A

BRITISH AMERICAN TOBACCO (MALAYSIA) BHD EMPLOYEES UNION

v.

B

KETUA PENGARAH KESATUAN SEKERJA, MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R2-25-337-2007]
15 JULY 2010

C

LABOUR LAW: *Trade Unions - Director General of Trade Unions - Jurisdiction - Whether competent to invoke s. 26(1A) of the Trade Unions Act 1959 and decide on a union's eligibility to represent employees - Trade Unions Act 1959, ss. 2, 26(1A)*

D

LABOUR LAW: *Trade Unions - Representation - Recognition and scope of representation of a trade union - British American Tobacco (Malaysia) Berhad Employees Union - Whether could represent all employees of the subsidiary companies of British American Tobacco (Malaysia) Berhad - Trade Unions Act 1959, ss. 2, 26(1A)*

E

WORDS AND PHRASES: *"Establishment" - Sections 2 and 26(1A) Trade Unions Act 1959 - Meaning of*

F

The applicant, a trade union of workmen registered under the Trade Unions Act 1959 ("the Act"), acted as a collective bargaining body for all employees of the second respondent and its subsidiary companies who came within the scope of the applicant's representation. The second respondent was engaged in the import, manufacture, distribution and sales of tobacco products through its wholly owned subsidiaries, the third respondent and the fourth respondents. The second respondent was an investment holding company providing day to day administrative and management services to its subsidiaries including the third and fourth respondents. *Vide* a Notice of Claim for Recognition dated 16 February 2000, the applicant had served on the second respondent a claim for recognition of the applicant by the second respondent and its subsidiaries in respect of eligible employee thereat. *Vide* letter dated 25 February 2000, the second respondent had on its behalf and that of its subsidiaries expressly accorded recognition to the applicant. Subsequently, *vide* letter dated 24 May 2007, the first respondent had summoned the principal office bearers of the applicant to a meeting at the first respondents office on 8 June 2007. At this meeting, the first respondent had

G

H

I

questioned the applicant's eligibility to represent employees of the third and fourth respondents on an application made by the second respondent. By a letter dated 29 October 2007, the first respondent made a decision ("the Impugned Decision") that the applicant was not entitled to represent employees of the third respondent and the fourth respondent. The applicant in this application challenged the Impugned Decision.

Held (dismissing the application with costs):

(1) The word "establishment" in the context of the definition under s. 2 read together with s. 26(1A) of the Act is plain and unambiguous. The word "establishment" is the sole word that is expressly stated in the singular *via-à-vis* the other words in the said section. Therefore, the applicant's submission that the word could be read to mean plural, was misconceived. In the event that Parliament intended otherwise, it would have expressly provided for the same (para 20).

(2) At all material times the second, third and fourth respondents remained separate legal entities. Although there was unity of business, the fact remained that all three companies were involved in different aspects of the business and were recognised in law as separate legal entities and were all separate/different establishments for the purpose of ss. 2(1) and 26(1A) of the Act. The lifting of the corporate veil can only be allowed in limited instances, none of which applied to the present case (para 22).

(3) The intention of Parliament was to encourage the flourishing of trade unionism when it introduced the amendment to s. 2(1) of the Act by inserting the word "establishment" in 1989. The intention was to enable the legitimizing of in-house unions in spite of the existence of national unions (para 26).

(4) The first respondent did not commit any error of law in coming to his ruling that the applicant could no longer represent the employees of the third and fourth respondents based on his interpretation of ss. 2(1) and 26(1A) of the Act. The first respondent was empowered to hand down the Impugned Decision pursuant to s. 4A of the Act. Further, s. 15 of the Act empowers the first respondent to cancel or withdraw the registration of a trade union if, *inter alia*, he is satisfied that the certificate of registration was obtained by fraud or mistake or that the trade union has contravened any provision of the Act (paras 31 & 32).

(5) The second, third and fourth respondent's conduct in earlier according recognition to the applicant did not estop them from later submitting their application to determine the competency of the applicant to represent employees of the third and fourth respondents and the first respondent from subsequently considering the same. The applicant cannot rely on an erroneously accorded recognition to support its contention that it should be allowed to continue representing the employees of the third and fourth respondents (para 40).

Case(s) referred to:

All Malaysian Estates Staff Union v Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

Dunport Steels Ltd and Others v. Sirs & Ors [1980] 1 WLR 142 ***(refd)***

Harilal Ratan v. The Sales Tax Officer, Section 111, Kanpur AIR 1973 SC 1034 ***(refd)***

Harris Advanced Technology (M) Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [1999] 7 CLJ 153 HC ***(refd)***

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA ***(refd)***

Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor [2005] 3 CLJ 517 CA ***(refd)***

Kennesion Brothers Sdn Bhd v. Construction Workers Union [1989] 2 CLJ 569; [1989] 1 CLJ (Rep) 54 SC ***(refd)***

Kesatuan Pekerja-Pekerja Perbadanan Perkapalan Antarabangsa Malaysia Berhad (MISC) Semenanjung Malaysia v. Perbadanan Perkapalan [2007] 3 ILR 686 ***(refd)***

Kopesma Car Rental Sdn Bhd v. Chin Moi Chin [1998] 2 ILR 540 ***(refd)***

Korea Development Corporation And Construction Worker's Union [1983] 2 ILR 319 ***(refd)***

Law Kam Loy & Anor v Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

Lee Liong Chan & Anor v. Tan Sri Datuk Teh Ewe Lim & Anor [1984] 1 LNS 67 HC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***

Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja [2000] 4 CLJ 233 FC ***(refd)***

Pepper (Inspector of Taxes) v. Hart [1993] 1 All ER 42 ***(refd)***

Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v. Minister of Labour, Malaysia & Ors [1989] 1 CLJ 4; [1989] 1 CLJ (Rep) 124 SC ***(refd)***

Perusahaan Otomobil Kedua Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja & Anor [2000] 5 CLJ 351 HC ***(refd)***

Re Dow Jones Publishing (Asia) Inc's Application [1988] 1 LNS 36 HC ***(refd)***

Tobacco Blenders and Manufactures Sdn Bhd & Anor v. Kesatuan Kebangsaan Pekerja-Pekerja Tembakau [2002] 3 ILR 654 ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 17A
Trade Unions Act 1959, ss. 2(1), 4A, 15, 26(1A)

Other source(s) referred to:
Industrial Relations Law of Malaysia, 3rd edn, pp. 131 - 132

For the applicant - VK Raj; M/s P Kuppusamy & Co
For the 1st respondent - Nik Mohd Nor Nik Kar SFC
For the 2nd, 3rd & 4th respondents - N Sivabalah; M/s Shearn Delamore & Co

Reported by Amutha Suppayah

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] Collective bargaining is the principal *raison d'être* of the trade union. In the case of a trade union of employees, recognition confers on the union the right to represent employees in a bargaining unit. In Malaysia, the law requires the compulsory registration of trade unions under the provisions of Trade Unions Act 1959. This gives a stamp of due formation of the trade union and assures the mind of the employer that the trade union is an authenticated body; the names and occupation of whose office bearers also become known. However, registration by itself does not secure automatic status in the bargaining process. Registration is merely a pre-condition. A registered trade union of employees needs to be recognized by the appropriate employer and *vice versa*. But when in an establishment there are more than one registered union, the question as to with whom the employer should negotiate or enter into bargaining assumes importance. It is a constant source of conflict in the industrial relations arena. This case is one of them.

[2] The tenor, texture and weight of the applicant's argument seem to be: "The applicant had all along the right to represent the workers of the third and fourth respondents before the impugned decision of the first respondent. The rules and constitutions of the applicant contain clear definition that the applicant can represent all workers of the second respondent and its subsidiaries, including the third and fourth respondents. Under the last collective agreement between the applicant and the second respondent, the word "company" is defined to include the second respondent and all its subsidiaries involved in the manufacture, sales, import and

distribution of tobacco products including the third and fourth respondents. The impugned decision of the first respondent has a direct effect of weakening the applicant by taking away a large portion of its membership. The policy of the government of encouraging the growth of in-house unions tendered to fragment the unions and eroded their bargaining strength".

[3] An old trade unions slogan: "United we stand, divided we fall", rings out loud and clear in this application.

[4] The applicant in this application challenges the decision of the Director General of Trade Union of Malaysia ("DGTU") ("the first respondent") dated 29 October 2007, holding that the applicant is not entitled to represent employees of Tobacco Importers & Manufactures Sdn Bhd ("the third respondent") and Commercial Marketing & Distributors Sdn Bhd ("the fourth respondent").

Factual Antecedents

[5] The relevant background of the case extracts from the supporting affidavit of Encik Ganesan Murty a/l James, the general secretary of the applicant, filed in support of this application which the argument of the applicant rests, is as follows:

(a) The applicant is a trade union of workmen registered under the Trade Unions Act, 1959 ("the Act"). The applicant acts as a collective bargaining body for all employees of the second respondent and its subsidiary companies who come within the scope of the applicant's representation.

(b) British American Tobacco (Malaysia) Berhad ("the second respondent") is a company incorporated in Malaysia under the Companies Act 1965. The second respondent is engaged in the import, manufacture, distribution and sales of tobacco products through its wholly owned subsidiaries, the third respondent and the fourth respondents.

(c) The second respondent was previously known as Rothmans of Pall Mall (Malaysia) Berhad. The second respondent is an investment holding company providing day to day administrative and management services to its subsidiaries including the third and fourth respondents.

(d) Rothmans of Pall Mall (Malaysia) Berhad changed its name to the second respondent's current name with effect from 3 November 1999. The change of name arose from the merger

of the tobacco business of Rothmans of Pall Mall (Malaysia) Berhad and Malaysian Tobacco Company Berhad on 3 November 1999.

(e) *Vide* a letter dated 22 October 1999 from the applicant, when it was known as Rothmans of Pall Mall (Malaysia) Berhad which was jointly signed by the second respondent as it was known then, and the Rothman's Employees Union (as the applicant was known then), both parties had requested the Industrial Court to take recognition to a variation of the then collective agreement, specifically cl. 4 which was varied to read as follows:

> 4.2 Company means Rothmans of Pall Mall (Malaysia) Berhad (RPMM) or any other name by which the company is called arising from a change of name and all subsidiaries involved in the manufacture, sale, import and distribution of tobacco products.

(f) The Industrial Court gave due recognition to this joint request and registered the variation as *Kopesma Car Rental Sdn Bhd v. Chin Moi Chin* [1998] 2 ILR 540 (Award No. 277/98) under Recognition No: VC 66-277/98-99 on 22 November 1999.

(g) The second respondent along with its subsidiaries including the third and fourth respondents recognizes that the applicant is the sole collective bargaining body in respect of all members of the applicant.

(h) *Vide* letter dated 21 December 1999, the fourth respondent had accorded recognition to the applicant in respect of its relevant employees.

(i) *Vide* a notice of claim for recognition dated 16 February 2000, the applicant had served on the second respondent a claim for recognition of the applicant by the second respondent and its subsidiaries in respect of eligible employee thereat.

(j) *Vide* letter dated 25 February 2000 in respect to the applicant's claim for recognition as referred to at the above paragraph, the second respondent had on its behalf and that of its subsidiaries expressly accorded recognition to the applicant.

(k) *Vide* letter dated 24 May 2007, the first respondent had summoned the principal office bearers of the applicant to a meeting at the first respondents office on 8 June 2007. At this

meeting, the first respondent had questioned the applicant's eligibility to represent employees of the third and fourth respondents on an application made by the second respondent.

(l) On the applicant's behalf, it was explained to the first respondent the background facts as laid out in the paragraphs above. The first respondent heard the applicant but made no further comments. The meeting ended there.

(m) By a letter dated 29 October 2007, the first respondent made the following decision ("the impugned decision"):

> ... saya berpendapat skop keanggotaan BATEU tidak lagi selaras dengan maksud kesatuan sekerja sepertimana yang dinyatakan di bawah s. 2(1) Akta Kesatuan Sekerja 1959 dan juga s. 26(1A) Akta Kesatuan Sekerja 1959 yang mana suatu kesatuan sekerja hanya boleh mewakili pekerja-pekerja yang digaji oleh establishment yang tertentu sahaja.
>
> Dengan ini, berasaskan kuasa di bawah s. 4A Akta Kesatuan Sekerja 1959 dan peruntukan-peruntukan di bawah s. 2(1) dan s. 26(1A) Akta yang sama, saya memutuskan BATEU tidak lagi layak mewakili pekerja-pekerja TIM dan CMD dari tarikh keputusan saya ini.

Grounds Of Challenge

[6] The applicant ascribing to the first respondent the following errors:

(i) The first respondent failed to take into account the object and intent of Parliament in amending the Act to introduce the word 'establishment' into s. 2(1) and s. 26(1A) of the Act, which was not intended to restrict the rights of the existing in-house union like the applicant;

(ii) The first respondent did not have the benefit of the wishes of the workers in the third and fourth respondents when making his impugned decision contrary to the object and intent of Parliament;

(iii) The first respondent has clearly read the word 'establishment' in isolation and in disregard of the words "trade, occupation or industry" as they appear in s. 26(1A) of the Act;

(iv) The first respondent failed to take into account of the fact that the second, third and fourth respondents acted as a single business unit in the cigarette/tobacco industry; and

(v) The three cases relied on by the first respondent in coming to the impugned decision are all distinguishable on the facts.

[7] Encik VK Raj, learned counsel for the applicant would submit that the sole purpose, object and intention of Parliament in inserting the word 'establishment' into s. 2(1) of the Act was to ensure that the DGTU's power to register in-house union becomes clear and should not be questioned as a matter of law. Learned counsel would contend that the decision of the first respondent has the contrary effect of seeking to weaken an existing in-house union, in the form of the applicant. In fact, the impugned decision of the first respondent will weaken the applicant because it will limit the scope of representation of the applicant from originally representing employees of the second respondent and its subsidiaries, to only representing employees of the second respondent.

[8] Learned counsel would further submit that in construing a statute, a reference to Parliament reports of proceedings or Hansard, as an aid to statutory interpretation, is permitted where the statute is ambiguous or obscure, or which if literally construed might lead to an absurdity. In support of his submission, learned counsel would place reliance on *Pepper (Inspector of Taxes) v. Hart* [1993] 1 All ER 42; [1992] 3 WLR 1032; *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285; *Re Dow Jones Publishing (Asia) Inc's Application* [1988] 1 LNS 36.

[9] Learned counsel would invite the court's attention to the debate in Parliament, in particular the speech of the then Deputy Minister of Labour, to gauge the true intent and object of Parliament in inserting the word "establishment" into s. 2(1) of the Act. The relevant parts of the speech of the Right Honourable Deputy Minister of Labour, Tuan Kalakau Untol, are as follows:

> Kerajaan pada masa ini menggalakkan penubuhan dan pendaftaran kesatuan-kesatuan sekerja dalaman. Galakan tidak bererti paksaan dan seperti lain-lain golongan rakyat para pekerja adalah biasa untuk menubuhkan atau menyertai sebuah kesatuan sekerja yang mereka pilih selaras dengan peruntukan Perlembagaan Malaysia yang menjamin kebebasan berkesatuan selagi kepentingan pekerja-pekerja secara umum dan ekonomi Negara pada keseluruhannya tidak terjejas. *Di dalam konteks ini, keinginan pekerja di sebuah syarikat yang bercadang hendak menyertai kesatuan sekerja kebangsaan berkenaan haruslah dihormati. Untuk menentukan supaya permohonan bagi pendaftaran sebuah kesatuan sekerja dalaman dapat diluluskan dengan sah dan teratur maka pindaan kepada akta ini adalah perlu.*
>
> (emphasis added)

Later at p. 58 of the Report, the Right Honourable Deputy Minister of Labour in his speech said the following:

> **Pindaan ini perlu dilakukan supaya kuasa Ketua Pengarah Kesatuan Sekerja untuk mendaftar kesatuan sekerja dalaman adalah jelas dan tidak lagi dipersoalkan dari segi undang-undang**. Pindaan ini tidak akan menjejaskan kepentingan kesatuan-kesatuan sekerja kebangsaan yang sedia wujud pada masa sekarang atau yang wujud pada masa akan datang. *Dengan pindaan ini, Ketua Pengarah Kesatuan Sekerja akan terus menimbang dan mendaftarkan kesatuan-kesatuan mengikut trade, pekerjaan, industri atau establishment selepas mempastikan agar segala kehendak Akta Kesatuan Sekerja 1959 dipatuhi dan kepentingan pekerja-pekerja serta Negara terkawal*. (emphasis added).

[10] Based on the highlighted parts of the speech above, learned counsel would argue that the following features appears:

(a) It was never intention of Parliament to allow the amendment to s. 2(c) of the Act to empower the DGTU to weaken the position of an in-house union like the applicant; and

(b) The true intention and objective of the government in amending s. 2(i) of the Act was to protect the interest of existing in-house unions, including the applicant as it was then known.

[11] Learned counsel would contend that the second, third, fourth respondents have acted and to continue to act as a single business unit because:

(i) They are collectively involved in the cigarette trade, occupation or industry and house consolidated financial statement; and

(ii) They had their place of business and registered address at the same address being Virginia Park, Jalan Universiti, 46200 Petaling Jaya, Selangor.

[12] Concerning s. 26(1A) of the Act, learned counsel would submit that the word "establishment" was also inserted by Amendment Act of A732. Prior to Act A732, the word "establishment" was not there. Therefore, if an employee is not employed or engaged in any particular trade, occupation or industry he cannot join or be a member or accepted as a member of a trade union. Learned counsel would further submit that it is quite clear that it was an intention of Parliament to widen the scope of employees concerned under s. 26(1A) of the Act and the word

"establishment" was included to be read together with the words in the same genus ie, trade occupation or industry. However, as can be seen, the DGTU's Impugned Decision to read into the legislation that only employees employed by particular establishment, in the sense that the particular establishment has to be a separate legal entity will not only narrow the scope and extent of the employees concerned artificially but it will also lead to a situation of reading the word "establishment" in isolation and in disregard to the words "trade, occupation or industry". This was an instance of a literal construction of the word establishment leading to an absurdity (See the case of *Chor Phaik Har (supra)*).

[13] To support his submission above, learned counsel would place reliance on *Lee Liong Chan & Anor v. Tan Sri Datuk Teh Ewe Lim & Anor* [1984] 1 LNS 67; [1985] 2 MLJ 138, where His Lordship Edgar Joseph Jr J (as he then was) had this to say at p. 143:

> At first, I was much impressed with this submission but, upon closer examination, the impression was quickly dispelled in that it failed to take into account the well known canon of construction **that exact colour and shape of the meaning of words in an enactment is not to be ascertained by reading them in isolation**. They must be read structurally and in their context for their significance may vary with their contextual setting. By "context" here is meant in a wide sense; this requires that provisions which bear upon the same subject matter must be read as a whole in their entirety; each throwing light and illuminating the meaning of the other. (emphasis added).

Findings Of The Court

[14] To my mind, the issue to be decided depends upon the interpretation placed upon definition of the word "establishment" under s. 2 and s. 26(1A) of the Act which read as follows:

> In this Act, unless the context otherwise requires or it is otherwise expressly provided:
>
> "employer" means any person or body of persons, whether corporate or unincorporated, who employs a workman, and includes the Government and any statutory authority.
>
> "establishment" means any place of business or employment belonging to an employer and includes any division or branch thereof.
>
> "trade union" or "union" means any association or combination of workmen or employers, being workmen whose place of work is in West Malaysia, Sabah or Sarawak as the case may be, or employers employing workmen in West Malaysia, Sabah or Sarawak, as the case may be:

A (a) within any particular establishment, trade, occupation or industry or within any similar trades, occupations or industries.

[15] Section 26(1A) of the Act provides:

> No person shall join, or be a member of, or be accepted or
B retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered.

[16] The nub of the problem centres on the meaning of the word "establishment". As the answer to the problem involves a question
C of statutory interpretation what is of immediate concern is the nature and effect of s. 17A of the Interpretation Acts 1948 and 1967. It reads as follows:

> In the interpretation of a provision of an Act, a construction
D that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[17] In the case of *All Malaysian Estates Staff Union v Rajasegaran*
E *& Ors* [2006] 4 CLJ 195, the Federal Court had this to say:

> The choice prescribed in s. 17A of "... a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object ..." can only arise when the meaning of a statutory
F provision is not plain and is ambiguous. If, therefore, the language of a provision is plain and unambiguous s. 17A will have no application as the question of another meaning will not arise. Thus it is only when a provision is capable of bearing two or more different meanings can s. 17A be resorted to in order to determine the one that will promote the purpose or object of
G the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation ...

[18] Ahmad Fairuz CJ in *Megat Najmuddin Dato' Seri (Dr) Megat*
H *Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645 quoted with approval the Indian Supreme Court's decision in *Harilal Ratan v. The Sales Tax Officer*, Section 111, Kanpur AIR 1973 SC 1034 where the court stated:

> In construing a statutory provision, the first and the foremost
I rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision the

> legislative intent is clear, we need not call into aid the other rules of construction of statues. The other rules of construction of statutes are called into aid only when, the legislative intent is not clear.

[19] As to the intention of Parliament, the Federal Court in *Muhammad Hassan v. PP* [1998] 2 CLJ 170 said at p. 191:

> As regards the submission of the learned deputy public prosecutor on the intention of Parliament, the correct approach, in our opinion is to ascertain the meaning of the words employed by Parliament rather than the intention of Parliament. As Lord Reid observed in *Black-Clawson International Ltd v. Papierwerke Ag* [1975] 2 WLR 513 at p. 517:
>
> > We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.

[20] It is now apposite to consider the word "establishment" read together with s. 26(1A) of the Act. To my mind, the word "establishment" in the context of the definition under s. 2 read together with s. 26(1A) of the Act is plain and unambiguous. The court would agree with Encik N Sivabalah's submission, learned counsel for the second, third and fourth respondents that it is apparent that the word "establishment" is the sole word that is expressly stated in the singular *via-à-vis* the other words in the said section. Therefore, the applicant's submission that the word can be read to mean plural, is misconceived. In the event that Parliament intended otherwise, it would have expressly provided for the same. The submission is impressed with merit. I am in entire agreement with the sentiments expressed in the case of *Dunport Steels Ltd and Others v. Sirs & Ors* [1980] 1 WLR 142, wherein Lord Diplock at p. 157 said:

> Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral ...

[21] I am bound to follow the decision in the case of *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747 where the Court of Appeal affirmed the decision of the High Court as follows:

> The union had argued that the first and second appellants were one and the same entity for purposes of the Trade Union Act 1959. That argument was rejected by Eusoff Chin J in the following terms:

I note that w.e.f. 10 February 1989 by Act A717, the Trade Union Act 1959 had been amended to enable a trade union to be formed within any particular establishment (see definition of 'trade union' or 'union' in s. 2 of the Trade Union Act).

The word 'establishment' in s. 2 has been defined to mean: any place of business or employment belonging to an employer, and includes any division or branch thereof.

From this it would appear that the plaintiff being a union of workmen who are employed by the 1st defendant, should confine itself to serving the cause of employees of the 1st defendant, and should carry out its union activities within the premises of the 1st defendant only.

The plaintiff alleged that both defendants are not separate establishments since Abdullah is the same human resource manager for both defendants.

I find that the two defendants may be in the same group, ie, Harris Corporation, but they are different companies, having different places of business.

The word 'establishment' as defined, has a wide meaning so that if, for example, a company has different places of business or employment, and has branches all over the country, or has various divisions, employees working in each place of business, branch or division may get together to form a trade union.

The activities of such union, however, are confined to such place, branch or division.

As such, the activities of the plaintiff including recruitment of members, should only be confined to the establishment and the employees of the 1st defendant.

[22] Based on the evidence available, at all material times the second, third and fourth respondents remained separate legal entities. Although there is unity of business, the fact remains that all three companies were involved in different aspects of the business and are recognised in law as separate legal entities and are all separate/different establishments for the purpose of s. 2(1) Trade Unions Act 1959 and s. 26(1A) of the Act.

[23] It is a basic premise of corporate law that each company and each of its subsidiaries are separate legal entities in law. The second, third and fourth respondents are all separate legal entities whereby the third and fourth respondents are subsidiaries of the second respondent.

[24] The superior courts have confirmed that the lifting of the corporate veil can only be allowed in limited instances, none of which apply to the present case. This is not a complaint of unjust dismissal wherein lifting the veil of incorporation may be necessary to determine who the true employer is. In the case of *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355, it was held by the Court of Appeal:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift "the veil of incorporation" (so the expression goes) when the justice of the case so demands.
>
> …
>
> However, a careful look at the contemporary cases shows that the view expressed by Salleh Abas FJ in the High Court and by Professor Gower no longer prevails. Indeed, the 7th edition of Gower's work no longer canvasses the earlier opinion quoted by Salleh Abas FJ. But that is not to say that the court in the *Hotel Jayapuri* case was wrong in lifting the veil of incorporation on the facts of that case. The *Hotel Jayapuri* case was concerned with the Industrial Relations Act 1967 which requires the Industrial Court to disregard technicalities and to have regard to equity, good conscience and the substantial merits of a case. Accordingly, in industrial law, where the interests of justice so demand, it may, in particular cases be appropriate for the Industrial Court to pierce or to disregard the doctrine of corporate personality.
>
> That is what happened in the *Hotel Jayapuri* case and no criticism of that case on its facts may be justified.
>
> …
>
> In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity. The former, that is to say, actual fraud, was expressly recognized to be an exception to the doctrine of corporate personality by Lord Halsbury in his speech in *Salomon v. A Salomon & Co Ltd* [1897] AC 22, the seminal case on the subject. (emphasis added)

[25] Let's assume, for the sake of argument, that a reference to Parliament reports of proceedings or Hansard, as an aid to interpret the word "establishment" is permitted in this case, the court is of the considered opinion that the above interpretation is consistent with object of the sections and in accordance with the requirement pursuant to s. 17(1A) of the Interpretation Act 1967.

[26] The intention of Parliament was to encourage the flourishing of trade unionism when it introduced the amendment to s. 2(1) of the Act by inserting the word "establishment" in 1989. The intention was to enable the legitimizing of in-house unions in spite of the existence of the national unions. The amendment come about in order to rectify an earlier Supreme Court decision in the case of *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Minister of Labour, Malaysia & Ors* [1989] 1 CLJ 4; [1989] 1 CLJ (Rep) 124. As pointed out by the Honourable Deputy Minister of Labour in response to Tuan Lee Lam Thye's question, Member of Parliament for Bukit Bintang:

> Jadi, sepertimana yang kita sedia maklum tujuan Kerajaan untuk memperkenalkan Rang Undang-undang Pindaan ini ialah untuk membenarkan pendaftaran kesatuan-kesatuan dalaman. Ini adalah jelas bahawa pindaan ini dibentangkan memandangkan keputusan Persatuan Pegawai-pegawai Bank Semenanjung Malaysia untuk apabila mereka telah mengambil satu kes terhadap Kerajaan, terhadap Pendaftar Kesatuan Sekerja dan yang Berhormat Menteri Buruh dalam Mahkamah Agung yang lalu yang menolak keputusan Pendaftar Kesatuan Sekerja untuk mendaftar Persatuan Pegawai-pegawai Maybank. Sebagai akibat pendaftaran Persatuan Pegawai-pegawai Maybank maka Malayan Banking Berhad telah menarik balik pengiktirafannya kepada Persatuan Pegawai-Pegawai Bank.

[27] It is common ground that within the tobacco industry, there already exists the National Union of Tobacco Workers ("NUTW"). In the case of *Tobacco Blenders and Manufactures Sdn Bhd & Anor v. Kesatuan Kebangsaan Pekerja-Pekerja Tembakau* [2002] 3 ILR 654, it was held that:

> The union's contention that it should have a collective agreement with TBM and CMD is that it has members who were formerly employees of MTC who have now jointed TBM. However TBM had already recognized its in-house union and had a collective agreement with it. The court would agree with TBM that it cannot recognise the national union in respect of the same employees and have another collective agreement with the national union and the in-house union. Such dispute should be resolved by the minister under s. 9(5) of the Act and not by the court.

[28] The first respondent had relied on the following cases in making his impugned decision: A

(i) *Harris Advanced Technology (M) Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [1999] 7 CLJ 153;

(ii) *Perusahaan Otomobil Kedua Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja & Anor* [2000] 5 CLJ 351; and B

(iii) *Kesatuan Pekerja-Pekerja Perbadanan Perkapalan Antarabangsa Malaysia Berhad (MISC) Semenanjung Malaysia* [2007] 3 ILR 686 (Award No. 1541 of 2007). C

[29] Learned counsel for the applicant would submit that the first respondent's reliance on the above cases were entirely misplaced as they are distinguishable on the facts.

[30] With respect, the court disagrees. In all the above cases, the D issue related to extending the union membership to subsidiary/ sister companies within a group wherein the court had consistently confirmed that it cannot allow the scope of coverage to extend in such a manner.

[31] Based on the foregoing, I am satisfied that the first E respondent did not commit any error of law in coming to his ruling that the applicant can no longer represent the employee of the third and fourth respondents based on his interpretation of ss. 2(1) and 26(1A) of the Trade Unions Act 1959.

F

[32] The court would agree with the submission of Encik Nik Mohd Noor Nik Kar, Senior Federal Counsel appearing for the first respondent that the first respondent was empowered to hand down the impugned decision pursuant to s. 4A of the Trade Unions Act 1959 which provides:

G

> In addition to the powers, duties and functions conferred on the Director General by this Act and any regulations, the Director General shall have and may exercise all such powers, discharge all such duties and perform all such functions as may be necessary for the purposes of giving effect to and carrying out the provisions of this Act. H

[33] Further, s. 15 of the Trade Unions Act 1959 empowers the first respondent to cancel or withdraw the registration of a trade union if, *inter alia*, he is satisfied that the certificate of registration was obtained by fraud or mistake or that the trade union has I contravened any provision of the Act.

[34] In the case of *National Union of Newspaper Workers v. Ketua Pengarah Kesatuan Sekerja* [2000] 4 CLJ 233, the Federal Court held that s. 26(1A) of the Act could be applied by the DGTU to render the entire membership of the union in the respondent companies not eligible and the union incompetent to represent the entire membership. The section could also be invoked and applied to *de facto* derecognize a union and disunionise members in respect of the establishment, trade, occupation or industry concerned.

[35] It is not disputed that the second, third and fourth respondents had earlier accorded recognition to the applicant. However, the second respondent subsequently made an application dated 1 November 2006 to the first respondent to determine the competency of the applicant to represent employees of the third and fourth respondents. The grounds for the application were given as follows:

> Walaupun kami memahami bahawa satu kesatuan dalaman (establishment union) tidak boleh mewakili pekerja-pekerja di establishment-establishment yang lain, kami telah tidak membuat bantahan kepada BATEU mewakili pekerja-pekerja di ketiga-tiga establishment. Tetapi baru-baru ini untuk membolehkan kami bersaing di dalam persekitaran perniagaan yang sentiasa berubah, kami perlu menstruktur semua operasi pengeluaran dan pengedaran syarikat. Pengstrukturan semula ini akan akibatkan fungsi-fungsi tertentu bukan sahaja untuk syarikat-syarikat tetapi juga untuk pekerja-pekerja, dan oleh itu kesatuan BATEU mungkin tidak boleh mewakili semua pekerja-pekerja dalam ketiga-tiga syarikat berkenaan.
>
> Oleh itu kami terpaksa membuat permohonan ini untuk menentukan kelayakan kesatuan tersebut mewakili pekerja-pekerja di ketiga-tiga establishment.
>
> Kami berpendapat bahawa kesatuan ini (BATEU) tidak boleh mewakili pekerja-pekerja dalam ketiga-tiga establishment iaitu BATMB, TIM dan CMD. Pendapat kami adalah berpunca dari tafsiran Kesatuan di Sek 2(1) Akta Kesatuan Sekerja 1959 yang memperuntukkan bahawa sesebuah kesatuan hanya boleh mewakili pekerja-pekerja dari establishment yang sama.

[36] Concerning the issue of whether an employer can withdraw unilaterally of recognition previously accorded, there is no specific provision in the Act that addresses this issue. In the case of *Kennesion Brothers Sdn Bhd v. Construction Workers Union* [1989] 2 CLJ 569; [1989] 1 CLJ (Rep) 54, Mohamed Azmi SCJ stated at p. 58:

> Once the employer has accorded the recognition, we agree with the learned judge that there appears to be no provision in the Act enabling the employer to act unilaterally in withdrawing or revoking the recognition.

[37] In *Korea Development Corporation And Construction Worker's Union* [1983] 2 ILR 319 (Award No. 173 of 1983), the Industrial Court in reference to the issue of recognition held:

> Once recognition has been accorded either by the company or by the decision of the Minister, the recognition has been accorded either by the company or by the decision of the Minister, the recognition stands for so long as the union exists, even only one employee of the company is left as a member of union.

[38] Wu Min Aun, in his book entitled "*Industrial Relations Law of Malaysia*", 3rd edn, at pp. 131-132 commented:

> While this statement is generally accurate, it is erroneous to state that recognition "stands for so long as the union exists". That was certainly an exaggerated view which discounted the possibility that another union might make a claim for recognition three years after the original recognition.

[39] The court would agree with the above comment because even if the issue of competency matter had been decided by the Minister himself in the first instance, the decision is not meant to be permanently final. The decision is subject to review on a fresh application for recognition. It applies also to the decision of an employer.

[40] The second, third and fourth respondent's conduct in earlier according recognition to the applicant does not estop them from later submitting their application and the first respondent from subsequently considering the same. The applicant cannot rely on an erroneously accorded recognition to support its contention that it should be allowed to continue representing the employees of the third and fourth respondents. The Court of Appeal in the case of *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor* [2005] 3 CLJ 517 confirmed the foregoing point that a wrongly given recognition cannot be allowed to stand:

> The order of recognition, therefore, has a serious impact to the employees' constitutional right, as it would affect their terms and conditions of employment by the collective bargaining.
>
> It is our finding that based on the matters hereinbefore highlighted there appears to be a major flaw in the decision making process of the first respondent when he issued the order

A of recognition in an obvious violation of the principles of legitimate expectation of the appellant that a secret ballot be held to determine the membership status of the second respondent. We therefore consider this is a case in which we would be justified in making an order of *certiorari* to issue.

B **Conclusion**

[41] For the reasons above stated, the first respondent did not commit any error of law when making the impugned decision. The applicant has failed to show grounds upon which this court can exercise its power of judicial review.

C

[42] Wherefore, this application is hereby dismissed with costs. The impugned decision of the first respondent is affirmed.

So ordered.

D

E

F

G

H

I