DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN & KUASA-KUASA KHAS)
PERMOHONAN SEMAKAN KEHAKIMAN NO. WA-25-594-12/2019

Dalam perkara Perkara 5 dan 8, Perlembagaan Persekutuan

Dan

Dalam perkara seksyen 25(2) dan Jadual, Akta Mahkamah Kehakiman 1964 (Akta 91)

Dan

Dalam perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012 (PU(A) 205/2012) dan/atau bidang kuasa sedia ada Mahkamah yang Mulia ini

Dan

Dalam perkara Akta Persaingan 2010 (Akta 712)

Dan

Dalam perkara Akta Suruhanjaya Persaingan 2010 (Akta 713)

Dan

Dalam perkara Keputusan Yang Dicadangkan oleh Suruhanjaya Persaingan berkenaan No. Kes MyCC(ED)700-1/4/1 yang bertarikh 23.09.2019

Dan

Dalam perkara Siaran Berita Suruhanjaya Persaingan Malaysia bertajuk "MyCC PROPOSES TO FINE GRAB RM86 MILLION FOR ABUSIVE PRACTICES" yang dikeluarkan pada 03.10.2019

Dan

Dalam perkara artikel bertajuk "Grab has till Dec 31 to submit written representations to MYCC" yang diterbitkan oleh The Edge

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ANTARA

1. MYTEKSI SDN. BHD.
(NO. SYARIKAT 201101025619)
(DAHULU NO. SYARIKAT 953755-D)

2. GRABCAR SDN. BHD.
(NO. SYARIKAT 201401013360
(DAHULU NO. SYARIKAT 1089444-V)

3. GRAB INC.
(NO. SYARIKAT IC-296805) **...PEMOHON-PEMOHON**

DAN

SURUHANJAYA PERSAINGAN **...RESPONDEN**

JUDGMENT

The factual background

[1] The 1st applicant is a company that currently provides services commonly known as "GrabTaxi" and "GrabFood". The 2nd applicant is a company that provides services commonly known as "GrabCar", "GrabExpress", "GrabAds", "GrabShare" and "GrabForBusiness". For brevity, the 1st and 2nd applicants will be referred to in this judgment as "Grab Malaysia".

[2] The 3rd applicant is a company incorporated in the Cayman Islands. It is the sole shareholder of the 1st applicant and the majority shareholder of the 2nd applicant.

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[3] The respondent is the Malaysia Competition Commission, known as MyCC, a body corporate established under s 3(1) of the Competition Commission Act 2010 ("CCA"). According to its website, its main role is to protect the competitive process for the benefit of businesses, consumers and the economy. The functions of MyCC are described in s 16 of the CCA. In essence, MyCC is the regulatory authority on all matters concerning competition laws in Malaysia.

[4] Under s 16(d) of the CCA, MyCC carries out the function of implementing and enforcing the competition laws in Malaysia. The competition laws are embodied in the Competition Act 2010 ("CA").

[5] The 2nd applicant entered into an agreement with Uber Malaysia Sdn Bhd ("Uber"), which provided, *inter alia,* that Uber would transfer all its local assets and business to the 2nd applicant.

[6] Upon complaints received, MyCC initiated an investigation on the matter, including issuing notices requiring the 1st and the 2nd applicants to provide information and documents pursuant to s 18(1) of the CCA.

[7] The central issue that is the subject matter of the instant case is the proposed decision of MyCC dated 23.9.2019 against the applicant in respect of Case No. MyCC (ED)700-1/4/1 ("Proposed Decision").

[8] The Proposed Decision was purportedly issued pursuant to s 36(1) of the CA. The allegation made against Grab Malaysia was that they had abused their dominant position in the relevant market by imposing restrictions on drivers from promoting competitors and prohibiting the provision of advertising services to competitors, thereby infringing s 10(1) of the same. This is reflected in para 252 of the Proposed Decision.

[9] The Proposed Decision includes imposing a financial penalty of RM86,772,943.76 ("the Fine") on the applicants and failing which the applicant would be subjected to a daily penalty of RM15,000 ("the Penalty") from the date of service of the Proposed Decision to each applicant pursuant to s 36(1) of the CA.

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[10] Aggrieved by the Proposed Decision, the applicants commenced an application for leave for judicial review for an order of certiorari to quash the same. The applicants also sought an order of prohibition against the investigation into s 14, 15 or 18 of the CA by MyCC in respect of the same complaints investigated by MyCC, culminating in the issuance of the Proposed Decision.

[11] In para 1.4 of the application, the applicants sought a declaration that MyCC was not empowered to publicise a proposed decision made under s 36 of the CA.

[12] The application for leave was dismissed on 9.3.2020; see ***MyTeksi Sdn Bhd & Ors v Suruhanjaya Persaingan*** **[2020] 11 MLJ 93**.

[13] The learned Judge held *inter alia* that the proposed decision under s 36(1) of the CA would be subjected to further process before the respondent decided whether there was a non-infringement or an infringement under ss 39 or 40 of the CA respectively. The proposed decision did not dispose of the rights of parties or alter such rights. According to the learned Judge, the Proposed Decision was not a final decision as the final decision was when MyCC decided on whether there was an infringement or otherwise.

[14] Aggrieved by the dismissal of the application for leave, the applicants appealed to the Court of Appeal.

[15] In allowing the appeal, the Court of Appeal held that the content of the proposed decision showed that the respondent was effectively making a decision in principle on the infringement. The plain effect of the Proposed Decision itself was indeed a decision in principle. In fact, according to the Court of Appeal, in its proposed decision, MyCC, *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 MyCC's directions. The nature of MyCC's determination under s 36 of the CA demonstrated that it was an important step on the path to decision-making under s 40 of the CA. Although a final decision under s 40 of the CA was not made, the Court of Appeal further held that it did not follow that the applicants were precluded from mounting a challenge at this earlier stage; see ***MyTeksi Sdn Bhd & Ors v Competition Commission*** **[2022] 6 MLJ 767 CA**.

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[16] Dissatisfied with the decision of the Court of Appeal, MyCC filed a notice of motion for leave to appeal to the Federal Court. The motion was dismissed by the Federal Court on 5.12.2022.

The Judicial Review: The Applicants' case

[17] The application for judicial review is supported by the affidavit of Goh Su Sean in Encl 3 ("AIS-3"). Encik Goh is the Country Head of Grab Malaysia and is also authorised to affirm the affidavit on behalf of the 3rd applicant.

[18] As alluded to earlier, this judicial review application is concerned with the Proposed Decision of the MyCC, purportedly pursuant to s 36(1) of the CA. The sub-section provides as follows:

> 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.

[19] Before me, learned counsel for the applicants highlighted that the condition precedent to the issuance of a proposed decision under s 36(1) of the CA is:

(a) There has to be a valid investigation; and

(b) Such investigation disclosed a prima facie case of infringement.

The extension of the argument is that, in the absence of a valid investigation, MyCC does not have the power to issue a proposed decision.

[20] Learned counsel for the applicants submitted that when that happens, then MyCC commits an error which goes to the jurisdiction; ***YB Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia*** **[1999] 2 CLJ 471 FC**.

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[21] The complaint that led to the investigation was made by one Mohamed Radzwan bin Abdul Wahab and was received by MyCC on 7.3.2019 ("the Radzwan Complaint"). In para 30 of the Proposed Decision, MyCC found that Radzwan was banned from driving for Grab "for promoting other e-hailing services to riders".

[22] Prior to the Radzwan Complaint, MyCC also received complaints in 2018 regarding an alleged discriminatory conduct on the part of Grab towards GrabTaxi drivers in favour of GrabCar drivers ("the 2018 Complaints"). According to MyCC, the majority of the complaints alleged that Grab had abused its dominant position through the imposition of unfair pricing practices.

[23] Learned counsel highlighted that the 2018 Complaints concerned a subject-matter that is unrelated to the conclusion made in para 252 of the Proposed Decision. In any event, MyCC conceded in para 31 of the Proposed Decision that it commenced the formal investigations under s 15 of the CA. S 15(1) provides:

> The Commission may, upon a complaint by a person, conduct an investigation on any enterprise, agreement or conduct that has infringed or is infringing any prohibition under this Act or against any person who has committed or is committing any offence under this Act.

In short, Grab Malaysia took umbrage that no investigation was carried out into the Radzwan Complaint that led to the issuance of the Proposed Decision.

[24] The gist of Grab's grievances is that MyCC relied on the documents in relation to the 2018 Complaint in arriving at the Proposed Decision, which is related to the Radzwan Complaint. Learned counsel for the applicants submitted that the Proposed Decision was illegal and *ultra vires* the CA or the CCA on the following grounds:

(a) The Proposed Decision was issued in excess of jurisdiction and power. Learned counsel contended that s 36(1) of the CA requires a valid investigation in order for MyCC to issue a proposed decision. Such an investigation is a condition precedent to the jurisdiction of MyCC and its exercise of power under that provision.

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(b) MyCC had failed to undertake a valid investigation prior to the issuance of the Proposed Decision by reason of it not having accorded Grab a meaningful right to be heard on the subject of the investigation that resulted in the issuance of the Proposed Decision. The case against it was not clearly identified such that it was put in a position to fully understand what it was being investigated for. MyCC had acted in breach of natural justice. Learned counsel contended that the fundamental rules of natural justice require that a party be informed of the case against it and be afforded a meaningful opportunity to answer it. According to learned counsel, this proposition is equally applicable to the investigative phase.

(c) MyCC did not have the power to impose a penalty that took effect upon the issuance of the Proposed Decision.

(d) MyCC wrongfully made public the Proposed Decision and the Proposed Fine. On 3.10.2019, MyCC issued a press release indicating its intention to impose "a financial penalty of RM86,772,943.76 against Grab as well as a daily penalty of RM15,000 per day from the date of service of the Proposed Decision should they fail to make remedial actions as directed by the Commission in addressing the competition concerns". The news release, which was available on the MyCC website, was also published by several news portals and mainstream media. According to learned counsel, the issuance and eventual publication of the press release had given rise to an impression of prejudgment. In any event, learned counsel contended that s 36(1) does not empower MyCC to notify the world at large of the Proposed Decision in the manner MyCC did through the News Release, the Press Conference and an interview given by the MyCC CEO with The Edge.

The validity of the investigation

[25] Before me, learned counsel for the applicants submitted that the CA requires MyCC to undertake a step-by-step process for the purposes of the investigation and, eventually, come to a decision on whether a person has infringed any of the prohibitions that are

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set out in Part II of the CA. Part II of the CA referred to the said prohibitions as Anti-Competitive Practices.

[26] The investigation process under the CA is provided under Part III under the title "Investigation and Enforcement". It is quite a comprehensive process and is covered under ss 14 to 34 of CA. S 18(1) of the CA provides that MyCC may, by notice in writing, require any person whom it believes to be acquainted with the facts and circumstances of the case under investigation to either provide any information or make a statement to it.

[27] Learned counsel then urged this Court to interpret the investigation process under the CA in the light of Arts 5 and 8 of the Federal Constitution.

[28] Art 5(1) provides for deprivation of life and liberty in "accordance with law". In ***Lee Kwan Woh v PP*** **[2009] 5 MLJ 30 FC**, the Federal Court declared that what Art 5(1) strikes down is all forms of State action that deprive either life or personal liberty bearing a meaning of the widest amplitude in contravention of substantive or procedural law.

[29] Art 8(1) of the Federal Constitution reads that:

> All persons are equal before the law and entitled to the equal protection of the law.

In the same case, the Federal Court held that the effect of Art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality, which is the test to be used when determining whether any form of State action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

[30] First, based on the aforesaid propositions and constitutional guarantees, learned counsel for the applicants submitted that the investigation process under Part III of the CA must strictly comply with the Act, Arts 5 and 8 of the Federal Constitution and rules of natural justice.

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[31] The applicants' case is, therefore, anchored on the argument that the persons involved in making the Proposed Decision under s 36(1) of the CA must not in any way be involved in the investigation process under Part III of the Act. In short, this separation of functions between the investigation team and the persons who made the Proposed decision must be set out clearly.

[32] Learned counsel further submitted that the persons who made the Proposed Decision must address their mind to the adequacy of the investigation, including whether the subject of the investigation process had been given the right to be heard and an opportunity to present exculpatory evidence.

[33] In short, the applicants contended that the various functions of investigation, prosecution and adjudication should not be merged prior to the issuance of the Proposed Investigation. The failure to demarcate and make clear the separate roles has given rise to a possible bias. Learned counsel then referred me to the decision of the Competition Appeal Board of Singapore in ***Nachi-Fujikoshi Corporation & Anor v. CCS*** **[2016] SGCAB 1** recognised that although the statute does envision for the commission to carry out all three roles, the commission is nonetheless bound act in accordance with the rules of natural justice, fairness and good faith.

[34] Secondly, learned counsel highlighted that s 36(1) of the CA employs the phrase "after the completion of the investigation". It is therefore the contention of learned counsel that the Proposed Decision can only be arrived at after the completion of a complete investigation.

Whether the investigation process was proper

[35] Learned counsel then attracted the attention of the Court to the steps taken by MyCC in the investigation process against the applicants:

(a) Between 28.3.2018 and 13.8.2019, MyCC collected information, ostensibly under ss 16(h) and 17(2)(i) of the CCA. S 17(2)(i) of the CCA, in particular, empowers MyCC to require the furnishing of information by enterprises to assist MyCC in the performance of its functions.

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(b) Despite the issuance of two Notices on 28.3.2018 and 16.6.2018 and holding three separate meetings with the representatives from Grab Malaysia, MyCC did not notify Grab Malaysia of any intention to commence an investigation or any ongoing investigation against them.

(c) The notice of investigation under s 18(1)(a) of the CA was only issued by MyCC on 3.12.2018. According to the Notice, the investigation was on a possible breach of s 10(1) of the CA in relation to the alleged abuse of a dominant position in the ride-hailing market in Malaysia.

(d) At this stage, the Radzwan Complaint had not been lodged yet. For the record, the Radzwan Complaint was only received by MyCC on 7.3.2019.

(e) After the issuance of the 1st Notice on 1.12.2018, MyCC further issued several notices to Encik Goh. An example of the notice can be seen in a letter dated 13.2.2019. It states as follows:

> As you are well aware of, the Commission has commenced an investigation against Grab under section 15(a) of the Competition Act ("the Act") where the Commission has reason to suspect the enterprise has infringed or is infringing section 10(1) of the Act in relation to the alleged abuse of a dominant position in the ride-hailing market in Malaysia.
>
> The Commission requires you to provide information BY HAND at the Commission's office at Level 15, Menara SSM@Central, No 7 Jalan Sentral 5, Kuala Lumpur Sentral, 50623 Kuala Lumpur by 12.00 pm on 22 February 2019.

(f) The complaint of Grab Malaysia is this. In all the notices of investigation, MyCC did not specify the basis of its belief that Grab Malaysia had infringed s 10(1) of the CA. The alleged abuse of dominant position, which is the subject matter of the prohibition, was not particularised by MyCC.

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(g) Between 6.5.2019 and 31.5.2019, MyCC issued five notices under s 18(1) of the CA requiring the presence of certain personnel of Grab Malaysia at MyCC's office to produce information and documents listed therein as well as to record a statement.

(h) The schedules appended to the S 18 Notices for Statement, referred to as Schedule A, did not specify any information or documents that were to be provided. An example of Schedule A is adduced in Exh G-28 of AIS-3. It defines "Document" to mean:

> Any matter expressed, described, or howsoever represented upon any substance, material, thing or article, including any material, thing or article, including any matter embodied on a disc, tape, film, sound track or other device whatsoever …

(i) Despite the series of s 18 Notices issued to Grab Malaysia in respect of the alleged prohibition under s 10 of the CA, MyCC failed to replicate the same investigation steps in the Radzwan Complaint.

[36] For the aforesaid reasons, learned counsel for the applicants urged me to conclude that the irresistible inference is that no investigation was carried out by MyCC in respect of the Radzwan Complaint on the allegation that Radzwan was banned from driving for Grab "for promoting other e-hailing services to riders".

[37] For the matters stated hereinbefore, learned counsel for the applicants prayed for the Court to allow this application for judicial review.

The response from MyCC

[38] MyCC, in opposing this application for judicial review, has filed an affidavit in reply through Siti Salwa binti Jaafar in Encl 53 ("AIR-53"). Puan Siti Salwa is the Assistant Director, Legal Division at MyCC.

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[39] Before me, learned counsel for MyCC, in his usual forceful self, submitted that this application for judicial review should be dismissed on the following grounds:

(a) The subject of the judicial review, namely the Proposed Decision, is not a final decision that is amenable to judicial review.

(b) This judicial review application is premature. The applicants should have exhausted the appeal mechanism provided under s 51 of the CA. In the circumstances, even if the applicants are aggrieved by the Proposed Decision, they should have appealed to the Competition Appeal Tribunal ("CAT").

(c) There was no illegality with regard to MyCC's investigations against the Applicants. Learned counsel contended that the Applicants are not entitled to challenge the investigation processes of MyCC. In any event, MyCC had conducted its investigations and arrived at the Proposed Decision pursuant to the provisions of the CA and CCA.

(d) It is the contention of MyCC that the applicants were well aware and appraised of the nature of the investigations against them by MyCC at all material times.

(e) MyCC's publication of the fact that the Proposed Decision had been issued against the Applicants is not illegal or ultra vires the provisions under the CA.

(f) There was no procedural impropriety on the part of the MyCC in that there was no breach of natural justice as the applicants had been duly given the opportunity to be heard. The allegation of an apparent bias against MyCC in the investigation process and arriving at the Proposed Decision is unfounded because MyCC was only carrying out its statutory duties under the CA and CAA.

[40] First, learned counsel attracted my attention that the Proposed Decision was made under s 36 of the CA. For all intents and purposes, it is not a final decision. A final decision is embodied under ss 39 and 40 of the CA, either in the form of a finding of non-infringement or an infringement, respectively.

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[41] It is the contention of learned counsel that by filing this application for judicial review prematurely, the applicants sought to circumvent the process enshrined under the CA. Since there is no finality in the Proposed Decision, learned counsel reiterated that it is not determinative of the alleged infringement of the applicants.

[42] Learned counsel referred me to a plethora of authorities to underscore his point that an applicant would only be at liberty to apply for judicial review where there was a determination of the issues arising from the inquiry. Suriyadi Halim JCA (later FCJ), in delivering the judgment of the Court of Appeal in ***Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors*** **[2009] 5 CLJ 153 CA**, held that:

> Apart from the reason as prognosed above, this appeal could also be dismissed on the ground that the judicial review application by the appellant merely served to fragment the decision making process and hence premature. We were not convinced that a 'decision' existed here that was amenable to judicial review in the context of judicial or administrative proceedings. The decision of the first respondent could not be said to have effectively disposed of the matter whereby its decision was final and determinative of the issue under consideration.

[43] In urging this Court to conclude that the Proposed Decision is not determinative of the issue under consideration, learned counsel attracted my attention that even the press release, which the applicants took umbrage, acknowledged that the nature of the Proposed decision was to assist the applicants in making representations and support the applicants' representations to MyCC.

[44] Secondly, learned counsel submitted that after the issuance of the Proposed Decision, the applicants could still make both oral and written representation to be considered prior to MyCC making a finding of infringement or non-infringement. In any event, after the final determination on the infringement or otherwise, parties can still appeal to CAT.

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[45] Learned counsel then cited the judgment of the Court of Appeal in ***Ketua Pengarah Hasil Dalam Negeri v Mudah.My Sdn Bhd*** **[2017] 5 CLJ 283 CA.** It was held in that case that the decisions of the Director General of Inland Revenue were not final and conclusive decisions amenable to review. According to the Court of Appeal, the internal remedial mechanisms under the Income Tax Act 1967 should have been first pursued before filing the judicial review challenge.

[46] Learned counsel pointed out that only in exceptional circumstances can an aggrieved party challenge a decision of a public authority without having to exhaust the domestic remedy, which can be seen in the judgment of the Federal Court in ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*** **[1999] 3 MLJ 1 FC**.

[47] Applying the said proposition to the facts of the case, learned counsel contended that the applicants had failed to establish exceptional circumstances to justify the attempt to circumvent the domestic remedy process under s 51 of the CA.

[48] Thirdly, learned counsel for the respondent submitted that the applicants are not entitled to challenge the investigation process adopted by MyCC. Learned counsel reiterated that the Proposed Decision stage is merely a step before the final decision, where a party's rights and obligations would be conclusively determined by MyCC.

[49] In support of the said submission, learned counsel relied on ***Lee Ting San Lorry Transport Sdn Bhd v Ketua Pengawai Eksekutif Suruhanjaya Persaingan Malaysia (MyCC) dan satu lagi*** **[2020] 7 MLJ 473**. In that case, the applicant filed an application for judicial review for an order of certiorari to cancel the investigation reference for the providing of information and documents by the Commission and a declaration that the investigation conducted by the second respondent is illegal, unreasonable and irrational and contained procedural impropriety in the decision. The High Court, in dismissing the application, held that the 2nd respondent's investigation was not yet complete. From a legal perspective, the 2nd respondent's investigation cannot be halted or stopped and cannot be judicially reviewed.

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[50] Based on the said proposition, learned counsel submitted that allowing such a challenge would ultimately hamper the entire investigative process of MyCC, where the Commission would be left vulnerable to judicial review challenges of their proposed decisions in addition to the final decision.

[51] Fourthly, as to the publication and press release regarding the Proposed Decision, learned counsel for the respondent submitted that nothing in the CA prohibits the making of public statements in relation to the Proposed Decision. In fact, according to learned counsel, the press statements made it clear that the Proposed Decision itself was not final and that the applicants could still make representations to challenge MyCC's findings.

[52] Learned counsel then referred me to the decision of the English Upper Tribunal (Tax and Chancery Chamber) in ***Angela Burns v The Financial Conduct*** **[2013] Lexis Citation 584**. It was *inter alia* held that in determining whether there should be publication, there is a presumption in favour of disclosure. This is in accordance with the open justice principle. In any event, the onus is on the applicants to demonstrate a real need for privacy by showing unfairness.

[53] Finally, as to the contention of the alleged breach of the principle of natural justice, throughout the investigation process, there was ample opportunity for the applicants to raise objections or issues in relation to any alleged deficiency in the investigation process. Unfortunately, according to learned counsel, the applicants did not do so. In any event, the opportunity to exculpate themselves was afforded to the applicants by virtue of the statutory procedures of oral and written representations which were exercised by the applicants.

[54] As to the allegation of apparent bias, learned counsel submitted that the applicants have failed to prove any causal link between the publication of the Proposed Decision and its assertion of apparent bias on the part of MyCC.

[55] For the aforesaid reasons, learned counsel urged this Court to dismiss the JR application with costs.

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Analysis

[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.

[57] In *MyTeksi*, Hanipah Farikullah JCA, in delivering the judgment of the Court of Appeal, held as follows:

> [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.
>
> [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).

[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.

[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 ***PP v Datuk Tan Cheng Swee & Anor*** [1980] 2 MLJ 276 FC, the principle of *stare decisis*

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requires more than lip service. In ***Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd*** [2010] 4 MLJ 651 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*.

[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.

[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.

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[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 s 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 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.

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Findings

[71] The Proposed Decision is tainted with procedural impropriety and breach of natural justice.

[72] In the result, my orders are as follows:

(a) An order of certiorari is hereby issued to quash the Proposed Decision.

(b) I am making any order on the issue of damages, since it has not been shown to me that there was an element of *mala fide* on the part of MyCC in arriving at and publishing the Proposed Decision.

(c) Costs is fixed at RM20,000 subject to allocatur.

Tarikh: 2 Oktober 2023



(WAN AHMAD FARID BIN WAN SALLEH)
Hakim
Mahkamah Tinggi Kuala Lumpur.

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Pihak-pihak:

Bagi Pihak Pemohon	:	Malik Imtiaz Sarwar, Shanthi Kandiah, Lim Yvonne, Tan Ken Seng Tetuan Shanthi Kandiah Chambers
Bagi Pihak Responden	:	Lim Chee Wee, Kwan Will Sen, Muayyad bin Khairulmaini, Saradha Laksmi Hariharan Tetuan Lim Chee Wee Partnership

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