5 DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO. S-02-233-02

10

ANTARA

LAW PANG CHING & 64 LAGI ... PERAYU-PERAYU

15

DAN

20 TAWAU MUNICIPAL COUNCIL ... RESPONDEN

(Dalam Perkara Mengenai Permohonan Kajian Semula
Kehakiman No. T – 1 Tahun 2001
25 Di Mahkamah Tinggi di Sabah dan Sarawak di Tawau

Antara

30 Law Pang Ching dan 67 Lagi ... Perayu-perayu

Dan

35 Tawau Municipal Council ... Responden

Coram: Gopal Sri Ram, J.C.A.
Raus Sharif, J.C.A.
40 Abu Samah Nordin, J.C.A.

JUDGMENT OF A. SAMAH NORDIN, J.C.A.

[1] This is an appeal by the appellants against the decision of the learned High Court Judge who dismissed their application for judicial review under order 53 of the Rules of the High Court 1980 ('RHC'). In their application, they seek the following reliefs:

(1) An order of certiorari to remove into this Honourable Court and to quash forthwith the decision by Tawau Municipal Council, as contained in its letters dated 16 July 2001, 6 July 2001 and 30 April 2001 to ATS Land Sdn Bhd, to terminate or revoke the approval dated 20 April 2000 granted to ATS Land Sdn Bhd to operate or manage the market known as Fuji Market on the lands held under documents of title TL 10751123 and TL 10751124 at Jalan Sin Onn, Tawau;

(2) A declaration that any decision by Tawau Municipal Council to terminate or revoke the approval dated 20 April 2000, granted to ATS Land Sdn Bhd to operate or manage the market known as Fuji Market on the lands held under documents of title TL 10751123 and TL 10751124 at Jalan Sin Onn, Tawau, on the reasons or the grounds as stated in Tawau Municipal Council's minutes of meeting dated 18 April 2001 (Ref: MPT/URSM: 100-26/Klt.12/) and 30 April 2001 (Ref: MPT/URSM: 100-26/Klt.13/01) is invalid, null and void;

5 (3) A declaration that Tawau Municipal Council's letters dated 16 July 2001, 6 July 2001 and 30 April 2001 at ATS land Sdn Bhd are invalid, null and void;

(4) An order of prohibition directed to Tawau Municipal
10 Council and any officer/s, servant/s, agent/s or contractor/s acting for or in its behalf prohibiting it or them, from entering the market known as Fuji Market being conducted on the lands held under documents of title TL 10-751123 and TL 10751124
15 at Jalan Sin Onn, Tawau, or doing anything for he purpose of ceasing all market or business activities in Fuji Market unless and until there has been a proper and lawful decision by Tawau Municipal Council to terminate the approval dated 20 April
20 2000 to the Landowner, ATS Land Sdn Bhd to operate or manage the market known as Fuji Market in accordance with law and in accordance with the principles of natural justice;

25 (5) That all proceedings on the decision of Tawau Municipal Council, to terminate or revoke the approval dated 20 April 2000 to the Landowner, ATS Land Sdn Bhd to operate or manage the market known as Fuji Market on the lands held
30 under documents of title TL 10751123 and TL 10751124 at Jalan Sin Onn, Tawau, be stayed until after the hearing of the application for judicial review or further order;

35 **The facts**

[2] The appellants are stallholders at a market known as Fuji Market in Tawau. The market stands on two pieces of

lands owned by ATS Land Sdn Bhd ('the landowner'). It consists of 104 hawker stalls and had been in operation since 1992. The present landowner took over possession of the market on 30.9.1998 after it bought over the lands from their previous owner.

[3] It was given a trading licence to continue the operation of the market with retrospective effect from 1.11.1998. This is contained in the respondent's letter of approval dated 20.4.2000. It is not in dispute that the trading licence is not given to individual stallholders. They merely paid their respective fees to the landowner, who then paid them to the respondent. The approval was for a temporary period, based on a monthly basis. It was not for an indefinite period. This is stated in paragraph 2.2 of the said letter, which reads as follows:

> "kelulusan ini adalah berbentuk sementara dan akan terus sah dan berkuatkuasa untuk bulan-bulan seterusnya KECUALI ia ditamatkan oleh Majlis dengan memberi notis bertulis selama empat (4) minggu kepada pihak tuan"

5 [4] At the luncheon hosted by the landowner at Marco Polo Hotel in Tawau, on 30.9.1998, the appellants claimed that the President of Tawau Municipal Council, gave a verbal representation that the respondent had no problem in allowing them to carry on their businesses at the market.
10 The President of the Council admitted making such verbal representation but in his affidavit he clarified that it was made to the landowner and not to the appellants.

[5] Following the said representation, the landowner had
15 written two letters dated 11.11.1998 and 17.9.1998 respectively to the respondent for a written assurance which the respondent did not bother to reply. It was only on 20.4.2000 that the respondent gave a written approval to the landowner subject, among others, to the conditions which I
20 had adverted to earlier. The market is well known to the residents of Tawau. The stallholders had been carrying on their businesses there for years without any grievances or unnecessary harassment from the respondent.

[6] Then comes the bombshell. On 30.4.2001 the landowner received a termination notice from the respondent to cease the operation of the market by or before 1.6.2001. This notice was superceded by another termination letter, dated 6.7.2001 to cease operation of the market by or before 5.8.2001, which notice was subsequently replaced by another letter, dated 16.7.2001, directing the landowner to cease the operation of the market by or before 15.10.2001. The respondent did not give any reasons for its decision.

[7] This prompted the landowner's solicitors to write to the respondent on 25.5.2001 asking for its reasons to close the market abruptly and to reconsider its decision, failing which, it would take legal action. The respondent's solicitor's reply on 25.6.2001 was that the termination was made pursuant to paragraph 2.2 of the respondent's letter of approval and under its by-laws. Prior to the said reply the landowner had written no less than five other letters appealing against the decision to close the market. The affected stallholders were

only informed of the said termination by the landowner. There was no direct correspondence between the respondent and the appellants. Attempts to persuade the respondent to reconsider and to revoke its decision, including an appeal by the state assemblyman for Sri Tanjung, Tawau constituency on behalf of the appellants were unsuccessful.

[8] In the end the landowner had no choice but to inform the appellants by letter dated 30.8.2001 to stop trading at the market by or before 15.10.2001. The landowner also advised the appellants that it had decided not to pursue any legal action against the respondent's decision to terminate the operation of the market.

[9] Faced with the inevitable prospect of having to cease trading at the market, the appellants turned to the High Court for judicial review to quash the decision of the respondent. The High Court dismissed their application with costs.

Grounds of appeal

[10] Several grounds of appeal were canvassed before us, including breach of principles of natural justice in that they were not given the opportunity to be heard and to make representations; that they have a legitimate expectation that the approval to continue trading at the market would not be withdrawn without first giving them the opportunity to make representations in view of the said verbal assurance by the respondent's President; breach of procedural fairness in that the respondent had not acted fairly and did not give any reason for its decision; taking into account irrelevant considerations and failed to take into account relevant considerations, including their right to livelihood, which is a proprietary right as guaranteed by the constitution.

[11] Another ground is that the respondent's decision is ultravires and in violation of its statutory duty when it covenanted with a third party, namely Renung Abadi Sdn Bhd ('RASB') to lease its land to the latter to operate another market, known as Xin Ann market and agreed to bind itself

not to renew/grant permission or issue licences to any person or company to operate a market place within three miles radius of Xin Ann market. By so doing, it has fettered its discretion and disabled itself from exercising its statutory duties in the way which is expected of it.

[12] Having heard the parties, I am of the view that there is only one ground that merits further consideration, that is, whether the appellants have a legitimate expectation that the approval to continue trading at the market would not be withdrawn without first giving them the opportunity to make representations. It is not in dispute that the respondent did not hear them in person. It is also not in dispute that the respondent did not give them any reply to their letters or pleas made on their behalf by the landowner as well as by the state assemblyman.

[13] The phrase "legitimate expectation" was first employed in **Schmidt v Secretary of State for Home Affairs** [1969] AER 904. In that case a foreign student sought review of the

5 Home Secretary's decision not to grant an extension of his temporary permit to stay in the United Kingdom. In rejecting his contention that he ought to have been afforded a hearing, Lord Denning, M.R, at page 909 said:

10 "The speeches in *Ridge v Baldwin* [1963] 2 AER 66 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would
15 add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say"

[14] Since then, the doctrine of legitimate expectation had
20 been applied in many different circumstances. In **R v Brent L.B.C. exp. Mac Donagh** [1990] C.O.D. 3; 21 H.L.R 494, gypsies had a legitimate expectation that a council would not evict them without finding them an alternative site. In **R v Enfield L.B.C. exp. T.F. Unwin (Roydon) Ltd** [1989] 1
25 Admin. L.R.51, contractors had a legitimate expectation that they would not be removed from the list without a hearing. In **R v Liverpool Corporation, exp. Liverpool Taxi Fleet**

5 **Operators' Association** [1972] 2 Q.B 229, it was held that the corporation's decision to increase the number of taxi licences without consulting the Operator's Association was unfair because the decision was in breach of an assurance to the contrary.

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[15] In **Attorney General of Hong Kong v Ng Yuen Shiu** [1983]2 AC 629, the applicant who was born in China entered Hong Kong illegally from Macau in 1967. By 1980, he was the partime owner of a small factory. In October, the same 15 year, the government announced changes in its immigration policy and that each illegal entrant from Macau would be interviewed and his case "treated on its merit's". After being questioned and detained, the Director of Immigration made a removal order against him without giving him an opportunity 20 of making any representations as to why he should not be removed. The applicant applied to the High Court for orders of certiorari to quash the removal order and prohibition restraining the director from executing it. The High Court

5 refused his application. On appeal, the Court of Appeal granted an order of prohibition preventing the director from executing the removal order until he had given the applicant an opportunity to be heard.

10 [16] The Attorney General's appeal to the Privy Council was dismissed. Lord Fraser of Tullyberton, in delivering the judgment of the Privy Council described the phrase 'legitimate expectation' as follows:

15 "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 Exparte Lain** [1967] 2 Q.B.
20 864. So it was held in **Reg v Board of Visitors of Hull Prison, Ex Parte St. Germain** (No.2) [1979] W.L.R 1041 that a prisoner is entitled to challenge, by judicial review, a decision by prison board of visitors, awarding him loss of remission of sentence, although he has no
25 legal right to remission, but only a reasonable expectation of receiving it".

At page 637, Lord Tullyberton added:

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"The expectations may be based upon some statement or undertaking by, or on behalf of the public authority which has the duty of making the decision, if the

5 authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an enquiry".

[17] Lord Diplock in **Council of Civil Service Unions v**

10 **Minister for Civil Service** [1985] AC 374 at page 408-409 held that for a legitimate expectation to arise the decision must affect the other person:

> "by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the
> 15 decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received
> 20 assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn".

25 [18] The learned counsel for the appellants referred to **R v Barnsley Metropolitan Borough Council** [1976] 3 AER 452 and **Mc Innes v Onslow Fane** [1978] 3 AER 217 to fortify his client's case. It is thus pertinent to look at those cases. In the first case, the applicant was a trader who traded from

30 a stall in the market for six years without a complaint. One

evening, after the market had closed, the applicant had an urgent call of nature. As the public lavatories were locked, the applicant went into a side street and urinated there. Following a complaint of his behaviour, the local authority decided to ban the applicant from trading in the market and to revoke his right to a stall without hearing him or his representative, when the market manager gave evidence before the local authority's subcommittee deliberating on his case. The applicant applied to the Divisional Court for an order of certiorari to quash the decision. It was dismissed. The Court of Appeal allowed his appeal and granted an order of certiorari on the ground, among others, that there was a breach of the rules of natural justice. Scarman L.J. in considering the gravity of the local authority's decision quoted a passage by the late Professor SA de Smith in his book, Judicial Review of Administrative Action, 3rd Ed. [1973] at page 197 which reads as follows:

> "Non-renewal of an existing licence is usually a more serious matter than refusal to grant a license in the first place. Unless a licensee has already been given to

> understand when he was granted the licence that renewal is not to be expected, non-renewal may seriously upset his plans, cause him economic loss and perhaps cast a slur on his reputation. It may therefore be right to imply a duty to hear before a decision not to renew when there is a legitimate expectation of renewal, even through no such duty is implied in the making of the original decision to grant or refuse the licence".

Scarman L.J observed that although the learned author was dealing with non-renewal, "everything that he says about non-renewal applies with even greater force to revocation".

[19] In **Mc Innes v Onslow Fane and another** Megarry V.C advanced at least three categories in which the court is entitled to intervene. First there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence

5 to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head include cases where 10 an existing licence-holder applies for a renewal of his licence or a person already elected or appointed to some position seeks confirmation from some confirming authority.

[20] The doctrine of legitimate expectation had been invoked 15 by the Supreme Court (as it then was) in **J.P Bethelson v Director General of Immigration, Malaysia & Ors** [1987] 1 MLJ 134. In that case the Supreme Court held that the appellant, an American working in Kuala Lumpur as a staff correspondent with Asian Wall Street Journal had a legitimate 20 expectation that his employment pass would not be cancelled prior to giving him a right to make representations. Abdool cader S.C.J, at page 138 said that, "all that need be given was an opportunity to the appellant to make representations".

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[21] A common trait in all these cases is that the aggrieved parties stand in direct relationship – without any go-between – with the decision makers. The expectation arises where a person responsible for taking a decision has induced in

10 someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. See De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th Ed. Paragraph 8 – 037.

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[22] With these cases in mind, can the appellants seriously claim that they have a legitimate expectation that the approval to continue trading at the market would not be withdrawn without first hearing their representations? The

20 indisputable facts are these. The appellants are not the licenceholders. They have no direct dealing with the respondent. The licenceholder is the landowner. The appellants had been allowed to do business under a licence

5 granted to the landowner on the land owned by the latter, which had been approved for a commercial development. The verbal assurance by the respondent's President was made at a luncheon hosted by the latter in the presence of some of the stallholders. It would not be incorrect to say that 10 they were there as invited guests. There was no suggestion that they co-hosted the function. The only logical and reasonable conclusion is that the assurance or representation must have been made or given to the landowner although it was a welcome news to the appellants.

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[23] Next, there is this insurmountable problem. The landowner is not a party to this application. It has taken a stand that it would not seek legal recourse and would abide by the decision of the respondent. This was decided after its 20 impassioned pleas to the respondent, both on its own behalf as well as for the appellants had been unsuccessful. Consequently it had, in writing, advised the appellants to cease trading at the market.

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[24] The reliefs sought by the appellants are essentially for the direct benefit of the landowner, who is the licenseholder, although the appellants would stand to gain, if they succeed in this application. Yet, the landowner is not before the court.

10 This was one of the grounds why the High Court dismissed the appellant's application.

[25] In my judgment, being in the position where they are in, the appellants do not have a legitimate expectation that the

15 approval would not be withdrawn until they have made their representations, when in the first place they are not the licenseholders. They can only hope that the approval to the landowner would not be withdrawn from which they would have benefitted. But they cannot claim to have a better

20 interest or right than the landowner. It is obvious that they do not fall into any of the categories referred to in **Mc Innes v Onslow Fane and another**.

5 [26] For the foregoing reasons, I am of the considered view that the appeal ought to be dismissed with costs. The deposit is to be paid to the respondent on account of taxed costs.

10 [27] I have had the privilege of reading the judgments in draft of both of my learned brothers and I am in agreement with my learned brother Raus Shariff that this appeal be dismissed with costs.

15 Dated this 4 day of February 2009

A.Samah Nordin
Judge
Court of Appeal Malaysia
20 Putrajaya

Counsel for the appellant: Chung Jiun Dan

25 Solicitors for appellant: Tetuan Chung & Associates

Counsel for the respondent: Hamid Hamzah bin Mydin

Solicitors for the respondent: Tetuan Amin Jaafar & Co.