

MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING

APPLICATION FOR JUDICIAL REVIEW NO.JR-10-2009-I

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IN THE MATTER of NOTICE
dated 26th day of August, 2009;

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IN THE MATTER of Kuching
Municipal Council (Licensing of
Miscellaneous Occupation) By-
Laws;

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IN THE MATTER of Local
Authorities (Licensing of
Miscellaneous Occupation)
(Omnibus Amendment) (No.2) By-
Laws, 1995, Sarawak).

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IN THE MATTER OF S.161A &
161B of the Sarawak Local
Authorities Ordinance (Cap.20);

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IN THE MATTER of Sarawak
State Sales Tax Ordinance 1998
(Cap.25);

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IN THE MATTER of S.5 of Pool
Betting Act 1967;

IN THE MATTER of Racing
(Totalisator Board) Act, 1961
(Revised 1992);

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IN THE MATTER of Order 53 of
the Rules of the High Court, 1980

BETWEEN

5 FIRMPOWER SDN. BHD. (Co. No.548096-T)
 Lot 167A, Lorong Hui Sing 3/2,
 Hui Sing Commercial Centre,
 93350 Kuching, Sarawak ... 1st Applicant

10 SUPEROLE SDN. BHD. (Co. No.492223-M)
 Lot 167A, Lorong Hui Sing 3/2
 Hui Sing Commercial Centre,
 93350 Kuching, Sarawak. ... 2nd Applicant

15 CAPITALHOP SDN. BHD. (Co. No.707973-H)
 19, Ground Floor, Kenyalang Shopping Centre
 93300 Kuching, Sarawak. ... 3rd Applicant

AND

20 The City Secretary
 Council of the City of Kuching South
 (Majlis Bandaraya Kuching Selatan)
 Jalan Padungan
 93675 KUCHING. ... 1st Respondent

25 THE GOVERNMENT OF SARAWAK
 AG, Chambers, 16th Floor,
 Wisma Bapa Malaysia
 Petra Jaya, Jalan Gersik,
 30 Kuching, Sarawak. ... 2nd Respondent

BEFORE THE HONOURABLE JUDICIAL COMMISSIONER
Y.A. PUAN RHODZARIAH BT. BUJANG

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IN CHAMBERS**JUDGMENT**

By an application dated 16.9.2009, the applicants have applied for leave to issue a writ of certiorari to quash a notice dated 26.8.2009 issued by the 1st respondent. The notice ordered the 3rd applicant to cease carrying their business of selling tickets for numbers forecast totalisator at their premises as they were not issued with a license to so operate under the Kuching Municipal Council (Licensing of Miscellaneous Occupation) By-Laws (“the By-laws” for short).

It must be stated at the outset, that the same applicants have been denied an application for an interlocutory injunction to stop the 1st respondent’s officers from conducting raids and locking up their premises where the tickets were sold. The judgment of YA Tuan Ravinthran Paramaguru delivered on 16.9.2009 in Kuching High Court Originating Summons No. 24-216-2009-(III) is now pending appeal in the Court of Appeal. In his grounds of judgment, YA Tuan Ravinthran Paramaguru has explained why the tickets sold by the applicants came within the definition of lottery. Having read the said judgment, I am in total agreement with him that the mechanics of the numbers forecast totalisator are such that it amounts to a lottery. I see no necessity to regurgitate what had been so admirably explained in His Lordship’s judgment as I am not entirely confident that I could do better justice to the issue of whether the game is a lottery than what YA Tuan Ravinthran Paramaguru had done.

Alternative argument

Mr. Wong Sing Nang, counsel for the applicants has however submitted on an alternative issue. He highlighted me to a part of YA Tuan Ravinthran Paramaguru's decision in which His Lordship referred to section 32(3) of the Pool Betting Act 1967 (Revised 1989) and held that "*one does not need a licence under the Pool Betting Act 1967 (Revised 1989) if the Betting scheme is approved by the Totalisator Board*". Mr. Wong Sing Nang then submitted that since the By-laws provides that a licence from the 1st respondent is required for the sale of "*any **licensed lottery***", this means that the said By-laws is not applicable to the applicants herein because YA Tuan Ravinthran Paramaguru has decided that they do not need a licence under the Pool Betting Act 1967.

Datuk JC Fong for the respondents argued and referred to the applicants' own documentary exhibits – in particular Exhs. CT7, CT10 and CT15 which show that the applicants themselves acknowledged that they have to obtain the licence from the State Secretary. The court, submitted Datuk JC Fong is not concerned with the licence under the Pool Betting Act 1967 but with the By-laws.

In fairness to the applicants, the By-laws as quoted by me earlier, indeed provides that a licence is required for "a licensed lottery" and it is true that YA Tuan Ravinthran Paramaguru only decided that numbers forecast totalisator comes within the definition of "*lottery*" but he did not specifically find that it was a "*licensed lottery*".

In arriving at this conclusion, I am guided by the definition given in law to the word “*licence*”. Jowitt’s The Dictionary of English Law defines licence as a permission given by one man to another to do some act which without such permission it would be unlawful for him to do so and Latham C.J. in ***The Federal Commissioner of Taxation v. United Aircraft Corporation 68 C.L.R. 525*** held that a licence “*is an authority to do something which would otherwise be wrongful or illegal or inoperative*”. This quotation is lifted from Stroud’s Judicial Dictionary of Words and Phrases.

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It is clear from the definitions given above that we can call that competent authority’s consent to operate the business by whatever name – be it a permit, an approval or a licence but the fact is the operation of that business is with the blessing of that authority. To give an otherwise interpretation to the words ‘*licensed lottery*’ would be to render absurd the operation of the By-laws in that an unlicensed lottery is allowed to operate without paying any licensing fees to the 1st respondent. This would also tantamount to the court condoning and encouraging the proliferation of unlicensed lottery outlets in the state, defeating the very object of requiring licence to be issued in the first place, which is so that the 1st respondent can monitor and regulate the operation of these outlets with respect to factors such as suitability of their location and opening hours, for instance.

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In giving the words of the legislature a purposive interpretation and not a literal one, I am much guided by the words of Lord Denning M.R. in ***Nothman v. Barnet London Borough Council (C.A.) (1978)***

1 WLR 220, a case in which the Court of Appeal had to interpret paragraph 10 of Schedule 1 to the Trade Union and Labour Relations Act 1974. A literal interpretation of that provision would mean that a woman who was dismissed after reaching the age of 60 (the retirement age being 65) cannot claim for reinstatement but a man of the same age and position could. In giving the provision a purposive interpretation so as to provide equal protection in the law to both sexes, Lord Denning M.R. said at page 228,

“In all cases now in the interpretation of statutes we adopt such a construction as will “promote the general legislative purpose” underlying the provision. It is no longer necessary for the judges to wring their hands and say : “There is nothing we can do about it.” Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind”.

For the record, this case was cited by the Court of Appeal in ***Tetuan Kumar Jaspal Quah & Aishah v Far Legion Sdn Bhd & Anor [2007] 3 CLJ 230.***

Thus, I would conclude that the applicants’ operation here falls within the definition of *‘licensed lottery’* in the By-laws and reached the same conclusion as YA Tuan Ravinthran Paramaguru in that they must obtain a licence stipulated in the By-laws. The undisputed fact is they did not do so and there is no room for argument on the legality of action of the 1st respondent council in issuing the impugned notice dated **26.8.2009**. It follows therefore that their application for leave is frivolous and vexatious and they have not crossed the threshold for

leave to be given to file their application for certiorari as well as the other reliefs sought in their application.

Accordingly, I dismiss this application with costs to the respondents to be taxed unless agreed. If not agreed, I would capped getting-up at RM5,000.00. In my view, the amount of getting-up is reasonable because the issues raised in this application have been substantially canvassed in the originating summons action.

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Sgd.

(Y.A. PUAN RHODZARIAH BT. BUJANG)

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Judicial Commissioner
High Court II Kuching

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Date of Decision : 26th day of November 2009

Date of Hearing : 25.11.1009 and 26.11.2009

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For Applicants : Mr. Wong Sing Nang,
Messrs. Wong, Orlando Chua & Kuok Advocates,
Kuching.

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For Respondents: Datuk JC Fong,
State Legal Counsel,
Encik Saferi bin Ali,
State Legal Officer,
State Attorney-General's Chambers Sarawak,
Kuching.