A

RAMLAH MUKADIS

v.

KETUA PENGARAH ALAM SEKELILING & ANOR

B

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[CIVIL SUIT NO: (MT-1) 22-245-2001]
20 NOVEMBER 2009

C ***ADMINISTRATIVE LAW:*** *Exercise of administrative powers - Decision - Application for renewal of approval rejected by Department of Environment - Applicant blatantly failed to comply with certain conditions - Whether rejection was done unreasonably or in bad faith*

D ***ADMINISTRATIVE LAW:*** *Exercise of administrative powers - Legitimate expectation - Application for renewal of approval rejected by Department of Environment - Applicant blatantly failed to comply with certain conditions - Absence of prior complaints, warnings or inquiries against applicant - Whether applicant entitled to legitimate expectation that approval will be renewed*

E

CIVIL PROCEDURE: *Estoppel - Res judicata and issue estoppel - Whether res judicata must be pleaded - Earlier action for order of certiorari to quash decision of Department of Environment dismissed - Whether present action seeking damages based on same decision of Department of*

F *Environment is res judicata*

EVIDENCE: *Presumption - Adverse inference - Evidence Act 1950, s. 114(g) - Failure to produce documents - Blanket request made by plaintiff for all letters without stating materiality - No order for discovery*

G *or production of documents - Whether evidence withheld or suppressed - Explanation given for non-production of documents - Whether proper to draw adverse inference*

The plaintiff was a trader and exporter of lead acid batteries scrap.

H On 20 July 1998 the first defendant ('DOE') approved the plaintiff's application for the export of lead acid batteries scrap ('the approval'). The approval was valid from 20 July 1998 to 30 June 1999. On 2 June 1999 the DOE issued a show cause letter to the plaintiff asking the plaintiff to show cause why the approval should

I not be suspended on the grounds of non-compliance of some of the conditions of the approval. On 14 June 1999 the plaintiff replied to the show cause letter admitting that they did not comply with the conditions because they considered the conditions as mere

formalities and asking for the approval to be renewed. On 2 July 1999 the DOE rejected the plaintiff's application for renewal of the approval. The plaintiff's appeal was rejected by the DOE. The plaintiff then applied to the KL High Court *vide* Originating Motion R2-25-85-1999 ('the KL Action') for *inter alia*, an order of *certiorari* to quash the DOE's decision and for an order directing the DOE to approve the plaintiff's application to renew the approval. The KL Action was dismissed. As such, the plaintiff filed the present writ action contending that the 1st defendant's refusal to renew the approval was unreasonable and that the plaintiff's legitimate expectation of the licence being renewed had been wrongfully denied by the DOE. The plaintiff claimed damages of RM2,252,880. The plaintiff also complained that the DOE failed and refused to produce certain documents she had asked for and therefore attempted to invoke an adverse presumption under s. 114(g) Evidence Act 1950.

Held (dismissing the claim with costs):

(1) The onus was on the plaintiff to show that in rejecting the plaintiff's application for the renewal of the approval the DOE had acted unreasonably or had acted in bad faith. The Director General of DOE (DW1) testified that the conditions which were imposed in the approval were in accordance with the intent and purposes of the Environmental Quality Act 1974 and the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal. The conditions were not mere formalities. The conditions were the basis for giving the approval in the first place. The plaintiff never objected to the conditions imposed in the approval. (paras 18 & 19)

(2) DW1 had applied her mind to the material facts and evidence before her when she decided not to renew the approval and when she decided to reject the plaintiff's appeal. The DOE's decision not to renew the approval was not unreasonable. (para 21)

(3) There was no evidence to show that the DOE had agreed to waive compliance of any of the conditions of the approval. The fact that there were no prior complaints, warnings or inquiries held against the plaintiff could not be equated with acquiescence on the part of the DOE. Further, this fact could not preclude the DOE from taking action against the plaintiff

for non-compliance of the conditions at any later date. On the contrary, the plaintiff had flouted the conditions blatantly. In the absence of any agreement, understanding, or arrangement, it could not be said that the DOE had committed itself to the plaintiff to renew the approval. As the first question was answered in the negative it followed that there was nothing for the DOE to have acted unlawfully in respect of its commitment as there was no commitment in the first place. The plaintiff's contention that it had a legitimate expectation was without any basis. (para 24)

(4) Even if the plaintiff had a legitimate expectation, DW1 had acted reasonably in exercising her discretion not to renew the approval. There was uncontroverted evidence to show that all the five conditions were breached by the plaintiff. The plaintiff treated the conditions as mere formalities. When asked to show cause the plaintiff's reply skirted the issues. (para 25)

(5) Illustration (g) of s. 114 is not mandatory, but depends on the circumstances of the case and, particularly, in the materiality of the documents or witnesses not produced. In this case there was no order for discovery or production of the documents. Other than mere speculation or conjecture, there was no evidence to show that the DOE withheld or suppressed evidence. The DOE responded to the plaintiff's request for the documents giving various reasons for their non production; some of the documents were privileged, whilst the others could not be identified for lack of particulars. Further, the plaintiff had made a blanket request for all letters without stating the materiality of the documents sought. Thus, it was not proper to draw an adverse inference merely on account of the failure to obtain the documents. (para 26)

(6) Unlike an ordinary estoppel which should be pleaded, the court has the inherent jurisdiction to dismiss an action by applying the doctrine of *res judicata*, which is an estoppel based on public policy, even if it has not been pleaded, as public policy requires that there should be finality in litigation. (para 29)

(7) The cause of action in both the KL Action and in the present suit were founded on the alleged unreasonableness of the two decisions made by DOE. As the KL Action has been dismissed, it followed that the parties were no longer permitted to litigate

once more the *res judicata*. The bringing of the present suit for a different set of reliefs did not detract from the fact that the same cause of action was being reasserted. (para 31)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***

Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 AC 629 ***(refd)***

Berry v. British Transport Commission [1961] 3 WLR 450 ***(refd)***

Council of Civil Services Union & Ors v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 CLJ 538 CA ***(refd)***

Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631; [2009] CLJ JT(3) FC ***(refd)***

Leonard Lim Yaw Chiang v. Director of Jabatan Pengangkutan Jalan Negeri Sarawak & Anor [2009] 6 CLJ 280 HC ***(refd)***

Minister of Labour, Malaysia v. Chan Meng Yuen [1992] 4 CLJ 1808; [1992] 1 CLJ (Rep) 216 SC ***(refd)***

Schmidt v. Secertary of State for Home Affairs [1969] 2 Ch 149 ***(refd)***

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

Legislation referred to:

Environmental Quality Act 1974, s. 34B

Environmental Quality (Schedule Wastes) Regulations 1989, regs. 10, 11, 12

Evidence Act 1950, s. 114(g)

Federal Constitution, art. 5(1)

Other source(s) referred to:

Fiadjoe, *Commonwealth Caribbean Public Law*, 2nd edn (Cavendish Publishing Limited: London, 1999, pp 34, 35

W Wade & C Forsyth, *Administrative Law*, 8th edn, Oxford University Press: Oxford, 2000, pp 494, 495

For the plaintiff - T Balaskanda; M/s Zaman & Assoc
For the defendant - Chandra Devi Letchumanan SFC

Reported by Amutha Suppayah

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] The plaintiff is a trader and exporter of lead acid batteries scrap. The plaintiff obtained the 1st defendant's (DOE) approval for the export of lead acid batteries scrap. The plaintiff contends that the 1st defendant's refusal to renew the approval is unreasonable and that the plaintiff's legitimate expectation of the licence being renewed has been wrongfully denied by the DOE. The plaintiff is claiming for loss and damages of RM2,252,880.

The Facts As Disclosed By The Evidence

[2] Lead acid batteries scrap is listed as a schedule waste under the Environmental Quality (Schedule Wastes) Regulations 1989 ('the EQ Regulations'). In 1997 The plaintiff applied to the DOE for approval to export lead acid batteries scrap. On 20 July 1998 the DOE approved the plaintiff's application when it issued the 'Approval Certificate For Export Of Scheduled Wastes As Required Under The Customs (Prohibition Of Export) (Amendment) (No. 2) Order 1993' together with conditions ('the approval'). The approval was valid from 20 July 1998 to 30 June 1999. By a letter dated 7 July 1998 the Environmental Impact Management Agency of Indonesia ('BAPEDAL') approved the export of lead acid batteries scrap from the Plaintiff to PT Indra Eramulti Logam Industri, Indonesia *via* Eco-Tropical Resources, Singapore for a period of up to 30 June 1999.

[3] On 2 June 1999 the DOE issued a show cause letter to the plaintiff asking the plaintiff to show cause why the approval should not be suspended on the grounds of non-compliance of some of the conditions of the approval. On 14 June 1999 the plaintiff replied to the show cause letter admitting that they did not comply with the conditions because they considered the conditions as mere formalities and asking for the approval to be renewed. On 2 July 1999 the DOE rejected the plaintiff's application for renewal of the approval. The plaintiff appealed to the DOE on 7 July 1999. The plaintiff's appeal was also rejected by the DOE on 19 July 1999.

[4] On 5 November 1999 the plaintiff applied to the KL High Court *vide* Originating Motion R2-25-85-1999 ('the KL action') for *inter alia*, (i) leave to apply for an order of *certiorari* to quash the DOE's decision, and (ii) an order directing the DOE to approve the

plaintiff's application to renew the approval. The plaintiff's application was dismissed with costs on 10 May 2000. The present writ action was filed by the plaintiff on 26 May 2001.

Plaintiff's Case

[5] The main thrust of the plaintiff's case as pleaded is that she was unable to comply with one of the conditions concerning the use of Sri Johor Trading & Transport Agency ('SJTTA') to transport the lead acid batteries scrap because SJTTA did not have container lorries. PW1 and PW3 gave evidence in support to the contention that the transportation of lead acid batteries scrap in pallets in lorries would not be environmentally safe. The DOE had not updated their rules to reflect the present environment and failed to take into consideration the plaintiff's explanation which shows that it is environmentally safer to use a container lorry. As a result of not using SJTTA the DOE refused to renew the approval. Consequently, the plaintiff was denied of her legitimate expectation of the approval being renewed. Her business has been adversely affected as she could no longer export lead acid batteries scrap.

[6] It was also contended that the DOE failed to inform the plaintiff about the requisite form which the plaintiff was required to submit to the DOE. The plaintiff was not given a set of the forms by the DOE. The forms were not on sale and were not obtainable. At any rate the necessary information is contained in the Customs Export Form K2 which is sent by the Customs Department to the DOE. Further, during the period from July 1998 to May 1999 there were no complaints or warnings from the DOE leading the plaintiff to believe that everything was in order.

[7] The plaintiff also complained that the DOE failed and refused to produce certain documents she had asked for. The documents, if produced, would have been in favour of the plaintiff (s. 114(g) Evidence Act 1950).

[8] The plaintiff has been deprived of her right to life under art. 5(1) of the Federal Constitution, to her right of livelihood and to the equality clause under the Federal Constitution (*Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] CLJ JT(3); *Dr. Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19). The plaintiff had a legitimate expectation that she had followed

the DOE's instructions during the said period. She had an expectation that the approval would be renewed. The plaintiff earned a profit of RM375,480 for a period of six months. She is claiming for loss and damages of RM2,252,880.

Defendant's Case

[9] The DOE contends that the plaintiff's application for renewal of the approval was made in reply to the DOE's show cause letter of 2 June 1999. The plaintiff was asked to show cause for breaching five of the conditions stated in the approval. Instead of responding to the show cause letter the plaintiff replied on 14 June 1999 applying for the approval to be renewed.

[10] SJTTA was nominated by the plaintiff as its transport contractor. Appointing SJTTA as its transport contractor was the plaintiff's own choice. The DOE's decision not to renew the approval was not unreasonable. Further, the matter has already been determined in the KL Action.

Issues To Be Tried

[11] The principal issues to be tried are as follows:

(1) Whether the DOE acted unreasonably in refusing to renew the Approval?

(2) Whether the whole action is *res judicata* as a result of KL Action?

Findings Of The Court

(1) Whether The DOE Acted Unreasonably In Refusing To Renew The Approval?

[12] The approval is valid for the period from 20 July 1998 to 30 June 1999. It was granted under s. 34B of the Environmental Quality Act 1974 ('the 1974 Act') which empowers the Director General of the DOE to grant written approval for the receiving or sending of scheduled wastes in or out of Malaysia. Lead acid batteries scrap is listed as schedule waste under the Environmental Quality (Schedule Wastes) Regulations 1989 ('the Regulations'). As a starting point it is necessary to note that the approval contained the following express conditions under the heading 'Conditions Of Approval':

(i) Only 2,640,000 pieces of Lead Acid Batteries Scrap is allowed to be shipped directly to P.T. Indra Emamulti Industri Logam, Indonesia without transit and transfer in any country;

(ii) The waste is destined for recovery at the following facility – P.T. Indra Eramulti Industri Logam, Gunung Gangsir Pasuran, Indonesia

(iii) *The Consignment Note shall be completed according to the Sixth Schedule (Regulation 10), Environmental Quality (Scheduled Wastes) Regulations 1989 and to be submitted to the Department of Environment, Malaysia according to procedures specified in the Regulations.* The Director General of Environmental Quality, Malaysia shall be informed immediately if the exporter did not receive copies of the Sixth Schedule of the Consignment Note from the final receiver within 30 days from the date the waste is transported out of the premise of the waste generator by the transport contractor (Sri Johor & Transport Agency). In this case, the exporter shall institute investigation and inform the results of the investigation to the Director General of Environmental Quality;

(iv) Waste card (Seventh Schedule, Regulation 11) shall be prepared by the waste generator and handed to the lorry driver and the vessel master transporting the waste;

(v) The exporter shall ensure that the lorry/vessel which carry the Lead Acid Batteries Scrap is well equipped with safety equipment in case of accidents or spillage during transportation;

(vi) The exporter and transport contractor shall ensure that the waste is transported safely to the receiver in Indonesia. In case of accidents of spillage, the exporter or transport contractor is responsible to inform the proper authorities immediately. The Director General of Environment Quality too shall be informed immediately through telefax number 603-29311480;

(vii) To submit the documents mentioned below, at least 7 days before the actual date of shipment:

By Land:

(a) Date and Quantity of Waste to be exported

(b) Lorry Registration number

(c) Lorry driver's name and Identity card number

By sea:

(a) Name of vessel

(b) Name of Master of vessel

(c) Shipment number

(d) Date of direct loading

(e) Date and time of departure

(viii) The exporter shall forward the Disposal Certificate to the department within 2 months from the date of completion of waste disposal or recovery. The Certificate shall contain the following information; and

(i) Date and place of disposal or recovery;

(ii) Information on the quantity of waste being disposed/recovered/recycled and residues generated from the process; and

(iii) Costs of recovery, transportation and other costs involved.

(ix) The approval certificate expires upon the establishment of local Recovery Plant. (emphasis added)

[13] As the facts leading to the non-renewal of the approval are central to the determination of this issue it is also necessary to refer to a number of letters beginning with the show cause letter dated 2 June 1999. This letter states that the plaintiff has failed to comply with five conditions in the approval. The five conditions listed out in the show cause letter are as follows:

(i) Tidak mengemukakan maklumat-maklumat lengkap mengenai pengeksportan 7 hari sebelum sebarang pengeksportan seperti kehendak syarat nombor (vii); [Did not submit the documents within 7 days regarding the export of the batteries as required under condition (vii)]

(ii) Tidak mengemukakan Sijil Pelupusan 2 bulan dari tarikh buangan diterima oleh penerima buangan di Indonesia seperti kehendak syarat nombor (viii); [Did not forward the Disposal Certificate to the department within 2 months from the date of completion of waste disposal as required under condition (viii)]

(iii) Tidak mengemukakan inventori yang lengkap mengenai kuantiti, tarikh dan punca batteri yang dieksport; [Did not submit inventory as to the quantity, date and to the source the batteries were exported as required by condition (i).]

(iv) Tidak mengemukakan dokumen nota konsainan bagi setiap eksport; [Did not submit the consignment note for each export as required by condition (iii)]

(v) Tidak menggunakan pengangkut yang diluluskan dan dilesenkan oleh Jabatan ini. [(Did not use the approved transport contractor as provided in condition (iii).] (English translation supplied)

[14] In the plaintiff's reply to the DOE dated 14 June 1999 ('the plaintiff's reply') the plaintiff said that the conditions were only a formality and applied for the renewal of the approval. The relevant portions in the plaintiff's letter are reproduced below:

10. **Kami memang tidak menggunakan perkhidmatan pengangkutan Syarikat Sri Johor Trading & Transport** kerana ia bukan merupakan sebuah syarikat pengendali pengangkutan kontena malah ia juga bukan merupakan sebuah syarikat berlesen untuk mengangkut bateri terpakai. **Nama syarikat tersebut telah disarankan oleh pihak tuan hanya sebagai formaliti mengisi borang AS 15.** ...

Kami telah menggunakan perkhidmatan Konsortium Perkapalan Berhad kerana syarikat tersebut diterajui oleh En. Mirzan Mahathir, kerana mengikut Perpatah Melayu 'Bapa borek anaknya rintik', sememangnya Konsortium Perkapalan Berhad merupakan sebuah syarikat bervisi, dinamik, dan futuristic. ...

14. Pada pertemuan dangan pegawai JAS pada 14 Mei 1999, saya telah disoal mengapa syarat-syarat Bil. 3 item i) ii) iii) iv) & v) tidak dikemukakan. Saya telah menyatakan bahawa saya akan berusaha untuk memenuhi syarat-syarat tersebut. Belum sempat untuk menyusun semula operasi dan pentadbiran syarikat, surat tuan datang untuk penjelasan kenapa Sijil Mengeksport No. 11/98 tidak boleh digantung.

15. Sebagai seorang bekas pegawai kanan kerajaan, **saya telah menimbangkan kesemua syarat syarat yang terkandung di Sijil Mengeksport No. 11/98 berbunyi sebagai formaliti sahaja.** Apabila Syarikat Sri Johor Trading & Transport diletak sebagai syarat untuk menjalankan perkhidmatan Haulier untuk 3000 kontena dan apabila kami diberi sijil yang tidak bertarikh serta kelulusan

A Kerajaan Indonesia membenar pengeksportan sehingga 30 Okt. 1999 manakala JAS memendekkannya kepada 30 June 1999, **kami memang patut disalahkan kerana menganggap semua syarat syarat tersebut sebagai formaliti sahaja.** (emphasis added)

B **[15]** The DOE replied on 2 July 1999 rejecting the plaintiff's application for the renewal of the approval on the ground that the plaintiff had breached a number of conditions. The relevant portions of the DOE's reply are as follows:

C 2. Setelah mengkaji permohonan tuan, Jabatan ini dengan ini **tidak meluluskan** permohohan tuan untuk memperbaharui Sijil Eksport No. 11/98 untuk mengeksport bateri terpakai ke Indonesia kerana pihak tuan tidak mematuhi beberapa syarat kelulusan sijil yang berkenaan seperti berikut:

D i) Tidak mengemukakan inventori yang lengkap mengenai kuantiti, tarikh dan punca bateri yang dieksport sebagai memenuhi kehendak syarat nombor (i);

ii) Tidak mengemukakan dokmen nota konsainan bagi setiap eksport seperti kehendak syarat nombor (iii);

E iii) Tidak menggunakan pengangkut yang diluluskan dan dilesenkan oleh Jabatan ini, seperti syarat nombor (iii) (sic);

iv) Tidak mengemukakan maklumat-maklumat mengenai pengeksportan 7 hari sebelum sebarang pengeksportan seperti kehendak syarat nombor (viii); dan

F

v) Tidak mengemukakan sijil pelupusan 2 bulan dari tarikh buangan diterima oleh penerima buangan di Indonesia seperti kehendak syarat nombor (viii).

G **[16]** On 7 July 1999 the plaintiff wrote to the DOE ('the plaintiff's appeal') appealing for the DOE to reconsider its decision. On this occasion the plaintiff said:

H 4. Kami merayu semoga puan memberi pertimbangan semula keatas keputusan tidak meluluskan permohonan memperbaharui Sijil Pengeksport No. 11/98 atas alasan-alasan berikut yang menjadi sebab penolakan permohonan memperbaharui Sijil Mengeksport No. 11/98.

I Syarat i): Maklumat mengenai KUANTITI, TARIKH dan PUNCA PUNCA BATERI TERPAKAI merupakan syarat syarat baru. Syarat i). Sijil Mengeksport tidak menggariskan keperluan maklumat maklumat tersebut. Walau bagaimanapun kami bersedia untuk mengemukakan maklumat maklumat tersebut kalau sekiranya puan memberi kelulusan untuk kami mengeksport semula.

Syarat ii): Syarat syarat melibatkan Sri Johor Trading & Transport Agency yang tidak berlesen mengangkut bateri terpakai dan tiada lesen perkhidmatan pengangkutan berKONTENA. Pihak puan telah memberi persetujuan secara lisan untuk kami menggunakan perkhidmatan mana mana syarikat kontena. Pernyataan ini telahpun dirakamkan didalam pernyataan kepada Pegawai Penyiasat JAS Johor, JAS Wilayah dan JAS Selangor.

Syarat iii): Penjelasan di Bil. ii). Merangkumi jawapan untuk alasan ini kerana syarat syarat ini turut melibatkan Sri Johor Trading & Transport Agency. Kami khuatiar oleh kerana kami menggunakan perkhidmatan Konsortium Perkapalan Berhad yang diterajui oleh En. Mirzan Mahathir kalau sekiranya terdapat unsur unsur 'REFORMASI' didalam penolakan pembaharuan Sijil Mengeksport No. 11/98 kerana pembaharuan Sijil Mengeksport No. 11/98 akan membolehkan laluan kelulusan Lesen Pengangkutan Jabatan Alam Sekitar kepada Konsortium Perkapalan Berhad. Kalau tidak masakan puan akan mengambil keputusan yang bercanggah dengan aspirasi Dasar Ekonomi Baru dan Malaysia Inc. Yang telah di pelopori oleh YAB Perdana Menteri Malaysia.

Syarat iv): Syarat ini juga melibatkan Sri Johor Trading & Transport Agency di mana jawapan adalah sama seperti penjelasan di Bil. ii).

Syarat v): Syarat viii). adalah diluar kawalan kami, kerana syarat ini di bawah kuasa Kerajaan Indonesia. Walau bagaimanapun sekiranya kami diberi peluang dan tunjukajar kami akan mematuhi semua syarat syarat yang dikenakan oleh pihak puan.

[17] By a letter dated 19 July 1999 the DOE rejected the plaintiff's appeal in the following manner:

2. Setelah meneliti jawapan-jawapan yang pihak puan kemukakan di dalam surat rayuan puan, adalah didapati maklumat-maklumat yang dikemukakan adalah tidak mempunyai bukti-bukti yang kukuh serta tidak mempunyai asas yang membolehkan Jabatan ini mempertimbangkan kembali permohonan puan.

[18] In this case there must be evidence to show that the DOE's decision is bad in the sense that it is made in breach of the *audi alteram partem* rule; or that it is made in excess of jurisdiction or power given to the DOE; or it is made *mala fide*; or it is tainted with illegality; or the decision is irrational within the meaning of 'irrationality' in *Council of Civil Services Union & Ors v. Minister for the Civil Service* [1985] AC 374 and falls within the meaning of

'Wednesbury unreasonableness' as decided in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223, and if it is shown that there is a procedural impropriety in arriving at the decision (*Leonard Lim Yaw Chiang v. Director of Jabatan Pengangkutan Jalan Negeri Sarawak & Anor* [2009] 6 CLJ 280, 290). The onus is on the plaintiff to show that in rejecting the plaintiff's application for the renewal of the approval the DOE had acted unreasonably or had acted in bad faith. Datuk Rosnani binti Ibrahim the Director General of the Department of Environment (DW1) testified that the six conditions were imposed in the approval in accordance with the intent and purposes of the Environmental Quality Act 1974 and the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal. Lead acid batteries scrap is categorised as Hazardous Waste under Item A 1160 List A to Annex VIII of the Basel Convention which Malaysia acceded to on 8 October 1993. Further, discarded or off specification batteries are listed as 'schedule waste' under the EQ Regulations which regulate the storing, handling and transportation of schedule waste. DW1 explained that conditions (i) and (ii) of the approval are found in the plaintiff's application and she approved them as requested. Conditions (iii), (iv) and (vi) are consistent with regs. 10, 11 and 12 of the EQ Regulations. SJTTA, the transport contractor stated in condition (iii) was nominated by the plaintiff in the application form for the approval. Conditions (vii) and (viii) were imposed to keep track of the lead acid batteries scrap being transported by land or sea and thus facilitate checks to ensure the conditions of approval are being observed by the plaintiff.

[19] It is pertinent to note that in the plaintiff's reply the plaintiff admitted that they did not comply with the conditions because they considered the conditions to be mere formalities and that they ought to be faulted for that. DW1 said that the conditions are not mere formalities. This is because the conditions are the basis for giving the approval in the first place. The conditions have to be strictly adhered to because they are meant to safeguard the environment and uphold the nation's obligations under the Basel Convention. The plaintiff never objected to the conditions imposed in the approval. It is also pertinent to note that save and except for condition (v), the plaintiff did not dispute the fact that all the other conditions were not complied with. This was also agreed by the plaintiff's manager Mohd Adam Das bin Abdullah (PW1) in

cross-examination. Condition (v) in the show cause letter relates to the plaintiff's failure to use SJTTA the approved and licensed transport contractor. The plaintiff's purported challenge of condition (v) through the evidence of PW1 and PW3 is without substance and merit. It is an afterthought because SJTTA was named as the transport contractor by the plaintiff in the application form for the approval. The plaintiff then decided to use a non-approved and unlicensed transport contractor. PW1 said that the plaintiff used container lorries from Pengangkutan Konsortium Perkapalan Berhad because SJTTA did not have container lorries. PW3 gave evidence in support to the contention that the transportation of lead acid batteries scrap in pallets in lorries would not be environmentally safe. The DOE had not updated their rules to reflect the present environment and failed to take into consideration the plaintiff's explanation which shows that it is environmentally safer to use a container lorry. Under cross-examination, however, DW1 explained that the used lead acid batteries which are drained of its acid content are safe to be transported in ordinary lorries without any need for containers. The used batteries can be transported in pallets. PW3 said that lead/acid from batteries scrap will spill on the road and pollute the environment. Even if the used batteries are drained, not 100% of the acid will be removed. Used batteries should be transported in containers. If transported in pallets and it rains, the run-off water from the batteries will spill on the road. However, in cross-examination PW3 agreed that DW1 being the caretaker of the environment issues should know better about the conditions under which used batteries should be transported. As the Director General of the DOE the DW1's evidence on this issue should be preferred over that of PW1 and PW3. After all, the DOE is the primary body entrusted with the task of safeguarding the environment and upholding the nation's obligations under the Basel Convention. Furthermore, the use of container lorries to transport the used batteries is a self-imposed condition which cannot in law or in fact exonerate the plaintiff from not complying with the condition.

[20] DW1 also said that the approval was given to the plaintiff because "I was of the opinion at the time that I have to fulfil and respect the judgment of the High Court in Johor Bahru Civil Suit No. 22.191.1990 which has been submitted by Nakas Trading *via* their appeal dated 2 July 1998." In Civil Suit No. 22.191.1990 the plaintiff had obtained judgment against the Customs Department for

loss and damages arising out of the stoppage of export of used batteries. DW1 added that she rejected the plaintiff's application to renew the approval on the following grounds. Firstly, the plaintiff's contravention of the conditions of the approval; secondly, to comply with the provisions of the 1974 Act including the regulations made there under and the Basel Convention; and thirdly, she was advised that the said judgment did not actually bind the DOE because the incident took place in that civil suit took place in 1987 which was before the date Malaysia became a party to the Basel Convention and before the Customs (Prohibition on Export) (Amendment) (No. 2) Order 1993 came into force on 12 October 1993.

[21] DW1 said she rejected the plaintiff's appeal for the following reasons. Firstly, there were contraventions of the conditions imposed on the approval. The plaintiff had regarded the conditions as unimportant and disregarded them with impunity. Secondly, she had taken into account the fact that Malaysia is a party to the Basel Convention which prohibits any exportation of scheduled waste material to another country if the scheduled waste material can be managed in one's own country. When the application for renewal of the approval was made there were three recycling facilities in Malaysia for scheduled waste material – used batteries. Thirdly, renewal of the approval would have also contravened the Basel Convention thereby affecting the credibility of Malaysia. In the premises, it has been shown that DW1 applied her mind to the material facts and evidence before her when she decided not to renew the approval and when she decided to reject the plaintiff's appeal. For the foregoing reasons the DOE's decision not to renew the plaintiff's approval is not unreasonable.

Legitimate Expectation

[22] It is also contended by the plaintiff that they were led to believe that everything was in order and therefore had a legitimate expectation that the approval would be renewed. The underlying principle behind the doctrine of legitimate expectation is founded on the duty to act fairly as a necessary element or concomitant of good governance or good administration (W. Wade & C. Forsyth, *Administrative Law*, 8th edn (Oxford University Press: Oxford, 2000) 494 to 495; and Fiadjoe, *Commonwealth Caribbean Public Law*, 2nd edn (Cavendish Publishing Limited: London, 1999) at pp. 34 to 35). The doctrine of legitimate expectation was initially recognised

by Lord Denning MR in *Schmidt v. Secertary of State for Home Affairs* [1969] 2 Ch 149, CA to denote something less than a right which may nevertheless be protected by the principles of natural justice; or an expectation of receiving some benefit or privilege to which the individual has no right (see *Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 CLJ 538 at 569 CA). In the Privy Council case of *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629 Ng Yuen Shiu an illegal immigrant challenged a deportation order. He contended that the Hong Kong government had previously given an undertaking that each case would be considered on its merits and that he was denied the opportunity of being heard. The Privy Council held that Ng had a legitimate expectation that a certain procedure would be followed and it was in the interest of good administration that the authorities should act fairly by implementing its stated policy. Lord Fraser said that "legitimate expectations in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis". His Lordship identified three practical questions underlying all legitimate expectation cases. They are:

(i) To what has the authority committed itself?

(ii) Has the authority acted unlawfully in respect of its commitment?

(iii) What should the court do about it?

[23] Thus, in *Darahman Ibrahim, supra* at p. 566 the Court of Appeal said that "where an applicant can demonstrate that a legitimate expectation has arisen, he has a powerful argument against a public body which has otherwise acted pursuant to the discretionary powers or duties lawfully conferred upon it. It is germane to state that a legitimate expectation in its procedural form arises where there has been a failure to follow an agreed, or customary, process of consultation. In the main, it is concerned about the quality of the decision making process."

[24] Whether an expectation exists is a question of fact. Turning to the first question – what did the authority commit itself to the plaintiff? The plaintiff contends that during the period of June 1998 to May 1999 the DOE neither complained nor warned or held an inquiry against the plaintiff for any wrong-doing. The plaintiff was led to believe that everything was in order. The plaintiff has a

A legitimate expectation that they had followed the instruction from the DOE during the said period and they had an expectation that the approval would be renewed. There is no evidence to show that the DOE has agreed to waive compliance of any of the conditions of the approval. The fact that there were no prior complaints, B warnings or inquiries held against the plaintiff cannot be equated with acquiescence on the part of the DOE. Further, this fact cannot preclude the DOE from taking action against the plaintiff for non-compliance of the conditions at any later date. On the contrary, the plaintiff has flouted the conditions blatantly. In the absence of any C agreement, understanding, or arrangement, it cannot be said that the DOE has committed itself to the plaintiff to renew the approval. As the first question is answered in the negative it follows that there is nothing for the DOE to have acted unlawfully in respect of its commitment as there is no commitment in the first place. D Accordingly, the plaintiff's contention that it has a legitimate expectation is without any basis.

[25] Even if the plaintiff had a legitimate expectation, the Court is of the view that DW1 acted reasonably in exercising her E discretion not to renew the approval. There is uncontroverted evidence to show that all the five conditions were breached by the plaintiff. The plaintiff treated the conditions as mere formalities. When asked to show cause the plaintiff's reply skirted the issues. Further, in the plaintiff's appeal, the plaintiff even went on to say F that in respect of condition (i) "Walau bagaimanapun kami bersedia untuk mengemukakan maklumat-maklumat tersebut kalau sekiranya puan memberi kelulusan untuk kami mengeksport semula." as if to say that the plaintiff will only comply with the condition if the approval is renewed. On the evidence as a whole it cannot be said G that the facts point overwhelmingly in favour of a different decision (*Minister of Labour, Malaysia v. Chan Meng Yuen* [1992] 4 CLJ 1808; [1992] 1 CLJ (Rep) 216 SC). The plaintiff also sought to introduce evidence to show that the alleged breach of condition (iii) in the approval is without basis. Firstly, the plaintiff was not told of the H forms at the back of the regulations. Secondly, all the relevant information is contained in the Customs Export Forms K2, a copy of which was sent by the Customs to the DOE. This explanation was not mentioned in the plaintiff's reply; it was also not mentioned in the plaintiff's appeal. The plaintiff's contention is an I afterthought. Be that as it may, the form is set out in Part 1 Sixth

Schedule of the regulations and this fact is expressly stipulated in condition (iii) in the approval. The plaintiff's excuses for failing to comply with condition (iii) are feeble and unconvincing.

[26] For completeness, it is necessary to touch on the DOE's alleged failure to produce certain documents for which the court was asked to draw an adverse inference under s. 114(g) of the Evidence Act 1950. Before drawing any presumption of fact, the circumstances must be carefully considered to ascertain whether there are adequate grounds to justify any presumption being raised. On this point the court is mindful of what Devlin LJ said in *Berry v. British Transport Commission* [1961] 3 WLR 450, 463: "Presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently desirable – in the sense that "estoppel are odious and the doctrine should never be applied without a necessity for it." In determining this issue the question to consider is whether the existence of a fact or a state of things makes the existence of another fact or a state of things so likely that it may be presumed to exist. The request for the documents was made by a letter dated 21 August 2002. The defendants replied on 28 September 2002 informing *inter alia* that some of the documents are privileged, some are in the defendant's bundle of documents, a number of the documents are not in their possession, and a number of the documents were being checked. Illustration (g) of s. 114 is not mandatory, but depends on the circumstances of the case and, particularly in the materiality of the documents or witnesses not produced. In this case there was no order for discovery or production of the documents. Other than mere speculation or conjecture, there is no evidence to show that the DOE withheld or suppressed evidence. The DOE responded to the plaintiff's request for the documents giving various reasons for their non- production; some of the documents are privileged, whilst the others cannot be identified for lack of particulars. In the plaintiff's solicitor's letter asking for the documents, the plaintiff asked for all letters bearing reference '38/392/000/038' to be produced. This is a blanket request as the plaintiff did not state or show the materiality of the documents sought. For the foregoing reasons the court does not think that it is proper to draw an adverse inference merely on account of the failure to obtain the documents.

(2) Whether The Whole Action Is Res Judicata As A Result Of KL Action?

[27] In the KL Action the plaintiff sought leave to issue *certiorari* to quash the DOE's decision dated 2 July 1999 and 19 July 1999 and for an order directing the DOE to approve the renewal of the approval. The DOE contends that the plaintiff having failed in this judicial review application at the K.L. High Court is seeking a second bite at the cherry by making this action. The matter is therefore *res judicata.*

[28] What is *res judicata* has been succinctly set out by the Supreme Court in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783. At p. 791 Peh Swee Chin FCJ said:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties; or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur.* The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium*. It is just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata,* but the earlier maxim has the further elevated status of a question of public policy.

[29] There are two kinds of estoppels *per rem judicatum*. The first relates to cause of action estoppel and the other to issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. The issue estoppel, conversely, prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. In addition, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently. Unlike an ordinary estoppel which should be pleaded, the court has the inherent jurisdiction to dismiss an action by applying the doctrine of *res judicata*, which is an estoppel based on public policy, even if it has not been pleaded, as public policy requires that there should be finality in litigation *(Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd, supra)*.

[30] According to the grounds of judgment of Faiza bin Haji Tamby Chik J in the KL Action the plaintiff set out the following three grounds for challenging the DOE's decision: (i) the DOE acted *ultra vires* the 1974 Act in imposing unreasonable conditions to the approval and consequently in not approving the plaintiff's renewal application; (ii) there was impropriety on the part of the DOE in considering the plaintiff's application for an approval to export used batteries overseas by considering irrelevant matters in not allowing the application; and (iii) there was impropriety on the part of the DOE when she decided that the plaintiff had failed to fulfil conditions that did not exist. The High Court dismissed ground (i) as the plaintiff was out of time and no extension of time was obtained. The High Court went on to hold that the conditions imposed in the approval are reasonable and in accordance with the 1974 Act and the Basel Convention. Ground (ii) was also dismissed as there was nothing to show that the DOE was instigated or influenced by a third party. As for ground (iii) the High Court found it would also fail as conditions (iii), (vii) and (viii) were breached. On the basis of the aforesaid, can it be said that the present action is *res judicata* as a result of the KL Action?

[31] The two decisions challenged by the plaintiff in the KL Action are the very same decisions made by the DOE on 2 July 1999 and on 7 July 1999 adverted to earlier. In this suit, the plaintiff's claim is not for a *certiorari* and a *mandamus*; instead the plaintiff is seeking damages for loss of profits on the grounds that the said decisions are unreasonable and in denial of the plaintiff's legitimate expectation. In the course of the trial learned counsel for the plaintiff objected when learned Senior Federal Counsel for the DOE raised *res judicata* during the cross-examination of PW1. This issue became academic after the DOE filed an amended statement of defence pleading *res judicata* in para 16A. The cause of action in both the KL Action and in this present suit is founded on the alleged unreasonableness of the two decisions. As the KL Action has been dismissed, it follows that the parties are no longer permitted to litigate once more the *res judicata*. The bringing of the present suit for a different set of reliefs does not detract from the fact that the same cause of action is being reasserted. There should be finality in litigation. Applying the principles cited above the Court finds that the present suit is *res judicata* as a result of the KL Action.

A **[32]** In conclusion the court finds that the DOE has not acted unreasonably in refusing to renew the approval. The plaintiff's claim that they had a legitimate expectation that the approval would be renewed is unsubstantiated and without basis. Further, the court finds that as the cause of action in this suit has already been
B adjudged in the KL Action, this suit is *res judicata*. For the foregoing reasons the plaintiff's claim is dismissed with costs.

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