorney is in fact a security arrangement to protect the interest of the donee. From the review of the Malaysian judicial decisions as discussed above, it is evident that the Courts in delivering judgements on the irrevocability of powers of attorney have gone on great lengths in applying, interpreting and distinguishing the applicability of irrevocability of power of attorney under Sections 6 and 7 of the Powers of Attorney Act 1949. Many parties have in fact executed irrevocable powers of attorney as a means to safeguard their respective interests but not all succeeded in Courts as they failed to understand the requirements of these Sections, perhaps due to the ambiguity of the wordings of the Sections. The power of attorney will not become irrevocable merely because the document itself describes the agency to be an irrevocable one. It must satisfy the conditions for the valid creation of an irrevocable power. This may perhaps be an indicator that the irrevocability of power of attorney as laid down in Sections 6 and 7 is very practical to protect the interests of the donee as

proprietary interest, or the donor must pay or honour an obligation to that party. In fact, it might also be relevant to retain express reference to a purchaser since the protection should extend to a bona fide purchaser from a person who has dealt with the

attorney whether or not that person was protected because he too acted in good faith.

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