IN THE COURT OF APPEAL OF MALAYSIA

Coram: Idrus Harun, JCA; Suraya Othman, JCA; Yeoh Wee Siam, JCA

Milton Lum Siew Wah v Malaysian Medical Council

Citation: [2018] MYCA 277 **Suit Number:** Civil Appeal No. W-02(IM)-1023-06/2015

Date of Judgment: 31 July 2018

Litigation & court procedure – Intervention by a non-party in a civil proceeding – Order 15 rule 6(2)(b)(ii) of the Rules of Court 2012

JUDGMENT

[1] On 3.11.2017, Dr. Lourdes Dava Raj a/l Curuz Durai Raj, the proposed intervener herein (the applicant) had filed a Notice of Motion seeking to be granted leave of this Court to intervene in these proceedings to set aside the order of this Court dated 27.10.2015. If leave is granted, the applicant seeks a consequential order that the said order of this Court be set aside, all steps taken and acts done by the Malaysian Medical Council qua the respondent pursuant to this Court's order of 27.10.2015 including the decision of the respondent dated 21.6.2016 be set aside, the decision of the respondent dated 20.5.2014 dismissing the charge against the applicant be reinstated and consequently the appellant's appeal in these proceedings which was allowed by this Court on 27.10.2015 be dismissed.

[2] The question that now arises concerns the reasons for which this motion was filed by the applicant some two years after the appeal herein was allowed by this Court. What has emerged from the scrutiny of the affidavits filed by the parties relating to this motion, the reasons for which and the circumstances under which the above reliefs are sought, may be traced back to a letter dated 31.12.2009 in which the appellant made a complaint to the respondent against the applicant for breach of principles of confidentiality of the medical profession in carrying out his duties as the person in charge of Assunta Hospital, Petaling Jaya when he distributed details of patients such as names, admission dates, their state of health and clinical prognosis before two Medical and Dental Advisory Committee meetings. At that material time, the applicant was the Chief Medical Services Officer of Assunta Hospital whilst the appellant was a visiting Consultant Obstetrician & Gynaecologist at the said hospital. Following the said complaint, an inquiry was held and commenced before the respondent's Preliminary Inquiry Committee (the Committee). The hearings took place over 4 days on 8.12.2010, 6.4.2010, 5.9.2011 and 4.6.2012. The inquiry was attended by the

applicant. It is noteworthy that the applicant was legally represented at the inquiry before the Committee.

[3] At the conclusion of the inquiry and after hearing the appellant's evidence and his witnesses, the Committee on 25.3.2013 decided that the evidence presented before it supported the allegations made by the appellant and proceeded to frame a charge against the applicant for infamous conduct in a professional respect under section 29(2)(b) of the **Medical Act 1971**. Following the said charge, the applicant elected to present his defence to the charge before the Committee on 28.10.2013 wherein he had admitted that he breached patient's confidentiality by revealing their details without the patients or their next-of-kin's consent. The Committee found that there were grounds to support the charge and recommended that there be an inquiry before the respondent.

[4] After the close of the inquiry before the respondent on 20.5.2014, by a majority decision, it was found that no case had been made out against the applicant and the respondent consequently directed the charge be dismissed. The applicant was formally notified of the decision on 12.6.2014. The appellant, being dissatisfied with the respondent's decision and unbeknown to the applicant, filed for judicial review at the Kuala Lumpur High Court on 22.7.2014 for which leave was granted on 26.8.2014. However, on 8.5.2015, the learned High Court Judge dismissed the appellant's judicial review application with costs. On 27.5.2015, the appellant filed an appeal to this Court against the said High Court's decision. On 27.10.2015, this Court after hearing submissions from both parties, allowed the appeal and quashed the respondent's decision and substituted it with an order that the applicant was guilty and remitted the case back to the respondent to hear the applicant's mitigation and for sentence. The respondent, by their letter dated 8.12.2015 enclosed the Court of Appeal's order dated 27.10.2015 to the applicant.

[5] The applicant and his counsel attended the hearing before the respondent which was held on 21.6.2016 and after hearing his plea in mitigation the applicant was given a reprimand. The applicant on 17.8.2016, consequently filed an originating summons to the High Court seeking an order that the order of reprimand issued by the respondent against the applicant be set aside and a declaration that the applicant was not a party to the appeal before the Court of Appeal and that as such, the applicant is not bound by its decision and order dated 27.10.2015. However, the originating summons on 22.8.2017 was dismissed by the High Court for which no appeal was filed by the applicant to the Court of Appeal. The application filed by the applicant herein is indeed founded on a backdrop of the above facts seeking reliefs as outlined earlier.

[6] The ground taken in this motion concerns principally the contentions that the order of this Court made on 27.10.2015 in the absence of the applicant was a nullity and ought therefore to be set aside. The applicant, we were told, should have been made a party to the judicial review proceedings from the very outset. This is an obvious elementary point which ultimately turns on fair play and decency, learned counsel for the applicant submitted. It was in addition urged for the applicant that the judicial review application was also in clear breach of Order 53 rule 4 of the **Rules of Court 2012** which expressly imposes an obligation on an applicant to notify all parties who would be directly affected by it. In the event, learned counsel submitted, on the principles set out in Order 15 rule 6(2)(b) of the

Rules of Court 2012 and the decision of the Privy Council in **Pegang Mining Co. Ltd v Choong Sam & Ors.** [1969] 2 MLJ 52, this is a plain and obvious case where leave ought to be granted.

[7] We need to stress on this aspect that the law relating to an intervention by a non-party is predicated primarily on the requirement that a non-party who wishes to intervene in any civil proceedings must necessarily do so only under, and in compliance with, the provisions of Order 15 rule 6(2)(b)(ii) of the same Rules. A consideration of the Federal Court's decision in **Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals** [2008] 2 MLJ 622, confirms this Court in the view which has been expressed. The Federal Court there held-

> "(2) Where a **non-party tries to intervene** in the proceedings, he must necessarily **do so under O 15 r 6 of the Rules of the High Court 1980 ('the RHC')**. There is no other provision under the NLC or any other law or rule for him to rely on. So, like interveners in other civil proceedings, he too **must comply with the provisions of O 15 r 6 of the RHC**."

It would suffice, to begin with, for the purpose of expressing our rendition of the law on this subject as we understand it, to reproduce below Order 15 rule 6(2)(b)(ii)-

> "(2) Subject to this rule, **at any stage of the proceedings** in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application-
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> (a) ...
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> (b) order any of the following persons to be added as a party, namely-
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> (i) ...;
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief of remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter." [our emphasis]

[8] The Federal Court in **Staghorn**, supra, also explained the words "at any stage of the proceedings" to mean that there is a proceeding pending. Abdul Hamid Mohamad CJ, delivering the judgment of the Federal Court, had this to say on this point and the effect of making an application to intervene at a late stage in the proceedings or after the proceeding has come to an end-

> "(1) The words **'At any stage of the proceedings...'** necessarily mean that there is a proceeding pending. Once the judgment is entered, the proceeding has come to an end. Furthermore, **O 15 is concerned with the very early stage of a proceeding**, to have all the necessary parties in before the trial begins (see paras 21 & 27).
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(4) An application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made under O 15 r 16 the RHC. The application may be made 'at any stage of the proceedings' meaning before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge had also become functus officio. Even then, the application must be made promptly. Order 15 r 6 of the RHC applies to all civil proceedings whether commenced by a writ, motion or summons etc."

[9] The applicant only filed this application on 3.11.2017 whereas the proceedings at the Court of Appeal were concluded on 27.10.2015. It is clear to us that there are no longer any proceedings in existence or pending as it has ended. Therefore there is no question or issue arising out of or related to or connected with a proceeding to be determined by this Court. In **Staghorn** at paragraph [22], the Federal Court gave its reasoning for this rule by referring to the Supreme Court's decision in **Chan Yee v Chan Yoke Fong** [1990] 3 MLJ 297 (SC) wherein Lee Hun Hoe CJ (Borneo) at page 299 said-

"The main object of the rule is to **prevent multiplicity of proceedings**. Under the rule the court has a very wide discretion to make the order that he made so that all matters in dispute could be effectively and completely determined and adjudicated upon."

[10] At paragraph [26], the Federal Court in **Staghorn** also referred to **Nite Beauty Industries Sdn Bhd & Anor v Bayer (M) Sdn Bhd** [2000] 3 MLJ 314. In that case, an unsecured creditor, who was bound by the scheme of arrangement and compromise approved by an order of court, applied to be added as a party to the proceedings before the court and also to declare, inter alia, the order a nullity. The application was also made under O 15 r 6(2) of the **Rules of the High Court 1980**. Jeffrey Tan J (as His Lordship then was), inter alia held-

"[3] Although O 15 r 6(2) states that such an application could be made **at any stage of the proceedings**, its scope should be **limited to an application made before final judgment** had been entered and not after because the proceedings would then have come to an end. Thus the **would-be intervener** who will be directly affected, **either legally** or financially, by any order which may be made in the action, **must intervene before that order is perfected and whilst the court is still not *functus officio***. All proceedings came to an end upon the approval of the scheme of arrangement and compromise on 14 May 1999, thus the court no longer has any jurisdiction to make any order under O 15 r 6(2) (see pp 318H-319B, E, I)." [our emphasis]

[11] At paragraphs [27] and [39] of **Staghorn** the Federal Court said-

"[27] Thus, we see that our courts have been very consistent regarding the scope of the application of this rule. This is very sensible as the words **'At any stage of the proceedings...' necessarily mean that there is a proceeding pending**. Once the judgment is entered, the proceeding has come to an end. Furthermore, O 15 is concerned with the very early stage of a proceeding, to have

all the necessary parties in before the trial begins. Thus, r 8 provides that, when the order under r 6 has been made, the plaintiff must accordingly amend the writ and serve the amended writ on the new defendant and upon service the new defendant is given the right to enter an appearance. **All these happen before the trial**."

"[39] So, when we talk about as soon as possible at any stage of the proceedings it must necessarily mean that even if the proceedings are still pending, it must be made as soon as possible". [our emphasis]

[12] In the case before us, the application was not made with reasonable promptitude. It was instead made more than 2 years after the judgment had been delivered by this Court for which no appeal was filed to the Federal Court. Hence, no proceedings are pending. The applicant, moreover, has also failed to explain his reasons for the delay of 2 years in his affidavit in support although he was legally represented at all stages of the proceedings before the Committee, the respondent and in the High Court. The applicant can only be added as a party before the order of this Court is perfected and whilst the court is still not functus officio. In this case, all the proceedings have come to an end and there is no cause or matter to be determined pending before this Court. Therefore, it is too late in the day for this Court to go into all this. The application we would say, has not been made in accordance with the principles laid down by the Federal Court in **Staghorn**.

[13] It is significant to mention that the applicant had taken various steps after becoming aware of the irregularity by proceeding to attend the hearing before the respondent on 21.6.2016 where he was reprimanded at the conclusion of the hearing and opted to file the originating summons to set aside the order of reprimand. It was almost 3 months after the High Court dismissed his originating summons, that the applicant decided to file this application. The application, as earlier stated, must be made in a timely fashion and before the applicant had taken any fresh step soon after becoming aware of the irregularity. The applicant had in fact taken more than one fresh step thereafter. We think that the applicant had in fact taken wrong steps in the whole episode culminating with this application which he has initiated when the proceedings have long ended, the issues herein have been fully litigated, the final order was perfected and the court was functus officio. In our judgment, this is a proper case where it would be legitimate for this Court to decline to exercise its discretion to grant leave even if the applicant has an undoubted legal right and his right would be adversely affected because he has not satisfied the conditions for leave to be granted under Order 15 rule 6(2)(b) of the **Rules of Court 2012** [**Zaharah Bt. A. Kadir v Ramunia Bauxite Pte Ltd & Anor, Court of Appeal Civil Appeal No: J-02-957-2005**; unreported]

[14] Further mention must also be made to the fact that the applicant, as we have earlier mentioned, at all material times had legal representation at all stages of the entire proceedings encompassing the hearings before the Committee, the respondent and the High Court. In fact after being informed of the Court of Appeal's decision dated 27.10.2015, the applicant chose to attend the proceedings on 21.6.2016 before the respondent and did not make any attempt to seek a stay of the said proceedings so that he could take steps (by intervening) to challenge the decision of the Court of Appeal upon becoming aware of the irregularity. Such conduct in our judgment amounts to a waiver of his rights.

The applicant even after attending all the above proceedings had filed the originating summons in the High Court on 17.8.2016 seeking an order to set aside the order of reprimand and a declaration that the applicant was not a party to the appeal before this Court and that as such, the applicant is not bound by the decision of this Court dated 27.10.2015. The declaration sought, in our judgment, manifests the intention on the part of the applicant to show that the decision of this Court so far as it concerns him is void ex debito justitiae. The issue was undoubtedly ventilated before the High Court but the applicant did not appeal to the Court of Appeal against the dismissal of his application. Clearly, the applicant had elected to adopt this course of action and his conduct, we would say amounted to an acquiescence of the decision of the Court of Appeal.

[15] The point of importance which we would like to make at this stage is that the applicant was given ample opportunity to ventilate his complaints. The originating summons which was filed by the applicant on 17.8.2016 according to learned counsel for the applicant is an appeal pursuant to section 31 of the **Medical Act 1971**. Section 31 of the **Medical Act 1971**, we apprehend, deals with an appeal to the High Court by the likes of the applicant against any order made by the respondent. It is apparent on a careful perusal of the originating summons that apart from appealing against the decision of the respondent dated 21.6.2016, the said originating summons, as explained in the preceding paragraph also seeks a declaration that the applicant is not bound by the decision of the Court of Appeal dated 27.10.2015 to which the applicant was not a party. Save the reliefs in prayers 1, 2, 3 and 5, the above remedy of the declaration sought in prayer 2, we find, is not an appeal pursuant to section 31 of the **Medical Act 1971** since it does not relate to or arise from the order made by the respondent. The declaration sought in our judgment manifests the intention on the part of the applicant to show that the decision of this Court so far as it concerns him is void ex debito justitiae. The issue of the applicant not being made or included as a party to the judicial review application thus and the legality of the Court of Appeal's order, without question, had already been fully ventilated before the High Court. The applicant did not appeal against the decision of the High Court to this Court of which section 31 of the **Medical Act 1971** and any other relevant law do not prohibit the applicant from doing so. Therefore the applicant should be estopped from bringing this application to obtain leave to intervene.

[16] We would necessarily emphasize that no purpose would be served even if the applicant is given leave to intervene as the matter has undoubtedly been fully litigated with all the issues already ventilated in the above proceedings. The court is functus officio and as such the issue having been disposed off by the High Court for which no appeal was filed to this Court, the matter ought not to be allowed to be further relitigated. We are of the view that on the facts of the present case, the previously-decided cases cited by the applicant as authorities in support of his application are clearly distinguishable from the case herein and are therefore irrelevant. This Court, moreover, had reviewed the respondent's decision making process in dismissing the charge when there was a clear admission by the applicant. There is also no prejudice in this case to the applicant as all documents in the proceedings before the respondent, of which the applicant was in attendance and legally represented, were produced in totality and verbatim transcript of his defence was produced before the Court of Appeal for its scrutiny. The decision of this Court was based on merits of the case and is final and complete. As no further appeals were filed to the Federal Court against the decision of this Court on

27.10.2015 and to this Court against the High Court's decision on 22.8.2017, the applicant therefore should not be allowed a second bite of the cherry by making this application which is clearly an abuse of the process of the court. There must be an end to litigation and this Court should not allow the matter, which without doubt includes the previously-decided issue of the validity of the impugned order of this Court, to be further agitated in this application. It ought to be emphasized that the dispute must achieve resolution from which no further application may be taken.

[17] For the reasons earlier given, it is now obvious to us that the instant application is wholly unmeritorious for which leave to intervene ought not to be granted. The application is dismissed with no order as to costs.

Signed

IDRUS BIN HARUN
Judge
Court of Appeal, Malaysia
Putrajaya

Dated: 31 July 2018

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LEGISLATION REFERRED TO:

Medical Act 1971, Sections 29(2)(b), 31

Rules of Court 2012, Order 15 Rule 6(2)(b), Order 15 Rule 6(2)(b)(ii), Order 53 Rule 4

Rules of the High Court 1980, Order 15 Rule 6(2)

JUDGMENTS REFERRED TO:

Chan Yee v Chan Yoke Fong [1990] 3 MLJ 297 (SC)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and Other Appeals [2008] 2 MLJ 622

Nite Beauty Industries Sdn Bhd & Anor v Bayer (M) Sdn Bhd [2000] 3 MLJ 314

Pegang Mining Co. Ltd v Choong Sam & Ors. [1969] 2 MLJ 52

Zaharah Bt. A. Kadir v Ramunia Bauxite Pte Ltd & Anor, Court of Appeal Civil Appeal No: J-02-957-2005