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WONG KIN HOONG & ORS

v.

KETUA PENGARAH JABATAN ALAM SEKITAR & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[APPLICATION FOR JUDICIAL REVIEW NO: R1-25-74-2008]
16 AUGUST 2010

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CIVIL PROCEDURE: *Judicial review - High Court - Application for extension of time to apply for leave - Applicants sought to quash first respondent's decision to approve second respondent's Environmental Impact Assessment ('EIA') report - Whether applicants had good reasons to*

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explain inordinate delay in seeking relief - Whether public interest and merits of case should be considered in granting extension of time - Whether first respondent's letter to applicants not entertaining request for detailed EIA report amounted to 'decision' capable of being judicially reviewed - Rules of High Court 1980, O. 3 r. 5 & O. 53 r. 3

E

The second respondent, which had been granted mining rights under a lease, was in the process of building a Carbon-In-Leach ('CIL') plant near Kampung Bukit Koman, Raub, Pahang ('the village') to process old gold mine tailings using cyanide. The first

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respondent was the governmental body responsible for enforcing the Environmental Quality Act 1974 ('EQA'). The applicants were residents and owners of properties in the village and were also members of a committee campaigning against the construction of the CIL plant. They claimed to represent the residents of the village. In early 1996, the second respondent informed the people

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of Raub, including the residents of the village, of its intention to build the CIL plant to source for gold. On 13 January 1997 ('the first decision'), the first respondent approved an Environmental Impact Assessment ('EIA') report submitted to it by the second respondent. The applicants felt the report did not comply with the

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requirements of s. 34A of the EQA and/or the regulations and/or the guidelines thereunder. The applicants applied to the first respondent to require the second respondent to submit to it a detailed EIA report concerning the CIL plant. On 21 February 2008 ('the second decision') the first respondent informed the

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applicants that as an EIA report had already been approved on 13 January 1997, their request was misplaced.

On 21 March 2008 the applicants filed an application in the High Court for leave to apply for judicial review of the first respondent's decisions. *Inter alia*, they wanted to quash the first respondent's decisions and require the second respondent to stop work on the CIL plant until it had submitted a detailed EIA report that fully complied with the EQA and its regulations and guidelines and after there had been public participation on the subject. The applicants sought an extension of time for the leave application in respect of the first decision since it fell outside the 40-day period prescribed under O. 53 of the Rules of the High Court 1980 ('RHC'). At the hearing, the respondents objected to the application, *inter alia*, on the grounds that (i) the applicants were guilty of inordinate delay in seeking relief as they knew of the preparation of the EIA report since 1996 and of its approval since January 1997 (ii) the prejudice to the second respondent, if the application was allowed, could not be compensated for by costs and (iii) the reference to the second decision as a 'decision' was a tactical ploy by the applicants to bring themselves within the 40-day time limit under O. 53 r. 3(6) of the RHC.

Held (dismissing the application):

(1) There was inordinate delay and no good reason to grant an extension of time to apply for leave in respect of the first decision. (para 1)

(2) The information pertaining to the CIL project and the approval of the EIA report had been in the public domain for a period of over 11 years. The applicants ought to have acted promptly but failed to exercise sufficient diligence despite the ample opportunities that were open to them. (paras 47 & 52)

(3) Public interest and merits of the case were not relevant in an application for extension of time but whether the applicants had proffered good reason for the delay. (paras 36 & 43)

(4) The letter of 21 February 2008 to the applicants by the first respondent was not a decision capable of judicial review. It was merely informatory in nature and did not in itself amount to a 'new decision'. It merely notified the applicants that an EIA report had been approved on 13 January 1997. Accordingly, there was no further decision to make as a decision had already been made 11 years ago. (paras 1 & 18)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Gandhinagar Motor Transport Society v. Bombay State AIR [1954] 202 ***(refd)***

Gnanasundaram v. Public Services Commission [1965] 1 LNS 41 HC ***(refd)***

In The Matter Of An Application By Robert And Sonia Burkett For Permission To Apply For Judicial Review (Court Of Appeal) (Case No: C/2000/2480) ***(refd)***

Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals [1997] 4 CLJ 253 CA ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Mersing Omnibus Co Sdn Bhd v. Minister of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

Nottinghamshire City Council v. Secretary Of State For The Environment And Another Appeal [1986] 1 All ER 199 ***(refd)***

Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal [2007] 4 CLJ 513 FC ***(refd)***

People's Union for Democratic Rights v. Union of India [1982] 3 SCC 235 ***(refd)***

R (On The Application Of Burkett And Another) v. Hammersmith And Fulham London Borough Council [2002] UKHL 23 ***(refd)***

R v. Secretary Of State For Health ex parte Alcohol Recovery Project Queen's Bench Division (Crown Office List) CO/310l/92 (Unreported) ***(refd)***

R v. Secretary Of State For The Home Department Another, Ex Parte Ruddock And Others [1987] 2 All ER 518 ***(refd)***

R v. Secretary Of State For Trade And Industry, Ex Parte Greenpeace, The Times, 19 January 2000 ***(refd)***

R v. Secretary Of State Of Education And Science And Another Ex Parte Threapleton, QBD 10 March 1988 ***(refd)***

R v. Stratford - On - Avon District Council And Another, Ex Parte Jackson [1985] 3 All ER 769 ***(refd)***

Ravindran P Muthukrishnan v. Malaysian Examinations Council [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 PC ***(refd)***

Sabah Berjaya Sdn Bhd v. Director General Of Inland Revenue Department & Anor [1996] 1 LNS 93 HC ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Tengku Anoomshah Tengku Zainal Abidin & Anor v. Collector Of Land Revenue, North East District, Penang & Anor [1995] 3 CLJ 434 HC ***(refd)***

Legislation referred to:

Environmental Quality Act 1974, ss. 3(b), (k), 34A(2), (3), (4), (6), (8)
Local Government and Housing Act 1989, s. 5
Rules of the High Court 1980, O. 3 r. 5, O. 53 rr. 1A, 2(4), 3(6), 4
State Mining Enactment 1996, s. 27
Town and Country Planning Act 1990, s. 106

Constitution of India, art. 32
Civil Procedure Rules 1998 [UK], rr. 54.4, 54.5(1)
Rules of the Supreme Court 1999 [UK], O. 53 r. 4(1)
Supreme Court Act 1981 [UK], ss. 31(6), 36(1)

For the applicants - Karina Yong (Jessica Binwani with her); M/s Jessica, Theiva & Kumaari
For the 1st respondent - Nizam Zakaria (Suhaila Haron with him) SFC; AG's Chambers
For the 2nd respondent - Dato' Cecil Abraham (S Nantha Balan & Sunil Abraham with him); M/s Zul Rafique & Partners

Reported by Ashok Kumar

JUDGMENT

Lau Bee Lan J:

[1] The applicants have appealed against a part of the court's decision given on 1 June 2009 where the court has dismissed the applicants' application for leave for judicial review (encl. 1). Basically on 1 June 2009, the court ruled:

> The Court finds that there is inordinate delay and there are no good reasons to grant extension of time in respect of the 1st decision (13.1.1997).
>
> In respect of the 2nd decision (21.2.2008), the Court is of the view that it is not a decision which is reviewable or amenable to judicial review.
>
> Encl. 1 para (b), c(i), (ii) and (d) which relate to the 1st decision and para (a), (c)(iii) to (viii) which relate to the 2nd decision is dismissed.

[2] The applicants' application (encl. 1) refers to two prayers and is in relation to two decisions dated 13 January 1997 ("1st decision") and 21 February 2008 ("2nd decision") of the 1st respondent:

(i) paragraph a, c(iii) to (viii) relate to the 2nd decision;

(ii) paragraph b, c(i), (ii) and (d) relate to the 1st decision.

[3] The court has considered the submissions of the applicants (AA1); 2nd submission - applicants' response to submission of the 2nd respondent (A6) and 3rd submission - response to 1st respondent (A10); 2nd respondent's written submission (B1) and 2nd respondent's written submission in reply (B3); AG's submission (C1) and the oral submissions including the relevant cause papers and authorities.

[4] The applicants are residents and registered owners of properties in Kampung Bukit Koman, Raub, Pahang (exh. JKK1 in encl. 3 - affidavit in support of the applicants). The applicants, are members of "Jawatankuasa Bertindak Menentang Penggunaan "Cyanide" Dalam Perlombongan Emas di Bukit Koman, Raub, Pahang" ("Anti-Cyanide Committee") and purport to represent all the residents of Kampung Bukit Koman (about 3,000) who the applicants contend object to the 2nd respondent's Carbon-In-Leach ("CIL") plant being built near the village.

[5] The 1st respondent is the director general of the department of environment and is the governmental body responsible for enforcing the provisions of the Environmental Quality Act 1974 ("EQA").

[6] The 2nd respondent is the company that has been granted the mining rights under Mining Certificate ("MC") 483 now known as Mining Lease ("ML") 1669 to approximately 303 acres of land. The 2nd respondent is the proponent of a project to process old gold mine tailings using the CIL process which involves the use of the chemical cyanide.

[7] For the chronology of events the court gratefully adopts the tabulation as set out at para. 8 at pp. 6-15 of the 2nd respondent's written submission ("B1"). The salient events are:

(a) As of early 1996, the 2nd respondent had informed the people of Raub including the residents of Kampung Bukit Koman that it intended to build a CIL plant to source for gold. Such information was readily available in the public domain by virtue of the various newspapers articles surrounding the 2nd respondent's proposed project and the fact that this issue was addressed in the Pahang State Assembly;

(b) On 13 January 1997, the 1st respondent approved the 2nd respondent's EIA Report;

(c) On or about March 2006, the 2nd respondent halted all mining operations under Phase 1 in preparation for the construction of the CIL plant under Phase 2;

(d) Over the course of the last 11 years numerous articles have appeared in the Chinese, Malay and English newspapers relating to the 2nd respondent's CIL project;

(e) The 2nd respondent together with its technical consultants and representatives from the Department of Environment have on a number of occasions consulted the residents of Kampung Bukit Koman and the JKKK Committee for Kampung Bukit Koman, ie, on 22 September 2006 and 19 November 2006;

(f) Between 29 January 2007 to 21 February 2008, the applicants and/or Sahabat Alam Malaysia commenced and/or undertook extra-legal and/or extra-judicial conduct in an attempt to obtain a detailed EIA Report and calling for a setting-aside of the initial EIA Report which was approved' on 13 January 1997. Some of the steps which had been taken by the applicants include:

(i) Organising various demonstrations in front of the gates of the 2nd respondent's facility;

(ii) On 9 May 2007, the 4th applicant, on behalf of the Anti-Cyanide Committee wrote to the Prime Minister of Malaysia regarding the 2nd respondent's project;

(iii) On 30 May 2007, the 4th applicant on behalf of the Anti-Cyanide Committee wrote to the Minister of Water, Energy and Communications and the Malaysian Palm Oil Board regarding the 2nd respondent's project;

(iv) On 21 June 2007, Sahabat Alam Malaysia wrote to the 1st respondent requesting a copy of the EIA Report;

(v) On 25 July 2007, the 4th applicant on behalf of the Anti-Cyanide Committee wrote to the Prime Minister of Malaysia for the second time regarding the 2nd respondent's project;

(vi) On 2 October 2007, Sahabat Alam Malaysia wrote to the Department of Health and Safety regarding the 2nd respondent's project.

(g) On or about 29 August 2007, Pahang Local Government and Environmental Committee Chairman Dato' Hoh Khai Mum arranged a briefing with regard to the cyanide issue. The briefing was conducted by the State Department of Environment ('DOE') Director-General Encik Hassan and Department of Minerals and Geosciences Director General Datuk Zulkifli Abu Bakar Members of both the Residents Committee and Anti-Cyanide Committee were invited. However, members of the Anti-Cyanide Committee were absent from the briefing. The above briefing was reported in Nanyang East Coast Edition.

(h) In September 2007, the applicants obtained a copy of the EIA Report.

(i) On 21 February 2008, the 1st respondent responded to the applicants' solicitors, Messrs Meena Raman & Partners rejecting the request for a detailed EIA Report to be furnished by the 2nd respondent given that the initial EIA Report had been approved on 13 January 1997. The 1st respondent requested that any evidence pertaining to sink holes as suggested by the applicants be provided so as to enable the 1st respondent to take such action as is deemed necessary; and

(g) On 21 March 2008, the applicants filed this application for leave of judicial review.

[8] Applicants' Contentions

(a) the law relating to extension of time for leave for judicial review has been subject to change such that the courts are more inclined to adopt a liberal approach and embark on an investigation of the merits (see para. 2(a) of B3);

(b) the applicants are seeking extension of time in respect of only the 1st decision of the 1st respondent in approving the Environmental Impact Assessment Report (EIA) Report on 13 January 1997. No extension of time is required in respect of the 2nd decision made on 21 February 2008 in refusing to review the 1st decision as the applicants are within the 40 day prescribed period under O. 53 of the Rules of the High Court ("the RHC") (para. 2(b) B3);

(c) there are credible grounds in favour of an extension of time being granted given the conduct of the 1st and 2nd respondents in failing to abide by the provisions of the EQA and the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 ('the EIA Order') (para. 2(c) B3).

[9] 1st Respondent's Contentions

(a) whether there is good reason to justify the application for extension of time in respect of the 1st decision as there is insufficient material placed before the court;

(b) whether there is any *prima facie* case for leave for judicial review with respect to the 1st and 2nd decisions.

[10] 2nd Respondent's Contentions

(a) the applicants have had full and actual knowledge of the preparation of the EIA Report since 1996 and the subsequent approval of EIA Report on 13 January 1997 as of 1997;

(b) there has been inordinate delay on the applicants' part in seeking recourse to the courts;

(c) the prejudice suffered by the 2nd respondent cannot be compensated by costs if extension of time is granted;

(d) the reference to the 2nd decision is a tactical ploy on the applicants' part to circumvent O. 53 r. 3(6) RHC.

Court's Findings

[11] As there is a difference in opinion as to the number of decisions involved in this case and whether it is reviewable, it is pertinent in this case to state in extenso the leave application for judicial review sought for by the applicants (encl. 1):

(a) kebenaran untuk semakan kehakiman di bawah Aturan 53 kaedah 3 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau bidangkuasa sedia ada Mahkamah yang Mulia ini;

(b) lanjutan masa, sekiranya perlu, diberikan kepada Pemohon-Pemohon untuk memfailkan permohonan ini, selaras dengan Aturan 53 kaedah 3(6) dan Aturan 3 kaedah 5 Kaedah-Kaedah Mahkamah Tinggi 1980;

(c) kebenaran diberikan kepada Pemohon-Pemohon yang dinamakan di atas untuk memohon perintah-perintah seperti berikut:

(i) deklarasi bahawa Laporan Penilaian Kesan Kepada Alam Sekeliling (Environmental Impact Assessment Report) (EIA) untuk cadangan untuk melombong dan mengekstrak emas daripada hampas lombong lama di Bukit Koman Raub ["Laporan EIA tersebut"] yang telah dikemukakan oleh Responden Ke 2 kepada Responden Pertama pada 27-8-1996 tidak menepati kehendak seksyen 34A Akta Kualiti Alam Sekeliling 1974 dan/atau peraturan-peraturan dan/atau garis panduan-garis panduan yang diperuntukkan di bawah s. 34A tersebut;

(ii) *certiorari* untuk membatalkan (quash) keputusan Responden Pertama bertarikh 13-1-1997 yang meluluskan Laporan EIA tersebut;

(iii) deklarasi bahawa keputusan Responden Pertama pada 21-2-2008 dalam menolak permohonan Jawatankuasa Bertindak Menentang Penggunaan Cyanide Dalam Perlombongan Emas, Bukit Koman agar Responden Ke2 dikehendaki menyediakan dan mengemukakan laporan EIA yang baru dan Terperinci [Detailed EIA] untuk kegiatan melombong dan/atau mengekstrak emas daripada hampas lombong yang lama di Bukit Koman, Raub adalah tidak adil dan/atau tidak munasabah dan/atau melanggari prinsip-prinsip natural justice dan/atau peruntukan Seksyen 34A Akta Kualiti Alam Sekeliling 1974 dan/atau melanggar hak-hak asasi Pemohon-Pemohon;

(iv) *certiorari* untuk membatalkan (quash) keputusan Responden Pertama bertarikh 21-2-2008 tersebut di mana Responden Pertama memutuskan bahawa Responden Ke 2 tidak dikehendaki menyediakan dan mengemukakan laporan EIA yang baru dan Terperinci untuk projek Responden Ke 2 tersebut;

(v) deklarasi bahawa sebelum Responden Ke 2 memulakan atau meneruskan sebarang aktiviti yang dicadangkan di lombong emas Bukit Koman, iaitu melombong dan/atau mengekstrak emas daripada hampas lombong yang lama, Responden Ke 2 terlebih dahulu perlu mengemukakan Laporan EIA yang baru dan terperinci untuk pertimbangan dan keputusan Responden Pertama dan mematuhi peruntukan-peruntukan Akta Kualiti Alam Sekeliling 1974 termasuk s. 34A Akta tersebut dan/atau peraturan-peraturan dan/atau garis panduan - garis panduan yang diperuntukkan di bawah s. 34A tersebut, termasuk keperluan untuk ulasan awam (public participation);

(vi) *mandamus* terhadap Responden Pertama supaya memerlukan Responden Ke 2 mengemukakan laporan EIA yang baru dan terperinci berkenaan dengan projek Responden Ke 2 untuk melombong dan/atau mengekstrak emas daripada hampas lombong yang lama di Bukit Koman, Raub, untuk pertimbangan dan keputusan Responden Pertama, dan mematuhi peruntukan-peruntukan Akta Kualiti Alam Sekeliling 1974 termasuk s. 34A Akta tersebut dan/atau peraturan-peraturan dan/atau garis panduan-garis panduan yang diperuntukkan di bawah s. 34A tersebut, termasuk melibatkan ulasan awam (public participation);

(vii) *mandamus* terhadap Responden Pertama supaya mengeluarkan perintah berhenti kerja terhadap Responden Ke 2 sehingga Responden Ke 2 mengemukakan laporan EIA yang baru dan terperinci dan mematuhi keperluan-keperluan di bawah s. 34A Akta Kualiti Alam Sekeliling 1974 dan/atau peraturan-peraturan dan/atau garis panduan-garis panduan yang diperuntukkan di bawah s. 34A, termasuk keperluan untuk ulasan awam (public participation), dan sehingga Responden Pertama membuat keputusan berkenaan Laporan EIA yang baru dan terperinci tersebut; atau

(viii) secara alternatif, satu injunksi dikeluarkan terhadap Responden Ke 2 oleh Mahkamah yang Mulia ini supaya Responden Ke 2 tidak memulakan atau meneruskan sebarang aktiviti yang dicadangkan di lombong emas Bukit Koman, iaitu melombong dan/atau mengekstrak emas daripada hampas lombong yang lama, sehingga Responden Ke 2 mengemukakan laporan EIA yang baru dan terperinci dan mematuhi keperluan-keperluan di bawah s. 34A Akta Kualiti Alam Sekeliling 1974 dan/atau peraturan-peraturan dan/atau garis panduan-garis panduan yang diperuntukkan di bawah s. 34A, termasuk keperluan untuk ulasan awam (public participation), dan sehingga Responden Pertama membuat keputusan berkenaan Laporan EIA yang baru dan terperinci tersebut.

(d) penggantungan prosiding dan keputusan Responden Pertama bertarikh 13-1-1997 yang meluluskan Laporan EIA tersebut yang telah dikemukakan oleh Responden Ke 2 pada 27-8-1996 sekiranya kebenaran untuk semakan kehakiman dibenarkan;

(e) relif lain sebagaimana difikirkan adil dan sesuai untuk diberikan oleh Mahkamah yang Mulia ini;

(f) Kos.

[12] At the outset I wish to state that I have referred to the "1st decision" and the "2nd decision", the terminology adopted by the applicants merely for ease of reference but without predetermining the issue as to whether there is only one decision or two decisions as this is a bone of contention between the applicants and 1st and 2nd respondents.

[13] Learned SFC basically submitted that the EIA Report approved on 13 January 1997 was not a decision but a mere exercise of a function under the EQA; there is nothing in s. 34A(2) EQA which empowers the putative 1st respondent whether to approve the complained activity ie, the mining activity or the use of cyanide. Relying on the Mining Lease (exh. RAGM61), learned SFC submitted that it was not issued under the EQA but under s. 27 of the State Mining Enactment. Learned SFC submitted the probable approving authority is the Jabatan Mineral dan Geosains Negeri Pahang based on (i) a letter dated 1 October 2007 (p. 120 encl. 3 - affidavit in support of the applicants) addressed to Mustapha bin Hussin (4th applicant) from

Lembaga Minyak Kelapa Sawit Malaysia that ... operasi perlombongan (emas di Bukit Koman, Raub, Pahang yang akan menggunakan kimia "cyanide" ... adalah di luar bidangkuasa kami dan tertakluk kepada kelulusan Jabatan Mineral dan Geosains Negeri Pahang"; and (ii) the report dated 7 December 2006 ("Lampiran A") (pp. 99-103, encl. 3) prepared by Jabatan Mineral dan Geosains Negeri Pahang in response to the query from the Chairman, Anti-Cyanide Committee addressed to Jabatan Alam Sekitar, Pahang (p. 98A, encl. 3).

[14] I agreed with the learned counsel for the applicants that it is not open to the 1st respondent to say that the decision of the 1st respondent is not a decision of a public authority within O. 53 r. 2(4) RHC. The specific role of the DG of Environmental Quality is specified in s. 3 EQA, which, *inter alia*, under s. 3(b) is "to be responsible for and to co-ordinate all activities relating to the discharge of wastes into the environment and for preventing or controlling pollution and protecting and enhancing the quality of the environment". Learned Counsel for the Applicants correctly highlighted s. 34A(3), (4) and (8) EQA and s. 3(k) "to undertake investigations and inspections to ensure compliance with the Act (EQA) or the regulations made thereunder and to investigate complaints relating to the breaches of this Act or the regulations made thereunder."

[15] Section 34A(2) EQA requires any person carrying out of a prescribed activity as defined under EQA to submit a report on the impact on the environment to the DG for his approval (s. 34A(3), (4) and (6).

[16] As correctly pointed out by the 2nd respondent, the applicants are seeking to review the approval of a preliminary EIA Report and different requirements apply to the preparation of a preliminary EIA Report than that of a detailed EIA report as prescribed in A Handbook of Environmental Impact Assessment Guidelines. The applicants argued that there were two decisions which are amenable to judicial review ie, the 1st decision, ie, the decision of the of the 1st respondent in approving the 2nd respondent's EIA Report handed down on 13 January 1997 whilst the 2nd decision is dated 21 February 2008 when the 1st respondent refused the request for a fresh and detailed EIA Report.

[17] Since the letter of 21 February 2008 (see the "Chronology of Events") is pertinent, the contents are reproduced:

> Projek Melombong Emas Di Bukit Roman, Raub, Pahang Atas MC 483, Mukim Gali, Daerah Raub
>
> Laporan Penilaian Kesan kepada Alam Sekeliling
>
> Saya merujuk kepada perkara di atas dan surat pihak tuan, bertarikh 19 Disember 2007.
>
> 2. Dimaklumkan bahawa Laporan Penilaian Kesan Kepada Alam Sekeliling (EIA) bagi projek melombong emas di Bukit Koman, Raub, Pahang telah dikaji oleh Jabatan ini dan ianya menepati kehendak Seksyen 34A, Akta Kualiti Alam Sekeliling 1974. Sehubungan itu, laporan tersebut telah diluluskan pada 13 Januari 1997.
>
> 3. Oleh demikian, tuntutan anakguam pihak tuan supaya (i) proses EIA terperinci dimulakan dan (ii) satu perintah berhenti kerja dikeluarkan; adalah tidak bertepatan. Laporan EIA yang diluluskan itu telah mengambil kira semua impak daripada aktiviti pelombongan emas ini dan langkah-langkah mitigasi telah dicadangkan bagi semua peringkat operasi.
>
> 4. Berhubung dengan kejadian 'sinkhole' yang dikaitkan dengan lombong emas di Bukit Koman, kerjasama pihak tuan adalah diminta untuk mengemukakan maklumat mengenai lokasi spesifik, tarikh kejadian dan lain-lain maklumat yang berkaitan secara terperinci bagi membolehkan Jabatan ini mengambil tindakan selanjutnya.
>
> 5. Jabatan ini akan sentiasa menjalankan pemantauaan ke atas projek ini bagi memastikan penggerak projek mematuhi Akta Kualiti Alam Sekeliling 1974 dan Peraturan-Peraturan di bawahnya agar ianya tidak mencemarkan alam sekitar.

[18] I agreed with the learned counsel for the 2nd respondent's submission that a perusal of the letter of 21 February 2008 merely indicates:

(a) The 1st Respondent was notifying the Applicants that EIA Report had been approved on 13.01.1997 in accordance with section 34A of the EQA. Accordingly, there was no further decision to make as the decision had already been made some 11 years;

(b) The only decision made by the 1st Respondent was on 13.01.1997 when the EIA Report was approved;

(c) The 1st Respondent's letter dated 21.02.2008 relates back to the sole decision in this matter which was made on 13.01.1997;

(d) The 1st Respondent's letter dated 21.02.2008 is not a stand-alone document. It is dependent and/or draws its roots from the approval of the EIA Report handed down on 13.01.1997;

(e) There are therefore no grounds upon which to seek to leave to review this purported "decision" of the 1st Respondent by way of the letter dated 21.02.1998;

(f) It could not plausibly be asserted from reading the letter that the 1st Respondent had actually considered the Applicants' request and subsequently made a "decision" to refuse the request which amounts to the 1st Respondent exercising its powers under Section 34A of the EQA against the Applicants; and

(g) As such, it is evident that the letter is merely informatory in nature and does not in itself amount to a "new decision".

[19] The case of *Nottinghamshire City Council v. Secretary Of State For The Environment And Another Appeal* [1986] 1 All ER 199 cited by the applicants to support their contention that the 1st respondent's letter dated 21 February 2008 amounts to a 2nd decision is of no assistance. As correctly submitted by the learned counsel for the 2nd respondent, the judicial review application in the case was made against the decision of the Secretary of State in issuing guidance with regard to the local authorities expenditure limits and the House of Lords has reversed the decision of the Court of Appeal and dismissed the applicant's application for judicial review and due cognizance ought to be given to the dicta of Lord Scarman at p. 204 e-h "Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judge's role to declare the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained; for Parliament has enacted that one of its House is responsible. Judicial review is a great weapon in the hands of judges; but the judges must observe the constitutional limits set by our parliamentary system on their exercise of this beneficent power".

[20] As for the applicants' reliance on the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65, I agreed with learned counsel for the 2nd respondent that it is misplaced. The facts of the case has been culled by the 2nd respondent as per para. 39(a) to (g) pp. 44-46 B1. To highlight in this case, the planning permission was granted on 6 September 1991 and was due to expire on 5 September 1992, the appellant (MPPP) only considered and granted the 1st application for extension some ten months later (20 July 1993) imposing additional conditions without giving the respondent (co-operative society) any notice. On 10 August 1993, the respondent sent a letter to the appellant asking it to reconsider its decision to invoke these additional conditions on the grounds that there were no such conditions imposed when the planning permission had been approved in 1991. Though the extension of planning permission granted was due to expire on 5 September 1993, the appeal letter was only considered by the appellant on 23 September 1993 and the result was communicated to the respondent with no reasons given wherein the appellant upheld its initial decision. The respondent then moved the court by way of an *ex parte* application for an order to quash the disputed conditions imposed by the appellants. On appeal by the respondent the Federal Court though allowing the appeal in part, ultimately held, *inter alia*, that:

> (a) in the exceptional circumstances of this particular case, it be ordered that the entire matter of the respondent's application for an extension of planning permission must be referred back to the appellant with a direction to reconsider and redetermine it according to law after the respondent has been afforded a reasonable opportunity to adduce evidence and make representations with respect to conditions, if any, to be imposed upon the grant of such extension and after such evidence and representations have been duly and fairly considered by the appellant through its Planning Authority; and
>
> (b) having regard to the background facts leading up to the imposition of the disputed condition, as found by the Court of Appeal, and having regard to the unsatisfactory reasons advanced by the Director of Planning in his affidavit, it would not be open to the appellant, upon reconsideration of the respondent's application, to reimpose the disputed condition or to impose any other pricing condition to the like effect, because to do so would be to unreasonably exercise

or abuse its powers or be unduly oppressive and perhaps more importantly a violation of the respondent's legitimate expectation.

[21] In the light of the above, I find there is no merit in the applicants' submission. The 2nd decision is not a reviewable decision as there is no decision to be reviewed in the first place. I agreed with the 2nd respondent there is only one decision which may be subjected to judicial review ie, the decision of the 1st respondent in approving the EIA Report handed down on 13 January 1997 (which for the sake of consistency and to avoid any form of confusion I shaft still refer to as the 1st decision).

[22] There is a related issue. Assuming the 2nd decision is indeed a "decision" which is amenable to judicial review (which I hold it is not), the applicants argued that the 2nd decision was made in time and filed within the prescribed 40 days period (21 February 2008 - date of decision to 21 March 2008 - date of filing application for leave for judicial review). The applicants admitted they obtained a copy of the EIA Report in September 2007 (para. 32 of applicants' 1st affidavit). As of September 2007, Miss Meenakshi Raman, counsel for the applicants was the secretary of Sahabat Alam Malaysia (SAM). There were a whole series of letters exchanged between M/s Meena Raman & Partners and the Department of Environment (JAS), the first of which is dated 18 October 2007 till 21 February 2008 (the 2nd decision as alleged by the applicants). As of 18 October 2007, the applicants had obtained the advice and comments on the preliminary EIA Report (annexed to the said letter) and the applicants could have filed their application for leave for judicial review.

[23] The next letter dated 19 October 2007 from the applicants' solicitors to JAS, made reference to the letter of 18 October 2007 (para. 6) and made it known to DG, JAS "PEIA tersebut telah diluluskan pada 13-1-1997, iaitu lebih daripada sepuluh tahun yang lalu". Again 19 October 2007 could be another occasion when the applicants could have filed their application for leave for judicial review.

[24] On 16 January 2008, the applicants' solicitors gave seven days' notice, otherwise they would commence legal proceedings. JAS replied *vide* letter dated 22 January 2008 "Jabatan ini dalam proses meneliti kes di atas ("Projek Lombong Emas Di Bukit Roman, Raub, Pahang Atas MC483, Mukim Gali, Daerah Raub Laporan Penilaian Kesan Kepada Alam Sekeliling.") sebelum

A sebarang keputusan boleh dibuat memandangkan terdapat beberapa isu yang perlu diteliti terlebih dahulu." I am of the view that the word 'keputusan' in the said letter has to be seen in the context of the whole chain of events and not on a stand alone basis (see para. 18 above).

B

[25] On 19 February 2008, again the applicants' solicitors gave seven days' notice to the 2nd respondent otherwise they would commence legal proceedings. Then followed the letter from JAS dated 21 February 2006. I have addressed this letter in para. 18 C above and I adopt the same here.

[26] O. 53 r. 3(6) RHC states that 'An application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant ...' If one D takes the 1st limb of the provision, it would be computed from 13 January 1997 or if one takes the 2nd limb, it would be computed from September 2007 (based on applicants' own admission) or on 8 January 2007 (the date when the 1st respondent informed the applicants that the EIA Report was E approved on 13 January 1997).

[27] Taking the whole sequence of events starting from September 2007 when the applicants obtained a copy of the EIA Report till 21 February 2008, it is my judgment that the status of F the letter of 21 February 2008 by the 1st respondent is not a decision but I am more inclined to agree with the 2nd respondent that it is tantamount to a ploy to circumvent the unjustifiable inordinate delay on the part of the applicants to act promptly (see also paras. 44-49 below).

G

[28] The next issue to be considered is whether the applicants should be granted an extension of time to file the application for judicial review in respect of the 1st decision. However before venturing into this issue, I believe the court should consider what H is the law with regard to an application for extension of time in a judicial review proceeding.

[29] The 40 days time period prescribed in O. 53 r. 3(6) of the Rules of the High Court ("the RHC") is jurisdictional and an I application for extension of time should be determined first before the court decides on whether leave ought to be granted (see approach endorsed by the Federal Court in *Ravindran P Muthukrishnan v. Malaysian Examinations Council* [1984] 1 CLJ 232;

[1984] 1 CLJ (Rep) 320; [1984] 1 MLJ 168, at p. 169, and followed by the Court of Appeal in *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805; [2008] 6 MLJ 704 at paras. 67 - 69 following *Mersing Omnibus Co Sdn Bhd v. Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 (FC)).

[30] Further, notwithstanding that the applicants are out of time, whether pursuant to O. 53 r. 3(6) RHC the applicants have shown 'good reason' for delay on their part and there must be some material for the court to exercise its discretion (See cases cited on the 2nd respondent's behalf - (i) *Tengku Anoomshah Tengku Zainal Abidin & Anor v. Collector Of Land Revenue, North East District, Penang & Anor* [1995] 3 CLJ 434 at p. 439 g-l, (ii) *Sabah Berjaya Sdn Bhd v. Director General Of Inland Revenue Department & Anor* [1996] 1 LNS 93; [1996] 5 MLJ 366 at p. 375 F-l, (iii) *Gnanasundaram v. Public Services Commission* [1965] 1 LNS 41; [1966] 1 MLJ 157 at p. 158 B-C right column, (iv) *R v. Stratford - on - Avon District Council And Another, Ex Parte Jackson* [1985] 3 All ER 769 at p. 770 Held 2, (v) *R v. Secretary Of State For The Home Department Another, Ex Parte Ruddock And Others* [1987] 2 All ER 518 at p. 521 h-l).

[31] With respect to the case of *Tengku Anoomshah Tengku Zainal Abidin (supra)* I find learned counsel for the applicants' statements "It was a case concerning the old O. 53 r. 1A"; "... the judge did in fact go on to consider the merits of the case to find there was no arguable case" flawed. The reason being although under the previous O. 53 r. 1A RHC, the principle governing extension of time is the same and at p. 439f, the learned judge categorically said "**Be it as it may, this court would be falling into error should it fail to recognize that by virtue of the nature of the application before me**, [at p. 436d-e "the plaintiffs had applied, *inter alia*, (under encl. 1) to be allowed an extension of two weeks to apply for leave to apply for an order of *certiorari* to quash the said award"] **I am precluded from considering the merits of the intended application for leave to issue an order of *certiorari***. My function here is solely to consider the plaintiffs' grounds on their application for extension of time to make their application for leave to apply for an order of *certiorari*, **and not the merits for an order of *certiorari*** as vigorously canvassed in their ground (b) above". (emphasis added).

[32] I also find learned counsel for the applicants' rebuttal with respect to the case of *Sabah Berjaya Sdn Bhd (supra)* erroneous in the light of the learned judge's statement p. 375 F-l "The rule that a party must exhaust its domestic remedy before applying for judicial review is not an absolute rule going to the jurisdiction and exceptional circumstances may exist to displace the rule." and although under the previous O. 53 r. 1A RHC, the principle governing extension of time is the same.

[33] As for the case of *Stratford - on - Avon District Council and another, ex parte Jackson (supra)*, I am of the view the court did not consider the merits of the application as contended by learned counsel for the applicants but rather considered the reason for the delay ie, at p. 770 Held 2 "In particular, difficulty in obtaining legal aid which was not caused by the applicant was sufficient reason for the court to extend time limit ... the (applicant) had not been at fault and she had acted with a proper sense of urgency."

[34] It is true in the case of *Secretary Of State For The Home Department, Ex Parte Ruddock (supra)*, although the court was unimpressed by the reasons for delay of the applicant, the court granted the extension of time as the matters raised in the case was of general importance (doctrine of legitimate expectation); however the case does not assist the applicants' position as the merits of the application (there is procedural impropriety in not abiding with the EQA requirements and the Handbook of Environmental Impact Assessment Guidelines in the preparation of the preliminary EIA report) is not to be considered at this stage (the justification for this approach is considered below).

[35] At this juncture it is appropriate for me to determine whether the court ought to undertake a close scrutiny of the merits of the case in determining whether an extension of time ought to be given. The applicants contended the merits ought to be considered relying on primarily *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 CA, p. 946 at para. 16 D-F, *R v. Secretary Of State For Trade And Industry, Ex Parte Greenpeace, The Times*, 19 January 2000 and *R v. Secretary Of State Of Education And Science And Another Ex Parte Threapleton*, QBD 10 March 1988.

[36] The Court of Appeal case of *Tang Kwor Ham (supra)* has been reversed on appeal to the Federal Court in *Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another*

Appeal [2007] 4 CLJ 513 and the decision of the High Court in refusing to grant leave *in limine* was upheld. In the light of the Federal Court decision of *Pengurusan Danaharta Nasional Bhd (supra)*, I accepted the submission of the learned counsel for the 2nd respondent that the dicta of Gopal Sri Ram JCA (as he then was) in the Court of Appeal decision of *Tang Kwor Ham (supra)* as not good law. It is to be observed that in accordance with the doctrine of *stare decisis* (see *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113 at p. 132), the Federal Court decisions in *Mersing Omnibus Co Sdn Bhd (supra)* and *Ravindran (supra)* ought to be followed; however as pointed out by the learned counsel for the 2nd respondent, both these high authorities were not considered. Thus I agreed with the submission of learned counsel that on the basis of the present law in Malaysia, public interest and merits are not relevant at the stage of an application for extension of time.

[37] In *Greenpeace (supra)* an application for permission for judicial review was made by Greenpeace Ltd, a well known campaigning body, the prime object of which relates to the protection of the natural environment. The application for permission to apply for judicial review was made against the decision of the Secretary of State in granting licences to companies who wish to search and bore oil in an area in the North East Atlantic which has become known as the Atlantic Frontier which was claimed to have not been made in accordance with the Habitats Directive. The application was considered on paper by Jowitt J who ordered that the application for permission and the substantive hearing be heard together at which all matters could be considered, including delay, permission and if appropriate, the substantive application.

[38] I am in agreement with the 2nd respondent that the applicants' reliance on *Greenpeace* is misconceived as the law relating to judicial review in England differs from that in Malaysia as the issue of delay is dealt with in the preliminary stage as alluded to in cases above and not at the substantive hearing as ordered by Jowitt J in *Greenpeace*. Further, it is to be noted that the court in *Greenpeace* in deciding whether it was an appropriate case for extending time applied O. 53 r. 4(1) Rules of the Supreme Court 1999 (now amended by r. 54.4 of Civil Procedure Rules 1998) and s. 31(6) of the Supreme Court Act 1981. Section 31(6) provides "where the High Court considers that there has been undue delay in making an application for judicial

review, the court may refuse to grant - (a) leave for the making of the application; or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration". There is no such provision in O. 53 RHC.

[39] The case of *Secretary Of State Of Education And Science And Another Ex Parte Threapleton (supra)*, concerned an application for judicial review made pursuant to a decision of the local authority to adopt the proposal for merger of two schools. I agreed with the 2nd respondent the said case is not relevant as it deals with the issue of whether the matter was fit to be considered for expedition and in any event the question of delay was to be heard as a substantive matter.

[40] Learned counsel for the applicants submitted the present case should not be defeated by technicalities as it is one of public interest:

> (a) clarify the law under section 34A of the Environmental Quality Act and the scope of and manner in which the powers of the 1st Respondent thereunder should be exercised;
>
> (b) set the requirements of good governance and administration for public authorities; and
>
> (c) concerns the protection of the Applicants fundamental right to life in the nature of a clean and healthy environment.

citing the case of *People's Union for Democratic Rights v. Union of India* [1982] 3 SCC 235 at p. 242.

[41] The case of *People's Union for Democratic Rights (supra)* concerns the alleged violation of fundamental rights of workmen involved in various construction works in connection with the ensuing Asian Games to be held in Delhi, India. The 1st petitioner, which is an organisation for protecting democratic rights wrote a letter to one of the judges of the Supreme Court alleging violation of fundamental rights of the workmen and the letter was then treated as a writ petition in accordance with art. 32 of the Constitution of India which provides that any individual or body can move the court on behalf of the poor, illiterate and ignorant

class for protection of their fundamental rights. As correctly submitted by the learned counsel for the 2nd respondent, this case is regarding the violation of fundamental right of the poor, ignorant and economically disadvantaged persons in respect of their wages and the exploitation of child labour and be distinguished from the instant case where the relief claimed is as per para. 40.

[42] Even then the issue has been addressed by the Court of Appeal and in *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals* [1997] 4 CLJ 253 at p. 256 Held 6 "The respondents also lacked substantive *locus standi* and the relief sought should have been denied because (i) the respondents were attempting to enforce a penal sanction, the discretion to enforce which lies entirely with the Attorney General (ii) the action was not a representative action and there was no special injury suffered by the respondents over and above the injury suffered by the other affected natives (iii) although the respondents had been deprived of their life under art. 5(1) of the Federal Constitution, such deprivation was in accordance with law and the respondents, therefore, have not suffered any injury as to necessitate a remedy".

[43] For the above reasons, I need not take a close scrutiny of the merits of the case in determining whether an extension of time ought to be given but to rather to focus on the issue of whether the applicants had proffered good reason for the delay.

[44] On the question of whether the applicants had proffered good reason for the delay pursuant to O. 53 r. 3(6) RHC, the applicants raised the following issues to be considered:

(a) whether the applicants have knowledge of the project in 1996 or the approval of the EIA Report in 1997?

(b) the conduct of the parties; and

(c) prejudice to the parties (both the applicants and the respondents).

[45] Contrary to what the applicants alleged, the evidence based on the chronology of events which has not been denied by the applicants (para. 27 of the 2nd respondent's 1st affidavit (encl. 11) showed they have knowledge of the EIA Report and of the use of cyanide in the 2nd respondent's CIL project prior to 2006:

A (a) The applicants have had actual knowledge of the 2nd respondent's intention to build a CIL Plant in Raub, Pahang as of 1996. This amounts to a period of 12 years prior to the institution of this action (21 March 2008);

B (b) The applicants have had actual knowledge of the 2nd respondent's preparations of the EIA Report prior to it being presented to the 1st respondent on 27 August 1996 by virtue of the discussions held with the residents of Bukit Koman. This amounts to a period of 12 years prior to the institution C of this action;

(c) The applicants have had actual knowledge of the approval of the EIA Report by the 1st respondent on 13 January 1997 as of 1997. This amounts to a period of 11 years prior to the institution of this action; and D

(d) Alternatively, the applicants have by their own admission had actual knowledge of the approval of the EIA Report by the 1st respondent on 13 January 1997 as of 8 January 2007. This amounts to a period in excess of one year prior to the E institution of this action.

[46] Proof of such knowledge is evident from:

(a) the discussions of the 2nd respondent and/or its consultants had with the residents of Kampung Bukit Koman in 1996 F (exh. RAGM8 in 2nd respondent's 1st affidavit);

(b) Statutory declaration of Mr Ng Yu Leng, a miner in Bukit Koman dated 25 May 2008 having knowledge about the proposal by 2nd respondent to use cyanide when the villagers G started to talk about cyanide about one to two years ago (2006-2007) (exh. 30 in applicants' 3rd affidavit (encl. 13));

(c) Statutory declaration of Mr Yee Fook Pin, a resident in Bukit Koman dated 25 May 2008 having knowledge about the H proposal by 2nd respondent to use cyanide in 2006-2007 (exh. 31 in applicants' 3rd affidavit);

(d) Statutory declaration of Mr Chang Kern Min, a member of the Anti-Cyanide Committee in Bukit Koman dated 31 May 2008 having knowledge about the proposal by 2nd respondent I to use cyanide to process gold in 1996 (exh. 14A in applicants' 3rd affidavit);

(e) Statutory declaration of Mr Liew Kon Fatt, a miner/retiree dated 19 June 2008 having knowledge about the proposal by 2nd respondent to use cyanide in its gold extraction process around 1996/1997 did not meet with any objections (exh. RAGM-58 in 2nd respondent's 2nd affidavit (encl. 14));

(f) Statutory declaration of Mr Chai Kwee Yew, a resident of Bukit Koman dated 19 June 2008 stating he and others in the community had knowledge about the proposal by 2nd respondent to use cyanide in its gold extraction process since 1996/1997; there was great publicity about the CIL project; he was involved in the discussion and/or consultation about the project with RAGM's consultants and with YB Dato' Biaw Nga (their then State Assemblyman) and was publicised that the latter had brought the cyanide usage to the Pahang State Assembly in 1996 (exh. RAGM-59 in 2nd respondent's 2nd affidavit);

(g) The numerous articles which appeared in the Chinese, Malay and English newspaper relating to the 2nd respondent's CIL project which highlighted on the use of cyanide (exh. RAGM-9 to RAGM-20 in 2nd respondent's 1st affidavit);

(h) There were discussions in the Pahang State Legislative Assembly on 24 April 1996 on the use of cyanide in the 2nd respondent's CIL project in which the then Menteri Besar of Pahang had allayed fears on the use of cyanide (exh. RAGM-14 in 2nd respondent's 1st affidavit).

[47] The aforesaid evidence is testimony of the fact and leads to the irresistible conclusion that that the information pertaining to the CIL project and/the approval of the EIA Report on 13 January 1997 has been in the public domain for a period of over 11 years. To buttress my point, I draw support from the case of *Abdul Rahman Abdullah Munir (supra)* where the Court of Appeal at para. 56 at p. 717 said "The notice board publicizing the project on 15 November 2003 and newspaper reports appeared thrice in the following three weeks ..." showed that the appellants (who sought to challenge the administrative decision taken by the 1st respondent (Datuk Bandar) in connection with proposed burial ground neighbouring the appellants' condominium) cannot deny they were aware of the project. Similarly, in the present case, with so much information on the CIL project in the public domain, that the residents of Kampung Bukit Koman have been aware of the project's progress and development.

[48] The applicants admitted that they had knowledge on 8 January 2007 of the approval of the EIA Report on 13 January 2007 (exh. JKK-5 in applicants' 1st affidavit). There is inordinate delay on the applicants' part:

(a) Premised on the undisputed fact that the applicants had actual knowledge of the EIA Report being approved on 13 January 1997, there has been an 11 years delay in the filing of the applicants' application for leave for judicial review (1st instance of delay);

(b) Premised on the undisputed fact that the applicants had actual knowledge of the EIA Report being approved as of 8 January 2007, there has been a delay in excess of one year two months in the filing of the applicants' application for leave for judicial review (2nd instance of delay);

(c) The information pertaining to the approval of the CIL project and/or the EIA Report on 13 January 1997 has been in the public domain by way of media coverage, discussion in the Pahang State Legislative Assembly and discussions between the 2nd respondent and the residents of Kampung Bukit Koman since 1996. There has therefore, been a delay of 11 years in the filing of the applicants' application for leave for judicial review (3rd instance of delay);

(d) Applicants by their conduct failed to move the court expeditiously for relief after no action was taken after the lapse of the 14 days specified in the applicants' solicitors' letter of 19 December 2007 (4th instance of delay):

(i) On 17 August 1996, the 2nd respondent presented the EIA Report for approval by the 1st respondent;

(ii) On 13 January 1997, the 1st respondent approved the said EIA Report; and

(iii) Time was of the essence and in the event a response was not forthcoming within 14 days from the date of the said letter, the applicants would take such action as was deemed necessary.

(e) On 16 January 2008, the applicants' solicitors wrote to the 1st respondent wherein it stated that time was of the essence and in the event a response was not forthcoming within seven

days from the date of the said letter the applicants would take such action as was deemed necessary but no action by the applicants after the lapse of seven days set by the applicants' solicitors (5th instance of delay);

(f) On 19 February 2008, the applicants' solicitors wrote to the 1st respondent wherein it re-iterated that time was of the essence and in the event a response was not forthcoming within seven days from the date of the said letter, the applicants would take such action as was deemed necessary but no action by the applicants after the lapse of seven days set by the applicants' solicitors (6th instance of delay).

[49] There is indeed inordinate delay because out of the six instances of delay, the applicants have had three separate occasions within the last year (19 December 2007, 16 January 2008 and 19 February 2008) in which to seek recourse before the court but failed to do so and this is inexcusable.

[50] I agreed that the conduct of the applicants in resorting to extra-judicial and/or extra-legal means, seeking to engage the Government, the Prime Minister of Malaysia and various regulatory bodies and non-governmental organisations in an attempt to seek the relief sought does not justify the long delay. I find support in the case of *Gnanasundram (supra)* at pp. 158-159 where Raja Azlan Shah J (as His Royal Highness then was) on considering "Firstly, he contended that the delay was due to the fact that his client was negotiating with the Government so that the latter would re-consider his position" followed the persuasive Indian authority of *Gandhinagar Motor Transport Society v. Bombay State* AIR [1954] 202 where the court said:

> Now, we have had to point out that the only delay which this court will excuse in presenting a petition is the delay which is caused by the petitioner pursuing a legal remedy which is given to him. In this particular case the petitioner did not pursue a legal remedy which is given to him. *In this particular case the petitioner did not pursue a legal remedy. The remedy he pursued was extra-legal or extra-judicial. Once the final decision of Government is given, a representation is merely an appeal for mercy or indulgence, but it is not pursuing a remedy which the law gave to the petitioner. But even assuming that that time should be condoned, the petitioners did not make a representation to Government till 15.2.1953, a month after the order was passed, and even when they received the final decision of*

A *Government on 3.4.1953, they waited a month more before this petition was presented. Therefore, in our opinion, there has been such delay in the presentation of this petition as would disentitle the petitioner to any relief at our hands*. (Emphasis added)

B **[51]** Although the applicants tried to distinguish the case of *Gnanasundaram (supra)*, I am inclined to agree with the 2nd respondent's submission that the case is applicable to the facts of this case in that the applicants have resorted to writing numerous letters to the various parties mentioned earlier and this is tantamount to an attempt to set aside and/or to call in question
C the approval of the EIA Report given on 13 January 1997.

[52] Another case which is of some persuasive value is *R v. Secretary of State for Health ex parte Alchohol Recovery Project Queen's Bench Division (Crown Office List)* CO/3101/92 (unreported). I am
D conscious that the issue of delay was dealt with after hearing the merits but guidance can be drawn from *Secretary Of State For Health Ex Parte Alchohol Recovery Project (supra)* when addressing delay under O. 53 r. 4 which bears some resemblance to our O. 53 r. 3(6) RHC. The court stated "applications (for judicial
E review) must be made timeously" and held that "although in one way by immediately organising a Parliamentary lobby ARP reacted promptly, it cannot be said that their application to this court was made promptly. ARP seek to justify their delay by arguing that "it would ... have been doing a grave disservice to resort to judicial
F review without first having gone through all other potential means of seeking redress."". Therefore the applicants ought to have acted promptly but failed to exercise sufficient diligence despite the ample opportunities open to them as have been alluded to earlier.

G **[53]** The applicants submitted that when they discovered the approval of the preliminary EIA Report there were two courses of action open to them - (i) to run immediately to the court with their fears or (ii) try to obtain a copy of the preliminary EIA Report from the 1st respondent to obtain a proper assessment of
H the facts before proceeding with the action; and they chose the 2nd course of action to avoid litigation and tried to resolve the dispute out of court. The case of *In The Matter Of An Application By Robert And Sonia Burkett For Permission To Apply For Judicial Review (Court Of Appeal)* (Case No: C/2000/2480) was cited.

I

[54] I find there is no merit in the argument canvassed by the applicants. Learned counsel for the applicants acknowledged in *R (On The Application Of Burkett And Another) v. Hammersmith And Fulham London Borough Council* [2002] UKHL 23; [2002] 3 All ER 97 the House of Lords had reversed the decision of the Court of Appeal which upheld the judgment of Richards J not to grant leave.

[55] Before the House of Lords, the claimant, Sonia Burkett (also brought action on her late husband's behalf) appealed against the decision of the Court of Appeal refusing their renewed application for permission to apply for judicial review of a resolution of the planning committee of the defendant local authority on 15 September 1999 authorising the director of the environment to grant outline planning permission to the interested party, (the developer) for the mixed use development of land subject to two conditions precedent - (i) there being no call in decision by the Secretary of State and (ii) completion of a satisfactory agreement enforceable pursuant to s. 106 of the Town and Country Planning 1990 Act. The critical issues to be considered (p. 108) were (i) whether the claimant's application for judicial review was lacking in promptitude considering that three months have lapsed after the resolution on 15 September 1999; and (ii) whether "15 September 1999" (rather than 12 May 2000, the date of grant of planning permission) is the correct date based on the interpretation of the words 'from the date when the grounds of the application first arose".

[56] The reasoning of the House of Lords centred on the interpretation and application of RHC O. 53 r. 4(1) and CPR 54.5(1) and s. 36(1) of the 1981 Act is found at particularly pp. 108 "(X) The interpretation and application of the rules of court' through p. 113. As submitted on the 2nd Respondent's behalf, the House of Lords held that the circumstances of this particular case ie, it being in the context of town planning law where statutory procedure involving preliminary decisions leading to a final decision affecting legal rights, judicial review may lie against a preliminary decision not affecting legal rights; and in the circumstances of this particular case, the House of Lords found that the words 'from the date when the grounds of the application first arose' refer to the date when the planning permission was granted ie, from the grant of the planning permission on 12 May 2000 and not from the resolution of 15 September 1999.

[57] With due respect to the learned counsel for the applicants, having combed the rationale of the House of Lords' judgment, I am of the view the statement "This part of the decision was affirmed by the House of Lords at para 42 ..." is not completely true. Whilst I agreed that Lord Steyn said "Such a view would also be in tension with the established principle that judicial review is a remedy of last resort", but His Lordship did not affirm the corollary in the passage quoted from the Court of Appeal judgment of Richards J by learned counsel for the applicants at para. 14 "It follows, as it always does when a potential applicant for judicial review expeditiously seeks a reasonable way of resolving the issue without litigation, that the court will lean against penalizing him for the passage of time and will where appropriate enlarge time if the alternative expedient fails. Thus potential applicants should not overlook the possibility of going first to the local authority's monitoring officer under s. 5 of the Local Government and Housing Act 1989; though they need not put up with undue delay in obtaining a response. Equally, an arguably premature application can often be stayed or adjourned to await events".

[58] I agreed with the 2nd respondent this present case can be distinguished from *R (on the application of Burkett and another) (supra)* as the decision given by 1st respondent on 13 January 1997 was final and not subjected to any condition precedent.

[59] Learned counsel for the 2nd respondent submitted the applicants' contention that they tried to resolve the dispute out of court is misconceived. I find there is merit in the 2nd respondent's submission for the reasons ventilated:

(a) the 2nd respondent had at all material times acted and/or responded promptly to any concern of the residents of Bukit Koman pertaining to its GIL Project. A comparison of the conduct of the parties is depicted in the table drawn by the 2nd respondent at para. 72 pp. 58 to 60 B3; and

(b) on or about 29 August 2007, Pahang Local Government and Environmental Committee Chairman Dato' Hoh Khai Mun arranged a briefing with regard to the cyanide issue. The briefing was conducted by the State Department of

Environment ('DOE') Director-General Encik Hassan and Department of Minerals and Geosciences Director General Datuk Zulkifli Abu Bakar. Members of both the Residents Committee and Anti-Cyanide Committee were invited. However, members of the Anti-Cyanide Committee did not attend in protest. The above briefing was reported in Nanyang East Coast Edition (exh. RAGM-39 in 2nd respondent's 1st affidavit).

[60] The 2nd respondent contended extension of time ought not to be granted as the 2nd respondent would suffer severe prejudice on the grounds:

(a) In reliance on the approval of the EIA Report handed down by the 1st respondent on 13 January 1997, to date, the 2nd respondent has spent approximately RM80 Million for the development of the project since 1996;

(b) The 2nd respondent's holding company, Peninsular Gold Limited has been promoting Malaysia as a regional player in the gold market;

(c) The 2nd respondent had proceeded with this project on the premise that there were no objections by the local residents prior to its implementation in 1999;

(d) The sunk costs relating to the construction of the Phase 2 of the CIL project runs into the millions of Ringgit;

(e) It was only premised on the approval of the EIA Report on 13 January 1997, that the 2nd respondent commenced Phase 1 of the said project and has now reached Phase 2;

(f) Premised on the approval of the EIA Report on 13 January 1997, the 2nd respondent has entered into agreements with third parties relating to the construction and development of the CIL Plant and the CIL project;

(g) There would be a delay in the completion of the construction of the said plant such the 2nd respondent and/or the Peninsular Gold Limited group as a whole would be placed in financial ruin and possibly liable to claims from third parties.

[61] The applicants opposed arguing (i) the CIL project only began in 2007, by which time the 2nd respondent was very much aware of the specific objections of the residents of Kampung Koman and cannot choose to plead the law in aid of its wrongdoings; and (ii) 2nd respondent failed to tender any evidence to substantiate its averments and its statements ought to be rejected.

[62] The 2nd respondent has shown proof:

(a) the 2nd respondent has valid mining interests and rights to ML1669 as per the endorsement at p. 2 of the said Mining Lease (top) "Akay Holdings Sdn Bhd - Surat Serbanika PN: 401/1996 Jil. 37 Fol. 18 Kesemua bahagian Akay Holdings Sdn Bhd kepada Raub Australian Gold Mining Sdn Bhd selama 6 tahun dari 31 Julai 1996 hingga 30 Julai 2002 mengikut Mining Enactment 1996 s. 36(l) Didaftarkan pada 1 Ogos 1996 jam 10.50 pagi". It is to be noted that period commenced from 31 July 1996;

(b) there is evidence *vide* the statutory declarations of some of the residents (para. 46 above) that the 2nd respondent had proceeded with the project on the premise there were no objection prior to its implementation in 1999;

(c) as at June 1998, the entire project costs RM30 million (exh. RAGM18 in 2nd respondent's 1st affidavit); it would not be unreasonable to expect RAGM since the approval of the EIA Report on 13 January 1997 to have incurred approximately RM80 million till to date, (6 May 2008 - date of affirmation of the affidavit);

(d) the 2nd respondent denied that funds for the construction of the CIL plant were raised only in 2005 with the listing of Peninsular Gold Ltd in the London Stock Exchange as there is an announcement dated 9 August 2007. It can be noted and in particular the sentence "All guarantees, securities and undertakings given to CIMB Bank Berhad in respect of the loans to RAGM and SEREM are in the process of being released', shows that the 2nd respondent did receive loan from local bank (CIMB) (exh. RAGM-62 in 2nd respondent's 2nd affidavit).

[63] As far as the 1st respondent is concerned in relation to the issue whether there is good reason to allow the applicants' application for extension of time *vis-a-vis* the 1st decision only, in terms of the law governing such an application, the learned SFC has taken the same position as that taken by the 2nd respondent The 1st respondent submitted there is no good reason to justify any extension and there was insufficient material placed before the court warranting the court to exercise its discretion in the applicants' favour; and there was inordinate delay as there was a lapse of ten years.

[64] For all the reasons adumbrated above, the court made the order as per the terms referred in para. 1 above.