

THIS APPLICATION

The respondent has now moved this court by way of notice of motion to have that decision of the Federal Court reviewed and reheard pursuant to rule 137 of the Rules of the Federal Court to prevent injustice or to prevent an abuse of the process of the court.

BACKGROUND

Let us first look at the facts of the case. The applicant was an insurance company acting with another insurance company as co-insurers. They have issued to the respondent a policy of insurance, for an amount initially of RM14.932 million but this insured sum was subsequently, in August 1989, increased to RM32.431 million. The subject matter of the insurance was security paper which was originally stored in Kuala Lumpur but was later transferred to a warehouse in Kampung Acheh, Sitiawan. About one month after the amount of the insured sum was increased, i.e. on 11.9.1989, the Kampung Acheh warehouse where the security paper was stored was on fire. The building together with its contents was all burnt down. The respondent therefore made a claim from both insurance companies. The applicant refused to pay on the ground that the claim was fraudulent and in breach

of Condition 13 of the insurance policy which provides that if the claim is in any respect fraudulent or if fraudulent means or device are used by the insured or anyone acting on his behalf to obtain any benefit under the policy or if the loss or damage is occasioned by the willful act or connivance of the insured.

When the insurance companies, refused to honour the claim, the respondent filed a suit at the High Court at Ipoh. The principal issue before the High Court at Ipoh was whether the fire was the act of arsonists or whether it was caused by spontaneous combustion. Many witnesses were called by both sides. The applicant relied on evidence of people who were allegedly personally involved in starting the fire. According to some of the applicants' witnesses, one Balasingam, who was the director and a minority shareholder in the respondent company was the one who paid them to start the fire and that the fire took place at 1:30 am in the early morning of 11.9.1989. The respondent's expert witnesses on the other hand were the chemists (namely, Mr. Amar Singh and Professor Dato' Dr. Chan Kai Cheong mentioned in the question referred to the Federal Court discussed later) who testified that the fire was a result of a spontaneous combustion and that the fire took place at 4:00 pm on the same date.

The learned trial judge concluded that it was not arson but was the result of a spontaneous combustion. In short, he believed one set of witnesses against the evidence of another set of witnesses, which he was entitled to do. He gave reasons why he chose to accept those witnesses rather than, on a balance of probabilities, the other set of witnesses.

The applicant, being dissatisfied with this decision exercised their right to appeal to the Court of Appeal. The Court of Appeal reheard the case and in so doing, examined all the facts in detail and concluded that the trial judge had not properly appreciated the facts. The Court of Appeal concluded there was fraud on the part of Balasingam. It gave eleven (11) grounds for reversing the decision of the trial judge and concluded that the fire was caused by arsonists in the early hours of 11.9.1989. It held that Balasingam was the perpetrator of this arson and his acts being the act of a director and a person in control of the respondent company, amounted to the act of the company. It went on to examine the law before concluding that the act of Balasingam amounted to the act of the company. The insured company therefore failed in its claim to receive the sum insured. At this stage, it is also difficult to say that the Court of Appeal was wrong in making those decisions. It supported its decision with detailed reasoning and legal authorities.

It should be noted that both counsels for respondent and counsels for appellant in the Court of Appeal mutually agreed that the appeal before the Court of Appeal “turns solely on questions of fact” – see grounds of judgment of the Court of Appeal.

QUESTIONS

Then came the turn of the respondent to seek for a reversal of the Court of Appeal's order in the Federal Court. It sought for and obtained leave to refer to the Federal Court the following two questions:

- “1. Whether it is opened to an appellate court to totally disregard (in the sense of not advertent at all to) the evidence and findings of two (2) experts one of whom was a Senior Government Chemist and Director of the Chemistry Department, Perak, Mr. Amar Singh (PW9) and the other a respected retired Professor Dato' (Dr.) Chan Kai Cheong (PW11) who both conducted investigations and tests of the site on the issue of arson, which issue is the most crucial in these proceedings and that significantly their evidence and findings had cast serious doubts that the fire was a result of arson and that it could have been caused by “spontaneous combustion” and whether it is competent for the Court of Appeal to rely more on the so called circumstantial evidence as opposed to the direct and scientific evidence in reversing a decision of a trial court.
2. Whether it is competent for the Court of Appeal to hold that the acts of a single shareholder/Director binds the company when the shareholder/Director was not acting in the course of his employment.”

The Federal Court heard the appeal on these two questions. In so doing, it also looked at the judgment of the High Court and that of the Court of Appeal and concluded that the decision of the High Court should be upheld. Again, the Federal Court went into detailed discussions of the facts adduced at the High Court as well as the eleven grounds given by the Court of Appeal before deciding so.

In its grounds of judgment, the Federal Court also considered the second question. In fact, in my opinion, this was not necessary because the first question being answered in the negative, the decision whether the director's acts amounted to the act of the respondent company became irrelevant.

There are now before us three sets of decisions on findings of facts, two (at the High Court and the Federal Court) decided on facts that the fire was caused by spontaneous combustion while one (that of the Court of Appeal) held that the claim was fraudulent since the fire was caused by the director of the respondent company.

This case has been much talked about within the insurance industry. The amount involved is very large. If it is truly a fraudulent claim, it is bad for the insurance business. Be as it may, this court will have to decide this case as it does in respect of any other cases, irrespective of who the parties are.

WHAT IS RULE 137

In the circumstances, should this court invoke its inherent jurisdiction to hear the case all over again? This depends on the interpretation of rule 137 of the Federal Court Rules 1995. The rule reads:

“For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.” (Emphasis mine)

It will be noticed that the rule starts with the words “For the removal of doubts ...” It is therefore clear that this rule does not actually confer the jurisdiction to hear any application or to make any order to prevent injustice or abuse of the process of the Court. It is merely a reminder that this court has that inherent jurisdiction. In fact, it was stated by Salleh Abas LP in *Dato Mohamed Hashim bin Shamsuddin v. Attorney-General Hong Kong* [1986] 2 MLJ 112 at page 115:

“It is also interesting to see how the so-called additional powers were introduced in the 1948 Ordinance by section 99A thereof (supra). The powers were described by the section as “the further powers” and these were “in amplification” of the powers conferred by the Ordinance or “inherent in any court”. Neither in derogation nor prejudicing the generality of the powers expressly conferred. It seems therefore that even without an express provision in the statute regarding this matter, the Court seems to have it and have it since the commencement of the 1948 Ordinance. It is a sort of power that should be implied or amplified from the very nature of

judicial powers expressly conferred upon the Court; its express mention being merely declaratory of the existence of the power, and thus its silence does not mean the disappearance of its existence." (Emphasis mine)

That was a case where the question was whether the High Court had the power to take evidence upon a letter of request issued by the Hong Kong High Court. There was originally such a power specifically mentioned in the Schedule to the Courts Ordinance 1948 but it was omitted when the Courts of Judicature Act 1964 was enacted in place of the Ordinance.

The Rules of the Federal Court 1995 was made by the Rules Committee pursuant to delegated powers under sections 16 and 17 of the Courts of Judicature Act 1964. Section 16 sets out the areas where the Rules Committee may make rules of the court.

"16. Rules of court may be made for the following purposes:

- (a) For regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court, [the Court of Appeal and the Federal Court] in all causes and matters whatsoever in or with respect to which those Courts have for the time being jurisdiction (including the procedure and practice to be followed in the registries of those Courts), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court [to the Court of Appeal or to the Federal Court] shall be made;" (emphasis mine)

Notice that under section 16(a) the rule making power is only in or with respect to which those courts have for the time being jurisdiction. It is not intended to confer any jurisdiction as intended to by Article 128 of the Federal Constitution. The Federal Court derives its judicial function from federal laws and although the Rules of the Federal Court are federal laws, they are not intended to confer any new jurisdiction.

In fact, this has been the interpretation since 1986. In *Dato Mohamed Hashim Shamsuddin v. Attorney-General, Hong Kong (supra)* at page 118, Abdoolcader SCJ said:

“This legislative provision clearly relates to a matter of practice and procedure with no question arising of creating or altering substantive rights or of any rules made pursuant thereto purporting per se to confer jurisdiction where none existed otherwise, and it is this specific enactment in the 1964 Act that enables the necessary rules to be spelt out to regulate the procedure for the purposes specified therein.”

Later in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, the Federal Court referred to the Rules of the High Court and said at page 222:

“The next topic to be logically considered in this context, is the status of the Rules of the High Court 1980.

By s 17(1) of the Courts of Judicature Act 1964, powers are conferred upon the Rules Committee to make ‘rules of court’ for the purpose of regulating and prescribing the practice and procedure to be followed in the respective courts for which each of them is constituted but within the strict limits defined by s 16.

The most decisive limitation placed on the powers of the Rules Committee, and indeed on the other rule-making authorities, is that they extend to regulating the 'practice and procedure of the High Court and other courts for which the Rules are made. Although these powers are wide, yet it cannot be gainsaid, that they do not extend into the area of substantive law. Clearly, there is a vital distinction made between, on the one hand, substantive law, the function of which is to define, create, confer or impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognized by courts of law or any tribunal seized with jurisdiction to adjudicate on a dispute before it."

From the wording of section 16, it is clear that what is delegated to the Rules Committee is only to make rules relating to practice and procedure, and not to affect substantive rights and duties.

INHERENT JURISDICTION

What then is the meaning of inherent jurisdiction? According to the Concise Oxford Dictionary, "inherent" means "existing in something, esp. as a permanent or characteristic attribute." In the context of the law, that inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction subject to valid existing laws including the Constitution. In other words, that inherent power is found within the very nature of a court of law, unlike power conferred by statute.

The Halsbury's Laws of England 4th Edition in Volume 37 at para 12 refers to "inherent jurisdiction" as follows:

"In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."

In *Bremer Vulkan v South India Shipping* [1981] 1 AER 289 at 295, Lord Diplock speaking on the subject of dismissing a pending action for one of prosecution said:

"The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice." (emphasis mine)

There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous occasions decided that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court. It has that very wide discretion.

However, that wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is within exceptional category. Rule 137 cannot be construed as conferring unlimited power to review its earlier decision for whatever purpose. The court must not be too eager to invoke the rule.

Some of the circumstances in which this discretion should be exercised or not, are as follows:

- a. That there was a lack of quorum e.g. the court was not duly constituted as two of the three presiding judges had retired. (*Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 MLJ 1)
- b. The applicant had been denied the right to have his appeal heard on merits by the appellate court. (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385)
- c. Where the decision had been obtained by fraud or suppression of material evidence. (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673)

- d. Where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the quorum that rendered the impugned decision. (*Allied Capital Sdn Bhd v. Mohd Latiff bin Shah Mohd and another application* [2005] 3 MLJ 1)
- e. Clear infringement of the law. (*Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2006] 1 MLJ 417)
- f. It does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel). (*Chan Yock Cher @ Chan Yock Kher v. Chan Teong Peng* [2005] 1 MLJ 101)
- g. Where an applicant under rule 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard. (*Raja Prithwi Chand v. Sukhraj Rai* AIR 1941)
- h. Where bias had been established. (*Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353)
- i. Where it is demonstrated that the integrity of its earlier decision had been critically undermined e.g. where the process had been

corrupted and a wrong result *might* have been arrived at. (*Re Uddin* [2005] 3 All ER 550)

- j. Where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and Court of Appeal. (*Joceline Tan Poh Choo & Ors v. V. Muthusamy* [2007] 6 MLJ 485)

These are but just instances where the court has exercised its discretion to invoke rule 137. There may be many other instances where rule 137 may apply as can be seen from Civil Procedure books where High Courts exercise their inherent jurisdiction to prevent injustice or abuse of the process of the court. By the very meaning of “inherent”, as discussed earlier, it is not wise to even attempt to list out the other instances where this court should exercise such discretion. It is best to leave the question open and decide the applications as they come before this court. Inherent jurisdiction is not something conferred by the statute but which it has by its very nature of being a court to enable it to do justice and prevent injustice.

Let us now examine whether this case is one where the Federal Court should exercise its discretion under rule 137.

JUSTICE

Rule 137 uses the term “injustice”. What is it?

Now, “justice” is a very wide and general term. Jurists through the years since Aristotle and Plato have tried to define justice and each has his own definition. It is not necessary for me to delve into that for the purpose of this judgment. Any party who has lost a case will always claim that there has been injustice against him while the successful party will plead otherwise. In our system, the court’s function is to hear and decide to the best of its ability, honestly, and after carefully considering all the evidence adduced before it, makes a decision. Based on its findings and applying the law as the judge understands, he arrives at his conclusion. That to my mind, in the context of this case, is justice. The decision may not be accepted by the unsuccessful party. But that is the best that an honest and an impartial judge can decide.

There must be a finality to deciding any dispute. It cannot be reviewed *ad infinitum*. It must end somewhere and in our system, it is the Federal Court. If there is any intention that Rule 137 be read as conferring appellate jurisdiction, this court cannot also sit as an appellate court to hear appeals from itself. (See Article 128 of the Federal Constitution and the decisions of the Federal Court in the cases of *Abdul Ghaffar bin Md. Amin v Ibrahim bin Yusoff & 1 Lagi* [Permohonan Sivil

No. 08-149-2007(P)] and *Sia Cheng Soon & 1 Lagi v Tengku Ismail bin Tengku Ibrahim* [Permohonan Sivil No. 08-151-2007(N)]).

Judges are mere mortals. They do not have ability to determine what had truly and actually taken place except to base their decision on legally admissible evidence adduced before them by the parties. The judges must arrive at a conclusion to the best of his ability. A judge who cannot make or delays his decision is not a good judge.

APPLICATION TO THE FACTS

Applying the interpretation of rule 137 as discussed above to the facts, was there any injustice done to the applicant or was there an abuse of the process of the court. In this case, the decision was based on the finding of facts by the trial court, not so much on the law. The High Court held that the fire was as a result of spontaneous combustion and not arson as claimed to be by the applicant. Finding of facts are normally left to the trial judge who has the benefit of seeing and assessing the witnesses but in this case the court of appeal decided that it should interfere with the finding of the trial judge and did so by reassessing the evidence of the witnesses. The Court of Appeal reversed the decision and held that was the act of arson by Balasingam,

a director of the respondent company. When, by leave given, this court heard the two questions posed by the respondent to this court, this court decided that the High Court judge was right in its decision. This court in turn reinstated the findings of the High Court and reversed the decision of the Court of Appeal.

As I had said earlier, the legal question of the director's responsibility to the respondent company is not necessary to be decided if it was held that the fire was not as the result of the act of the director. Only if the fire has been the act of the director, is it relevant whether that act of the director is the act of the respondent company.

FINALITY

Should this court now reconsider the findings of this court and possibly arrive at another decision? Examining the facts adduced by both parties at the trial, the arguments at the court of appeal and this court, it is not possible to say that there has been a manifest error committed by this court when it decided to restore the decision of the High Court. It is not right for me to say whether it was the High Court or the Court of Appeal or the Federal Court was right or wrong. According to our system, it must be held that the Federal Court was right in arriving

at its decision. There must be a finality. In England, the House of Lords is the apex court and in the United States of America, the Supreme Court. Before the right of appeal to the Privy Council was abolished, the Privy Council was our apex court.

There is no assurance that even if leave is given to review that decision of the Federal Court, the losing party will not claim injustice and seek for another review. Where does it then end? In *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn. Bhd. & Ors.* [1986] 1 MLJ 166 at page 167, this is what my learned Chief Justice, Abdul Hamid C.J. (Malaya) (as he then was) in the Supreme Court said:

“The question before the Court is, therefore, whether sub-section (4) can be construed to confer an unlimited power on the Supreme Court to review, meaning to re-open, re-examine and re-consider with a view to correction, variation, alteration or reversal, if necessary, an earlier decision in an appeal that has already been heard and disposed of.

Our view is that there is no merit in the contention made by the applicants. Sub-section (4) of the Act cannot be construed to mean that it confers unlimited power upon the Supreme Court to re-open, re-hear or re-examine, if necessary, to reverse or set aside a judgment given in an appeal already heard and disposed of by it. So to construe would indeed not only be contrary to the clear meaning to the words used in section 69 but also contrary to Article 128(1) of the Federal Constitution.

Article 128(3) states that “the jurisdiction of the Supreme Court to determine appeals from a High Court or a judge thereof shall be such as may be provided by federal law.

The Courts of Judicature Act, 1964 is such a law made pursuant to Clause (3) of Article 128.

With respect to appeals, section 41 of the Act provides that appeals shall be decided in accordance with the opinion of the

majority of judges composing the Court. Read in the light of section 67(1), the jurisdiction of the Supreme Court in regard to civil appeals shall specifically be to hear an appeal from any judgment or order of any High Court. There is certainly no provision which confers jurisdiction on a Supreme Court to hear and determine appeals from a decision given in an appeal it has already heard and disposed of.

Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by section 42, in particular sub-section (3) of section 42. The other exception is as provided under section 44 sub-section (3) to the effect that every order such as that envisaged in sub-section (1) of section 44 may be discharged or varied by the full Court.” (Emphasis mine)

Sections 42 and 44 referred to in that judgment have since been amended with the restructure of the appellate courts on 24.6.1994 i.e. the creation of another appellate level, the Federal Court. What was Supreme Court is now known as the Court of Appeal. In fact, now section 101 of the Courts of Judicature Act 1964 prevents any judgment or order of the High Court from being reversed or varied on appeal or be ordered a retrial by the Federal Court unless it affects the merits or the jurisdiction of the court. I quote the judgment of the case of *Dato’ Seri Anwar bin Ibrahim v. Public Prosecutor* [2004] 3 MLJ 517 at page 544:

“On the issue of relitigation, it is useful to rely on the dicta of Eusoffe Abdoolcader FJ (as he then was) in *Dato’ Mokhtar Bin Hashim & Anor v PP* [1983] 2 MLJ where the learned judge said (at p 271):

... This attempt to relitigate and reopen an issue conclusively decided in respect of the same proceedings and between the same parties would appear to us to be as clear an instant of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in Hunter v Chief Constable of the West Midlands Police & Ors [1982] AC 528, 542 which was applied by this court in Tractors Malaysia Bhd. v. Charles Au Yong [1982] 1 MLJ 320, 321.

Rule 137 of the Rules of the Federal Court 1995 allows the Federal Court to exercise its inherent powers the Federal Court to exercise its inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The rule has been invoked by the Federal Court in a number of cases like Chia Yan Teck & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1 and MGG Pilli v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673. However, it must be observed that its application was only in limited circumstances. If there were to be a liberal application of r 137 then there would be chaos in our system of judicial hierarchy. Hence we would think that it is on a case by case basis. Certainly it cannot be the intention of the legislature when promulgating r 137 that every decision of this court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final. (Emphasis mine)

The Federal Court in *Adorna Properties Sdn Bhd v Kobchai*

Sosothikul [2005] 1 CLJ 565 at p 572 said:

“Secondly, there is much force to be given to the contention that there should be finality to any litigation. The main judgment was handed down by this court which is the apex court of this country. If the application of r 137 is made liberally the likely consequence would be chaos to our system of judicial hierarchy. There would then be nothing to prevent any aggrieved litigant from challenging any decision on the ground of ‘injustice’ vide r. 137.” (Emphasis mine)

I am therefore not satisfied that there is any probability of the Federal Court's judgment being wrong and that injustice has or will occur to the applicant. As was said by my learned Chief Justice, Abdul Hamid Mohamad when he was a Federal Court Judge in *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29 at page 45 para *h*:

“It has been seen that the applicant questions the findings of this court both in law and on facts. These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision.”

I would apply the same reasoning to the present case.

I therefore find this is not a fit and proper case for this court to exercise its inherent jurisdiction to make any order for the case to be reviewed. This application is dismissed with costs.

Both my learned Chief Justice Abdul Hamid Haji Mohamad, and brother Zulkefli Ahmad Makinudin, FCJ have read this judgment and agreed with it.

Dated :

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