REKAPACIFIC BHD

v.

SECURITIES COMMISSION & ANOR & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NOS: W-02-845-2002,
W-04-151-2002 & W-02-231-2003]
27 NOVEMBER 2004

ADMINISTRATIVE LAW: *Judicial review - Application for - Discovery - Circumstances in which discovery may be permitted in judicial review proceedings*

ADMINISTRATIVE LAW: *Judicial review - Application for - Cross-examination - Circumstances in which cross-examination may be permitted in judicial review proceedings*

ADMINISTRATIVE LAW: *Judicial review - Application for - Interlocutory relief - Restraints*

ADMINISTRATIVE LAW: *Judicial review - Application for - Discovery - Application for discovery dismissed by first instance judge - Material required by applicant wholly irrelevant to application for judicial review - Relevant material already with applicant - Whether appellate intervention justified*

Rekapacific, a public listed company was de-listed by the Stock Exchange for alleged breaches of listing rules. It appealed unsuccessfully to the Committee of the Stock Exchange ('Exchange'). It also lodged a parallel appeal to the Securities Commission. That appeal was not considered as the Commission left the matter to be dealt with by the Exchange. Rekapacific then took out an application for judicial review. Several voluminous affidavits were delivered by the parties. In the course of those proceedings it applied for discovery of documents and later to interrogate the respondents and to cross-examine certain persons. The High Court refused both applications. These refusals formed the subject matter of the first and second appeals. The High Court also granted a stay of the judicial review proceedings pending the appeals and the Exchange appealed. This constituted the third appeal.

Held (dismissing the first two appeals but allowing the third appeal) Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] At common law, discovery, whether of documents or by way of interrogatories were procedurally not available in an application for prerogative remedies. It is only in very rare cases that either cross-examination or discovery or both should be permitted in judicial review proceedings. This is because questions of fact are rarely in dispute in judicial review proceedings. However, the judicial review court would be justified in ordering cross-examination if there were any essential or fundamentally important questions of fact that were in serious dispute. (p 114 b-f)

[2] It is too well settled that where a public law decision is impugned on the ground of Wednesbury unreasonableness or of proportionality it is for the public decision-maker to provide reasons to justify his decision. Where a public decision-maker fails to provide reasons, then the court is entitled to conclude that he has no good reason for making the decision in question. Since it is for the public decision-maker to give reasons for his decision, it is open to a court for the just disposal of a judicial review application to require the decision-maker to make discovery of the material on which he based his decision. This would assist the court to determine whether any reasonable person similarly circumstanced as the decision-maker in question would have acted in like fashion. (pp 114 g-h, 115 a-h & 116 a)

[3] The restraint suggested by Lord Diplock in *O'Reilly v. Mackman* [1983] 2 AC 237 in relation to ordering cross-examination and that suggested by Lord Scarman in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 in relation to making an order for discovery should be adopted by the Malaysian courts when dealing with applications for these interlocutory reliefs in the course of an application for judicial review. (p 119 g-h)

[4] In the instant case, all relevant material based on which the Exchange arrived at its decision was already with Rekapacific. There was therefore no necessity to order discovery. The further material which Rekapacific required the Exchange to make discovery related to other companies; which were wholly irrelevant to Rekapacific's application for judicial review. It was also clear from the judgment of the learned High Court judge that he adopted the approach recommended by the English authorities when exercising his discretion whether to grant or to refuse the appellant's applications. In the circumstances the Court of Appeal was

unable to discern any appealable error in the way in which discretion was exercised. The appellant had failed to establish a case for appellate correction that entitled the Court of Appeal to exercise an independent discretion. The first and second appeals therefore failed. (p 120 a-d)

[5] With regard to the third appeal, it was clear that the High Court judge misunderstood the nature of the order he was asked to make. He was of the view that if a stay of the judicial review proceedings were not granted then Rekapacific would suffer injury through de-listing, which has been stayed pending disposal of those proceedings. However it was not the case of Rekapacific that it would suffer irreparable harm if a stay were not granted. Further, the shareholders of Rekapacific would suffer no loss of their investment by reason of the de-listing since Rekapacific was plainly insolvent. The learned judge was therefore plainly wrong in directing a stay. (p 120 e-f)

*[**Bahasa Malaysia** Translation Of Headnotes*

Rekapacific, sebuah syarikat yang tersenarai di Bursa Saham Kuala Lumpur, telah dibatalkan penyenaraiannya kerana didakwa melanggar syarat-syarat penyenaraian. Ia merayu kepada Jawatankuasa Bursa Saham ('Bursa') tetapi tidak berjaya. Pada ketika yang sama ia juga merayu kepada Suruhanjaya Sekuriti. Rayuan tersebut bagaimanapun tidak dipertimbang oleh kerana Suruhanjaya menyerahkan kepada Bursa untuk menangani perkara yang berbangkit. Rekapacific kemudian memfail permohonan untuk semakan kehakiman. Berjilid-jilid afidavit telah dikemukakan oleh pihak-pihak. Ketika prosiding-prosiding tersebut sedang berjalan, Rekapacific memohon untuk penzahiran dokumen-dokumen dan kemudian untuk menyoal-siasat responden dan memeriksa balas orang-orang tertentu. Mahkamah Tinggi menolak kedua-dua permohonan. Penolakan tersebut membawa kepada rayuan pertama dan kedua. Mahkamah Tinggi juga telah menggantung prosiding semakan kehakiman sementara menunggu rayuan-rayuan dan Bursa merayu. Rayuan Bursa merupakan rayuan ketiga di sini.

Diputuskan (menolak rayuan pertama dan kedua tetapi membenarkan rayuan ketiga)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Di sisi common law, penzahiran, sama ada penzahiran dokumen ataupun melalui pemeriksaan, secara prosedurnya, tidak boleh dibuat dalam suatu permohonan untuk remedi-remedi prerogatif. Pemeriksaan balas atau penzahiran atau kedua-duanya hanya dibenarkan dalam kes-kes tertentu prosiding semakan kehakiman dan adalah amat terhad. Ini kerana persoalan fakta jarang menjadi pertikaian dalam prosiding-prosiding semakan

kehakiman. Walau bagaimanapun, sebuah mahkamah semakan kehakiman mempunyai justifikasi untuk memerintah pemeriksaan-balas jika terdapat pertikaian mengenai persoalan-persoalan fakta yang benar-benar penting.

[2] Sudah menjadi sesuatu yang diterima bahawa di mana suatu keputusan undang-undang awam dicabar atas alasan ketidakmunasabahan Wednesbury atau keberkadaran, ia adalah terletak atas pembuat keputusan awam untuk menjustifikasikan keputusannya. Di mana si pembuat keputusan awam gagal memberi sebab musabab, maka mahkamah boleh membuat rumusan bahawa beliau tidak mempunyai alasan kukuh untuk membuat keputusan itu. Oleh kerana beban terletak atas pembuat keputusan awam untuk memberi alasan bagi keputusannya, maka adalah terbuka bagi mahkamah, demi untuk memutuskan permohonan semakan kehakiman secara adil, untuk meminta pembuat keputusan itu membuat penzahiran akan bahan-bahan di atas mana beliau mengasaskan keputusannya. Ini akan membantu mahkamah untuk memutuskan sama ada seseorang yang munasabah, jika berhadapan dengan halkeadaan serupa, akan bertindak dengan cara yang sama.

[3] Kawalan seperti yang dikata oleh Lord Diplock dalam *O'Reilly v. Mackman* [1983] 2 AC 237 dalam hubungan dengan perintah pemeriksaan-balas dan oleh Lord Scarman dalam *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 dalam hubungan dengan perintah untuk penzahiran, harus diterimapakai oleh mahkamah-mahkamah di Malaysia apabila berurus dengan permohonan untuk relif-relif interlokutori sebegini, yang dibuat sewaktu perbicaraan permohonan semakan kehakiman sedang berjalan.

[4] Dalam kes semasa, kesemua bahan-bahan relevan di atas mana Bursa membuat keputusannya sudahpun berada di tangan Rekapacific. Dengan itu tiada alasan untuk memerintahkan penzahiran. Bahan-bahan tambahan yang Rekapacific mengkehendaki Bursa untuk membuat penzahiran adalah berhubung-kait dengan syarikat-syarikat lain, yang sama sekali tidak relevan kepada permohonan semakan kehakiman Rekapacific. Adalah juga jelas dari penghakiman yang arif hakim Mahkamah Tinggi bahawa beliau telah menerimapakai pendekatan yang dianjurkan oleh autoriti-autoriti Inggeris apabila melaksanakan budi bicaranya sama ada untuk membenar atau menolak permohonan-permohonan perayu. Dengan hal yang demikian, Mahkamah Rayuan tidak dapat melihat apa-apa pun kesilapan yang boleh

dirayu berkaitan cara budi bicara tersebut dilaksanakan. Perayu gagal membuktikan suatu kes untuk pembetulan di peringkat rayuan bagi membolehkan Mahkamah Rayuan melaksanakan budi bicaranya secara bebas. Rayuan pertama dan kedua dengan itu gagal.

[5] Berkaitan rayuan ketiga, adalah jelas bahawa hakim Mahkamah Tinggi telah tersalah faham akan sifat perintah yang dipohon kepada beliau. Beliau berpendapat jika sekiranya penggantungan prosiding semakan kehakiman tidak dibenarkan, maka Rekapacific akan mengalami kerugian melalui pembatalan penyenaraian. Bagaimanapun, kes Rekapacific bukanlah bahawa ia akan mengalami kerugian tak boleh dipulih jika penggantungan tidak dibenarkan. Selain itu, pemegang-pemegang saham Rekapacific tidak akan mengalami kerugian pelaburan ekoran pembatalan penyenaraian, kerana Rekapacific sememangnya sudah insolven. Yang arif hakim dengan itu jelas silap apabila memerintahkan penggantungan.]

Case(s) referred to:
Barnard v. National Dock Labour Board [1953] 2 QB 18 ***(refd)***
Pahang South Union Omnibus Co Bhd v. Minister of Labour and Manpower & Anor [1981] CLJ 83; [1981] CLJ (Rep) 74 FC ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, s. 2
Rules of the High Court 1980, O. 53 r. 6

Other source(s) referred to:
Richard Gordon, *Judicial Review and Crown Office Practice*, pp 254-257

(Civil Appeal No: W-02-845-2002)
For the appellant - Malik Imtiaz Sarwar (Richard Yeoh with him); M/s Ranjit Ooi & Robert Low
For the 1st respondent - Tommy Thomas; M/s Tommy Thomas
For the 2nd respondent - N Navaratnam (Brendan Siva & Selena Chow with him); M/s Kadir, Andri, Aidham & Partners

(Civil Appeal No: W-04-151-2002)
For the appellant - Malik Imtiaz Sarwar (Richard Yeoh with him); M/s Ranjit Ooi & Robert Low
For the 1st respondent - Tommy Thomas; M/s Tommy Thomas
For the 2nd respondent - N Navaratnam (Brendan Siva & Selena Chow with him); M/s Kadir, Andri, Aidham & Partners

(Civil Appeal No: W-02-231-2003)

For the appellant - N Navaratnam (Brendan Siva & Selena Chow with him); M/s Kadir, Andri, Aidham & Partners

For the respondent - Malik Imtiaz Sarwar (Richard Yeoh with him); M/s Ranjit Ooi & Robert Low

[Appeal from High Court, Kuala Lumpur; Judicial Revision No: R2-34-135-2001]

Reported by Andrew Christopher Simon

JUDGMENT

Gopal Sri Ram JCA:

There are three appeals before us. They are civil appeal Nos. W-02-845-02 ("the first appeal"), W-04-151-02 ("the second appeal") and W-02-231-03 ("the third appeal"). The appellant in the first and second appeals is Rekapacific Berhad ("Rekapacific) while the Securities Commission and the Kuala Lumpur Stock Exchange are the respondents. In the third appeal, it is the Stock Exchange which is the appellant while Rekapacific is the respondent. The facts relevant to all these appeals are as follows.

Rekapacific is a public listed company. It was de-listed by the Stock Exchange for alleged breaches of listing rules. It appealed unsuccessfully to the Committee of the Stock Exchange. It also lodged a parallel appeal to the Securities Commission. But that appeal was not considered as the Commission left the matter to be dealt with by the Exchange. Rekapacific then took out an application for judicial review. Several voluminous affidavits were delivered by the parties. Then, in the course of those proceedings it applied for discovery of documents and later to interrogate the respondents and to cross-examine Md Nor Ahmad, the deponent of an affidavit delivered in opposition to the application for judicial review and one Selvarani Rasiah, a person mentioned by Md Nor Ahmad in his affidavit. The High Court refused both applications and this forms the subject matter of the first and second appeals. The High Court then granted a stay of the judicial review proceedings pending these appeals and that forms the subject matter of the third appeal. At the conclusion of the arguments on 22 November 2004, we dismissed the first and second appeals but allowed the third appeal.

In giving our reasons for our decision we think it appropriate to begin by looking at the nub of the learned judge's reasoning for refusing the applications for discovery, the administration of interrogatories and for cross-examination. This is what he said:

> All the interlocutory applications share a common theme. They seek to gain access to information that is not relevant and was not available to and not considered by KLSE during its decision making process leading up to its decision to de-list the securities of the Applicant. The fact remains that the documents and information that the Applicant seeks largely relate to matters which were not before the KLSE and were therefore not taken into consideration by the KLSE in arriving at the decision to de-list the Applicant. Even if these documents are relevant, it is not necessary for the fair disposal of this matter.

The issue before us is whether the learned judge was wrong in adopting the aforesaid approach. Before addressing that question we think it useful to discuss the scope and practical effect of r. 6 of the new O. 53 that permits discovery and cross-examination. The first point to note is that these are new enabling provisions. As a matter of procedural history, *certiorari* and the other prerogative remedies were proceedings on the Crown side of the Queen's Bench Division and were not therefore civil proceedings. Section 2 of the Government Proceedings Act 1956 gives statutory recognition of this by excluding applications for prerogative remedies from the definition of "civil proceedings" in that Act. The consequence was that at common law, discovery, whether of documents or by way of interrogatories were procedurally not available in an application for prerogative remedies. So, we see Denning LJ saying in *Barnard v. National Dock Labour Board* [1953] 2 QB 18 that "In *certiorari* there is no discovery, whereas in an action for a declaration there is."

The second point that needs to be made – and made quite emphatically – is that it is only in very rare cases that either cross-examination or discovery or both should be permitted in judicial review proceedings. This is because questions of fact are rarely in dispute in judicial review proceedings. Of course, if there are any essential or fundamentally important questions of fact that are in serious dispute then the judicial review court would be entirely justified in ordering cross-examination to enable it to make the relevant finding of fact.

The same may be said of applications for discovery. It is now too well settled that where a public law decision is impugned on the ground of Wednesbury unreasonableness or of proportionality (as is the position in the present instance) it is for the public decision-maker to provide reasons to justify his decision. And where a public decision-maker fails to provide reasons, then the court is entitled to conclude that he has no good reason for making the decision in question. No authority is required for this proposition, but if there is need to cite authority, then it suffices to quote from the judgment of the Federal Court delivered by Abdoolcader SCJ in *Pahang South Union Omnibus Co Bhd v. Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 where his Lordship said:

The scope of judicial review is narrower and limited and it would be useful and apposite to reproduce in extenso the delightfully lucid and comprehensive exposition on this aspect by Lord Denning MR, in *General Electric Co Ltd v. Price Commission* [1975] ICR 1, 12 (at p. 12) when he stresses the supervisory nature of the jurisdiction:

> Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves make the original findings of fact. They will not themselves embark on a re-hearing of the matter: see *Healey v. Minister of Health* [1955] 1 QB 221. But, nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly: see *In re HK (An Infant)* [1967] 2 QB 617, 630 and *Reg v. Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 QB 417. The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation: see *Punton v. Ministry of Pensions and National Insurance* [1963] 1 WLR 186. And if the decision-making body has gone wrong in its interpretation, they can set its order aside: see *Ashbridge Investments Ltd v. Minister of Housing and Local Government* [1965] 1 WLR 1320. (I know of some expressions to the contrary, but they are not correct.) If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere: see *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1007, 1061. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding – so unreasonable that a reasonable person would not have come to it – then again the courts will interfere: see *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223. If the decision-making body goes outside its powers, or misconstrues the extent of its powers, then, too, the courts can interfere: see *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside: see *Sydney Municipal Council v. Campbell* [1925] AC 338. *In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons – in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly:* see *Padfield*'s case [1968] AC 997, 1007, 1061.

Since it is for the public decision-maker to give reasons for his decision, it is open to a court for the just disposal of a judicial review application to require the decision-maker to make discovery of the material on which he based his decision. This would assist the court to determine whether any reasonable person similarly circumstanced as the decision-maker in question would have acted in like fashion.

Further, the general rule as to interrogatories is that:

> although interrogatories must be confined to matters which are in issue, they may under some circumstances extend to facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue. (See *Marriott v. Chamberlain* [1886] 17 QBD 154; *Osram Lamp Works Ltd v. Gabriel Lamp Co* [1914] 2 Ch 129. In considering whether the interrogatories should be allowed or not the court must consider whether they are designed to obtain admissions of facts which will reduce the issues, shorten the length of the trial and thus save costs. (per Gill CJ (Malaya) in *Sheikh Abdullah bin Sheikh Mohamed v. Kang Kock Seng* [1975] 1 MLJ 89.

In an application for judicial review, the "matters which are in issue" and "facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue" are *ex necessitae rei* confined to the grounds of review set out in the judgment of Lord Denning quoted in para. 6 of this judgment. And those are all matters which may, and in the vast majority of cases, must, be disposed of without the aid of discovery.

The current practice in England after the amendment to their O. 53 is set out at pp. 254-257 of Richard Gordon's work *"Judicial Review and Crown Office Practice"* which is the *locus classicus* on the subject:

> Cross-examination
>
> Formerly it was exceptionally rare for applications to be made, or leave granted, for cross-examination in judicial review proceedings. In *O'Reilly v. Mackman* [1983] 2 AC 237 however, Lord Diplock, at pp. 282-283, took the opportunity to emphasise that:
>
> > whatever may have been the position before the rule was altered in 1977 in all proceedings for judicial review that have been started since that date the grant of leave to cross-examine deponents upon applications for judicial review is governed by the same principles as it is in actions begun by originating summons, it should be allowed whenever the justice of the particular case so requires.

Notwithstanding the generality of this statement there have been indications (both pre and post *O'Reilly v. Mackman*) that the court will be slow to permit cross-examination under O. 53, Note, for example, the comments of Watkins LJ in *R. v. Jenner* [1983] 1 WLR 873 as to the unsuitability of judicial review for assessing questions of fact. For rare cases where cross-examination has been allowed see: *R v. Waltham Forest LAC, ex p. Baxter* [19991 QB 419; *R v. Derbyshire CC, ex p. The Times Supplements* [1991] COD 129.

In *George v. Secretary of State for the Environment* [1979] 77 LGR 689, Lord Denning MR observed that it would only be upon rare occasions that the interests of justice would require that leave to cross-examine be given. There were similar dicta in *R v. Inland Revenue Commissioners, ex p. Rossminster Ltd* [1980] AC 952 at 1027, and *R v. Board of Visitors of Albany Prison, ex p. Fell* (unreported 8 July 1981). In *R v. Home Secretary, ex p. Khawaja* [1984] AC 74 it was said that the interests of justice would rarely require the attendance of an overseas deponent for cross-examination. In *R v. Home Secretary, ex p. Patel* [1986] Imm AR 208 Webster J deprecated the use of cross-examination of witnesses who needed an interpreter or whose first language was not English, (his decision was upheld at [1986] Imm AR 515).

Even in *O'Reilly v. Mackman* Lord Diplock qualified the effect of his observations by indicating that the nature of the issues that normally arise on judicial review rarely requires cross-examination. The only expressly recognised exceptions to this (see: [1983] 2 AC 237 at 282) were alleged procedural unfairness or a breach of natural justice. He warned that:

> ... the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in *Edwards v. Bairstow* [1956] AC 14, 36; and to allow cross-examination presents the court with a temptation, not always easily resisted, to substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament. ...

These dicta, whilst rightly underlining the essence of the review process, appear to posit a somewhat narrow test for the exercise of the court's discretion to allow cross-examination. It is possible to envisage other situations where, applying Lord Diplock's test, the justice of a particular case may require cross-examination. In particular a conflict of evidence on the affidavits before the court may need to be resolved in order to investigate the factors affecting a decision and whether there has been an abuse of discretion. See eg, the observations of Woolf J in *R v. Home Secretary, ex p. Rouse and Shrimpton* (unreported, 13 November 1985). Contrast, though, *R v. Reigate JJ., ex p. Curl* [1991] COD 66 where it was held that disputes as to events in magistrates' courts did not generally make cross-examination desirable.

Discovery and inspection

Parties seeking discovery and inspection of documents may experience more difficulty than in an ordinary action, notwithstanding the incorporation of O. 24 into judicial review proceedings.

Whereas in most actions discovery occurs automatically under O. 24 rr. 1 and 2 there is no inherent right, in applications for judicial review, to orders for discovery or inspection.

The retention of control by the court may indicate that such orders will be more difficult to obtain in cases under O. 53. Certainly this was the view of the Court of Appeal in *R v. Secretary of State for the Home Office, ex p. Harrison* (unreported, 10 December 1987) where it was stated that on an application for judicial review discovery would be appropriate in fewer cases and was likely to be more circumscribed.

In general, the following principles appear to govern the grant or refusal of discovery under O. 53:

(a) Discovery will not be ordered so as to make good defects in the applicant's evidence, (*R v. Inland Revenue Commissioners, ex p. Taylor* [19881 COD 6 1; *R v. Secretary of State for Education, ex P. J* [1993] COD 146; *R v. Inland Revenue Commissioners, ex p. National Federation of Small Employed and Small Businesses Ltd* [1982] AC 617 at p. 635H).

(b) One will seldom obtain full private law type discovery in a Wednesbury challenge, (*R v. Secretary of State for the Environment, ex p. Smith* [1988] COD 3).

(c) By contrast, discovery will be ordered under O. 53 where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the matter, (within the meaning of O. 24 r. 8), (see *R v. Inland Revenue Commissioners, ex p. J. Rothschild Holdings Plc* [19871 STC 163; *R v. Governor of Pentonville Prison, ex p. Herbage (No. 2)* [1987] QB 1077).

(d) Discovery will also be ordered to go behind the contents of affidavits if there was some matter before the court which suggested that the contents of the affidavits were not accurate, (*Re H, The Guardian*, 17 May 1990). By contrast, discovery will not be ordered where there is no reason to doubt the bona fides or accuracy of the reasons given on affidavit, (see *R v. Secretary of State for the Environment, ex p. Islington L.B.C.* [1992] COD 67; *R v. Secretary of State for Health, ex p. L.B. of Hackney* [1994] COD 432).

The most authoritative pronouncement remains that of Lord Scarman in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 654. In relation to discovery under O. 53 he indicated that:

> ... Upon general principles, discovery should not be ordered unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty; and it should be limited strictly to documents relevant to the issue which emerges from the affidavits.

The second limb of this statement is unexceptionable. It is a guiding rule that discovery and inspection must be restricted to matters relevant to an existing dispute. Indeed, in judicial review proceedings it has been held that discovery must be central to the application, (see *R v. Secretary of State for the Home Department, ex p. Benson* [1989] COD 329).

It is, however, questionable whether, as a preliminary requirement, the court must attempt an evaluation of merits. Interlocutory relief will be granted only after leave has been given to apply for judicial review. In that sense therefore an applicant seeking discovery has, *ex hypothesi*, an arguable case for asserting a breach of public duty. In *R v. Secretary of State for Transport, ex p. ABH Road Safety Limited* [1993] COD 150 Schiemann J left open the possibility that, in an appropriate case, the grant of leave in judicial review may sometimes be taken to establish a *prima facie* ground of irrationality, thereby justifying an order for discovery. Certainly, following the grant of leave it is difficult to see what else the court can do when considering discovery/inspection beyond determining whether potentially discoverable documents are relevant to the issues between the parties.

Given the two-stage procedure under O. 53 it may be that Lord Scarman was merely emphasising the overall hurdles to be surmounted before discovery could become available. Even if these hurdles are surmounted the doctrine of public interest immunity would appear to have more scope, having regard to the nature of judicial review, as a means of opposing an order for discovery in O. 53 proceedings.

We are of the view that the restraint suggested by Lord Diplock in *O'Reilly v. Mackman* in relation to ordering cross-examination and that suggested by Lord Scarman in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd* in relation to making an order for discovery should be adopted by our courts when dealing with applications for these interlocutory reliefs in the course of an application for judicial review.

Returning to the present instance, we would make the following observations. First, this is a case in which all relevant material based on which the Stock Exchange arrived at its decision is already with Rekapacific. There is therefore no necessity to order discovery. Second, the further material of which Rekapacific requires the Stock Exchange to make discovery relates to other companies which are on an objective view of the matter wholly irrelevant to Rekapacific's application for judicial review. Third, it is clear from the passage in the judgment of the learned judge already quoted that he adopted the approach recommended by the English authorities when exercising his discretion whether to grant or to refuse the appellant's applications. In these circumstances we are unable to discern any appealable error in the way in which discretion was exercised here. It must not be forgotten that in appeals of this sort, the initial jurisdiction of this court is one of review only and that we do not have an independent discretion of our own to exercise. It is only after an appellant has established a case for appellate correction that this court becomes entitled to exercise an independent discretion. That is certainly not the case here. The first and second appeals therefore fail.

As regards the third appeal, it has been amply demonstrated by the appellant therein that the learned judge misunderstood the nature of the order he was asked to make. Hence we find him saying that if a stay of the judicial review proceedings were not granted then Rekapacific would suffer injury through de-listing, which has been stayed pending disposal of those proceedings. But it was not the case of Rekapacific that it would suffer irreparable harm if a stay were not granted. Further, the de-listing of Rekapacific which will take effect if and when it fails in those proceedings would cause it or its shareholders no harm in real terms as it was plainly insolvent. Put another way, the shareholders of Rekapacific would suffer no loss of their investment by reason of the de-listing. The learned judge was therefore plainly wrong in directing a stay.

Before we conclude we must say in fairness to counsel for the appellant in the first and second appeals that as he began presenting his case, it became fairly obvious that his client's complaints relate to unfair treatment by the respondents to those appeals. As we have already said, the nature of learned counsel's case is that the decision made by the second respondent is one which no reasonable public decision-maker would make. Even a cursory perusal of the voluminous affidavits and exhibits delivered in this case show that the appellant has more than sufficient material to advance its case on the merits. But we must not, by our comment, to be taken as saying that the appellant

will succeed on the merits of its application for judicial review. It may not. All that we are saying is that there is adequate material on which the appellant in the first and second appeals may proceed without the necessity of cross-examination or discovery.

For the reasons already given, the first and second appeals were dismissed and the third appeal was allowed. The respondents in the first and second appeals were awarded the costs of those appeals but with the rider that only one item of getting up was to be permitted by the taxing registrar. As for the third appeal, this was allowed with costs. The appropriate orders as to the deposits in court were made.

My learned brothers Abdul Aziz bin Mohamad and Mohd Ghazali bin Mohd Yusoff, JJCA have seen this judgment in draft and have expressed their agreement with it.