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Suruhanjaya Persaingan v Myteksi Sdn Bhd & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-425–08 OF 2023
NANTHA BALAN, LIM CHONG FONG AND AHMAD KAMAL JJCA
19 MARCH 2025

C *Administrative Law — Judicial review — Certiorari — High Court allowed respondents' application for judicial review against proposed decision of Malaysian Competition Commission — Whether proposed decision constituted final decision that was amenable to judicial review — Whether respondents attempted to by-pass or supplant domestic remedy of statutory appeal provided for in Competition Act* D *2010 ('Act 712') — Whether there was provision to appeal against proposed decision made under s 36(1) of Act 712 — Whether investigations had been conducted professionally — Whether respondents had been fully aware and appraised of nature of investigations — Whether proposed decision tainted with procedural impropriety — Competition Act 2010 ss 18(1)(a), (b), 35, 36(1), 37,* E *38, 39 & 40 — Rules of Court 2012 O 53*

The appellant in the present appeal was the Malaysian Competition Commission, the first respondent was a company providing services known as 'Grab Taxi' and 'Grab Food', the second respondent was a company providing F 'Grab Car', 'Grab Express', 'Grab Ads', 'Grab Share' and 'Grab for Business', and lastly, the third respondent was the shareholder of both the first respondent and the second respondent. In year 2018, the appellant had investigated complaints alleging that the second respondent, in abuse of its dominant market position, imposed unfair pricing practices through discriminatory G conduct towards Grab taxi drivers in favour of Grab car drivers ('2018 complaints'). Subsequently in year 2019, the appellant had conducted investigation of a complaint from a Grab driver that the second respondent banned him from driving for Grab for 'promoting other e-hailing services to riders' ('2019 complaint'). Following these investigations, the appellant had H issued its proposed decision ('the proposed decision') which imposed a financial penalty of RM86,772,943.76 on all the respondents, failing which they would be subjected to a daily penalty of RM15,000 from the date of service of the proposed decision pursuant to s 36(1) of the Competition Act 2010 ('Act 712'). Aggrieved, the respondents filed a judicial review application I pursuant to O 53 of the Rules of Court 2012 to quash the proposed decision. The High Court found in favour of the respondents, hence, the present appeal by the appellant. The appellant submitted that: (a) the judicial review application was premature because the proposed decision was not a final decision; (b) the respondents must not by-pass or supplant the domestic

remedy of statutory appeal provided for in Act 712; and (c) the investigations had been conducted professionally and the respondents had been fully aware and appraised of the nature of the investigations at all material times, as such, the proposed decision was neither illegal nor ultra vires Act 712.

Held, dismissing the appeal and affirming the decision of the High Court with costs of RM50,000 to be paid by the appellant to the respondents subject to allocatur:

(1) The issue of whether the proposed decision constituted a final decision that was amenable to judicial review had been duly considered by the Court of Appeal in the case of *MyTeksi Sdn Bhd & Ors v Competition Commission* [2022] 6 MLJ 767 ('the said case'). The court in the present appeal was in full agreement with the legal propositions in the said case and found that the learned High Court judge did not commit any appealable error in relying on and adopting the same in paras 57 to 60 of the grounds of judgment ('the GOJ'). Put simply, the judicial review application commenced by the respondents was not premature (see paras 24–27).

(2) In respect of the issue of by-passing or supplanting the domestic remedy of statutory appeal, the court had carefully read ss 35 to 40 of Act 712 and found that there was no provision to appeal on a proposed decision made under s 36(1) of Act 712. In other words, there was no internal remedial procedure available, contrary to what was alluded to by the appellant. Consequently, the court did not find that the learned High Court judge committed any appealable error in paras 61 and 62 of the GOJ (see paras 28–29).

(3) The appellant was obliged to ensure a proper investigation was carried out pursuant to Part III of Act 712 on investigation and enforcement. Consequently, in issuing the proposed decision, the appellant must have given prior notification to the respondents regarding the investigation, including the subject matter thereof. Additionally, the appellant's power to request information, documents, and statements under s 18(1)(a) and (b) of Act 712 must be exercised reasonably and in accordance with the Act. Thus, the investigation by the appellant must be predicated by a third-party complaint and tied thereto. The appellant must thereafter notify the respondents and the appellant may thereafter require any person whom the appellant believed to be acquainted with the facts and circumstances of the case to provide the information or document which was relevant to the investigation and/or making a statement providing an explanation or information (see paras 31–32).

(4) Based on the evidence, the appellant had investigated the 2018 complaints, including notifying the respondents and obtaining their responses between February and July 2019. However, there was no

A evidence that the appellant notified the respondents regarding the investigation of the 2019 complaint. The appellant had not provided a reasonable explanation for this omission. This was a critical issue, as it deprived the respondents of the opportunity to understand the precise complaint(s) against them. Despite the absence of a formal notification B regarding the 2019 complaint, the appellant requested information from the respondents between May and June 2019. Upon comparing the appellant's requests for information related to the 2018 complaints and the 2019 complaint, the court found that the latter was ambiguous and could not be meaningfully responded to. In such circumstances, the C court found that the appellant was cavalier in the carrying out of the investigation of the 2019 complaint against the respondents. This was unfair and constituted procedural impropriety (see paras 33 & 35).

[Bahasa Malaysia summary

D Perayu dalam rayuan semasa ialah Suruhanjaya Persaingan Malaysia, responden pertama ialah sebuah syarikat yang menyediakan perkhidmatan yang dikenali sebagai 'Grab Taxi' dan 'Grab Food', responden kedua ialah syarikat yang menyediakan 'Grab Car', 'Grab Express', 'Grab Ads', 'Grab Share' dan 'Grab for Business', dan yang terakhir, responden ketiga ialah E pemegang saham bagi kedua-dua responden pertama dan kedua. Pada tahun 2018, perayu telah menyiasat aduan-aduan yang mendakwa bahawa responden kedua, dalam penyalahgunaan kedudukan pasaran dominannya, mengenakan amalan penetapan harga yang tidak adil melalui perlakuan diskriminasi terhadap pemandu teksi Grab yang memihak kepada pemandu F kereta Grab ('aduan-aduan 2018'). Seterusnya pada tahun 2019, perayu telah menjalankan siasatan ke atas aduan seorang pemandu Grab bahawa responden kedua melarangnya memandu untuk Grab kerana 'mempromosikan perkhidmatan e-hailing lain kepada penunggang' ('aduan 2019'). Berikutan siasatan-siasatan ini, perayu telah mengeluarkan keputusan yang dicadangkan G ('keputusan yang dicadangkan') yang mengenakan penalti kewangan sebanyak RM86,772,943.76 ke atas semua responden, jika gagal mereka akan dikenakan penalti harian sebanyak RM15,000 dari tarikh penyampaian keputusan yang dicadangkan menurut s 36(1) Akta Persaingan 2010 ('Akta 712'). Terkilan, responden-responden memfailkan permohonan semakan kehakiman menurut H A 53 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan keputusan yang dicadangkan tersebut. Mahkamah Tinggi membuat dapatan yang memihak kepada responden-responden, justeru, rayuan semasa oleh perayu. Perayu berhujah bahawa: (a) permohonan semakan kehakiman tersebut adalah pramatang kerana keputusan yang dicadangkan tersebut bukanlah keputusan I muktamad; (b) responden-responden tidak boleh memintas atau menggantikan remedi domestik rayuan berkanun yang diperuntukkan dalam Akta 712; dan (c) penyiasatan telah dijalankan secara profesional dan responden-responden telah menyedari dan menilai sepenuhnya sifat penyiasatan tersebut pada setiap masa yang material, oleh itu, keputusan yang

dicadangkan tersebut tidak menyalahi undang-undang mahupun ultra vires Akta 712.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi dengan kos sebanyak RM50,000 yang perlu dibayar oleh perayu kepada responden-responden tertakluk kepada alokatur:

(1) Isu sama ada keputusan yang dicadangkan tersebut merupakan keputusan muktamad yang boleh disemak melalui semakan kehakiman telah dipertimbangkan dengan sewajarnya oleh Mahkamah Rayuan dalam kes *MyTeksi Sdn Bhd & Ors v Competition Commission* [2022] 6 MLJ 767 ('kes tersebut'). Mahkamah dalam rayuan semasa bersetuju sepenuhnya dengan cadangan undang-undang dalam kes tersebut dan mendapati hakim Mahkamah Tinggi yang bijaksana tidak melakukan apa-apa kekhilafan yang boleh dirayu apabila bergantung dan menerima pakai perkara yang sama dalam perenggan 57 hingga 60 alasan penghakimannya. Ringkasnya, permohonan semakan kehakiman yang dimulakan oleh responden-responden adalah tidak pramatang (lihat perenggan 24–27).

(2) Berkenaan dengan isu memintas atau menggantikan remedi domestik rayuan berkanun, mahkamah telah membaca dengan teliti ss 35 hingga 40 Akta 712 dan mendapati bahawa tidak terdapat peruntukan untuk merayu ke atas keputusan yang dicadangkan yang dibuat di bawah s 36(1) Akta 712. Dalam erti kata lain, tiada prosedur remedi dalaman yang tersedia, bertentangan dengan apa yang dihujahkan oleh perayu. Akibatnya, mahkamah tidak mendapati bahawa hakim Mahkamah Tinggi yang bijaksana melakukan apa-apa kekhilafan yang boleh dirayu dalam perenggan 61 dan 62 alasan penghakimannya (lihat perenggan 28–29).

(3) Perayu bertanggungjawab memastikan penyiasatan yang sewajarnya telah dijalankan menurut Bahagian III Akta 712 mengenai penyiasatan dan penguatkuasaan. Oleh yang demikian, dalam mengeluarkan keputusan yang dicadangkan tersebut, perayu mestilah telah memberi makluman terlebih dahulu kepada responden-responden berkenaan penyiasatan tersebut, termasuk hal perkaranya. Selain itu, kuasa perayu untuk meminta maklumat, dokumen, dan pernyataan di bawah s 18(1)(a) dan (b) Akta 712 perlulah dilaksanakan dengan munasabah dan mengikut Akta tersebut. Oleh itu, siasatan oleh perayu mestilah berdasarkan aduan pihak ketiga dan terikat dengannya. Perayu setelah itu hendaklah memberikan makluman kepada responden-responden dan kemudiannya perayu boleh menghendaki mana-mana orang yang perayu percaya mengetahui fakta dan keadaan kes untuk memberikan maklumat atau dokumen yang berkaitan dengan penyiasatan dan/atau membuat

kenyataan bagi memberikan penjelasan atau maklumat (lihat perenggan 31–32).

(4) Berdasarkan keterangan, perayu telah menyiasat aduan-aduan 2018 tersebut termasuk memaklumkan responden-responden dan mendapatkan jawapan mereka antara Februari hingga Julai 2019. Namun tiada keterangan bahawa perayu memaklumkan responden-responden berhubung siasatan bagi aduan 2019 tersebut. Perayu tidak memberikan penjelasan yang munasabah untuk peninggalan ini. Ini adalah isu kritikal, kerana ia menyekat responden-responden daripada peluang untuk memahami aduan yang tepat terhadap mereka. Walaupun dengan ketiadaan pemberitahuan rasmi berhubung aduan 2019 tersebut, perayu tetap meminta maklumat daripada responden-responden antara Mei dan Jun 2019. Setelah membandingkan permintaan perayu untuk mendapatkan maklumat berkaitan aduan-aduan 2018 dan aduan 2019 tersebut, mahkamah mendapati bahawa aduan 2019 tersebut adalah samar-samar dan tidak dapat dijawab secara bermakna. Dalam keadaan sedemikian, mahkamah mendapati perayu bersikap acuh tak acuh dalam menjalankan siasatan bagi aduan 2019 tersebut terhadap responden-responden. Ini adalah tidak adil dan merupakan ketidakwajaran prosedur (lihat perenggan 33 & 35).

Cases referred to

MyTeksi Sdn Bhd & Ors v Competition Commission [2022] 6 MLJ 767, CA (refd)

Myteksi Sdn Bhd & Ors v Suruhanjaya Persaingan [2023] MLJU 2142; [2023] CLJU 1921; [2023] 2 MLRA 697, HC (refd)

R (on the application of Shrewsbury and Atcham Borough Council and another) v Secretary of State for Communities and Local Government (Shropshire County Council, interested party) [2008] 3 All ER 548, CA (refd)

R (on the application of The Garden and Leisure Group Ltd) v North Somerset Council and another [2003] EWHC 1605, QBD (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 AMR 433, FC (refd)

Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150; [1981] CLJ 84, FC (refd)

Legislation referred to

Competition Commission Act 2010 ss 18(1)(a), (1)(b), 35, 36, 36(1), 37, 38, 39, 40, Parts II, III

Rules of Court 2012 O 53, O 53 r 2(3)

Appeal from: *Myteksi Sdn Bhd & Ors v Suruhanjaya Persaingan* [2023] MLJU 2142 (High Court, Kuala Lumpur)

Tommy Thomas (Mervyn Lai Wei Shiung, Alicia Gomez and Wong Ting Ying with him) (Tommy Thomas) for the appellant.
Malik Imtiaz Sarwar (Lim Yvonne, Shanthi Kandiah, Yo Yi Yun, Azyan bt Mohamed Ibrahim and Chin Yan We with him) (Shanthi Kandiah Chambers) for the respondents.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an appeal against a judicial review decision relating to infringement penalty under the Competition Commission Act 2010 ('the Act').

[2] The appellant is the Malaysian Competition Commission, commonly known as MyCC and was respondent in the High Court.

[3] The first respondent is a Malaysian incorporated private limited company providing services commonly known as 'Grab Taxi' and 'Grab Food' and was the first applicant in the High Court.

[4] The second respondent is also a Malaysian incorporated private limited company providing 'Grab Car', 'Grab Express', 'Grab Ads', 'Grab Share' and 'Grab for Business' and was the second applicant in the High Court.

[5] The third respondent is a Cayman Island incorporated company and the sole shareholder of the first respondent, as well as the majority shareholder of the second respondent. The third respondent was the third applicant in the High Court.

[6] We heard the appeal on 18 November 2024 and thereafter adjourned our decision to deliberate on the intricate arguments advanced by the parties.

[7] Having done so, we now deliver our decision along with our supporting reasons below.

BACKGROUND

[8] By an agreement dated 25 March 2018 made between Uber Malaysia Sdn Bhd ('UM') and the second respondent, UM transferred all its local assets and business to the second respondent.

[9] Upon receiving a complaint from a Grab driver, Mohamed Radzwan bin Abdul Wahab ('complainant'), on 7 March 2019, the appellant initiated an

investigation. According to the complainant, the second respondent banned him from driving for Grab for 'promoting other e-haling services to riders' ('2019 complaint').

[10] Additionally, the appellant also investigated complaints received in 2018 alleging that the second respondent, in abuse of its dominant market position, imposed unfair pricing practices through discriminatory conduct towards Grab taxi drivers in favour of Grab car drivers ('2018 complaints').

[11] As a result of the aforementioned investigations, the appellant on 23 September 2019, issued its proposed decision ('proposed decision').

[12] The proposed decision essentially imposed a financial penalty of RM86,772,943.76 ('fine') on all the respondents, failing which they would be subjected to a daily penalty of RM15,000 ('penalty') from the date of service of the proposed decision pursuant to s 36(1) of the Act.

[13] Aggrieved by the proposed decision, the respondents commenced a judicial review application in the High Court on 30 December 2019 to quash the proposed decision.

IN THE HIGH COURT

[14] The respondents contended that the proposed decision was illegal and ultra vires the Act, as the appellant relied on documentary evidence from the 2018 complaints to reach its proposed decision concerning the 2019 complaint. The respondents also argued that no proper investigation was carried out, particularly in notifying and interviewing the respondents regarding the 2019 complaint.

[15] Furthermore, the respondents contended that the Act required the appellant to undertake a thorough step by step investigation and the proposed decision was flawed in concluding that the respondents had infringed the prohibitions set out in Part II of the Act.

[16] In response, the appellant argued that the judicial review application filed by respondents is premature because the proposed decision is not a final decision. The respondents must not also by-pass or supplant the domestic remedy of statutory appeal provided for in the Act.

[17] Moreover, the appellant maintained that the investigations had been conducted professionally and that the respondents had been fully aware and appraised of the nature of the investigations at all material times. Hence, the proposed decision is neither illegal nor ultra vires the Act.

[18] The High Court judge on 6 July 2023 found in favour of the respondents ('judgment') and quashed the proposed decision and the fine and penalty imposed.

[19] In this regard, the learned High Court judge held as follows in the grounds of the judgment ('GOJ') which has been reported as *Myteksi Sdn Bhd & Ors v Suruhanjaya Persaingan* [2023] MLJU 2142; [2023] CLJU 1921:

> [56] Let me begin with the issue of whether this application for judicial review is premature and whether the applicants should have waited for the final decision before taking any further steps to protect their interests.
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> [57] In *MyTeksi*, Hanipah Farikullah JCA, in delivering the judgment of the Court of Appeal, held as follows:
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> > [42] However, it does not follow that the appellants are necessarily precluded from mounting a challenge at this earlier stage. There is no automatic bar to challenge at this stage. Therefore, it is necessary to consider at the substantive stage the reasons set out by the respondent for its proposed decision. It is also necessary to consider whether a useful purpose would be served by allowing that proposed decision under s 36 to be challenged in advance of a final decision if the court in its discretion considers that a useful purpose would be saved by such a challenge. Such challenges may be entertained in appropriate circumstances.
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> > [43] Certiorari is available when a decision affects rights or where through a preliminary step, it is sufficiently connected with a decision that does so (see *Hot Holdings Pty Ltd v Creasy and Others* [1996] 134 ALR 469).
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> [58] With respect, under the doctrine of stare decisis, I am bound by this proposition. The judgment of the Court of Appeal made it in no uncertain terms that the proposed decision can be challenged by way of judicial review, even if it has not been crystallised into a final decision either under s 39 or s 40 of the CA.
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> [59] In short, an order of certiorari lies against the proposed decision since it is 'sufficiently connected with' the final decision. It has not been shown to me that the judgment of the Court of Appeal is per incuriam. As held by the Federal Court in *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276; [1980] CLJU 58; [1980] 1 LNS 58 (FC), the principle of stare decisis requires more than lip service. In *Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd* [2010] 4 MLJ 651; [2010] 6 CLJ 745 (CA), the Court of Appeal reasserted the proposition that a High Court is bound to follow a decision of the Court of Appeal unless it can be shown that the said decision is per incuriam.
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> [60] In any event, the applicants are not challenging the investigation process as in Lee Ting San. The investigation has been completed, hence the proposed decision. MyCC could not have made the proposed decision under s 36 of the CA if the process of investigation was still ongoing. With respect, I therefore find it difficult to accept the line of argument that the investigation will be hampered when it has, for all intents and purposes, been completed.
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> [61] As to the issue of domestic remedy, the Court of Appeal held that the CA did

not provide for appeals against decisions made under s 36(1). Hence, the CAT under the CA did not have jurisdiction to deal with complaints concerning the issuance of a proposed decision under s 36(1). The right to appeal under the CA was only concerned with decisions made under ss 35, 39 and 40 of the CA.

[62] In the circumstances, I hold that the issue of the need of the applicants to exhaust the domestic remedy does not arise. As held by the Court of Appeal, it is not provided under the CA.

[63] I will now address the issue of whether the proposed decision, which is the subject matter of this judicial review, has adhered to the requirement stipulated under s 36 of the CA. The applicants' grievance is that the proposed decision was made basically on the Radzwan complaint when the investigation was centrally on the 2018 complaints.

[64] There was no evidence before me that MyCC had taken the investigative steps on the Radzwan complaint in the same manner that it had handled the 2018 complaints. One can be forgiven in concluding that no proper investigation was made on the Radzwan complaint-only a proposed decision.

[65] I am therefore of the respectful view that it is impossible for MyCC to make a fair proposed decision on the Radzwan complaint and hence held that there was a prima facie case of infringement under s 36(1) when at all material times the applicants were only asked to address on the issues relating to the 2018 complaints during the investigation process. The proposed decision is sufficiently connected with the final decision to be made by MyCC. While no final decision was made under s 39 or 40 of the CA, the proposed decision based on the wrong investigation process would have prejudiced the applications.

[66] The rule of natural justice is that no man may be condemned unheard; *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152; [1975] CLJU 72; [1975] 1 LNS 72 (FC).

[67] The correct investigation process on the correct allegation of infringement was necessary in order to enable the applicants to defend and meet the case alleged against them adequately.

[68] The investigation process was therefore tainted with procedural impropriety. In any event, the applicants were not given the right to be heard. The end result would the proposed decision is equally tainted and therefore amenable to judicial review.

[69] As to the allegation of apparent bias that MyCC is the investigator, prosecutor and adjudicator, I do not think this line of argument is tenable. The statutory role of MyCC is spelt out in CA and CCA. Learned counsel did not seriously argue before me that the steps stated in the CA and CCA are unconstitutional for it to be struck down.

[70] On the issue of the press release, I am of the view that it was fair in that the press statements made it clear that the proposed decision itself is not final and that the applicants may still make representations to challenge MyCC's findings. While there is nothing in the CA or CCA that prohibits the publication of the proposed decision, which includes the proposed finding, it is more desirable that such a press

release is only to be issued after MyCC has arrived at a final decision.

[20] The appellant is dissatisfied with the judgment and hence on 4 August 2023 appealed to this court.

FINDINGS OF THIS COURT

[21] The parties primarily repeated their submissions in the High Court before us.

[22] The application in the High Court was made pursuant to O 53 of the Rules of Court 2012, and it is evident that O 53 r 2(3), confers wide discretionary powers on the court, particularly in matters of remedies; see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 AMR 433 (FC).

[23] However, our appellate function here is merely to review the decision of the High Court. In *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150; [1981] CLJ 84, Abdoolcadeer J (later SCJ) held as follows with emphasis added by us:

> *There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion* (*Charles Osenton and Company v Johnston* [1942] AC 130 (at p 148), per Lord Wright). *The Privy Council held in Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228; [1964] CLJU 237; [1964] 1 LNS 237 *that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to Evans v Bartlam* [1937] AC 473.
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> The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett v James* [1978] AC 297 (at pp 317, 326). For good measure, we would refer to the felicitous expression of Goulding J, in *Re Reed (a debtor)* [1979] 2 All ER 22, on this point (at p 25):
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> > ... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.

[24] Hence, we will first address whether the proposed decision constitutes a final decision that is amenable to judicial review. The appellant contended that it is not, whereas the second and third respondents argued otherwise.

[25] This issue has, in fact, been duly considered by this court in *Myteksi Sdn Bhd & Ors v Suruhanjaya Persaingan* [2023] MLJU 2142; [2023] CLJU 1921; [2023] 2 MLRA 697 CA when granting leave to commence judicial review in the High Court below. In this regard, Hanipah Farikullah JCA (now FCJ) held as follows, with emphasis added by us:

> [34] In the present case, the issue is whether a decision prior to the final exercise of a decision can be said to sufficiently affect legal rights. In this connection, the question is whether there is a decision which constitutes some condition precedent to the exercise of power which will affect legal rights.
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> [35] It is important to analyse the structure of the decision-making process prescribed by the Competition Act 2010, under which the proposed decision was made. The Competition Act creates various decision-making schemes before the respondent makes a final decision that entails there has been an infringement of the prohibition.
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> [36] The relevant provisions of the Competition Act are as follows:
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> 36 proposed decision by the Commission
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> (1) If, after the completion of the investigation, the Commission proposes to make a decision to the effect that one of the prohibitions under Part II has been or is being infringed, the Commission shall give written notice of its proposed decision to each enterprise that may be directly affected by the decision.
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> (2) The notice shall:
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> (a) set out the reasons for the Commission's proposed decision in sufficient detail to enable the enterprise to whom the notice is given to have a genuine and sufficient prospect of being able to comment on the proposed decision on an informed basis;
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> (b) set out any penalties or remedial action that the Commission proposes to apply; and
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> (c) inform each enterprise to whom the notice is given that the enterprise may, within such reasonable period as may be specified in the notice:
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> (i) submit written representations to the Commission; and
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> (ii) indicate whether it wishes to make an oral representation before the Commission.
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> 37 Oral representation
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> If an enterprise informs the Commission, within the period specified in the notice given under s 36 that it wishes to make an oral representation, the

Commission shall, before taking any relevant decision:

(a) convene a session for the oral representation to be held at a date, time and place determined by the Commission; and

(b) give written notice of the date, time and place to:

(i) the enterprise concerned;

(ii) any person who had lodged a complaint with the Commission concerning the practice that was the subject of the Commission's investigation; and

(iii) any other person whose presence at the session of the oral representation is considered necessary by the Commission.

38 Conduct of hearings

(1) Notwithstanding s 37, the Commission may at any time conduct a hearing for the purpose of determining whether an enterprise has infringed or is infringing any prohibition under Part II.

(2) If the Commission determines that a hearing is to be held, it shall give at least fourteen days' notice in writing to the enterprise concerned and to other interested third parties:

(a) recording its decision to convene the hearing;

(b) specifying the date, time and place for the holding of the hearing; and

(c) stipulating the matters to be considered at the hearing.

(3) When the Commission decides to hold a hearing, it shall also decide:

(a) whether to hold individual hearings with each of the enterprises and any other interested third parties separately or to hold a single hearing attended by all the enterprises involved and the interested third parties; and

(b) whether to hold a hearing:

(i) in public; or

(ii) in a closed session, for the purpose of protecting confidential information.

(4) The hearing shall be governed by and conducted in accordance with the procedural rules for the time being in effect, as published by the Commission.

(5) The Commission shall keep a record of the hearing as is sufficient to set out the matters raised by any person participating in the hearing.

(6) An enterprise may be represented at a hearing by:

(a) any of its authorized officers or employees;

(b) any advocate and solicitor;

(c) any person falling within the description specified for that purpose in the Commission's procedural rules; or

39 Finding of non-infringement

Where the Commission has made a decision that there is no infringement of a prohibition under Part II, the Commission shall, without delay, give notice of the decision to any person who is affected by the decision stating the facts on which the Commission bases the decision and the Commission's reason for making the decision.

40 Finding of an infringement

(1) If the Commission determines that there is an infringement of a prohibition under Part II, it:

(a) shall require that the infringement to be ceased immediately;

(b) may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end;

(c) may impose a financial penalty; or

(d) may give any other direction as it deems appropriate.

(2) The Commission shall, within fourteen days of its making a decision under this Part, notify any person affected by the decision.

(3) The Commission shall prepare and publish reasons for each decision it makes under this section.

(4) A financial penalty shall not exceed ten per cent of the worldwide turnover of an enterprise over the period during which an infringement occurred.

[37] Our immediate task is to determine, against the backdrop of the respondent's proposed decision, whether leave should be granted or alternatively, if obviously not frivolous or vexatious, whether the application is legally hopeless such that we are satisfied that there is no case fit for further argument as a full inter partes hearing.

[38] We begin by considering whether there is on the face of it an arguable case for leave to be granted.

[39] It seems that the content of the proposed decision shows that the respondent was effectively making a decision in principle on the infringement. We are of the view that the plain effect of the proposed decision itself, was indeed a decision in principle. In fact, in its proposed decision, the respondent inter alia imposed a daily penalty of RM15,000 from the date of service of the proposed decision in the event the appellants failed to comply with the respondent's directions. The nature of the respondent's determination under s 36 of the Act demonstrates that it was an important step on the path to decision-making under s 40 of the Act.

[40] In our view, although part of the process remains to be gone through, there is already a decision that can be targeted.

[41] *Plainly, there was no final decision under s 40 of the Competition Act. Under the*

provisions of s 40, the final decision will only arise when the respondent gives notice of the decision stating the facts on which the respondent based the decision and its reasons for making the proposed decision. The appellants could have waited until such a determination.

[42] *However, it does not follow that the appellants are necessarily precluded from mounting a challenge at this earlier stage. There is no automatic bar to challenge at this stage. Therefore, it is necessary to consider at the substantive stage the reasons set out by the respondent for its proposed decision. It is also necessary to consider whether a useful purpose would be served by allowing that proposed decision under s 36 to be challenged in advance of a final decision if the court in its discretion considers that a useful purpose would be saved by such a challenge. Such challenges may be entertained in appropriate circumstances.*

[26] We are in full agreement with the aforementioned legal propositions and find that the learned High Court judge did not commit any appealable error in relying on and adopting the same in paras 57 to 60 of the GOJ. We are also fortified by the English cases of *R (on the application of The Garden and Leisure Group Ltd) v North Somerset Council and another* [2003] EWHC 1605 and *R (on the application of Shrewsbury and Atcham Borough Council and another) v Secretary of State for Communities and Local Government (Shropshire County Council, interested party)* [2008] 3 All ER 548 (CA) where Carnwath LJ held as follow in the latter case with emphasis added by us:

Judicial Review proceedings may come after the substantive event, with a view to having its set aside or 'quashed'; or *in advance, when it is threatened or in preparation, with a view of having it stayed or prohibited. In the latter case, the immediate challenge may be directed at decisions or actions which are no more than steps on the way to the substantive event*. In the planning example, judicial review may be directed at a local authority resolution to grant permission while it is still conditional on, say, the completion of a highways agreement, even though the resolution can have no legal effect until the issue of the formal permission.

[27] Put simply, the judicial review application commenced by the respondents is not premature.

[28] Moving on in respect of by-passing or supplanting the domestic remedy of statutory appeal, we have carefully read ss 35 to 40 of the Act and find that there is no provision to appeal on a proposed decision made under s 36(1) of the Act. In other words, there is no internal remedial procedure available, contrary to what was alluded to by the appellant.

[29] Consequently, we again do not find that the learned High Court judge committed any appealable error in paras 61 and 62 of the GOJ.

[30] Thirdly, regarding the respondents' contention on the conduct of the

investigation by the appellant, it is trite law that the proposed decision, which emanated from the investigation, is subject to certiorari if the decision is tainted with illegality, irrationality or procedural impropriety. In this regard, Edgar Joseph Jr FCJ held as follows in *R Rama Chandran v The Industrial Court of Malaysia & Anor*:

> It is often said that judicial review is concerned not with the decision but the decision-making process. (See, eg *Chief Constable of North Wales v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of *procedural impropriety*.
>
> But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review makes it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for *process*, but also for *substance*.
>
> In this context it is useful to note how Lord Diplock defined the three grounds of review, to wit, (i) *illegality*, (ii) *irrationality* and (iii) *procedural impropriety*. This is how he put it:
>
> > By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> >
> > By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.
>
> To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decisionmaker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as *'procedural impropriety'* rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in

> the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[31] Upon our review, we are satisfied, as contended by the respondents, that the appellant is obliged to ensure a proper investigation is carried out pursuant to Part III of the Act on investigation and enforcement. Consequently, in issuing the proposed decision, the appellant must have given prior notification to the respondents regarding the investigation, including the subject matter thereof. Additionally, the appellant's power to request information, documents, and statements under s 18(1)(a) and (b) of the Act must be exercised reasonably and in accordance with the Act.

[32] Thus, the investigation by the appellant must be predicated by a third-party complaint and tied thereto. The appellant must thereafter notify the respondents and the appellant may thereafter require any person whom the appellant believes to be acquainted with the facts and circumstances of the case to provide the information or document which is relevant to the investigation and/or making a statement providing an explanation or information.

[33] From the evidence adduced, we find that the appellant had investigated the 2018 complaints, including notifying the respondents and obtaining their responses between February and July 2019. However, there is no evidence that the appellant notified the respondents regarding the investigation of the 2019 complaint. The appellant has not provided a reasonable explanation for this omission. This is a critical issue, as it deprived the respondents of the opportunity to understand the precise complaint(s) against them. Despite the absence of a formal notification regarding the 2019 complaint, the appellant requested information from the respondents between May and June 2019. Upon comparing the appellant's requests for information related to the 2018 complaints and the 2019 complaint, we find that the latter was ambiguous and could not be meaningfully responded to.

[34] That notwithstanding, the appellant in its proposed decision found as follows:

> (273) Based on the evidence, the Commission found that Grab was intentionally refusing to comply with the request of the Commission in seeking the required information pursuant to the notice under section 18(1) of the Act dated 18.7.2019 such that it impelled the Commission to remind Grab of the penal consequences of failure to comply. The feet dragging conduct on the part of Grab unnecessarily impeded the investigation process. Therefore, the Commission hereby imposes an increment of 20% from the starting point of the financial penalty as stated in paragraph (264).

[35] In such circumstances, we find that the appellant was cavalier in the

carrying out of the investigation of the 2019 complaint against the respondents. This is unfair and constitutes procedural impropriety.

[36] As the result, we find no appealable error by the learned High Court judge in finding that the appellant's investigation was tainted with procedural impropriety in paras 63 to 69 of the GOJ. In fact, we noted His Lordship also concluded that the appellant conflated the investigations of the 2018 complaints and 2019 complaint in the issuance of the proposed decision. The conclusion seems justified to us in the circumstances that prevailed at the material time.

CONCLUSION

[37] For the foregoing reasons, we find the appeal unmeritorious and is accordingly dismissed. The decision of the High Court is affirmed.

[38] We further order costs of RM50,000 to be paid by the appellant to the respondents subject to allocatur.

Appeal dismissed; decision of High Court affirmed with costs of RM50,000 to be paid by appellant to respondents subject to allocatur.

Reported by Dzulqarnain Ab Fatar