

Attorney general's discretion is not unfettered

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Litigation, Malaysia

- 🕒 **Background**
- 🕒 **First appeal**
- 🕒 **Second appeal**
- 🕒 **Decision**

The attorney general is a public officer who has been given ample discretionary power under Article 145 of the Malaysian Federal Constitution to institute, conduct or discontinue any criminal proceedings.

The question is, where a public officer's decision is subject to judicial review, does this equally apply to the attorney general?

Background

In *Peguan Negara Malaysia v Chin Chee Kow*,⁽¹⁾ the Federal Court was required to decide whether the prerogatives of the attorney general were not amenable to the judicial process.

The case consisted of two appeals – Civil Appeal 58 (the first appeal) and Civil Appeal 59 (the second appeal). Both focused essentially on the same question, which revolved around Section 9 of the Government Proceedings Act 1956.

Section 9(1) of the act provides that the attorney general has the power to give written consent to persons who have an interest in trusts for public, religious, social or charitable purposes to initiate a suit on behalf of the government or the public for the purposes of, among other things, asserting any interest in the trust property.

In the first appeal, the question was whether the attorney general's written consent under Section 9 in respect of civil cases was non-justifiable or non-reviewable.

In the second appeal, the question was whether the attorney general's written consent under Section 9 in respect of civil cases was justifiable or reviewable.

First appeal

The deceased testator, Cheah Leong Kean, made a public charitable trust in his will so that RM15,000 was given to his children to construct a pagoda and outhouses for the benefit of the Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan (the association). The initial trustees failed to ensure that the building works were carried out as per the terms of the trust and as a result there were insufficient funds to carry out the works. The association thus resorted to obtaining funds from third parties.

However, as a pre-condition of the promised funds, the association had to be appointed as a trustee. The association hence applied to the attorney general for consent under Section 9(1) so that an application could be made to the High Court for the association to be made a trustee. The attorney general rejected this application on the ground that consent had already been given to the current trustees.

The secretary of the association was granted leave by the High Court to file a judicial review against the attorney general's decision. The attorney general appealed against the High Court's decision in the Court of Appeal, and this was accordingly dismissed, hence the present appeal to the Federal Court.

Second appeal

The second appeal concerned an agreement for the partition of land into two pieces – one for the benefit of the trustees of the Thai community and the other for the trustees of the Burmese community. The attorney general consented under Section 9 to appoint the trustees for both communities. The appellants in this appeal executed a trust deed stating that they had consented to be appointed as the trustees for the Burmese community.

The appellants then entered into a joint venture agreement with a developer to develop the land by constructing commercial premises.

The second respondent filed an originating summons, applying for an order to set aside the registration of the appellants as the owners of both areas of land.

After filing the originating summons, the second respondent wrote to the attorney general for consent to proceed with the originating summons, which was granted. The appellants made an *ex parte* application to quash the attorney general's consent. The attorney general had also objected to the appellants' application on the ground that its decision was non-justiciable. The appellant's application was dismissed by the High Court and the appeal was also dismissed by the Court of Appeal. Aggrieved, the appellants brought the current appeal to the Federal Court.

Decision

The Federal Court held that the attorney general derives its power to give consent or otherwise from a statute – that is, Section 9(1) of the Government Proceedings Act. As such, there are no inherent constitutional objections to the jurisdiction of the courts being invoked to review the decision made by the attorney general pursuant to a statute.

This discretion of the attorney general under Section 9(1) is different from the unfettered discretion of the attorney general in relation to the prosecution of criminal offences based on the Federal Constitution. Such unfettered discretion cannot be allowed in civil cases – especially when it involves the public – as this may lead to an abuse.

Therefore, the attorney general's power to give consent or otherwise under Section 9(1) is not absolute and is subject to legal limits.

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Endnotes

(1) [2019] 1 LNS 219.

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