Anwar Siraj and Another v Ting Kang Chung John
[2009] SGCA 61

Case Number : CA 18/2009, SUM 4120/2009

Decision Date : 09 December 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; V K Rajah JA

Counsel Name(s) : The appellants in person; Ng Yuen (Malkin & Maxwell LLP) for the respondent/applicant

Parties : Anwar Siraj; Khoo Cheng Neo Norma — Ting Kang Chung John

Civil Procedure – Striking out Notice of Appeal served out of time

9 December 2009

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 This was an application made by Ting Kang Chung John ("the applicant") to strike out the appeal, Civil Appeal No 18 of 2009 ("the appeal" or "CA 18/2009"), filed by Anwar Siraj and Norma Khoo ("the appellants") against the decision of the High Court in *Anwar Siraj and another v Ting Kang Chung John and another* [2009] SGHC 71. We granted the application to strike out the appeal and now give our reasons.

Background to application

2 A brief account of the main events leading to the application to strike out the appeal are these. Pursuant to an agreement signed on 30 December 1999 ("the Agreement") the appellants had engaged Teo Hee Lai Building Construction Pte Ltd ("Contractor") to demolish and reconstruct their house located at No 2 Siglap Valley. The Agreement provided that in the event of a dispute arising thereunder, the same would be referred to arbitration. It also provided that in the event of the parties being unable to agree on the appointment of an arbitrator, the President of the Singapore Institute of Architects ("SIA") was empowered to appoint an arbitrator for them.

3 In July 2001, a dispute arose between the appellants and their Contractor, and they were unable to agree on an arbitrator. Accordingly, on 12 December 2001, the President of the SIA appointed the applicant, John Ting, as the sole arbitrator. As will be seen, from then on, for one reason or another, the parties, as well as the arbitrator, were mired in one difficulty after another.

4 The appellants were unhappy with the applicant as the appellants felt that the latter did not proceed with the arbitration with due despatch. The appellants complained about the applicant's competence as an arbitrator and even alleged bias on his part and proceeded to institute Originating Motion No 26 of 2002 to have him removed as arbitrator. The High Court ruled that there were insufficient grounds to remove the applicant as arbitrator in *Anwar Siraj and another v Ting Kang Chung and another* [2003] 2 SLR 287 as the allegations of misconduct and bias were not shown on the facts.

5 The appellants alleged that on 13 May 2003, the applicant required the parties pay the sum of

$50,000 by 27 May 2003 as arbitration fees before he would commence the arbitration hearing. The Contractor claimed to have made payment of its share of the fees, *ie*, a sum of $25, 000, on 10 September 2003.

6 Thereafter, arbitration hearing began. However, the appellants complained that on 24 November 2003 the applicant conducted the arbitration hearing *ex parte*, with only the presence of the Contractor but not the appellants. They further claimed that the applicant refused to furnish them with copies of the notes of hearing when so requested. However, on 1 December 2003, the applicant invited the Contractor and the appellants to present submissions. The appellants replied that without the benefit of the notes of evidence, they were unable to do so.

7 On 15 April 2005, after a lapse of more than a year, the applicant wrote the arbitration award, but refused to release it until the appellants or the Contractor paid the sum of $199,178.40, which represented the balance of his total fees (at $242,200).

8 On 2 June 2006, the appellants filed Suit No 348 of 2006/M ("Suit 348/2006") against the Contractor claiming for overpayment.

9 On 21 September 2006, the applicant filed Originating Summons No 1807 of 2006/S ("OS 1807/2006") against the Contractor (as the first defendant) and the appellants (as second and third defendants) seeking an extension of time from the court to issue his award. He also prayed for an order that the Contractor and the appellants do jointly and severally pay the sum of $199,178.40 as arbitrator's fees.

10 On 24 September 2008, by way of Originating Summons No 1231 of 2008/W ("OS 1231/2008"), the appellants sought to set aside the arbitration award rendered by the applicant, and to obtain an order declaring that the arbitration agreement had ceased to have any effect.

11 On 31 October 2008, by way of an application (Summons No 4814/2008/F) made in OS 1231/2008, the appellants asked for, *inter alia*, the following orders:

a. pursuant to O 4 r 1 of the Rules of Court (Cap No 322, R 5, 2006 Rev Ed) ("ROC"), that the three proceedings, namely, OS1231/2008, OS1807/2006 and Suit 348/2006 be consolidated;

b. any other directions which the court may deem fit and just to make in respect of the aforementioned consolidation;

c. pursuant to O 28 r 8 and O 5 rr 2 and 4 of the ROC, that OS1231/2008 be converted into a writ of summons;

d. any other directions which the court may deem fit and just in respect of the aforementioned conversion;

e. that the police and/or Commercial Affairs Department ("CAD") and/or other investigating authority be directed to:

(i) speedily complete their investigations into the magistrate's complaints (namely, CM-002943-04, CM002436-04 and CM-002282-05) and to furnish their comprehensive report to the court;

(ii) speedily investigate all allegations of fraud, cheating and falsification of bills made

against the applicant, the Contractors and their agents; and all allegations of criminal negligence due to loss of documents or any other evidence resulting from the actions/omissions of the applicant.

12 The third prayer listed in [11] above was considered by the High Court in *Anwar Siraj and another v Ting Kang Chung John and another* [2009] SGHC 129 and was dismissed. Being dissatisfied, the appellants filed an appeal (Civil Appeal No 49 of 2009) against that decision. The appeal in Civil Appeal No 49 of 2009 was dismissed by this court which found that as there was really no substantial dispute of fact in OS 1231/2008 necessitating the conversion of the originating summons into a writ; witnesses could be cross-examined on specific aspects of their affidavits.

13 The fifth prayer (see [11] above) came up for consideration by Lee Seiu Kin J who, in his decision in *Anwar Siraj and another v Ting Kang Chung John and another* [2009] SGHC 71, declined to make the orders. He also awarded costs to the applicant. The appellants filed an appeal (*ie*, CA18/2009) against this decision. This was the appeal which the applicant sought to strike out and which we had granted.

The High Court's decision

14 Lee J declined to make the orders asked for in the fifth prayer essentially on two grounds. First, a judge had no power to order the police to conduct an investigation or to speed up that process. Second, even if the court had such a power, it would not exercise that power because there was no connection between the events which formed the subject matters in the magistrate's complaints and the dispute in OS1231/2008, or in the other related proceedings involving the arbitration dispute. This was how Lee J explained the position (at [2] of his grounds of decision):

> ... I informed the plaintiffs that criminal complaints are investigated by the police and if any criminal offence is disclosed as a result of such investigation, the matter is referred to the Public Prosecutor who decides whether an offence is made out and if so, whether to prosecute the offender. While a judge may refer criminal complaints to the police for investigation, he has no power to order them to conduct an investigation if they decide not to do so, or to speed up any investigation. I would add that even if I had such power, in the circumstances of this case, in particular the fact that there was no connection between the events complained of in the three Magistrate's complaints referred to in prayer 5 of the Summons and the dispute in this originating summons or any of the related cases, viz Originating Summons No 1807 of 2006 and Suit 348 of 2006, I would not be inclined to exercise such discretion to make those orders.

After the High Court decision

15 Lee J made his ruling on 19 January 2009. Thereafter, on 5 February 2009, this court, in Civil Appeal No 172 of 2008 (which arose from an interlocutory application made in OS 1807/2006), made the direction that OS1807/2006 and OS1231/2008 were to be consolidated and heard together by the same judge. The court also directed that all parties were enjoined from making any further applications or filing of further affidavits in respect of the aforesaid consolidated originating summonses.

16 In the meantime, pursuant to the decision of Lee J (see [13] above), the solicitors for the applicant filed a bill of costs for taxation. By a letter dated 16 February 2009, the appellants demanded that the applicant made an application to adjourn the hearing of the taxation of the bill, failing which the appellants would proceed to file a notice of appeal against Lee J's decision.

17 On 19 February 2009, the appellants, who acted in person in this matter and related proceedings, filed the appeal (*ie*, CA 18/2009) against the decision of Lee J. However, the appellants did not, as required, pay the prescribed security for costs of the appeal. Neither did they serve the notice of appeal on the applicant. Instead, the appellants only made payment of the security for costs on 23 July 2009 and served the notice of appeal on the applicant's solicitors on the 24 July 2009.

18 In the meantime, by a letter dated 23 February 2009, the appellants informed the applicant that on 19 February 2009 a notice of appeal had been filed against Lee J's decision, and should the applicant choose to proceed with the taxation of the bill, the appellants would proceed to serve the notice of appeal in CA 18/2009 on the applicant.

Period within which notice of appeal must be served

19 The period within which a notice of appeal must be served on the respondent is prescribed in O 57 r 4 of the ROC which reads:

> **Time for appealing** (O. 57, r. 4)
>
> 4. Subject to this Rule, every notice of appeal must be filed and served under Rule 3 (6) within one month —
>
> (a) in the case of an appeal from an order in Chambers, from the date when the order was pronounced or when the appellant first had notice thereof;
>
> (b) in the case of an appeal against the refusal of an application, from the date of the refusal; and
>
> (c) in all other cases, from the date on which the judgment or order appealed against was pronounced.

20 Order 3 r 2(2) states that "[w]here the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date". As Lee J's order was made on 19 January 2009, the notice should have been filed and served by the latest on the 19 February 2009. In this instance, the notice of appeal was served more than five months later on 24 July 2009.

Does the court have the power to strike out a notice of appeal served out of time?

21 The applicant's application was for the appeal to be *struck out*. While there are no provisions in the ROC that directly relate to the striking out of notices of appeal, in *Riduan bin Yusof v Khng Thian Huat and another* [2005] 2 SLR 188 at [18], this court recognised the court's inherent jurisdiction to strike out a notice of appeal that was *filed* out of time:

> While as a general principle it is possible to strike out a notice of appeal in certain circumstances, the present application [where the court decided that the present facts do not justify striking out] should be distinguished from the more conventional situation where notices of appeal are usually struck out because they are filed out of time. As the White Book notes at para 57/3/7:
>
> > *Cases involving striking out of notices of appeal are usually linked to O. 57, r. 4 (time for appealing)*. … See *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1991] S.L.R. 118 and *Ooi Phee Cheng v. Kok Yoon San* [1951] 1 M.L.J. 135.

[emphasis in original]

22 Now, the instant case was not one where the notice of appeal was filed out of time. Therefore, the question that needs to be addressed is whether a notice of appeal which was filed within time but served out of time could similarly be struck out. In this regard, one must bear in mind that an appeal only comes into being when both the filing of the notice of appeal as well as its service are made within the prescribed time. One of the earliest cases which established the principle that service of the notice of appeal on the respondent was critical was the English Court of Appeal case of *Ex parte Saffery. In re Lambert* (1877) 5 Ch D 365 where, at 367, Jessel MR said that the "meaning of appealing is giving notice to your adversary of your intention to appeal, by serving upon him a notice of appeal". This approach was endorsed by our High Court in the case of *Tan Thye Heng v Pan Mercantile (S) Pte Ltd and another* [1989] SLR 973 ("*Tan Thye Heng*") which held that before there could be an appeal before an appellate court, the notice of appeal must be both filed and served within the prescribed time. The ruling in *Tan Thye Heng* was accepted in the later case of *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 2 SLR 686 at [16] and approved by this court in *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1SLR 757 ("*Lee Hsien Loong*") at [30]. Thus, we would reiterate that the filing *and* service of the notice of appeal are *both* critical and any non-compliance with *either* requirement would be fatal to an appeal coming into being. This is exactly what is provided for in O 57 r 4.

23 In *AD v AE* [2004] 2 SLR 505 at [9], this court expressly held that in determining whether to grant an extension of time to enable the service of a notice of appeal out of time, there ought, in principle, be no difference between the two circumstances of late filing of notice of appeal and of late service of notice of appeal:

> Although in this case the notice of appeal was issued within time and only its service was out of time, it is clear that under the ROC, service of the notice is an essential prerequisite for there to have been an appeal. *An application to extend time to serve a notice of appeal filed within time is no different in nature from that to extend time to file a notice of appeal out of time as an appeal would only come into being where the notice is both filed and served*. Accordingly, an application for an extension of time to serve a notice of appeal out of time should be treated on the same basis as an application to extend time to file a notice of appeal out of time ... . [emphasis added].

24 As the effect of either event, whether it is a case of late filing of a notice of appeal or late service of a notice of appeal, is that there is no appeal in existence, this court should have the same power to strike out a notice of appeal which was served out of time. In other words, if the court has the power to strike out a notice of appeal in the former event, it should also be able to do so in the latter event. There is no reason of principle to distinguish between the two events.

25 In this connection, we note that in *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR 565 ("*Linda Lai*"), the notice of appeal was *set aside* for, *inter alia*, being filed and served out of time. We did not think that this case intended to draw a distinction between the "striking out" and "setting aside" of a notice of appeal. No issue was raised there as to whether there was any difference between these two orders. The prayer there asked the court to "set aside" the notice of appeal. The practical effect of these two orders, in the context of a case like the present, is the same, *ie*, the appeal is no longer in existence.

Discretion to extend time

26 We turn next to consider the question of whether there is a discretion in the court to extend

time to enable a notice of appeal, which was not served within time, to be served out of time. For this purpose, we need to refer to O 2 r 1(1) and O 3 r 4 of the ROC which read:

> Non-compliance with Rules (O. 2, r. 1)
>
> 1.—(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> Extension, etc., of time (O. 3, r. 4)
>
> 4.—(1) *The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required* or authorised *by these Rules* or by any judgment, order or direction, *to do any act in any proceedings*.
>
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
>
> …
>
> (4) In this Rule, references to the Court shall be construed as including references to the Court of Appeal.
>
> [emphasis added].

In the light of these two rules, it is abundantly clear that the non-service of the notice of appeal on the applicant within time is an irregularity which could be cured by the court in the exercise of its discretion to extend time pursuant to O 3 r 4.

27 At this juncture, we should add a qualification to what appears to be the plain sense of O 3 r 4(2). Here, it is necessary to refer to O 57 r 17 of the ROC which states:

> Extension of time (O. 57, r. 17)
>
> **17**. Without prejudice to the power of the Court of Appeal under Order 3, Rule 4, to extend the time prescribed by any provision of this Order, the period for filing and serving the notice of appeal under Rule 4 or for making application ex parte under Rule 16 (3) *may be extended by the Court below on application made before the expiration of that period*.

Thus, the High Court has the power to extend time to file or serve a notice of appeal out of time only if the application is made to the High Court before the expiration of the prescribed period for filing or service. If the application to extend time is made after the deadline for the aforesaid, the application has to be made to the Court of Appeal – see *Chen Chien Wen Edwin v Pearson* [1991] SLR 578.

28 However, in the present case, although no formal application was made by the appellants to court asking for an extension of time to serve the notice of appeal out of time, we were nonetheless prepared to consider whether this was a case in which the court should exercise indulgence in favour of the appellants.

Considerations in exercising discretion to extend time

29 The principles which apply to determine whether the court should exercise its discretion to extend time to file a notice of appeal or to serve a notice out of time are well established in case law. The modern approach taken by this court to this question may be found in its decision in *Pearson v Chen Chien Wen Edwin* [1991] SLR 212 ("*Pearson*"). There are four factors which the court would consider in determining how the discretion should be exercised. These are: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding if time for appealing is extended; and (d) the degree of prejudice to the would-be respondent if the application is granted. But we would emphasise that this is not a numbers game. The significance of each factor must depend on its facts and circumstances of the case. In the final analysis, the applicant for an extension of time must show grounds sufficient to persuade the court to extend its sympathy to him.

30 While these are the factors which are relevant to the court in determining how its discretion should be exercised, there are two other considerations which should nevertheless not be disregarded. In *Linda Lai* at [45], relying on the Privy Council decision in *Thamboo Ratnam v Thamboo Cumarasamy and Cumarasamy Ariamany d/o Kumarasa* [1965] 1 WLR 8 at 12, this court held that when applying these factors, the court should nevertheless bear in mind the fact that the overriding consideration was that the ROC must *prima facie* be obeyed, with reasonable diligence being exercised. Second, in *The Melati* [2004] 4 SLR 7 at [37], this court underscored the point that the need for finality was a "paramount consideration".

Length of delay

31 In *Linda Lai*, there was a lapse of three months and 19 days. The court there noted that it was a delay of more than four times the period prescribed under Order 57 r 4. By way of comparison, in *AD v AE* the delay was 49 days and the court there thought that such a period was "[b]y any standard[s], ... a very substantial delay". We should add that in *AD v AE*, the prescribed period for service of the notice was seven days of it being issued, pursuant to O 55C r 1(4), it being a case involving an appeal from the District Court.

32 Admittedly, the delay in the present case was more than five times the period prescribed by O 57 r 4. However, the length of delay must be seen in its context as the facts of each case are different: see *Lee Hsien Loong* at [52].

Reasons for delay

33 It was clear from the letters dated 16 and 23 February 2009 written by the appellants that one of the reasons for the delayed service on the respondent was the appellants' attempt to use service of the notice of appeal as a bargaining chip to prevent the respondent from proceeding with the taxation of the bill of costs as ordered by Lee J (see [17] and [18] above).

34 The appellants sought to explain the delay of the *service* as being due to their uncertainty over whether they had the *right to appeal*. However, we could not see how this explanation could hold. If the appellants really had any doubt or uncertainty over their right to appeal we would have thought that they would hold back the filing of the notice of appeal and seek legal advice. More significantly, this explanation of theirs could hardly jell with their action in filing the notice, and not serving it and using the fact of the filing of the notice of appeal as a leverage to extract some concession from the applicant. In our opinion, their letters of 16 and 23 February 2009 spoke more loudly than the purported explanation. No reason was given as to why they did not seek legal advice if they had real doubts as to their right to appeal. On the contrary, their actions were quite deliberate, taken in the

hope that such actions would bring about the desired result. We would also add that while recognising the appellants are lay persons, they are no strangers to court proceedings, having been involved in numerous interlocutory applications and several appeals. They have become seasoned lay litigators.

35 In *Linda Lai* at [48], it was held that financial difficulties *per se* are not sufficient to justify an extension of time, otherwise, the rules on the provision of security for costs and the need for promptly filing and serving the notice of appeal would be set at naught. This court in *Lee Hsien Loong* at [22] reaffirmed the following passage in *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd* [2002] 3 SLR 357 at [18] to the effect that a mere assertion that there has been an oversight is obviously insufficient and could lead to an abuse of process:

> Not only was the length of the delay quite substantial (bearing in mind [that] the prescribed period of time within which a party must apply to the judge for further arguments was only seven days), there were no extenuating circumstances offered for the 'oversight' of the solicitor. Some explanation should have been offered to mitigate or excuse the oversight. *If, in every case, 'oversight' is per se a satisfactory ground, we run the risk of turning the rules prescribing time into dead letters. It would be observed in breach. It would be all too simple for a party to run to a judge to ask for indulgence because of oversight. The need for finality must be borne in mind*. [emphasis added]

36 In our judgment, if oversight or negligence *per se* was insufficient to justify an extension of time, *a fortiori*, a conscious assumption of risk on the appellants' part, coupled with a move (*ie*, withholding service) which was deliberately aimed at a specific collateral purpose (see [16] and [18] above). It was not a case where the appellants could legitimately claim ignorance of the rules or had *bone fide* misunderstood the rules.

Chances of appeal succeeding

37 Turning now to the third factor, the threshold set for this factor is a rather low one – is the appeal hopeless? : see *Lee Hsien Loong* at [19] and *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd and another* [2001] 4 SLR 441 ("*Aberdeen Asset*"). In *Aberdeen Asset* at [43], this court stated:

> As to the question of merits, it is not for the court at this stage to go into a full-scale examination of the issues involved. Neither is it necessary for the applicant to show that he will succeed in the appeal. The threshold is lower: the test is, is the appeal hopeless? ... Unless one can say that there are no prospects of the applicant succeeding on the appeal, this is a factor which ought to be considered to be neutral rather than against him.

38 It would be recalled (see[14] and [17] above) that the subject matter of CA 18 /2009, was in relation to the High Court's refusal to order the police, or the CAD, to speedily investigate into the magistrate's complaints and allegations of fraud made against the applicant. The question here was whether the court could, in a civil proceedings, to which neither of these law enforcement agencies was a party, compel them to investigate more speedily into the magistrate's complaints lodged by the appellants.

39 We would first observe that the appellants had failed to submit any authorities which showed that the court had the power, in a civil suit, to make a mandatory order against the said law enforcement agencies in those terms when the agencies were not a party to the proceedings. The appellants relied on the case of *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 ("*Fagan*"), a case which was quite irrelevant. We were nonplussed as to why *Fagan* was cited

because that case concerned a question of law as to whether the offence of assault under s 51 of the Police Act 1964 (c 48) (UK) necessarily required *mens rea* and *actus reus* to be present at the same time. It had no bearing on the question of whether the court had the power to make a mandatory order against the police, who were not a party to the proceedings.

40 The proper process for the Appellants to invoke for the said object would have been to commence proceedings for an order of *mandamus* : see, *eg*, *R v Chief Constable of Devon and Cornwall, Ex parte Central Electricity Generating Board* [1982] QB 458 ("*R v Chief Constable of Devon and Cornwall*"). Without deciding here on the outcome of any application for such an order, it is interesting to note that even in cases where an application for a *mandamus* order has been made, the English Courts have been slow in granting such an order against the police. As succinctly summarised in Clive Lewis QC, *Judicial Remedies in Public Law* (Sweet & Maxwell, 4th Ed, 2009) at para 4-084:

> The courts will not … give orders to the police telling them how and when to exercise their powers in specific situations as the court is not in a position to determine what action particular situations will require. [*R. v Chief Constable of Devon and Cornwall Ex p. Central Electricity Generating Board* [1982] Q.B. 458 (court refused mandamus ordering police to remove demonstrators from land to enable drilling to take place).] Nor will the courts review the disposition of forces and the allocation of resources to particular crimes or areas will not be reviewed. [*R. v Metropolitan Police Commissioner Ex p. Blackburn* [1968] 2 Q.B. 119; R. *v Chief Constable of Sussex Ex p. International Traders Ferry Ltd* [1998] 3 W.L.R. 1260.]

41 In *R v Chief Constable of Devon and Cornwall*, a statutory board applied to the Divisional Court for a *mandamus* order directing the police to remove protestors and obstructors at a worksite where a nuclear power station was planned to be built upon. The board appealed against the Divisional Court's refusal to grant the order. The English Court of Appeal found that although the obstructors' actions had resulted in a breach of the peace, the court would not grant orders to the police as to how the police should carry out their duties (at 472):

> Notwithstanding all that I have said, I would not give any orders to the chief constable or his men. *It is of the first importance that the police should decide on their own responsibility what action should be taken in any particular situation*. As I said in *Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118, 136:
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> > ... it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere.
>
> The decision of the chief constable not to intervene in this case was a policy decision with which I think the courts should not interfere. All that I have done in this judgment is to give the "definitive legal mandate" which he sought. It should enable him to reconsider their position. I hope he will decide to use his men to clear the obstructors off the site or at any rate help the board to do so.
>
> [emphasis added].

Equally pertinent are the views of Templeman LJ at 481:

> … it is for the police and the board to co-operate and to decide upon and implement the most effective method of dealing with the obstructors. *The court cannot tell the police how and when their powers should be exercised, for the court cannot judge the explosiveness of the situation or deal with the individual problems which will arise as a result of the activities of the obstructors*. This court can [however] and does confirm that the police have powers to remove and arrest passive resisters in the circumstances which prevail at the site when the board resume their work to complete their survey. [emphasis added].

42 In the light of these authorities, it was clear to us that the appeal against the decision of Lee J in refusing to make an order directing the police or the CAD to investigate more speedily into the magistrate's complaints lodged by the appellants was hopeless and bound to fail. There would be no point in allowing the appeal to continue. In coming to this view, we were not concerned so much by the procedural defect as such, *ie*, the law enforcement agencies were not before the court. We would add that *even if* the appellant had commenced proceedings by the correct process, namely for an order of *mandamus*, we would still refuse the order because it was not for this court to instruct the law enforcement agencies as to how they should go about doing their jobs. Moreover, for the reasons set out in the next two paragraphs, which was also the alternative ground given by Lee J in refusing to grant the order asked for by the appellants (see [14] above), the appeal was wholly without merit.

43 A perusal of the three magistrate's complaints clearly show that they have nothing to do with OS 1231/2008 and OS 1807/2006 ("the consolidated proceedings"). In the first complaint, the appellants alleged that several parties dumped articles/objects outside the gate of the appellants' house. They alleged that these parties were engaged and abetted by the applicant to carry out the offensive acts. In the second complaint, it was alleged that the applicant had on earlier occasions threatened to dump articles/objects outside the office of a solicitor. It was further alleged that the applicant had ceased threatening the solicitor but instead directed his threats to the appellants and their family. In the third complaint, the same parties were alleged to have harassed, disturbed the peace, caused anxiety, and intruded upon the privacy of the appellants and their family all brought about or abetted by the applicant.

44 In contrast, the substantive issues that the court would be concerned with in the consolidated proceedings are: whether the applicant is entitled to the fees demanded by the applicant as arbitrator, and if so, what is the proper quantum; whether the arbitration award given by the applicant ought to be set aside; and whether the arbitration agreement shall cease to have effect. Clearly, the three magistrate's complaints, and any investigations revolving around them, are totally unrelated to the issues in the consolidated proceedings.

Conclusion

45 There is no need for us to consider the fourth factor of "prejudice" because the first three factors, particularly the factor on merits, were more than sufficient to convince us that we should not grant an extension of time to allow the appeal to proceed, as that would just be a waste of judicial time. The application to strike out the appeal was accordingly allowed with costs and with the necessary consequential orders.