QSR BRANDS BHD

v.

SURUHANJAYA SEKURITI & ANOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO. W-02-1216-2005]
13 FEBRUARY 2006

ADMINISTRATIVE LAW: *Exercise of judicial functions - Judicial review - Application for leave - Principles applicable - Whether sole question at leave stage is whether application frivolous - Whether arguments such as availability of an alternative remedy go to merits of substantive application and do not fall to be considered at leave stage*

ADMINISTRATIVE LAW: *Exercise of judicial functions - Judicial review - Application for leave - Whether applicant a person "adversely affected" - Principles applicable - Whether applicant lacked standing to make application - Rules of the High Court 1980, O. 53 r. 2(4)*

The appellant was the target company in a take-over bid made by Kulim (Malaysia) Bhd, the second respondent in this case. The appellant's board, obviously unhappy with this, engaged the Securities Commission ('the Commission'), the first respondent, in some correspondence. The Commission wrote refusing an extension of time for the appellant's board to take the usual steps with regard to the take-over bid in accordance with the Take-over Code. The appellant then applied for leave to issue judicial review against the Commission. The respondents appeared at the *ex parte* hearing and argued that leave should be refused. The learned judge after a protracted hearing refused leave, correctly concluding that the Commission's letter was a decision within O. 53 r. 2(4) of the Rules of the High Court 1980. However, she went on to hold that the appellant was not a person "adversely affected" within the aforesaid sub-rule and accordingly lacked standing to make the application. She also held that the appellant had failed to exhaust the alternative remedy. She refused leave to apply for judicial review on these two grounds. Hence, the present appeal.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

(1) Arguments such as the availability of an alternative remedy go to the merits of the substantive application for judicial review and ought never to be dealt with at the leave stage. The sole question at the leave stage is whether the application is frivolous. In light of the settled approach to be taken at the leave stage, the learned judge erred in dealing with the alternative remedy at the leave stage. It is manifestly clear that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. *A fortiori*, it is a matter which does not fall to be considered on a leave application. (paras 3, 6 & 10)

(2) In an ordinary case, if on a reading of the application for leave to issue judicial review the court is satisfied that the applicant has neither a sufficient personal interest in the legality of the impugned action, nor is the application a public interest litigation, then leave may safely be refused on the ground that the applicant is not a person "adversely affected". In the instant case, it was apparent on a quick perusal of the facts that the appellant lacked a sufficient personal interest in the legality of the impugned action because the appellant, as the target company, had no role whatsoever to play by virtue of the Take-over Code. It was not in putative breach of any law by reason of anything the Commission had done or threatened to do. Next, this was not a public litigation. It was a private interest litigation. So, there was no question of granting the appellant *locus standi* under the second test. Indeed, this was a case that did not even come within the *de minimis* rule. It fell outside the spectrum altogether. The learned judge was entirely correct in holding that the appellant lacked threshold standing. Therefore, there was no merit in the complaint made against the judge's judgment on the issue of *locus standi*. (paras 18, 19, 20 & 21)

Bahasa Malaysia *translation of headnotes*

Perayu adalah syarikat sasaran dalam satu percubaan mengambilalih yang dibuat oleh Kulim (Malaysia) Berhad, responden kedua di sini. Lembaga perayu, yang menentang pengambilalihan, telah menghubungi Surahanjaya Sekuriti melalui beberapa suratnya. Suruhanjaya menjawab bahawa ia tidak

bersedia untuk melanjutkan tempoh bagi Lembaga mengambil langkah-langkah biasa di bawah Kod Pengambilalihan bagi menghadapi cubaan pengambilalihan tersebut. Perayu kemudian memohon izin (leave) untuk membuat semakan kehakiman terhadap keputusan Suruhanjaya. Di pendengaran *ex parte* yang menyusul, responden-responden hadir sambil berhujah bahawa izin harus ditolak. Yang arif hakim, selepas perbicaraan yang panjang lebar, telah menolak izin, dan merumuskan dengan betulnya bahawa surat Suruhanjaya adalah suatu keputusan bagi maksud A. 53 k. 2(4) Kaedah-kaedah Mahkamah Tinggi 1980. Apapun, yang arif hakim memutuskan bahawa perayu bukanlah seorang yang terjejas atau 'adversely affected' dalam ertikata kaedah kecil di atas, dan dengan itu tidak berkompeten untuk membuat permohonan di sini. Selain itu, perayu juga dikatakan gagal memanfaati kesemua remedi alternatif yang terbuka baginya. Atas alasan-alasan ini, yang arif hakim menolak izin untuk memohon semakan kehakiman dan perayu merayu.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

(1) Hujah mengenai kewujudan remedi alternatif adalah menyangkuti merit permohonan substantif bagi semakan kehakiman dan kerana itu tidak seharusnya ditangani di peringkat permohonan izin. Persoalan tunggal di peringkat permohonan izin adalah sama ada permohonan adalah remeh. Akibatnya, kewujudan remedi alternatif hanya menjadi relevan di peringkat pendengaran usul substantif semakan kehakiman. *A fortiori*, ia bukan perkara yang perlu dipertimbangkan atas suatu permohonan izin.

(2) Dalam suatu kes biasa, jika mahkamah, setelah menghalusi sesuatu permohonan untuk izin, berpuas hati bahawa perayu tidak mempunyai kepentingan peribadi yang mencukupi atas keesahan tindakan yang dicabar itu, atau jika permohonan tersebut bukan suatu guaman kepentingan awam, maka izin wajar ditolak atas alasan bahawa pemohon bukan seorang yang terjejas. Dalam kes semasa, adalah agak nyata, dari penelitian ringkas fakta-fakta, bahawa perayu tidak mempunyai kepentingan peribadi yang mencukupi terhadap keesahan tindakan yang dicabar. Ini kerana, perayu, sebagai syarikat sasaran, tidak mempunyai peranan untuk dimainkan berdasarkan Kod Pengambilalihan. Perayu tidak berdepan dengan kemungkinan melanggar undang-undang akibat dari apa

yang dilakukan atau hendak dilakukan oleh Suruhanjaya. Ia nyata satu guaman untuk kepentingan persendirian. Oleh itu, tidak timbul soal memberikan perayu *locus standi* dengan berdasarkan ujian kedua. Yang pasti, kes ini langsung tidak dirangkumi oleh kaedah *di minimis* dan jelas berada di luar jangkauan kaedah tersebut. Yang arif hakim dengan itu betul bilamana memutuskan bahawa perayu tidak mempunyai hak teras atau 'threshold standing'. Sungutan terhadap penghakaiman yang arif hakim atas isu *locus standi* adalah tidak bermerit.

Case(s) referred to:

Boyce v. Paddington Borough Council [1903] 1 Ch 109 ***(refd)***

Finlay v. Canada [1986] 33 DLR 421 ***(refd)***

Gouriet v. Union of Post Office Workers [1978] AC 435 ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Government of Malaysia v. Lim Kit Siang [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Harbanslal Sahnia v. Indian Oil Corporation Ltd AIR [2003] SC 2120 ***(refd)***

Inland Revenue Commissioners v. National Federation of Self-employed & Small Businesses Ltd [1982] AC 617 ***(foll)***

JP Berthelsen v. Director-General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(refd)***

Lai Cheng Cheong v. Sowaratnam [1983] 2 MLJ 113 ***(refd)***

Malik Brothers v. Narendra Dadhich AIR [1999] SC 3211 ***(refd)***

Mohamed Nordin Johan v. Attorney General, Malaysia [1983] 1 MLJ 68

Petaling Tin Bhd v. Lee Kian Chan [1994] 2 CLJ 346 SC ***(dist)***

Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 2 MLJ 177 ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan [1996] 2 CLJ 771 CA ***(refd)***

Tang Kwor Ham v. Pengurusan Danaharta Nasional Bhd [2006] 1 CLJ 927 CA ***(refd)***

Thorson v. Attorney General of Canada [1975] 1 SCR 138 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 16, O. 29, O. 53 r. 2(4)

For the appellant - Malik Imtiaz Sarwar (Mathew Thomas Philip & Ang Hean Leng with him); M/s Thomas Philip

For the 1st respondent - RR Sethu (SM Meow & Nasha Phedra Amin with him); M/s Zainal Abidin

For the 2nd respondent - Raja Aziz Addruse (Cyrus Das, Elisabeth Iype, Lohan Sabapathy & Zainal Abidin Jamal with him); M/s Zainal Abidin

[Appeal from High Court, Kuala Lumpur; Application Revision No: R2-25-220-2005]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

Background

[1] On 5 December 2005 this court was moved on a certificate of urgency for a stay pending appeal. The learned judge's judgment was available and the point at hand was one of law and practice arising from uncontroverted facts. The matter was one of undoubted urgency and importance to all concerned. We accordingly directed that the motion to be treated as the appeal proper and granted the parties dispensation from complying with the Rules of the Court of Appeal 1994. The appeal was then, on application of counsel, heard on 7 December 2005. At the conclusion of arguments we dismissed the appeal. The reasons for our decision are now produced.

[2] The facts are these. The appellant was the target company in a take-over bid made by Kulim (Malaysia) Berhad, the second respondent in this case. The appellant's board was obviously unhappy with this. So it engaged the Securities Commission, the first respondent before us, in some correspondence. On 14 October 2005, the Commission wrote refusing an extension of time for the appellant's board to take the usual steps with regard to the take-over bid in accordance with the Take-Over Code. The appellant then applied for leave to issue judicial review against the Commission. The respondents appeared at the *ex parte* hearing and argued that leave should be refused. The learned judge after a protracted hearing refused leave. She correctly concluded that the Commission's letter was a decision within RHC O. 53 r. 2(4). However, she went on to hold that the appellant was not a person "adversely affected" within the aforesaid sub-rule and accordingly lacked standing to make the application. She also held that the appellant had failed to exhaust the alternative remedy. On these two grounds she refused leave to apply for judicial review.

We will in a moment state our views on the conclusion of the learned judge on each of these two points. But we find it convenient to do so in a slightly different order from that adopted by the judge.

The Alternative Remedy Argument

[3] The very first point that we would make is that arguments such as the availability of an alternative remedy go to the merits of the substantive application for judicial review and ought never to be dealt with at the leave stage. The sole question at the leave stage is whether the application is frivolous. As Raja Azlan Shah LP observed in *Mohamed Nordin bin Johan v. Attorney General, Malaysia* [1983] 1 MLJ 68:

> 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*.

[4] And as Abdoolcader SCJ said in *JP Berthelsen v. Director-General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160:

> 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*.

[5] In *Tang Kwor Ham v. Pengurusan Danaharta Nasional Bhd* [2006] 1 CLJ 927, this court in its majority judgment sought to collect and discuss the several authorities on the subject and concluded as follows:

> 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, eg, proceedings in Parliament (see Article 63 of the Federal Constitution).

That is a view to which we adhere. A

[6] In the light of the settled approach to be taken at the leave stage, we are of the respectful view that the learned judge erred in dealing with the alternative remedy argument at the leave stage. She should have curbed the enthusiasm of counsel for the B respondents by informing them that the alternative remedy point is one that she was not prepared to deal with in limine but that it would have to be properly taken and dealt with at the hearing of the substantive motion.

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[7] The second point we would make is this. The existence of an alternative remedy does not automatically and without more oust the court's judicial review jurisdiction. The proper approach is for the judicial review court to take into account the availability of the alternative remedy in deciding whether to exercise its D discretion to grant relief on the substantive application. Thus, in *Harbanslal Sahnia v. Indian Oil Corporation Ltd* AIR [2003] SC 2120, RC Lahoti J (later CJ) said:

> So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the E appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, F the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged. (*See Whirlpool Corporation v. Registrar of Trade* G *Marks, Mumbai and Others* [1998] 8 SCC 11).

[8] In *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110, Hashim Yeop A Sani SCJ said:

> In answer to the first question, we would therefore hold that the H discretion is still with the courts, but where there is an appeal provision available to the applicant, *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty, or in appropriate cases, a serious breach of the principles of natural justice. I

[9] In *Lai Cheng Cheong v. Sowaratnam* [1983] 2 MLJ 113, Wan Suleiman FJ said:

> An applicant for *certiorari* is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy – see *R v. Postmaster General Ex p Carmichael* [1928] 1 KB 291.
>
> Nor need he have, before he can apply for that remedy, exhausted his right of appeal to a court of law. Thus, in *The King v. Wandsworth Justices* [1942] 1 KB 281 two summonses were preferred before Wandsworth Justices by the inspector of weights and measures for the county of London against the applicant, Henry Read, a butcher, charging him with having misrepresented by means of tickets the weight of certain meat which he offered for sale. At the hearing of the summonses the tickets were not produced, and, the applicant's counsel having objected to their absence, the solicitor representing the inspector agreed that the question whether or not the absence of the tickets had been satisfactorily accounted for should be treated as a preliminary issue in the proceedings to be decided before determination of the summonses on their merits. The justices, having heard evidence and arguments, withdrew to consider the matter. On their return after a considerable time, the chairman announced that the applicant was acquitted on one summons and convicted on the other and a fine of 10s. was imposed. The applicant obtained leave to make this application for an order of certiorari to remove the conviction into the court that it might be quashed.

[10] In the light of these weighty authorities, it is manifestly clear that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. *A fortiori*, it is a matter which does not fall to be considered on a leave application. That brings us to the other point.

Locus Standi

[11] Historically speaking, the requirement of standing to approach a court for judicial review was one that was established by the courts to keep out litigants who had no legitimate grievance against the administrative arm of the State. The object was to prevent them from crossing the threshold of the courts of justice. This requirement established by judges for themselves that only those with a legitimate grievance may cross the threshold and enter the court is what is known as "threshold *locus standi*". It is quite different from the doctrine of "substantive *locus standi*", which falls to be determined by court at the very end of the case, when

it comes to decide whether on the facts and circumstances discretion ought to be exercised in the applicant's favour. See, *Tan Sri Hj Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177.

[12] Under the former O. 53, the only remedies available were the prerogative orders of *certiorari*, prohibition and mandamus. The remedies of declaration and injunction could not be claimed under O. 53. If you wanted a declaration that a particular administrative act was invalid then an O. 15 r. 16 had to be resorted to; the proceeding had to be commenced either by writ or originating summons. Or if you wanted to restrain by injunction a public decision maker from pursuing a particular course of conduct, you had to resort to O. 29 and here too you had to either take out a writ or originating summons. The procedural lacuna in the public law environment produced immense *locus standi* difficulties for an applicant seeking relief. The problem was one of classification. Declaration and injunction were classified by the courts as private law remedies only to be obtained in a public law action or proceeding by the Attorney-General or upon his relator. So, the test for threshold standing in private law was very strict. It was governed by the judgment of Buckley J in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109 where he said:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (eg, where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

[13] It is for the foregoing reason that in *Government of Malaysia v. Lim Kit Siang* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63, Abdul Hamid CJ (Malaya) identified self interest as an element of the rule of standing to sue for a declaration and injunction in what was essentially a public law action. His lordship said:

> A justification for standing rules relates to standing as a function of the adversary system. Self-interest is seen as the motivating force that will ensure that the parties present their respective positions in the best possible light. If the motivation of self-interest

A is non-existent so that the ensuing dispute is not with respect to contested rights and obligations of the parties themselves, then the assurance of diligent preparation and argument cannot exist.

[14] This is entirely in keeping with the principles governing standing to obtain private law remedies in a public law context. It B demonstrates the approach to *locus standi* in private law proceedings.

[15] By contrast, *certiorari* and the other prerogative remedies were classified as public law remedies which permitted a far more C liberal threshold *locus standi* test to be met. Hence, Lord *Wilberforce said in Gouriet v. Union of Post Office Workers* [1978] AC 435 that in applications for prerogative writs in the environment of public law enforcement the courts have allowed applicants "liberal access under a generous conception of *locus standi*."

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[16] It is to rid this dichotomous approach which often produced injustice that O. 53 in its present form was introduced. There is a single test of threshold *locus standi* for all the remedies that are available under the order. It is that the applicant should be E "adversely affected". The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words "adversely affected". At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action F impugned. See, *Finlay v. Canada* [1986] 33 DLR 421. This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 CLJ 771) has been or is being or is about to G be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing. See, for example *Thorson v. Attorney General of Canada* [1975] 1 SCR 138.

[17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under H challenge is so tenuous that the court may be entitled to disregard it as *de minimis*. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is I that laid down by the Supreme Court of India in *Malik Brothers v. Narendra Dadhich* AIR [1999] SC 3211, where, when granting leave, it was said:

> [P]ublic interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

[18] In an ordinary case, if on a reading of the application for leave to issue judicial review the court is satisfied that the applicant has neither a sufficient personal interest in the legality of the impugned action in the sense already discussed, nor is the application a public interest litigation, then leave may safely be refused on the ground that the applicant is not a person "adversely affected". In this context, the court must bear in mind what Lord Diplock said in *Inland Revenue Commissioners v. National Federation of Self-employed & Small Businesses Ltd* [1982] AC 617:

> 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. 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 application.

[19] Take the facts here. It is apparent on a quick perusal of the facts that the appellant lacks a sufficient personal interest in the legality of the impugned action. Because the appellant as the target company has no role whatsoever to play by virtue of the Take-over Code. It is not in putative breach of any law by reason of anything the Securities Commission has done or threatened to do. The facts here are readily distinguishable from those of *Petaling Tin Bhd v. Lee Kian Chan* [1994] 2 CLJ 346, the authority relied on by the appellant. In that case, there had been a public censure against certain shareholders in the appellant, Petaling Tin, who

were acting in concert. Later Petaling Tin in that case received for registration, transfer forms for 250,000 shares registered in the name of the third respondent but beneficially owned by the second respondent. There was a doubt arising from a difference between the appellant and the Panel on Take-overs and Mergers about the interpretation of certain rules in the Take-over Code. There was a real and genuine fear that the registration forms may be invalid. It is in those circumstances that Petaling Tin sought a declaration. There is nothing of the sort, even remotely, here. So *Petaling Tin Bhd v. Lee Kian Chan* is readily distinguishable from the present case.

[20] Next, this is not a public interest litigation. It is a private interest litigation. So, there is no question of granting the appellant *locus standi* under the second test. Indeed, this is a case that does not even come within the *de minimis* rule. It falls wholly outside the spectrum altogether.

[21] It follows that the learned judge was entirely correct in holding that the appellant lacked threshold standing. We are therefore of the view that there is no merit in the complaint made against the judge's judgment on the issue of *locus standi.*

Conclusion

[22] For the reasons already given, the appeal failed and was dismissed. The orders that are usually consequent upon a dismissal were made.