DR LOURDES DAVA RAJ CURUZ DURAI RAJ

v.

DR MILTON LUM SIEW WAH & ANOR

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Rohana Yusuf PCA, Azahar Mohamed CJM, David Wong Dak Wah CJSS, Nallini Pathmanthan FCJ
[Civil Appeal No: 02(i)-118-12-2018(W)]
29 July 2020

Administrative Law: *Judicial review — Judicial review proceedings — Rules of natural justice — Adverse order made against person directly affected who was deprived of his right to be heard — Whether rules of natural justice breached — Whether order a nullity and ought to be set aside — Whether principle in Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals applied — Rules of Court 2012, O 15 r 6, O 53 r 4(2)*

The appellant ('Dr Lourdes') was, at the material time, the Chief Medical Service Officer and person in charge of Assunta Hospital. The 1st respondent ('Dr Milton') was then a Visiting Consultant Obstetrician & Gynaecologist at the same hospital while the 2nd respondent was the Malaysian Medical Council ('MMC'). Pursuant to a complaint by Dr Milton, the MMC charged Dr Lourdes with infamous conduct in a professional respect. An inquiry was carried out and, by a majority, the MMC found that Dr Lourdes had no case to answer. Dr Milton was dissatisfied with the outcome of the inquiry and proceeded to institute judicial review proceedings for an order of *certiorari* against the MMC's majority decision. Dr Milton additionally sought a declaration that Dr Lourdes was guilty of the charge against him and that the MMC be ordered to hear his plea in mitigation and for the imposition of an appropriate sentence. Dr Milton filed the judicial review application only against MMC, and did not include Dr Lourdes as a party. The High Court dismissed Dr Milton's judicial review application; the Court of Appeal, however, allowed Dr Milton's appeal. At the mitigation hearing, the MMC imposed the punishment of reprimand on Dr Lourdes. In response, Dr Lourdes filed an originating summons seeking to set aside the reprimand and to obtain a declaration that since he was not a party to the Court of Appeal proceedings, he was not bound by the Court of Appeal's decision. The High Court dismissed Dr Lourdes' originating summons. Dr Lourdes then sought leave of the court to intervene in the Court of Appeal proceedings and to set aside the Court of Appeal order. The Court of Appeal found no merits in the motion and dismissed his application to intervene, resulting in the present appeal. The Federal Court granted leave on the following questions of law: (i) where at the hearing of an application for judicial review an adverse order was made against a person directly affected by the application, whether the

order was a nullity within the meaning of the decision in *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* and ought to be set aside as of right, in a case where the person directly affected: (a) was not served Form 110, the statement and all affidavits in support or notified of the application and date of hearing, in breach of the mandatory requirements of O 53 r 4(2) Rules of Court 2012 ('ROC'); and (b) was consequently deprived of his right to be heard at the hearing at which the adverse order was made against him, in breach of the rules of natural justice; and (ii) if the answer to Question 1 was in the affirmative, whether the principle in *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* ('*Staghorn*'), that intervention under O 15 r 6 ROC would not be allowed where proceedings had come to an end, applied to a case where the order was a nullity for breach of the rules of natural justice and the mandatory requirements of O 53 r 4(2) ROC and intervention was sought for the purpose of setting aside the order.

Held (allowing the appeal):

(1) With regard to Question (i), where the livelihood of a person was at stake, that person ought to be accorded all the rights he was entitled to, paramount of which was the right to be heard in his own cause, to be accorded a fair hearing and given the opportunity to defend himself against the charge proffered against him. In this regard, it was untenable to contend that Dr Lourdes was directly affected by the decision of the MMC but not directly affected by the decision of the Court of Appeal. The order sought by Dr Milton effectively usurped the power of the MMC to regulate the conduct of its own members as the court order in his favour removed from the MMC its power to decide on whether the charge against Dr Lourdes had been made out. The right to be heard on the particular facts of the instant appeal, extended to all stages of the proceedings which affected Dr Lourdes, and this included the judicial proceedings. The Court of Appeal erred in not considering the miscarriage of justice suffered by Dr Lourdes when it imposed a finding of guilt on him and restricted his right to be heard in his defence to only putting in a plea of mitigation before the MMC. Question (i) was thus answered in the affirmative. (paras 31, 35, 38 & 61)

(2) As for Question (ii), in the case of *Staghorn*, the issues of an affected party not being given notice, and not being accorded the opportunity to be heard in his own defence did not arise in the same manner as in the present appeal. In *Staghorn*, this court found that Staghorn Sdn Bhd was not an interested party while here Dr Lourdes was a party most directly involved as the entire proceedings emanated from an allegation of professional misconduct on his part. He was central to the entire case and his exclusion from participation in one of the most important aspects of adjudication resulted in the reversal of a finding of innocence, without him having been heard in his own defence at all. A clearer case of a breach of one of the most fundamental rules of natural justice was rarely seen, and that rule was the right to be heard. This resulted in a serious miscarriage of justice, and Dr Lourdes was an affected party. Hence, *Staghorn* was inapplicable to the factual matrix of the present

case as the facts, law and considerations differ were entirely different and distinguishable there. *Staghorn* also was decided on the considerable length of time it took for Staghorn Sdn Bhd to apply to intervene. That was not the case here, as Dr Lourdes had no notice whatsoever of the judicial review filed by Dr Milton, until the MMC took steps to carry out the order of the Court of Appeal and convened to hear Dr Lourdes' plea in mitigation. There was no delay on Dr Lourdes' part. Question (ii) was hence answered in the negative. (paras 43, 44 & 61)

(3) In the present proceedings, Dr Lourdes was not seeking to adduce fresh evidence to re-litigate the judicial review proceedings. He was seeking to intervene to be heard in respect of the finding of guilt made against him in his absence in the judicial review proceedings. Dr Lourdes although having had the opportunity to defend himself before the MMC, was not made a party in the judicial review proceedings before the High Court and Court of Appeal, and this failure to add him as a party precluded him from articulating his own defence before the courts. He was excluded to his detriment. The right to be heard was not restricted to merely domestic inquiry proceedings but extended to all available avenues of appeal. Dr Lourdes not being joined as a party at the High Court and Court of Appeal levels, was a matter of serious detriment to him, particularly when the Court of Appeal made a finding of guilt on his part. Dr Lourdes was without question an affected party, and thus pursuant to O 53 r 4(2) ROC, he was entitled to notice of the judicial review proceedings so that he could be heard in his own defence. Therefore, the order of the Court of Appeal was a nullity because the appellant was not given the right to be heard. (paras 55, 57 & 61)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 1 MLRA 183 (folld)

Bolton v. Law Society [1994] 1 WLR 531 (refd)

Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374; [1984] UKHL 9 (refd)

Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 4 MLRA 674 (distd)

FW Goonetilleke v. The Medical Council [1911] 1 MLRH 652 (refd)

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2007] 3 MLRA 150 (distd)

Kanda v. Government of the Federation of Malaya [1962] AC 322 (refd)

Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor (folld)

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1997] 2 MLRA 146 (refd)

North West Water Ltd v. Binnie & Partners (A Firm) [1990] 3 All ER 547 QBD (distd)

Regina v. Rent Office Service & Anor, ex-parte Muldoon [1996] 1 WLR 1103 (distd)

Trikkon Sdn Bhd v. Mahinder Singh Dulku [2009] 4 MLRH 190 (refd)

Legislation referred to:

Courts of Judicature Act 1964, 96(a)

Medical Act 1971, ss 3, 4, 4A(2)(b), (c), 29(2)(b), 31(2)

Medical (Amendment) Act 2012, s 27

Rules of Court 2012, O 15 r 6, O 53 r 4(2)

Counsel:

For the appellant: Lambert Rasa-Ratnam (Chan Mun Yew with him); M/s Lee Hishammuddin Allen & Gledhill

For the 1st respondent: Anita Kaur Randhawa (Phang See Eng with her); M/s Asbir, Hira Singh & Co

For the 2nd respondent: Gurdev Singh Bal; M/s Irmohizm, Gurdev & Co

JUDGMENT

Nallini Pathmanthan FCJ:

[1] This appeal raises a conflict between two seemingly contradictory principles which the courts need to balance. Between the policy of avoiding the opening of the floodgates to endless litigation by upholding finality in judicial decisions on the one hand, and on the other, protecting the sacrosanct rights of an affected person to be accorded the right to be heard in his own defence; which should prevail? Ultimately based on the particular facts of the instant appeal, we decided in the interests of the affected person, the appellant before us, whose livelihood would be threatened by the order obtained by the 1st respondent against him *in absentia*. We append the reasons for our decision below.

Salient Background Facts

[2] At the material time, the appellant before us, Dr Lourdes Dava Raj Curuz Durai Raj ('Dr Lourdes') was the Chief Medical Service Officer and person in charge of Assunta Hospital while the 1st respondent before us, Dr Milton Lum Siew Wah ('Dr Milton') was then a Visiting Consultant Obstetrician & Gynaecologist at the same hospital.

[3] The 2nd respondent before us is the Malaysian Medical Council ('MMC'), a statutory body established pursuant to s 3 of the Medical Act ('MA') 1971. The MMC's dual functions are to register medical practitioners and to regulate the practice of medicine (see s 4 of the MA 1971) and in furtherance of its functions, it has the power to regulate the standards of practice as well as the professional conduct and ethics of registered medical practitioners (see s 4A(2) (b) and (c) of the MA 1971).

[4] It is not in dispute that Dr Lourdes circulated clinical summaries of a total of six patients to doctors for the purpose of discussion during Medical and Dental Advisory Committee meetings at Assunta Hospital on 23 September

2009 and 9 December 2009. This committee was tasked with studying the morbidity and mortality in those cases with the end aim of improving the standard of medical care in the said hospital.

[5] Dr Milton was among the doctors who received the summaries. He took exception to the fact that Dr Lourdes circulated the said documents without a cover of confidentiality and without informing the committee that the prior consent from the patients or their next-of-kin had been obtained. This, he contended, was a breach of confidentiality and a violation of s 2.2.2 of the MMC's Code of Professional Conduct, s 3.2 of the MMC's Guideline "Good Medical Practice" and ss 1, 2, 8d and 9 of MMC's Guideline "Confidentiality". He complained to the then President of the MMC, Tan Sri Dr Hj Mohd Ismail Merican, in a letter dated 31 December 2009.

[6] Based on Dr Milton's complaint, the Preliminary Investigation Committee I of the MMC charged Dr Lourdes with infamous conduct in a professional respect, as informed in the letter dated 25 March 2013. In the same letter, Dr Lourdes was requested to elect either to state his defence before the said Preliminary Investigation Committee or to have the matter referred to the Malaysian Medical Council for an inquiry. He chose the former and the inquiry was held on 20 May 2014.

[7] Before the inquiry, Dr Lourdes affirmed a statutory declaration on 19 May 2014. He explained that he had been newly appointed as the person in charge of the hospital at the material time, and only realised that he may have breached the confidentiality requirement when Dr Milton raised this issue during the second meeting on 9 December 2009. He averred that thereafter, he stopped doing so and endeavored to strictly adhere to the guidelines and relevant legislation.

[8] In his defence, he averred that it was the doctors attending the committee meeting who requested the clinical summaries of the presenting doctors prior to the meeting. Despite being aware of doctor-patient confidentiality, he did not realise it was applicable in the context of a mortality and morbidity assessment meeting. He asserted that he disclosed patient names not with any *mala fides*, but did so in the interests of continuing medical education. He therefore contended that such an inadvertent act would not amount to "infamous conduct in a professional respect".

[9] On 20 May 2014, the inquiry was carried out. By a majority, the MMC found that Dr Lourdes had no case to answer. However, they noted that there were lapses and deficits in relation to handling documents in the hospital and advised him to improve this. Dr Lourdes was officially informed of this by way of a letter dated 12 June 2014 from the then President of the MMC, Datuk Dr Noor Hisham Abdullah.

[10] To the knowledge of Dr Lourdes, the matter ended there. However, Dr Milton was dissatisfied with the outcome of the inquiry and proceeded to institute judicial proceedings, as set out below.

The Proceedings

[11] The chronology of the judicial and disciplinary proceedings in this matter are set out at length below as the 1st respondent defended the appellant's present appeal on the grounds of, *inter alia*, delay and *res judicata*. As such it is important to appreciate the detailed chronology of events to comprehend why we did not concur with the 1st respondent's stance.

The High Court

[12] On 26 August 2014, Dr Milton was granted leave to institute judicial review proceedings for an order of *certiorari* against the MMC's majority decision that no case had been made out against Dr Lourdes. Dr Milton sought additionally, a declaration that Dr Lourdes was guilty of the charge against him and that the MMC be ordered to hear his plea in mitigation and for the imposition of an appropriate sentence. It is of considerable significance that Dr Milton filed the judicial review application only against MMC, and did not include Dr Lourdes as a party.

[13] The High Court dismissed Dr Milton's judicial review application with costs of RM10,000.00. The learned judge however failed to address or discuss the failure to include Dr Lourdes as a party to the judicial review proceedings. Instead, the thrust of the judgment centred on the premise that Dr Milton had no locus to institute the proceedings as he was not a person adversely affected by the decision of MMC. As he had brought the proceedings to assert public rights and/or the preservation of the public confidence in the medical profession, the judge held that the proper party to institute proceedings was the Attorney General, who is properly vested with power to assert a public right by way of public law litigation. On that ground alone, Dr Milton's case, it was held, ought to be dismissed.

[14] The judge went on to deal with the merits of the judicial review application. Firstly, Her Ladyship found that Dr Lourdes had not expressly admitted to the charge against him. Secondly, Dr Milton had failed to show that the decision of the MMC was tainted with illegality, irrationality, procedural impropriety, or that irrelevant matters had been taken into consideration and/or that relevant matters had not been taken into consideration. Hence, there was no basis for the court to interfere with the majority findings by the MMC that Dr Lourdes was not guilty of the charge against him.

The Court Of Appeal

[15] Dr Milton succeeded in his appeal to the Court of Appeal. On 27 October 2015, the Court of Appeal allowed Dr Milton's appeal, set aside the High

Court's decision, and granted the order of *certiorari* as well as the declaration sought by Mr Milton to the effect that Dr Lourdes was guilty of the charge of a breach of confidentiality. It remained for the MMC to hear Dr Lourdes' plea in mitigation and punish him. Of particular significance once again, is that Dr Lourdes was not heard in his own defence at the hearing of the appeal before the Court of Appeal, because he had not been made a party to those judicial review proceedings.

[16] As directed by the Court of Appeal, on 21 June 2016, the MMC convened the mitigation hearing. There is no dispute that Dr Lourdes was accorded the right to be heard at this stage and was represented by counsel. It is noteworthy that no attempt was made at this stage by Dr Lourdes to dispute or set aside the orders made in the judicial review proceedings, despite not having been heard.

MMC's Hearing On Mitigation And Punishment

[17] At the outset of the mitigation hearing, Dr Lourdes' counsel, Ms Shanti Abraham made several preliminary objections. Of relevance to the present appeal is the objection that Dr Lourdes was not bound by the decision of the Court of Appeal, as he was not a party to the court proceedings. She placed on record that she and her client attended the mitigation hearing under protest. She also raised other pertinent issues which severely prejudiced Dr Lourdes.

[18] The MMC imposed the punishment of reprimand on Dr Lourdes.

Appeal Against MMC's Decision By Dr Lourdes

[19] In response to the punishment meted out by the MMC, Dr Lourdes filed an originating summons under s 31 of the Medical Act 1971 seeking to set aside the reprimand and to obtain a declaration that since he was not a party to the Court of Appeal proceedings, he was not bound by the Court of Appeal's decision dated 27 October 2015.

[20] The High Court dismissed Dr Lourdes' originating summons. However, Dr Lourdes did not further appeal to the Court of Appeal. The High Court decided so on the grounds that the MMC was bound by the decision of the Court of Appeal until it was set aside, and that the High Court was not a suitable avenue to challenge a decision of the Court of Appeal.

[21] Dr Lourdes then appealed to the Court of Appeal, but in the proceedings pursuant to which the Court of Appeal order dated 27 October 2015 was issued. He sought leave of the court to intervene in the Court of Appeal proceedings and to set aside the Court of Appeal order dated 27 October 2015.

The Decision Of The Court Of Appeal

[22] In summary, the Court of Appeal held that:

(a) There was inordinate delay in the filing of the motion, that delay extending to almost two years after the first order of the Court of

Appeal, finding Dr Lourdes guilty of the charge. (The Court of Appeal did not consider nor give weight to the subsequent events that occurred during the two-year period.);

(b) There was waiver by Dr Lourdes in attending the plea in mitigation hearing before the MMC. (The Court of Appeal failed to consider or give weight to the numerous preliminary objections made by counsel before the MMC, and the express stipulation that participation was without prejudice to steps taken to defend or set aside the order made against Dr Lourdes);

(c) Dr Lourdes had admitted to the charge. (The Court of Appeal failed to consider that he had only admitted to the circulation of the information to a limited number of persons for a limited and legitimate purpose. He had not admitted to breaching patient confidentiality *per se*);

(d) There was no prejudice to Dr Lourdes;

(e) Applying *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2007] 3 MLRA 150 ('*Staghorn*'), the Court of Appeal concluded that intervention should not be allowed where proceedings have come to an end. (The Court of Appeal failed to consider the breach of natural justice arising from the failure to include Dr Lourdes as a party to the judicial review proceedings initiated by Dr Milton.)

[23] The Court of Appeal therefore found no merits in the motion and dismissed his application to intervene. That decision led to the present appeal before us.

[24] The Federal Court granted leave on the following questions of law:

The First Question of Law

Where at the hearing of an application for judicial review an adverse order is made against a person directly affected by the application, whether the order is a nullity within the meaning of the decision in *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 1 MLRA 171 and ought to be set aside as of right, in a case where the person directly affected:

(a) was not served Form 110, the statement and all affidavits in support or notified of the application and date of hearing, in breach of the mandatory requirements of O 53 r 4(2) Rules of Court 2012; and

(b) was consequently deprived of his right to be heard at the hearing at which the adverse order was made against him, in breach of the rules of natural justice.

The Second Question of Law

If the answer to Question 1 is in the affirmative, whether the principle in *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2007] 3 MLRA 150, that intervention under O 15 r 6 Rules of Court 2012 will not be allowed where proceedings have come to an end, applies to a case where the order is a nullity for breach of the rules of natural justice and the mandatory requirements of O 53 r 4(2) Rules of Court 2012 and intervention is sought for the purpose of setting aside the order.

Our Analysis Of The Submissions Before The Federal Court

The Preliminary Objection

[25] We will briefly deal with the preliminary objection raised by the respondents that the Federal Court has no jurisdiction to hear this appeal as this matter did not arise from a decision of the High Court in its original jurisdiction. First, such an objection should have been raised at the leave stage as the issue of jurisdiction is one which relates to a threshold requirement. As leave has been granted, it is apparent that the leave panel considered that the Federal Court did in fact have jurisdiction to hear this matter.

[26] Secondly, we are of the view that the respondents ought not to lose sight of the fact that for the purposes of this appeal, the relevant matter in the High Court is not the s 31 appeal by Dr Lourdes as to the reprimand imposed upon him by the MMC, but the judicial review proceedings filed by Dr Milton to obtain an order of *certiorari* against the MMC's finding of no case to answer and declaratory relief. The motion to intervene and set aside the Court of Appeal order dated 27 October 2015 was not filed in the s 31 appeal proceedings.

[27] Moreover, it is not in dispute that there was no appeal against the High Court's decision to dismiss the appeal on 22 August 2017. It can be seen from the case number under which Dr Lourdes filed motion encl 7(a) that it was filed in the appeal arising out of the High Court's decision to dismiss Dr Milton's judicial review application. It is trite that judicial review proceedings are appealable to the Federal Court. The preliminary objection was therefore dismissed.

The First Question Of Law

[28] In the first question of law, Dr Lourdes relied on the case of *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 1 MLRA 171 ('*Muniandy*') to urge the court to recognise that it is a breach of natural justice not to accord Dr Lourdes the right to be heard. *Muniandy* is authority for the well-settled principle of law that an order made against a party in breach of his fundamental right to be heard is a breach of natural justice. It renders the order a nullity and is liable to be set aside. The 1st respondent's

counsel argued that *Muniandy* could be distinguished on its factual matrix from the present case.

[29] Counsel for the appellant argued that although *Muniandy* (above) was decided in relation to different facts which raised different provisions of law from the present case, the court ought to similarly recognise that all parties directly affected ought to be served with cause papers and heard. This is also a statutory requirement under O 53 r 4(2) of the Rules of Court (ROC) 2012, which is set out below for ease of reference:

> **"O 53 r 4 Notice**
>
> (1) Where leave has been granted under this rule, the applicant shall, within fourteen days after the grant of such leave, file a notice in Form 110.
>
> (2) Upon extraction of the sealed copy of Form 110, **the applicant shall serve** a copy of the same together with a copy of the statement and all affidavits in support **on all persons directly affected by the application** not later than fourteen days before the date of hearing specified in the Form 110."
>
> [Emphasis Ours]

[30] The counsel for the appellant contended, in our view quite rightly, that Dr Lourdes is a person directly affected by the judicial review application by Dr Milton because:

(a) the prayers seek to overturn the MMC's majority decision that Dr Lourdes was not guilty of the charge against him; and

(b) he was found guilty of the charge; and

(c) convene to hear his plea in mitigation.

[31] We are of the view that where the livelihood of a person is at stake, that person ought to be accorded all the rights he is entitled to, paramount of which is the right to be heard in his own cause, to be accorded a fair hearing and given the opportunity to defend himself against the charge proffered against him.

[32] In this regard, it is untenable to contend that Dr Lourdes was directly affected by the decision of the MMC but not directly affected by the decision of the Court of Appeal. The 1st respondent claimed that the MMC, which imposed punishment on Dr Lourdes, is an intermediary agency, citing the case of *Regina v. Rent Office Service & Anor, ex-parte Muldoon* [1996] 1 WLR 1103 ('*Muldoon*') which concerned a provision equivalent to our O 53 r 4(2) ROC 2012.

[33] *Muldoon* (above) is distinguishable on the following basis. The facts of that case pertained to judicial review sought by citizens who wanted the Liverpool City Council to determine their housing benefit claims The party who sought to be added as a party to the proceedings was the Secretary of State for Social

Security. In that case, the House of Lords found that the Secretary could not be said to be a person directly affected by the decision of the Liverpool City Council as he was, in the words of Lord Keith of Kinkel at p 1105, "only indirectly affected, by reason of his collateral obligation to pay subsidy to the local authority.".

[34] We are of the view that the consequence of the Secretary not being added as a party to the proceedings cannot be equated to Dr Lourdes whose very livelihood and reputation is directly affected by the decision of the Court of Appeal. The Secretary's only concern was the increase in amount of subsidies he might have to pay to local authorities. Therefore he is "indirectly affected" as his concern is related to State money, not his own, although he is acting in the interest of the state. On the other hand, Dr Lourdes is personally affected by the judicial review proceedings instituted by Dr Milton and is therefore directly affected.

[35] It is untenable for the 1st respondent to contend that Dr Lourdes would not be directly affected when his name appears in the order of the Court of Appeal. The order sought by Dr Milton effectively usurps the power of the MMC to regulate the conduct of its own members as the court order in his favour removes from the MMC its power to decide on whether the charge against Dr Lourdes has been made out. Hence, we rejected this submission.

[36] We also noted that Dr Milton did not pray for the matter to be remitted for a different composition of the Disciplinary Board to re-hear Dr Lourdes' defence and make a decision, which he could have very well prayed for. Instead, Dr Milton asked the court to step into the shoes of the Disciplinary Board composed of doctors tasked with overseeing and regulating MMC's own members, of the medical profession, and find Dr Lourdes guilty. As correctly stated by the High Court, it is better for a professional body such as the MMC to manage its own members in relation to their conduct, so the court should not readily interfere with findings by the MMC, unless the decision is perverse or takes into account irrelevant matters or fails to take into account relevant matters, or contravenes the doctrine of proportionality (see *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374; [1984] UKHL 9).

[37] We are in agreement with the view of the High Court which is based on case law such as the Privy Council case of *FW Goonetilleke v. The Medical Council* [1911] 1 MLRH 652; the High Court case of *Trikkon Sdn Bhd v. Mahinder Singh Dulku* [2009] 4 MLRH 190 and the English case of *Bolton v. Law Society* [1994] 1 WLR 531 ('*Bolton*') which was held to be of persuasive value by the Malaysian Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1997] 2 MLRA 146 ('*Ng Hock Cheng*'). The reason why *Ng Hock Cheng* (above) did not adopt *Bolton* (above) was because it was decided in relation to a professional body, where the Disciplinary Tribunal had punished a solicitor who breached the Law Society rules, but *Ng Hock Cheng* (above) related to dismissal of a

government servant after disciplinary proceedings were instituted by the Public Services Commission.

[38] The 2nd respondent's counsel submitted that there was no prejudice to Dr Lourdes not being given notice of the judicial review proceedings and/ nor the opportunity to be heard at the same, on the basis that Dr Lourdes was heard before the Preliminary Inquiry Committee and the MMC, and the record of the proceedings before the MMC was before the High Court and Court of Appeal in the judicial review proceedings. We reject this contention as the principles of natural justice are not satisfied by reason of Dr Lourdes having the opportunity to defend himself in the domestic inquiry proceedings. The right to be heard on the particular facts of the instant appeal, extended to all stages of the proceedings which affected him, and this includes the judicial proceedings. The Court of Appeal, with respect, erred in not considering the miscarriage of justice suffered by Dr Lourdes when it imposed a finding of guilt on him and restricted his right to be heard in his defence to only putting in a plea of mitigation before the MMC.

The Second Question Of Law

[39] In the second question of law, the counsel for Dr Lourdes contended that the principle in the case of *Staghorn* ought not apply to bar Dr Lourdes from applying to intervene to set aside the order of the Court of Appeal. The Federal Court held in *Staghorn* that an application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge also becomes *functus officio*. The Federal Court emphasised that just because the court is of the view that the order made earlier had caused injustice, it does not mean that the order to intervene should be given as the requirements of O 15 r 6 of the Rules of Court 2012 still have to be satisfied.

[40] The principle in *Staghorn* should not apply to court orders which are null, because that would then be unjust to parties affected by such orders, as was the case with Dr Lourdes.

[41] We shall discuss the facts of *Staghorn* and proffer our reasons as to why it is inapplicable to the present case. The subject matter at stake in *Staghorn* was a piece of land which a company had charged to Hong Leong Bank as security for a loan. The company defaulted in the repayment of the loan and Hong Leong Bank took steps to realise the security. It obtained an order for sale from the court and the land was sold by public auction. More than two years after the public auction of the land, Staghorn Sdn Bhd applied to intervene to set aside the order for sale and the public auction. This was because after the company charged the land to Hong Leong Bank, the two registered proprietors of the land executed a sale and purchase agreement to sell the same land to Staghorn Sdn Bhd and Staghorn appointed Teck Lay Realty Sdn Bhd as the nominee for the purchase.

[42] A perusal of the case discloses that the primary reason for the decision is that Staghorn Sdn Bhd did not have any interest in the land, having nominated Teck Lay Realty Sdn Bhd in this regard. Staghorn Sdn Bhd's name was not on the land title (for that matter, neither was the name of Teck Lay Realty Sdn Bhd) and it accordingly had no interest in the land for the court to allow it to intervene and become a party to the foreclosure proceedings, which were already *functus officio* by that time. Since the public auction was successful, Staghorn could not assert rights superior to the purchaser who enjoyed an indefeasible title.

[43] Therefore, in *Staghorn*, the issues of an affected party not being given notice, and not being accorded the opportunity to be heard in his own defence did not arise in the same manner as in the present appeal. In *Staghorn*, this court found that Staghorn Sdn Bhd was not an interested party by reason of it having no interest in the land. Here Dr Lourdes was a party most directly involved as the entire proceedings emanated from an allegation of professional misconduct on his part. He was central to the entire case and his exclusion from participation in one of the most important aspects of adjudication resulted in the reversal of a finding of innocence, without his having been heard in his own defence at all. A clearer case of a breach of one of the most fundamental rules of natural justice is rarely seen, and that rule is the right to be heard. (See *Kanda v. Government of the Federation of Malaya* [1962] AC 322 per Denning LJ). This resulted in a serious miscarriage of justice.

[44] We have found above that Dr Lourdes is an affected party. We are therefore of the view that *Staghorn* is inapplicable to the factual matrix of the present case as the facts, law and considerations differ were entirely different and distinguishable there. *Staghorn* also was decided on the considerable length of time it took for Staghorn Sdn Bhd to apply to intervene. That is not the case here, as Dr Lourdes had no notice whatsoever of the judicial review filed by Dr Milton, until MMC took steps to carry out the order of the Court of Appeal and convened to hear Dr Lourdes' plea in mitigation. There was no delay on Dr Lourdes' part.

Ancillary Issues

[45] One ancillary issue that requires addressing is the reason why Dr Lourdes did not appeal the High Court decision that a s 31 appeal cannot be an avenue to challenge the Court of Appeal order. The answer proferred was twofold - first, the High Court held that Dr Lourdes ought to set aside the Court of Appeal order, and that is what he proceeded to act on.

[46] Secondly, s 31(2) of the Act at the material time provided that the decision of the High Court was final. Section 27 of Act A1443 deleted subsection (2) of s 31 of the principal Act, therefore removing the restriction on appealing orders of the High Court in respect of s 31 appeals. Act A1443 only came in to force on 1 July 2017 by virtue of the gazette PU(B) 333/2017. It must be pointed out

that this was two months before the decision of the High Court on 22 August 2017, so that Dr Lourdes could have appealed, had he wished to do so.

[47] Having considered the chronology of events and the relevant law, we concluded that Dr Lourdes ought not to have been shut out of intervening to set aside the Court of Appeal order, reversing the finding of innocence made against him. The refusal of the Court of Appeal to do so by the application of *Staghorn* is, with respect, erroneous. This is one of those rare cases that fall within the ambit of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLRA 183 ('*Badiaddin*'). The intervention of the court is necessitated by a serious miscarriage of justice arising as a consequence of a breach of natural justice. We therefore proceeded to hear the substantive merits of Dr Lourdes' appeal.

The Merits Of Dr Lourdes' Appeal

[48] The appellant's counsel reiterated their position from the start, that Dr Lourdes had never admitted to the charge against him. He admitted distributing the patients' clinical summaries but asserted that it was an honest mistake and so could not have amounted to infamous conduct in a professional respect.

[49] The second respondent's counsel argued for a broader application of the principle of *res judicata* by extending it to bind nonparties. He argued that even though Dr Lourdes was not a party to the proceedings in the courts below, it would be an abuse of process to allow him to relitigate the matter. He contended that since the same facts are involved as the original suit, the doctrine of *estoppel per rem judicatum* applies to bar Dr Lourdes from bringing this appeal.

[50] This is a tangled web which we must unweave. It is apparent from the submissions of the 2nd respondent's counsel here, as well as in putting forth their preliminary objection on the issue of jurisdiction, that they have confused the High Court judicial review proceedings filed by Dr Milton with the High Court proceedings in relation to the s 31 appeal filed by Dr Lourdes in relation to the MMC's decision to impose a reprimand upon him. We reiterate here, as we have done above under our discussion of the preliminary objection raised by the respondents, that these two proceedings are clearly not the same.

[51] First of all, Dr Lourdes is not filing a new judicial review action in respect of the MMC's finding of no case to answer in respect of Dr Milton's complaint. Dr Lourdes filed an application to intervene in the Court of Appeal proceedings since Dr Milton did not add him as a party to the original judicial review. Therefore, Dr Lourdes is not attempting to have a second bite at the cherry and have his matter decided by different judges with a view to procure a possibly different and more favourable outcome. This is not, as contended by the second respondent's counsel, a re-litigation of the judicial review proceedings.

[52] Secondly, we refer to the case which the 2nd respondent's counsel relied on, *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 4 MLRA 674

('*Dato' Sivananthan*') where the Court of Appeal referred to the decision of Drake J in *North West Water Ltd v. Binnie & Partners (A Firm)* [1990] 3 All ER 547 QBD ('*North West*'). We are of the view that these cases are inapplicable because the point of law in the instant appeal is different from that considered in those cases.

[53] In *North West*, the first action was brought by victims of an explosion against three parties – the water authority, the contractors of the system and the consultant engineers (ie Binnie & Partners). The High Court found all three parties liable but the Court of Appeal held that the consultant engineers were wholly liable. That judgment was a final judgment.

[54] The second action in *North West* was brought by the water authority to recover damages against the consultant engineers for losses it had suffered. The consultant engineers sought to adduce fresh evidence to deny negligence. It was in this regard that the water authority raised the doctrine of estoppel to say that although the plaintiffs in the first action, ie the victims of the explosion, were not parties to the second action, estoppel would still apply in the second action to prevent the consultant engineers from adducing fresh evidence to deny negligence. The rationale is that the finding of negligence against the consultant engineers was final and binding and no evidence could be now brought to alter that finding. That finding of negligence could not be re-litigated a second time.

[55] We note that in the present proceedings, Dr Lourdes is not seeking to adduce fresh evidence to re-litigate the judicial review proceedings. He is seeking to intervene to be heard in respect of the finding of guilt made against him in his absence in the judicial review proceedings. Therefore it is clear that the decision in *North West* is wholly inapplicable to this appeal.

[56] *North West* dealt with an attempt to re-litigate a final finding of negligence against a party, whereas in the instant appeal, the appellant is seeking to exercise his right to be heard which was denied in the original judicial review proceedings.

[57] Dr Lourdes although having had the opportunity to defend himself before the MMC, was not made a party in the judicial review proceedings before the High Court and Court of Appeal, and this failure to add him as a party precluded him from articulating his own defence before the courts. He was excluded to his detriment. We have stated above that the right to be heard is not restricted to merely domestic inquiry proceedings but extends to all available avenues of appeal. Dr Lourdes not being joined as a party at the High Court and Court of Appeal levels, is a matter of serious detriment to him, particularly when the Court of Appeal made a finding of guilt on his part. Dr Lourdes is without question an affected party, and thus pursuant to O 53 r 4(2) RC 2012, he was entitled to notice of the judicial review proceedings so that he could be heard in his own defence.

[58] The case of *Dato' Sivananthan* can be distinguished from the present case as the matter at stake there was a particular monetary sum paid in expectation of a joint venture agreement which failed. The rightful recipient of the monetary sum was sought to be determined in two different proceedings, which in itself amounted to a duplicity of proceedings. Not unexpectedly, the outcome of the two different proceedings resulted in conflicting decisions as the plaintiffs and defendants of the two cases were different. When the respective plaintiffs succeeded in summary judgment applications, naturally the outcome was that different defendants were held to be liable to pay the same sum to different plaintiffs. It is evident that the factual matrix of that case is wholly different from the present appeal. As such the case is inapplicable.

[59] The facts here are entirely different. This is a case involving a breach of natural justice, rather than *res judicata* or issue estoppel. This in turn is because the adjudication of the substantive dispute was conducted in the absence of a primary actor. It is again different from a default situation because Dr Lourdes was expressly excluded from the judicial review proceedings. This amounted to a deliberate act to preclude him from defending himself. This takes it out of the purview of the doctrine of *res judicata*, issue estoppel and abuse of process. We are therefore of the view that *Dato' Sivananthan* is distinguishable from the facts of this appeal.

Conclusion

[60] In summary, there were three decisions we made at the close of submissions. First, we dismissed the preliminary objection of both respondents that s 96(a) of the CJA 1964 had not been complied with.

[61] Secondly, on the appeal proper, we unanimously decided that the order of the Court of Appeal was a nullity because the appellant was not given the right to be heard. We therefore allowed the appeal and set aside the order of the Court of Appeal. For avoidance of any doubt, we reiterate that we had answered the first question of law in the affirmative and the second question of law in the negative. For clarity, we set out the questions in full below.

> The First Question of Law
>
> Where at the hearing of an application for judicial review an adverse order is made against a person directly affected by the application, whether the order is a nullity within the meaning of the decision in *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 1 MLRA 171 (FC) and ought to be set aside as of right, in a case where the person directly affected:
>
> a) is not served Form 110, the statement and all affidavits in support or notified of the application and date of hearing, in breach of the mandatory requirements of O 53 r 4(2) Rules of Court 2012; and

b) was consequently deprived of his right to be heard at the hearing at which the adverse order was made against him, in breach of the rules of natural justice.

Answer: Affirmative

The Second Question of Law

If the answer to Question 1 is in the affirmative, whether the principle in *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2007] 3 MLRA 150, that intervention under O 15 r 6 Rules of Court 2012 will not be allowed where proceedings have come to an end, applies to a case where the order is a nullity for breach of the rules of natural justice and the mandatory requirements of O 53 r 4(2) Rules of Court 2012 and intervention is sought for the purpose of setting aside the order.

Answer: Negative

[62] Finally, in respect of the notice of motion to intervene in the Court of Appeal (encl 7a), we allowed prayers 2(a), (b) and (c) which are summarised as follows:

(a) The order of this court dated 27 October 2015 is set aside;

(b) All steps and any action taken by the respondents pursuant to the order of this court dated 27 October 2015 is set aside, and any endorsement of the decision and order of the respondents on the Malaysian Medical Registry is nullified; and

(c) The decision and order of the respondents dated 20 May 2014 to dismiss the charge against the proposed intervener for wrongful behavior in any professional sense under s 29(2)(b) of the Medical Act 1971 is reinstated.

[63] We award costs of RM40,000.00 against each of the respondents subject to allocatur fees. The deposit, if any, is to be refunded to the appellant.

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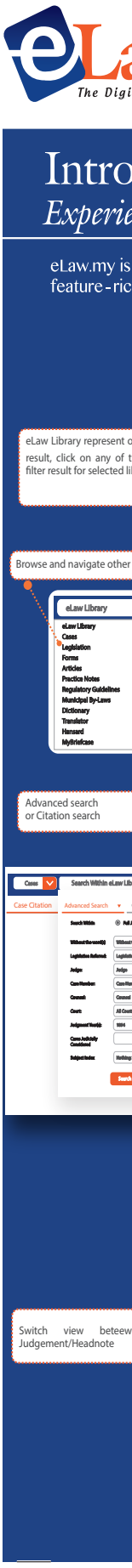

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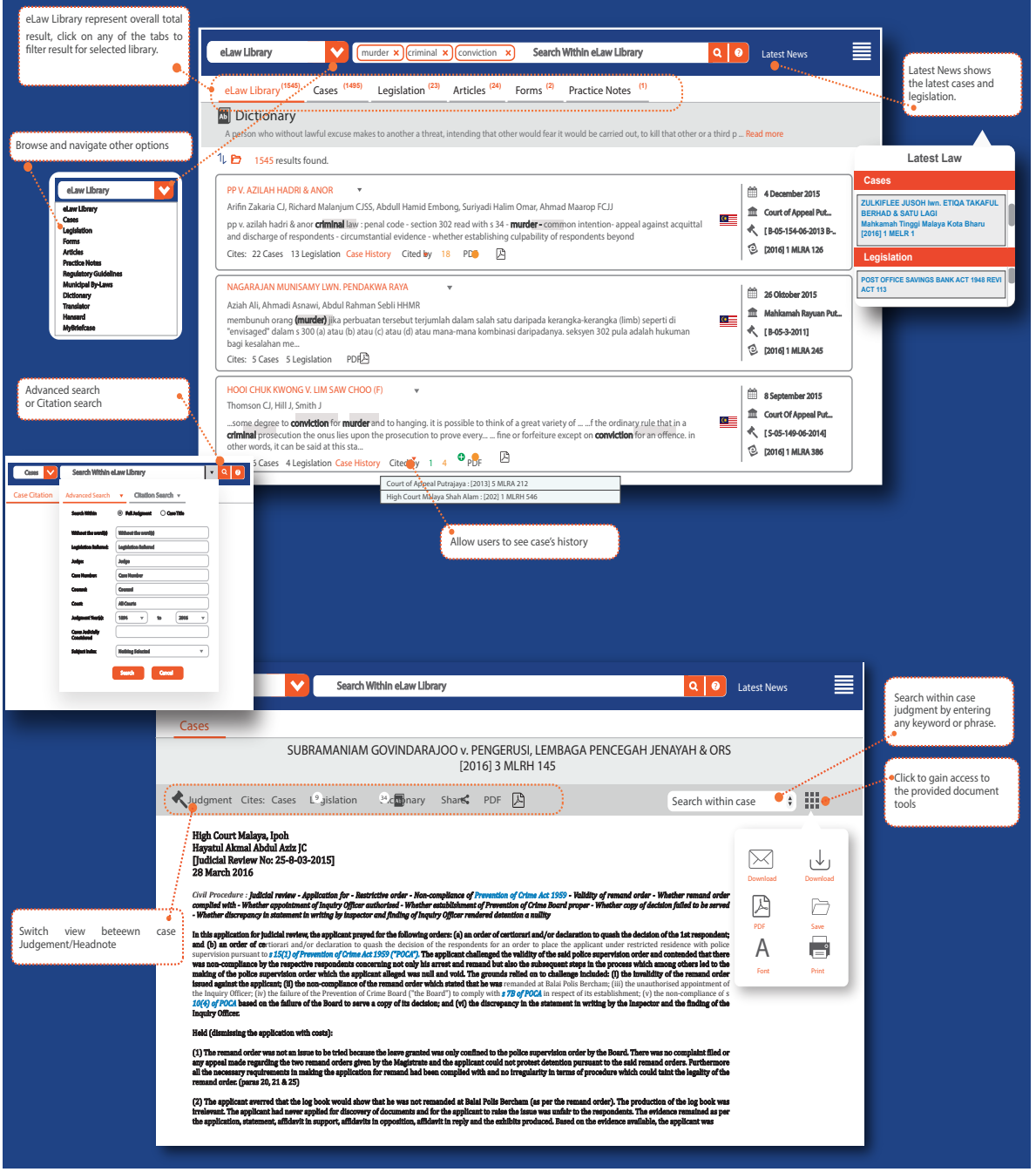

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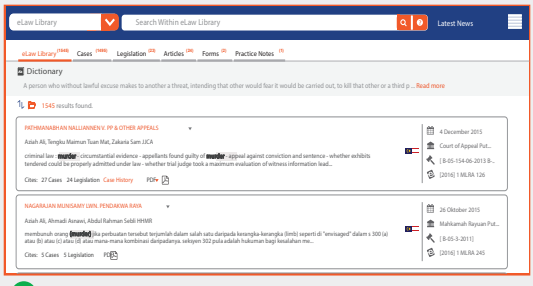

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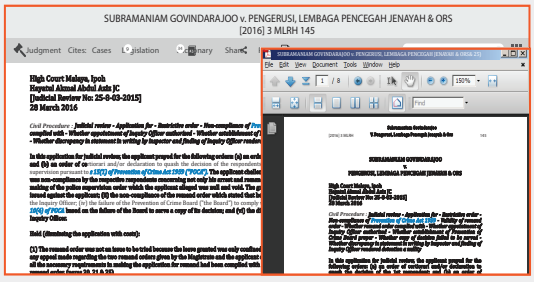

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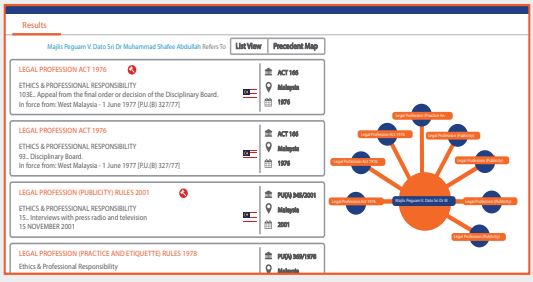

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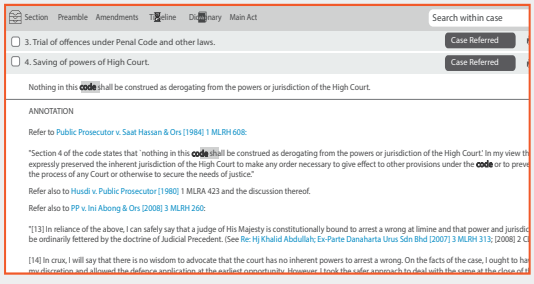

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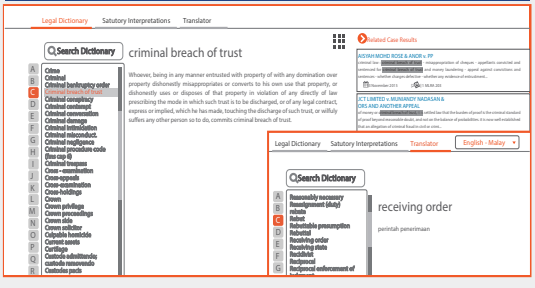

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