A

WONG KIN HOONG & ORS

v.

KETUA PENGARAH JABATAN ALAM SEKITAR & ANOR

B

COURT OF APPEAL, PUTRAJAYA
KN SEGARA JCA
HISHAMUDIN MOHD YUNUS JCA
JEFFREY TAN JCA
C [CIVIL APPEAL NO: W-01-152-2009]
3 AUGUST 2011

CIVIL PROCEDURE: *Extension of time - Application for leave - Delay of 11 years - Whether delay inordinate - Whether there were good*
D *reasons to allow extension - Whether merits of case and public interest relevant consideration in application for extension of time - Whether delay constituted abuse of process of court*

Raub Australian Gold Mining Sdn Bhd ('the second respondent')
E had been granted the mining rights and had used a toxic substance, cyanide to extract gold from the area in and around Kampung Bukit Koman, Raub, Pahang. The use of the cyanide, was sanctioned by the first respondent, the Director General of the Department of Environment. The second respondent obtained
F the approval on 13 January 1997 upon submission of the preliminary environmental impact assessment report ('EIA') pursuant to s. 34A(2) of the Environmental Quality Act 1974. The appellants, members of the Anti-Cyanide Committee and purported to represent all the residents of Kampung Bukit Koman,
G contended that they became aware of the use of cyanide by the second respondent only in 2006 *ie*, ten years later and prior to that were not aware of the intended use of the "Carbon-in-Leach" process or the first respondent's approval of the same. The appellants also alleged that there was no actual or deliberate
H communication to them of the approval of the preliminary EIA until 18 October 2007 when the appellants secured a copy of the preliminary EIA. The appellants therefore filed an application for leave for judicial review coupled with an application for an extension of time to file the same against the first respondent's
I decision approving the preliminary EIA - almost 11 years after the

decision. The application was dismissed by the High Court on the grounds of inordinate delay and that there were no good reasons for extending the period. Hence this appeal against that decision.

Held (dismissing appeal with no order as to costs)
Per KN Segara JCA delivering the judgment of the court:

(1) An application for an extension of time in respect of a decision made more than ten years before reflected an abuse of the process of the court. The application should be dismissed irrespective of whether the case fell under the category of public interest litigation or otherwise. (paras 3-5)

(2) An application for leave for judicial review must be made promptly, *ie*, 40 days from the date when the grounds for the application first arose or when the decision was first communicated to the applicant. There had been an element of "wilful blindness" by the appellants to the existence of the said report in 1997 by their own conduct or that of their legal advisers and/or parties interested (*Sahabat Alam Malaysia*) in promoting public interest litigation. A diligent search or inquiry at the Department of Environment in 1997 or a reasonable request from the proponent of the project by any *bona fide* interested party in 1997 would have given the said party access to the said preliminary EIA report. (paras 4 & 12)

(3) In the circumstances, the High Court judge was correct in holding, *inter alia*, that the merits of the appellants' case were not to be considered in deciding whether to exercise the discretion of the court to allow an extension of time; that public interest and merits were not relevant at the stage of an application for extension of time; that there was an inordinate delay and that there were no good reasons to grant extension of time. Hence, the High Court judge had not misdirected herself in law and in fact in not allowing the extension of time applied for by the appellants. (para 2)

Bahasa Malaysia *Translation Of Headnotes*

Raub Australian Gold Mining Sdn Bhd ('responden kedua') telah diberikan hak melombong dan menggunakan bahan toksik, sianida, untuk mengeluarkan emas daripada dalam dan sekitar kawasan Kampung Bukit Koman, Raub, Pahang. Penggunaan sianida telah

A diluluskan oleh responden pertama, Ketua Pengarah Jabatan Alam Sekitar. Responden kedua telah memperoleh kelulusan pada 13 Januari 1997 selepas mengemukakan laporan awal penilaian kesan alam sekitar ('PKAS') menurut s. 34A(2) Akta Kualiti Alam Sekeliling 1974. Perayu-perayu, ahli-ahli Jawatankuasa Anti-Sianida
B dan bertujuan mewakili kesemua penduduk Kampung Bukit Koman, menghujahkan bahawa mereka hanya menyedari penggunaan sianida oleh responden kedua pada tahun 2006 iaitu sepuluh tahun kemudian dan sebelum itu tidak mengetahui tentang niat mereka untuk menggunakan proses "Carbon-in-Leach" atau
C kelulusan yang diberikan oleh responden pertama. Perayu-perayu juga mendakwa bahawa tidak ada komunikasi sebenar atau percubaan untuk memberitahu mereka mengenai kelulusan bagi PKAS awal sehingga 18 Oktober 2007 apabila perayu-perayu memperoleh satu salinan PKAS awal. Oleh itu, perayu-perayu
D memfailkan permohonan untuk kebenaran semakan kehakiman bersama-sama dengan permohonan untuk lanjutan masa untuk memfailkannya terhadap keputusan responden pertama yang meluluskan PKAS awal - 11 tahun selepas keputusan diberikan. Permohonan tersebut ditolak oleh Mahkamah Tinggi atas alasan
E kelewatan yang melampau dan bahawa tidak ada alasan yang baik untuk melanjutkan tempoh. Maka rayuan ini terhadap keputusan itu.

Diputuskan (menolak rayuan tanpa perintah untuk kos)

F **Oleh KN Segara HMR, menyampaikan penghakiman mahkamah:**

(1) Permohonan untuk lanjutan masa berkaitan dengan keputusan yang telah dibuat lebih daripada sepuluh tahun dahulu menggambarkan penyalahgunaan proses mahkamah.
G Permohonan tersebut wajar ditolak tanpa mengambil kira sama ada kes tersebut terangkum di bawah kategori litigasi kepentingan awam atau sebaliknya.

(2) Suatu permohonan untuk kebenaran bagi semakan kehakiman
H perlu dibuat segera, iaitu 40 hari dari tarikh alasan untuk permohonan timbul dan apabila keputusan tersebut diberitahu kepada pemohon. Terdapat elemen "wilful blindness" oleh perayu-perayu terhadap kewujudan laporan tersebut pada tahun 1997 oleh tindakan mereka sendiri atau penasihat
I undang-undang mereka dan/atau pihak-pihak yang berkepentingan (Sahabat Alam Malaysia) dalam mempromosikan

litigasi berkepentingan awam. Suatu carian yang teliti di Jabatan Alam Sekitar pada tahun 1997 atau permintaan yang munasabah daripada penyokong projek tersebut oleh mana-mana pihak yang berkepentingan secara *bona fide* dalam tahun 1997 akan memberikan pihak tersebut akses kepada laporan awal PKAS tersebut.

(3) Dalam keadaan tersebut, hakim Mahkamah Tinggi betul dalam memutuskan, antara lain, bahawa merit kes perayu-perayu tidak perlu dipertimbangkan dalam memutuskan sama ada budi bicara mahkamah perlu dilaksanakan untuk membenarkan lanjutan masa; bahawa terdapat kelewatan yang melampau dan bahawa tidak ada alasan yang baik untuk membenarkan lanjutan masa. Dengan itu, hakim Mahkamah Tinggi tidak tersalah arah dirinya dari segi undang-undang dan fakta dalam menolak permohonan lanjutan masa oleh perayu-perayu.

Legislation referred to:
Environmental Quality Act 1974, s. 34A(2)
Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987, s. 11(b)
Rules of the High Court 1980, O. 53 rr. 3(6), 4(1)

For the appellants - Malik Imtiaz Sarwar (Jessica Ram Binwani, Theivanai Amarthalingam, Jenine Gill with him); M/s Jessica, Theiva & Kumari
For the 1st respondent - Shamsul Bolhassan (Suhaila Harun with him) SFCs; AG's Chambers
For the 2nd respondent - Tan Sri Dato' Cecil Abraham (CS Nantha Balan, Sunil Abraham & Farah Shuhadah Razali with him); M/s Zul Rafique & Partners

Reported by S Barathi

JUDGMENT

KN Segara JCA:

[1] The appellants are members of the Anti-Cyanide Committee and purport to represent all the residents of Kampung Bukit Koman. They were the applicants in the court below for leave to obtain an extension of time to file an application for judicial review of the decision of the 1st respondent made under s. 34A of the Environmental Quality Act 1974 ("EQA") relating to a report on the impact on environment resulting from prescribed activities by the 2nd respondent.

A **[2]** The High Court Judge ("HCJ") dismissed the application on the grounds of the inordinate delay in the application by the appellants and that there were no good reasons for extending the period within which to make the application for leave under the Rules of the High Court 1980 ("RHC 1980"). We are entirely in B agreement with the grounds of decision of the court below. We see no reason to interfere in the exercise of discretion and the well-reasoned grounds of decision that had taken into consideration both the law and facts applicable to the merits of the appellants' application. The HCJ had addressed all the issues C raised by the counsel. In our view she had come to a correct finding that does not warrant appellate interference. Her full grounds of decision are appended to our judgment for ease of comprehension of the application (with the several reliefs prayed therein), the facts as found by her and the cases adverted to.

D

[3] An application for an extension of time to apply to obtain leave for judicial review in respect of a decision made more than 10 years prior to the date of the application reflects an abuse of the process of the court and *ipso facto* the application should be E dismissed irrespective of whether the case falls under the category of public interest litigation or otherwise. Public officers should be allowed to conduct their duties in the public interest with certainty and alacrity without any apprehension of their decisions becoming subject to question at some unreasonable and unascertainable time F in the future under the cloak of judicial review.

[4] The law on applications for leave for judicial review is clear and unambiguous. An application for leave for judicial review must be made promptly with regard to any impugned decision. In any event the application to court should be made within 40 days G from the date when 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 good reason for doing so, extend the period of 40 days (O. 53 r. 3(6) RHC 1980).

H

[5] Applications for judicial review can only be made after leave for same has been granted and within 14 days thereafter the applicant files a notice in Form 111B (O. 53 r. 4((1) RHC 1980).

I

[6] The 1st respondent is the Director General, Department of Environment and is responsible for enforcing the provisions of the EQA.

[7] The 2nd respondent has been granted the mining rights under the Mining Certificate 483 now known as Mining Lease 1669 to approximately 303 acres of land. The 2nd respondent intended to use and is now using diluted cyanide to extract gold from gold tailings which have been left over from previous mining activities by a process known as "Carbon-in-Leach". The tailings are located in an area within the Mining Lease 1669.

[8] It is alleged by the appellants that the 1st respondent had sanctioned the use by the 2nd respondent of a toxic substance, "Cyanide" to extract gold from the area in and around Kampung Bukit Koman, Raub, Pahang by approving on 13 January 1997 the Environmental Impact Assessment Report submitted by the 2nd respondent to the 1st respondent on 27 August 1996.

[9] The 2nd respondent's project falls within the definition of prescribed activity under s. 11(b), Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987. It was as such required to submit an environmental impact assessment report ("EIA") to the 1st respondent before any approvals for carrying out the activity is granted by the relevant approving authority to the 2nd respondent.

> ... The report shall be in accordance with the guidelines prescribed by the Director General and shall contain an assessment of the impact such activity will have or is likely to have on the environment and the proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment.

(See s. 34A(2), EQA)

[10] The 1st respondent's guidelines set out in the "Handbook of Environmental Impact Assessment Guidelines" provides for a two-tiered assessment process. The 1st stage is a preliminary report. If the preliminary report identifies a significant impact on the environment or the impacts are unknown, a detailed assessment is to be submitted by the person intending to carry out the prescribed activity.

[11] The 2nd respondent submitted the preliminary EIA to the 1st respondent on 27 August 1996. It received the approval of the 1st respondent on 13 January 1997. The appellants contend that there was no "public participation" in the preparation of the preliminary EIA.

[12] The appellants contend that only some 10 years later in 2006 that they became aware of the use of cyanide by the 2nd respondent and that prior to 2006 they were not aware of the 2nd respondent's intended use of the "Carbon-In-Leach" process or the 1st respondent's approval of the same. The appellants further allege that there was no actual or deliberate communication to the appellants of the approval of the preliminary EIA until 18 October 2007 when the appellants secured a copy of the preliminary EIA. Our immediate observation to this is that there had been an element of "wilful blindness" by the appellants to the existence of the said report in 1997 by their own conduct or that of their legal advisers and or parties interested (*Sahabat Alam Malaysia*) in promoting public interest litigation by an alleged infringement of fundamental rights to life and livelihood arising from the alleged hazardous impact of "Cyanide" on the appellants. A diligent search or inquiry at the Department of Environment in 1997 or a reasonable request from the proponent of the project by any *bona fide* interested party in 1997 would have given the said party access to the said preliminary EIA report in 1997.

[13] On 21 March 2008 the appellants filed an application for leave for judicial review coupled with an application for an extension of time to file the same against the 1st respondent's decision approving the preliminary EIA - almost 11 years after the decision.

[14] We are unanimous that the HCJ was correct when she held that:

(i) the merits of the appellants' case are not to be considered when deciding whether to exercise the discretion of the court to allow an extension of time;

(ii) public interest and merits are not relevant at the stage of an application for extension of time;

(iii) there is an inordinate delay; and

(iv) there are no good reasons to grant extension of time.

[15] We are unanimous that the HCJ has not misdirected herself in law and in fact in not allowing the extension of time applied for by the appellants.

[16] Appeal dismissed with no order as to costs. The cross-appeal by the 2nd respondent on the issue of costs is also dismissed. Deposit refunded to appellant.