

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)  
RAYUAN SIVIL NO. S – 02 – 233 – 2002**

ANTARA

LAW PANG CHING & 64 LAGI

... PERAYU-  
PERAYU

DAN

TAWAU MUNICIPAL COUNCIL

... RESPONDEN

(Dalam perkara mengenai Permohonan Kajian Semula  
Kehakiman No. T-1 Tahun 2001  
Di Mahkamah Tinggi di Sabah & Sarawak di Tawau

Antara

Law Pang Ching & 67 Lagi

... Perayu-  
Perayu

dan

Tawau Municipal Council

... Responden)

Coram: Gopal Sri Ram, J.CA.

Rauf Sharif, J.C.A.

Abu Samah bin Nordin, J.C.A.

**JUDGMENT OF GOPAL SRI RAM, J.C.A.**

1. The appellants are stallholders at the Fuji Market in Tawau. The market stands on privately owned land. It was established in by the previous proprietor to the land after obtaining approval from the respondent local authority to construct stalls. The appellants had no contractual relationship with the respondent. They merely paid all dues to the land owner who paid them on to the respondent. Later, the land in question was transferred to ATS Land Sdn Bhd (“ATS”) which is the present registered proprietor. As before, ATS collected

the licence fees from the appellants and paid them on to the respondent. It is in evidence and freely admitted by the respondent that in 1998 its President attended a lunch organised by the stallholders and, in his speech made to the gathering, represented that the appellants could continue to do business at Fuji Market. However, by a letter dated 30 April 2001 addressed to ATS and received by it on 28 May 2001, the respondent terminated the operation of Fuji Market. Following some correspondence, the respondent, on 19 October 2001 wrote to the appellants and other stallholders asking them to move out of Fuji Market. There is material on record to show that the respondent had leased of a piece of land owned by it to a company Renung Abadi Sdn Bhd ("Renung") and granted it the right to operate another market there called the Xin Ann Market. The lease was for 25 years and there is a term in it that the respondent is not to grant or renew permission to anyone to operate a market within a 3 mile radius of Xin Ann Market. Matters pertaining to the Fuji and Xin Ann Markets were discussed at a meeting of the respondent held on 30 April 2001. The minutes of that meeting show that Renung had commenced an action against the respondent for damages for breach of the terms of the lease and that it had called on the respondent to close down the Fuji Market which the respondent had agreed to do. Later, the appellants instituted proceedings for judicial review and on 17 January 2002 obtained leave. Twelve days later, on 29 January 2002 the stallholders at Fuji Market were offered places at the Xin Ann Market. Some of the stallholders moved there. But the appellants refused. They pursued their application for judicial review in which they sought

certiorari and declaratory relief. The High Court dismissed their application and they have appealed to this Court. So much for the facts.

2. Although a number of grounds were argued before the learned judge and before us, there is really only one point that merits consideration. It is the effect in law of the promise or representation – call it what you will – made by the respondent’s President to the gathering at which the appellants were present that they could carry on doing business at the Fuji Market. In my judgment the rights, if any, of the appellants’ in public law fall to be determined by reference to the now well established doctrine of legitimate expectation.

3. The starting point is **Berthelsen v Director General of Immigration [1987] 1 MLJ 134** where the Supreme Court held that a foreign national who was in this country by virtue of an employment pass had a legitimate expectation to receive procedural fairness before the cancellation of his pass by the relevant authority. The Court quoted with approval the following passage in the judgment of Lord Fraser of Tullybelton in **Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629**:

“Accordingly ‘legitimate expectations’ in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: see *Reg v Criminal Injuries Compensation Board Ex parte Lain* [1967] 2 QB 864. So it was held in *Reg v Board of Visitors of Hull Prison Ex parte St*

*Germain (No 2)* [1979] 1 WLR 1041 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it.”

4. In **Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1**, the Federal Court held, *inter alia*, that the doctrine of legitimate expectation had both a procedural and a substantive dimension. In so doing, it expressly approved the approach adopted by Simon Brown LJ (now Lord Brown of Eaton-under-Heywood) in **R v Devon County Council; ex p Baker [1995] 1 All ER 73** stated in the following terms:

“Sometimes the phrase [legitimate expectation] is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as *R v Secretary of State for the Home Department, ex p Asif Mahmood Khan* [1983] 1 All ER 40, [1984] 1 WLR 1337 and *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482. It was used in the same sense but unsuccessfully in, for instance, *R v Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd* [1990] 1 All ER 91,

[1990] 1 WLR 1545, and [1991] 3 Admin LR 265. These various authorities show that **the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it.** The doctrine employed in this sense is akin to an estoppel in so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is *R v Torbay BC, ex p Cleasby* [1991] COD 142; of the latter, *ex p Khan*." [Emphasis added.]

5. In **R v North and East Devon Health Authority, ex p. Coughlan [2001] QB 213**, Lord Woolf CJ recognised that the doctrine of legitimate expectation may entitle persons affected to a substantive benefit. And, Lord Hoffmann when delivering his speech in **R (Reprotech (Pebsham) Ltd) v East Sussex CC [2002] UKHL**

**8**, approved **Coughlan**. In the very recent decision of the House of Lords in **R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61** (speeches handed down on 22 October 2008), Lord Carswell, while electing to remain silent on the limits of the doctrine of substantive legitimate expectation, accepted that substantive enforceable rights could be conferred by the doctrine of legitimate expectation. He said:

“The final issue which I want to discuss is that of legitimate expectation. All members of the Court of Appeal were in agreement that the Chagossians had a legitimate expectation that they would be permitted to return, and that the prohibition contained in the 2004 Orders in Council brought about a breach of that. The principles governing what is now known as substantive legitimate expectation were outlined by the Court of Appeal in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 in a judgment which has now become very familiar. They have not yet been considered in depth by the House, although in *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348, 354, para 34 Lord Hoffmann accepted *Coughlan* as correct. I would therefore prefer not to express a concluded opinion on the limits of the concept. **I am**

**content, however, for present purposes to accept that breach of such an expectation can give rise to an actionable claim and to consider the issue on that basis.**” [Emphasis added.]

6. I may add that the decided cases make it abundantly clear that the representation may be directed either at “a single individual, or a number of individuals or a class”. (See, **De Smith’s Judicial Review**, 6<sup>th</sup> edn, p. 616, citing **Coughlan**, “where residents of a home for severely disabled people had been promised a ‘home for life’”; **R v Jockey Club Ex p RAM Racecourses Ltd [1993] All ER 225** and **R v IRC ex parte Camq Corp [1993] 1 WLR 191**.)

7. Now apply the principles enunciated in the above quoted authorities to the facts of the present case. Here we have evidence of a clear and unambiguous representation by the respondent’s President that the appellants could continue to do business at Fuji Market. It was certainly reasonable for the appellants to rely on this representation given the authoritative source from which the representation came and the fact that it related to a matter affecting the appellants’ livelihood. Moreover, the nature of the representation made is not inconsistent with the statutory duties imposed upon the respondent. As such, the respondent as a public body is bound in fairness by the representation made. Put a little differently, the representation made to the appellants as a class of persons, namely the stall holders in Fuji Market, conferred on them a substantive right to continue remain at Fuji Market; a right that gave rise to an actionable claim.

8. In his judgment, the learned judge said this when refusing judicial review:

“As regards the arguments that there was no reason given for the decision to terminate the Market and that the applicants were not given any or adequate opportunity to make presentation before the termination was made, I think such contentions were misconceived. There was no denial that the Market affair was between the respondent and ATS. The letters of approval (LPC-6, LPC-11 and LPC-12 of Enclosure 3) and subsequently the termination (LPC-7 of Enclosure 3) were addressed to ATS. It was ATS that was expected to make the payment for the stall – license fees. Receipts for the payment of such fees were in the name of ATS. Yet ATS was not before the Court as an applicant for such order as prayed for by the applicants in this case. And although the applicants asserted that they were in fact the parties that paid for the fees through ATS that could not be said to have earned them the same position as ATS. As between the applicants and ATS their relationship at best would be contractual in which the respondent was not a party.”

9. It may be seen from the above quoted passage that what the

learned judge was looking for was some privity of contract or other legal relationship between the appellants and the respondent. With respect, this is a serious misdirection. The appellants' claim before the High Court was not based upon a private law action in contract or tort against the respondent. It was a claim for the public law remedy of judicial review. By adjudging a claim in public law with reference to private law principles is, in my respectful view a serious error.

10. Viewed from another perspective, the passage already quoted makes it equally obvious that the learned judge denied relief on the ground of *locus standi*. This approach clearly falls foul of the standing granted by RHC Ord. 53. The appellants were clearly persons who were adversely affected by the respondent's decision that was made in violation of the representation already adverted to earlier in this judgement. They therefore had both threshold as well as substantive *locus standi* and hence were entitled to relief by way of judicial review. The law relating to *locus standi* in applications for judicial review under Ord. 53 was stated by this court in **QSR Brands Bhd v Suruhanjaya Sekuriti [2006] 3 MLJ 164** as follows:

“There is a single test of threshold locus standi for all the remedies that are available under the order. It is that the applicant should be ‘adversely affected’. The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words ‘adversely affected’. At one end of the spectrum are cases where the particular applicant has an

obviously sufficient personal interest in the legality of the action impugned (see *Finlay v Canada* [1986] 33 DLR 421). This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261) has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing. See, for example *Thorson v Attorney General of Canada* [1975] 1 SCR 138.

[17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as *de minimis*. In the middle of the spectrum are cases which are in the nature of a public interest litigation.”

11. Now apply that test to the facts of this case. Here you have a group of stallholders – the appellants – who earn their daily bread by trading their wares at Fuji Market. No doubt the land upon which they ply their trade is not their own. No doubt they have no contractual nexus with the respondent. Yet, they cannot earn their livelihood at Fuji Market unless the respondent issues the relevant licences. Then you have the representation by the respondent’s

President that the appellants could continue to earn a living at Fuji Market. The respondent's decision to go back upon its word prejudices the appellants' right to their livelihood. Taking these facts together – in their totality – it is my judgment that the appellants are persons who are adversely affected by the respondent's decision.

12. For my part, I am prepared to hold that even if all other facts were absent here, the making of the representation by the respondent would confer standing on upon the appellants. In my judgment, a pre-existing legal relationship between the public body making the promise or representation and the person to whom it is made is not a *sine qua non* for the doctrine of legitimate expectation to bite. The law has developed far enough for the courts to enforce promises or representations made by or on behalf of a public body to persons who will be adversely affected if those promises or representations are reneged upon. If a public body goes back on its word, the persons adversely affected by its act or omission will be able to obtain the appropriate relief by way of judicial review. As Verma J said in **Food Corporation of India v Kamadhenu Cattle Feed Industries AIR 1993 SC 1601**:

“There is no unfettered discretion in public law. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated

fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.”

13. Almost 15 years earlier, Raja Azlan Shah Ag CJ (Malaya) expressed the same view albeit in different words in **Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135:**

“Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be

exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.”

14. From these authorities I come to the conclusion that the existence of a legitimate expectation is sufficient in itself to confer *locus standi* upon an applicant to bring an application for judicial review. A similar view was expressed in **Union of India v Hindustan Development Corporation AIR 1994 SC 980**, although the discussion there was confined to the role of legitimate expectation in the sphere procedural fairness. This is unsurprising as that case was decided before the recognition of the substantive dimension that the doctrine possesses.

15. Before concluding, I must mention the article by Professor Christopher Forsyth titled “Wednesbury Protection of Substantive Legitimate Expectation” **(1997) Public Law 375** which I have found to be of considerable assistance. In it Professor Forsyth expresses the following view to which I subscribe:

“The protection of the trust placed by individuals in the statements of officials is, it is submitted, of great importance. Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices. The law expects high standards from public bodies in such circumstances. As Simon Brown LJ. said in *ex p. Unilever* [R. v. Commissioner of Inland Revenue, *ex parte* Unilever Plc, (1996) STC 681] ‘Public authorities in general ... are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness than would apply as between private citizens’. Thus, save where there is an overriding public interest, it is submitted that it will generally be unreasonable to leave substantive legitimate expectations unprotected.”

All that needs to be added is that in the present instance there is no overriding public interest that calls for a negation of the legitimate expectation created in the appellants by the representation earlier adverted to.

16. It follows from what I have said thus far that the respondent's decision to close down Fuji Market is null and void and of no effect.

The appellants are therefore entitled to the orders sought by them. I would accordingly allow the appeal and set aside the orders of the High Court. There shall be an order in terms of the motion for judicial review. The respondent must pay the costs of this appeal and those incurred in the court below.

Dated this 4<sup>th</sup> day of February 2009.

Gopal Sri Ram  
Judge, Court of Appeal  
Malaysia  
Putrajaya

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|---------------------------------------|---------------------------|
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