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The Weekly Law Report on Malaysian Cases

[2006] 4 AMR 89-188 Week 28 July 12, 2006

CASES REPORTED

THOMSON

SWEET & MAXWELL ASIA

KDN PP 7783/3/2007 MITA (P) No 237/02/96

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KDN PP 7783/3/2007 MITA (P) No 237/02/96

Tang Kwor Ham & 2 Ors
v
Pengurusan Danaharta Nasional Bhd & 5 Ors

Court of Appeal – Civil Appeal No M-02-644-2003
Appeal from High Court, Melaka – Judicial Review No 13-2-2002
Gopal Sri Ram, Hashim b Yusoff, Zaleha bt Zahari, JJCA

October 24, 2005 and February 10, 2006

Administrative law *– Remedies – Judicial review – Application for – Proposal for sale of assets by special administrators appointed under the Pengurusan Danaharta Nasional Berhad Act 1998 – Whether amenable to judicial review – Whether Pengurusan Danaharta Nasional Bhd a "person or authority" – Whether application for judicial review may be made by majority shareholders acting in a representative capacity – Approach to be adopted by High Court when considering application for leave to issue judicial review – Companies Act 1965 – Courts of Judicature Act 1964, paragraph 1 of schedule – Pengurusan Danaharta Nasional Berhad Act 1998, ss 24, 26(2) – Rules of the High Court 1980, Order 15 r 12, Order 53 rr 2(4), 3(6)*

Company law *– Derivative action – Whether majority shareholders acting in representative capacity entitled to commence derivative action for purpose of seeking public law remedy by way of judicial review – Companies Act 1965 – Courts of Judicature Act 1964, paragraph 1 of schedule – Pengurusan Danaharta Nasional Berhad Act 1998, ss 24, 26(2) – Rules of the High Court 1980, Order 15 r 12, Order 53 rr 2(4), 3(6)*

The appellants were directors of the sixth respondent (the company) which had a non-performing loan (NPL) pursuant to credit facilities given to it, and which loan was then acquired by the first respondent. The second, third and fourth respondents were the special administrators (the special administrators) appointed by the first respondent under s 24 of the Pengurusan Danaharta Nasional Berhad Act 1998 (the Danaharta Act) whereas the fifth respondent was an independent advisor also appointed by the first respondent under s 26(2) of the Danaharta Act. The special administrators had prepared and submitted to the first respondent, a workout proposal (the proposal) recommending the sale of a piece of land with the property thereon (the land) belonging to the sixth defendant, at a price of RM7.6 million. A report by the fifth respondent was also submitted together with the said proposal. The proposal was approved by the first defendant and by the majority of the secured creditors of the company. The appellants, on behalf of themselves and also by way of representative and derivative action on behalf of the company applied to the High Court pursuant to Order 53 of the Rules of the High Court 1980 (the RHC) for leave for judicial review of the said proposal. The appellants claimed that the proposal was infused with public elements and that they had not been given the opportunity to air their grouses at the secured creditors meeting at which the

proposal was approved. It was further claimed that the correct value of the land was not less than RM15 million.

Senior federal counsel appearing for the attorney-general (the AG) and counsel for the first respondent objected to the appellants' motion by way of representative and derivative action which it was contended, was wrongly and improperly initiated by the appellants who were majority shareholders of the company. It was further contended that a derivative action is maintainable in respect of enforcement of a private law remedy and not in public law and that the subject matter sought to be reviewed was not amenable to judicial review as the respondents do not fall within the meaning of public authority in Order 53 r 2(4) of the RHC. The High Court, after having entertained strenuous opposition to the same by the AG and the first respondent, dismissed the appellants' application.

The appellants appealed against the said decision on the grounds, inter alia, that the High Court had erred in law and facts in not holding that the first respondent, in the context of the proceedings filed, was a public authority under Order 53 r 2(4) of the RHC; that they had not made out an arguable case and that the exceptions to the rule in *Foss v Harbottle* (1843) 67 ER 189 (*Foss v Harbottle*) in relation to fraud on the minority, is not applicable in proceedings relating to public remedies.

Issues

1. The approach to be adopted by the High Court when considering an application for leave to issue judicial review.
2. Whether it was wrong for the appellants to have framed their application in a representative and derivative capacity for the benefit of the company.
3. Whether the first respondent is a "public authority" within the scope of Order 53 r 2(4) of the RHC and not amenable to judicial review.
4. Whether the appellants' application for leave should have been granted by the High Court.

Held, allowing the appeal

1. As was laid down in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617; *George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors* [1988] 1 MLJ 319 and *YAM Tunku Dato Seri Nadzaruddin ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur* [2003] 1 AMR 352, the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. The only circumstance in which a court may on a leave application undertake a closer scrutiny of the merits of the case, is on an application for extension of time to apply for judicial review. It becomes a matter of necessity for the court in such an instance to scrutinise the material before it with some care to ensure that there is a good arguable case on the merits warranting the exercise of discretion in the applicant's favour. This is in addition to the requirement that the applicant must provide a satisfactory explanation for the delay on his or her part. [*see p 100 lines 35-41 - p 103 lines 9-21*]

2. (a) A "derivative action" is a mere variation of the representation rule as applied in the environment of company law and is a procedural device invented by the Court of Chancery to get over the rule in *Foss v Harbottle*. As a general rule, the derivative action is available "... where the persons against whom the relief is sought themselves hold and control the majority of the share in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress", per Lord Davey in *Burland v Earle* [1902] AC 83. The device of a derivative proceeding is not to be treated in absolute or rigid terms. [*see p 107 lines 2-4; p 108 lines 30-33; p 108 line 39 - p 109 line 7; p 109 lines 17-18*]

(b) There is nothing in Order 15 r 12 of the RHC that excludes its application to judicial review proceedings instituted under Order 53. Hence an application for judicial review may be made by an applicant acting in a representative capacity, as had occurred in this case. In the circumstances, the High Court was wrong in thinking that the appellants' application for leave could be dismissed in limine on the ground of misjoinder. [*see p 110 lines 11-16*]

3. (a) Order 53 of the RHC merely prescribes the procedure for applying to the court for relief prescribed by paragraph 1 of the schedule to the Courts of Judicature Act 1964 (CJA). Being a mere rule of court, it cannot enlarge, cut down, modify or qualify a provision in an Act of Parliament. In Order 53 r 2(4) of the RHC the expression "public authority" is used, whereas in paragraph 1 of the schedule to the CJA the words "any person or authority" are used instead and in the event of any conflict between Order 53 and paragraph 1 of the schedule to the CJA, it is the latter which must prevail. [*see p 115 lines 9-32*]

(b) In this instance, the first respondent, though being a company incorporated under the Companies Act 1965, it is wholly financed by public funds, with its affairs being directly or indirectly under the control of the Minister of Finance representing the federal government, and its powers, apart from its memorandum of association, are conferred upon it by the Danaharta Act. In the circumstances, and on the authorities, the first defendant is a "person or authority" within paragraph 1 of the schedule to the CJA and is therefore amenable to judicial review. [*see p 117 line 38 - p 118 line 4*]

(c) Though it may well be true that the court hearing the substantive motion may conclude that certiorari is not available on the facts, that does not entitle the court to then dismiss the application. If it is concluded that there are merits in the applicant's complaint, it may and should as a

matter of justice, grant such relief as is appropriate in the circumstances of the case. [*see p 118 lines 16-20*]

(d) There was no merit in the learned senior federal counsel's argument that the appellants had no cause to argue on an application for judicial review on the basis that there was no "decision" made by anyone and since Order 53 r 2(4) of the RHC speaks of any person who is adversely affected by the "decision" of any public authority. There was indeed a "decision" that was made by the first respondent as was demonstrated by the appellants. Order 53 r 2(4) of the RHC must not be read in isolation but must be read contextually, together with Order 53 r 3(6) and if the sub-rules are read together and in their proper context, it can be seen that there need not always be an actual decision by someone. [*see p 120 lines 1-17*]

4. On the facts and on the authorities, the High Court ought to have granted the appellants the leave sought. Whatever arguments that the other respondents may have for not being amenable to judicial review must be re-ventilated at the hearing of the substantive motion. [*see p 121 lines 1-6*]

Translation

Undang-undang pentadbiran – *Remedi – Semakan kehakiman – Permohonan untuk – Cadangan untuk jualan aset oleh pentadbir khas yang dilantik di bawah Akta Pengurusan Danaharta Nasional Berhad 1998 – Sama ada boleh dihadapkan kepada semakan kehakiman – Sama ada Pengurusan Danaharta Nasional Bhd "orang atau pihak berkuasa" – Sama ada permohonan untuk semakan kehakiman boleh dibuat oleh pemegang saham majoriti bertindak dalam kapasiti representatif – Pendekatan untuk diguna oleh Mahkamah Tinggi apabila mempertimbangkan permohonan untuk membenarkan semakan kehakiman – Akta Syarikat 1965 – Akta Mahkamah Kehakiman 1964, perenggan 1 jadual – Akta Pengurusan Danaharta Nasional Berhad 1998 – Kaedah-Kaedah Mahkamah Tinggi 1980, Aturan 15 k 12, Aturan 53 kk 2(4), 3(6)*

Undang-undang syarikat – *Tindakan terbitan – Sama ada pemegang saham majoriti bertindak dalam kapasiti representatif berhak untuk memulakan tindakan terbitan untuk tujuan memohon remedi undang-undang awam melalui semakan kehakiman – Akta Syarikat 1965 – Akta Mahkamah Kehakiman 1964, perenggan 1 jadual – Akta Pengurusan Danaharta Nasional Berhad 1998 – Kaedah-Kaedah Mahkamah Tinggi 1980, Aturan 15 k 12, Aturan 53 kk 2(4), 3(6)*

Perayu adalah pengarah responden keenam (syarikat tersebut) yang mempunyai pinjaman bermasalah berikutan kemudahan kredit yang diberi kepadanya, dan pinjaman yang mana kemudiannya diambil alih oleh responden pertama. Responden kedua, ketiga dan keempat adalah pentadbir khas (pentadbir khas tersebut) yang dilantik oleh responden pertama di bawah s 24 Akta Pengurusan Danaharta Nasional Berhad 1998 (Akta Danaharta tersebut) manakala responden kelima adalah penasihat bebas juga dilantik oleh responden pertama di bawah s 26 Akta

Danaharta tersebut. Pentadbir khas telah menyediakan dan menyerahkan kepada responden pertama satu cadangan penyelesaian (cadangan tersebut) mencadangkan jualan sebidang tanah dengan harta benda di atasnya (tanah tersebut) yang dimiliki oleh defendan keenam pada harga RM7.6 juta. Laporan oleh responden kelima juga diserahkan bersama dengan cadangan tersebut. Cadangan tersebut diluluskan oleh defendan pertama dan oleh majoriti pemiutang terjamin syarikat tersebut. Perayu bagi pihak diri mereka sendiri dan juga melalui representatif dan tindakan terbitan bagi pihak syarikat tersebut memohon kepada Mahkamah Tinggi berikutan Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980 (KMT) untuk membenarkan semakan kehakiman terhadap cadangan tersebut. Perayu menuntut bahawa cadangan tersebut diisikan dengan unsur awam dan mereka tidak diberi peluang untuk mengemukakan rungutan mereka pada masa mesyuarat pemiutang terjamin di mana cadangan tersebut diluluskan. Ia selanjutnya dituntut bahawa nilai sebenar tanah tersebut tidak kurang daripada RM15 juta.

Peguam kanan persekutuan yang mewakili peguam negara (PN) dan peguam responden pertama membantah terhadap usul perayu melalui tindakan representatif dan terbitan yang mana ia dihujahkan dimulakan dengan salah dan tidak betul oleh perayu, yang mana adalah pemegang saham majoriti syarikat tersebut. Ia selanjutnya dihujahkan bahawa tindakan terbitan boleh diselenggarakan berkaitan dengan penguatkuasaan remedi undang-undang persendirian dan bukan undang-undang awam dan bahawa perkara yang dipohon untuk disemak tidak boleh dihadapkan kepada semakan kehakiman kerana responden tidak terangkum di dalam maksud pihak berkuasa awam dalam Aturan 53 k 2(4) KMT. Mahkamah Tinggi, selepas mendengar bantahan terhadap perkara yang sama daripada PN dan responden pertama, menolak permohonan perayu.

Perayu merayu terhadap keputusan tersebut atas alasan, inter alia, bahawa Mahkamah Tinggi tersilap dalam undang-undang dan fakta kerana tidak memutuskan bahawa responden pertama, dalam konteks prosiding yang difailkan, adalah pihak berkuasa awam di bawah Aturan 53 k 2(4) KMT; bahawa mereka tidak menyediakan kes yang boleh dihujahkan dan bahawa pengecualian kepada kaedah dalam kes *Foss v Harbottle* (1843) 67 ER 189 (*Foss v Harbottle*) berkaitan dengan frod terhadap minoriti, tidak boleh diaplikasikan dalam prosiding berkaitan dengan remedi awam.

Isu-isu

1. Pendekatan yang akan digunakan oleh Mahkamah Tinggi apabila mempertimbangkan permohonan untuk membenarkan semakan kehakiman.
2. Sama ada adalah salah bagi perayu untuk merangkakan permohonan mereka dalam kapasiti representatif dan terbitan bagi faedah syarikat tersebut.
3. Sama ada responden pertama adalah "pihak berkuasa awam" dalam skop Aturan 53 k 2(4) KMT dan tidak boleh dihadapkan kepada semakan kehakiman.
4. Sama ada permohonan perayu untuk kebenaran patut diberikan oleh Mahkamah Tinggi.

Diputuskan, dengan membenarkan rayuan

1. Seperti yang diputuskan di dalam kes *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617; *George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors* [1988] 1 MLJ 319 dan *YAM Tunku Dato Seri Nadzaruddin ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur* [2003] 1 AMR 352, Mahkamah Tinggi sepatutnya tidak melihat pada merit kes pada peringkat kebenaran. Peranannya hanyalah untuk melihat jika permohonan untuk kebenaran adalah remeh-temeh. Cuma satu sahaja keadaan di mana sesuatu mahkamah boleh atas permohonan kebenaran menjalankan pemerhatian yang lebih teliti terhadap merit kes tersebut, adalah semasa permohonan untuk lanjutan masa untuk memohon semakan kehakiman. Ia menjadi suatu perkara yang perlu bagi mahkamah dalam keadaan tersebut untuk meneliti material di hadapannya dengan berhati-hati untuk memastikan bahawa terdapat kes yang bagus untuk dihujahkan atas merit mewajarkan pelaksanaan budi bicara memihak pemohon. Ini adalah tambahan terhadap keperluan bahawa pemohon mesti memberikan penjelasan yang memuaskan bagi kelewatan oleh pihak beliau.

2. (a) "Tindakan terbitan" adalah hanya variasi peraturan representasi seperti yang diaplikasikan di dalam undang-undang syarikat dan adalah devis prosedur yang dicipta oleh Mahkamah Chancery untuk mengatasi kaedah dalam kes *Foss v Harbottle*. Sebagai peraturan am, tindakan terbitan adalah terdapat "... di mana sesiapa terhadapnya relief dipohon memegang dan mengawal majoriti saham dalam syarikat, dan tidak membenarkan tindakan dibawa dalam nama syarikat. Dalam kes itu mahkamah membenarkan rungutan pemegang saham untuk membawa tindakan dalam nama mereka sendiri. Ini walau bagaimanapun, adalah hanya prosedur supaya dapat memberi remedi untuk kesalahan yang jika tidak, akan terlepas pemulihan", oleh Lord Davey dalam kes *Burland v Earle* [1902] AC 83. Devis daripada prosiding terbitan tersebut tidak boleh dianggap sebagai mutlak atau tegar.

   (b) Tidak terdapat apa-apa dalam Aturan 15 k 12 KMT yang mengecualikan pemakaiannya kepada prosiding semakan kehakiman yang dimulakan di bawah Aturan 53. Maka, permohonan untuk semakan kehakiman boleh dibuat oleh pemohon yang bertindak dalam kapasiti representasi, seperti yang terjadi di dalam kes ini. Dalam keadaan ini, Mahkamah Tinggi adalah salah dalam memikirkan bahawa permohonan perayu untuk kebenaran boleh ditolak in limine atas alasan salah cantum.

3. (a) Aturan 53 KMT hanya menyatakan prosedur untuk memohon kepada mahkamah untuk relief yang dinyatakan oleh perenggan 1 jadual kepada Akta Mahkamah Kehakiman 1964 (AMK). Dengan hanya sebagai peraturan mahkamah, ia tidak boleh memperbesarkan, memotong, mengubah atau mengenakan syarat ke atas sesuatu peruntukan dalam Akta Parlimen. Dalam Aturan 53 k 2(4) KMT pernyataan "pihak

berkuasa awam" digunakan, manakala dalam perenggan 1 jadual kepada AMK perkataan "mana-mana orang atau pihak berkuasa" digunakan sebaliknya dan jika berlakunya konflik di antara Aturan 53 dan perenggan 1 jadual kepada AMK, perenggan 1 jadual kepada AMK mesti mengatasi.

(b) Dalam kes ini, responden pertama, walaupun sebagai syarikat yang ditubuhkan di bawah Akta Syarikat 1965, ia dibiayai sepenuhnya oleh dana awam, dengan hal ehwalnya di bawah kawalan Menteri Kewangan secara terus atau tidak yang mewakili kerajaan persekutuan, dan kuasanya, selain daripada memorandum persatuannya, diberikan kepadanya oleh Akta Danaharta. Dalam keadaan ini, dan mengikut otoriti, perayu pertama adalah "orang atau pihak berkuasa" dalam perenggan 1 jadual kepada AMK dan oleh itu boleh dihadapkan kepada semakan kehakiman.

(c) Walaupun ia mungkin betul bahawa mahkamah yang mendengar usul substantif boleh memutuskan bahawa atas fakta tidak terdapat certiorari, ini tidak memberi hak kepada mahkamah untuk menolak permohonan tersebut. Jika ia diputuskan bahawa terdapat merit dalam rungutan pemohon, ia boleh dan patut sebagai perkara keadilan, memberikan relief tersebut seperti yang wajar dalam keadaan kes ini.

(d) Tidak terdapat merit dalam hujahan peguam kanan persekutuan bahawa perayu tidak mempunyai sebab untuk menghujah atas permohonan untuk semakan kehakiman atas dasar bahawa tidak terdapat "keputusan" dibuat oleh sesiapapun dan memandangkan Aturan 53 k 2(4) AMK menyatakan mengenai mana-mana orang yang terjejas secara bertentangan oleh "keputusan" daripada mana-mana pihak berkuasa awam. Jelas terdapat "keputusan" yang dibuat oleh responden pertama seperti yang ditunjukkan oleh perayu. Aturan 53 k 2(4) KMT tidak boleh dibaca secara sendirian tetapi mesti dibaca mengikut konteks, bersama dengan Aturan 53 k 3(6) dan jika sub-peraturan dibaca bersama dan dalam konteks yang betul, ia boleh dilihat bahawa tidak perlu selalunya suatu keputusan sebenar oleh seseorang.

4. Atas fakta dan mengikut otoriti, Mahkamah Tinggi sepatutnya memberikan perayu kebenaran yang dipohon. Apa-apa hujahan yang responden lain mungkin ada untuk tidak dihadapkan kepada semakan kehakiman mesti disuarakan pada pendengaran usul substantif tersebut.

Cases referred to by the court (Majority)

A Solicitor, Re (1890) LR 25 QBD 17, CA *(ref)*
Ajay Hasia v Khalid Mujib AIR 1981 SC 487 *(ref)*
Commissioners of Sewers v Gellatly (1876) LR 3 Ch D 615 *(ref)*

Damodaran v Vesudevan [1975] 2 MLJ 231, FC *(ref)*
Davis, Ex parte (1871-72) LR 7 Ch App 526, CA *(ref)*
Duke of Bedford v Ellis [1901] AC 1, HL *(ref)*
Dwarka Nath v Income Tax Officer AIR 1966 SC 81 *(ref)*
Eh Riyid v Eh Tek [1976] 1 MLJ 262, FC *(ref)*
Fishermen and Friends of the Sea v The Environment Management Authority & Anor [2005] UKPC 32, HC *(ref)*
Foss v Harbottle (1843) 67 ER 189 *(ref)*
Ganpat v Lingappa AIR 1962 Bom 104 *(ref)*
George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors [1988] 1 MLJ 319, HC *(ref)*
Hartmont v Foster (1881-82) LR 8 QBD 82, CA *(ref)*
IRC v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, HL *(ref)*
Irving v Askew (1870) LJ QB 118 *(ref)*
John v Rees and Others [1970] Ch 345, Ch D *(ref)*
JP Berthelsen v Director-General of Immigration, Malaysia & Ors [1987] 1 MLJ 134, SC *(foll)*
Mohamed Nordin b Johan v Attorney General Malaysia [1983] 1 MLJ 68, FC *(foll)*
Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105, HC *(ref)*
Praga Tools Corporation v CV Imanual AIR 1969 SC 1306 *(foll)*
R v Secretary of State for the Home Department, ex p Rukshanda Begum [1990] COD 107, CA *(ref)*
Rama Chandran, R v The Industrial Court, Malaysia [1997] 1 AMR 433; [1997] 1 MLJ 145, FC *(ref)*
Ramana Dayaram Shetty v The International Airport Authority of India AIR 1979 SC 1628 *(ref)*
Sarip Hamid & Anor, Tuan Hj v Patco Malaysia [1995] 2 AMR 1759; [1995] 2 MLJ 442, SC *(not foll)*
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 AMR 1900; [2002] 2 MLJ 413, CA *(ref)*
Tan Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2003] 4 MLJ 332, HC *(ref)*
Taff Vale Railway Co v The Amalgamated Society of Railway Servants [1901] AC 426, HL *(ref)*
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC *(ref)*
Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 3 AMR 308; [2002] 2 MLJ 707, CA *(ref)*
Tunku Nadzaruddin ibni Tuanku Jaafar, YAM Dato' Seri v Datuk Bandar Kuala Lumpur & Anor [2003] 1 AMR 352; [2003] 1 CLJ 210, HC *(ref)*
Wallersteiner v Moir (No 2) [1975] QB 373, CA *(ref)*
Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors [2003] 1 MLJ 98, HC *(ref)*

Cases referred to by the court (Minority)

Foss v Harbottle (1843) 67 ER 189 *(ref)*
Ganda Oil Industries Sdn Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor [1988] 1 MLJ 174, SC *(ref)*
OSK & Partners v Tengku Noone Aziz & Anor [1983] 1 MLJ 179, FC *(ref)*
Sarip Hamid, Tuan Hj v Patco Malaysia Bhd [1995] 4 AMR 1759, SC *(ref)*
Sivarasah Rasiah v Badan Peguam Malaysia & Anor [2002] 2 AMR 1900; [2002] 2 MLJ 413, CA *(ref)*
Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 3 AMR 3082; [2002] MLJ 707, CA *(foll)*
Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors [2003] 1 MLJ 98, HC *(foll)*

Legislation referred to by the court

India
Indian Companies Act 1913
Indian Constitution, Article 226
Jammu and Kashmir Registration of Societies Act 1898

Malaysia
Companies Act 1965
Courts of Judicature Act 1964, paragraph 1 of schedule
Federal Constitution, Article 63
Financial Procedure Act 1957, s 14
Legal Profession Act 1976
Pengurusan Danaharta Nasional Berhad Act 1998, ss 3, 4(3), 5, 9, 10, 22, 22(2), 24, 26, 30, 31(1), (2), 32, 33, 44(1), 44(1B)(c), (2), 45, 46, 46(3), 47, paragraph 8 second schedule
Rules of the High Court 1980, Order 15 rr 6(1), 12, Order 53, Order 53 r 1(1), 2(3), (4), 3(1), (3), (6)

United Kingdom
Rules of the Supreme Court 1883, Order XVI r 9

Lim Wei Chun (Lim Whei Chun) for appellant
J Kannaperan (Shearn Delamore & Co) for first respondent
Anita Ibrahim (Lee Hishamuddin, Allen & Gledhill) for the second to fourth respondents
G Balan for the fifth respondent
Mary Lim Thiam Suan, SFC (AG'S Chambers) for attorney general

Judgment received: June 14, 2006 and March 3, 2006

Gopal Sri Ram, JCA

[1] This case essentially involves a point of procedure in judicial review proceedings. It is nevertheless an important case. Because it also concerns the amenability to judicial review of the several entities created by the Pengurusan Danaharta Nasional Berhad Act 1998 (the Danaharta Act).

[2] For present purposes, the facts here fall within a narrow compass. They are set out in a succinct form by the learned judge in his judgment which is reported in [2003] 4 MLJ 332. It suffices to reproduce an extract from the headnote of the case which accurately reproduces the learned judge's appreciation of the facts:

> The applicants were three of the four directors of Tang Kwor Ham Realty Sdn Bhd, ("the company"), and held a total of 60% of the shares therein. The first respondent ("Danaharta") was a company incorporated under the Companies Act 1965, while the second, third and fourth respondents ("the special administrators") were special administrators appointed by Danaharta under the Pengurusan Danaharta Nasional Berhad Act 1998 ("the Danaharta Act"). The fifth respondent was an independent adviser appointed by Danaharta under the Danaharta Act, while the company was a nominal sixth respondent. The company owned the land and property on which the Grand Hill Hotel was situated ("the subject land"). The company also had a non-performing loan ("NPL") of about RM26m pursuant to credit facilities granted to it and this NPL was acquired by Danaharta under the Danaharta Act and a vesting certificate. A workout proposal prepared and submitted by the special administrators to Danaharta ("the workout proposal"), together with the report of the fifth respondent, was approved both by Danaharta and by a majority of the secured creditors of the company. The workout proposal recommended the sale of the subject land at RM7.6m. The applicants claimed that the correct value of the subject land was not less than RM15m. Thus the applicants, on behalf of themselves and also by way of representative and derivative action on behalf of the company, sought leave to apply for judicial review of the workout proposal. The applicants claimed that the workout proposal was infused with public elements and was thus amenable to judicial review.

[3] On these facts the learned judge refused the applicants before him (appellants in this court) leave to apply for judicial review. And he did that after entertaining strenuous opposition to the application both from the attorney general (who was not a party to the application but was entitled as of right to appear upon it) and counsel for Danaharta in the form of written argument. There is another important fact that I must mention at this juncture. The other respondents did not appear at what was meant to be the ex parte hearing of the applicants' motion for leave. So they really had no

opportunity of taking any position on the facts and the law before the learned judge. The applicants have appealed against the learned judge's decision.

[4] Now, when this appeal came before us on July 11, 2005 we formed the view that the learned judge ought not to have refused the applicants leave to apply for judicial review. We therefore called upon counsel for the respondents to argue why the appeal ought not to be allowed. Fortunately for us, the attorney general had, on this occasion the advantage of formidable representation in the person of learned senior federal counsel, Dato' Mary Lim who had also appeared in the court below. I must in particular thank her for her arguments and the citation of relevant authority, a trait rarely seen at the Bar these days. Based on her submissions and those of learned counsel for the first respondent, there are two broad issues that fall for determination. One procedural; the other substantive. I will address each of these in turn.

[5] There are two procedural points. The first has to do with what is to happen at the leave stage in proceedings for judicial review. Applications for leave under Order 53 are made – and they must be made – through a two stage process. This is the historical fallout of the practice of the old Court of King's of having an ex parte nisi hearing before deciding whether to issue notice to the opposite party to show cause why the particular prerogative writ should not issue against it. In other words, the opposite party had to make what was called "a return to the writ". The inter partes hearing concluded with a direction that the writ issues or not, i.e. the rule nisi being made absolute. In 1883, when the English Rules of the Supreme Court were introduced, prerogative writs were replaced with prerogative orders and we continued to follow those 1883 rules until the introduction of the Rules of the High Court in 1980.

[6] The question that arises for acute decision in this appeal is this. What is the approach the High Court should take when considering an application for leave to issue judicial review? The answer to that question is to be found in the following passage in the speech of Lord Diplock in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

[7] In *George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors* [1988] 1 MLJ 319, Lim Beng Choon J described in crisp language the approach the court should take at the leave stage. He said:

> At the outset, it is very significant to take note that the application in the instant proceeding is not one for an order of certiorari but rather for leave to apply for such an order. On principle and authority, I am of the view that at this stage of the proceeding, the court is required only to inquire whether the matter to be decided by the court is not in fact frivolous and vexatious in the sense that it is a trivial complaint of an administrative error by a busybody with a misguided sentiment and misconception of the law. Another requirement at this stage of the proceeding which a court has to consider is that the applicant must produce sufficient evidence to sustain a prima facie case that a public officer or authority that made the decision had acted unlawfully or that he or it had in its exercise of the administrative discretion acted ultra vires the power given to him or it under the relevant statute. If the court is satisfied that the applicant has complied with these two requirements, leave would usually be granted irrespective of whether the applicant has suffered no greater injury than thousands of the King's subjects.

[8] Again in *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur* [2003] 1 AMR 352; [2003] 1 CLJ 210, Ramly Ali J summarised the task that the court has to perform at the leave stage in the following terms:

> At this stage of the proceedings the court need not go into the matter in great depth. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a guide perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the substantive application. (See: *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617).

[9] In my judgment, both these cases, *George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors* and *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Jaafar* correctly state the law. It does not appear that any of learned counsel who appeared in the court below cited these authorities to the learned judge.

[10] To paraphrase in less elegant language what has been said in these cases, the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time

or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, e.g., proceedings in Parliament (see Article 63 of the Federal Constitution).

[11] In *Mohamed Nordin b Johan v Attorney General Malaysia* [1983] 1 MLJ 68, Raja Azlan Shah Ag LP laid down the test to be applied at the leave stage in judicial review proceedings as follows:

> We allowed the appeal and granted the appellant leave to apply for an order of certiorari because we are of the view that the learned judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari. When this court grants leave, it has jurisdiction to hear the substantive motion itself. This practice is not inconsistent with the one in vogue in England: see *Regina v Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union* [1966] 2 QB 21 which was followed in *Regina v Croydon Justices, Ex parte Lefore Holdings Ltd* [1980] 1 WLR 1465.

[12] This test was applied by the Supreme Court in *JP Berthelsen v Director-General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134, where Abdoolcader SCJ said:

> At the outset of the hearing of the appeal before us we were of the view ex facie that leave should in fact have been granted in the court below as the point taken by the appellant was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari. We accordingly applied and followed the procedure adopted by the Federal Court in *Mohamed Nordin b Johan v Attorney General Malaysia* [1983] 1 MLJ 68 (at p 70) and allowed the appeal, and granted leave to the appellant to apply for an order of certiorari. We then turned to a consideration of the substantive motion for certiorari on an undertaking by counsel for the appellant to formally file this in the registry.

[13] Learned senior federal counsel relied on the following passage in the judgment of Edgar Joseph Jr SCJ in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia* [1995] 4 AMR 1759; [1995] 2 MLJ 442 as stating a different – and a higher test – than that stated in *Mohamed Nordin b Johan v Attorney General, Malaysia* and *JP Berthelsen v Director-General of Immigration*:

> In *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107, the Court of Appeal in England correctly laid down

guidelines to be followed by the court when considering an application for leave, in the following terms:

(i) The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

(iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, ... namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[14] With respect, I am unable to agree with this argument of learned senior federal counsel. In the first place, to say that a case is frivolous is the same thing as saying that there is no arguable case. It is mere semantics. In the second place, the point made by the English Court of Appeal which was adopted in toto as correct by the Supreme Court in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia* is that in a case where the High Court has a doubt about whether the case is frivolous or not, *it is for that court* to invite the putative respondent to attend and make representations as to whether or not leave should be granted. So, the putative respondent to the substantive motion is not entitled as a matter of right to appear, demand to be heard and to convert the proceedings into a full blown opposed ex parte hearing on the merits of the application. Third, you must note the important caveat entered by the English Court of Appeal in *Rukshanda Begum* that "the inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing". Fourth, neither *Mohamed Nordin b Johan v Attorney General, Malaysia* nor *JP Berthelsen v Director-General of Immigration* were cited to the Supreme Court in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia.* Had there been such citation, it is doubtful whether the Supreme Court would have been prepared to apply the decision of an English Court of Appeal to that of its own earlier decision and that of its immediate precursor.

[15] There is this further point. The constraints referred to in *Rukshanda Begum* were never applied in this case. First, it was not the court that invited the first respondent to attend because there was a doubt in the court's mind whether leave should be granted. Instead, the first respondent appeared and proceeded to oppose the leave application as if it was entitled to do so as a matter of right. In the second place, the court permitted the ex parte hearing to become a full bloomed exploration of the merits of the case. A reading of the judgment as a whole makes that amply clear.

[16] The only circumstance in which a court may, on a leave application, undertake a closer scrutiny of the merits of the case is on an application for extension of time to apply for judicial review. It is not difficult to see why this is so. A party applying for an extension of time is really relying on the court to exercise discretion in his or her favour. And it is trite that the onus is on such a person to satisfy the court that there are good grounds why discretion ought to be favourably exercised. To that end, it is necessary for an applicant to place all relevant material before the court to demonstrate that he or she has more than an arguable case on the merits. It therefore becomes a matter of necessity for the court to scrutinise the material before it with some care to ensure that there is a good arguable case on the merits warranting the exercise of discretion in the applicant's favour. This is, of course, in addition to the requirement that the applicant must provide a satisfactory explanation for the delay on his or her part. See, *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105.

[17] In *Fishermen and Friends of the Sea v The Environment Management Authority & Anor* [2005] UKPC 32, the appellants moved Bereaux J of the High Court of Trinidad & Tobago for an extension of time to file proceedings for judicial review. The learned judge heard this application over six days at the end of July 2002 and refused the appellants an extension of time to apply for judicial review. The appellants appealed to the Court of Appeal which, by a majority, affirmed the judge's decision on the ground that Bereaux J had properly exercised his discretion in refusing to extend the time. A further appeal to the Privy Council also failed. Lord Walker of Gestingthorpe who delivered the advice of the board said (at paragraph 27):

> Their Lordships do not accept that (as Lucky JA thought) the judge, by refusing an extension of time, pre-empted the determination of the most important issues in the case. He recognised that he could have carried forward the issue of delay to a substantive hearing. But he had in the course of a six-day hearing done far more than make a "quick perusal" of the merits. As Their Lordships read his judgment he expressed a definite preliminary view against granting an extension of time, because of the unjustifiable delay on the part of FFS, but then went on to test that conclusion against other issues, including the public interest and the strengths and weaknesses of *FFS*'s case. His consideration of those other matters did not alter his preliminary view. On the contrary, they confirmed his view that an extension should not be granted.