LAM ENG RUBBER FACTORY (M) SDN BHD v PENGARAH ALAM SEKITAR, NEGERI KEDAH DAN PERLIS & ANOR

[2005] 2 MLJ 493

CIVIL APPEAL NO K–01–44 OF 1995

COURT OF APPEAL (PUTRAJAYA)

DECIDED-DATE-1: 23 NOVEMBER 2004

GOPAL SRI RAM, ABDUL AZIZ AND MOHD GHAZALI JJCA

CATCHWORDS:
Administrative Law - Exercise of administrative powers - Licence - Application for licence refused based on non-conversion of land use - Ground for refusal had no basis - Subsequent refusal of licence based on different grounds - Whether legitimate expectation that licence will be granted - Whether discretion exercised unfairly

Environmental Law - Environmental Quality Act - Application for licence - Licence refused based on non-conversion of land use - Ground for refusal had no basis - Subsequent refusal of licence based on different grounds - Whether legitimate expectation that licence will be granted - Whether discretion exercised unfairly

Environmental Law - Environmental Quality Act - Appeal Board - Appeal against refusal to grant licence dealt with by State Director instead of Appeal Board - Whether ultra vires Act

HEADNOTES:
The appellant operated a rubber factory in Sungai Petani, Kedah since 1940. In November 1993, the appellant applied for the licence from the Department of Environment, Kedah. The first respondent, the director of environment for Kedah and Perlis responded in mid-February 1994, saying that the appellant's land had not been converted from agriculture to industry and for that reason the appellant's application for a licence could not be considered. In actual fact, an earlier court judgment of KC Vohrah J between the appellant and the state director, Kedah and the land administrator, Kuala Muda, Sungai Petani, Kedah had held that the appellant had not infringed the condition of the issue document of title to their land — therefore, there was no necessity for the appellant to apply for a change of land user. After some correspondence and a reminder from the appellant, the department did not respond further. The following year, the appellant applied for the licence for 1995. Its

application was refused, the reason given was that the area surrounding the factory had become a residential area and it was unsuitable for the appellant to carry on operations there. The appellant was dissatisfied and appealed to the Appeal Board created by the Enviroment Quality Act 1974 ('the EQA'). However, its appeal was purportedly refused by the first respondent. The appellant accordingly moved to the High Court for certiorari to quash the first respondent's decision. Its application failed. The High Court held that since the appellant had no licence for the year 1994 they had carried on their factory illegally and had no legitimate expectation to have a licence for 1995.

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The Court held, allowing the appeal with costs, remitting the appeal to the Appeal Board and setting aside the orders of the High Court): In the first place, it was the wrongful conduct of the first respondent that led to the appellant having had no licence for 1994. The first respondent had told the appellant that the licence for 1994 was not forthcoming unless the condition of land use was altered. That objection was of no consequence in the light of KC Vohrah J's ruling. So the appellant was legitimately entitled to have the licence issued to it. Parliament had conferred upon the first respondent the discretion to decide whether to issue the licence or not. But the law requires him to exercise this power or discretion fairly, justly and without misdirecting himself on the law or the facts Any reasonable man in would have been led by the words and conduct of the first respondent to believe that the 1994 licence would be issued once the problem about the condition in the title to the land had been resolved. As for conduct, he accepted the payment made by the appellant and also did not respond at all to the appellant's reminder. Then atthe hearing came the suggestion that the appellant was not entitled to relief because it carried out its operations in 1994 without a licence. There was a smacking of unfairness and injustice in administration

(3) (per Gopal Sri Ram JCA, Mohd Ghazali JCA concurring) The EQA had vested the appellate power in the Appeal Board: not in the first respondent (see para 3). The first respondent had no jurisdiction whatsoever to deal with the appellant's appeal. His act in dealing and refusing the appeal was ultra vires the EQA (see para 13).

(4) (per Abdul Aziz JCA)

The only issue that the court had to decide was whether the decision of the first respondent that the appeal could not be considered was lawful. The decision was obviously unlawful. The appellant's appeal being a matter within the jurisdiction of the Appeal Board, it was not for the first respondent to decide that the appeal could

not be considered. It was for the Appeal Board to decide the fate of the appeal .

(5) (per Abdul Aziz JCA, dissenting) Other matters that had been submitted on in the appeal before the court, which turned on the question whether it was correct that as the learned judge held, the appellants had not been issued a licence for the previous period of 1 April 1994 to March 1995 and therefore there was no licence to renew and also because in that period the appellant had been operating illegally since they had no license, and [*495] which included the question of who was at fault in the appellant's not being able to obtain licence for that period, were not matters that the court needed to decide. They were matters that may be relevant to the appeal to the Appeal Board and that the Appeal Board may have to consider, the court should refrain from expressing any views about them (see para 19).

[Bahasa Malaysia summary
Perayu mengendalikan sebuah kilang getah di Sungai Petani, Kedah semenjak 1940. Dalam bulan November 1993, perayu memohon lesen dari Jabatan Alam Sekitar, Kedah. Responden pertama, pengarah alam sekitar untuk Kedah dan Perlis membalas dalam pertengahan bulan Februari 1994, dan menyatakan yang tanah perayu belum ditukar dari pertanian kepada perusahaan dan dari itu, permohonan perayu untuk lesen tidak dapat dipertimbangkan. Pada fakta sebenar, penghakiman terdahulu yang dibuat oleh KC Vohrah H di antara perayu dan pengarah negeri, Kedah dan pentadbir tanah, Kuala Muda, Sungai Petani, Kedah telah memutuskan bahawa perayu tidak melanggar syarat dokumen hak milik keluaran tanah mereka — dari itu, adalah tidak perlu untuk perayu memohon pertukaran kegunaan tanah. Selepas beberapa pertukaran surat menyurat dan satu peringatan dari perayu, jabatan tersebut tidak memberi maklum balas langsung. Tahun berikutnya, perayu memohon untuk lesen untuk tahun 1995. Permohonan tersebut ditolak, alasan yang diberikan ialah kawasan sekitar kilang tersebut telah menjadi kawasan perumahan dan ianya tidak sesuai bagi perayu mengendalikan operasinya di sana. Perayu tidak berpuas hati dan merayu ke lembaga rayuan yang ditubuhkan oleh Akta Kualiti Alam Sekitar 1974 ('AKAS'). Walau bagaimanapun, rayuannya ditolak oleh responden pertama. Perayu dengan itu memohon Mahkamah Tinggi untuk perintah certiorari untuk membatalkan keputusan responden pertama. Permohonan tersebut gagal. Mahkamah Tinggi memutuskan, oleh kerana perayu tidak mempunyai lesen untuk tahun 1994 mereka telah mengendalikan kilangnya secara haram dan tidak mempunyai harapan yang sah untuk mendapat lesen untuk tahun 1995.

Diputuskan, membenarkan rayuan dengan kos, meremitkan rayuan ke Lembaga Rayuan dan mengetepikan perintah-perintah Mahkamah Tinggi:
(1) (oleh Gopal Sri Ram HMR, Mohd Ghazali HMR bersetuju)
Pertamanya, ianya merupakan salah laku responden pertama yang menyebabkan perayu tidak mempunyai lesen untuk tahun 1994. Responden pertama telah memberitahu perayu bahawa lesen untuk tahun 1994 tidak dikeluarkan sehingga syarat guna tanah diubah. Bantahan tersebut tidak

mempunyai kesan berikutan keputusan KC Vohrah H. Dari itu, perayu berhak di sisi undang-undang mendapat lesen dikeluarkan kepadanya (lihat perenggan 4).

(2) (oleh Gopal Sri Ram HMR, Mohd Ghazali HMR bersetuju) Parlimen telah memberikan kepada responden pertama budi bicara untuk memutuskan [*496] sama ada untuk mengeluarkan lesen atau tidak. Akan tetapi undang-undang memerlukannya menggunakan kuasa tersebut atau budi bicara tersebut secara adil dan saksama dan tanpa salah arah mengenai undang-undang atau fakta-fakta (lihat perenggan 5); Savrimuthu v Public Prosecutor [1987] 2 MLJ 173 dan Laker Airways Ltd v Department of Trade [1977] QB 643 diikut. Mana-mana orang waras dalam keadaan perayu disebabkan oleh perkataan dan perlakuan responden pertama akan mempercayai bahawa lesen untuk tahun 1994 akan dikeluarkan setelah masalah mengenai syarat dalam hak milik tanah tersebut diselesaikan. Berkenaan dengan perlakuan, beliau menerima bayaran yang dibuat oleh perayu dan tidak memberi sebarang maklum balas kepada peringatan yang dibuat oleh perayu. Kemudian semasa perbicaraan terdapat cadangan bahawa perayu tidak berhak untuk relief kerana ia mengendalikan operasinya di dalam tahun 1994 tanpa lesen. Ini merupakan satu ketidakadilan dalam pentadbiran (lihat perenggan 9).

(3) (oleh Gopal Sri Ram HMR, Mohd Ghazali HMR bersetuju) AKAS telah meletak hak kuasa rayuan pada lembaga rayuan: bukan pada responden pertama (lihat perenggan 3). Responden pertama tidak mempunyai sebarang bidang kuasa untuk berurusan dengan rayuan perayu-perayu. Tindakannya untuk berurusan dan menolak rayuan tersebut adalah ultra vires AKAS (lihat perenggan 13).

(4) (oleh Abdul Aziz HMR) Satu-satunya isu yang perlu diputuskan oleh mahkamah adalah sama ada keputusan responden pertama yang memutuskan bahawa rayuan tersebut tidak boleh dipertimbangkan adalah sah. Keputusan tersebut jelasnya tidak sah. Rayuan perayu-perayu adalah di dalam bidang kuasa Lembaga Rayuan, ianya bukan untuk responden pertama memutuskan sama ada rayuan tersebut tidak boleh dipertimbangkan. Ianya adalah untuk Lembaga Rayuan memutuskan nasib rayuan tersebut (lihat perenggan 18).

(5) (oleh Abdul Aziz HMR menentang) Perkara-perkara lain yang dihujahkan semasa rayuan di hadapan mahkamah, yang menyoal kesahihan keputusan yang arif hakim yang memutuskan bahawa oleh kerana perayu tidak diberikan lesen untuk jangka masa terdahulu iaitu dari 1 April 1994 ke Mac 1995 maka tidak terdapat lesen untuk diperbaharui dan dari itu juga dalam jangka masa tersebut perayu telah beroperasi secara haram kerana mereka tidak mempunyai lesen, dan juga persoalan siapakah yang bersalah kerana perayu tidak dapat memperoleh lesen dalam tempoh tersebut, bukanlah perkara yang perlu diputuskan oleh mahkamah; kerana ia merupakan perkara-perkara yang mungkin relevan untuk rayuan kepada Lembaga Rayuan dan yang mungkin akan dipertimbangkan oleh Lembaga Rayuan, mahkamah patut dihalang dari memberikan apa-apa pandangan

mengenainya (lihat perenggan 19).] [*497]

Notes
For cases on Enviromental Quality Act generally, see 6 Mallal's Digest (4th Ed, 2004 Reissue) paras 2266–2268.
For cases on exercise of administrative powers, see 1 Mallal's Digest (4th Ed, 2002 Reissue) para 8.

Cases referred to
Laker Airways Ltd v Department of Trade [1977] QB 643
Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997
Savrimuthu v Public Prosecutor [1987] 2 MLJ 173

Legislation referred to
Environmental Quality Act 1974 ss 18, (1), 35(1)(a), 36

Appeal from
Originating Motion No 25–11 of 1995 (High Court, Alor Setar)

Ghazi Ishak (B Jayasingam with him) (Ghazi & Lim) for the appellant.
Suzana Atan (Senior Federal Counsel) (Attorney General's Chambers) for the respondents.

Gopal Sri Ram JCA:

[1] (delivering majority judgment):

[2] 1 This appeal was heard and allowed on 23 November 2004 for the reasons now produced. The facts are relatively simple. The appellant operates a rubber factory in Sungai Petani, Kedah. The factory has been in operation since 1940. Each year the appellant applied for and obtained a licence from the local authority. In 1974, the Environmental Quality Act ('the EQA') came into force. By reason of its provisions, the appellant had to obtain a licence from the Department of the Environment, Kedah.

After the EQA came into force, the appellant applied for and was issued the requisite licence by the department. Then a problem arose in 1993 when the appellant applied for their 1994 licence. It happened in this way.

[3] 2 In November 1993, the appellant applied for the licence as it had done in the preceding years. It filled up the prescribed form and submitted it with the processing fee of RM250. The first respondent, the director of environment for Kedah and Perlis responded in mid-February 1994. He wrote, saying that according to his department's records the appellant's land had not been converted from agriculture to industry and for that reason the appellant's application for a licence could not be considered. The first respondent also drew the appellant's attention to s 18 EQA which made it an offence to operate a factory without [*498] a licence. There was then an exchange in correspondence culminating in the appellant's solicitors sending to the first respondent a copy of the judgment of KC Vohrah J in originating motion No 32–33 of 1987 (High Court, Alor Setar) between the appellant in the instant appeal and the state director, Kedah and the land administrator, Kuala Muda, Sungai Petani, Kedah where that learned judge held that the appellant had not infringed the condition of the issued document of title to their land. In other words, there was no necessity for the appellant to apply for a change of land user. The solicitors' letter which dated 21 February 1994 also said that it would be contrary to law for the first respondent not to issue the appellant the licence it had applied for. On 6 March 1994 the first respondent wrote to the appellant's solicitors calling for a meeting on 26 March 1994. Why a meeting was required is unclear. After all, the appellant had complied with all the statutory requirements and was plainly entitled to a licence. In any event, no meeting appears to have taken place because the appellant's solicitors replied saying that the appellant's representative was not available on the date of the proposed meeting. Then on 12 April 1994 the appellant sent a reminder asking for the licence to be issued. The rest was silence.

[4] 3 Then, as usual, the appellant applied for the licence for 1995. On this occasion its application was refused. The reason given was that the area surrounding the factory had become a residential area and it was unsuitable for the appellant to carry on operations there. It is significant that no complaint was made that the appellant had operated their factory without a licence for the year 1994. The appellant was dissatisfied and appealed to the Appeal Board created by the EQA. However, its appeal was purportedly refused by the first respondent. This was plainly illegal. For, the EQA had vested the appellate power in the Appeal Board: not in the first respondent. The appellant accordingly moved to the High Court for certiorari to quash the first respondent's decision. Its application failed. And for the oddest of reasons. The High Court accepted the submission of learned senior federal counsel that since the appellant had no licence for the year 1994 they had carried on their factory illegally and had no legitimate expectation to have a licence for 1995. This, in my judgment, is not correct.

[5] 4 In the first place, it was the wrongful conduct of the first respondent that led to the appellant having had no licence for 1994. He (the first respondent) had in so many

words told the appellant that the licence for 1994 was not forthcoming unless the condition of land use was altered. That objection was of no consequence in the light of KC Vohrah J's ruling in originating motion No 32–33 of 1987 (referred to earlier). So the appellant was legitimately entitled to have the licence issued to it.

[6] 5 Of course, Parliament has conferred upon the first respondent the power or, to use a more well worn expression, the discretion to decide whether to issue the licence or not. But the law requires him to exercise this power or [*499] discretion fairly, justly and without misdirecting himself on the law or the facts. As Salleh Abas said in Savrimuthu v Public Prosecutor [1987] 2 MLJ 173:

> [P]ublic interest, reason and sense of justice demand that any statutory power must be exercised reasonably and with due consideration.

[7] 6 The same principle was laid down in slightly different language by Lord Denning MR in Laker Airways Ltd v Department of Trade [1977] QB 643. There are two passages in the judgment of the Master of the Rolls that merit reproduction. This is what he said in the first:

> The underlying principle is that the Crown cannot be estopped from exercising its powers, whether given in a statute or by common law, when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to a private individual: see Maritime Electric Co Ltd v General Dairies Ltd [1937] AC 610 where the Privy Council, unfortunately, I think, reversed the Supreme Court of Canada [1935] SCR 519. It can, however, be estopped when it is not properly exercising its powers, but is misusing them; and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public: see Robertson v Minister of Pensions [1949] 1 KB 227, Re Liverpool Taxi Owners' Association [1972] 2 QB 299, HTV Ltd v Price Commission [1976] ICR 170.

[8] 7 And this is what he said in the second:

> The two outstanding cases are Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, and Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 769, where the House of Lords have shown that when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers, so as to see that they are used properly, and not improperly or mistakenly. By mistakenly, I mean under the influence of a misdirection in fact or in law.

[9] 8 The judgment of Lord Denning MR in Laker Airways Ltd v Department of

Trade [1977] QB 643 has been referred to and applied by our Federal Court. See Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204; Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337.

[10] 9 Now apply these pronouncements to the present facts. Here we have a case where any reasonable man in the appellant's shoes would have been led by the words and conduct of the first respondent to believe that the 1994 licence would be issued once the problem about the condition in the title to the land had been resolved. As for words, you only have to look at the letter he wrote. As for conduct, he accepted the payment made by the appellant and also did not respond at all to the appellant's reminder. Then at the hearing comes the suggestion that the appellant was not entitled to relief because it carried out its operations in 1994 without a licence. Now put that altogether and put it in any appropriate terms. You may say that the first respondent is [*500] estopped from refusing the 1994 licence. Or you may say that it is a case where the appellant was put in a position where it had a legitimate expectation that the 1994 licence would be issued. It does not matter. What in reality you have is a smacking of unfairness and injustice in administration.

[11] 10 Learned senior federal counsel suggested in her argument that the appellant had not acted reasonably because it had only sent one reminder to the first respondent. Now, how many reminders is a member of the public supposed to send to a government department before its staff will act? Quite frankly, I am unable to find an answer to that question.

[12] 11 In my judgment, each and every member of the public has a legitimate expectation to have his or her written communication to a government department looked into and dealt with in a timeous, courteous and efficient manner. It may be an application for a licence. It may be a letter of query. Or it may be a letter of complaint. Whatever the nature of the communication, there must be a response within a reasonable time. Otherwise it will be a case of poor administration. And the law does not sanction poor administration. Indeed, in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, the House of Lords approved Lord Denning's dissent in the Court of Appeal in that case where he said:

> Good administration requires that complaints should be investigated and that grievances should be remedied.

[13] 12 I recall at one point of time when Tun Abdul Razak our second Prime Minister introduced a system whereby every letter received by a government department was responded to promptly by an acknowledgment card which carried a file number with the pre-printed remarks that the matter was receiving attention. This enabled the writer to have a file reference with which to follow up with his inquiry or complaint. I cite this merely as an example of good administration in practice. One should not lose sight of the fact that for these many years the motto of the civil service administration has been 'Cekap, Bersih dan Amanah' (Clean, Efficient and

Trustworthy). In my judgment, it is the duty of the judicial arm of the government, the courts, to ensure good administration by the due observance of this motto on a case by case basis. Otherwise members of the public who are adversely affected by a breach of the spirit and intendment of the motto in question will be left without resort to administrative justice.

[14] 13 That brings me to this case. The first respondent, as I have said, had no jurisdiction whatsoever to deal with the appellant's appeal. His act was ultra vires to the EQA. We therefore allowed the appeal with costs here and below and remitted the appeal to the Appeal Board appointed under s 36 of the EQA to hear and dispose of the appeal in accordance with law. The orders of the High Court were set aside. The deposit was ordered to be refunded to the appellant.

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[15] 14 My learned brother Mohd Ghazali bin Mohd Yusoff JCA had seen this judgment in draft and has expressed his agreement with it.

Abdul Aziz JCA:

[16] :

[17] 15 The problems faced by the appellant company and the events surrounding them are broadly outlined in the grounds of judgment of my learned brother Gopal Sri Ram JCA. The problems concerned licensing in respect of the appellant's rubber factory. By virtue of an order of the minister under s 18(1) of the Enviromental Quality Act 1974, the occupation or use of the factory required license.

[18] 16 In the High Court the appellant sought orders to quash a decision that the first respondent made on 15 January 1995 and a decision of 25 February 1995, said in the appellant's notice of motion to have been made by the second respondent board. The decision of 15 January 1995 was a decision to refuse to renew the licence for the period 1 April 1995 to 31 March 1996. The decision of 25 February 1995 was actually a decision of the first respondent himself on the appellant's appeal to the second respondents against the decision of 15 January 1995. The decision of 25 February was that the appeal could not be considered becauses there had been complaints of offensive smell emanating from the appeallant's factory and because of the discharge of effluent from the factory had often failed to comply with the conditions of licence. The appellant also sought by their notice of motion and order either to compel the first respondent to consider the renewal application (which he had done) or to compel the second respondents to hear the appellant's appeal.

[19] 17 At the close of his oral submission in the appeal before us, which arose from the High Court's dismissal of the appellant's notice of motion, the appellant's counsel

said that basically the appellant's grievance was over the summary rejection by the first respondent of their appeal to the Appeal Board. It may be mentioned that the appellant's right of appeal is given by s 35(1)(a) of the Act and the appeal is to the Appeal Board constituted under s 36. The appellant's notice of appeal had been addressed to the second respondent, described as 'Badan Rayuan Jabatan Alam Sekitar, Negeri Kedah and Perlis', as to which the judge said that there was no body that was known by that name, but no question arose before us that that was not the Appeal Board mentioned in s 36

[20] 18 In view of what the appellant's counsel said, the only issue that I saw that we had to decide was whether the decision of the first respondent that the appeal could not be considered was lawful. If it was not, the decision had to be quashed and an order had to be made to enable the appellants to pursue their appeal. The decision was obviously unlawful. The appellant's appeal being a matter within the jurisdiction of the Appeal Board, it was not for the first respondent to decide that the appeal could not be considered. It was for the Appeal Board to decide the fate of the appeal.

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[21] 19 We accordingly quashed the decision of 25 February 1995 and remitted the matter to the Appeal Board to consider and decide the appellant's appeal according to law. In the event, other matters that had been submitted on in the appeal before us, which turned on the question whether it is correct that as the learned judge held, the appellants had not been issued a licence for the previous period of 1 April 1994 to March 1995 and therefore there was no licence to renew and also because in that period that had been operating illegally since they had no license, and which included the question of who was at fault in the appellant's not being able to obtain licence for that period, were not matters that we needed to decide; and as they are matters that may be relevant to the appeal to the Appeal Board and that the Appeal Board may have to consider, I refrain from expressing any views about them.

ORDER:
Appeal allowed. Appeal remitted to Appeal Board.