

<b>YONG TECK SANG</b>	...	<b>1st Appellant</b>
<b>HAJAH NORAINAH BINTI HAJI KAHAR</b>	...	<b>2nd Appellant</b>
<b>TENGGU PUTRA AMIR FAROUK AL HAJ</b>	...	<b>3rd Appellant</b>
<b>PG HJH MARIAM BINTI AL-MARHUM</b>	...	<b>4th Appellant</b>
<b>DPB MUDA HJ HASHIM</b>		

AND

<b>PG HJ ABD RAHMAN BIN PSI PH ISMAIL</b>	...	<b>Respondent</b>
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**(Court of Appeal of Brunei Darussalam)**  
**(Civil Appeal No. 9 of 2014)**

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Before: Mortimer P, Leonard and Burrell JJ A.  
**24<sup>th</sup> of November, 2014**

*Civil Law – A person adversely affected by a decision made by a public officer sued him for tort: Articles 84B (2) and 84C considered.*

*Held: The court had no jurisdiction*

Mr Lt. Col @ Hj Harif bin Hj Ibrahim for Plaintiff  
DPP Hjh Fauziah Hj Sulaiman and DPP Suhana Hj Sudin for Respondent

**Leonard, JA.:**

By a Writ dated the 12<sup>th</sup> of March, 2013 the appellants brought proceedings in the High Court against the respondent. The first four paragraphs of the claim endorsed on the Writ and repeated in the Statement of Claim seek declarations to the effect that the defendant's actions had been oppressive and abusive, that the definition of original CDs and DVDs or items sold by the plaintiffs "is not gazetted by the Government and irregularised (sic)" that the appellants had suffered loss and damages in the sum of more than B\$300,000.00 and that the appellants be paid "all incomes losses and damages..." to be assessed. It seems that the ostensible ground for the Board's action was that the appellants were selling illicit copies of CDs and similar articles. In their Statement of Claim the appellants alleged that the respondent was applying criteria of his own invention for deciding whether the CDs etc, were illicit copies rather than criteria gazetted by the government. It is their case that the respondent acted "wrongfully and with intent to injure" them thus causing them to suffer damages and loss. They say that the respondent went beyond the scope of his duty and powers and that his actions "went well beyond the reasonable enforcement" and alternatively his actions and those of the staff under his command "were anchored at abusing and oppressing" the appellants. The respondent was accused of failure to act in a reasonably competent and lawful manner, of incompetence, of breach of his duty to complete a fair, impartial and balanced investigation and enforcement and of acting negligently, without a lawful reason. Another complaint was that the Respondent deprived the appellants of the opportunity of exercising the right to defend themselves that they would have had if they had

been prosecuted. Counsel for the appellant says that the proceedings are for the tort of misfeasance in public office, though nowhere in the Writ or the endorsed claim or the Statement of Claim is that stated.

The respondent applied successfully to the registrar for the proceedings to be struck out on the ground that they disclosed no reasonable cause of action, were frivolous and vexatious and/or an abuse of the process of the court. He claimed that he was at all material times acting in his official capacity and that by virtue of section 84B(2) of the Constitution of Brunei Darussalam he was immune to any proceedings. It is common ground that by virtue of Article 84C of the Constitution Judicial Review is not available to the appellants.

The appellants were out of time by one day in filing a notice of appeal against the registrar's order to strike out. They applied for an extension of time and it was refused by the registrar on the basis that the appeal against the striking out order would not succeed. They appealed to the High Court against the registrar's decision not to grant an extension of time. Findlay J, also being of the opinion that an appeal against the striking out would be hopeless, dismissed the appeal.

It is common ground that at the material time the respondent was Chairman of the Municipal Board of Bandar Seri Begawan (BSB). It is also common ground that the Municipal Board was the statutory authority for the issue, overseeing and revocation of business operating licences in the government gazetted area of BSB.

There is no previous decision of this court as to whether Article 84B (2) of the Constitution of Brunei Darussalam bars an action against a public officer for misfeasance in public office.

Article 84B (2) provides that

*“Any person acting on behalf or under the authority, of His Majesty the Sultan and Yang Di-Pertuan shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to have been done in his official capacity.”*

Taking the words of that Article in their ordinary natural meaning we find that it does cover any action for tort based on anything done or omitted to be done by a public officer in his official capacity. We are reinforced in that view because Article 84B (2) contains the following proviso.

*“Provided that, subject to Article 84C, provision may be made by written law for the bringing of proceedings against the Government or any officer, servant or agent thereof, but not his Majesty the Sultan and Yang Di-Pertuan, in respect of wrongs committed in the course of carrying on the government of Brunei Darussalam.”*

The existence of the proviso is a strong indication that the legislature must have intended that Article 84B (2) would operate to prevent proceedings in respect of anything, including a wrong, done by the Government or any officer, servant or agent thereof (but not His Majesty the Sultan) committed in the course of carrying on the government of Brunei Darussalam. If that were not the intention there would be no need for the proviso.

Article 84C, to which the proviso is subject, reads as follows:

- “84C. (1) The remedy of judicial review is and shall not be available in Brunei Darussalam.*
- (2) For the avoidance of doubt, there is and shall be no judicial review in any court of any act, decision, grant, revocation or suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion by His Majesty the Sultan and Yang Di-Pertuan, or any party acting on his behalf or under his authority or in the performance of any public function, under the provisions of this Constitution or any Written law or otherwise, including any question relating to compliance with any procedural requirement governing such act or decision.*
- (3) In this Article, “judicial review” means proceedings instituted by any manner whatsoever including, but not limited to, proceedings by way of*
- (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;*
  - (b) an application for a declaration or an injunction;*
  - (c) a Writ of habeas corpus; and*
  - (d) any other suit or action relating to or arising out of any act, decision, grant, revocation or suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion conferred on His Majesty the Sultan and Yang Di-Pertuan, or any party acting on his behalf or under his authority or in the performance of any public function, under the provisions of this Constitution or any Written law or otherwise.*

We note that the appellants in their Writ and Statement of Claim apply for declarations. By virtue of paragraph 3(b) above that is not permitted where the proceedings are brought in the circumstances described in paragraph 3(d).

It is not disputed that at the material time the respondent was a public officer acting under the authority of His Majesty the Sultan and the Board under his control was exercising a power granted to it. Paragraph 3(d) of Article 84C is undoubtedly applicable to the proceedings brought by the appellants. The appellants cannot get round the bar to proceedings, as they seek to do, by saying that the respondent’s manner of exercising a lawful power was such as to cause him to cease to be a public officer and render him a private individual open to an action arising out of his official actions. The action was brought in respect of something that the respondent could do only in his official capacity. If a person aggrieved by an administrative decision seeks, because he cannot apply for judicial review, to bring as an action for tort it will avail him nothing because such an action is caught by paragraph 3(d).

It may well be that some legislation contemplated by the proviso will at some time be enacted but for the time being the proceedings out of which this appeal arises are not permitted by the Constitution. This court has no jurisdiction to entertain them.

The appeal is dismissed. There will be an order that the respondent's costs of the appeal be taxed if not agreed and paid by the Appellants.

**Mortimer, P.**

**Leonard, J.A.**

**Burrell, J.A.**