IN THE COURT OF APPEAL OF MALAYSIA

Coram: Tengku Maimun Tuan Mat, JCA; Nallini Pathmanathan, JCA; Zabariah Yusof, JCA

Majlis Perubatan Malaysia and Another v Asia Pacific Higher Learning Sdn Bhd

Citation: [2018] MYCA 200 **Suit Number:** Civil Appeal No. W-02(IM)(NCVC)-1432-07/2017

Date of Judgment: 07 June 2018

JUDGMENT

Introduction

[1] This is an appeal by the Malaysian Medical Council ('the MMC') and Prof. Dato' Dr. Wan Mohamed Bebakar ('the Professor') in respect of an application to amend a re-amended statement of claim in Civil Suit No. 22NCVC-51-02/2014 ('Suit No. 51'). Suit No. 51 was commenced by Asia Pacific Higher Learning Sdn Bhd ('APHL') which owns Lincoln University College. The Professor was sued as the 2nd defendant as he is a member of the MMC, the 1st defendant, and was the chairman of the accreditation panel which visited Lincoln University College in May 2011 and in April 2013. The facts are not in dispute and are set out below.

The salient facts

[2] On 6 February 2014, APHL commenced two actions, namely:

1) Kuala Lumpur High Court Suit No. 22NCVC-51-02/2014 (Suit 51) against the MMC and the Professor; and

2) Kuala Lumpur High Court Judicial Review Application No. R2-25-13-02/2014 ('O.S. 25 for JR') against only MMC.

Subsequently in 2014, APHL filed Kuala Lumpur High Court Sivil Suit No. WA-21NCVC-38-04/2016 ("Suit 38").

[3] While O.S. 25 for JR and Suit 38 are not directly before us in this appeal, the sequence of events and prayers sought there, **are** in point of fact relevant to this appeal, by reason of the overlap in the relief sought and given that the factual background is the same in all these suits.

Suit 51-the civil claim

[4] Suit 51 against the MMC and the Professor is premised on the torts of negligence, breach of statutory duty and misfeasance of public office on their part arising from several visits to one Lincoln University College ('LUC') to survey, monitor and/or accredit specific medical degree programmes proposed to be undertaken by APHL (namely MOA/PA 0927, MOA/PA 1561 and MQA/PA 1562). These visits were undertaken in May 2011, April 2013, July 2013 and October 2013. On 10 October 2013, pursuant to these accreditation visits, the MMC took a decision to cancel the proposed programmes as listed above. In short, APHL's complaint was that in so determining to cancel these programmes, the two defendants, the respondents here, had been negligent, breached their statutory duty and committed the tort of a misfeasance of public office. The relief originally sought in Suit 51 included, *inter alia*:

(i) General damages for negligence, breach of statutory duty and misfeasance;

(ii) Special damages in the sum of RM450,000-00 being the costs of preparation for the accreditation visits;

(iii) Special damages in the sum of RM1 million as costs of preparation for the second accreditation;

(iv) Interest;

(v) Injunctive relief and an apology.

[5] There was no prayer for damages sought as a consequence of the cancellation of the medical programmes.

[6] The claim was amended twice-first to extend the causes of action to assessment visits conducted, and second to include an allegation of bias against MMC as well as conflict of interest.

[7] Vide the third amendment application, comprising the subject matter of this appeal, APHL sought to enlarge the special damages claimed, so as to recover the costs it allegedly incurred for a period of 3 years from 2011 in the sum of RM579,992,400-00, as a consequence of the cancellation of the medical programmes. (The cancellation of the medical programmes also comprises the subject matter of O.S. 25 for JR).

[8] This re-re-amendment application was brought some three years after Suit 51 had been filed. It was brought mid-trial. APHL had eight witnesses and had called six of the eight at the material time. Another two witnesses remained to be called before the plaintiff closed its case. The amendment comprised additional facts to support APHL's claim for special damages arising from the cancellation of the medical programmes.

O.S. 25 for JR-the judicial review application

[9] In O.S. 25 for JR, which was filed on the same day as Suit 51, APHL brought a claim against the MMC amongst others to:

(i) quash by way of certiorari the decision made on 10 October 2013 to cancel the medical degree programmes;

(ii) declare that the cancellation was null and void; and

(iii) obtain an order of mandamus to compel the MMC to maintain the existing approvals given to Lincoln University College to conduct the medical degree programmes.

[10] In this judicial review application APHL sought no damages either in respect of or arising from the cancellation of the medical degree programmes which it alleged were wrongful.

[11] It is evident from the foregoing that APHL had commenced two different suits on the same date namely 6 February 2014, one in public law and another in private law, in respect of a single grievance, namely the cancellation of medical degree programmes by the MMC, which resulted, it is alleged, in it suffering loss and damage.

Suit 38-the third suit

[12] Then some two years later on 7 April 2016 APHL commenced another action in the Kuala Lumpur High Court in Suit 38 against MMC, the Minister of Health and the Government of Malaysia, again for the torts of a breach of statutory duty and misfeasance in public office arising from the allegedly wrongful action by MMC to cancel the medical degree programmes on 10 October 2013 and for the reduction in the student quota for another medical degree programme from 100 students to 70 students.

[13] The effect of this suit was to, *inter alia*, add a claim for special damages in the sum of RM579 million odd, that was not claimed in either Suit 51 or O.S. 25 for judicial review. It is pertinent that the relief for special damages in the sum of RM579 million odd was first made in this suit. It was only after it was struck out that the amendment application to include this claim was made in Suit No. 51.

Decisions and chronology of steps taken in the proceedings in Suit 51, O.S. 25 for judicial review and Suit 38

[14] Suits 51 and O.S. 25 for JR proceeded to be heard.

[15] Interlocutory applications were filed by the MMC and the Professor in April 2014 to strike out APHL's claim in Suit 51 on the grounds, *inter alia*, that there was duplicity of proceedings between Suit 51 and O.S. 25 for JR. The learned Judge dismissed the applications to strike out and found that there was no duplicity because Suit 51 and O.S. 25 for JR related to distinct and separate causes of action. The former related to private law rights in tort, while the judicial review arose from a breach of the MMC's public law duty and obligations. There was no appeal against this finding.

[16] Learned counsel for APHL submitted that the decision of the High Court is thereby final and res judicata applies, thus the MMC and the Professor are precluded from raising the issue of duplicity or abuse of process in relation to Suit 51 and O.S. 25 for JR.

[17] On 17 June 2016 the High Court judge ruled in favour of APHL in O.S. 25 for JR. The High Court quashed the said cancellation and ordered the MMC to maintain all the previous approvals granted to APHL to conduct the relevant medical programmes. The MMC appealed to the Court of Appeal which dismissed the appeal on 30 October 2017.

[18] In April 2016, more than 2 years after filing Suit No. 51 and O.S. 25 for JR, APHL commenced a new suit, Suit 38 against MMC, the Minister for Health and the Government of Malaysia seeking damages from the said cancellation. In addition, APHL sought a declaration that the action of the MMC to reduce the quota for the MQA/PA 0927 medical degree programme was unlawful, and sought damages arising out of the said reduction of quota. This action on the part of MMC was taken after APHL filed Suit No. 51. The Minister for Health and the Government of Malaysia were sued on the basis of vicarious liability.

[19] MMC, the Minister for Health and the Government of Malaysia filed striking out applications in respect of Suit No. 38.

[20] The Minister for Health and the Government of Malaysia premised their striking out application on, among others, the protection accorded to them under the **Government Proceedings Act 1956** and the assertion that the members of the MMC were not public officers. The High Court allowed the striking out applications by the Minister for Health and the Government of Malaysia.

[21] The MMC premised its striking out application on multiplicity of proceedings. In respect of the MMC's application, the High Court only struck out the claim for damages arising out of the said cancellation but did not strike out the part of Suit No. 38 pertaining to the reduction of quota, as that cause of action accrued after the filing of Suit No. 51.

[22] APHL and the MMC appealed to the Court of Appeal against the High Court decision to allow the striking out in part. Subsequently, both parties discontinued this appeal by consent on 23 August 2017 after the outcome of APHL's amendment application, set out below.

The Third Amendment Application by APHL in Suit 51 comprising the subject matter of this appeal

[23] After that part of Suit No. 38 claiming special damages in the sum of RM579 million odd allegedly arising out of the cancellation of the medical programmes was struck out, APHL filed an application to amend the statement of claim in Suit 51 to add a claim for damages in relation to the said cancellation. In essence, APHL sought to incorporate the claims in Suit 38 which had been struck out by the High Court into the pre-existing Suit 51.

[24] In addition, APHL sought to alter the claim for damages in connection with the pre-enrolment

visit carried out by the MMC evaluation panel in May 2011. In Suit No. 51 this was an original claim but APHL originally claimed only RM450,000-00. APHL asserted that it had to appoint lecturers for the pre-enrolment visit and incurred costs for transportation, boarding and lodging the said lecturers and had to pay them professional allowances. By the amendment to the statement of claim, APHL sought to recover the costs incurred for transportation, boarding and lodging the said lecturers for 3 years from 2011 at the rate of RM399,000-00 per year, and to recover the costs in engaging the said lecturers, totalling RM4,938,000-00.

[25] This amendment application was filed during the trial, before the last 2 witnesses for APHL were called to testify.

[26] The High Court allowed the part of the amendment application in relation to adding the claim for damages arising out of the cancellation of the medical programmes, but dismissed that part of the amendment which sought to change the claim for damages in connection with the pre-enrolment visit from a one-off occurrence to a claim spanning 3 years starting in 2011. It is pertinent that the learned Judge, in determining the striking out applications had opined that the damages arising from the cancellation of the medical programmes should be claimed by APHL by way of an amendment to the pleadings in Suit 51 rather than by way of a separate action. Dissatisfied, the MMC and the Professor appealed here against that part of the High Court decision allowing APHL to add the claim for damages into the statement of claim for Suit No. 51.

The arguments taken before us in summary

[27] Before us learned counsel for the MMC and the Professor submitted that the amendment application by APHL amounted to a tactical manoeuvre as it was filed after the decision in Suit 38 where APHL's claim for the special damages in the sum of RM579,992,400-00 ('RM579.9 million') arising from the termination of the medical programmes was struck out.

[28] The application, it was submitted, amounted to a second bite of the cherry given that APHL:-

(a) failed to make a claim for the special damages in the sum of RM579.9 million, stated to be arising from the cancellation of the medical programmes in the O.S. 25 for JR;

(b) filed a fresh claim vide Suit 38 to recover the RM579.9 million which suit is premised on private law causes of action;

(c) having failed to institute a new suit for recovery of the special damages, then sought to achieve the same result by amending Suit 51 to accommodate this claim.

[29] Finally it was contended that res judicata in the broader sense applied to the present facts as APHL could have and ought to have sought the special damages of RM579.9 million in O.S. 25 for JR.

[30] For APHL it was contended that this amendment application was limited to pleading certain additional and supplemental material facts to support APHL's claim for special damages of RM579.9

million.

[31] The amendment application, it was submitted, also arose from the judicial review application, namely O.S. 25 for JR where they had sought certiorari, a declaration and mandamus in respect of the decision of the MMC cancelling the medical degree programmes. This was allowed by the High Court as a consequence of which the previous approvals were maintained. The Court of Appeal upheld the decision of the High Court.

[32] APHL maintained that it had not sought damages in O.S. 25 for JR because the application would be determined on affidavit evidence; there were disputed facts and the award of damages is at the discretion of the Court and the determination of the judicial review application would be delayed if there were to be separate proceedings to assess the damages necessitating the calling of oral evidence.

[33] As a consequence it decided to claim for damages by way of a suit in the High Court as the parties were the same, and the primary facts pertaining to the cancellation of the programmes and the judicial review application had been pleaded in the civil suit.

[34] APHL also explained the delay in filing the amendment. Learned counsel for APHL maintained that the amendment application was bona fide and did not prejudice the MMC and the Professor to the extent that they could not be compensated with costs. Finally, it did not change the character of the original suit to one that was inconsistent with the earlier claim. In short that it met the test in **Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors** [1983] 1 MLJ 213.

Our Analysis And Decision

[35] The learned Judge in the High Court granted the application to re-re-amend the Statement of Claim in Suit 51 to enable APHL to make claim for special damages in the sum of RM589.9 million. His Lordship posed the question to be decided by the court thus: whether there is a cogent and reasonable explanation for the fact that the plaintiff is only now making a claim for damages as a consequence of the unlawful cancellation of the medical programmes.

[36] The learned Judge concluded that he was satisfied because he accepted that the claim for damages was more appropriately pursued in a trial rather than by way of affidavit evidence. As such His Lordship concluded that it was an entirely legitimate course of action for APHL to have taken. This is what he said:

> *"It follows that, if the plaintiff is entitled to elect to commence an action by way of a writ action for a breach of a public law duty that infringes upon its private law rights (in accordance with the principles in Ahmad Jefri's case discussed at paragraphs 24 to 26 ante), then it should be permitted by the same reasoning to elect to pursue the remedy for such breach in that writ action. The fact that the plaintiff had previously commenced the judicial review application ought not operate to prevent it from now pursuing damages in the writ action, for the reason that the plaintiff did not previously claim for damages in the judicial review application."*

[37] We are unable, with respect to concur with the learned judge *inter alia*, on the foregoing ground. Both Suit 51 and O.S. 25 for JR are premised on a single factual matrix. APHL chose to pursue the public law aspects of the claim vide O.S. 25 for JR, and private law claims in Suit 51. This brings us to the question of whether this can indeed be done. A perusal of the leading authority on this point, namely **Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan Kesenian Johor & Ors** [2010] 3 MLJ 145, [2010] 5 CLJ 865 **('Ahmad Jefri')** does not lend support to such a conclusion.

[38] In that case the Federal Court recognised the general principle cited in **O'Reilly v Mackman** [1983] 2 AC 237 **('O'Reilly')**, dating back to the 1950s, where it was held that where the law prescribes a specific means to proceed to enforce a right then that mode ought to be followed. Where the right sought to be enforced is a public law right, then the proper mode to be adopted under adjectival law is judicial review or one of the prerogative writs. Where the right sought to be enforced is a private law right, then a writ is the proper mode to be adopted. Failure to accord with this general principle would result in the action being struck out as amounting to an abuse of process of the court.

[39] What then happens when the right sought to be enforced has both public law and private law aspects?

[40] This is where **Ahmad Jefri (above)** expressly provided the answer, namely that the principle enunciated in **O'Reilly (above)** is not writ in stone. While this summarisation is simplistic and does not do justice to the reasoning in that case, **Ahmad Jefri (above)** essentially prescribes that if the claim in its entirety has predominantly public law features then the adjectival law relating to public law ought to be followed, namely by way of judicial review or one of the prerogative writs, under **Order 53 of the Rules of Court (RC) 2012**. If however it is the private law aspects that are predominant then the procedural mode adopted for such claims, namely the writ, ought to be utilised.

[41] The Federal Court in **Ahmad Jefri (above)** in adopting the reasoning in **O'Reilly (above)** stated that there are exceptions to the general principle laid down by the House of Lords in **O'Reilly (above)**. The case of **O'Reilly (above)** laid down the general principle that an issue which depends on the existence of a public law right should be determined in judicial review proceedings and not otherwise. The Federal Court in **Ahmad Jefri (above)** pointed to the statement of Lord Diplock in **O'Reilly (above)** that among the exceptions to the general rule are where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or by originating summons.

[42] In prescribing this formula to be utilised in determining which adjectival process to be utilised the Federal Court drew heavily from English common law. So did the Federal Court in **Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors** [2006] 2 MLJ 389 where Steve Shim FCJ (as he then was) held, *inter alia*, as follows:

> *"[30] The Court of Appeal presided by Lord Woolf MR [in the case of Trustees of Dennis Rye Pension Fund & Anor v Sheffield City Council [1997] 4 All ER 749] held that when performing*

its role under the Local Government and Housing Act (UK) in relation to the making of grants, a local authority was in general performing public functions which did not give rise to private rights; but once an application for a grant had been approved, a duty to pay it arose on the applicant fulfilling the statutory conditions and that duty would be enforceable by an ordinary action. The court further emphasized that although, in the case before it, there was a dispute as to whether those conditions had been fulfilled, any challenge to the local authority's refusal to express satisfaction would depend on an examination of issues largely on fact-that furthermore, the remedy sought for the payment of a sum of money was not available on an application for judicial review. The court concluded that an ordinary action was the more appropriate and convenient procedure and consequently that the plaintiff's actions were not an abuse of process. The appeal was therefore dismissed.

[31] It is clear that when the speeches by Lord Woolf MR and Pill LJ are read in their proper perspective, they explicitly recognize that remedies for protecting both private and public rights can be given in private law proceeding and an application for judicial review. It is pertinent to note the observations made by Lord Woolf MR in explaining the seminal decision in O'Reilly v Mackman [1983] 2 AC 237 when he said as follows:

Where does that leave O'Reilly v Mackman ... and what can be done to stop this constant unprofitable litigation over the divide between public and private law proceedings? What I could suggest is necessary to begin by going back to first principles and remind oneself of the guidance which Lord Diplock gave in O'Reilly v Mackman. This guidance involves recognizing (a) that remedies for protecting both private and public rights can be given in both private law proceedings and on an application for judicial review; (b) that judicial review provides, in the interest of the public, protection for public bodies which are not available in private law proceedings (namely the requirement of leave and protection against delay).

[32] Another significant case referred to by Lord Woolf MR was Roy v Kensington & Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705 where it was held before a strong bench of law lords comprising Lords Bridge, Emslie, Griffiths, Oliver and Lowry that although an issue which depended exclusively on the existence of a purely public law right should, as a general rule, be determined in judicial review proceeding and not otherwise, a litigant asserting his entitlement to a subsisting private law right, whether by way of claim or defence, was not barred from seeking to establish that right by action by the circumstance that the existence and extent of the private right asserted could incidentally involve the examination of a public law issue. It seems apparent from Roy that claims in negligence against local authorities could be brought by way of writ action if the claims depend on ordinary tort principles (see also Davey v Spelthorne Borough Council [1984] AC 262)."

[43] We are aware that even after the exercise of a public law power, a claim can be made for monies due in the form of a private law claim. (See for example **Trustees of Dennis Rye Pension Fund and another v Sheffield City Council** [1997] 4 All ER 74 **('Dennis Rye')**; and **Roy v Kensington And Chelsea And Westminster Family Practitioner Committee** [1992] 1 A.C. 62 **('Roy')**). In those

cases however the claims for monies due could clearly be severed from the public law exercise of a function. These claims arose and were, in a sense, vested or accrued claims for monies due and owing to the claimants which had arisen separately and well after the exercise of a public law power/ discretion.

[44] In **Dennis Rye (above)**, Lord Woolf MR stated as follows:

> *"The statutory provisions I have cited make it clear that the legislation contains a statutory code for the approval of grants. The rule is designed to give to the person entitled to the benefit of the grant a right to payment of the grant on compliance with the conditions contained in the legislation. When this has happened the authority has no justification for refusing payment. In this situation I can see no reason why the landlord cannot bring an ordinary action to recover the amount of the grant which is unpaid as an ordinary debt. Notwithstanding the statutory code, it would be disproportionate to seek a remedy of, say, mandamus or a declaration by way of judicial review to enforce payment. Any suggestion that there had been any abuse of process involved in bringing an ordinary action in the High Court or county court would be totally misconceived. Judicial review was not intended to be used for debt collecting."*

[45] After considering the case of **O'Reilly (above)**, Lord Woolf MR went on to give some guidelines on how to decide when an action should be brought under public law or private law:

> *"Having established the foundation of the general rule it seems to me that there will be a reduction in the difficulties which are apparently being experienced at present by practitioners and the courts, if it is remembered that:*
>
> *(1) If it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of cases it should not be necessary for purely procedural reasons to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue.) If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List. It is difficult to see how a respondent can be prejudiced by the adoption of this course and little risk that anything more damaging could happen than a refusal of leave.*
>
> *(2) If a case is brought by an ordinary action and there is an application to strike out the case, the court should, at least if it is unclear whether the case should have been brought by judicial review, ask itself whether, if the case had been brought by judicial review when the action was commenced, it is clear leave would have been granted. If it would, then that is at least an indication that there has been no harm to the interests judicial review is designed to protect. In addition the court should consider by which procedure the case could be appropriately tried. If the answer is that an ordinary action is equally or more appropriate than an application for*

judicial review that again should be an indication the action should not be struck out.

(3) Finally, in cases where it is unclear whether proceedings have been correctly brought by an ordinary action it should be remembered that after consulting the Crown Office a case can always be transferred to the Crown Office List as an alternative to being struck out.

In O'Reilly v. Mackman [1983] 2 A.C. 237, 285, Lord Diplock anticipated that the exceptions to the general rule which he pronounced would be worked out on a case by case basis. To an extent that has happened but despite the efforts the courts have made to clarify the situation... the issue as to which procedure should be adopted has become increasingly complex and technical... I hope, however, that the far from comprehensive pragmatic suggestions made above will be of some assistance. They do involve not only considering the technical questions of the distinctions between public and private rights and bodies but also looking at the practical consequences of the choice of procedure which has been made. If the choice has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting an abuse. Here it is important to remember that there does not have to be an application to strike out even if it is considered that the wrong procedure has been adopted. Often the interests of justice and the parties will be better served by getting on with the action. Certainly there should be no appeal unless there is some practical reason for doing so.

If this approach is adopted in this case it is obvious that the issues can be more conveniently dealt with in an ordinary action than on an application for judicial review. The case is one in which it could be said leave would be given apart from the question of delay. As to delay I found wholly unconvincing the suggestion which was made that in the circumstances of this case that the council could be embarrassed from an accounting point of view if entitlement to payment of grants was delayed from one year to another. It is not suggested that the council has large number of cases in which it is being challenged in relation to the non-payment of grant. The issues are likely to be mainly ones of fact. The primary remedy which is being sought is the payment of a sum of money which requires a remedy which is not available on an application for judicial review."

[46] In the same case, Pill LJ stated after considering the case of **Roy (above)**:

"In present circumstances, a refusal to approve an application for a grant gives rise to no right to damages. Discretions are also involved, for example section 115 (discretionary approval) and section 118 (determining a specification). However, once an application is approved a duty to pay it arises upon compliance by the applicant with the statutory requirements and the duty is in my view enforceable by an ordinary money claim."

[47] In **Roy** a health authority that had been sued by a medical practitioner, Roy, for basic practice allowance stated to be payable to him for services provided. The authority sought to strike out Roy's claim on the basis that it was an abuse of process as it had been brought by way of a private law writ action. It was contended for the health authority that the relationship between Roy, as a medical practitioner and the medical committee under the National Health Service Regulations was incapable

of being contractual. For Roy it was argued that a medical practitioner has a private legal right to remuneration for services, and this was conferred by the terms of his service and obligations. The House of Lords in determining this issue made several statements of relevance to our case:

(a) Per Lord Bridge of Harwich *"...It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him..."*;

(b) It was also stated that the principle or general practice as set out in **O'Reilly (above)** should not be extended to require a litigant to proceed by way of judicial review in circumstances where his claim for damages for negligence might in consequence be adversely affected. I can for my part see no reason why the same consideration should not apply in respect of any private law right which a litigant seeks to invoke, whether by way of action or defence. (See **Wandsworth London Borough Council v Winder** [1985] AC 461.);

(c) In **Roy** the House of Lords found that the statutory terms were "just as effective as they would be if they were contractual to confer upon the doctor an enforceable right in private law to receive the remuneration to which the terms entitle him". It therefore followed, it was held, that in the event of a dispute the doctor was entitled to claim and recover by way of writ action the quantum of remuneration which he is able to prove as being due to him.

[48] What may be gleaned from the cases cited above is that where a claim bears both public and private law features the dominancy of either should determine the mode to be adopted. If the primary and dominant purpose is to challenge the exercise of a public law right, then judicial review is the proper mode. **Order 53** as it now stands allows for the assessment of damages fully. In point of fact **Order 53** has been expanded to include an entire armament of procedural devices that were normal features of a private law claim, for example, injunctive relief and damages. In its modern form, it is more than suitable to accommodate a claim for damages.

[49] In the instant case the primary complaint of APHL was the wrongful revocation or cancellation of medical degree programmes that had previously been accredited and recognised by the MMC. The MMC, whether utilising its powers to grant accreditation, or revoke or cancel such accreditation is exercising public law rights. Any claim for damages arising from the exercise of such a public law right would rightfully emanate from, or arise as a consequence of, the wrongful exercise of such public law powers. In short it is an adjunct to or consequence of such exercise of a public law power.

[50] In the instant appeal, APHL also brought a private law action premised on the private law causes of action of negligence, breach of statutory duty and misfeasance in public office. This private law action was brought in respect of essentially the same issue namely the revocation of the medical

degree programmes. This is evident from the fact that the revocation of such programmes comprises an essential part of the private law claim in Suit 51.

[51] It is essentially this division of what is a single grievance into a public law claim on the one hand, and a private law claim on the other hand which seems to us to be less than tenable under the law as we comprehend it. It is clear from the plethora of case-law cited above that where there appears to be a seeming confusion as to which mode or process to follow, ie under public law or private law, then the prescription provided in **Ahmad Jefri (above)** ought to be applied to determine which route ought to be adopted.

[52] In other words an analysis is undertaken of the entire nature of the claim to ascertain whether it comprises essentially public law or private law features. The mere fact that damages are an essential part of the claim does not mean that it must be commenced by way of writ. More so when **Order 53** provides for or allows for damages to be assessed. The impression that damages are less easily proven in judicial review ought not to obscure the fundamental legal proposition that any analysis of the claim and the remedy sought should focus primarily on whether the claim emanates primarily from the exercise of a public law or private law right. Or put another way whether the nature of the right comprising the root or basis of the claim is properly classified as being a public law right or a private law right.

[53] In the instant case that has not been done or followed. Instead, APHL has sought to cover or encompass all possible remedies seemingly available to it by filing, on the one hand, an application for judicial review, and on the other hand, a writ premised on private law rights. That too, on the same day.

[54] That amounts in effect to splitting its claim into two halves, one based on public law and one in private law. This to our minds, is untenable. That is not what the law provides. The law as extolled above requires a litigant or potential plaintiff or defendant to analyse the nature of its claim or defence and mount it correctly in either one or the other adjectival modes. Ultimately it must be remembered that the adoption of one or the other routes is procedural, although it does have repercussions on the kind of relief that will ultimately be procured.

[55] What may be gleaned from the case law is that a claim that has myriad features should nonetheless be analysed carefully to ascertain where its dominant features and basis lies. Once that is done it will be apparent whether the claim ought to be brought in one form or another.

[56] In the instant case therefore the bringing of two claims, one in public law and one in private law premised on the same set of facts is questionable. It however has a direct effect on the amendment sought here. In O.S. 25 for JR no damages were sought at all. It will be recalled that the judicial review application related to the wrongful cancellation of the medical degree programmes. The amendment comprising the subject matter of the present appeal seeks special damages in the sum of RM579.9 million arising from such cancellation of the medical degree programmes. Vide Suit 38, which was filed prior to this amendment application, the same claim for special damages was sought and disallowed.

[57] In point of fact learned counsel for APHL submitted that the proposed amendments were a consequential amendment whereby APHL was seeking to plead the facts pertaining to the outcome of the judicial review application filed on the same day as Suit 51. Vide the amendment, APHL sought to plead that O.S. 25 for JR was allowed by the High Court in 2016 and it now sought to claim, in Suit 51, the damages arising from the cancellation of the medical degree programmes that comprised the subject matter of O.S. 25 for JR. APHL thereby effectively conceded that its amendment was sought to seek relief in Suit 51 premised on negligence and breach of statutory duty, of special damages that arose as a result of its public law action in O.S. 25 for JR.

[58] That in itself amounts to a tactical manouvre apart from the fact that APHL has sought to bring two seemingly separate and distinct claims in respect of what is in effect a grievance or dispute containing both public law and private law features. That is the essential flaw.

[59] This was further compounded when APHL failed to make a claim for damages in O.S. 25 for JR. Therefore what APHL is seeking to do is to make good its failure to make claim for special damages in the judicial review application by bringing it under Suit 51.

[60] The problem with allowing a division of what may appear to be "distinct and separate" claims arising from what is in effect a single cause of action is this: It allows prospective litigants to commence both a private law and public law action in respect of one claim and to then, as in the instant case, choose either suit or forum to obtain relief in respect of either claim.

[61] In any event, having commenced two separate claims, APHL ought not to be allowed to bring a claim for special damages in the not inconsiderable sum of RM579.9 million resulting from the cancellation of the medical degree programmes, in the civil suit which was never premised on this basis.

[62] We are aware that early on in the course of Suit 51, the MMC and the Professor brought striking out applications on the grounds of duplicity. These applications were dismissed on the grounds that the two actions, Suit 51 and O.S. 25 for JR were separate and distinct claims. There was no appeal against those interlocutory decisions. To that extent learned counsel for APHL maintained that this issue is res judicata and binding on the parties.

[63] However the issue we have raised and dealt with here is not premised on duplicity. What we have raised is a fundamental issue relating to the filing of a claim which comprises both public and private law characteristics.

[64] Our concern arises by reason of the splitting or division of a single claim into two halves, one relating to public law and the other to private law. That is not the correct position in law to be adopted in initiating a claim. A claim having both distinct private and public law features does not, as we have stated repeatedly above, warrant being split into two, to have each half determined separately. And notwithstanding this error, that when relief in one of the erroneously split claims is forgotten or not prayed for, that such relief is then sought for in the other action.

[65] Such a practice would give rise to a multifold number of claims arising out of a single factual matrix which has both public law and private law facets.

[66] However these claims would not be the same claims, ie replicas, but would comprise half a claim premised on private law and another half premised on public law. To that extent, it differs from a position of simple duplicity where an entire claim is brought in one court and then another. Here, it bears repeating that, a claim which should have been brought as one claim premised on **Ahmad Jefri (above)** has been split in two by specific choice and pursued separately in two courts. Here it is a division rather than pure duplicity. The interlocutory applications made related purely to duplicity rather than whether a claim can or ought to be split in two into public law and private law claims.

[67] It has also been contended that by dismissing this appeal we are in direct contradiction with the decision of this Court in affirming the judicial review application allowed by the High Court. However, this is not the case. We are not holding or stating or implying in any manner whatsoever that we disagree with the decision of this court that the judicial review action was correctly decided. What we are saying here is that the relief sought now in Suit 51 ought to have been claimed in the JR application as the special damages of RM579.9 million arose directly and as a consequence of the cancellation of the medical degree programmes. There is, therefore, no conflict whatsoever.

Exercise of discretion by the learned Judge

[68] Even if we are incorrect in our approach above, applying the principles in **Yamaha Motor (above)** as well as the more recent decision of **Hong Leong Finance v Low Thiam Hoe** [2016] 1 MLJ 301, we are not persuaded that the learned Judge exercised his discretion correctly. The latter case is perhaps more relevant, given that this amendment was made both mid-trial and after a similar attempt to have it brought in vide Suit 38 was dismissed. Our reasons are as follows:

(i) The explanation afforded by APHL to justify the application for the amendment being made at this late stage does not on the facts, for the reasons stated above, amount to a cogent or reasonable explanation. A failure to claim damages arising from the cancellation of the medical programmes ought not to be slotted into Suit 51 when it falls to be correctly considered under the JR application. It is a clear attempt to make good a mistake made in the course of the JR proceedings. The fact that it is seemingly easier to claim damages vide a writ action affords no cogent basis to accept the claim in Suit 51 at this juncture. Judicial review in its current form allows for a detailed assessment of damages in respect of complex claims. The fact that it takes time or requires detailed oral evidence and cross-examination cannot comprise the basis to have the claim taken up here very much later, as a matter of convenience;

(ii) In these circumstances, we are unable to concur with the learned Judge that it is not a tactical manoeuvre. On the contrary, the application for a re-re-amendment to include a special damages claim for RM579.9 million appears to us to amount to a tactical manoeuvre. The learned Judge did not explain why he considered it not to be such;

(iii) The particulars establishing liability which APHL itself admits from the O.S. 25 for JR action

which is res judicata is not properly brought in this Suit 51. The failure to do so in the JR action cannot be made good by simply supplementing it here. The implication of allowing the amendment application is that parties are allowed to litigate in instalments;

(iv) The application has been made at an extremely late date. The reasons given are less than persuasive. This is precisely the form of amendment that is frowned upon in **Low Thiam Hoe (above)**. Even Suit 38, filed prior to this amendment was only made two years after the disposal of the judicial review action. What more an amendment made even later in Suit 51 mid-trial;

(v) The quantum of the claim sought to be brought in at this stage gives rise to considerable prejudice to the opposing parties namely it alters the nature of the claim from one character to another. The special damages as admitted by APHL arise from the cancellation of the medical degree programmes and not directly from negligence or a breach of statutory duty. If indeed they had, they would have been pleaded at the outset;

(vi) A further point for consideration is that the new claim for sizeable special damages amounting to RM579.9 million is not particularised. It is trite that a claim for special damages ought to be fully particularised. In **Ong Ah Long v Dr S Underwood** [1983] CLJ (rep) 300 it was held that an amendment seeking to introduce special damages ought to be fully particularised in order to make known to the opposing party the type of claim and evidence that it will be confronted with at trial. There has been no attempt to fully explain this claim nor more important to set out the basis for the claim in any sufficient detail. Given the size of this additional claim sought to be brought in at this late stage, the need for particularisation becomes even greater. (see also **Ngooi Ku Siong & Anor v Aidi Abdullah** [1985] 1 MLJ 30, **Perrestrello E Companhia Limitada v United Paint CO** [1969] 3 All ER 479 at 485 to 486 and **Pal Associates Sdn Bhd v The Syndicate of the Press of the University of Cambridge** being authorised by the **Chancellor Masters and Scholars of the University of Cambridge** [2014] 10 MLJ 728);

(vii) Such an amendment mid-trial also has the undesirable effect of taking the opposing party very much by surprise. They have prepared for the case on the basis of a specific liability and on the basis of specific causes of action. To bring in a claim for special damages arising from the JR action which is now again admittedly res judicata is both procedurally and substantively erroneous;

(viii) The learned Judge has contradicted himself by stating at the outset of the judgment that Suit 51 when dealing with the cancellation of the medical programmes did NOT attempt to found or create any cause of action on that front. However, in paragraph 52 the learned Judge says otherwise namely that having commenced a writ action premised on a breach of statutory duty, APHL should be able to claim damages for such cancellation. This would only be true if there had been no action for judicial review. Here it is apparent that APHL is seeking to rectify a mistake or omission namely the failure to claim damages in the JR proceedings by amending the claim in Suit 51 to seek damages;

(ix) We are cognisant that the learned Judge in dismissing Suit 38 commented that the claim ought

to have been made by way of an amendment to Suit 51. This in itself ought not to be taken by parties to amount to a conclusive decision on the law or on any possible application made to amend Suit 51. It is obiter at best. It remained incumbent on APHL at all times to consider its own conduct in firstly splitting the claim erroneously and then seeking to make claim in a different suit for damages naturally arising from the adjudication of the JR suit.

Conclusion

[69] In these circumstances we are of the unanimous view that the learned Judge erred in allowing the amendment. This appeal had merits, warranting appellate intervention for the reasons set out above.

[70] The appeal is therefore allowed with costs of RM7,000-00 to the appellant, subject to the allocatur. The deposit is refunded.

Signed

Nallini Pathmanathan
Judge
Court of Appeal
Malaysia

Dated: 7.6.2018

COUNSEL

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LEGISLATION REFERRED TO:

Government Proceedings Act, 1956

Rules of Court 2012, Order 53

JUDGMENTS REFERRED TO:

Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan Kesenian Johor & Ors [2010] 3 MLJ 145, [2010] 5 CLJ 865

Hong Leong Finance v Low Thiam Hoe [2016] 1 MLJ 301

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389

Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30

O'Reilly v Mackman [1983] 2 AC 237

Ong Ah Long v Dr S Underwood [1983] CLJ (rep) 300

Pal Associates Sdn Bhd v The Syndicate of the Press of the University of Cambridge being authorised by the Chancellor Masters and Scholars of the University of Cambridge [2014] 10 MLJ 728

Perrestrello E Companhia Limitada v United Paint CO [1969] 3 All ER 479

Roy v Kensington And Chelsea And Westminster Family Practitioner Committee [1992] 1 A.C. 62

Trustees of Dennis Rye Pension Fund and Another v Sheffield City Council [1997] 4 All ER 74

Wandsworth London Borough Council v Winder [1985] AC 461

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213