DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. P-01(A)-643-08/2022

ANTARA

KHOR KHENG LONG
(NO. K/P: 640723-07-5483) PERAYU

DAN

PENTADBIR TANAH DAERAH SEBERANG
PERAI SELATAN RESPONDEN

.....

[Dalam Mahkamah Tinggi Malaya Di Pulau Pinang
Di Dalam Negeri Pulau Pinang
Rujukan Pengambilan Tanah No. PA-15-54-01/2021

Antara

Khor Kheng Long
(No. K/P: 640723-07-5483) Pemohon

Dan

Pentadbir Tanah Daerah Seberang
Perai Selatan Responden]

CORAM

S. NANTHA BALAN, HMR

AZIMAH BINTI OMAR, HMR

CHOO KAH SING, HMR

JUDGMENT OF THE COURT

Introduction

[1] This is a land reference appeal before this Court. The appeal was filed by the land owner ("the appellant") against the decision of the High Court dated 28.7.2022 ("the HC decision").

[2] The grounds in the Memorandum of Appeal can essentially be dealt with within these two questions of law before this Court for determination:

i) Whether the respondent / the High Court in determining the "market value" and "adequate compensation" pursuant to the legal principles under the First Schedule of the Land Acquisition Act 1960 can give an award below than the lesser amount between the two valuation reports adduced by the Government Valuer and the Private Valuer;

ii) Whether the buildings situated on the scheduled land which were bought by the appellant together with the scheduled land and which were previously being occupied by the estate workers are illegal buildings and thus are not entitled to be compensated pursuant to subparagraph 1(3A) of the First Schedule of the Land Acquisition Act 1960.

[3] The events leading to the above two questions of law raised before us for determination are set out below.

Background Facts

[4] On 9.12.2020, a land enquiry was held by the Land Administrator to determine the market value of a scheduled land (Lot 10059, GRN 158668, Mukim 8, Daerah Seberang Perai Selatan) which belonged to the appellant. The size of the scheduled land is 24,873.00 square meters (m²) (or 267,732.972 square feet [ft²]).

[5] In the enquiry, the appellant averred that the fair market value for the scheduled land was RM346.60 per m² as at 5.11.2020. The appellant sought compensation for the scheduled land in the sum of RM8,620,982.00 (24,873 m² x RM346.60). The appellant also sought, inter alia, for compensation of 20 units of residential building ("the buildings") erected on the scheduled land the total value of which amounted to RM1,868,329.00.

[6] During the enquiry, the Land Administrator referred to a meeting held between the appellant and the authority on 23.10.2020. The meeting minutes recorded that the appellant had agreed to accept an offer made by the authority to the appellant in a sum of RM4,500,000.00 as the compensation amount for the acquisition of the scheduled land. The Land Administrator took cognizance of the meeting minutes and recorded in the proceedings of the enquiry as follows:

> "*Bayaran pampasan tanah yang dituntut oleh pemilik ialah RM4,500,000.00 berdasarkan perbincangan sebelum proses pengambilan seperti di dalam minit perbicangan*"

"*Beberapa siri perbincangan / perundingan telah di adakan dengan pihak tuan tanah. Persetujuan telah diperolehi dengan tuan tanah berkaitan nilai pampasan*."

[7] Premised on the above finding, the Land Administrator awarded the compensation amount for the scheduled land in the sum of RM4,500,000.00 (approximately RM180.83 per m² x 24,873.00 m² [or RM16.80 per ft² x 267,732.972 ft²]). The Land Administrator did not award any compensation for the buildings.

[8] The appellant was not satisfied with the decision of the Land Administrator and filed a *Borang N* to challenge the compensation award made by the Land Administrator at the High Court. The appellant averred that there was no agreement reached between him and the authority and submitted that he was entitled to challenge the Land Administrator's award. The learned High Court Judge held that there was no agreement reached between the appellant and the authority and stated as follows:

"[10] Having considered the affidavits filed by both parties, I am of the view that there was no agreement as far as the amount of compensation is concerned simply because it was still open for the applicant to challenge the said amount. Hence, I proceed to consider the reports prepared by both JPPH and AAPC as well as the Assessors' opinions besides the submissions advanced by both parties."

[9] The learned High Court Judge, after having considered the appellant's and respondent's valuers' reports respectively, referred to the comparables stated in the appellant's valuer's report and made

substantial changes to the market value based on the recommendation of the private assessor's findings. The learned High Court Judge concluded that the market value of RM202.58 per m² (or RM18.82 per ft²) was a fair and reasonable market value as the compensation amount for the scheduled land. The reasoning of the learned High Court Judge could be found in his *Alasan Penghakiman* at paragraphs 11 to 14 as reproduced below:

> [11] There is no common comparable lot. I have considered the features in all comparable lots picked by both the valuers and the assessors. Both the JPPH and the Government Assessor prefer Lot 681. After making the allowances JPPH suggests RM270.00 per m² or RM25.08 psf while the Government Assessor suggest RM260.00 per m² or RM24.25 psf. I cannot accept taking Lot 681 alone as comparable. Granted Lot 681 was transacted on 15.9.2020 and it is the most recent among all available comparables but its size is too small i.e. 4,932.098 m² while the scheduled land is 24,873.000 m². Land of substantial difference in size according to the Federal Court in Superintendent of Lands and Surveys, Sarawak v. Aik Hoe & Co. Ltd [1966] 1 LNS 188; [1966] 1 MLJ 243 and Ng Tiou Hong (supra) was not suitable to use as comparable. Further the whole of Lot 681 is zoned for development.
>
> [12] I cannot accept Lot 7706 alone as suggested by the applicant as it is an interior land, undulated and below road level. All the comparables carry plus and minus points therefore to my mind preferring a single lot as comparable is not appropriate more so when all have different features except their location.

[13] Turning to the Private Assessor's assessment, I am of the view that her opinion is more realistic. She takes Lots 681, 680, 7706 and 6276 as comparables in making her assessment. Lot 680 was transacted on 25.7.2017, Lots 7706 and 6276 were both transacted in 2019. Lot 680 measures 20,386.0069 m² and Lot 7706 measures 20,430.00 m² while Lot 6276 is 11,280.00 m² hence, only slight adjustments need to be given. I am mindful of the fact that Lot 680 was transacted more than 3 years from the material date. Subparagraph 1(1A) of the First Schedule of Act 486 provides:

> *"In assessing the market value of any scheduled land, the valuer may use any suitable method of valuation to arrive at the market value provided that regard may be had to the prices paid for the recent sales of lands with similar characteristics as the scheduled land which are situated within the vicinity of the scheduled land and with particular consideration being given to the last transaction on the scheduled land within two years from the date with reference to which the scheduled land is to be assessed under subparagraph (1)."*

However, it does not mean that Lot 680 cannot be considered at all. Further it is a first layer land similar to the scheduled land and abuts Lot 681. Lot 680 is of first layer while Lots 7706 and 6276 are interior land.

[14] Although I agree that the three comparables offered by APPC are suitable, I find that the adjustments or allowances made are unreasonable. They are undulated and below road level and only Lot 7706 is squarish. I cannot agree with the huge adjustments given by APPC. For instance, he gives a +30% adjustment for the time factor for Lot 680 without providing any reasons.

> [15] Having given the necessary adjustments to the four comparables, the Private Assessor obtains an average price of RM18.82 psf or RM202.58 per m². I find that the adjustments she gives are more sensible this figure is more sensible thus, I agree that RM18.82 psf or RM202.58 per m² is a fair and reasonable market value for the scheduled land.

[10] With regard to the claim for compensation of the buildings, the High Court Judge held that the appellant was not the owner of the buildings, that the buildings were constructed and/or owned by squatters, and that the buildings were already in existence before the appellant acquired the land. The learned High Court Judge also held that since the buildings were constructed and occupied by the squatters, therefore, they were illegal and no compensation was to be awarded for the buildings.

[11] On 28.7.2022, the High Court Judge ordered, inter alia, that the compensation award for the scheduled land be increased from RM4,500,000.00 to RM5,038,734.50 (based on RM RM202.58 per m² [or RM18.82 per ft²]). In other words, an additional compensation amount of RM538,734.50 was to be paid to the appellant on top of the RM4,500,000.00 which was awarded earlier by the Land Administrator.

[12] The appellant was not satisfied with the High Court's decision, and filed an appeal before us. The main complaint of the appellant is that the High Court Judge did not accept both the JPPH's and appellant's valuer's reports' recommendation of the comparables. Instead, the learned High Court Judge preferred a value recommended by the private assessor based on an average value premised on four comparables. The value accepted by the learned High Court Judge as fair market value, i.e.

RM202.58 per m² (or RM18.82 per ft²), was way below the recommended values of the appellant's valuer and/or JPPH's report. The appellant's valuer recommended the fair market value as RM346.60 per m² (or RM32.20 per ft²) based on Lot 680, whereas, the JPPH / the respondent recommended the fair market value as RM270 per m² (or RM25.08 ft²) based on Lot 681. It is on this basis that the first question of law was framed for determination before this Court.

[13] With regard to the second question of law, it concerns whether compensation should or should not be awarded to "illegal" buildings.

The findings of this Court

[14] The respondent's counsel raised an objection to the appellant's appeal before us. The respondent's counsel submitted that there should be no appeal from a High Court decision to the Court of Appeal as to compensation pursuant to s. 49 of the Land Acquisition Act 1960 ("the Act"), except that for an appeal on question of law.

[15] The respondent's counsel cited a string of Federal Court decisions in support of the legal proposition (see **Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat** [2017] 5 CLJ 526, FC; **Amitabha Guha v Pentadbir Tanah Daerah Hulu Langat** [2021] 3 CLJ 1, FC; and **Pentadbir Tanah Daerah Johor v Nusantara Daya Sdn Bhd** [2021] 7 CLJ 1, FC). We are fully aware of the legal proposition enunciated in those cases.

[16] However, in the present appeal the first question of law hinges on the power of a High Court Judge exercising his role in a land reference

court. Whether a High Court Judge could exercise his discretionary power to arrive at a compensation value which is below than that of an offer made by JPPH / the respondent or the appellant? The second question of law is whether an "illegal" building ought to be compensated in a land acquisition proceeding?

[17] In this appeal, this Court is not asked to consider whether the application of valuation principles was correct or otherwise when the High Court computed the amount of compensation to be awarded, as opposed to the appeal in **Pentadbir Tanah Daerah Johor v Nusantara Daya Sdn Bhd**. The complaint in that case "essentially concerned issue of fact and / or application of valuation principles when computing the amount of compensation to be awarded for the acquisition."

[18] The first question of law concerns the ambit of the powers of a High Court judge in a land reference proceeding. The decision of this Court, if the first question of law is answered in the negative, will have a consequential effect on the compensation amount. The second question of law essentially deals with the legitimacy of a claim for compensation of an "illegal" building in an acquisition proceeding. On both scores, we are of the view that the appellant's appeal has crossed the threshold of the proviso to s. 49 of the Act.

The first question of law

[19] The respondent's counsel did not challenge the High Court's finding that there was no agreement. The respondent's counsel went on to submit before us that the learned High Court was entitled to adopt the

opinion of the private assessor that the fair market value could be lower than the JPPH's offer. We could not agree with the submission.

[20] In the first place, the High Court in a land reference proceeding is always guided by the evidence produced before it. The applicant's valuer's report is the fist evidence before the court. Clause 2(1) of the Third Schedule of the Act states: "the applicant's valuer's report alone must establish a *prima facie* case for the applicant." This would be the first evidence before the court to guide the judge to arrive at a fair market value.

[21] The consideration of the applicant's valuer's report is to be followed by the consideration of a rebuttal report by the respondent as further evidence for the High Court judge to consider what the fair market value for the scheduled land is.

[22] It would be easier to narrow down a possible fair market value when there is a common comparable between the applicant's valuer's report and the respondent's valuer's report. If there is none, then the High Court judge would have to consider the best comparable available before him.

[23] The High Court judge would be assisted by a private assessor and a government assessor in the examination of the comparables. The High Court judge is not bound by the decision, recommendation or advice given by the two assessors. Nevertheless, the High Court judge must be guided by the evidence presented before the court.

[24] The court is presented with various proposals of what the market value is by the applicant and the respondent. There will be the highest market value on one side and the lowest market value on the other side.

[25] In the present case, the appellant's valuer recommended the fair market value as RM346.60 per m² (or RM32.20 per ft²); whereas, the respondent's valuer (JPPH) recommended the fair market value as RM270.00 per m² (or RM25.08 per ft²). The fair market values recommended by the two sides differ because both sides have used different comparables as the basis for evaluation and adjustment as there was no common comparable. The higher end of the spectrum was the sum of RM346.60 per m² (or RM32.20 per ft²) (as offered by the appellant's valuer) and the lower end of the spectrum was the sum of RM270.00 per m² (or RM25.08 per ft²) (as offered by JPPH / respondent).

[26] The government assessor agreed with the respondent's valuer to use Lot 681 as the best comparable, and after taking into consideration the adjustment, the government assessor came to a sum of RM260.00 per m² (or RM24.25 ft²) as the fair market value. This amount is close to the lower end of the spectrum. However, the learned High Court Judge rejected this amount.

[27] The learned High Court Judge adopted the private assessor's recommendation that the fair market value ought to be RM202.58 per m² (or RM18.82 per ft²). This amount was far below the lower end of the spectrum. It was also lower than the government assessor's recommendation, i.e., RM260.00 per m² (or RM24.25 ft²).

[28] We do not have the benefit of understanding how the private assessor could come to this conclusion because her report and reasoning were not provided in the appeal records before us.

[29] This Court is of the view that the learned High Court Judge was not entitled within his power to accept and find the amount of RM202.58 per m² (or RM18.82 per ft²) as the market value. This is because the finding of the High court Judge was lower than the market value recommended and offered by JPPH / the respondent.

[30] Article 13 of the **Federal Constitution** provides that "no person shall be deprived of property save in accordance with law", and "no law shall provide for the compulsory acquisition or use of property without adequate compensation." If JPPH / the respondent was of the opinion that the fair market value of the schedule land was, at the minimum, RM270.00 per m² (or RM25.08 per ft²) constitute adequate compensation, there is no legal basis as to why the appellant should only be entitled to compensation based on a value which was less than a "minimum" market value that JPPH / the respondent was willing to pay.

[31] It is observed that the market value of RM270 per m² (or RM25.08 per ft²) offered by JPPH / the respondent at the High Court was the same amount as offered in the enquiry at the Land Office.

[32] We agree with the appellant's counsel's submission that the compensation amount for a fair market value should fall somewhere in between the two recommended market values offered by the appellant's valuer's report on one side and the JPPH's valuation report on the other

side. At the very least, the JPPH's recommended market value should be regarded as the "minimum opening" fair market value.

[33] We are of the considered view that the learned High Court Judge fell into error when his Lordship failed to address his mind to consider the "minimum opening" fair market value offered by JPPH in its report and accepted the private assessor's market value which was far below than the "minimum opening" fair market value.

[34] We are also of the considered view that it is not permissible for the respondent to now argue that the learned High Court Judge was correct to come to a market value which was lower than what it was previously willing to offer to pay per the JPPH's report.

[35] Although there is no doubt that the learned High Court was entitled to come to his own conclusion of what the fair market value was for the schedule land, his Lordship must be guided by the evidence presented before him. Here, the learned High Court Judge awarded a sum lower than the market value which JPPH / the respondent was willing to offer and pay. This could not be legally correct when viewed through the lens of "adequate compensation" from a constitutional right perspective.

[36] Based on the above reasoning, we are of the considered view that the minimum amount that the appellant ought to be compensated should be based on the "minimum opening" market value of RM270.00 per m^2 (or RM25.08 per ft^2) as offered in the JPPH report. Hence, our answer to the first question of law is in the negative, and this part of the appellant's appeal is allowed.

[37] For the record, the appellant's counsel has conceded before this Court to accept the sum of RM270.00 per m² (or RM25.08 per ft²) as the market value for the compensation of the scheduled land.

The second question of law

[38] As for the compensation for the buildings, there is no supporting evidence that those buildings were legally built in compliance with the relevant planning laws or State land law. The learned High Court Judge concluded that there was no dispute that the said buildings were built or owned by squatters. These were the learned High Court Judge's findings:

> "[16] As regards the buildings, the following facts are undisputed namely,
>
> 16.1 the applicant is not the owner of the buildings;
> 16.2 the buildings were constructed and/or owned by squatters;
> 16.3 they existed before the applicant purchased the said land;
>
> Therefore, the applicant is not a "person interested" in the buildings found thereon (see *Cahaya Baru Development Bhd v. Lembaga Lebuhraya Malaysia* [2010] 8 CLJ 761). Further the buildings were constructed and occupied by squatters and hence illegal and no compensation ought to be given (see *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577 and subparagraph 1(3A) of the First Schedule of Act 486)."

[39] Insofar as the claim for compensation for the buildings is concerned, the burden was on the appellant to demonstrate that the buildings were legal in order to attract the requisite compensation. However, there is no probative evidence of legality in this regard. The mere fact that *cukai pintu* (assessment) was paid to the local authority does not prove the buildings were legally constructed with approvals.

[40] We are not persuaded by the appellant's counsel that the learned High Court Judge was wrong in disallowing compensation for the buildings. As such, the answer to the second question of law is positive in that those buildings were illegal, and therefore, the appellant was not entitled to compensation under paragraph 1(3A) of the First Schedule of the Act. Hence, this part of the appellant's appeal is not allowed.

Conclusion

[41] Based on the above reasoning, this Court, in a unanimous decision, allows the appellant's appeal in part.

[42] This Court orders, inter alia, that the award of compensation for the appellant's land (or the scheduled land) that was acquired is to be based on RM270.00 per m^2 and multiplied by 24,873.00 m^2 (or RM25.08 per ft^2 x 267,732.972 ft^2). The compensation award for the scheduled land is, therefore, to be in the sum of RM6,714,742.94, and not RM5,038,734.50 as awarded by the learned High Court Judge. The respondent, therefore, is required to pay an additional amount of RM1,676,008.40 (RM6,714,742.94 - RM5,038,734.50) to the appellant. We hereby further order that interest at 5% per annum be chargeable on the sum of

RM1,676,008.40 from the date of the *Borang K* (dated 14.1.2021) until the date of full payment.

[43] We make no order as to costs for the appeal.

Date: 29.10.2023

-sgd-

(CHOO KAH SING)
Judge
Court of Appeal

(**Note**: The decision of this Court was delivered on 21.8.2023)

Counsel(s) for the appellant:

Karin Lim

(Shamshul bin Jamil with her)

Messrs. Presgrave & Matthews

Counsel(s) for the respondent:

Roslinda Binti Mohd Shafie

(Naizatul Zima binti Tajudin with her)

State Legal Advisers