IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: W-01(IM)-122-02/2024

BETWEEN

SURUHANJAYA PERSAINGAN ... APPELLANT

AND

TRIBUNAL RAYUAN PERSAINGAN & 24 OTHERS ... RESPONDENTS

CORAM:

AZIZUL AZMI BIN ADNAN, JCA
AHMAD FAIRUZ BIN ZAINOL ABIDIN, JCA
EVROL MARIETTE PETERS, JCA

GROUNDS OF JUDGMENT

Introduction

[1] This was an appeal against the decision of the High Court in dismissing the Appellant's application for leave to commence judicial review proceedings against the decision of the Competition Appeal Tribunal which had set aside penalties imposed by the Appellant on the 2nd to 24th Respondents.

Factual background

[2] The undisputed facts were that in September 2020, the Appellant, the Malaysia Competition Commission ("MyCC"), issued its decision against the 2nd to 24th Respondents, finding them to have infringed section 4 of the Competition Act 2010 ("the Competition Act"), which reads:

> Section 4 – *Prohibited horizontal and vertical agreement*
>
> (1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.
>
> (2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to-
>
> *(a)* fix, directly or indirectly, a purchase or selling price or any other trading conditions;
>
> *(b)* share market or sources of supply;
>
> *(c)* limit or control-
>
> (i) production;
> (ii) market outlets or market access;
> (iii) technical or technological development; or
> (iv) investment; or
>
> *(d)* perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

(3) Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.

[3] A total financial penalty of MYR173,655,300 was imposed on the 2nd to 24th Respondents.

[4] Being dissatisfied with the decision, the 2nd to 24th Respondents filed their appeals to the Competition Appeal Tribunal ("CAT") pursuant to section 51 of the Competition Act, which reads:

Section 51 – *Appeal to the Competition Appeal Tribunal*

(1) A person who is aggrieved or whose interest is affected by a decision of the Commission under section 35, 39 or 40 may appeal to the Competition Appeal Tribunal by filing a notice of appeal to the Competition Appeal Tribunal.

(2) A notice of appeal shall be made in writing to the Competition Appeal Tribunal within thirty days from the date of the decision of the Commission and the appellant shall give a copy of the notice to the Chairman of the Commission.

(3) The notice of appeal shall state in summary form the substance of the decision of the Commission appealed against, shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate and shall be signed by the appellant or his advocate.

[5] CAT heard the appeals and in September 2022, allowed such appeals, and set aside MyCC's decision. Dissatisfied, MyCC filed an *ex parte* application for leave ("the Leave Application") to commence judicial review proceedings at the High Court to challenge CAT's decision.

[6] The High Court dismissed the Leave Application on two principal grounds. First, that MyCC had lacked the requisite *locus standi* to

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challenge CAT's decision, as it was not a "person adversely affected" by the decision within the meaning of Order 53 rule 2(4) of the Rules of Court 2012 ("Rules of Court"), which reads:

> Order 53 – *Application for judicial review*
>
> …
>
> Rule 2 – Applications
>
> …
>
> (4) Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application.
>
> [Emphasis added.]

[7] The learned High Court Judge considered himself bound by the decision of this Court in *Malaysian Airline System Bhd v Competition Commission & Another Appeal* [2022] 1 CLJ 856 ("the *MAS* decision"). The *MAS* decision stands for the proposition that MyCC lacks the requisite *locus standi* to apply for judicial review of a decision rendered by CAT, which is its own appellate authority. The rationale underpinning this ruling is that MyCC, having discharged its quasi-judicial function in arriving at its decision, became *functus officio* and was, thereby rendered incapable of challenging the outcome of the appellate process. MyCC was, therefore, not in any meaningful sense, a "person adversely affected" by CAT's decision, and, hence, failed to satisfy the threshold requirement under Order 53 rule 2(4) of the Rules of Court.

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[8] Secondly, the learned High Court Judge was of the view that MyCC had failed in its duty to make full and frank disclosure in the Leave Application, by withholding from the High Court the material fact that MyCC itself had proposed amendments to the Competition Act to create a right of appeal which it knew it did not presently possess.

[9] Dissatisfied with the decision of the learned High Court Judge, MyCC appealed ("this Appeal").

Issues

[10] The first issue concerned whether MyCC had the requisite *locus standi* to seek judicial review of a decision of CAT, its own appellate tribunal. Arising from this was the further issue of whether the *MAS* decision, which held that MyCC had lacked such standing, was rendered *per incuriam*, thereby justifying a departure from the doctrine of *stare decisis*.

[11] The second issue was whether MyCC had failed to make full and frank disclosure in its *ex parte* leave application for judicial review, and if so, whether such non-disclosure warranted the dismissal of the Leave Application.

[12] We unanimously dismissed this Appeal for the following reasons.

Contentions, evaluation, and findings

[13] As this Court is a court of coordinate jurisdiction with the court that decided *MAS*, the doctrine of *stare decisis* requires this Court to follow that decision unless it is established that it was rendered *per incuriam*.

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[14] It was, therefore, necessary to examine the scope of the doctrine of *per incuriam*. The doctrine is a well-established, albeit narrow, exception to the principle of *stare decisis*. Literally meaning "through want of care" or "through inadvertence", it applies where a court has rendered a decision in ignorance of, or without regard to, a binding statutory provision or a binding authority which, had it been considered, would have compelled a different result.

[15] In *Duke v Reliance Systems Ltd* [1987] 2 WLR 1225, Sir John Donaldson MR explained that the doctrine is engaged only where a court has reached its decision without knowledge of a binding authority or statutory provision, and it can be demonstrated that, had the court been aware of that authority or provision, it must necessarily have reached a contrary conclusion.

[16] The same narrow approach has been adopted in our jurisprudence. In *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590, the Federal Court held that a decision is rendered *per incuriam* where it is made without the court's attention having been drawn to a relevant statutory provision or binding authority. Likewise, in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, the Federal Court adopted the formulation in *Morelle v Wakeling* [1955] 2 QB 379, emphasising that the *per incuriam* doctrine applies only where some part of the reasoning is demonstrably wrong because of such an oversight.

[17] It follows that the *per incuriam* doctrine must be applied with considerable restraint. It is not enough that different arguments could have been advanced or that additional authorities might have

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persuaded the court to reach a different conclusion. Nor does the *per incuriam* doctrine permit a subsequent court to revisit a precedent merely because it considers the earlier decision to be erroneous. Rather, it is confined to cases where the earlier decision overlooked a binding statutory provision or authority that would necessarily have led to a different outcome.

[18] Against this legal backdrop, it was necessary to examine the reasoning of the Court of Appeal in the *MAS* decision. In that case, the Court of Appeal held that once MyCC had made a determination under section 40 of the Competition Act, it had discharged its statutory adjudicative function and had become *functus officio*. Section 40 of the Competition Act reads:

> Section 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 percent of the worldwide turnover of an enterprise over the period during which an infringement occurred.

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[19] In that capacity, MyCC is a quasi-judicial body which no longer has a personal or proprietary interest in the outcome of any subsequent appeal before CAT. Instead, its role is that of a neutral decision-maker whose function is to assist the appellate tribunal.

[20] The Court of Appeal in the *MAS* decision expressed this principle in unequivocal terms:

> Under the statutory scheme of the Act, the CAT is the appellate authority of the MyCC. Therefore, the MyCC must give due deference to and respect for its superior's appellate decision and abide by the decision of the CAT. For the MyCC to ignore or challenge the decision of its own appellate authority would be administrative insubordination of a kind repugnant to the whole statutory scheme of the Act.

[21] In reaching that conclusion, the Court of Appeal in the *MAS* decision had relied on the statutory scheme established under section 40 of the Competition Act, which empowered MyCC, upon finding an infringement pursuant to Part II (*Anti-Competitive Practices*) of the Competition Act, to issue the appropriate remedial directions, impose financial penalties and publish the reasons for its decision. Once those statutory functions had been exercised, MyCC's adjudicative role was complete.

[22] Consistent with that reasoning, the Court of Appeal in the *MAS* decision further held that MyCC, as a quasi-judicial body, cannot be regarded as "a person who is adversely affected by the decision" within the meaning of Order 53 rule 2(4) of the Rules of Court. Accordingly, it lacked the requisite *locus standi* to seek judicial review of a decision rendered by its own appellate tribunal.

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[23] In advancing its argument that the *MAS* decision was rendered *per incuriam*, the Appellant relied on the following grounds, namely, that the Court of Appeal in the *MAS* decision had:

a) Failed to consider authorities on administrative tribunals' right to challenge appellate tribunal decisions;

b) Failed to consider the dichotomy between the regulatory and adjudicatory functions of MyCC;

c) Violated article 8 of the Federal Constitution; and

d) Failed to appreciate the Judiciary's role as the final arbiter of disputes.

Whether MAS decision was per incuriam for failing to consider authorities on administrative tribunals' right to challenge appellate tribunal decisions

[24] The Appellant contended that the decision of the Court of Appeal in *MAS* was rendered *per incuriam* on the basis that the Court of Appeal in that case had failed to consider the established position in Malaysian administrative law that certain quasi-judicial bodies may, in appropriate circumstances, possess *locus standi* to challenge decisions of their own appellate tribunals.

[25] In support of this proposition, the Appellant relied principally on the decision of the Court of Appeal in *Majlis Perbandaran Pulau Pinang v Lembaga Rayuan Negeri Pulau Pinang & Anor* [2006] 1 MLJ 352 ("*Majlis Perbandaran Pulau Pinang")*. The Appellant submitted that, in that case, a local planning authority, which was itself exercising a quasi-judicial function, was permitted to challenge, by way of judicial

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review, a decision of the State Planning Appeal Board that had overturned its decision. By analogy, the Appellant argued that MyCC, as the primary decision-maker under the Competition Act, should similarly possess standing to challenge a decision of CAT, which functions as its appellate authority.

[26] The Appellant, therefore, contended that the failure of the Court of Appeal in *MAS* to consider and apply the principle in *Majlis Perbandaran Pulau Pinang* amounted to a failure to consider a relevant authority, thereby rendering the decision *per incuriam*. Consequently, the Appellant submitted that the learned High Court Judge in the present case had erred in following the *MAS* decision, and that this Court should, therefore, depart from that decision and recognise MyCC's *locus standi* to challenge CAT's decision.

[27] Having carefully considered this submission, we were unable to agree. In our view, the Appellant's reliance on *Majlis Perbandaran Pulau Pinang* was misplaced and did not advance its case for the following reasons.

[28] First, the question of MyCC's *locus standi* must be determined by reference to the statutory framework established under the Competition Act, and not by analogy with other statutory regimes, however superficially similar they may appear. As the Court of Appeal itself had observed in *Majlis Perbandaran Pulau Pinang*, the right of appeal is not a common law right; it exists only by virtue of statute. Accordingly, the nature and extent of any appellate right, including the identity of persons entitled to invoke them, must be ascertained from the legislation itself.

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[29] Under the Competition Act, Parliament created a specific appellate structure. Section 51 of the Competition Act permits a person aggrieved by, or whose interest is affected by, certain decisions of MyCC, under sections 35, 39 or 40, to appeal to CAT. Section 58(3) of the Competition Act, however, expressly provides that a decision of CAT is final and binding on the parties to the appeal. Section 60 of the Competition Act further protects CAT and those acting on its behalf from legal proceedings in respect of acts or omissions done in good faith in the exercise of their functions. Sections 51, 58 and 60 of the Competition Act provide as follows:

> Section 51 – *Appeal to the Competition Appeal Tribunal*
>
> (1) A person who is aggrieved or whose interest is affected by a decision of the Commission under section 35, 39 or 40 may appeal to the Competition Appeal Tribunal by filing a notice of appeal to the Competition Appeal Tribunal.
>
> **...**
>
> Section 58 – *Decision of the Competition Appeal Tribunal*
>
> **...**
>
> (3) A decision of the Competition Appeal Tribunal is final and binding on the parties to the appeal.
>
> **...**
>
> Section 60 – *Protection against suit and legal proceedings*
>
> No action, suit, prosecution or other proceedings shall lie or be brought, instituted or maintained in any court against-
>
> *(a)* the Competition Appeal Tribunal;
>
> *(b)* the President or any member of the Competition Appeal Tribunal;
>
> *(c)* the Secretary or any other officer of the Competition Appeal Tribunal; or

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> *(d)* any person authorised to act for and on behalf of the Competition Appeal Tribunal,
>
> in respect of any act or omission done or omitted by him or it in good faith in such capacity.
>
> [Emphasis added.]

[30] The statutory scheme of the Competition Act is, therefore, unambiguous. While Parliament expressly confers a right of appeal against decisions of MyCC, it does not confer upon MyCC any corresponding right to challenge a decision of CAT. That omission was both deliberate and significant. Had Parliament intended MyCC to enjoy a further avenue of recourse against the decision of its own appellate tribunal, it could easily have provided for such a right in clear and express terms. It chose not to do so. The courts must give effect to that legislative choice rather than supply, through judicial interpretation, a right of appeal which Parliament itself has withheld.

[31] The reasoning of the Court of Appeal in *MAS* was, therefore, grounded not on an absence of awareness of other statutory regimes, but on a careful interpretation of the Competition Act itself. The Court of Appeal in *MAS* considered the statutory finality accorded to the decisions of CAT, distinct institutional roles assigned to MyCC and CAT, and the quasi-judicial character of MyCC's functions, once it had exercised its powers under section 40 of the Competition Act.

[32] Secondly, and more significantly, the decision in *Majlis Perbandaran Pulau Pinang* had not addressed the question that was before this Court. The *locus standi* of the local planning authority in *Majlis Perbandaran Pulau Pinang* was neither challenged nor considered,

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and the court, in that case, was not called upon to decide whether a primary decision-maker may impugn the decision of its own appellate tribunal. In those circumstances, *Majlis Perbandaran Pulau Pinang* could not be elevated into authority for the proposition that a quasi-judicial body possesses the right to judicially review the decision of its appellate authority.

[33] In fact, the actual *ratio decidendi* of *Majlis Perbandaran Pulau Pinang* concerned an entirely different issue, namely, whether the decision of the local planning authority was one that was appealable under the Town and Country Planning Act 1976 ("the Town and Country Planning Act"). The Court of Appeal in that case held that the jurisdiction of the State Planning Appeal Board was confined to appeals against decisions where planning permission had been refused or granted subject to conditions. Since the decision of local planning authority in question fell outside the statutory ambit, that appeal to the State Planning Appeal Board against the decision of the local planning authority was incompetent. The appeal was, therefore, allowed by the Court of Appeal on that basis alone.

[34] Thirdly, the statutory regimes relied upon by the Appellant were materially distinguishable. Under the Town and Country Planning Act, a local planning authority performs an administrative and regulatory role in determining applications for planning approval. Its decisions form part of an ongoing regulatory framework, and it may retain an institutional interest in the proper development and implementation of planning policies.

[35] The role of MyCC under the Competition Act is fundamentally different. MyCC investigates alleged infringements, conducts

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adjudicative proceedings, makes findings of infringement and imposes the consequences prescribed by section 40 of the Act. Upon issuing its decision, MyCC has completed its statutory adjudicative function and becomes *functus officio*. Its role thereafter is not that of an aggrieved litigant seeking to defend its decision, but that of a quasi-judicial body whose decision has been subjected to appellate review by CAT.

[36] As the Court of Appeal had observed in *MAS*, CAT is the appellate authority established by Parliament to review MyCC's decisions. MyCC was, therefore, required to respect and abide by CAT's decisions. To permit MyCC to challenge the decision of its own appellate tribunal would undermine the statutory hierarchy created by Parliament and would be inconsistent with the very appellate structure established under the Competition Act.

[37] Finally, the authorities relied upon by MyCC arising from the Town and Country Planning Act and the Customs Act 1967 ("Customs Act") did not assist its case. Apart from not being binding on the Court of Appeal in *MAS*, those decisions arose from statutory frameworks materially different from the Competition Act. They did not establish any general principle that a primary decision-maker has standing to challenge the decision of its own appellate tribunal.

[38] In the circumstances, we were unable to conclude that the Court of Appeal in *MAS* had overlooked any binding authority or statutory provision that would have compelled a different conclusion. The decision was reached upon a consideration of the statutory scheme of the Competition Act and the respective institutional roles of MyCC

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and CAT. The requirements for a finding of *per incuriam* were, therefore, not satisfied.

Whether MAS decision was per incuriam for failing to consider dichotomy between regulatory and adjudicatory functions of MyCC

[39] The scope of MyCC's statutory functions and powers was further raised by the Appellant, who placed considerable reliance on the relatively recent decision of the Supreme Court of India in *Airports Economic Regulatory Authority of India v Delhi International Airport Ltd & Ors* [2024] 10 SCR 1404 ("the *AERA* case").

[40] The Appellant contended that the decision in the *AERA* case supported the proposition that a regulatory authority may challenge a decision of its appellate body. It was argued that the Court of Appeal in *MAS* had relied upon an earlier Indian authority, namely, *District Executive Officer v State of Kerala* 1991 (1) KLT 390*,* which, according to the Appellant, had since been displaced by the Supreme Court of India in the *AERA* case.

[41] In the *AERA* case, the Supreme Court of India had considered whether the Airports Economic Regulatory Authority of India ("AERA"), a statutory regulator responsible for determining airport tariffs, could be impleaded as a party in an appeal against its tariff orders before the Telecom Disputes Settlement and Appellate Tribunal.

[42] The Supreme Court of India held that the answer depended upon the nature of the function exercised by the statutory authority when making the impugned decision. The Supreme Court of India drew an important distinction between adjudicatory and regulatory functions:

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> A statutory authority may be entrusted with the performance of both adjudicatory and regulatory functions. This Court has held that while it need not be impleaded as a respondent in an appeal against an adjudicatory order, it may be made a contesting party in an appeal against an order issued in exercise of its regulatory functions because then it may have a vital interest in the bearing on matters of public interest.

[43] The Supreme Court of India found that AERA's tariff determination was regulatory in nature as it involved economic evaluation, policy considerations, and the balancing of competing public interests. It was not a determination of past rights or liabilities, but a forward-looking exercise of regulatory discretion directed towards achieving statutory objectives.

[44] Relying on this reasoning, the Appellant submitted that MyCC, being a regulator, should similarly be entitled to appeal against a decision of CAT.

[45] We found this submission untenable for the following reasons.

[46] At the outset, we recognised that comparative jurisprudence may, in appropriate circumstances, provide valuable assistance in interpreting legal principles. However, foreign decisions do not form part of the binding law of Malaysia and cannot displace the clear meaning of domestic legislation. As recognised by the Court of Appeal in *Mann Holdings Pte Ltd & Anor v Ung Yoke Hong* [2019] 8 MLJ 186, decisions of foreign courts, however persuasive, remain no more than persuasive authority.

[47] More importantly, the Appellant's reliance on the *AERA* case overlooked the fundamental distinction between the general

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statutory role of MyCC as a regulator and the specific function it was performing when it made the decision under challenge.

[48] In our view, this distinction was critical. The question was not whether MyCC was, in general, a regulatory body. It plainly was. The real question was the nature of the particular decision-making function exercised by MyCC in the present case. This distinction lies at the heart of the administrative law principles governing the exercise of supervisory jurisdiction by this Court.

[49] Upon examination of the statutory scheme under the Competition Act, we were satisfied that MyCC's final determination against the Respondents was adjudicatory in character. The following steps undertaken by MyCC bore all the essential features of a quasi-judicial proceeding:

(a) Investigation — MyCC conducted an investigation under Part III (*Investigation and Enforcement*) of the Competition Act, including the gathering of evidence and the interviewing of relevant witnesses;

(b) Proposed Decision — Pursuant to section 36 (*Proposed decision by the Commission*) of the Competition Act, MyCC issued a proposed decision setting out its preliminary findings;

(c) Representation — the affected enterprises were given the opportunity to make written and oral representations under sections 36 (*Proposed decision by the Commission*) and 37 (*Oral representation*) of the Competition Act;

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(d) Hearing — A formal hearing was conducted under section 38 (*Conduct of hearings*) of the Competition Act, during which the parties were permitted to present evidence and legal submissions;

(e) Deliberation — The panel of Commissioners considered and deliberated upon the evidence and representations advanced; and

(f) Determination — MyCC subsequently issued its final determination under section 40 (*Finding of an infringement*) of the Competition Act, finding an infringement of section 4 (*Prohibited horizontal and vertical agreement*) of the Competition Act and imposing financial penalties.

[50] The above-mentioned steps undertaken by MyCC were not acts of regulatory policy formulation. They were acts of adjudication. MyCC was not establishing industry-wide policy, setting economic standards, or determining future regulatory frameworks. Rather, it was applying statutory provisions to specific parties, assessing evidence, determining whether a contravention had occurred, and imposing consequences arising from that finding. In substance, MyCC was acting in a judicial capacity, rather than as a policy-making regulator.

[51] Our view was fortified by the distinction between the *AERA* case and the present appeal, demonstrated by the respective statutory frameworks.

[52] In India, Parliament had expressly provided a right of appeal to the competition authority against decisions of the appellate tribunal. Section 53T of the Indian Competition Act permits, among others,

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the Competition Commission of India or any statutory authority to appeal to the Supreme Court of India against a decision or order of the appellate tribunal. Section 53T of the Indian Competition Act provides:

> The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them…
>
> [Emphasis added.]

[53] The Supreme Court of India in the *AERA* case considered this provision. Although it was not the sole basis of the conclusion reached by Supreme Court of India, it formed part of the relevant statutory context.

[54] No equivalent provision exists under the Malaysian Competition Act. On the contrary, the Malaysian legislation establishes a specific and closed appellate structure, with no express statutory right conferred upon MyCC to appeal against a decision of CAT.

[55] Accordingly, the *AERA* case did not advance the Appellant's argument. It concerned a different statutory framework and, more importantly, a different type of decision-making function. AERA was exercising a regulatory function involving policy and public interest considerations; MyCC, in the present case, was performing an adjudicatory function involving the determination of a specific statutory infringement.

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[56] In any event, as alluded to earlier, the *AERA* case is a foreign judgment and is not binding upon this Court. At its highest, it may serve as persuasive authority where the statutory frameworks and factual circumstances are analogous. As demonstrated above, they are not.

Whether MAS decision was per incuriam for having violated article 8 of the Federal Constitution

[57] The Appellant further contended that the *MAS* decision offended article 8 of the Federal Constitution, which guarantees equality before the law and equal protection of the law. The provision reads:

> Article 8 – *Equality*
>
> (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> ...

[58] The essence of the argument was that the *MAS* decision created an unjustifiable disparity between MyCC and other statutory bodies performing comparable quasi-judicial functions.

[59] In support of this contention, the Appellant drew a comparison between MyCC and other administrative bodies, in particular Local Planning Authorities under the Town and Country Planning Act, which have been permitted to challenge decisions of the Appeal

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Board, and the Director General of Customs under the Customs Act, who has been allowed to appeal against decisions of the Customs Appeal Tribunal.

[60] The Appellant argued that these bodies, like MyCC, exercise adjudicatory functions and operate within a statutory framework involving an appellate tribunal. Yet, unlike those bodies, MyCC had been denied access to the courts once CAT had determined an appeal against its decision. According to the Appellant, this amounted to unequal treatment under article 8(1) of the Federal Constitution, as there was no rational basis for distinguishing MyCC from other statutory authorities and preventing it from seeking further recourse.

[61] We were unable to accept this submission for the following reasons.

[62] The principle of equality under article 8 of the Federal Constitution does not require identical treatment in all circumstances. Rather, it permits differential treatment where the distinction is based on a reasonable classification founded upon an intelligible differentia, and where that distinction bears a rational nexus to the object sought to be achieved by the legislation.

[63] In the present case, the distinction between MyCC and other statutory bodies referred to by the Appellant was not without justification. The relevant consideration was not merely whether these bodies exercised quasi-judicial powers or were subject to appellate review. The critical question was the statutory role and institutional position assigned to each body within its respective legislative framework.

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[64] As explained in the *MAS* decision, MyCC, when determining whether there has been an infringement of the Competition Act, performs a quasi-judicial function. Upon reaching its determination, MyCC becomes *functus officio*. CAT, as the statutory appellate body created under the same legislative scheme, is entrusted with the function of reviewing MyCC's determination. To permit MyCC itself to challenge CAT's decision would undermine the hierarchical structure established by Parliament and would result in what was described in the *MAS* decision as "administrative insubordination".

[65] The statutory framework governing competition law, was, therefore materially different from those applicable to local planning authorities or customs authorities. Those regimes operate within different institutional structures, with different legislative objectives and appellate arrangements. The fact that other statutory bodies may have been granted further rights of appeal does not mean that MyCC must necessarily enjoy an identical position.

[66] In our view, the classification drawn by the Competition Act was neither arbitrary nor discriminatory. It reflected the particular design of the competition law regime, which required a clear separation between the decision-maker at first instance and the appellate authority entrusted with reviewing that decision.

[67] Accordingly, the differential treatment of MyCC was justified by the statutory purpose of maintaining the integrity, independence, and hierarchy of the competition law framework. The distinction had satisfied the requirements of reasonable classification and, as such, had not infringed article 8 of the Federal Constitution.

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Whether MAS decision was per incuriam for having failed to appreciate role of judiciary as final arbiter of disputes

[68] The Appellant further contended that the decision of the Court of Appeal in *MAS* represented an impermissible judicial usurpation of legislative power. The gravamen of the Appellant's submission is that, by denying MyCC any avenue to challenge decisions of CAT, the Court of Appeal had effectively read into the Competition Act a restriction on access to justice which Parliament had not seen fit to enact.

[69] In advancing this contention, the Appellant invoked article 121 (*Judicial power of the Federation*) of the Federal Constitution, and relied upon the principles enunciated by the Federal Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2018] 1 MLJ 545 and *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561. These authorities affirmed the fundamental constitutional position that judicial power resides exclusively in the judiciary, and that no administrative tribunal may be elevated to the status of a final arbiter of legal disputes.

[70] The Appellant submitted that the supervisory jurisdiction of the High Court is a cornerstone of the constitutional framework, and that any attempt to oust or curtail that jurisdiction, whether by judicial decision or statutory provision, must be scrutinised with the utmost care. The Appellant further contended that since the Competition Act contains no clear and explicit words ousting the jurisdiction of the High Court, the Court of Appeal in the *MAS* decision had, in substance, effected a judicial usurpation of the legislative function.

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[71] We found such contention untenable for the following reasons.

[72] First, the *MAS* decision had not abolished or curtailed an existing right of appeal. Nor did it insulate decisions of CAT from judicial scrutiny. The Court of Appeal in the *MAS* decision merely interpreted the Competition Act and concluded that Parliament had not conferred upon MyCC a statutory right to appeal against decisions of CAT.

[73] The judicial function is to declare what the law is, and not what it ought to be. Where Parliament has expressly conferred a right of appeal, the courts will give effect to it. Equally, where Parliament has chosen not to do so, the courts cannot create such a right under the guise of statutory interpretation. To hold otherwise would be to legislate from the Bench, thereby transgressing the constitutional separation of powers.

[74] Moreover, the Appellant's contention that the Court of Appeal in the *MAS* decision had denied MyCC access to the courts was misplaced. A distinction must be drawn between a statutory right of appeal and the supervisory jurisdiction of the High Court. The absence of the former does not extinguish the latter.

[75] In fact, a decision of CAT is not beyond judicial scrutiny. Like the decisions of other statutory tribunals, it remains amenable to judicial review on recognised public law grounds, including illegality, irrationality, procedural impropriety, or jurisdictional error. Judicial review exists to ensure that CAT acts within the limits of its statutory powers and in accordance with the law. What the Court of Appeal in the *MAS* decision held was simply that MyCC, having acted in a

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quasi-judicial capacity and having become *functus officio* upon rendering its decision, was not the proper party to invoke that supervisory jurisdiction in order to challenge the appellate tribunal's decision on its merits.

[76] Indeed, MyCC's own conduct reinforces this conclusion. Following the *MAS* decision, it proposed the introduction of section 58A into the Competition Act to confer upon itself a statutory right of appeal against decisions of CAT. Had such a right already existed, there would have been no necessity for legislative amendment. The proposed amendment was, therefore, a clear acknowledgment that the perceived deficiency lay not in the reasoning of the *MAS* decision, but in the statutory framework itself.

[77] It was our view, therefore, that far from usurping legislative power, the Court of Appeal in the *MAS* decision respected the constitutional boundaries between the judicial and legislative branches. It had interpreted and applied the Competition Act as enacted by Parliament.

[78] It was also pertinent to note that, following the decision in *MAS*, MyCC had sought leave to appeal to the Federal Court. That application for leave was dismissed. Undeterred, MyCC subsequently applied for a review of that decision pursuant to rule 137 of the Rules of the Federal Court 1995. That application was, likewise, dismissed.

[79] The dismissal of both applications were significant. Had the *MAS* decision been shown to be plainly erroneous by reason of having overlooked binding authority or contravened a statutory provision

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requiring a different conclusion, the appropriate course would have been for the Federal Court to intervene. The refusal to grant leave and the subsequent refusal to review the decision demonstrated that MyCC had failed to establish any exceptional basis to displace the authority of the *MAS* decision.

Whether High Court Judge erred in finding material non-disclosure by Appellant at Leave Application

[80] The learned High Court Judge, having concluded that MyCC lacked the requisite *locus standi* to commence the judicial review proceedings, was not required to consider any further issue arising from the Leave Application. In particular, once the learned High Court Judge had determined that MyCC had no standing to challenge the decision of CAT, the Leave Application was liable to be dismissed on that basis alone.

[81] Nevertheless, the learned High Court Judge had proceeded to consider a further issue, namely whether MyCC had failed to comply with its duty of full and frank disclosure in obtaining leave to commence judicial review. Having considered the matter, the learned High Court Judge had found that MyCC had failed in that duty.

[82] We agreed with that conclusion for the following reasons.

[83] It is a well-established principle that an applicant who seeks relief from the court without notice to the opposing party, commonly referred to as an *ex parte* application, assumes a duty of the utmost good faith. Such an applicant is required to make a full and frank disclosure of all material facts relevant to such application.

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[84] This duty to make full and frank disclosure was not limited to facts which support the applicant's case. It extends to all matters within the applicant's knowledge which may have a bearing on the court's determination, including matters adverse to the applicant's position. An applicant is not entitled to place before the court only those facts favourable to its case while withholding matters which may affect the exercise of the court's discretion. The obligation is one of candour and completeness, requiring the applicant to present a fair and balanced account of the circumstances.

[85] The reason for this stringent obligation is apparent. In an *ex parte* application, the court hears only from one side. The absent party has no opportunity to correct any inaccuracies, challenge assertions, or bring relevant matters to the court's attention. The court must, therefore, be able to rely upon the applicant's honesty and transparency. A failure to comply with this duty undermines the integrity of the judicial process and may render any order obtained liable to be set aside.

[86] In the present case, MyCC's application for leave to commence judicial review was made *ex parte*. The Respondents were not before the High Court and had no opportunity to address the court on matters relevant to the application, including matters relating to MyCC's own understanding of its legal position. In those circumstances, MyCC was under an enhanced obligation to ensure that the court was provided with a complete and accurate account of all material facts.

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[87] However, MyCC had failed to disclose two documents of considerable significance, namely the *Consultation Paper on the Proposed Amendments to the Competition Act* and the *Salient Points of the Proposed Amendments to the Competition Act.*

[88] Both documents were issued by MyCC itself on 25 April 2022, several months before the filing of the Leave Application on 1 December 2022. The significance of those documents was undeniable. In the *Salient Points of the Proposed Amendments to the Competition Act*, it was expressly stated that MyCC had proposed the introduction of section 58A into the Competition Act, which would confer upon MyCC a statutory right of appeal to the High Court against decisions of CAT.

[89] More importantly, it was stated in the *Salient Points of the Proposed Amendments to the Competition Ac* as follows:

> Section 58A was introduced following the decision of the Court of Appeal in *Malaysian Airlines System Berhad v Competition Commission & Another Appeal* [2022] 1 CLJ 856.

[90] The importance of those documents was that they revealed MyCC's own acknowledgment of the legal position following the *MAS* decision. The documents demonstrated that MyCC was aware that, under the existing statutory framework, it did not possess the standing to challenge a decision of CAT. Having encountered that obstacle in the *MAS* decision, MyCC sought legislative amendment to create a right of appeal which it did not then have.

[91] By failing to disclose those documents, MyCC had deprived the High Court of material information directly relevant to the exercise of its

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discretion. This was not an insignificant omission. The undisclosed documents went to the very foundation of the Leave Application. Had they been placed before the High Court, the court would have been apprised of the full circumstances in which MyCC sought judicial review, including MyCC's own recognition of the legal impediment it faced.

[92] We also considered it significant that MyCC was not an ordinary litigant. It is a statutory regulator entrusted with the enforcement of competition law and the exercise of public powers. Such an institution carries a correspondingly high obligation to act with integrity, fairness, and candour in its dealings with the court. As the custodian of the statutory regime it administers, MyCC ought to have been particularly mindful of its obligation to ensure that the court was not deprived of relevant information.

[93] That obligation, however, was not fulfilled.

[94] The learned High Court Judge, therefore, correctly concluded that MyCC had failed to discharge its duty of full and frank disclosure. We agree with that conclusion. An application for leave to commence judicial review in circumstances where material facts were not disclosed cannot be allowed.

Conclusion

[95] In the upshot, based on the aforesaid reasons, and after judicious consideration of all the evidence before this Court, submissions of all Parties, and Grounds of Judgment of the learned High Court Judge, we unanimously dismissed the Appeal with costs in the

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amount of MYR30,000 (subject to allocatur) for each set of solicitors for the Respondents.

Dated: 18 August 2026

……SIGNED……

(EVROL MARIETTE PETERS)
Judge of the Court of Appeal
Malaysia

Counsel:

For the Appellant – Dato' Seri V Sithambaram, Kwan Will Sen, Ruebankumar Asokan, Muayyad Khairulmaini, Emilia Lye Jia Jia; Messrs Lim Chee Wee Partnership

For the 2nd Respondent – Khoo Guan Huat, Shanthi Kandiah, Angela Hii Hui Chi, Azyan Mohamed Ibrahim; Messrs Shanti Kandiah Chambers

For the 3rd Respondent – Nahendran Navaratnam, Wong Wye Wah, Mark Lau, and Kristen Tan; Messrs Sreenevasan Young

For the 4th Respondent – Dawn Wong; Messrs Adnan Sundra & Low.

For the 5th Respondent – Kirin Shanti Moganasundram, Wong Lien Lien, and Ooi Ji Shan; Messrs Shearn Delamore.

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For the 6th to 9th Respondents – Tunku Farik Tunku Ismail, Tan Sixin, and Yap Mei Foong; Messrs Azim, Tunku Farik & Wong.

For the 10th, 13th to 16th, and 19th Respondents – Anand Raj, Jeevitha T Thurai Rathnam, Justin Chai Zi Le, Srriya Nithiananda Jawahar; Messrs Shearn Delamore

For the 11th and 12th Respondents – Yon See Ting, Sivaram Prasad, Ashrvini Nair Gobalakerisnan; Messrs Christopher & Lee Ong.

For the 17th, 18th, and 20th Respondents – Manshan Singh, Lim Shu Yi, Tan Shi Wen; Messrs Skrine

For the 21st to 24th Respondents – Mark La Brooy, Yenne Chow, Steven Ramesh; Messrs Raja, Darryl & Loh

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