A

WONG KIN HOONG & ANOR

v.

KETUA PENGARAH JABATAN ALAM SEKITAR & ANOR

B

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
C AHMAD MAAROP FCJ
HASAN LAH FCJ
ZALEHA ZAHARI FCJ
[CIVIL APPEAL NO: 01-1-01/2012]
20 MAY 2013
D [2013] CLJ JT(2)

CIVIL PROCEDURE: *Judicial review - Application for leave - Extension of time to apply for leave - Whether an exercise of judicial discretion - Whether going to jurisdiction - Duty of trial judge - Whether not to consider merits of case when hearing application for extension of* E *time - Rules of the High Court 1980, O. 53 r. 3(6) - Rules of Court 2012, O. 53 r. 3(6), (7)*

Raub Australian Gold Mining Sdn Bhd, the second respondent in this case, had sought to build a Carbon-In-Leach plant near F Kampung Bukit Koman, Raub, Pahang to process old gold mine tailings using cyanide, and to that end had submitted an Environmental Impact Assessment report ('EIA report') to the first respondent, the authority responsible for enforcing the provisions of the Environmental Quality Act 1974 ('EQA'). On 13 January G 1997, the first respondent approved the EIA report. On 21 March 2008, the appellants, the residents of Kampung Bukit Koman, being dissatisfied with the approval and alleging that the plant would violate s. 34A of the EQA, applied to the High Court under O. 53 r. 3 Rules of the High Court 1980 ('RHC') for leave H to apply for judicial review to quash the first respondent's decision of 13 January 1997, and for an extension of time to file the application. The leave application was however dismissed by the High Court for reasons that the appellants, having filed the application more than 11 years after the impugned decision was I made, and more than one year after it was communicated to them, were guilty of inordinate delay. It was the view of the learned judge that there was no good reason to extend the 40-day time

frame prescribed by O. 53 r. 3 for filing the leave application, and in any case that, since the application for leave goes to jurisdiction, there was no need for her to consider the merits of the case when hearing the application for extension of time. The appellants appealed to the Court of Appeal and being unsuccessful thereat appealed further. Before the learned justices of the apex court herein, the appellants *inter alia* argued that: (i) based on the majority decision in the Court of Appeal case of *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional & Ors ('Tang Kwor Ham')*, the trial judge below ought to consider the merits of the case when considering the appellants' application for extension of time for leave to commence judicial review; and (ii) the authorities of the Federal Court in *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower ('Mersing Omnibus')* and *Ravindran v. Malaysian Examinations Council ('Ravindran')*, which precluded examination of the merits of the case in such applications, were bad law and ought to be overruled. The respondents retorted that *Mersing Omnibus* and *Ravindran* are still good law, and in any case that reliance on *Tang Kwor Ham* is misconceived as that case was not concerned with the issue of extension for time nor consideration of merits at the leave stage.

Held (dismissing appeal)
Per Raus Sharif PCA delivering the judgment of the court:

(1) The procedure relating to the filing of a judicial review application is set out in O. 53 RHC. An application for judicial review is a two-stage process, *ie*, the leave application and should leave be granted the hearing of the substantive application arguments on its merits. (para 14)

(2) Prior to the amendment to the RHC in 2000, the provisions relating to applications for leave for judicial review was O. 53 r. 1A. By the amendment made in 2000, O. 53 r. 1A was deleted and replaced by O. 53 r. 3(6). The same provision was adopted in the Rules of Court 2012 under which the time frame to apply for judicial review was extended from 40 days to three months. (paras 15-17)

(3) The applicable provision in the present case was O. 53 r. 3(6) of the RHC. It follows that the application for leave must be made within 40 days from the date when the grounds of application first arose or when the decision was first

communicated to the appellants. Be that as it may, a common factor in the relevant provisions was that an application for leave for judicial review must be made promptly, and that the court may, upon application, and if it considers there is good reason for doing so, extend it. Thus, whether an extension of time ought to be granted or not is an exercise of judicial discretion. (paras 18 & 19)

(4) With respect, this court is unable to agree with the proposition made by Gopal Sri Ram JCA in *Tang Kwor Ham*. The principal issue in *Tang Kwor Ham* was the jurisdiction to secure an injunction against Danaharta by way of judicial review. However, the Federal Court in *Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors and Another Appeal* had reversed the majority decision of the Court of Appeal, and upheld the decision of the High Court in refusing to grant leave. The remarks of Gopal Sri Ram JCA in *Tang Kwor Ham* ("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"... etc) were also made *obiter*. The remarks reflect an incorrect proposition of law as there was a complete absence of discussion or reference to the Federal Court decisions in *Mersing Omnibus* and *Ravindran*. (paras 28 & 29)

(5) The principle in *Mersing Omnibus* and *Ravindran* is still good law. Whilst it is true that both *Mersing Omnibus* and *Ravindran* were decided under the old O. 53 r. 1A of the RHC, the principle in relation to an application to extend time to file an application for judicial review remains the same. (para 29)

(6) The time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not is irrelevant. (para 30)

Bahasa Malaysia *Translation Of Headnotes* A

Raub Australian Gold Mining Sdn Bhd, responden kedua dalam kes ini, berhasrat untuk membina sebuah kilang Carbon-in-Leach bagi memproses bijih-bijih lombong emas lama di Kampung Bukit Koman, Raub, Pahang dan untuk itu telah mengemukakan satu B laporan Penilaian Kesan Alam Sekeliling ('laporan EIA') kepada responden pertama, pihak berkuasa yang bertanggungjawab menguatkuasakan peruntukan-peruntukan Akta Kualiti Alam Sekeliling 1974 ('EQA'). Pada 13 Januari 1997, responden pertama telah meluluskan laporan EIA. Pada 21 Mac 2008, perayu-perayu, C penduduk-penduduk Kampung Bukit Koman, yang tidak berpuashati dengan kelulusan dan mendakwa bahawa kilang akan melanggari s. 34A EQA, memohon kebenaran Mahkamah Tinggi di bawah A. 53 k. 3(6) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk memohon semakan kehakiman bagi membatalkan D keputusan responden pertama bertarikh 13 Januari 1997, dan untuk lanjutan masa bagi memfailkan permohonan. Permohonan kebenaran bagaimanapun ditolak oleh Mahkamah Tinggi atas alasan bahawa perayu-perayu telah melakukan kelengahan yang melampau apabila memfailkan permohonan tersebut lebih dari 11 tahun E setelah keputusan dibuat, dan lebih dari satu tahun setelah keputusan diberitahu kepada mereka. Mengikut yang arif hakim, tidak terdapat apa-apa alasan kukuh untuk melanjutkan tempoh masa 40 hari bagi pemfailan permohonan kebenaran seperti yang ditetapkan oleh A. 53 k. 3, dan walau apapun, oleh kerana F permohonan untuk kebenaran menjurus kepada bidangkuasa, maka tiada keperluan untuk beliau menimbang merit kes semasa mendengar permohonan lanjutan masa. Perayu-perayu merayu ke Mahkamah Rayuan dan setelah gagal membuat rayuan seterusnya. Di hadapan yang arif hakim-hakim mahkamah tertinggi di sini, G perayu-perayu antara lain berhujah: (i) bahawa berdasarkan keputusan majoriti Mahkamah Rayuan di dalam kes *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional & Ors* ('*Tang Kwor Ham*'), hakim bicara di bawah sepatutnya menimbang merit kes bilamana mendengar permohonan perayu-perayu untuk lanjutan H masa bagi kebenaran untuk memulakan semakan kehakiman; dan (ii) autoriti Mahkamah Persekutuan di dalam *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower ('Mersing Omnibus')* dan *Ravindran v. Malaysian Examinations Council ('Ravindran')*, yang menolak pemeriksaan merit kes dalam permohonan- I permohonan sebegini, bukan lagi merupakan undang-undang yang

dipakai dan kerana itu harus ditolak. Responden-responden membalas bahawa *Mersing Omnibus* dan *Ravindran* masih merupakan undang-undang terpakai, dan walau apapun kebergantungan kepada *Tang Kwor Ham* adalah salah kerana kes tersebut tidak berkait dengan isu lanjutan masa atau pertimbangan merit di peringkat permohonan kebenaran.

Diputuskan (menolak rayuan)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Prosedur mengenai pemfailan permohonan untuk semakan kehakiman diperuntukkan oleh A. 53 KMT. Permohonan untuk semakan kehakiman adalah satu proses dua peringkat, iaitu bermula dengan permohonan kebenaran dan jika kebenaran diberi, pendengaran hujah-hujah permohonan substantif di atas merit.

(2) Sebelum pindaan kepada KMT pada tahun 2000, peruntukan berkaitan permohonan kebenaran untuk semakan kehakiman adalah A. 53 k. 1A. Melalui pindaan pada tahun 2000, A. 53 k. 1A telah dimansuh dan diganti dengan A. 53 k. 3(6). Peruntukan sama telah diterimapakai oleh Kaedah-Kaedah Mahkamah 2012 di mana jangka masa bagi memohon semakan kehakiman telah dilanjutkan dari 40 hari ke tiga bulan.

(3) Peruntukan yang terpakai dalam kes ini adalah A. 53 r. 3(6) KMT. Ianya mengikut bahawa permohonan untuk kebenaran hendaklah dibuat dalam tempoh 40 hari dari tarikh di mana alasan-alasan permohonan mula berbangkit atau dari keputusan disampaikan kepada perayu-perayu. Apapun, satu ciri am yang terdapat pada semua peruntukan-peruntukan relevan adalah bahawa permohonan kebenaran untuk semakan kehakiman mestilah dibuat dengan segera, dan mahkamah boleh, atas permohoan dan jika merasakan ada alasan baik untuk berbuat demikian, melanjutkan masa. Oleh itu, sama ada lanjutan masa dibenarkan ataupun tidak adalah perkara pelaksanaan budibicara kehakiman.

(4) Dengan hormat, mahkamah ini tidak bersetuju dengan saranan yang dibuat oleh Gopal Sri Ram HMR di dalam *Tang Kwor Ham*. Isu utama di dalam *Tang Kwor Ham* adalah bidangkuasa untuk mendapatkan injunksi terhadap Danaharta melalui

semakan kehakiman. Bagaimanapun, Mahkamah Persekutuan di dalam kes *Pengurusan Danaharta Nasional Berhad v. Tang Kwor Ham & Ors and Another Appeal* telah mengakas keputusan majoriti Mahkamah Rayuan dan mengesahkan keputusan Mahkamah Tinggi yang enggan memberi kebenaran. Kata-kata Gopal Sri Ram HMR di dalam *Tang Kwor Ham (*"satu-satunya keadaan di mana mahkamah, atas permohonan kebenaran, boleh melihat dengan lebih teliti kepada merit kes, adalah permohonan untuk lanjutan masa bagi memohon semakan kehakiman" … dll) juga dibuat secara *obiter*. Kata-katanya itu mencerminkan satu saranan undang-undang yang salah kerana tiada apa-apa kupasan atau perbincangan dibuat terhadap keputusan Mahkamah Persekutuan di dalam *Mersing Omnibus* dan *Ravindran.*

(5) Prinsip seperti yang dibentangkan di dalam *Mersing Omnibus* dan *Ravindran* masih merupakan undang-undang yang dipakai. Sementara memang benar bahawa *Mersing Omnibus* dan *Ravindran* telah diputuskan di bawah A. 53 k. 1A KMT yang lama, prinsip berhubung dengan permohonan untuk melanjutkan masa bagi pemfailan permohonan semakan kehakiman masih tetap sama.

(6) Jangka masa untuk memohon semakan kehakiman seperti yang ditetapkan oleh Kaedah-Kaedah adalah fundamental. Ia menjurus kepada bidangkuasa dan sebaik sahaja hakim bicara menolak penjelasan yang diberi atas kelewatan memohon lanjutan masa untuk memohon semakan kehakiman, mahkamah tidak lagi berbidangkuasa untuk mendengar permohonan kebenaran untuk memohon semakan kehakiman. Sama ada permohonan mempunyai merit atau sebaliknya adalah tidak relevan.

Case(s) referred to:

Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors and Another Appeal [2007] 4 CLJ 513 FC ***(refd)***

Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***

Ravindran P Muthukrishnan v. Malaysian Examinations Council [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 FC ***(refd)***

Tang Kwor Ham v. Pengurusan Danaharta Nasional [2006] 1 CLJ 927 CA ***(not foll)***

Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Legislation referred to:
Environmental Quality Act 1974, s. 34A
Rules of Court 2012, O. 53 r. 3(6), (7)
Rules of the High Court 1980, O. 53 rr. 1A, 2(4)

For the appellants - Malik Imtiaz Sarwar (Jesicca Ram Binwani, Theivanai Amarthalingam, M Sarguna Kumaari with him); M/s Jessica, Theiva & Kumari
For the 1st respondent - Suzana Atan (Shamsul Bolhassan with her) SFCs; AG's Chambers
For the 2nd respondent - Cecil W M Abraham (CS Nantha Balan, Sunil Abraham, Farah Shuhadah Razali with him); M/s Zul Rafique & Partners

[Appeal from High Court, Kuala Lumpur; Judicial Review No: R1-25-74-08]

Reported by Wan Sharif Ahmad

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This is an appeal by the appellants against the decision of the Court of Appeal which upheld the decision of the High Court in dismissing the appellants' application for leave for extension of time to file an application for judicial review pursuant to O. 53 r. 3 of the Rules of the High Court 1980 ("the RHC").

[2] On 6 September 2012, we heard and dismissed the appeal. We now give our reasons.

Background Facts

[3] Briefly, the facts are these. The company known as Raub Australian Gold Mining Sdn Bhd ("the second respondent") had been granted mining rights under a lease. At the material time, the second respondent was in the midst of building a Carbon-In-Leach Plant ("CIL Plant") near Kampung Bukit Koman, Raub, Pahang ("Kampung Bukit Koman") to process old gold mine tailings using cyanide.

[4] The Director General of the Department of Environment ("the first respondent"), the authority responsible for enforcing the provisions of the Environmental Quality Act 1974 ("EQA"), had on 13 January 1997 approved the Environmental Impact Assessment ("EIA") report submitted by the second respondent ("the 1st decision"). A B

[5] The appellants who were residents and owners of the properties at Kampung Bukit Koman, and also members of the committee campaigning against the construction of the CIL Plant was of the view that the EIA report did not comply with the requirements of s. 34A of the EQA and/or regulations and/or guidelines thereunder. Accordingly, the appellants applied to the first respondent for the second respondent to submit a detailed EIA of the CIL Plant to it. C

[6] On 21 February 2008, the first respondent informed the appellants that as the EIA report had already been approved on 13 January 1997, their request was misplaced ("the 2nd decision"). D

[7] On 21 March 2008, the appellants filed an application in the High Court for leave to apply for judicial review *inter alia*, to quash the 1st decision as well as a declaration on that the 2nd decision of the first respondent was unfair and unreasonable, against the principles of natural justice, contrary to s. 34A of the EQA and in violation of their human rights. The application also sought for an extension of time to file the leave application in respect of the 1st decision since the application was filed outside the scope of 40 days period prescribed under O. 53 r. 3 of the RHC. E F

[8] On 1 June 2009, the High Court dismissed the appellants' application. It was held that there was inordinate delay on the part of the appellants in filing the application. The delay was more than eleven (11) years from the time the 1st decision was made known to the public, and more than one (1) year from the time it was communicated to them. It was also held that, the delay in the filing of appellants' application for leave to file the application for judicial review goes to jurisdiction and the merits of the case need not be considered in hearing an application for extension of time. In respect to the 2nd decision, the learned judge held that it was not a decision that is amenable to judicial review. G H I

[9] On 3 August 2011, the Court of Appeal, unanimously affirmed the decision of the learned High Court Judge.

Leave To Appeal To Federal Court

[10] On 11 January 2012, leave to appeal was granted by this court and the sole question framed for determination was:

> Having regard to the decisions of the Supreme Court in *Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266; [1983] 2 MLJ 54, and *Ravindran P Muthukrishnan v. Malaysian Examinations Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320; [1984] 1 MLJ 168 and the Court of Appeal in *Tang Kwor Ham v. Pengurusan Danaharta Nasional* [2006] 1 CLJ 927 whether a Court is required to consider the merits of an application for leave to commence judicial review made under Order 53 rule 3 of the Rules of the High Court 1980 when determining an application for an extension of time to file the said leave application?

Submissions

[11] Encik Malik Imtiaz Sarwar, learned counsel for the appellants submitted that the question posed should be answered in the affirmative. He argued that the amendment to O. 53 r. 3(6) of the RHC in 2000 had the effect of permitting the court to consider the merits of the case in considering an application for extension of time for leave to file an application for judicial review. He submitted that the two decisions of the Federal Court in *Mersing Omnibus Co. Sdn Bhd v. Minister of Labour and Manpower (supra) ("Mersing Omnibus")* and *Ravindran v. Malaysian Examinations Council (supra) ("Ravindran")* which precluded an examination of the merits of the case was no longer good law as these two cases were decided prior to the amendment of O. 53 r. 3(6) of the RHC. Learned counsel urged this court to adopt the majority decision of the Court of Appeal's decision in the case of *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional & Ors (supra) ("Tang Kwor Ham")*.

[12] Tan Sri Dato' Cecil WM Abraham, learned counsel for the second respondent submitted otherwise. He submitted that all that the 2000 amendment to O. 53 did was *inter alia* to extend the time limit within which an applicant may file an application for leave to file an application for judicial review. The amendments made no mention that the merits of an application should be

considered in considering an application for extension of time. According to him, there was no change, except for the prescribed period in filing an application for judicial review. According to him *Mersing Omnibus* and *Ravindran* were still good law. He further submitted that the appellants' reliance in the majority decision of *Tang Kwor Ham* was misconceived as the principal issue in *Tang Kwor Ham* was the right to secure injunctive relief and the case was not concerned with the issue of extension of time nor the consideration of merits at the leave stage.

[13] Puan Suzana Atan, learned Senior Federal Counsel who appeared on behalf of the first respondent, supported the submissions of the learned counsel for the second respondent. She reiterated that, the principle enunciated in *Mersing Omnibus* and *Ravindran* was still good law. She further submitted that in the present case there was no good reason being adduced by the appellants to show that they had accounted for the delay to the satisfaction of the court.

Findings

[14] The procedure relating to the filing of a judicial review application is set out in O. 53 of the RHC. An application for judicial review is a two-stage process. The first stage is the leave application and the second stage is the hearing of the substantive application arguments on its merits, should leave be granted.

[15] Prior to the amendment made in 2000 to the RHC, the provisions relating to an application for leave for judicial review was O. 53 r. 1A which provides as follows:

> 1A. Leave shall not be granted to apply for an order of *certiorari* to remove any judgment, order, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made within 6 weeks after the date of the proceedings or such other period (if any) as may be prescribed by any enactment or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the Court or Judge to whom the application for leave is made and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

[16] In year 2000, amendment to the RHC saw the deletion of O. 53 r. 1A and replaced by O. 53 r. 3(6) which provides that:

> 3(6) An application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[17] The same provision was adopted in the Rules of Court 2012 that came into effect on 1 August 2012. Under the Rules of Court 2012, the time frame to apply for judicial review was extended from 40 days to three (3) months. Order 53 r. 3(6) and (7) of the Rules of Court 2012 provides as follows:

> (6) An application for judicial review shall be made promptly and in any event within (3) three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.
>
> (7) The court may, upon an application, extend the time specified in rule 3(6) if it considers that there is good reason for doing so.

[18] A common factor in the above provisions is that an application for leave for judicial review must be made promptly but the court may upon application and if it considers that there is good reason for doing so, extend it. Thus, whether an extension of time ought to be granted or otherwise is an exercise of judicial discretion. And it is a well-settled principle that an appellate court will rarely interfere with the court exercise of judicial discretion unless it is clearly satisfied that the discretion had been exercised on a wrong principle. (See Federal Court decision in *Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101; [1981] 150 and Privy Council case of *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 31 MLJ 228).

[19] In the present case the applicable provision at the material time when the appellants filed their application for judicial review was O. 53 r. 3(6) of the RHC. Under the said order, an application must be made within forty (40) days from the date when the grounds of the application first arose or when the decision is first communicated to the applicant. As stated earlier, the learned trial judge finding was that the application was made

more than eleven (11) years from the time the 1st decision was made known to the public, and more than one (1) year from the time it was communicated to the appellants. The trial judge also ruled that there was no good reason for extending the then prescribed period of 40 days.

[20] The Court of Appeal agreed with the decision and reasoning of the trial judge and therefore found no reason to interfere with the judge's exercise of discretion. However, that was not the issue before us. The sole issue before us was whether the learned judge, in exercising her discretion, was required to take into consideration the merits of the case.

[21] As stated earlier, learned counsel for the appellants' contention was that the trial judge ought to consider the merits of the case when considering the appellants' application for extension of time for leave to commence judicial review. He argued that the Federal Court cases of *Mersing Omnibus* and *Ravindran*, which precluded the examination of the merits of the case, should be overruled. Instead he urged us to adopt the majority decision of the Court of Appeal in the case of *Tang Kwor Ham* as it purported to reflect the current position in dealing with an application for leave for judicial review. Thus, it is important for us to look at the three cases more closely.

[22] *Mersing Omnibus* was concerned with the interpretation of O. 53 r. 1A of the RHC. In that case, the Minister of Labour and Manpower on 23 November 1981 made a decision that Mersing Omnibus was to extend their recognition to the union for the categories of employees stipulated therein. On 9 January 1982, Mersing Omnibus sought leave to apply for an order of *certiorari* to quash the decision of the Minister. Leave was granted by the trial judge but subsequently, on the substantive application for *certiorari*, the application was dismissed. Mersing Omnibus appealed. The Federal Court held that Mersing Omnibus's application for leave was filed after six (6) weeks had lapsed from the decision of the Minister. It was then held that, as Mersing Omnibus was out of time, and as it had neither sought an extension of time nor accounted for the delay to the satisfaction of the judge, leave should not in the first place have been granted to Mersing Omnibus.

[23] In *Ravindra*n, the Malaysian Examinations Council in exercise of its powers under s. 9 of the Malaysian Examinations Council Act 1980 had annulled all of the results of Ravindran in the 1982 STP examination. The order was made on 6 July 1983 and Ravindran received the order on 15 July 1983. Ravindran's application for *certiorari* to quash the Malaysian Council's Order was made on 30 August 1983. It was eight (8) days out of time, if the time were to run from the date of the Council's decision was served, and thirteen (13) days out of time, if the time runs from the date of the decision of the Council. The trial judge dealt with two aspects of the issue before him. First, he dealt with the reason for the delay in applying for the extension of time. Secondly, he dealt with the merits of the case if the explanation for the delay was accepted. The learned trial judge rejected the explanation for the delay. On appeal, the Federal Court was of the view that the whole issue was one of jurisdiction. It was held that as the learned trial judge had rejected the explanation for the delay it follows that the learned trial judge had no jurisdiction to hear the application for leave for an order of *certiorari*.

[24] In *Tang Kwor Ham*, the company had a non performing loan (NPL) of about RM26 million pursuant to credit facilities granted to it. The NPL was acquired by Danaharta under the Pengurusan Danaharta Nasional Berhad Act 1998 ("Danaharta Act"). A workout proposal prepared and submitted by the Special Administrators to Danaharta, together with the report of an Independent Advisor was approved by Danaharta and the majority of the secured creditors of the company. The workout proposal recommended the sale of the subject land at RM7.6 million. The applicants in that case who were three of the four directors of the company, claimed that the correct value of the subject land was not less than RM15 million. 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.

[25] The learned High Court Judge rejected the applicant's leave to apply for judicial review. He held, *inter alia*, that the workout proposal does not come within the purview of the decision of a "public authority" in O. 53 r. 2(4) of the RHC; but concerns

commercial transactions made by persons and bodies who were private entities. The learned High Court judge also held that the infusion of public element and public interest in the Danaharta Act does not *ipso facto* make the workout proposal a decision of a "public authority".

[26] The majority decision of the Court of Appeal decided otherwise. By majority, the order of the High Court was set aside and the motion for leave was granted. Learned judge, Gopal Sri Ram, JCA (as he then was) speaking for the majority decision *inter alia* held that:

> 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.

[27] Gopal Sri Ram JCA went on further to state that:

> ... It is not an improper exercise of discretion for a judge who forms the preliminary view that an application for extension ought to be refused to hear full argument on the merits of the case for the purpose of testing his preliminary conclusion against the other issues that arise in the case, including the strength and weakness of the respondent's case. For, it may well be that after considering the merits, he may come to the conclusion that although the particular applicant was guilty of inordinate delay, the public interest and the conduct of the respondent justifies the grant of an extension of time. I would add that this approach is not confined only to applications for judicial review but civil proceedings generally.

[28] With respect, we are unable to agree with the proposition made by Gopal Sri Ram JCA in *Tang Kwor Ham*. Firstly, as rightly pointed out by learned counsel for the second respondent, the principal issue in *Tang Kwor Ham* was the jurisdiction to secure an injunction against Danaharta by way of judicial review. The Federal Court in *Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors and Another Appeal* [2007] 4 CLJ 513 had reversed the majority decision of the Court of Appeal. The decision of the High Court in refusing to grant leave was upheld by the Federal Court.

[29] Secondly, we are of the view that the remarks of Gopal Sri Ram JCA as produced earlier in this judgment were *obiter*. These *obiter* remarks reflect an incorrect proposition of law as there was a complete absence of discussion or reference to the Federal Court decisions in *Mersing Omnibus* and *Ravindran*. Finally, we are of the view that the principle in *Mersing Omnibus* and *Ravindran* is still good law. Whilst it is true that both *Mersing Omnibus* and *Ravindran* were decided under the old O. 53 r. 1A of the RHC but the principle in relation to an application to extend time to file an application for judicial review remains the same.

[30] In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.

[31] For all the reasons stated above, we unanimously answered the sole question posed in the negative. We therefore dismissed the appeal with costs.