IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 01(f)-13-09/2021(W)

BETWEEN

DATUK BANDAR KUALA LUMPUR ... APPELLANT

AND

1. **PERBADANAN PENGURUSAN TRELLISES**
2. **PERBADANAN PENGURUSAN KIARA GARDEN**
3. **PERBADANAN PENGURUSAN THE RESIDENCE**
4. **PERBADANAN PENGURUSAN TTDI PLAZA**
5. **BADAN PENGURUSAN BERSAMA THE GREENS**
6. **ABDUL HAFIZ BIN ABU BAKAR**
   (mendakwa sebagai pegawai awam,
   Persatuan Penduduk Taman Tun Dr Ismail)
7. **KHOO ZHAO PHIN**
8. **FIRDAUS NISHA BIN MUHAMMAD FAIZAL**
9. **LOO LY MUN**
10. **BOO SU-LYN**
11. **MEMANG PERKASA SDN BHD**
12. **YAYASAN WILAYAH PERSEKUTUAN**
13. **PERTUBUHAN PENDUDUK PERUMAHAN AWAM BUKIT KIARA, DEWAN BANDARAYA, TAMAN TUN DR. ISMAIL KUALA LUMPUR**

... RESPONDENTS

(consolidated with 3 other cases)

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: 01(f)-12-09/2021(W)

BETWEEN

YAYASAN WILAYAH PERSEKUTUAN
(No. Pendaftaran Syarikat: 152446-W) ... APPELLANT

AND

1. **PERBADANAN PENGURUSAN TRELLISES**
2. **PERBADANAN PENGURUSAN KIARA GARDEN**
3. **PERBADANAN PENGURUSAN THE RESIDENCE**
4. **PERBADANAN PENGURUSAN TTDI PLAZA**
5. **BADAN PENGURUSAN BERSAMA THE GREENS**
6. **ABDUL HAFIZ BIN ABU BAKAR**
   (mendakwa sebagai pegawai awam,
   Persatuan Penduduk Taman Tun Dr Ismail)
7. **KHOO ZHAO PHIN**
8. **FIRDAUS NISHA BIN MUHAMMAD FAIZAL**
9. **LOO LY MUN**
10. **BOO SU-LYN**
11. **DATUK BANDAR KUALA LUMPUR**
12. **MEMANG PERKASA SDN BHD**
    (No. Pendaftaran Syarikat: 420233-X)
13. **PERTUBUHAN PENDUDUK PERUMAHAN AWAM**

BUKIT KIARA, DEWAN BANDARAYA, TAMAN TUN DR. ISMAIL KUALA LUMPUR

... RESPONDENTS

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: 01(f)-14-09/2021(W)

BETWEEN

MEMANG PERKASA SDN BHD ... APPELLANT

AND

1. **PERBADANAN PENGURUSAN TRELLISES**
2. **PERBADANAN PENGURUSAN KIARA GARDEN**
3. **PERBADANAN PENGURUSAN THE RESIDENCE**
4. **PERBADANAN PENGURUSAN TTDI PLAZA**
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   (mendakwa sebagai pegawai awam,
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7. **KHOO ZHAO PHIN**
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10. **BOO SU-LYN**
11. **DATUK BANDAR KUALA LUMPUR**
12. **YAYASAN WILAYAH PERSEKUTUAN**

13. PERTUBUHAN PENDUDUK PERUMAHAN AWAM BUKIT KIARA, DEWAN BANDARAYA, TAMAN TUN DR. ISMAIL KUALA LUMPUR

... RESPONDENTS

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 01(f)-55-09/2021(W)

BETWEEN

PERTUBUHAN PENDUDUK PERUMAHAN AWAM KIARA, DEWAN BANDARAYA, TAMAN TUN DR. ISMAIL, KUALA LUMPUR ... APPELLANT

AND

1. PERBADANAN PENGURUSAN TRELLISES
2. PERBADANAN PENGURUSAN KIARA GARDEN
3. PERBADANAN PENGURUSAN THE RESIDENCE
4. PERBADANAN PENGURUSAN TTDI PLAZA
5. BADAN PENGURUSAN BERSAMA THE GREENS
6. ABDUL HAFIZ BIN ABU BAKAR
(mendakwa sebagai pegawai awam, Persatuan Penduduk Taman Tun Dr Ismail)
7. KHOO ZHAO PHIN
8. FIRDAUS NISHA BIN MUHAMMAD FAIZAL
9. LOO LY MUN

10. BOO SU-LYN ... RESPONDENTS

(all 4 appeals arose from)

(IN THE MATTER OF THE COURT OF APPEAL OF MALAYSIA
CIVIL APPEAL NO. W-01(A)-712-12/2018

BETWEEN

1. PERBADANAN PENGURUSAN TRELLISES
2. PERBADANAN PENGURUSAN KIARA GARDEN
3. PERBADANAN PENGURUSAN THE RESIDENCE
4. PERBADANAN PENGURUSAN TTDI PLAZA
5. BADAN PENGURUSAN BERSAMA THE GREENS
6. ABDUL HAFIZ BIN ABU BAKAR
(mendakwa sebagai pegawai awam,
Persatuan Penduduk Taman Tun Dr Ismail)
7. KHOO ZHAO PHIN
8. FIRDAUS NISHA BIN MUHAMMAD FAIZAL
9. LOO LY MUN
10. BOO SU-LYN

... APPELLANTS

AND

1. DATUK BANDAR KUALA LUMPUR
2. YAYASAN WILAYAH PERSEKUTUAN
(No. Pendaftaran Syarikat:152446-W)

3. MEMANG PERKASA SDN.BHD.
(No. Pendaftaran Syarikat: 420233-X)
4. PERTUBUHAN PENDUDUK PERUMAHAN AWAM BUKIT KIARA, DEWAN BANDARAYA TAMAN TUN DR. ISMAIL, KUALA LUMPUR

... RESPONDENTS

In the High Court of Malaya at Kuala Lumpur
(Appellate & Special Powers Division)
Judicial Review Application No. WA-25-210-08/2017

Between

1. Perbadanan Pengurusan Trellises
2. Perbadanan Pengurusan Kiara Garden
3. Perbadanan Pengurusan The Residence
4. Perbadanan Pengurusan TTDI Plaza
5. Badan Pengurusan Bersama The Greens
6. Abdul Hafiz Bin Abu Bakar
(Mendakwa Sebagai Pegawai Awam, Persatuan Penduduk Taman Tun Dr Ismail)
7. Khoo Zhao Phin
8. Firdaus Nisha Bin Muhammad Faizal
9. Loo Ly Mun
10. Boo Su-Lyn ... Applicants

And

1. **Datuk Bandaraya Kuala Lumpur**
2. ~~**Dewan Bandaraya Kuala Lumpur**~~
3. **Yayasan Wilayah Persekutuan**
   (No. Syarikat:152446-W)
4. **Memang Perkasa Sdn. Bhd**
   (No. Syarikat:420233-X)
5. **Pertubuhan Penduduk Perumahan Awam**
   Bukit Kiara, Dewan Bandaraya, Taman Tun
   Dr. Ismail, Kuala Lumpur

... Respondents

CORAM:

MOHAMAD ZABIDIN BIN MOHD DIAH, CJM
NALLINI PATHMANATHAN, FCJ
RHODZARIAH BINTI BUJANG, FCJ

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GROUNDS OF JUDGMENT

I. INTRODUCTION

1. Four appeals are brought before this Court, all relating to the grant of planning permission by the Datuk Bandar of Kuala Lumpur, as the relevant local authority, in respect of a proposed development which comprises a part of, and is located within, a public park known as Taman Rimba Kiara.

2. In dispute are the merits of a judicial review application, where neighbouring properties and persons ('the Respondents') sought to quash the grant of permission for the proposed development by the local authority, primarily on the basis that it did not conform to or comply with the statutory provisions of the **Federal Territory (Planning) Act of 1952 ('FT Act')**.

3. Although the Respondents sought relief solely against the local authority, three other parties who could, potentially, be affected by any decision of the Court in this regard, applied to intervene in the proceedings. They were successfully joined as parties in the initial application for judicial review before the High Court.

4. They comprise:

(i) The landowner of HSD 119599 PT 9244, Mukim Kuala Lumpur, Tempat Bukit Kiara, Daerah Kuala Lumpur ('the subject land') on which the proposed development is to be constructed – Yayasan Wilayah Persekutuan;

(ii) The developer – Memang Perkasa Sdn Bhd; and

(iii) An association of longhouse residents – Pertubuhan Penduduk Perumahan Awam Bukit Kiara, who presently reside on the subject land.

5. At first instance, the High Court refused to quash the grant of planning permission and dismissed the application for judicial review. The Court of Appeal reversed the decision of the High Court and on 27 January 2021 granted, *inter alia*, an order quashing the decision of the local authority, namely the Datuk Bandar Kuala Lumpur.

6. The aggrieved parties, who comprise the Appellants, sought and obtained leave to appeal in respect of eight questions of law (which are set out further on in the judgement).

II. THE PARTIES

A. The Appellants

7. The Appellants in this Court comprise:-

(a) The Datuk Bandar of Kuala Lumpur **('Datuk Bandar'**) in Civil Appeal No. 01(f)-13-09/2021(W) **('No.13')**;

(b) Yayasan Wilayah Persekutuan ('**Yayasan'**) in Civil Appeal No. 01(f)-12-09/2021 **('No. 12'**);

(c) Memang Perkasa Sdn Bhd **('Memang Perkasa'**) in Appeal No. 01(f)-14-09/2021(W) **('No.14')**; and

(d) Pertubuhan Penduduk Perumahan Awam Bukit Kiara, Dewan Bandaraya Taman Tun Dr Ismail Kuala Lumpur **('the Long House Association'**) in Civil Appeal No. 02(f)-55-09/2021 **('No. 55'**).

B. The Respondents

8. The Respondents comprise residents and property owners in Taman Tun Dr Ismail, Kuala Lumpur ('TTDI'). They are essentially persons or entities, who live within a 150 to 350 metre radius of the proposed development and maintain that they are adversely affected by it. More specifically:-

(1) The 1st to 5th Respondents are the Management Corporations and Joint Management Body representing the proprietors of condominiums or apartments neighbouring the proposed development;

(2) The 6th Respondent is the public officer of the registered residents' association for TTDI;

(3) The 7th to 10th Respondents are long-time residents and frequent users of Taman Rimba Kiara.

III. THESE APPEALS

9. The Appellants' grievances in this series of five appeals are manifold. The commonality in their complaints include the following: -

A. *Locus Standi*

(1) The Court of Appeal finding that the Respondents enjoy the requisite *locus standi* to initiate the judicial review proceedings in the High Court, when they are in point of fact not 'qualified objectors' under **Rule 5(3) of the Planning (Development) Rules 1970 [*P.U. (A) 7/1971*]** ('**the Planning Rules 1970**'). In this context they complain that the Court of Appeal erred in concluding that in judicial review proceedings, **Rule 5(3)** is not relevant. They further challenge the conclusion of the Court of Appeal that the Respondents are not mere busybodies but have a real and genuine interest in the proposed development, in that it will adversely affect their lives and properties, and they therefore enjoy *locus standi*;

(2) The Court of Appeal construing **Order 53 Rule 2(4) of the Rules of Court 2012 ('RC 2012')** as conferring both threshold and substantive *locus standi*;

(3) The failure of the Court of Appeal to consider that **Rule 5(3) of the Planning Rules 1970** 'cannot be overridden' by **Order 53 Rule 2(4)** which is subsidiary legislation.

In short, these complaints centre on the scope and ambit of *locus standi* under Malaysian law. This requires a full examination, comprehension and consideration of '*locus standi*' as borne out by written law and case-law in this jurisdiction.

B. Duty to Consult and Hear

(4) That the Court of Appeal erred in imposing a common law duty on the Datuk Bandar to consult and hear objections from the Respondents who do not fall within the purview of **rule 5(3) of the Planning Rules 1970** which restricts such right of consultation to a specific class of persons who do not include the 1st to 10th Respondents.

C. The Legal Status of the KL Structure Plan under the FT Act

(5) In finding that the **KL Structure Plan 2020** is a legally binding document, the Court of Appeal erred. It is a policy document with no force of law;

D. Duty to Give Reasons

(6) The Appellants complain that the Court of Appeal erred in deciding that the Datuk Bandar has a duty to give reasons for its decisions to objectors, notwithstanding the absence of a statutory provision requiring it to do so;

(7) They further maintain that the Court of Appeal erred in holding that the reasons for such decision must be conveyed to the objectors at the time the decision is communicated;

(8) It erred in finding that there is a common law duty to inform the objectors of the outcome of the hearing and the response to the objections raised;and

(9) The Court of Appeal also erred, as asserted, in deciding that the Datuk Bandar is precluded from supplementing its reasons for its decision in granting the Impugned Development Order (‘the **Impugned Development Order**’) by way of other facts and

reasons subsequently deposed to by way of affidavit in judicial review proceedings.

E. Conflict of Interest

(10) The Appellants claim that the Court of Appeal erred in applying the test for conflict of interest as set out in ***Steeples v Derbyshire County Council [1984] 3 All ER 468*** (‘***Steeples’)***, rather than that set out in ***R v Edmundsbury Borough Council, ex parte Investors in Industry Commercial Properties Ltd [1985] 3 All ER 234*** (‘***Edmundsbury’)***;

(11) The Court of Appeal erred in concluding that there was a conflict of interest involving the Datuk Bandar, based on the Joint Venture Agreement between Yayasan and Memang Perkasa, given that the Datuk Bandar is a trustee sitting on the Board of Trustees of Yayasan and is also the head of the local authority. The latter is the sole authority empowered under the law to grant planning permission for the proposed development on the application of, and at the behest of the developer, Memang Perkasa.

IV. THE QUESTIONS OF LAW UPON WHICH LEAVE WAS GRANTED THESE APPEALS

10. The Appellants have been granted leave to appear before the apex court on the following eight questions of law: -

(1) Whether ***Order 53 rule 2 (4) of the Rules of Court*** is confined to the determination of threshold *locus standi* or whether it extends to confer substantive *locus standi* upon an applicant in an application for judicial review having regard to the decisions of the Court of Appeal in ***QSR Brands Bhd v Suruhanjaya Sekuriti [2006] 3 MLJ 164*** and of the Federal Court in ***Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177*** and in ***Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi [2014] 3 MLJ 145***?

('Leave Question No. 1')

(2) Whether an applicant seeking judicial review of a development order is required to come within the terms of ***Rule 5(3) of the Planning Rules 1970*** before he or she may be granted relief having regard to the decision in ***District Council Province Wellesley v Yegappan [1966] 2 MLJ 177***?

('Leave Question No. 2')

(3) Whether the requirement of locus standi in judicial review proceedings set out in ***Order 53 Rule 2(4) of the Rules of Court 2012*** may override the provisions of ***Rule 5(3) of the Planning Rules 1970***, the latter being written law, having regard to the decision of the

Federal Court in ***Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai v Muziadi bin Mukhtar [2020] 1 MLJ 141***?

('Leave Question No. 3')

(4) In law whether a management corporation (1st to 4th Respondent) or joint management body (5th Respondent) established pursuant to Section ***39 of the Strata Titles Act 1985*** and ***Section 17 of Strata Management Act 2013*** has:-

(i) the necessary power to initiate judicial review proceeding to challenge a planning permission granted on a neighbouring land?;

(ii) the locus standi to initiate a judicial review proceeding on matters which does not concern the common property of the management corporation or joint management body?; and

(iii) the power to institute a representative action on behalf of all the proprietors on matters which are not relevant to the common property?

('Leave Question No. 4')

(5) Whether the Kuala Lumpur Structure Plan is a legally binding documents which a planning authority must

comply with when issuing a development order having regard to the decisions of the Federal Court in ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1*** and the ***Court of Appeal in Perbadanan Pengurusan Sunrise Garden Kondominium vs Sunway City (Penang) (Civil Appeal No. P-01(A)-222- 07/2017)*** and connected appeals?

('Leave Question No. 5')

(6) Whether, in the absence of a statutory direction to the contrary, a planning authority in deciding to issue a development order is under a duty at common law to give any or any adequate reasons for its decision to persons objecting to the grant of the development order having regard to the decisions in ***Public Service Board of New South Wales v Osmond (1986) 159 CLR 656***, of the Federal Court in ***Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72*** and that of the Court of Appeal in ***The State Minerals Management Authority, Sarawak & Ors v Gegah Optima Resources Sdn Bhd [2021] 1 MLJ 268***?

('Leave Question No. 6')

(7) If the answer to Leave Question No. 6 above is in the affirmative, then whether the reasons must be conveyed to the objectors at the time of its communication or whether reasons may be given in an affidavit opposing judicial review proceedings?

('Leave Question No. 7')

(8) Where the High Court in judicial review proceedings negatives actual bias or a conflict of interest on the part of an authority issuing a development order, is a Court of Appeal entitled to hold that there nevertheless would be a likelihood of bias having regard to the conflicting decisions in ***Steeples v Derbyshire Country Council [1984] 3 ALL ER 468***, ***R v Sevenoaks District Council, ex parte Terry [1985] 3 All ER 226*** and ***R v St Edmundsbury Borough Council ex parte Investors in Industry Commercial Properties Ltd [1985] 3 All ER 234***?

('Leave Question No. 8')

V. THE PRIMARY ALL-ENCOMPASSING ISSUE FOR CONSIDERATION IN THESE APPEALS

11. These questions of law however arise from the primary all-encompassing issue that requires adjudication in this administrative judicial review application. And that primary issue is whether the Datuk Bandar exercised his discretion

correctly and lawfully, namely within the ambit of the specific powers afforded to it as an entity under the **FT Act**, in granting planning permission for the construction of the proposed development.

12. Put another way, did the Datuk Bandar do, or omit to do anything such that the exercise of its discretion was *ultra vires* or unlawful? Judicial review is available only as a remedy for conduct of an authority which is *ultra vires* or unlawful, but not for acts done lawfully in the exercise of an administrative discretion, which are complained of only as being unfair or unwise.

13. Judicial review is sought by the Respondents in relation to whether those circumscribed powers accorded to the Datuk Bandar under the **FT Act** were:-

    (a) Exercised legally, in conformity with, and within the ambit of the statute;

    (b) Exercised rationally;

    (c) Exercised with proportionality; and

    (d) Exercised without bias and in accordance with the principles of natural justice.

14. As these sub-issues, which together answer the primary issue of whether the Datuk Bandar exercised his discretion

legally comprise mixed questions of fact and law, it is necessary to consider the relevant facts and law involved in these appeals. It is only after a consideration and analysis of the primary issue that the questions of law which require an answer can be answered appropriately. We, therefore, turn first to the relevant law, and then the facts, comprising the background to these appeals.

15. That takes us to an examination of the relevant law, namely the **FT Act**. This is necessary because in order to analyse whether the Datuk Bandar exercised his powers and discretion legally and in conformity with the Act under **section 22(4)**, it is necessary to comprehend the purpose and object of the **FT Act**.

16. Put another way, the construction of **section 22(4) FT Act** requires a holistic construction of the **FT Act** rather than a consideration of the section *in vacuo* in order to arrive at its full meaning. This accords with **section 17A of the Interpretation Acts 1948 and 1967**.

VI. THE PURPOSE AND OBJECT OF THE FEDERAL TERRITORY (PLANNING) ACT 1982

17. We shall first consider the purpose and object of the **FT Act** to construe how planning is controlled under the Act. This is necessary to understand how **section 22** of the **FT Act** is to be interpreted when the section provides for reference to the provisions of the **KL Structure Plan**.

Against this, we will then be in a position to determine whether the Datuk Bandar was acting within his statutory powers when he chose to grant the Impugned Development Order.

18. The legislative history of the **FT Act** is a salient starting point.

A. The Legislative History of the FT Act

19. Prior to the **FT Act**, town planning and zoning had a long and somewhat complex legislative history in this jurisdiction.

20. The legislative history of town planning in Malaysia is well set out in the comprehensive textbook on the subject entitled ***'Malaysian Town and Country Planning – Law and Procedure'***. As gleaned from this textbook as well as from the submissions of the parties, planning law in the Federal Territory of Kuala Lumpur commenced with **the Sanitary Boards Enactment (Cap 137)** which was enacted on 1 February 1930, later renamed **the Town Boards Enactment (Cap 137)**. The former Act concentrated on health and sanitation including drainage as part of the law.[1]

[1] Nurul Syala Abdul Latip, Tim Heath, Shuhana Shamsuddin, M. S. Liew, Kalaikumar Vallyuthm 'The Contextual Integration and Sustainable Development of Kuala Lumpur's City Centre Waterfront: An Evaluation of the Policies, law and Guidelines' (ICSBI 2010) http://irep.iium.edu.my/3101/1/UTP_conference.pdf

21. Pursuant to the **Town Boards Enactment (Cap 137),** in 1967, **Plan Nos. L886, L887, and L888** were gazetted under **Gazette Notification No. 1197 of 1967** and titled the **Comprehensive Development Plan** ('the **CDP**'). The **CDP** relied upon by the Appellants are these gazetted plans dating back to 1967, and not the gazetted KL Structure Plan 2020 or the then draft KL Local Plan.

22. On 20.8.1970, the **Emergency (Essential Powers) Ordinance No. 46 of 1970 [*P.U.(A) 297/1970*]** ('the **Emergency Ordinance No. 46**') came into force, and the **CDP** was renamed **Plan Nos. 1039, 1040 and 1041** respectively (see **section 4(1) of the Emergency Ordinance No. 46**) by the Minister for the Federal Capital of Kuala Lumpur. Per **section 47** of the **Emergency Ordinance No.46, the Planning (Development) Rules 1970 [*P.U. (A) 7/1971*]** was enacted. These are the Planning Rules relied upon by the Datuk Bandar to-date.

23. On 1.2.1972, Kuala Lumpur achieved city status as 'Bandaraya Kuala Lumpur' or 'the City of Kuala Lumpur' per the **City of Kuala Lumpur Act 1971.** On 1.2.1974, Kuala Lumpur became a Federal Territory per the **Constitution (Amendment) (No. 2) Act, 1973 [Act A206]**.

24. On 21.5.1973, the **City of Kuala Lumpur (Planning) Act 1973** repealed the **Emergency Ordinance No. 46.** Though the **Emergency Ordinance No. 46** was repealed, the **CDP** and the **Planning Rules 1970** were allowed to remain in

place per **Part III of the City of Kuala Lumpur (Planning) Act 1973** insofar as they are not inconsistent with the provisions of the **City of Kuala Lumpur (Planning) Act 1973**.

25. On 25.8.1982, the **FT Act** came into force, although in a piecemeal fashion. **Parts I to III of the FT Act** (being, **sections 1 to 18 of the FT Act)** came into effect on that date. On 15.8.1984 (being the relevant date for Part X of the **Federal Territory (Planning) Act**), the **Federal Territory (Planning) Act 1982** repealed the **City of Kuala Lumpur (Planning) Act 1973**.

26. Pursuant to **section 65(2)(a) of the FT Act,** the **Planning Rules 1970** and the **CDP** remained in force but only insofar as they are not inconsistent with the **FT Act.** The issue of whether the **CDP** and the **Planning Rules 1970** are consistent with the **FT Act** or not, is a legal issue falling for consideration within these appeals.

27. The Long Title to the **FT Act** sets out that it is an Act to make provisions for *'the control and regulation of planning in the Federal Territory'* amongst others: -

> "An Act to make provisions for the control and regulating of proper planning in the Federal Territory, for the levying of development charges, and for purposes connected therewith or ancillary thereto."

28. The **FT Act** was promulgated for the proper control and regulation of town and country planning in the Federal Territory of Kuala Lumpur. The **Town and Country Planning Act 1976** applies to the rest of the country, but the Federal Territory of Kuala Lumpur has carved its own legislative path in view of it being the nation's capital. **Article 74 of the Federal Constitution** states that Parliament may make laws in the **Federal List** or **Concurrent List** in the **Ninth Schedule**. **Item 27 of List I of the Ninth Schedule** covers all matters relating to the Federal Territories and this allows Parliament to make laws for the Federal Territory of Kuala Lumpur

29. The **FT Act** achieves control and regulation primarily by employing a tiered series of development plans, as provided in **Part III of the FT Act** (or **sections 7 to 18 of the FT Act**). These development plans comprise a structure plan followed up by a local plan for the Federal Territory.

30. A structure plan is defined in **section 2 of the FT Act** as a written statement accompanied by diagrams, illustrations and other descriptive matter containing policies and proposals in respect of the development and use of land. It is, in short, a master plan of planning policies for the entire region.

31. A local plan is defined as a map and a written statement which formulates, in detail, proposals for the development

and use of land in the area and contains matters specified by the Minister. The full definition is set out in **section 2** read together with **section 13 of the FT Act**.

32. Thus, the **FT Act** envisions development within the Federal Territory of Kuala Lumpur to take effect through this tiered series of development plans. **Part III of the FT Act** (or **sections 7 to 18 of the FT Act**) governs the content and manner of preparation, production, alteration, amendment, and the legal character of these development plans.

33. The provisions of **Part III of the FT Act** cascade over to **Part IV of the FT Act** (or **sections 19 to 30**), which sets out how planning permission ought to be granted or prohibited in the region.

34. As such, the **FT Act** envisages that the grant or prohibition of planning permission should accord with **Part III**, namely the development plans. In other words, the grant or refusal of planning permission hinges on adherence to these development plans. By way of metaphor, and to paraphrase Mohd Zawawi Salleh FCJ in ***Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai v Muziadi bin Mukhtar [2020] 1 MLJ 141; [2019] 7 AMR 521 ('Muziadi')*** *'the stream cannot rise above its source'.*

35. Here, the development plans in **Part III** are equivalent to the source, while the grant or prohibition in **Part IV of the FT Act** is the stream. This statutory cascade of **Part III** to

Part IV ensures regulation and control are achieved in that the development plans comprise the base regulatory element and planning permission centres on compliance with those development plans, although the Datuk Bandar enjoys a discretion to depart from the same in certain circumstances.

36. Therefore, in determining whether the grant or refusal of planning permission is in accordance with the **FT Act** or not, it is imperative that **Part III** and **IV** are read together, rather than *in vacuo* such that a harmonious construction is achieved. Conversely, if the planning permission provisions in **Part IV** are read in isolation, the result would not accord with the purpose of the Act which is to ensure regulation and control in accordance with the development plans in **Part III**. It would also result in planning permission being granted in a piecemeal fashion, running antithetically to a holistic construction of the Act. This would defeat the purpose of the Act, which requires compliance with the 'source'.

37. We are additionally guided by the **Hansard of the Dewan Rakyat dated 22.10.1981**, as produced by the 1st to 10th Respondents, wherein the then Minister of Federal Territory during the second and third reading of the **Federal Territory (Planning) Bill 1981**, at pages 4288 – 4290 and 4320, stated that the **CDP** was intended to be replaced with the structure plan system which comprises a structure plan and a local plan:

(The English translation):

"Today, development in the Federal Territory is planned and controlled according to the provisions of the "Kuala Lumpur City (Planning) Act 1973 (Act 107) as amended by the Kuala Lumpur City (Planning) Act 1977 (Amendment) (Act A 416/77). In Act 107, it is stated that development must be implemented based on the Comprehensive Development Plan, indeed this Comprehensive Development Plan not only has some specific weaknesses due to the emphasis on physical aspects, but it is also no longer in line with the rules of modern planning. Therefore this Comprehensive Development system needs to be replaced with a new system called the Structure Plan System as provided in the Bill presented…

This Structure Plan system has two important components which are: First the Structure Plan and Second the Local Plan…"

38. From the **Hansard of the Dewan Rakyat dated 22.10.1981**, a few salient points may be distilled: -

(i) The **FT Act** was proposed before Parliament to make better provisions for the control and regulation of proper planning in the Federal Territory of Kuala Lumpur; and

(ii) That the **CDP** system was to be replaced with a structure plan system comprising of a structure plan

and a local plan as the comprehensive development system had weaknesses and was not in line with modern planning methods.

B. The Requirement for Public Participation in the Production of the Development Plans

39. A fundamental feature of the **FT Act** is the statutory requirement for public participation. As far back as the **Town Planning Enactment of the Federated Malay States of Malaya**, the need for public participation was recognised. It introduced, even then, the concept of public interest as justification for 'encroaching' on the development rights of landowners[2].

40. It is no surprise that the element of public participation is also a fundamental feature of the **FT Act** in the land planning process. This element is therefore an integral part of the democratic process which enables the public to require accountability in relation to development in and around where they live.

C. Public Participation and the Development Plans

41. This aspect, which requires public participation in the drawing up of both structural plans and local plans, is provided for in **Part III of the FT Act** (or **sections 7 to 18**

[2] See Malaysian Town and Country Planning, Law and Procedure, (Malaysia: CLJ Publication, 2012) at page 10

of the FT Act). The **FT Act** mandates a statutory process whereby draft development plans can only become complete by first going through a certain level of publicity at the very outset ('the **Statutory Development Plans**'). This is best demonstrated by the process by which a draft structure plan ('**the Draft Structure Plan**') becomes a gazetted structure plan ('**the Gazetted Structure Plan**').

42. On the date of the **FT Act** coming into force or as soon as possible thereafter, the Datuk Bandar is required to submit the Draft Structure Plan to the Minister and a public notice relating to the Draft Structure Plan is to be published in the Gazette and in local newspapers ('the **Public Notice**'). The **FT Act** requires the Public Notice to contain, *inter alia*, particulars of the place where copies of the Draft Structure Plan may be inspected per **section 7(1) and (2) of the FT Act**. The statutory requirement that a draft development plan be open for public inspection and the invitation for written objections (and implicitly, the provision of an address where written objections may be submitted) demonstrates that the **FT Act** envisages and requires a considerable level of cooperation between the relevant local authority and the public in order to bring into effect the development plan.

43. This issuance of a public notice **per section 7(1) and (2) of the FT Act**, above, is the minimum level of publicity the Draft Structure Plan must go through.

44. Critically, the Draft Structure Plan is displayed and allows the public to object to its contents. The public are given the opportunity to shape the 'terms' of the Draft Structure Plan.

45. This is evident from **section 7(2)(ii) of the FT Act** which provides that objections may be received *'from any person'* as opposed to any specific category of persons. If there is no objection received, the Draft Structure Plan may only proceed to the next stage, i.e., submission to the Minister, after the expiry of the period for objections per **section 7(4)**. Nonetheless, if there is any objection received, a Committee appointed by the Minister pursuant to **section 7(3)** shall consider the objection as well as hear any person and report on such objection as stipulated in **section 7(5) and (6)**. This whole scheme demonstrates that the right of objectors to be heard is safeguarded by the **FT Act**. In this regard, it may be said that the **FT Act** statutorily embeds the right of public discourse.

46. Upon the Draft Structure Plan's approval by the Minister ('the **Structure Plan**'), the **FT Act** requires that another public notice in the Gazette and local newspapers is to be published, **with details stating where copies of the Structure Plan may be inspected per section 9(1) of the FT Act. From the date of publication of the public notice in the Gazette, the Structure Plan shall come into effect.**

47. The effect of **gazetting** the public notice relating to the Structure Plan denotes/signifies that it is recognised in law

as a statutory development plan which has to be complied with, as envisaged under the Act.

48. At the outset of the Act's Long Title, the Act provides for *'the control and regulating of proper planning'*. Whilst the Act does not specifically list out principles of proper planning, the Act labours to provide for the preparation and passing of statutory development plans that determines how the Federal Territory of Kuala Lumpur takes shape over the course of the next twenty years or so. Therefore, it may be said that the Act's purpose and object of providing for proper planning is encased within the statutory development plans.

D. Public Participation and Alteration, Addition, Revision, or Replacement of the Structure Plan

49. At any time after the Structure Plan 'comes into effect', alteration is permitted so long as the proposed alteration undergoes the same level of publicity and the same procedure of an issued public notice and a hearing of objections as the Draft Structure Plan was subjected to (i.e., **subsections 7(2), (3), (4), (5), (6) and (7) and sections 8 and 9 shall apply**) per **section 10(1) and 11 of the FT Act**. In this respect, there is a consistent threshold of publicity accorded to the procedure for implementing any amendment or alteration to the development plan under the **FT Act**.

50. Like the **Town and Country Planning Act 1976**, the **FT Act** also provides that all development plans pursuant to the Act garners legitimacy by passing through the public eye, and any changes thereafter to the same development plans must similarly traverse the same path in order to be accorded the same legitimacy.

E. Public Participation and the Local Plan

51. In the same manner as the Structure Plan comes into being, draft local plans are crafted to provide detailed plans for each region within the Federal Territory of Kuala Lumpur. The draft local plan is expected to follow on closely from the Structure Plan.

52. Draft local plans are accorded the same level of publicity as that given to the Structure Plan. Before they are adopted, the draft local plan must first be published by public notice in the Gazette and in local newspapers per **section 14** ('**the Draft Local Plan**'). As is the case with the Draft Structure Plan, the Draft Local Plan may only proceed to the next stage of adoption by the Commissioner after the expiry of the period for objections or after the objections or representations have been considered per **section 16(1)**, in keeping with the statutory leitmotif that objections are enshrined and accounted for. Having considered the mainstay of the **FT Act**, namely the conversion to, and implementation of a structure plan system as opposed to a

comprehensive development system as previously practiced under earlier and repealed legislation, we now turn to the section detailing the powers conferred on the Datuk Bandar under the **FT Act** in relation to the grant or refusal of planning permission.

F. Section 22 of the FT Act and the Datuk Bandar's Discretion

53. The relevant section relating to the grant or refusal of planning permission for development is **section 22 of the FT Act.** It reads as follows:-

> *"Development order*
>
> ***22. (1) The Commissioner shall have power exercisable at his discretion to grant planning permission or to refuse to grant planning permission in respect of any development irrespective of whether or not such development is in conformity with the development plan; provided however the exercise of the discretion by the Commissioner under this subsection shall be subject to subsection (4) and section 23.***
>
> *(2) Where the Commissioner decides to grant planning permission in respect of a development he may issue a development order –*
>
> *(a) Granting planning permission without any condition in respect of the development;*

(b) Granting planning permission subject to such condition or conditions as the Commissioner may think fit in respect of the development:

Provided that the Commissioner shall not issue a development order under this subsection unless he is satisfied that the provision of section 41 relating to the assessment of development charges has been complied with.

(3) Without prejudice to the generality of paragraph 2(b), the Commissioner may impose any or all of the following conditions……

(4) The Commissioner in dealing with an application for planning permission shall take into consideration such matters as are in his discretion expedient or necessary for purposes of proper planning and in this connection but without prejudice to the discretion of the Commissioner to deal with such application, the Commissioner shall as far as practicable have regard to –

(a) the provisions of the development plan and where the local plan has not been adopted, the Comprehensive Development Plan; and
(b) any other material consideration:

Provided that, in the event of there being no local plan for an area and the Commissioner is satisfied that any application for planning permission should not be considered in the interest of proper planning until the local plans for the area have been prepared and adopted under this Act then the Commissioner may either reject or suspend the application.

(5) Upon receipt of an application for planning permission the Commissioner shall within such time as may be prescribed either grant or refuse the application and when the application is granted subject to condition or refused, the Commissioner shall give his reasons in writing for his decision."

(Emphasis ours)

54. **Section 22** prescribes in **subsection (1)** that the Datuk Bandar may grant planning permission irrespective of the development plan. The provision exempts the Datuk Bandar from following the statutory structure plan, but the exercise of that exemption is restrained or limited by the proviso to **subsection (4)** in the same section and **section 23**. This simply means that **section 22(1)** does not confer an absolute power of exemption on the Datuk Bandar to arbitrarily disregard or discount the provisions of the statutory development plan.

55. **Section 22(4)** is multifaceted and contains several limbs. The first limb which reads ***"the Commissioner in dealing with an application for planning permission shall take into consideration such matters as are in his discretion expedient or necessary for purposes of proper planning ..."***. makes it clear that the Datuk Bandar is required to take into consideration matters that are in his discretion **expedient or necessary for proper planning**.

56. This means that the Datuk Bandar is obligated by law to consider matters which are expedient, i.e. **beneficial or necessary for proper planning**. We comprehend from the **FT Act** that proper planning refers to the system of planning and regulation underlying the Act, namely the structure plan system as opposed to the **CDP** system. So the need to consider the statutory development plans is an essential task, even if there is to be a subsequent departure from the same. **What underscores the consideration of 'matters' for the exercise of the Datuk Bandar's discretion in this section, is the need to adhere to proper planning as envisaged under the Act.**

57. The Datuk Bandar's discretion as to what is expedient or necessary for purposes of proper planning **appears** to be worded widely. However, this does not detract from a statutory construction that such discretion should be exercised objectively and not subjectively or selectively. If the latter approach is adopted, this will necessarily lead to arbitrariness. Arbitrariness is precisely what a holistic reading of the Act seeks to prohibit. Therefore, in exercising its discretion, the Datuk Bandar is expected to act reasonably, logically and in conformity with the purpose and object of the Act. The same is propounded in the following judgments:-

(1) Raja Azlan Shah FJ in ***Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd [1979] 1 MLJ 135;[1978] 1 LNS 143 –***

"... Unfettered discretion is a contradiction in terms ... **Every legal power must have legal limits, otherwise there is dictatorship.** In particular, **it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably.** In other words, **every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.** The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that **"public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place"**, (per Danckwerts L.J. in Bradbury v London Borough of Enfield [1967] 3 All ER 434 442.)"; and

(2) ***Hashim Yeop A Sani CJ (Malaya)*** *in* ***Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9; [1990] 1 CLJ rep 195; [1990] 1 CLJ 1103 –***

"The minister had a discretion under s 20(3) of the Act and that is not in dispute. The issue is whether the discretion is unfettered. To say it is an unfettered discretion is a contradiction in terms. **Unfettered discretion is another name for arbitrariness.**

> The minister's discretion under s 20(3) is wide but not unlimited. As stated earlier, **so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had mis-directed himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute.** Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one."

58. In order for a court to assess whether the Datuk Bandar's discretion has in fact been exercised within the ambit of the Act, it is necessary that the Datuk Bandar explains or sets out the 'matters' that are in his objective opinion, expedient or necessary for purposes of proper planning, and which therefore caused him to exercise his discretion to either grant or refuse planning permission. Otherwise, it would not be possible for any party, the court or the public to know or comprehend on what basis a decision was made to either allow or refuse planning permission. The issue of when such reasons ought to be given also arises for consideration in this series of appeals, and will be considered later.

59. The construction above, to the effect that the discretion afforded in both **subsection 1** and the **first limb of subsection 4** is **not** an unfettered discretion is further borne out by the **third limb of subsection 4**. But first it is

necessary to consider the effect of the connecting limb, the second limb.

60. The second limb reads ***"...and in this connection but without prejudice to the discretion of the Commissioner to deal with such application..."***. This means that when considering those matters which the Datuk Bandar objectively reasons are expedient or necessary for the purposes of proper planning, but without detracting from his powers to exercise his discretion to either grant or refuse permission even where there is a departure from the statutory development plans.

61. It is the limb that connects:-

(a) the matters which the Datuk Bandar is obligated by law to consider and give effect to, in relation to proper planning; but

(b) seeks to preserve the Datuk Bandar's ability to depart from the development plans, in the exercise of his discretion as provided in sub-section (1).

62. **Section 22 in its entirety seeks to reconcile the fundamental need for compliance with the statutory development plans, and the Datuk Bandar's power to depart from the same in sub-section (1). This is achieved by granting such a discretion in sub-section**

(1) but limiting and circumscribing the exercise of that power as specified in sub-section (4).

63. **Put another way, subsection (1) of section 22 is circumscribed, defined and limited by sub-section (4).**

64. Therefore, the words ***"without prejudice to the discretion of the Commissioner to deal with such application"*** serves the purpose of stipulating that although the **Datuk Bandar** is bound to adhere to the overarching purpose of proper planning, he may still depart from the development plan. Any such departure however is still subject to the **third limb and the proviso to sub-section (4).**

65. The **third limb** reads **"the Commissioner shall as far as practicable have regard to – (a) the provisions of the development plan and where the local plan has not been adopted, the Comprehensive Development Plan; and (b) any other material consideration".**

66. The **third limb** pronounces that, **sub-sections (a) and (b) "shall"** be given regard to **"as far as practicable"**. The use of the word **'shall'**, given the purpose and object of the **FT Act**, lends itself more favourably to the mandatory sense of the word. In other words, the Datuk Bandar is obligated in law, as far as is practicable to give regard to the provisions of the statutory development plan.

67. It follows that it is only where the **statutory local plan** has not been adopted that the **CDP** is to be utilised instead. In construing **sub-section (a)** it bears repeating that the same has to be read in a holistic context. The **FT Act** envisages that a structure plan is brought into force as soon as possible after the passing of the Act, followed shortly thereafter by the detailed local plan. It does not envisage a prolonged delay in the production and implementation of either the structure plan or the local plan. Any such delay, designed or otherwise, would serve only to undermine the purpose and object of the Act, namely regulated planning in accordance with public input and expectation as contained in the statutory development plans.

68. As such, the legally coherent construction to be accorded to **paragraph (a) of sub-section 4 of section 22**, more particularly in relation to the use of the **CDP**, is that recourse is to be had to the **CDP** in the early years following enactment and implementation of the **FT Act**, prior to the **local plan** being drawn up. The **local plan** in turn is expected to be drawn up and implemented within a short time of, if not before or at approximately the same time as the **structure plan**.

69. Such an interpretation is further supported by the **proviso to sub-section 4** which allows for the Commissioner to reject or suspend the application for planning permission where he/it is satisfied that the proper planning requires that the local plans be drawn up and adopted under the Act.

Proper planning again comes to the fore in the exercise of discretion by the Commissioner. Therefore, it follows that the **CDP** is not and cannot comprise an alternative to the **local plan**. The **CDP** is merely there to fill in a gap during the time when the **local plan** is being drawn up and gazetted. This proviso underscores the point that a long delay in the adoption of the local plan does not warrant automatic or prolonged utilisation of, or recourse to, the **CDP**.

70. Put another way, the **CDP** is a saving provision to tide over the period pending the production and adoption of the local plan as the secondary tier of the Act's statutory development plan. As enumerated above, the statutory development plans are the Act's purpose and object. Therefore, where there is already the first tier of the statutory development plan in place, i.e., the structure plan, the **CDP** may be referred to in a manner that does not oust and conflict against the statutory development plans in order to give true effect to the Act.

71. **Subsection (b) of section 22(4)** reads that ***"any other material consideration"*** is to be regarded in addition to **subsection (a)**. The use of the word **'and'** envisages that both limbs ought to be adhered to and one cannot be cherry-picked at the expense of ignoring the other.

72. What factors or matters then comprise **"any other material consideration"** in the context of **sub-section (b)**? Given

the Act's purpose and object, the test of what constitutes ***"any other material consideration"*** when deciding whether or not to grant planning permission, is whether the **"consideration"** serves a planning purpose within the four corners of the Act.

73. In ***Great Portland Estates plc v Westminster City Council [1984] 3 All ER 744*** where the English Town and Country Planning Act 1971 was in operation, it was held that development plans ***'are concerned with the use of land and more particularly with its 'development', a term of art in planning legislation'*** and **thus a material consideration is a consideration that *'serves a planning purpose... And a planning purpose is one which relates to the character of the use of land'*.**

74. We are of the view that this definition or test aptly describes the character of a material consideration. The definition incorporates the primary requirement of serving a planning purpose, which is an essential element of the **FT Act**. Additionally, planning purpose is then defined as a purpose which relates to the character of the use of the land. Applying this test, that which amounts to a material consideration should relate to the use of land and how a change in its use may affect the wider development of the region.

75. Within **section 22(4)** alone, there have been two references to the phrase "proper planning". **The Long Title**

of the FT Act also enshrines the phrase “proper planning”. While the Act does not explicitly set out a definition of ‘proper planning’ it is evident that the Act labours to provide for the statutory development plans as the instrument to implement development within the Federal Territory of Kuala Lumpur. As such, statutory development plans comprise the basis for proper planning.

76. Having considered the purpose and object of the **FT Act** including in particular **section 22(4) FT Act** which provides the background law to be applied in the present appeals, we move on to consider the salient background facts of the instant case.

VII. SALIENT BACKGROUND FACTS AND LAW

A. The History of Taman Rimba Kiara

77. The chronology of events giving rise to this dispute dates back to the 1970’s. As stated by the 1st to 10th Respondents, Taman Rimba Kiara in its entirety was a public park measuring 25.2 acres located within the TTDI and Bukit Kiara area. Earlier, it was part of a privately owned rubber estate which was subsequently acquired by the State Authority in the 1970’s.

78. The 1st to 10th Respondents submit, premised on a master plan produced by an architect at the time, that the aim was to turn the entire area into the KL Botanical Gardens, with

a National Arboretum and Heroes' Mausoleum. It was designated to be a large-scale nursery to serve and support the larger botanical gardens and national arboretum. This did not materialize.

79. The Datuk Bandar in submissions containing plans has acknowledged that the subject land is designated and coloured as a 'green area' in the Kuala Lumpur Structure Plan 2020 ('**KL Structure Plan**').

80. As a consequence of the acquisition of the entire 25-acre area by the Government, the former workers of the rubber estate and their families, were re-housed in longhouses in the north eastern corner of Taman Rimba Kiara. These residents were promised long-term, permanent housing by the Government. That did not transpire. The proposed development is expected to resolve this almost 50-year-old promise by the Government, vide the construction of the 29-storey block to house all the residents of the longhouses. There are presently some 100 families in this longhouse community.

B. The Subject Land and the Proposed Development

81. The land on which the proposed development is supposed to be built is identified as HSD 119599, PT 9244, Mukim Kuala Lumpur, Tempat Bukit Kiara, Daerah Kuala Lumpur. It measures 12 acres ('**the Subject Land**'). The proposed development itself comprises of 9 blocks of high-rise

apartments, more particularly 8 blocks of 42-54-storey serviced apartments and 1 block of 29-storey affordable apartments, with basement and podium carparks ('**the Proposed Development**').

C. The KL Structure Plan 2020

82. On 16 August 2004, in compliance with the **Federal Territory (Planning) Act 1982**, the public notice containing the approval of the Draft Structure Plan was gazetted. The effect of the KL Structure Plan was to set out in general terms how land in various parts of the Federal Territory of Kuala Lumpur would be utilised. This naturally affected the 25 acres comprising Taman Rimba Kiara.

83. The KL Structure Plan 2020, which was produced in 2004, zones the area comprising Taman Rimba Kiara, including the Subject Land, as a green open space. As such the Structure Plan envisaged the area as comprising public space for public use. It is significant that the KL Structure Plan also stipulates that it is the intention of the Datuk Bandar that the KL Structure Plan is to be followed and supported by the KL Local Plan:

> *"Adalah menjadi hasrat Dewan Bandaraya Kuala Lumpur (DBKL) supaya pelan struktur di ikuti dan di sokong oleh pelan tempatan atau pelan-pelan tempatan."*[3]

[3] Paragraph 12 of the Kuala Lumpur Structure Plan 2020

84. In May 2008, again in compliance with the **FT Act**, the draft KL Local Plan was presented to the public after going through the specific procedures prescribed under the **FT Act**. The entire 25 acres of Taman Rimba Kiara was zoned as a public park and a green open space. In this context, clause 8.3 of the draft KL Local plan specifies the area as **'Cadangan Taman Awam dan Kawasan Lapang'.**

85. Objection hearings with the public, as envisaged under the **FT Act** took place from September 2008 to May 2009 with respect to the draft KL Local Plan. The KL Local Plan was intended to be completed by September 2011, but due to a series of delays was only finally gazetted on 30 October 2018.

D. Alienation of the Subject Land

86. In the interim, Yayasan applied to the State Authority of Federal Territory of Kuala Lumpur for the alienation of the Subject Land, i.e., the 12 acres of land on which the proposed development is to be built. This meant alienating 12 acres from the original land, identified as Lot 55118, comprising 25.5 acres known as Taman Rimba Kiara.

87. On 8 November 2012 and 14 December 2012, a Land Executive Committee of the Federal Territory ('Land Exco') meeting was held to consider an appeal by Yayasan for the alienation of 12 acres of Taman Rimba Kiara.

88. In the course of the hearing of these appeals, this Court asked, whether the Datuk Bandar had sat as one of the members of the Land Executive Committee as required by law under **section 12 of the National Land Code** as modified in the **Federal Territory (Modification of National Land Code) (Amendment) Order 2004 [P.U. (A) 220/2004]**). The question posed by the Court was then answered in the affirmative by counsel for the Datuk Bandar. This fact had not previously been disclosed by the Datuk Bandar to the Courts below. It is therefore unclear whether the Datuk Bandar alerted other Land Exco members that the KL Structure Plan specified the Subject Land/Taman Rimba Kiara as a green open space.

89. It is unclear whether statutory rectification and amendment of the KL Structure Plan (per **sections 10** and **11 of the FT Act**) was carried out pursuant to the Subject Land/Taman Rimba Kiara's change of land use, i.e., whether there was a hearing of objections before the public concerning a change of land use spreading across 25.2 acres. Any lay person reading the KL Structure Plan would most likely conclude that the Subject Land/Taman Rimba Kiara was still, and would remain, a green open space.

90. On 8 January 2013, the Lands and Mines Office of the Federal Territory of Kuala Lumpur ('Pejabat Pengarah Tanah dan Galian Wilayah Persekutuan') issued a letter to Yayasan advising that the Land Exco had approved the partial alienation of Lot 55118 Tapak Rumah Panjang Bukit

Kiara, Mukim Kuala Lumpur i.e., the Subject Land to be utilised for mixed development subject to a premium being paid for the Subject Land. This meant in effect that the open space for public use marked in green in the KL Structure Plan could be utilised for construction.

91. The express condition for the Subject Land which was now designated as 'mixed development' rather than green open space for public use was that the land should be utilised only for the purpose of mixed development sites: -

> *'Syarat-Syarat Nyata:*
>
> *Tanah ini hendaklah digunakan hanya untuk tujuan tapak pembangunan bercampur sahaja"*

92. On 11 August 2014, the Subject Land was alienated to Yayasan. The category of land use for the Subject Land was stated as "*bangunan*" (building). The express condition for the Subject Land was stipulated to be 'mixed development'. It seems that the green open space for public use demarcated in the KL Structure Plan was not followed.

93. Subsequent to the alienation of the Subject Land, Lot 55118 was split into 2 separate plots, i.e., Lot PT9244 and Lot PT55118, of 12 acres and 13 acres respectively. The Proposed Development is to take place on the upper half of the 12 acres i.e., on the Subject Land, where the

longhouse residents are. The Proposed Development also includes the construction of a highway that eats into the lower half of the 13 acres i.e., Lot 55118.

94. This application and appeal for the alienation of the Subject Land to Wilayah Yayasan therefore came **after** the gazetting of the KL Structure Plan on 16 August 2004 and after the presentation of the draft KL Local Plan in May 2008, but prior to the gazetting of the latter, ten years later, in 2018.

E. The JVA between Yayasan and Memang Perkasa for the Development of the Subject Land

95. On 7 April 2014, Yayasan entered into a joint venture agreement ('**JVA**') with Memang Perkasa to develop the subject land. The **JVA** was for the construction of the proposed development. The terms of the **JVA** which are relevant in the present appeal are as follows:

(i) Preamble A provides that Yayasan has applied for the alienation of a plot of land, namely PT 9244 (where Taman Rimba Kiara and more particularly the subject land is situated);

(ii) Preamble C and D further states that the alienation of the subject land has been approved and accordingly, Borang 5A dated 8 January 2013 has been issued for

the payment of a premium. Yayasan has sought an extension of time to pay the premium;

(iii) Clause 4.1 provides that Memang Perkasa is to pay Yayasan a sum of RM160 million as Yayasan's entitlement under the **JVA**;

(iv) Clause 5.3 allows Memang Perkasa to encumber the subject land for the purposes of financing and for the provision of 3rd party charges involving Yayasan;

(v) Clause 5.6.1 states that Yayasan acknowledges that the quantum of Yayasan's entitlement is based on –

(a) Memang Perkasa securing the development order upon such terms and conditions acceptable to Memang Perkasa, at Memang Perkasa's absolute discretion; and

(b) a minimum plot ratio of 1:6 approved by the authorities.

(vi) Clause 8.1 requires Yayasan to provide all necessary assistance to the developer, Memang Perkasa in respect of all its applications whenever requested with a view to expedite all approvals for development including liaising with the authorities; and

(vii) Yayasan, has an address in the Bangunan DBKL 3, the address of the 1st Appellant or Datuk Bandar here.

F. Issuance of the Impugned Development Order

96. On 10 October 2014, the Datuk Bandar purportedly delegated its powers under the **FT Act** to a list of persons including the Pengarah Perancang Bandar dan Desa, who is the person who eventually signed the development order dated 13 July 2017.

97. On 23 October 2014, Yayasan executed and gave a Power of Attorney to Memang Perkasa, authorizing Memang Perkasa to apply to the relevant authorities for consent to transfer, change, impose, alter the land use, conditions and restrictions related to the Subject Land, to apply for planning permission on the Subject Land, and to deal with all matters in relation to the Subject Land.

98. Between 14 June 2016 to 16 June 2016, the Datuk Bandar erected a notice to inform the public that it had received an application for planning permission for the Proposed Development. This was pursuant to **rule 5(3) of the Planning Rules 1970**.

99. On 18 August 2016, the Datuk Bandar issued a notice of a hearing pursuant to **rule 5 of the Planning Rules 1970** to the 1st, 2nd and 6th Respondents ('**the Notice of Hearing**').

100. On 29 August 2016, at the hearing to hear objections from affected parties regarding the Proposed Development ('**the Hearing**'), representatives from the 1st, 2nd and 6th Respondents advanced the following objections to the Proposed Development:-

(i) The Proposed Development is irrational, unreasonable and not in accordance with applicable laws, rules, and regulations;

(ii) The Proposed Development contravenes the KL Structure Plan 2020 and the draft KL Local Plan in terms of land usage, zoning and density;

(iii) The Proposed Development will cause the destruction of Taman Rimba Kiara and irreversibly destroy the park's eco-system;

(iv) The Proposed Development will significantly increase the congestion and pollution levels in TTDI and Taman Rimba Kiara; and

(v) There is a conflict of interest as the senior officers of DBKL also hold senior and/or management positions in Yayasan, the owner of the Subject Land.

101. As an aside, during the Hearing, the Respondents were informed of a proposal to construct a new flyover and

highway/road network to create access for and support the increased density caused by the Proposed Development ("**the Highway Proposal**"). Previously, the Respondents had no knowledge of the Highway Proposal.

102. On 15 December 2016, Memang Perkasa, *vide* SAM Planners' letter, submitted to the Appellants its proposed residential development (affordable apartments) and commercial development to increase the density of the affordable housing to 976 per acre and plot ratio of the commercial development to 1:9 ('**the 3rd Proposed Development**').

103. On 28 February 2017, a meeting between JKTPS and Memang Perkasa was held, and it was decided that the 3rd Proposed Development would be postponed to allow Memang Perkasa to comply with further directions.

104. On 28 February 2017, per the local authorities' One Stop Centre online portal ('the **OSC**'), the Datuk Bandar allegedly granted conditional planning permission for the Proposed Development.

105. On 21 March 2017, JKTPS approved the proposed development (affordable apartments) and commercial development subject to conditions ('the **4th Proposed Development**').

106. On 31 March 2017, the 1st, 2nd, and 6th Respondents issued letters to the Datuk Bandar to reiterate their objections above. The 1st to 10th Respondents allege that no response from the Datuk Bandar was received. At this juncture, 7 months had passed since the Hearing.

107. On 3 April 2017 and 4 April 2017, the Datuk Bandar issued a letter informing the 1st and 2nd Respondents of the following:–

(i) That the Proposed Development was still at an evaluation stage; and

(ii) That the Respondents will be informed once a formal decision was reached.

108. On 10 May 2017, the Datuk Bandar published a statement in the News Straits Time where he stated the following:–

(i) The Proposed Development was still pending final approval; and

(ii) The Datuk Bandar would hold a meeting with the residents of TTDI and users of Taman Rimba Kiara in accordance with **rule 5 of the Planning Rules 1970** before approving the Proposed Development.

109. Between 1 June 2017 to 11 July 2017, the 1st to 10th Respondents' solicitors issued three letters to the Datuk

Bandar to seek clarification on the status of the Proposed Development. No reply was purportedly received.

110. On 13 July 2017, the Impugned Development Order was issued by the Datuk Bandar.

111. On 20 July 2017, the Datuk Bandar issued a letter containing the following statements, namely that:–

(i) The Datuk Bandar had considered the objections raised by the 1st, 2nd and 6th Respondents;

(ii) The Datuk Bandar will require Memang Perkasa to conduct further "communication strategy (sic)" to explain the Proposed Development to the residents at 3 stages: before, during, and after the construction of the Proposed Development; and

(iii) It is to be noted that, no statement or reference was made to the KL Structure Plan, the Local Plan, or the **CDP**.

112. On 28 July 2017, the 1st to 10th Respondents discovered Memang Perkasa carrying out survey works at Taman Rimba Kiara.

113. On 10 August 2017, by way of written parliamentary reply issued by the then Minister of Federal Territories, the 1st to 10th Respondents discovered that the Datuk Bandar

had granted the Development Order. The Respondents were not advised nor given notice of the grant of the Development Order.

114. On 11 August 2017, the 1st to 10th Respondents filed this application for judicial review. On 23 August 2017, leave was granted. On 28 November 2018, the High Court dismissed the 1st to 10th Respondents' Judicial Review application. On 27 January 2021, the Court of Appeal unanimously allowed the 1st to 10th Respondents' appeal with costs. On 1 September 2021, the Federal Court granted leave to the Appellants to appeal against the Court of Appeal's Order.

115. On 30 October 2018, the KL Local Plan was gazetted.

116. The Subject Land under the gazetted KL Local Plan departs significantly from the draft KL Local Plan, in that the Subject Land is designated as 'mixed development' under the gazetted KL Local Plan. This is borne out by a comparison of the two plans and by the Auditor-General's Report series 2 (Chapter 6).

117. This then brings to a close the salient factual matrix.

VIII. THE CENTRAL ISSUE IN THESE APPEALS: DID THE DATUK BANDAR EXERCISE ITS DISCRETION VALIDLY, LEGALLY AND WITHIN THE AMBIT OF THE SPECIFIC

POWERS AFFORDED TO IT UNDER THE FEDERAL TERRITORY (PLANNING) ACT 1982?

A. On what Basis did the Datuk Bandar Exercise its Discretion under section 22(4) FT Act?

118. Turning to the central all-encompassing issue at hand in these appeals as specified earlier, did the Datuk Bandar exercise his discretion within, and in accordance with, the powers conferred on it under the **FT Act**?

119. In order for the court to make this assessment it is essential to comprehend on **what basis and how** the Datuk Bandar exercised its discretion under **section 22(4) FT Act**.

B. The Contents of the Datuk Bandar's Affidavits

120. The Datuk Bandar's reasons for the exercise of his discretion may be gleaned solely from the affidavits filed by the Datuk Bandar in consequence of the judicial review proceedings filed by the Respondents. No reasons nor explanations were afforded at the material time, i.e. at the point when planning permission was granted, as to why the subject land, which was zoned under the Structure Plan as land for public use, was altered to the land use category of mixed development.

121. There are four affidavits rendered by one Datuk Haji Mohd Najib bin Hj. Mohd, identified as the Deputy Director General (Planning) of DBKL, dated between 15 January 2018 to 7 September 2018 as well as the Datuk Bandar's letter dated 20 July 2017 which comprise the material available to explain how and why the Datuk Bandar exercised his discretion in granting the Impugned Development Order

122. On perusing the same, the following points may be distilled. The Datuk Bandar consulted various technical documents and reports and met with various external agencies such as JKTPS and JKPS to facilitate the decision.

123. It was also averred that the Impugned Development Order was not contrary to the KL Structure Plan and the KL Local Plan, and evaluations of Memang Perkasa's planning permission with JKPS and JKTPS was done carefully taking into account all relevant aspects of planning, or '*mengambil kira segala aspek perancangan yang relevan*'.

124. There were no statements breaking down what constituted these 'relevant' aspects of planning. The Datuk Bandar averred that the decision made by JKPS on the 30 March 2017 was a decision made in accordance with the Act and was followed up with the issuance of the Impugned Development Order.

125. Additionally, the Datuk Bandar considered that the land use of the Subject Land was for mixed development, and thus development must be accorded to the Subject Land. The Datuk Bandar also stated that the use of the Subject Land for modern and planned development would further improve the development of Kuala Lumpur.

126. The fact that there was a final settlement reached between the Bukit Kiara Longhouse Community, Memang Perkasa and Yayasan also operated as a reason as to why the Impugned Development Order was granted.

127. The overarching statement made was that the Datuk Bandar had complied with all the requirements as imposed by the **FT Act and the Planning Rules 1970** when considering the Proposed Development so as to grant the Impugned Development Order.

128. Much was also made about the traffic reports conducted and statements that the Datuk Bandar ameliorated traffic concerns surrounding the Proposed Development. This amelioration also featured in the letter dated 20 July 2017, that *inter alia* the access roads would be built by Memang Perkasa, that entry and exit roads would not be built through Jalan Wan Kadir 1 and Jalan Datuk Sulaiman, and that parking spaces would be built.

129. In relation to objections, the Datuk Bandar averred that it took note of the objections raised and dealt with those

objections by making amendments to the proposed development and imposing various conditions on Memang Perkasa, before granting the Impugned Development Order. As such it was maintained that the Datuk Bandar had fulfilled his statutory obligations under the Act.

C. Do the Affidavits Explain the Exercise of the Datuk Bandar's Discretion?

130. With respect, the totality of the affidavits and the single letter referred to above, offer little insight, if at all, into *how or why* the Datuk Bandar as the Commissioner exercised his discretion in deciding to grant the Impugned Development Order.

131. To take the point to its fullest, the Act provides that the Datuk Bandar, when dealing with an application for planning permission, may grant or refuse permission irrespective of whether the development is in conformity with the relevant statutory plans. In the instant case, the development is not in conformity with the statutory development plans. The decision to grant permission even when there is non-compliance with the **Structure Plan** is, however subject to **section 22(4),** as explained earlier.

132. And **subsection (4)** requires the Datuk Bandar to consider matters that are, in his discretion, expedient or necessary for purposes of proper planning. In exercising this discretion, the Datuk Bandar is bound, as far as is

practicable, to consider provisions of the development plan and any other material considerations.

133. Yet, the statements offered by the affidavits are simple reproductions of the wording of **section 22 of the Act**. With respect, an absence of particulars or facts as to ***how*** the decision was in accordance with the Act, and ***what was done*** so as to comply with the requirements of the Act, means that the Datuk Bandar's averment that the exercise of discretion leading to the grant of the Impugned Development Order was done in accordance with the Act, and that all requirements of the Act were complied with, is without basis. It is for a court of law to hold that the exercise of discretion was done in accordance with the law after considering the particulars and facts produced by the party who so alleges that they have complied with the law.

134. In summary therefore, the many statements made were to the effect that everything was above board and in accordance with **section 22 of the Act**. However, when the verbiage is stripped away, there is little information or substance as to the basis of the exercise of the Datuk Bandar's discretion –

(i) For example, there is no enumeration of the **material considerations** that were taken into account.

(ii) Neither is there any explanation as to why the Structure Plan was not followed, and instead the **CDP**.

(iii) This too in light of the fact that the local plan was already in existence as a draft, and merely required adoption by way of gazettement.

(iv) The departure from the statutory development plans is not explained.

(v) The availability of the proviso to suspend permission was also neither considered nor explained.

(vi) Neither was there a statement as to why this development would be beneficial under regulated planning law in the interests of the development of the area, or was necessary for the purposes of proper planning.

(vii) The affidavits are bereft of any principles of proper planning regulation or how development would be enhanced.

D. Summary of Our Conclusions from the Datuk Bandar's Affidavits

135. In summary it is not possible to ascertain with any certainty:-

(a) why the Datuk Bandar departed from the statutory development plan, namely the Structure Plan;

(b) why the Datuk Bandar utilised the **CDP** and a series of planning rules and regulations which conflicted or contravened the Structure Plan;

(c) why the Datuk Bandar chose to ignore the draft Local Plan in its entirety, despite several years having elapsed since the production of the gazetted Structure Plan in 2004. As approval for the proposed development was sought several years later in 2008, there is no explanation nor reason afforded as to why there was no consideration given to this plan, or why it could not be gazetted and the issue of the approval suspended until it was;

(d) why the **CDP** was utilised, when it is to be utilised where the local plan is nowhere near completion. However, as a matter of fact, both the statutory development plans were in existence. The draft Local Plan was not gazetted and such gazetting was not undertaken for some seven years.

(e) Why the **CDP** was utilised when it is defined specifically to apply to specific lots namely Plans Nos 1039, 1040 and 1041, which does not extend to the subject land which is outside the scope of the **CDP**;

(f) why there was recourse to the **Planning Rules 1970** and zoning and density rules applicable during the **CDP** era, when Parliament had already laid in place and decreed the replacement of the same with the structure plan system. The fact that these rules were retained pending the introduction of the structure plan system does not in itself justify continued and deliberate reliance on the same;

(g) how the Datuk Bandar arrived at the decision that it was in order to depart from the statutory development plans under **sub-section (1) of section 22 FT Act**, while meeting the requirements of the **proviso** to such departure as outlined under **sub-section (4)**. We have analysed this above. When exercising his discretion under the first limb to depart from the statutory development plan, the Datuk Bandar can only do so if it has been shown that the matters set out in **sub-section 4** have been complied with. This has not been satisfactorily made out in the affidavits or elsewhere in the pleadings or submissions.

F. The Use of the CDP

136. **Section 22** requires, as stated earlier, the Datuk Bandar to give consideration to matters which are necessary for proper planning, and this would necessarily include the provisions of the Structure Plan, the **CDP for lands comprising plan numbers 1039,1040 and 1041,** where

there is no local plan and other material considerations. However, the use of the **CDP** is transient and more significantly can only relate to land falling within the areas it covers. **The definition section of the FT Act makes it clear that the CDP relates only to land in plan numbers 1039, 1040 and 1041**.

137. The subject land does not fall within these plan numbers but outside of it. It is worth reiterating that the ability to rely on the **CDP** envisages a bona fide reliance on the same where it is genuinely not possible to rely on a local plan because it is still being drawn up or does not subsist. Such use too, is limited to the lands in the **CDP** as set out above. It would not, with respect, envisage a situation where a local plan subsists but remains unadopted, deliberately or otherwise. The very existence of the local plan would require consideration to be given to the same

138. Nothing in the affidavits affords any basis for this court to conclude that any such deliberations were undertaken. With respect, if it is difficult to see what path the Datuk Bandar trod, much less if such path was that set by the legislature. The legislature has provided a complete and concise manual of how planning permission is to be granted in the Federal Territory of Kuala Lumpur, with tiered development plans to be considered and with clear stipulations as to how the discretion accorded to the Datuk Bandar is to be exercised.

139. However, the statements proffered in the affidavits fail to disclose any such consideration or deliberation in the exercise of the discretion. On the contrary, the basis for the exercise of powers under **section 22** to grant planning permission remain murky. In the face of such opacity, it is difficult to conclude that the Datuk Bandar exercised his discretion in accordance with the powers afforded to it under **section 22 FT Act**.

140. Much was made in the affidavits of the Datuk Bandar's compliance with the **CDP** and the **Planning Rules 1970** when granting the Impugned Development Order under **section 22 of the FT Act**, which requires consideration. The position taken appears to be that by such compliance the requirement of exercising its discretion in accordance with **section 22 FT Act** is met completely.

141. This then gives rise to the question of whether compliance by the Datuk Bandar with the **CDP,** the **Planning Rules 1970, and the Federal Territory (Planning) (Zoning and Density) Rules 1985 ('Zoning and Density Rules 1985')** is equivalent to the valid exercise of the powers conferred on the Datuk Bandar under **section 22** such that the exercise of its discretion is in conformity with the section, the Act and proper planning development?

142. In order to answer this question, it is also necessary to comprehend the nature of statutory development plans in this jurisdiction under the **FT Act**, as well as the status of

the **CDP** and its use in the grant of planning permission in the instant appeals. The reason for this is because, in order to assess whether there was compliance with **section 22**, the competing legal status of the **CDP** under the **FT Act**, as opposed to the statutory plans under the **FT Act** comes into question. Does the use of the **CDP** rather than the statutory development plan meet the purpose and object of the **FT Act**? And particularly where the **CDP** has no application to the subject land? In this context it must be pointed out (as will be discussed later) that the Datuk Bandar seeks to justify the use of the **CDP** by reliance on the Zoning and Density Rules 1985. These rules provide that all areas outside of the **CDP** are zoned as residential. However if the **CDP** itself does not apply to the subject land, can the **CDP** then be used to state that the subject land is zoned as residential rather than as open space under the Structure Plan?

143. If the statutory development plan i.e. the Structure Plan is pure policy, as submitted by the Appellants, and has no force of law, then it is arguable that the failure, neglect or refusal to follow the same does not undermine, nor affect the purpose and object of the **FT Act** and **section 22**. What would be the case however if the statutory development plan is not a mere guideline but provides a statutory blueprint for proper planning purposes under the **FT Act**? Put another way, if the statutory development plan is not 'mere policy' but is a core part of the **FT Act** that requires compliance, and further, requires clear

reasoning to be provided when departed from (as envisaged under **section 22**), what is the effect of departing from such a development without explanation? Or by maintaining that compliance is not required because it is 'mere policy'?

144. Does such non-compliance and a failure to explain that non-compliance, taint the exercise of discretion by the Datuk Bandar in granting planning permission for the development? Does such non-compliance denote a failure to adhere to the underlying purpose and object of proper planning and development in accordance with the law? The answer will turn on the legal status to be accorded to statutory development plan/s under the **FT Act**.

145. Needless to say, this issue comprises a central feature of the dispute between the parties and requires consideration and analysis.

G. The Legal Status of the KL Structure Plan

146. A useful starting point is a consideration of the parties' positions on this issue, which may be gleaned from their submissions.

147. In the interest of brevity and clarity, we understand the essence of the parties' submissions on this point to be as follows: -

The Datuk Bandar's Submissions in Summary

(a) The Datuk Bandar contends that the **KL Structure Plan** is not a legally binding document as it merely contains written statements on policies and general proposals for development. What is envisaged in the Structure Plan cannot remain the same as there would have to be changes made from time to time throughout the years;

(b) Alienation of the subject land for a mixed development was just such a case, and the logical conclusion to be drawn is that such development should ensue irrespective of the Structure Plan 2020, given that it was brought into effect in 2004, prior to the alienation of the subject land on 11 August 2014;

(c) **Paragraph 3, section 1.2 of the KL Structure Plan** clearly states that it reflects the development of Kuala Lumpur over the next 20 years and does not contain proposals for detailed physical planning for any specific area;

(d) As such, it is submitted that *'the KL Structure Plan 2020 is not a plan stating exactly with accuracy the development in any particular area and this would be done at the local plan stage*'. *'The weight to be placed on the structure plan is a proper judgment for the planning authority'*; and

(e) In the absence of a local plan at that material time (despite the draft local plan being in existence), it was submitted that a reading of **section 22(4) of the FT Act** allows for planning permission to be considered based on the **CDP**. In the present case, the subject land is located outside the **CDP** and no land use is specified. Nonetheless the **Zoning and Density Rules** provide that all lands **outside the CDP** are zoned as residential with a density of 60 persons per 0.4 hectare. Therefore, it is submitted, the subject land is zoned for use as 'residential' and not as an open space for public use or as a city park as contended by the respondents.

H. The Submissions of the 1st to 10th Respondents

148. For these Respondents it is contended that:

(a) In the KL Structure Plan, the subject land is zoned or designated as:-

(1) a city park under Figure 13.2;

(2) open space, recreation & Sports facilities under Figure 6.1; and

(3) green areas under Figure 6.3

As such the proposed development is in conflict and inconsistent with the KL Structure Plan.

(b) **Sections 7 to 12 of the FT Act** make it clear that an *'important democratic concept of public participation lies at the heart of planning law'*. Citing **section 1.3 of the KL Structure Plan** the Respondents state that *'the KL Structure Plan 2020 was born out of a public participatory process'* and *'it is therefore clear that the KL Structure Plan is not a unilaterally imposed top-down administrative policy'*;

(c) The Structure Plan is *'an environmental contract'* between the planning authorities and the residents' paraphrasing the Irish supreme Court in ***The Attorney General (at the relation of Fran McGarry, Paddy O'Hara, Patricia Mulligan, Neil Cremin and John Hamilton) and Frank McGarry, Paddy O'Hara, Patricia Mulligan, Neil Cremin and John Hamilton (in their own right), Plaintiffs v Sligo County Council, Defendant [1991] 1 IR 99 at 113***: -

"The plan is a statement of objectives; it informs the community, in its draft form of the intended objectives and affords the community the opportunity of inspection, criticism, and if thought, proper, objection. When adopted it forms an environmental contract between the planning authority, the Council, and the community, embodying a promise by the Council that it will regulate private development in a manner consistent with the objectives stated in the plan, and further

that the Council itself shall not effect any development which contravenes the plan materially.";

(d) The **CDP** was intended to be replaced with the structure plan system (which comprises the structure plan and the local plan) and the structure plan contains diagrams/figures to aid the structure plan's content. The law in relation to the purpose and object of the **FT Act (from the Hansard of the Dewan Rakyat dated 22 October 1981 during the second and third reading of the FT Act at pages 4288-4290)** made it clear beyond dispute that the purpose of the **FT Act** was to replace the **CDP** with the structure plan system.

149. It was explained that with the structure plan system, it was not only the physical aspects of development that were taken into consideration but also, social, economic, environmental and other salient factors, to meet specific enhanced objectives in the interests of the public. It further specified that the two important components of this system are the structural plan and the local plan. It was also stressed that the introduction of this system in the Federal Territory was consonant with the system accepted and practiced in the other states of West Malaysia under the **Town and Country Planning Act 1976**.

150. For these reasons it was submitted that the Structure Plan could not simply be dismissed as 'mere policy' but did in fact have statutory force.

I. The Submissions by Yayasan

151. Yayasan supported the Datuk Bandar's position and maintained that the Structure Plan does not legally bind the Datuk Bandar from *'slavish compliance'* with it. They relied on the following authorities for this proposition:

(a) ***Rahman bin Abdullah Munir & 67 Lagi v Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 704 ('Rahman bin Abdullah Munir')*** where it was held that the structure plan is not legally binding as it is merely a compilation of policies on future development in the City of Kuala Lumpur;

(b) ***Gurit Kaur a/p Sohan Singh v Datuk Bandar Kuala Lumpur [2019] 8 MLJ 379 [2018] 1 LNS 2038; [2018] AMEJ 1746*** where it was held that the structure plan contains general policies to guide the development of Kuala Lumpur;

(c) Reliance was also placed on ***Simpson v Edinburgh Corporation [1960] SC 313 ('Simpson')***, later adopted by the Federal Court in ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan***

***[1999] 3 MLJ 1; [1999] 3 AMR 3529; [1999] 3 MLJ 1; [1999] 3 CLJ 65 ('Sungai Gelugor')*.**

152. On these grounds it is submitted that there is therefore no requirement for the local planning authority to 'slavishly comply' with the development plan in reliance on the judgement in ***Sungai Gelugor*** (supra). The Datuk Bandar is merely required to '**have regard**' to the Structure Plan.

153. To this end, reference was made to **section 2 of the FT Act** to state that development plans mean the KL Local Plan.

154. In this context however it is to be noted that the definition in **section 2** includes the following in **sub-section (b**): ***'if there is no local plan for the area, the structure plan for the area'***. As the **KL Local Plan** was not gazetted at the material time, the Datuk Bandar concludes that reference could be made not to the **Local Plan** nor the **Structure Plan** but instead to the **CDP**. (The **CDP** is a plan formulated and utilised under the repealed **City of Kuala Lumpur (Planning) Act 1973**, but preserved under the **FT Act** for specific purposes. This will be discussed further below).

J. Memang Perkasa

155. Counsel for *Memang Perkasa* supported the arguments put forward by the Datuk Bandar in relation to the legal

status of the **KL Structure Plan** and maintained that it is **not** legally binding.

156. In *Memang Perkasa's* submissions it took the position that the Court of Appeal departed from legal precedent where it has been held that the Datuk Bandar **has** discretion to depart from a structure plan, as specifically held in ***Sungai Gelugor*** (supra). There **Edgar Joseph Jr FCJ** held that local planning authorities are to take into consideration development plans but such consideration does not mean **'slavish compliance'**. Reference was made to the **City of Kuala Lumpur (Planning) Act 1973** where the Datuk Bandar purportedly wields a wide discretion to depart from any plan as proper planning requires a wide exercisable discretion.

157. It was further submitted that **section 22(1) FT Act** stipulated that the Datuk Bandar, in exercising its discretionary powers under the Act, could grant a development order whether or not it conformed with the statutory development. As such, the power to grant the development order is conferred on the Datuk Bandar, and may be granted even where the proposed development departs from the **KL Structure Plan**. To that end it was submitted that the discretionary power of the Datuk Bandar should not be restricted. Accordingly, non-conformity with a development plan could not form the basis for quashing the decision of the Datuk Bandar as

there were likely to be changes to the **Structure Plan** from time to time.

K. Our Analysis of the Status of the Development Plans under the FT Act

158. In summary, the lynchpin of the Appellants' collective arguments calls for a reading of **Part IV of the FT Act** (i.e. **section 22 of the FT Act**) to the exclusion of the other parts of the **FT Act**. Yet, **Part IV** cannot be read *in vacuo,* not when provisions within **Part IV** depend on provisions within **Part III**.

159. As we have set out earlier in our examination of the **FT Act**, **Part III** makes it clear that development plans are accorded statutory force. Statutory powers wielded pursuant to **Part IV**, therefore, such as the grant of development orders per **section 22(1) FT Act**, cannot be construed in isolation, without reference to the Statutory Development Plans of **Part III**. This is illustrated by, for example, *'development otherwise than in conformity with the development plan'* per **section 19 (1) of Part IV** and *'the local plan'* per **section 22 (4)(a) of Part IV**.

160. In many respects, **Part III** is the core or nucleus, as it were, of the **FT Act. Part IV** therefore cannot be read in isolation from **Part III**. This statutory cascade of **Part III of the FT Act** to **Part IV of the FT Act** ensures continuity

and uniformity in ensuring that regulated town planning is achieved under the **FT Act**.

L. The KL Structure Plan (2004)

161. **The KL Structure Plan (2004)** contains the primary policy of the Datuk Bandar, then the City Hall Kuala Lumpur, and sketches out in visual terms how the Federal Territory was to be developed in the following twenty or so years. The 'how' is answered by a set of policies.

162. But, it does not follow that by saying that the KL Structure Plan represents mere policies, this then diminishes the KL Structure Plan's legal character of bearing statutory force. To give development plans their own force of law is to ensure that planning in the Federal Territory is achieved pursuant to cohesive planning principles over space and time. Parliament, by embedding into the **FT Act** a mandatory process of public participation, ensures the inclusion of the public's views on the proposed plan. Once gazetted, there is no room for extraneous matters to be inserted at will, nor for development planning on an inconsistent and piecemeal basis.

163. The fact that these development plans are set out in the statute in express terms requiring compliance means that they cannot be equated to policies which require no such strict compliance. It is not possible to utilise the term 'policy' or series of policies to circumvent or obviate the

need to comply with statute. The statute prescribes that development has to be undertaken in accordance with the **Structure Plan and Local Plan**. It is no answer to that statutory requirement to contend that compliance is not required because it is mere policy.

164. Another issue pertaining to the legal nature of the Structure Plan needs consideration and emphasis. The **FT Act** directs that statutory structure plans are to be gazetted. This is a clear departure from the English counterpart of the **FT Act** (i.e., the *Town and Country Planning Act 1968, the Town and Country Planning Act 1971 (subsequently amended in part by the Town and Country Planning Act 1971), and the Town and Country Planning Act 1990)*. Under the legislation outlined in the United Kingdom development plans are **not** gazetted as the last procedural step for structure plans to come into force. Instead, the English legislation above provides that development plans simply come into force upon adoption by the relevant authority.[4]

165. The question then becomes what is the effect of gazetting any development plan? Why did our Parliament take it one step further and legislate that all development plans enacted pursuant to the **FT Act** are to be gazetted and thereby given the force of law?

[4] See section 9 of the UK Town and Country Planning Act 1968, section 9 of the UK Town and Country Planning Act 1971, section 15 of the UK Town and County Planning Act 1990

166. On **16 August 2004**, the Structure Plan 2020 was gazetted, and it represented the views of all Malaysians on what they envisioned the Federal Territory of Kuala Lumpur would look like in sixteen years, in 2020. It was a vision that required sixteen years to take full effect, and cardinal to its ability to achieve this vision was the element of continuity, or as the **Long Title of the FT Act** expresses it as, *'the control and regulating of proper planning'.*

167. Continuity, control, and regulation of town planning in the Federal Territory is achieved when a development plan is gazetted and given the force of law. This is the only intention of Parliament that can reasonably be inferred from the fact of Parliament going one step further than the English provisions. It therefore follows that having the force of law, 'slavish compliance' is required in relation to statutory development plans, as set out in the **FT Act**, including the KL Structure Plan.

168. To this extent we are not entirely *ad idem* with Edgar Joseph FCJ's dicta in ***Sungai Gelugor***, where His Lordship accepted that the Structure Plan had statutory force, but then went on to state that there was no necessity for 'slavish compliance' with the same.

169. To comprehend our contention fully, it is noteworthy that His Lordship Edgar Joseph FCJ adopted the approach taken by the **Scottish Outer House** in ***Simpson***.

However, a careful reading of the Scottish equivalent of our **FT Act namely the Town and Country Planning (Scotland) Act 1947**, reveals that the relevant planning authorities in that jurisdiction are required only to approve the statutory development plan for it to become operative on the date at which the notice stating that the development plan has been approved, is first published.[5]

170. This means, in effect that there is no equivalent of **section 9 of the FT Act**. The **Structure Plan and Local Plan** in this jurisdiction enjoy statutory force as there is a requirement that these plans are gazetted before they come into force. Unlike Scottish legislation, it is not simply a case of publishing a notice to the effect that the development plans have been adopted. The additional requirement of gazettement as well as the reading of the object and purpose of the **FT Act** confers statutory force to development plans in this jurisdiction.

171. The fact that the **FT Act** has a provision expressly stipulating that the Datuk Bandar is not bound to comply strictly with the **Structure Plan** does not detract from the general position that it enjoys statutory force, as does the Local Plan. This is because the discretion accorded to the

[5] Publishment, in this respect, is to be done through the mediums of a newspaper and the Edinburgh Gazette. Per Marco McGinty Petitioner (Reclaimer) against Scottish Ministries Respondent 2014 SCLR 318 at 339: "The *Edinburgh Gazette* was the national newspaper of record; it was a newspaper circulating in the area to which the plan or programme relates."

Datuk Bandar under **section 22**, as explained earlier is fettered by the express stipulations in that section.

172. In this jurisdiction, we find that Parliament has provided a comprehensive code of planning control in the Federal Territory through the **FT Act**. The Act is a form of planning law, and this law, which imposes restrictions in the public interest upon private rights, must be applied equally and consistently to all. Such are the demands of what it means to achieve proper town planning, as emphasised by Mary Lim JCA (as her Ladyship then was) in the Court of Appeal:

> *"... None of these plans can be passed and be of any force unless and until the time-consuming and pain-staking process of preparing drafts; publication of those drafts through the requisite mediums; consultation and public hearings on the drafts; adoption, adaptation, repeal, replacement of drafts from the results of the consultation; consent of the Minister in charge, all elaborately set out in Act 267 have been complied with"*

173. The statutory force of development plans such as the Structure Plan which, in point of fact, does require "slavish compliance" ensures that citizens comprehend at the outset what their neighbourhood will develop into in the near future, whether the character of their neighbourhood as they now know it, will or will not, be preserved. It assures citizens of the nature of their locality for a specific period of time in the future.

174. Where there is to be an alteration or variation, their voices may still be heard pursuant to the provisions of the **FT Act**, which allow for their objections to be heard and considered. As a corollary, this democratic right of participation is a statutory embodiment of the right to be heard, in that the **FT Act** provides an opportunity at the outset for all objections to be heard prior to the adoption and gazettement of the KL Structure Plan.

175. Thereafter, there are no provisions in the Act for a right to be heard unless the KL Structure Plan undergoes alteration, addition, revision, or replacement. In that event, there are specific steps that have to be undertaken to accommodate the variations as statutorily provided in the **FT Act** in **section 10**.

M. The Extent of Public Participation in the KL Structure Plan

176. For completeness, as stated in Chapter 1.3 of the KL Structure Plan 2020, we note that a total of 258 objection forms comprising 945 objections were received from individuals, governmental departments and agencies, educational institutions, professional bodies, elected representatives, political parties and other organisations. The written objections represented all 17 sectoral studies as outlined by the Draft KL Structure Plan 2020.

177. A total of 18 persons were appointed by the Minister to the Public Objection Hearing Committee, comprising of both representatives from professional bodies and public officials. A total of 29 public objection hearing sessions were held between 5 May 2003 and 16 June 2003, during working days from Monday until Thursday. A total of 228 objectors were present at the oral objections. Three representatives of an organisation or agency were given 30 minutes to present their oral objections, while each individual was given 15 minutes. The Public Objection Hearing Committee held another 27 sessions between 15 August 2008 and 6 October 2003 to consider 936 objections from 175 individuals and 83 groups of objectors.

178. The Report of the Public Objection Hearing Committee was then submitted to the Mayor of Kuala Lumpur on 8 December 2003.

179. These facts and statistics go to show that the statutory hearing of objections is a laborious, comprehensive and expensive process. It is undertaken to ensure full public participation in the preparation of the **KL Structure Plan**. This outpour of labour and finances incorporating the objections of the public, as required under the **FT Act**, go on to form the backbone of the **KL Structure Plan**. To that end the **KL Structure Plan** cannot be ignored or be shrugged off, as it were, without more. It begs the

question: Why enact laws only to later not follow such promulgated law?

180. The objective of the legislature in enacting provisions that guard the integrity of public participation in forming Statutory Development Plans is clear. Town planning represents a very real meeting point between administrative authorities and citizens. Town planning decrees, for the sake of regulated town planning, how private lives ought to be organised, i.e., where places of work ought to be located, where schools should be situated, where parks and recreation areas are placed, where commercial areas need be placed, and where sanitary waste may be safely kept. This puts into sharp focus the need for public participation in forming Statutory Development Plans that function to organise and lock in the regulation of development for the ultimate benefit of citizens in public spaces for decades to come.

181. As **the KL Structure Plan 2020 at paragraph 4 of Section 1.1** puts it: -

> *'the Plan contains details of all relevant separate components that make up the City, that is, its economic base and population, land use and development strategies, commerce, tourism, industry, transportation, infrastructure and utilities, housing, community facilities, urban design and landscape, environment and special areas. These components, though in discrete parts, are inter-related and mutually contingent. Policies and proposals for each of these components are*

therefore, directed towards their composition into an integrated whole, that is, the efficiently functioning, progressive and felicitous city (sic)'

182. We are therefore *ad idem* with Mary Lim JCA (as her Ladyship then was) that *'responsibility and duty can only be reasonably and properly discharged if the CDP, structure plan and the local plan, were compendiously referred to as the source, reference or basic legal document upon which any planning permission is to be evaluated at the time the application is being considered'.*

183. The inevitable conclusion having considered the legislative history and purpose and object of the **FT Act** at this juncture, is that the Structure Plan is a legally binding document which a planning authority must comply with, insofar as the statutory provisions of **section 22** provides.

184. As an adjunct to the above, namely that Parliament has provided a comprehensive code of planning control in the Federal Territory through the **FT Act**, the Datuk Bandar as the Commissioner is best placed to be cognizant of the inconsistencies between the **FT Act**, the **CDP,** the **Zoning and Density Rules 1985** and **the Planning Rules 1970**.

185. In light of the express purpose and object of the **FT Act**, it follows that the glaring inconsistencies in these older pieces of legislation which do not sit harmoniously with

the **FT Act** ought not to be relied upon or utilised as the prevailing or governing law in determining planning or development post the **Structure Plan.**

186. The latter comprises, as stated earlier, the core or central feature of the **FT Act** which replaced and superseded earlier legislation. Therefore, full effect must be given to the same, rather than earlier and superseded legislation and the development maps such legislation promulgates, such as the **CDP**

187. As explained earlier, the use of the **CDP** is not legally tenable despite it being expressly mentioned in the **FT Act**, as its purpose was to provide continuity during the transition period when the **Structure Plan and Local Plan** were being developed and gazetted. It does not sanction the deferring or suspension of the gazetting of any statutory development plan to provide a basis to revert to the use of the outdated maps under repealed legislation on a continued basis, extending well over a decade or two.

188. In the instant appeals, again as highlighted earlier, the continued use of the **CDP** was particularly incongruous and unsuitable as the subject land does not even fall within the area delineated by that plan.

N. The Use of the CDP, the Zoning and Density Rules 1985 and the Planning Rules 1970 – Does Compliance with the Same Sanctify the Exercise of Discretion by the

Datuk Bandar under Section 22 FT Act, where there has been a Departure from the Statutory Development Plan?

189. The Datuk Bandar maintains in its submissions that it is entitled to depart from the **Structure Plan** and rely instead on the **CDP together with the 1985 and 1970 Rules**.

O. Is this Exercise of Discretion by the Datuk Bandar Good in Law?

190. Having analysed the matter as set out above, we are of the view that such exercise of discretion is not good in law for the following reasons.

191. The **CDP** is defined in **section 2 of the FT Act** as *".....the comprehensive development plan referred to as plans Nos.: 1039, 1040 and 1041 in the "City of Kuala Lumpur (Planning) Act 1973 [Act 107]"*

192. The **City of Kuala Lumpur (Planning) Act 1973 [Act 107]** has since been repealed by the **FT Act** *vide* **section 65(1)**. Therefore, it follows that all systems utilised under the repealed Act such as the **CDP** would stand repealed. However, the **CDP** itself has been saved under **section 22(4) FT Act**.

193. The **CDP** as stated earlier is defined as land in **Plan Nos 1039, 1040 and 1041** under **section 2 of the FT Act**. It is

important to note that **the subject land in these appeals does NOT fall within the land in Plan Nos 1039, 1040 aand 1041. It is outside of the CDP**. The **CDP** is meant to be a comprehensive development plan for land falling within those specified plans and no other. It is not meant for use for the development of areas of land outside of these plans. **Therefore, the use of the CDP itself in the grant of the development order comes into question.**

194. **As the subject land is not within the CDP, the reliance on the same by the Datuk Bandar, to grant the development order, for a development outside the CDP areas, is fundamentally erroneous in law. In short, there is no basis in law for the Datuk Bandar to rely on section 22(4) FT Act to justify use of the CDP.**

195. **There can only be reliance on section 22(4) FT Act for lands falling within the CDP areas.**

196. **In short, the CDP has simply no relevance to the grant of a development order in relation to the subject lands because it is inapplicable to the same.**

197. This brings us to the question of the purpose of saving the **CDP** in view of the introduction of the structure plan system. It is evident that the saving of the **CDP** was strictly for the purposes of regulating the development of lands located in **Plan Nos 1039, 1040 and 1041 only. All**

lands falling outside of the CDP would be regulated by the statutory development plan.

P. The Utility of the CDP under the FT Act

198. The **CDP's** sole utility as a savings provision is also explicit from legislative history. As set out in the history of the legislation preceding the **FT Act**, the **CDP** was enacted pursuant to the **Town Boards Enactment (Cap 137),** in 1967, later renamed as Plan Nos. 1039, 1040 and 1041 pursuant to **section 4(1) of the Emergency (Essential Powers) Ordinance No. 46 of 1970.**

199. The **City of Kuala Lumpur (Planning) Act 1973** then repealed the **Emergency Ordinance No. 46** per **section 48(1)**, but the **CDP** was allowed to remain in place insofar as it was not inconsistent with the provisions of the **City of Kuala Lumpur (Planning) Act 1973**, per **section 48(2)**.

200. When the **FT Act** came into force, the same occurred, in that any rule or order, *inter alia*, made under the **City of Kuala Lumpur (Planning) Act** - *"shall insofar as it was not inconsistent with the **FT Act** 'continue in force and have the like effect as if it had been made under' the **FT Act*** "by virtue of **section 65**.

201. It is inexorably clear that any prior legislation repealed by the successive **FT Act** was only retained as a **savings**

provision to be used in the interim period pending the production and completion of the Structure Plan and the Local Plan. It is not tenable that a repealed Act can live both as repealed law, and still be used in its full force, as if never repealed.

202. The Appellants have maintained that the **CDP** is the correct plan to use by reference to **section 22 of the Act** in light of the fact that the **Local Plan** was ungazetted at the material time in addition to their contention that development plans under the **FT Act** mean only the Local Plan. The Appellants also suggest that the **CDP** does not conflict with the **KL Structure Plan**.

203. However, when these matters are examined in detail including the law it becomes apparent that:

(a) the Structure Plan prevails over the **CDP** and this is because the **CDP** was promulgated under the **Emergency Ordinance No. 46** and has since been maintained as a transition or savings provision in the **FT Act** for the land in Plan Nos 1039,1040 and 1041. This is clearly because the production of the KL Structure Plan and the Local Plan would require time before it came into effect. During such time the **CDP** remained available for use for those lands, and not the subject land, provided that it did not conflict with the Structure Plan once gazetted. Put another way, until the KL Structure Plan came into effect reliance

could be had on the **CDP for those lands,** but once the KL Structure Plan was gazetted it has to prevail over the **CDP** by reason of the purpose and object of the entirety of the **FT Act** which we have examined as earlier.

(b) the argument put forward by the Datuk Bandar and Yayasan is of no merit as they failed to refer to the definition of "development plan" in **section 2 of the FT Act**. Their reliance on the decision of the Court of Appeal in the case of ***Ramachandran s/o Appalanaidu & Ors v Dato Bandar Kuala Lumpur & Anor [2012] 6 MLJ 519; [2012] 6 AMR 124; [2012] 1 LNS 625 ('Ramachandran')*** (see paragraph 115) ought to be distinguished as the Court omitted to refer to the definition of development plan in **section 2 of the FT Act** and neglected to construe **section 22(4)(a) of the FT Act** in totality as the word "and" in such provision should be read conjunctively as in the structure plan and the **CDP** (because at that material time, the local plan had yet to be adopted). By construing **section 22(4)(a) of the FT Act** read together with the definition of "development plan" in **section 2 of the FT Act** whether literally or purposively, there is no doubt that the KL Structure Plan cannot be ignored.

204. As would be apparent from our analysis above, the structure plan encompasses public participation as part of

a democratic right to regulation and planning of land development. Therefore, the **CDP** cannot abrogate from, or undermine, this fundamental aspect of the **FT Act**. In the instant case, the Datuk Bandar has chosen to rely solely on the **CDP** to the exclusion of the **Structure Plan** maintaining that it was a matter of mere policy with no statutory force. That is an incorrect proposition in law given again our analysis of the object and purpose of the Act.

205. In summary, the Datuk Bandar erred in relying on the transitional or savings provision and ignoring the statutory structure plan in exercising his discretion to grant the Impugned Development Order. Secondly, he continued to give weight to the **CDP** notwithstanding that it conflicted directly with the **KL Structure Plan**. In this context, it is also important to bear in mind the fact that the local plan was already in existence although not gazetted. No explanation was afforded as to why the **draft local plan** was not gazetted, particularly as it had been completed. It was subsequently only gazetted in 2018. The proposed development also contradicted the then draft **Local Plan** that was synchronised with the **Structure Plan** as envisaged by the **FT Act**.

206. In the present set of appeals, the use of the **CDP** was wrongly relied on some 35 years after the introduction of the structure plan system (from the date of coming into force of the **FT Act** versus the date when the Impugned

Development Order was granted). And such use was relied on some 10 years after the **KL Structure Plan** was completed and the **draft local plan in existence**. Given further the **proviso to section 22 in sub-section (5),** where the Datuk Bandar may stay his hand on the grant of planning permission until the structural plans are ready, it begs the question why reliance was still placed on the **CDP**. This is particularly so when the **CDP** is wholly inapplicable in relation to the subject land, which falls outside of it.

207. In these circumstances, particularly given the paucity of facts and circumstances explaining how and why the Datuk Bandar exercised his discretion, it is difficult to accept that the Datuk Bandar exercised his discretion in accordance with or within the ambit of **section 22 of the FT Act**.

208. The exercise of the discretion by the Datuk Bandar under **section 22** is fundamentally flawed as it contravenes **section 22(4) FT Act**. As **section 22(4)** has not been correctly complied with, the Datuk Bandar's ability to depart from the statutory development plan, i.e. the Structure Plan, as envisaged under **section 22(1)** is similarly tainted. This means that **section 22 FT Act** has been contravened.

209. This in itself renders the exercise of discretion by the Datuk Bandar invalid and renders such exercise an illegality.

Q. The CDP and the Zoning and Density Rules 1985

Rule 2 of the Zoning and Density Rules 1985

210. The Datuk Bandar further relied on **Rule 2 of the Zoning and Density Rules 1985** to explain the exercise of its discretion to grant approval for the development. **Rule 2** provides that all lands within the Federal Territory of Kuala Lumpur and outside Plan Nos 1040 and 1041 are zoned as residential with a density of 60 persons per 0.4 hectare. Therefore, by relying on **Rule 2**, it is argued that the subject land can be said to be zoned as residential.

211. **Rule 2** was enacted pursuant to **section 64 FT Act Section 64** gives a general power to the Datuk Bandar to make rules with the approval of the Minister. The purpose of the rules is to facilitate the *'better carrying out of the provisions of the FT Act'*. To that end, **Rule 2** and all other rules serve to supplement the **FT Act** and strengthen the purpose and object of the Act rather than detract from the same.

212. However, **Rule 2** is in conflict with the **Structure Plan**. This is because the **Structure Plan** designates the subject land as a green area or open space for public use.

While **Rule 2** designates all lands outside of the **CDP** as residential land. Which then prevails?

213. Given that the use of **Rule 2** is intended to facilitate the **FT Act**, and given the statutory force to be accorded to the **Structure Plan**, it follows that the **Structure Plan prevails over Rule 2** and its designation of the subject land as residential.

214. As of the gazettement of the **KL Structure Plan**, the subject plan had to be zoned as open space and green area for public use. Any attempt to circumvent the provisions of the **KL Structure Plan** is bad in law, given that the **FT Act** implemented the structure plan system. Therefore, the reliance by the Datuk Bandar on **Rule 2** rather than the **KL Structure Plan** and his consequent treatment of the land use as residential (which was subsequently then converted to mixed development) is bad in law, as it is not in conformity with the **FT Act**.

215. This further supports our conclusion that the Datuk Bandar exercised his discretion erroneously and in contravention of the express provisions of **section 22 FT Act**.

216. We now move to consider the use of **rule 5 of the Planning Rules 1970**.

R. The Planning Rules 1970 and the FT Act – the Reliance on Rule 5

217. The issue here is whether the **Planning Rules 1970** are reconcilable with the **FT Act**. The **Planning Rules 1970** were enacted pursuant to **section 47 of the Emergency Ordinance No. 46**. The **Emergency Ordinance No. 46** defined "Authority" under **section 2** as the Federal Capital Planning Authority established under **section 5**.

218. The **City of Kuala Lumpur (Planning) Act 1973** then repealed the **Emergency Ordinance No. 46** pursuant to **section 48(2)**, but the **Planning Rules 1970** were allowed to remain in place insofar as they were not inconsistent with the provisions of the **City of Kuala Lumpur (Planning) Act 1973**, per **section 48(2)**.

219. The **FT Act** consequently repealed the **City of Kuala Lumpur (Planning) Act** with the saving of the **Planning Rules 1970** insofar as such rules were not inconsistent with the **FT Act** *vide* **section 65 of the Act**.

220. **Rule 5(3) of the Planning Rules 1970** provides notification to specific groups or classes of persons who may then object to any proposed development, if they are aggrieved. The classes of persons who may object is strictly limited to the three classes of persons specified in those Rules namely:-

(a) registered owners of land adjoining the subject land;

(b) registered owners of land separated by any road, lane, drain or reserved land the width of which does not exceed twenty metres owners; and finally

(c) registered owners of land located within the distance of two hundred meters from the boundary of the land.

221. It is immediately apparent that it is different from the **FT Act**, where objections are taken by the public prior to the gazettement of the Structure Plan and the Local Plan. There is no restriction as envisaged by **Rule 5(3)**, as the statutory development plan system under the **FT Act** requires public participation in the regulation of development and planning with a region. Such unrestricted ability to object, is inconsistent with the specific procedures set up to provide notification only to restricted classes of persons as provided under **Rule 5(3)**.

222. Thus, **Rule 5(3) Planning Rules 1970** stipulates contrary to the **FT Act,** that it is not an unrestricted class of persons who have the right to object to any proposed development, but only persons who are registered owners of adjacent land *and* whose land falls within the categories (a), (b) or (c) set out under **Rule 5(3)**.

223. It must however be emphasised that the **Planning Rules 1970** only remain applicable after the repeal of its parent

Act if, the Rules do not conflict with the purpose and object of the **FT Act.** The **Planning Rules 1970** are wholly inconsistent with the purpose and object of the **FT Act,** the essence of which allows for public participation in the planning and development of Kuala Lumpur.

224. In other words, the **FT Act** does not provide for the hearing of objections in respect of each and every application for planning permission. Instead, the **FT Act** allows for a consideration of objections from the public to enable the creation of the statutory development plans. The **FT Act** envisages a period of objections from the public prior to the gazettement of the **Structure Plan and Local Plan** (and in the event of variations to the same) but not thereafter.

225. Therefore, to continue to hold 'objection hearings' under **Rule 5(3) of the 1970 Rules** (which is consonant with the repealed method of dealing with planning permissions) is contrary to the express provisions of the **FT Act**, not to mention the purpose and object of the Act.

226. We understand from the Datuk Bandar's submissions that **Rule 5(3) of the Planning Rules 1970** was used to hold objection hearings because it placed reliance on the **CDP** by virtue of its reading of **subsection (a) of section 22 (4)**. Given our analysis above, it follows that the Datuk Bandar erred in relying on **Rule 5(3) of the Planning**

Rules 1970 for the rules are completely antithetical to its parent Act, **the FT Act**.

227. Moreover, the Datuk Bandar erred by relying on the **CDP** to the extent of reviving it for purposes beyond a savings provision, as evidenced from legislative history and a holistic construction of the Act.

228. In summary therefore, the Datuk Bandar's use and reliance of **Rule 5(3) of the Planning Rules 1970** and the **CDP** tainted his decision to grant the Impugned Development Order. We accordingly hold that the Datuk Bandar acted beyond the scope of his statutory powers under **section 22 of the FT Act** when granting the Impugned Development Order. The Impugned Development Order is correspondingly contrary to law. (We have also considered **Rule 5(3)** in the context of locus standi further on in this judgement.)

229. On the central issue of whether the Datuk Bandar exercised his discretion in accordance with **section 22 FT Act**, for the compendium of reasons we have set out above, we conclude that the Datuk Bandar 's exercise of discretion was illegal, null and void because it:-

(a) acted *ultra vires* or outside the purview of the Datuk Bandar's discretion as statutorily provided for in **section 22 FT Act**;

(b) acted in contravention of the purpose and object of the **FT Act** and therefore illegal, null and void;

(c) took into consideration and acted in reliance on law that was inconsistent with and contrary to the **FT Act**;and

(d) failed to take into consideration the provisions of the **FT Act** which expressly require compliance with the statutory development plans.

S. The Position of the Longhouse Settlers

230. The longhouse settlers concur with the submissions of the other Appellants that the development should proceed as it would be of benefit to them. They contend that they have waited for several decades (almost fifty years) for the State Authority to make good on its promise to re-house them. This development provides the opportunity for them to be given modern housing, which they believe would be preferable to their current living conditions.

231. Having considered the submissions of the settlers, we are of the view that:

(a) The fact that the State Authority has failed to make good on a promise made decades ago, does not justify the local authority contravening provisions of

the FT Act in order to allow for housing to be allocated to these longhouse settlers;

(b) The issue of housing for the longhouse settlers is a separate obligation owed by the State Authority to the settlers;

(c) The local authority is not in a position to rely on the issue of the lack of provision of housing for the longhouse settlers to justify the grant of the impugned development order where such an order has the effect of converting what was meant to be a public space for public use, to a mixed development for private purposes;

(d) This is particularly so, when the development order transgresses the provisions of the FT Act.

232. As such the redress of the longhouse settlers is properly brought against the State Authority rather than the other appellants in these appeals. The fact that the longhouse settlers have waited for decades and may continue to do so does not warrant this development proceeding in light of the various contraventions of the statutory development plan and the law.

IX. CONFLICT OF INTEREST

233. We now move on to consider the Appellants' complaint which is that the Court of Appeal erred when it found that the Datuk Bandar was in a position of conflict of interest in issuing the Impugned Development Order. More particularly their contention is that the legal test applied by the Court of Appeal is erroneous. It is contended that if the correct legal test had been applied, the result would have been different.

234. This issue is reflected in Leave Question No. 8:-

> "***Where the High Court in judicial review proceedings negatives actual bias or a conflict of interest on the part of an authority issuing a development order, is a Court of Appeal entitled to hold that there nevertheless would be a likelihood of bias having regard to the conflicting decisions in Steeples v Derbyshire Country Council [1984] 3 ALL ER 468, R v Sevenoaks District Council, ex parte Terry [1985] 3 All ER 226 and R v St Edmundsbury Borough Council ex parte Investors in Industry Commercial Properties Ltd [1985] 3 All ER 234?***"

(Emphasis Ours)

235. The commonality of the Appellants' grievances here is that they claim the Court of Appeal erred in applying the test for conflict of interest set out in ***Steeples***, *rather than that set out in* ***R v Sevenoaks District Council, ex parte***

Terry [1985] 3 All ER 226 ('Sevenoaks') *and* ***Edmundsbury***. Further, the Appellants contend the Court of Appeal erred to conclude there was a conflict of interest on the factual matrix of the case. The Court of Appeal concluded that a conflict of interest situation arose factually in relation to the Datuk Bandar, premised *inter alia* on:-

i. The fact that Tan Sri Haji Mohd Amin Nordin bin Abdul Aziz, the then Datuk Bandar is a member of Yayasan's Board of Trustees. Yayasan is the owner of the Subject Land;

ii. The provisions within the Joint Venture Agreement between Yayasan and Memang Perkasa, which envisage to a certainty that approval will be given by the Datuk Bandar.

236. Tan Sri Haji Mohd Amin Nordin did not sit personally to decide on whether to approve or reject the planning permission. He chose not to do so in view of his involvement as a member of Yayasan's Board of Trustees.

237. In these circumstances the issue before us is whether the Datuk Bandar exercised his discretion pursuant to **section 22** while being in a position of a conflict of interest and bias, thus tainting such exercise. If so, the grant of planning permission is similarly tainted and is bad in law.

238. It should be emphasised that this issue comprises a separate basis for challenging the exercise of discretion by the Datuk Bandar, otherwise than the earlier contraventions of the **FT Act** detailed above.

A. The Salient Facts Relating to the Issue of Conflict of Interest and Bias

239. An allegation of bias and of a presence of a conflict of interest is heavily premised on a case's individual facts, and a holistic appreciation of the facts *in toto* is essential. The facts are usefully compiled by way of a diagram for clarity. Our analysis is to be read alongside the diagram outlining the salient chronology of facts ('**the Diagram**').

B. The Facts of the Present Appeal Relating to a Conflict of Interest and/or Bias in Relation to the Grant of Planning Permission by the Datuk Bandar

240. Allegations of a conflict of interest and/or bias in judicial review requires an examination of the decision-making process and merits more than a perfunctory analysis of a case's factual matrix.

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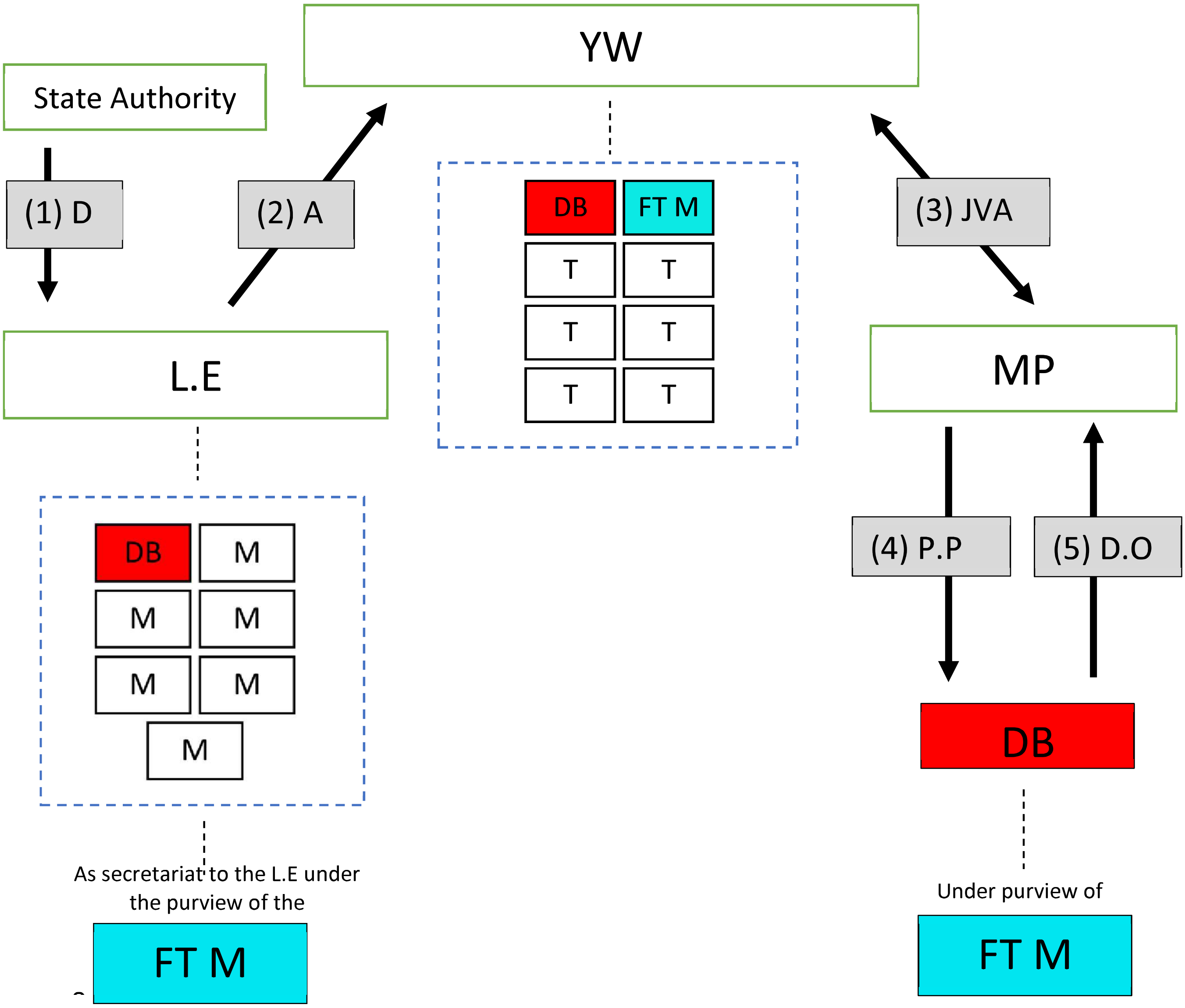
KEY

- **L.E.:** Land Exco
- **YW:** Yayasan
- **MP:** Memang Perkasa
- **DB:** Datuk Bandar
- **FT M:** Federal Territories Minister
- **M:** Member (within Land Exco)
- **T:** Trustee (within Yayasan)



(1) D: the State Authority delegated its powers of disposal including land alienation to the Land Exco

(2) A: The Land Exco alienates the Subject Land in favour of YW after premium for the said land being paid by YW

(3) JVA: YW and MP enter into a JVA

(4) P.P.: MP applies for planning permission pursuant to the Power of Attorney executed by YW

(5) D.O: the Impugned Development Order was granted

241. The facts, as outlined in the Diagram, of the decision-making process vis-à-vis the Impugned Development Order are as follows: -

(1) Firstly, from "(1) D" of the Diagram:-

i. It is not in dispute that the Subject Land was initially state land, which belonged to the Government of the Federation pursuant to **Schedule of the Constitution (Amendment) (No. 2) Act 1973 (P.U. (A) 56/1974).**

ii. The power to alienate state land was later delegated from the State Authority to the Land Executive Committee of the Federal Territory ("**Land Exco**") by virtue of **Delegation of Powers under section 13 (P.U. (B) 108/2003)**.

iii. The Datuk Bandar sits as one of the members of the Land Exco pursuant to **section 12 of the Federal Territory (Modification of National Land Code) (Amendment) Order 2004 [P.U. (A) 220/2004.**

iv. Thus, the Datuk Bandar sat as a member of an authority that had the power to decide and alienate the Subject Land from state land into private land capable of being developed on.

242. Points iii and iv came to light during the course of the hearing, as a consequence of questions posed by the Court to counsel for the Datuk Bandar as well as all parties. Learned counsel for the Datuk Bandar readily conceded that the Datuk Bandar did indeed sit on the Land Exco which determined the issue of the alienation of the Subject Land from the State to Yayasan.

243. The other Appellants took objection to this fact being raised or taken into consideration in determining this issue for the reason that this issue had only 'come to light' so to speak in the course of the hearing. It was further strongly contended that this fact should not be taken into consideration by the Court because it had not been pleaded, but had come to light in the course of the hearing in response to a specific question by the Court. The Appellants maintained that as such the Datuk Bandar nor they were accorded an opportunity to rebut this allegation by way of affidavit. Accordingly, it was submitted that this fact should be ignored and not taken into consideration in deciding on whether a conflict of interest/bias situation subsisted or not, in relation solely to the Datuk Bandar.

244. We have considered these submissions carefully. We concluded that the fact in issue, namely that the Datuk Bandar sat on the Land Exco which took the decision to alienate the land to Yayasan is relevant and significant, as this is a matter of public record, which ought to have been disclosed to the Court from the very outset. It is not

for the Court to have to make an independent ascertainment of this fact. It falls within the purview of the duty of disclosure of the Datuk Bandar. (This duty will be discussed further below).

245. Moreover, it is a pertinent fact because when it is considered in conjunction with the other salient facts, namely that the Datuk Bandar also sat on the Board of Trustees of Yayasan and is the entity that determines whether or not planning permission is to be granted in respect of any development on the subject land, it becomes a relevant fact for the purposes of ascertaining conflict of interest and/or bias. It means, as stated above, and as is apparent from the diagram, that the Datuk Bandar effectively wore three 'hats' in three different capacities all of which had a significant effect on the issues of whether a conflict of interest and/or bias situation subsisted or not. This is because:-

(a) The alienation of the subject land to Yayasan- in this context, the Datuk Bandar is, or ought to have been, aware of the land use or zoning of the subject land i.e. as green area and open space under the Structure Plan which was gazetted in 2004. Notwithstanding this, on alienation, the zoning or land use of the subject land was altered from green area and open space to mixed development;

(b) The entry of Yayasan into a Joint Venture Agreement with Memang Perkasa for the purposes of a mixed development – which meant that the zoning or land use would have to be altered in a manner which was inconsistent with the land use specified under the KL Structure Plan. The Datuk Bandar would have been aware of this requirement to re-zone;

(c) The Datuk Bandar, sitting as a member of Yayasan's board of trustees was, or would have been aware of the contents of the Joint Venture agreement entered into between Yayasan and Memang Perkasa. This is significant because it spells out clearly that it is contingent upon the consent/approval of the Datuk Bandar being obtained for the development to proceed (see Clause 5.6.2 of the Joint Venture Agreement which provides that if the agreement is terminated Yayasan has to pay Memang Perkasa all sums received from it, which is in excess of RM60 million);and

(d) The Datuk Bandar as an institution or entity had complete control and discretion in determining whether or not to grant planning permission.

246. For these reasons, we conclude that it was incumbent upon the Datuk Bandar as a local authority subsisting for the purposes of serving the public in relation to planning regulation, to provide full disclosure. This is why

discovery applications rarely arise or should rarely arise in such judicial review applications. It is expected that the Datuk Bandar provide all the relevant facts as part of its duty to the public or in the public interest. It is after all a public institution with statutory duties owed to the citizenry.

247. As for the other Appellants, this is not an issue that is directly relevant to them. The thrust of their submissions was that the truth of the extent of involvement of the Datuk Bandar in the grant of the Development Order for this project, ought to be ignored on the grounds that the Respondents did not plead this fact. Alternatively, that the Court ought not to transgress the 'borders' of the pleadings, which limit the purview of the Court's powers in judicial review.

248. We rejected this contention for the following reasons:-

(a) This is a matter which centres directly on the Datuk Bandar in the context of this judicial review application, rather than the other Appellants, who it must be remembered, sought to be included as parties in this matter. Their interest is primarily pecuniary, as considerable monies have been expended in procuring approval for this mixed development. As such their objections are secondary to the primary issue which relates solely to the role of the Datuk Bandar;

(b) We determined that the Datuk Bandar, as a local authority and public body, was duty bound to provide disclosure to the Court in relation to the various roles it 'played' in relation to this application;

(c) Pleadings should not be utilised to suppress, camouflage or hide what amounts to a deliberate failure of disclosure. That would amount to distorting the function of pleadings. The rule against being taken by surprise envisages that parties to litigation are prejudiced in the course of litigation because a salient matter which was not within their knowledge is brought up and affects them adversely because they are not in a position to rebut the new facts suddenly produced;

(d) In the instant case however, there was no question of the Datuk Bandar being in any such position, as it was well within the knowledge of the Datuk Bandar that it had sat on the Land Exco meetings to determine the alienation of the subject land to Yayasan. This was not a fact that was within the knowledge of the Respondents and brought up suddenly to seek to derail the opposing parties' case. This was a fact brought up by the Court. It is in fact a matter which is contained in the **National Land Code**, and is to that extent a matter of law. The Datuk Bandar was not taken by surprise because it was, through its counsel,

able to respond immediately to agree that this was indeed the case; and

(e) Therefore, the line of case-law which prohibits the inclusion of new facts which effectively alter the 'goal-posts', is inapplicable. This is not such a case. Therefore the fact that it was not pleaded (as the Respondents were unaware of this fact) does not stop the Court from considering this matter of fact and law.

(f) As for the contention that the alienation of the Subject Land was a separate matter, we are not adjudicating on the alienation of the Subject Land from the State Authority to Yayasan. We are not voiding the alienation. We are examining the factual background to the Impugned Development Order to ascertain whether the Datuk Bandar exercised its discretion properly under **section 22(4) FT Act**. As this factual background discloses the various roles played by the Datuk Bandar in both alienation and the grant of the Impugned Development Order, it is not possible to artificially excise the alienation from the grant of planning permission for the purpose of ascertaining whether a conflict interest of situation and/or bias arose.

249. We now return to the diagram.

(2) Secondly, from "(2) A" of the Diagram:-

(i) The approval to alienate Lot 55118 Tapak Rumah Panjang Bukit Kiara, Mukim Kuala Lumpur (of which, the Subject Land is part) was granted by the Land Exco to Yayasan by way of a letter dated 8 January 2013 ("**Letter Granting Alienation**"). The Letter Granting Alienation advised that Lot 55118 was to be used for mixed development, subject to a premium being paid for the Subject Land ("the **Premium**").

(ii) The Datuk Bandar therefore sat as a member of Yayasan's Board of Trustees, the successful applicant for the Subject Land's alienation

(3) Thirdly, from "(3) JVA" of the Diagram:

(i) The JVA was entered between Yayasan and Memang Perkasa on 7 April 2014. The JVA addressed, amongst others, the terms and payment of the Premium.

(ii) The Datuk Bandar sat as a member of the Board of Trustees that owns the Subject Land, which was soon to be developed as a mixed development by way of applying for planning permission to the Datuk Bandar.

(iii) Yayasan then granted Memang Perkasa a Power of Attorney in the latter's favour, whereby Memang Perkasa was accorded the power to apply for the Impugned Development Order on Wilayah Persekutuan's behalf on 23 October 2014. (See clause 5.5, Appendix IV and Appendix V of the JVA.)

(iv) Therefore, the Datuk Bandar sat as a member of the Board of Trustees that gave the developer, Memang Perkasa, the power to apply to the Datuk Bandar for planning permission.

(4) Fourthly, from "(4) P.P" of the Diagram:-

(i) An application for planning permission was then made by Memang Perkasa's architects, SAM Planners, on 26 June 2015 pursuant to **section 22 of the FT Act**. As outlined by the 1st to 10th Respondents, the Power of Attorney earlier granted from Yayasan to Memang Perkasa in effect meant that the application for planning permission here was also an application by Yayasan.

(ii) Therefore, the Datuk Bandar sat as a member of the Board of Trustees of Yayasan for planning permission made to the Datuk Bandar, i.e., the

authority that has powers to grant planning permission

(5) Fifthly, from "(5) D.O" of the Diagram:-

(i) The Impugned Development Order was then approved by the Datuk Bandar on 13 July 2017 **pursuant to section 22 of the FT Act** with a plot ratio of 1:10;

(ii) Thus, the Datuk Bandar is the authority that approved the Impugned Development Order in favour of the applicant trust where it sits as one of eight Board of Trustee's members.

(iii) For completeness, the Datuk Bandar then issued a notice of a hearing pursuant to **rule 5 of the Planning Rules 1970** on 18 August 2016. The hearing of objections from affected parties was held on 29 August 2016.

250. <u>The factual matrix therefore discloses that the Datuk Bandar was a part of the entity that approved the Subject Land's alienation, a part of the Applicant for planning permission, i.e. Yayasan that had delegated its powers to Memang Perkasa by way of a power of attorney, as well as the entity that granted the Impugned Development Order.</u>

251. **The question that arises for consideration is whether this series of facts tantamount to a conflict of interest and/or bias, or not.**

252. This requires a consideration of case-law from various jurisdictions. Prior to that however it would be useful to consider how the courts below dealt with this issue. In this context we consider the history of these appeals as well as the submissions of the parties.

C. History of Appeals:
Decision of the High Court

253. The High Court dismissed the application for judicial review by the Respondents here. The learned High Court Judge found no basis for the contention that there was a conflict of interest. It premised its decision on the fact that while the Datuk Bandar was a member of Yayasan's Board of Trustees, the Impugned Development Order was not approved by the Datuk Bandar because the Datuk Bandar was not involved in the decision-making process to approve the planning permission.

254. It also relied on the fact that the Datuk Bandar himself (then, Tan Sri Haji Mohd Amin Nordin bin Abdul Aziz) did not personally sign the Impugned Development Order, did not sit in on any of the meetings in relation to the Impugned Development Order, nor was involved in the decision-making process to approve the planning

permission. As such it was concluded that: *'merely being a member out of 8 members of the Board of Trustee… does not prove any conflict of interest'*.

255. In other words, the High Court made a distinction between the institution known as Datuk Bandar and the person heading the institution, personally.

256. The decision to grant the Impugned Development Order was therefore found to be fair and in compliance with the **FT Act** and **the Planning Rules 1970**. The High Court relied on the principles enunciated in ***Edmundsbury***.

D. Decision of the Court of Appeal

257. The Court of Appeal reversed the decision of the High Court. With respect to a finding of a conflict of interest, in summary, the Court of Appeal concluded that considering the terms of the JVA as a whole, and the chronological records of the approval of the planning permission, the Datuk Bandar's discretion to grant the Impugned Development Order had been tainted.

258. The Court of Appeal largely premised its decision based on the clauses of the JVA, by holding that the clauses showed that Yayasan's commercial and financial interests were subject to the procurement of the Impugned Development Order.

259. The Court of Appeal rejected the case of ***Edmundsbury*** and ***Sevenoaks*** and declared that ***Steeples*** was the correct authority and reflected the proper approach to be adopted by the Court.

E. Submissions of the Parties

260. We turn next to the submissions of the parties on this issue.

F. Submissions for the Datuk Bandar

261. For the Datuk Bandar it was emphasised that firstly, the Subject Land does not belong to the Datuk Bandar but to Yayasan. This is unlike the position in the trilogy of cases relied upon namely ***Edmundsbury***, ***Steeples*** **and** ***Sevenoaks***, where the local councils were the owners of the subject land.

262. Secondly, counsel for the Datuk Bandar stressed that Tan Sri Haji Mohd Amin Nordin bin Abdul Aziz did not sit on the decision- making board that determined the grant of planning permission for the development. To that end, the point was made that Tan Sri Haji Mohd Amin Nordin bin Abdul Aziz distanced himself from the determination of the grant or rejection of planning permission under the **FT Act**, given his position as a member of the Board of Trustees of Yayasan. It was further emphasised that other

members of Yayasan's Board of Trustees do not hold any management post in the Datuk Bandar's administration.

263. Thirdly, it was submitted that the Court of Appeal erred by failing to consider the internal decision-making process prior to, and during, the issuance of the Impugned Development Order. The office-bearer of the Datuk Bandar did not sign the Impugned Development Order.

264. Counsel for the Datuk Bandar further submitted that the Datuk Bandar delegated his duty to grant the Impugned Development Order to a specific planning committee (namely, JKTPS and JKPS). Having delegated his duty to grant the Impugned Development Order to JKPS, the Datuk Bandar did not sit in on the JKPS meeting when the planning permission was granted. Counsel for the Datuk Bandar also submits that the decision maker to grant permission (i.e., Datuk Haji Mohd Najib, the Deputy Director General (Planning)) has no personal interest with the Impugned Development Order.

265. Fourthly, the Datuk Bandar is not a party to the JVA and Yayasan is said to be a separate and distinct legal entity from the Datuk Bandar. Therefore, his discretion cannot be affected, as he is not a party to the contract.

266. Fifthly, the Datuk Bandar is the only planning authority for the City of Kuala Lumpur. Therefore, all planning permission applications are bound to be decided by the

Datuk Bandar and it is inevitable for the Datuk Bandar to have either a direct or indirect interest in some of the developments in Kuala Lumpur. However, that does not preclude the Datuk Bandar and its officers, who are delegated to exercise the powers under the **FT Act,** from deliberating on the application for planning permission.

267. The other submissions in brief were that:-

(a) It was a policy of the Government at the material time, to construct 80,000 affordable houses in Kuala Lumpur;

(b) The Impugned Development Order is consistent with the category of land use stipulated in the document of title and the KL Local Plan gazetted on 30 October 2018; and

(c) Therefore, there could be no interference with, nor any appearance of a conflict of interest or bias.

G. Submissions for Yayasan

268. Counsel for Yayasan took pains to emphasise that Yayasan is an organisation that generates and manages funds in order to contribute and improve the living standards of underprivileged citizens in the Federal Territory.

269. Secondly, the Datuk Bandar could not be said to have a determining role on the Board, as it merely sits as one of eight members of Yayasan's Board of Trustees.

270. It was further emphasised that the Datuk Bandar did not hold any control and/or governing vote *vis-à-vis* decisions made by Yayasan's Board of Trustees.

H. Submissions for Memang Perkasa

271. Counsel for Memang Perkasa stressed that the Datuk Bandar does not receive financial gain nor incur financial commitments or liability in respect of the JVA. In particular, the Court of Appeal failed to consider or meaningfully explain how the existence of contractual terms between Yayasan and Memang Perkasa did, in any way, bind the Datuk Bandar so as to amount to a factor in the exercise of discretion by it. In this regard, counsel for Memang Perkasa submitted that it is the commitment on the part of the planning authority to the counterparty, that forms the fetter of discretion, as acknowledged in ***Steeples***.

272. It was further submitted that the JVA is a conditional contract as expressly acknowledged by both the Datuk Bandar and Yayasan. That meant that it was not the obligation of the Datuk Bandar to ensure that the Development Order be obtained.

273. Further, as borne out by clauses 2.2 and 2.3 of the JVA, it was submitted that the development as envisaged under the JVA, is to be carried out at the absolute discretion of Memang Perkasa, without interference from Yayasan. Therefore, the Datuk Bandar plays no role in the development itself.

274. Premised on the foregoing submissions, the Datuk Bandar, Yayasan and Memang Perkasa are in unison in their conclusion that the correct test to be applied on deciding the issue of conflict of interest is the dicta of Stocker J in ***Edmundsbury***, i.e., whether the planning authority had acted in such a way prior to the decision that it could not have exercised a proper discretion.

275. To that end it was submitted that the Court of Appeal erred by placing reliance on ***Steeples*** as opposed to ***Edmundsbury***. In ***Steeples***, it was submitted, the local authority contractually bound itself to the counterparty to the joint venture agreement, but in the instant appeals, neither the office of the Datuk Bandar nor the head of the institution or signatory to the institution, bound themselves to any provisions within the JVA so as to fetter their discretion. The three Appellants then reasoned that because the High Court had made no findings as to there being a conflict of interest in the decision to grant the Impugned Development Order, it was not open to an appellate court to subsequently intervene in these findings.

I. The Submissions for the 1st to 10th Respondents

276. The 1st to 10th Respondents submit that the High Court erred in deciding that there was no conflict of interest. They further submitted that the Court of Appeal, in reversing the High Court, adopted the correct approach and therefore reached the correct decision on this issue.

277. We have taken the liberty to distil the submissions advanced by the Respondents as follows:-

i. The High Court failed to appreciate that the conflict of interest is institutional conflict, rather than conflict in a personal capacity on the part of the head of the institution. As such, the Datuk Bandar's delegation of duty does not cure the institutional conflict.

ii. The conflict of interest lies also in the fact that the Datuk Bandar is a trustee for Yayasan as well as the approving authority of the Impugned Development Order. This means that the Datuk Bandar wears two hats:-

(a) One as a trustee of Yayasan, owing a fiduciary duty to it; and

(b) The other as the approving authority, which determines the success or failure of the application for planning permission on the part of Memang Perkasa which is an agent for Yayasan, as the latter gave Memang Perkasa a power of attorney;

iii. Accordingly, the 1st to 10th Respondents conclude that Yayasan was essentially asking one of its own board members, the Datuk Bandar, to grant itself planning permission.

iv. As for the JVA between Yayasan and Memang Perkasa, the 1st to 10th Respondents submit that the JVA must be interpreted as a whole, and that a cumulative reading of the JVA would show that Yayasan had contributed significantly to ensure the Impugned Development Order was secured and approved, whereas all Memang Perkasa was required to do was furnish all financial commitments as well as make the application for development on Yayasan's behalf. This commitment in writing was effected even before the application for the Impugned Development Order was submitted, amongst other facts.

v. As such, it was a 'done deal'.

vi. Therefore, the 1st to 10th Respondents agree with the Court of Appeal that ***Steeples*** ought to be preferred

over ***Edmundsbury*** when determining the existence of a conflict of interest. They submit that ***Steeples*** may be distinguished from ***Edmundsbury*** by reason of the fact that there was a concession made by the applicant in ***Edmundsbury*** that the decision was fair. Additionally, they point out that there was a letter by Sainsbury's solicitors in ***Edmundsbury*** to the planning committee that any action on the part of the council was without prejudice to its statutory function as a local authority.

vii. The 1st to 10th Respondents additionally submit that Leave Question No. 8 was framed by the Appellants on the basis that actual bias must be shown.

J. Our Analysis on Conflict of Interest and Bias: The Relevant Test

278. In order to comprehend the nub of this issue it is necessary to consider and analyse the cases of ***Edmundsbury, Sevenoaks and Steeples.***

279. The facts of ***Edmundsbury*** are briefly as follows:-

(a) This is a case from the United Kingdom. A borough council, namely the ***Edmundsbury*** Borough Council (***Edmundsbury***), was the owner of the subject land. It was also the local planning authority. The borough

council therefore wore two ‘hats’, one as landowner and the second as the planning authority.

(b) ***Edmundsbury*** therefore made an application to itself for the granting of planning permission in relation to the erection of a supermarket on a site owned by it. The council subsequently decided not to proceed with its application but instead entered into an agreement with a company, Sainsbury’s, for the sale of a long lease of the council's site, subject to Sainsbury’s obtaining the necessary planning permission for development of the site as a supermarket.

(c) Before any decision was made on Sainsbury’s application, six further applications were received from developers for the erection of supermarkets in the area. Wide coverage of the issues raised by the applications was given by local press and all members of the council were informed of the council’s conditional agreement with Sainsbury’s.

280. The council then refused all other applications, and planning permission was granted in favour of Sainsbury. One of the six unsuccessful applicants applied for judicial review.

281. Before the High Court, the applicant conceded that there was no bias and the council’s decision to grant the planning permission was in actual fact, fair at 250: -

> *"The issue can be further refined, for counsel for the applicants has expressly rejected any actual bias on the part of the planning committee or the officers, and concedes that, whatever may have been the appearances, the committee, in fact, acted properly and without bias. His contentions, as reflected in the wording in which this ground is couched, are that, having regard to the history of the matter and the corporate interest of the council as landlord, the other applicants or a member of the public might, contrary to the admitted fact, consider that they had... 'not had a fair deal' or that the reasonable man might feel that the matter had been a foregone conclusion and that justice had not been seen to be done."*

282. The High Court also noted that the council was conscious of possible implications of certain clauses on the discharge of their statutory functions, and as a result from a telephone call, Sainsbury's solicitors wrote a letter expressing that 'any action on your part as Landlord is without prejudice to your statutory function as a local authority' (see, at 240).

283. As such, Stocker J formulated the test in view of the above concession and letter, at 256: -

> *"... there is no requirement,* ***once the decision is found (as I should have found had this been an issue) or conceded to be fair, to pose any further inquiry whether by some further test, whether this be by reference to the reasonable man or a reasonable likelihood viewed***

> ***through some other eyes, such as those of the judge, the decision may be impugned as unlawful or void.***
>
> *If I am wrong in this decision and therefore it becomes my duty to decide this issue by reference to the reasonable man test, then I should,* ***in this case, hold that the reasonable man, knowing all the facts, would reach the conclusion that the decision was a fair one****...*
>
> *The existence of the contract itself was known to the members of the committee. It seems to me, however, that the reasonable man must also be deemed to know the letter from Sainsburys' solicitors of 18 April 1984, acknowledging the fact that any action on the part of the council was without prejudice to its statutory functions as a local authority.*
>
> *... It follows that, in my judgment, the correct test is to pose the question: did the planning committee in reaching its decision to grant planning permission to Sainsburys take into account all proper considerations and exclude all improper ones and reach its decision fairly?"*

(Emphasis ours)

284. It is on the foregoing facts that the Court in ***Edmundsbury*** concluded that the grant of planning permission was valid and good in law, free from any allegation of bias. It is noteworthy that in the two-pronged argument and approach adopted by the High Court Judge, there were two crucial admissions or concessions made by the applicant for judicial review. In our case that would mean the Respondents. In that case:-

(a) the applicant to the judicial review application expressly conceded that "....*the committee, in fact, acted properly and without bias.".* In other words, there was no allegation that the approving authority for planning permission had acted in a situation where a conflict of interest and/or bias arose. On the contrary, the applicant accepted that the borough council, i.e. ***Edmundsbury***, had acted with full propriety and within the purview of its powers and duties. This concession or admission of a lack of bias or a conflict of interest, in itself distinguishes the facts from the facts of the instant appeals. In the instant appeals however, clear allegations of a conflict and/or bias are levelled at the local authority, necessitating a consideration of this issue, both factually and legally.

Put another way, the core of the issue arising for consideration here, was conceded as never having occurred in ***Edmundsbury***. **The fairness of the planning committee's decision-making was not an issue before the court.** However, it was a significant deciding factor and an issue before the court in ***Edmundsbury.***

(b) Secondly, the Judge in that case went on to consider the proper test to be applied in such a factual situation and concluded that the proper test was

whether "....***the reasonable man, knowing all the facts, would reach the conclusion that the decision was a fair one****...".* Again however, a crucial fact that was present in ***Edmundsbury*** which is absent in the present appeals is that while the members of the borough council in ***Edmundsbury*** were aware of the existence of the lease agreement with Sainsbury's, they were also aware of the letter from Sainsbury's acknowledging that any action on the part of the borough council was without prejudice to the carrying out of its statutory functions as a local authority.

285. In other words, Sainsbury's accepted expressly that any determination by the borough council had to be undertaken in conformity with its duties as a local council. Their hands were in no way tied by the borough council's entry into the lease agreement with Sainsbury's. The council's exercise of discretion was therefore in no way fettered by the Sainsbury lease agreement.

286. In our case, however, the situation is somewhat different by reason of the following additional facts:-

(i) In ***Edmundsbury*** the lease agreement between the borough council and Sainsbury's was conditional upon the grant of planning permission by the ***Edmundsbury*** borough council. With the letter from Sainsbury's as explained above, the local council

was able to exercise its discretion independently notwithstanding the agreement.

(ii) In the instant appeal, the JVA is not a stringent conditional contract, where the contract becomes unconditional upon the grant of the development order. Instead, the conditions precedent in the JVA relate to an extension of time for the payment of premium by Yayasan through Memang Perkasa to the Land Office. These 'conditions' may be waived by Memang Perkasa at its behest. As such the contract effectively becomes unconditional when Memang Perkasa so decides. The net effect of this is that the parties are effectively bound by the JVA. In that context it is unlike ***Edmundsbury*** and condition precedents in other conditional contracts which require the parties to fulfil the condition precedent before the contract comes into being;

(iii) Additionally, in the event the Development Order is not granted and the JVA terminated, Yayasan is penalised by having to refund the monies already paid to the land office by way of premium. In other words, Yayasan would have to pay out of its own pocket, the sum of in excess of RM60 million to Memang Perkasa, if the development order is not procured. That term places a tremendous burden on Yayasan, to the extent that it 'forces' Yayasan to ensure that it incurs no such penalty. The Datuk

Bandar being a part of Yayasan was aware of the huge penalty that could be placed on Yayasan in the event a Development Order is refused.

287. However, as a member of the Board of Trustees of Yayasan, the Datuk Bandar owed a fiduciary duty to Yayasan. It was on the other hand, as the institution responsible for regulation of planning and the grant of planning permission for developments, solely responsible for the approval of the impugned Development Order.

288. The net result is that the Datuk Bandar was placed in a position whereby:-

(a) As an entity owing a fiduciary duty to Yayasan, it was bound to ensure that Yayasan would not be penalised for failing to procure the Development Order;

(b) On the other hand, it owed a duty to the public at large to ensure that any development order issued was in accordance with the **FT Act**, the Structure Plan and the interests of the public who are entitled to expect lawfully regulated planning permission to be issued by the Datuk Bandar.

(c) That is what gave rise to the allegation of a position of conflict and/or bias vis a vis the Datuk Bandar. In ***Edmundsbury***, there was no question of the local

council having to make any form of penalty payment in the event the development order was not procured. This is evident both from the concession by counsel for the applicant, as well as the letter from Sainsbury's solicitors stating expressly that the grant of planning permission was without prejudice to the borough council's lease contract with Sainsbury's.

289. In view of the disparate and distinguishing factual matrix of ***Edmundsbury*** it is not directly applicable to the facts in the instant appeals.

K. The Test In *Edmundsbury*

290. Taking directly from the decision of the High Court the test in ***Edmundsbury*** is:

> "…..*the correct test is to pose the question: did the planning committee in reaching its decision to grant planning permission to Sainsbury's take into account all proper considerations and exclude all improper ones and reach its decision fairly?"*

291. Applying this test to the present factual matrix the answer would be as follows:-

(i) It is not possible to say with any degree of certainty whether all proper considerations were taken into

account and that improper considerations were excluded, because as stated earlier in the judgement, there is a dearth of information or reasons proffered for the issuance of the Development Order by the Datuk Bandar. This aspect of the case was dealt with in considering the reasons given by the Datuk Bandar in its affidavits. Given the paucity of information, it is not possible for this Court to make any assessment of the basis for the Datuk Bandar's decision, either from the documents or affidavits. As it is not possible to make that assessment, it follows that it is not tenable to conclude that the Datuk Bandar did take all relevant matters into consideration and excluded all improper ones;

(ii) Given the factual matrix of the present appeals, and the fact that the conflict of interest and/or bias is alleged against the Datuk Bandar as an institution rather than personally, it is difficult to state that the Datuk Bandar was in a position to exercise its discretion independently and fully, given its position as:-

(a) a member of the Land Exco deciding on the alienation of the subject land to Yayasan. In the course of making the decision to alienate, the land use of the subject land was altered from green area and open space for public use in the Structure Plan, to that of mixed development.

There is no information nor disclosure from the Datuk Bandar as to how or why such a conversion was made;

(b) As a member of the Board of Trustees of Yayasan, the Datuk Bandar was privy to the JVA entered into between Yayasan and Memang Perkasa. The terms and conditions were fully known to it, including the term that the failure to obtain a Development Order would result in a serious penalty against Yayasan. This knowledge which is attributable to the Datuk Bandar as an institution, meant that in the course of determining the application for planning permission the Datuk Bandar was in a position of conflict of interest or bias. The fact that the person holding the position as the head of the Datuk Bandar, excluded himself from the meeting which decided the issue of the Development Order does not obviate the conflict of interest or bias because the challenge here relates to conflict of interest and/or bias against the Datuk Bandar as an institution. It is not a case of personal bias or conflict of interest on the part of the person who heads the institution;

(c) It is important that bias or conflict of interest is considered in its institutional sense, rather than a personal sense, otherwise it would be open to

the Datuk Bandar to enter into various contracts and exclude the head or its representative from the final meeting where planning permission is either given or rejected and maintain that it is not in a position of conflict or bias. That would circumvent the safeguard in the **FT Act** requiring the Datuk Bandar to exercise its discretion independently, fairly and in accordance with the law;and

(d) As a member of the Board of Trustees of Yayasan, the Datuk Bandar owed a fiduciary duty to safeguard the interests of Yayasan. Such fiduciary duty was in conflict with the Datuk Bandar's duty to independently approve the proposed development. This too, gives rise to a prima facie case of a conflict of interest and/or bias. In view of the absence of any explanation or information given by the Datuk Bandar, this prima facie case was not rebutted.

292. As such, even applying the test in ***Edmundsbury***, it follows that the Datuk Bandar, being so intricately involved in various stages of the process leading up to the application for planning permission, did place itself in a position of conflict, whereby its duty to act independently and fairly in deciding whether or not to issue a Development Order, conflicted with its fiduciary duty to Yayasan. Its earlier decision in 2013, as a member of the

Land Exco to approve the alienation and change the land use, tainted its exercise of discretion to grant the Development Order for the proposed development.

L. *Sevenoaks*

293. Allied to the decision of ***Edmundsbury*** is the earlier High Court decision of ***Sevenoaks***, which was relied upon by the Stocker J in ***Edmundsbury***.

294. The facts of ***Sevenoaks*** are briefly as follows:-

(1) A district council owned a site which was designated in the town plan for redevelopment. In 1980, after calling for tenders, the council entered into discussions with a development company that wished to build a shopping centre, which was later changed to a supermarket, theatre and office complex. The council's planning sub-committee then recommended that the same offer be accepted. The council approved the recommendation and planning permission was approved in 1982. The council and the developers then entered into a formal agreement for the development and eventual lease of the land.

(2) It was contended by the applicant that the planning permission ought to be void on the grounds that the council had improperly fettered itself, or the

discretion of the planning committee to approve or reject planning permission.

(3) Further or alternatively, it was contended that the council gave the appearance to reasonable people that it regarded itself or the planning committee as being committed to granting planning permission. In other words, that there was no independent exercise of discretion in determining whether planning permission should or should not be granted, on the merits of the application.

295. The High Court in ***Sevenoaks*** found that the formal agreement between parties was not made until some three weeks **after the decision to grant planning permission was made** by the planning committee.

296. The judge further found that the council was in no way contractually bound to the developer. He noted that a supermarket chain within the shopping centre, sought assurance that planning permission for a supermarket at the site would be granted. However, the supermarket chain was specifically told by the council's officers that no assurance could be given as to the council or planning committee's decision in relation to whether or not planning permission would be granted.

297. This is to be contrasted with the present appeals where the JVA was executed some three years **prior to the**

grant of the Development Order. This meant that Yayasan, to the knowledge and participation of the Datuk Bandar, committed itself to the construction of the mixed development project some three years prior to the grant of planning permission.

298. Therefore, the Datuk Bandar had express knowledge of the development that was envisaged, the cost of the same, and the obligation of Yayasan on default. As the Datuk Bandar, it was, or ought to have been, cognisant of its duties under the **FT Act in section 10** relating to the alteration of the Structure Plan. It ought to have recommended that an alteration or revision be made to the KL Structure Plan in relation to the conversion of land use of the subject land. This the Datuk Bandar failed to do.

M. The Legal Test in *Sevenoaks*

299. In ***Sevenoaks***, the judge found that the appropriate test for bias in making an administrative decision is whether the council is able to exercise proper discretion when granting the planning permission. **He further held that it was unnecessary for the court to apply the 'reasonable man' test to examine whether there was a conflict of interest**:-

> *"... Of course, the council must act honestly and fairly, but it is not uncommon for a local authority to be obliged to make a*

decision relating to land or other property in which it has an interest. In such a situation, the application of the rule designed to ensure that a judicial officer does not appear to be biased would, in my view, often produce an administrative impasse.

In my judgment, the correct test to be applied in the present case is for the court to pose to itself the question: had the district council before 5 January 1982 acted in such a way that it is clear that, when the committee came to consider Fraser Wood's application for planning permission, it could not exercise proper discretion? Of course, in asking that question, it may appear that the answer is Yes, even though an individual councillor says quite genuinely and honestly that he personally was able to approach the decision without bias. But, if the answer to the question is No, it is in my judgment neither necessary nor desirable for the court to go further and consider what the opinion of a reasonable man would be. In so far as this formulation differs from that adopted by Webster J in Steeples v Derbyshire CC, I respectfully disagree with him."

(Emphasis ours)

300. In these circumstances, and applying the test in ***Sevenoaks,*** can it be said that when the Datuk Bandar exercised its discretion some three years later under **section 22 FT Act**, was it able to do so independently and fairly?

301. The answer would be in the negative, as such exercise of discretion by the Datuk Bandar was:-

(1) Improperly fettered by its role in Yayasan;

(2) Improperly fettered by its earlier decision to alienate the subject land in a manner inconsistent with the KL Structure Plan; and

(3) In contravention of the Structure Plan.

302. The Appellants contend that the foregoing test is the *correct test to be applied and that the Court of Appeal* erred in departing from the test adopted in ***Sevenoaks*** and applying the test enunciated in ***Steeples***. Before analysing this contention, it would be useful to comprehend the facts and the law applied in ***Steeples***.

N. *Steeples*

303. The facts of ***Steeples*** are briefly as follows:-

(a) The local council owned an area which they proposed to develop as a leisure centre. The local council entered into an agreement with a private company for the development of the said area. **The agreement provided that the council would take all reasonable steps to obtain the requisite planning permission. The agreement also provided that if the council failed, *inter alia*, to use their best endeavours to**

obtain such permission or consents, they would pay the company £116,875 liquidated damages.

(b) The planning permission in question was ultimately approved and challenged by a local resident on the grounds of bias.

304. The High Court held that the council's decision to grant planning permission was in breach of the rules of natural justice. Webster J held that the procedures under the relevant regulations meant the planning authority at the time ought to have been **'particularly scrupulous to ensure that its decision is seen to be fair, particularly when it is at all controversial'**.

305. Further, the High Court opined that **the council could have avoided committing themselves to the developers in any way until after the planning decision had been properly made, or if the council were to make a contract with the developers, they could have ensured that the contract was subject to planning permission and they had no obligation of any sort in connection with the obtainment of planning permission, and that they would be under no liability of any sort should planning permission not be obtained.**

306. The English High Court set out several principles to determine the presence of bias and a conflict of interest.

Having considered the same, the judge put forward the applicable test in the following terms, namely, that if a reasonable man would infer that the terms of the contract in question were likely to influence the council's decision, a council's decision to grant planning permission was void or voidable.

> *"In conclusion, therefore, and applying the tests to which I have just referred, in my judgment it is probable that a reasonable man, not having been present at the meeting when the decision was made, and not knowing of my conclusion as to the actual fairness of it, but knowing of the existence and of all the terms of the contract (but without regard to the question whether they would in law have been enforceable), would think that there was a real likelihood that those provisions in the contract which require the county council, and for that matter the joint venture committee, to use their best endeavours to obtain planning permission, and that the contract as a whole in the light of its provisions to which I have referred, had had a material and significant effect on the planning committee's decision to grant the permission; and accordingly, on that ground, I hold that that decision was either voidable or void."*

307. Thus, the applicable legal test enunciated in ***Steeples*** (see, at 494 onwards) to determine bias and the presence of conflicts of interests may be summarised as follows:-

(a) Whether it is probable that a reasonable man not having been present at the meeting when the decision was made, and not knowing of the conclusion as to

the actual fairness of it but knowing of the existence and of all the terms of the contract, would think that there was a real likelihood that those provisions in the contract which required the administrative authority to use their best endeavours to obtain planning permission, had a material and significant effect on the planning committee's decision to grant the permission.

O. Applying *Steeples* to the Facts of the Instant Appeals

308. When the legal test above is applied to the facts of the instant appeals it follows that conflict of interest and bias are made out. This is because:-

(i) A reasonable person who was not present at the Datuk Bandar's meeting approving the issuance of the Development Order, and not knowing of the actual fairness of the conclusion reached, but who was aware of the terms and conditions of the JVA between Yayasan and Memang Perkasa is very likely to conclude that the contractual provisions there certainly required the Datuk Bandar, institutionally, to utilise its best endeavours to grant planning permission for the development. The requirement that Yayasan refund the premiums paid in the event of a default would, in the eyes of a reasonable man, amount to a strong factor requiring approval to be

given by the Datuk Bandar, given its inextricable link institutionally with the Yayasan;

(ii) In the instant appeals we have the following additional material facts:-

(a) The manner in which the alienation and the rezoning of the land use from 'open space for public use' to 'mixed development' was effected by the Datuk Bandar in favour of Yayasan;and

(b) The presence of the power of attorney here in **clause 5.5** of the **JVA, and found in Appendix IV (Limited Power of Attorney) and Appendix V (Full Power of Attorney) of the JVA**. A power of attorney is a 'formal instrument by which one person empowers another to represent him, or act in his stead for certain purposes'[6]. We note that the power of attorney expressed in Appendix V of the JVA is ***'given for valuable consideration and shall be irrevocable'*** and Yayasan, as the donor, makes the declaration that ***'all and every receipt, deed, matter and thing which shall be given, made, executed or done'*** by Memang Perkasa, as the attorney, to be ***'good, valid and effectual... as if the same***

[6] Jowitt, Dictionary of English Law (3rd edn, 2010); see also, Bowstead & Reynolds (20th edn) at 2-039

has been signed, sealed, delivered, given or made or done' by Yayasan itself.

309. Authority given by a donor to an attorney 'can be irrevocable, but this is only where the notion of agency is employed as a legal device for a different purpose from that of a normal agency, to confer a security or other interest on the "agent". In such a case it is intended that the agent use the authority not for the benefit of his principal but for his own benefit, to achieve the objects of the arrangement'. Thus, 'authority is irrevocable where it accompanies a security or proprietary interest and is part of it or a means of achieving it'.[7]

310. This means that Memang Perkasa was acting as an agent of Yayasan, and Yayasan was Memang Perkasa's principal. The act of Memang Perkasa applying to the Datuk Bandar, via the Power of Attorney, was as ***'good, valid and effectual... as if the same had been... done by' Yayasan***.

311. This agency, expressed to be irrevocable, meant that Yayasan, with the Datuk Bandar sitting as one of its board members, gave Memang Perkasa the authority to achieve the objective of the JVA. It takes little to conclude that the objective of the JVA was the obtainment of planning

[7] Bowstead & Reynolds (20th edn) at 10-007. See also, section 6(1) of the Powers of Attorney Act 1949: 'if a power of attorney given for valuable consideration is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser (a) the power shall not be revoked at any time… (b) any act done at any time by the donee of the power, in pursuance of the power, shall be valid…'

permission and subsequent development on the subject land.

312. However, the achievement of the JVA's objective could not be realised without fettering the Datuk Bandar's independent exercise of discretion in **section 22 FT Act**, as the regulator and planning authority of the Federal Territory of Kuala Lumpur. It is therefore difficult to comprehend how the Datuk Bandar could exercise its fiduciary duties as a trustee on the board of Yayasan in relation to the JVA, while independently carrying out its duties as a regulator and approving authority.

313. Therefore, applying the test in ***Steeples*** namely that in the eyes of a reasonable person who was not present at the meeting and did not know the actual fairness of the decision reached, the facts here taken collectively warrant the conclusion that there was a real likelihood that the provisions in the JVA which required, *inter alia*, Yayasan to use its best endeavours to obtain planning permission, did have a material and significant effect on the Datuk Bandar as an institution, to grant the planning permission. This means that the exercise of discretion was not independent, fair or in accordance with the law.

P. The Difference between the Approaches taken in *Edmundsbury* and *Sevenoaks* versus *Steeples* – Which is the Preferable line of Authority to be Followed?

314. The fundamental difference between the two approaches by the courts in ***Edmundsbury*** and ***Steeples*** is that the former, ***i.e. Edmundsbury***, leaves the question of the existence of a conflict of interest situation or bias to be determined by the adjudicating authority, here the Courts, the latter, ***i.e. Steeples***, leaves the issue of a conflict of interest or bias to be determined by a reviewing court through the eyes of a fair-minded member of the public.

315. Put another way, the test in ***Edmundsbury*** is concerned with the degree of possibility of the existence of bias which is to be determined solely by the court. It requires the court to ascertain whether on the facts there was actual bias. As such the test is essentially subjective and determined solely by the Court.

316. By contrast, the test in ***Steeples,*** requires the adjudicator or the court to 'step back' as it were, and assess, on an objective basis, whether the notional fair-minded member of the public could reasonably entertain suspicion or an apprehension of bias, even if the court is satisfied that there was no bias in fact.

317. Having given careful consideration to the two lines of authority propounded, we are of the view that the approach taken in ***Steeples*** is preferable to that stated in ***Edmundsbury*** and ***Sevenoaks*** for the following reasons:-

(i) Premised on the facts, the core issue of the existence of bias or a conflict of interest was never in issue in *Edmundsbury* or *Sevenoaks*, because those allegations were never made. On the contrary it was conceded and accepted that the local authorities in those cases had acted fairly and independently. It is otherwise in the present case, where allegations of a conflict of interest and/or bias are expressly levelled against the Datuk Bandar;

(ii) As stated earlier the distinction between the two lines of cases turns on an actual finding of bias on the one hand as opposed to a reasonable apprehension or suspicion of bias. This means that the Court does not make an actual finding as to whether the local authority was definitely or tangibly affected by bias. Such an approach is to be preferred because it is clear that the court is making no adverse finding on whether or not the local authority's decision was actually tainted by bias. Making findings of fact that local authorities are actually affected by bias in the course of their decision making, particularly in relation to planning permissions, gives rise to public unease. In any

event in the instant appeals we have painstakingly gone through both sets of tests and concluded that whichever is applied, a finding of a conflict of interest and/or bias is made out, as concluded by the Court of Appeal;

(iii) The use of the reasonable apprehension of bias as suggested in *Steeples* is preferable to the rationale of a 'real likelihood' or 'real danger' of bias as espoused in effect by *Sevenoaks* and *Edmundsbury* because the former puts forward an objective test, while the latter requires a subjective test. We say so because the test of whether a fair-minded member of the public would reasonably conclude that there was a suspicion of bias requires the court to stand in the shoes of that member of the public and make an assessment based on the facts extraneous to the actual decision-making process that took place in reality. However, with the real danger of bias test, the Court itself is required to assess on such facts as are available whether the local authority in making its decision was afflicted, as a matter of fact, by actual bias. Although it may require a lower standard of proof, namely a sufficient degree of possibility, the requirement of a finding of actual bias remains a subjective test; and

(iv) As we have stated at the outset the purpose and object of the **FT Act** is to regulate planning and to

afford the public a degree of participation in determining the way in which planning will evolve over a specific period of time. The element of public participation therefore comprises an essential component of the **FT Act**. The adoption of the objective test of a reasonable apprehension or reasonable suspicion of bias on the part of the fair-minded member of the public is consonant with the ethos, purpose and object of the Act.(see **Re Shankar Alan s/o Annat Kulkarni [2006] SGH 194**).

Q. The Reasonable Suspicion of a Conflict of Interest and/or Bias

318. The adoption of the reasonable apprehension or suspicion of bias test brings with it the question: Who is a fair-minded member of the public? And what knowledge should be imputed to the reasonable person?

319. This is answered fully in *Steeples* and the reasoning there is above reproach. Accordingly, it is adopted.

320. In deciding whether the decision of the local authority is seen to be fair, the Court should consider **looking through the eyes of a reasonable person hearing of the relevant matters – *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577 ('Metropolitan Properties')***, per Lord Denning MR, at p. 599E and per Danckwerts L.J., at p. 602D;

R. Knowledge and the Fair Minded Member of the Public

321. In response to the second question namely what is the knowledge to be imputed to this fair minded member of the public, the answer is that he is taken to know of all matters whether in fact known or available to the public or not, which are in evidence at the trial.

322. The authority for this proposition is to be found in *Metropolitan Properties* per Lord Danckwerts LJ where it was held:-

> *"....a person subsequently" – subsequently to the making of the decision in question – "hearing of these matters might reasonably feel doubts,";*

And per Webster J in *Steeples*:

> *"..but I also rely on the principle and common sense of the matter which is:* ***that the body in question, before it makes its decision, must ensure that after it has made that decision it will be seen to the public at large, in the person of a hypothetical reasonable member of the public, to have acted fairly; and for that purpose it must be taken to assume that all facts, whether confidential or not, are or will become available to the public****, if only to members or employees of the authority in question in their capacity as members of the public****; and that it would be impossible to cast upon the court the burden of deciding which of the*

actual facts are and which are not to be deemed to be known to the public or its hypothetical reasonable member."

(Emphasis ours)

323. In the context of the present appeals therefore when applying the test, the entire factual matrix of the Datuk Bandar's involvement should be assumed be known to the public for the purposes of applying the test to ascertain whether it was in a position of a conflict of interest or bias. Therefore the fact that the Datuk Bandar sat on the Land Exco in relation to alienation, a query raised by the Court based on the provisions of the **National Land Code**, must be taken to be available for the purpose of applying the test to ascertain bias. To that end the content of pleadings cannot be utilised to exclude what are important and relevant matters of fact and law.

324. It must be said in this context that we have kept in mind that the test to be applied in, *inter alia*, judicial proceedings in relation to bias in this jurisdiction is the 'real danger of bias' test as stated in the House of Lords case of ***Regina v Gough [1993] AC 646***.(see ***Public Prosecutor v Tengku Adnan bin Tengku Mansor [2020] 5 MLJ 220 at paragraphs 11-17; Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara [2001] 4 CLJ 701; Sungai Gelugor*** (although there are cases that have relied on the 'reasonable suspicion' test). It might well be

asked whether there are differing standards for judicial proceedings as compared to administrative decisions.

325. In response, our conclusion on this point determining that the 'reasonable suspicion' test in *Steeples* is to be preferred, is premised on our analysis of the issue above. It is not necessary for the present purposes to express a final view on whether a similar or different standard should apply to administrative as compared to judicial decisions.

S. Applying the Foregoing Test - What Amounts to a Fetter upon the Discretion in Question?

326. This is a question that turns heavily on the facts of the particular case in issue. Anything constitutes a fetter for this purpose at the very least, if a reasonable man would regard it as being likely to have a material and significant effect one way or another on the outcome of the decision in question.

T. Institutional versus Personal Conflict of Interest and/or Bias

327. Another point of importance that requires addressing at this juncture are the submissions relating to what may collectively be termed the difference between personal and institutional conflicts of interest.

328. The Appellants have moved us to consider there is no conflict of interest by reason that the office-bearer of the Datuk Bandar did not sign off the Impugned Development Order, that the Datuk Bandar delegated his duty to grant the Impugned Development order to JKTPS and JKPS, i.e., specific planning committees and did not sit in on the JKPS meetings when planning permission was granted, and that the decision maker (i.e., Datuk Haji Mohd Najib, the Deputy Director General (Planning)) has no personal interest with the Impugned Development Order.

329. Counsel for the Datuk Bandar also advanced the contention that the Datuk Bandar is the only planning authority for the City of Kuala Lumpur and therefore all planning permission applications are bound to be decided by DBKL and it is inevitable for the DBKL to have either a direct or indirect interest in some of the development in Kuala Lumpur.

330. We commence by agreeing with the 1st to 10th Respondents submission that what we are dealing with here is institutional conflict, as it is the institution of the Datuk Bandar that approves any application of planning permission. The delegation and sitting out of meetings and the act of the Datuk Bandar himself not signing the Impugned Development Order does not cure institutional conflict.

331. The conclusive answer to this issue however is to be found in **section 5 of the Federal Capital Act 1960 (Act 190)** which reads as follows:-

> *"Section 5. Commissioner to be a body corporate*
> *(1) The Commissioner shall be for all purposes a corporation sole under the name of "Datuk Bandar Kuala Lumpur" or, in English, "the Commissioner of the City of Kuala Lumpur."*

332. This statutory provision makes it clear that the Datuk Bandar as a corporation sole, is an institution. In carrying out its statutory duties, it functions at all times as an institution. The person for the time being holding the office of Commissioner or any person delegated to carry out those functions is not Datuk Bandar the person. Therefore, in construing and applying the law, regard must be had to the Datuk Bandar as the corporation sole and should not be conflated with the person for the time being holding the office of the head of the corporation.

333. In the context of the instant appeals therefore the exercise of discretion under **section 22(4)** is undertaken by the corporation sole and not the person holding the office of the head of the corporation sole or any other person delegated to carry out such duties. It must therefore be institutional conflict of interest that is the subject matter of focus and not personal conflict.

U. Conclusion

334. In conclusion, by way of answer to **Leave Question No. 8**, we decline the tests found in ***Edmundsbury*** and ***Sevenoaks*** but prefer the principles enunciated in ***Steeples*** and to that end uphold the decision of the Court of Appeal which, with respect, correctly applied the case.

335. As we have concluded that there was a conflict of interest and/or bias afflicting the decision of the Datuk Bandar, which is a separate and independent ground of challenge, it follows that on this ground alone the Impugned Development Order is void and ought to be set aside.

X. *LOCUS STANDI*

336. The commonality of the Appellants' grievances in these appeals centre on the scope and ambit of locus standi under Malaysian law. This is a significant issue because if it is determined in the Appellants' favour it means that all the appeals ought to be allowed as the judicial review proceedings fail *in limine*. And conversely, allows the 1st to 10th Respondents to proceed on to the merits of the substantive claim, should they succeed in establishing standing to sue.

337. The issue is reflected in the first four questions of law, which challenge and impugn the 1st to 10th Respondents'

standing to even bring these judicial review proceedings before a court of law:-

> "1. Whether ***Order 53 rule 2 (4) of the Rules of Court*** is confined to the determination of threshold locus standi or whether it extends to confer substantive locus standi upon an applicant in an application for judicial review having regard to the decisions of the Court of Appeal in ***QSR Brands Bhd v Suruhanjaya Sekuriti [2006] 3 MLJ 164*** and of the Federal Court in ***Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177*** and in ***Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi [2014] 3 MLJ 145***?"
>
> "2. Whether an applicant seeking judicial review of a development order is required to come within the terms of ***Rule 5(3) of the Planning (Development) Rules 1970*** before he or she may be granted relief having regard to the decision in ***District Council Province Wellesley v Yegappan [1966] 2 MLJ 177***?"
>
> "3. Whether the requirement of locus standi in judicial review proceedings set out in ***Order 53 Rule 2(4) of the Rules of Court 2012*** may override the provisions of ***Rule 5(3) of the Planning (Development) Rules 1970***, the latter being written law, having regard to the decision of the Federal Court in ***Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai v Muziadi bin Mukhtar [2020] 1 MLJ 141***?"
>
> "4. In law whether a management corporation (1st to 4th Respondent) or joint management body (5th Respondent) established pursuant to Section ***39 of the Strata Titles Act 1985*** and ***Section 17 of Strata Management Act 2013*** has:-

4.4 the necessary power to initiate judicial review proceeding to challenge a planning permission granted on a neighbouring land?

4.5 the locus standi to initiate a judicial review proceeding on matters which does not concern the common property of the management corporation or joint management body?

4.6 the power to institute a representative action on behalf of all the proprietors on matters which are not relevant to the common property?"

(Emphasis ours)

A. Finding of the Courts Below on *Locus Standi* in Brief

338. The High Court accepted the submission of the Appellants here that in order for the **1st to 10th Respondents** to challenge the Impugned Development Order, they must bring themselves within the ambit of **Rule 5(3) of the Planning Rules 1970** which confers the right to object to registered owner of lands adjoining the subject land.

339. On the issue of the status of the 1st to 4th Respondents as management corporations of strata buildings and the 5th Respondent as a joint management body of a strata building the High Court reasoned that the respective statutes of the 1st to 4th Respondents and the 5th

Respondent do not grant them power to commence a judicial review action, either for themselves or for parcel owners to challenge a development order. As their powers and duties were conferred strictly by statute, their application failed *in limine* and these entities could not initiate proceedings for judicial review in this capacity.

340. The Court of Appeal rejected the argument that **Order 53 rule 2(4) RC 2012** provides for a threshold test of *locus standi* and that the applicants in the judicial review proceedings must further establish substantive *locus standi* under **Rule 5(3) of the Planning Rules 1970**. Instead, the Court of Appeal held that the 1st to 10th Respondents (as they appear before us) were "adversely affected" under **Order 53 rule 2(4) RC 2012** and thus have *locus standi* to institute these judicial review proceedings.

B. Submissions of the Parties before this Court

The Appellants

Datuk Bandar

341. In summary, the Datuk Bandar took the position that the 1st to 10th Respondents do not have standing to sue as they are not **qualified persons** under **Rule 5(3) of the Planning Rules 1970**, having no evidence that they are registered proprietors of lands adjoining PT9244, i.e., the plot of land where the Subject Land is located. The Datuk Bandar relies on, among others, the case of ***Ramachandran***, to contend that the right to object is a

statutory right and it is established in case law that if a person does not fall under **Rule 5(3) of Planning Rules 1970**, then he has no *locus standi* under **Order 53 of the RC 2012** to challenge the decision of the Datuk Bandar to grant planning permission.

C. Yayasan

342. Yayasan similarly relies on ***Ramachandran* (supra)** and submits that since the 1st to 5th Respondents are creatures of statute, the scope of their powers and duties should be limited to the powers and functions conferred by statute, while the 6th to 10th Respondents are not registered proprietors of the land adjoining the Proposed Development.

343. Counsel for Yayasan also took issue with 1st to 10th Respondents contention that the 1st to 5th Respondents had instituted the judicial review proceedings as a representative action under **Order 15 rule 12 of the RC 2012** because the Re-Amended Statement of Claim stated that they are bringing the action "*in their own rights and in a representative capacity for the unit owners …*" which does not equate to compliance with **Order 15 rule 12 of the RC 2012.** There is no evidence of consent of "*all or as representing all except but one of more of*" the said parcel or unit owners of the respective condominiums adduced before the High Court.

D. Memang Perkasa

344. Memang Perkasa also echoes the above views and relies on the cases of ***Muziadi*** and ***YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor [2003] 5 MLJ 12; [2003] 1 AMR 352; [2003] 1 CLJ 210*** *('**Nadzaruddin**')* to say that the Court of Appeal's decision disregarded the statutory framework under which the applicants to the judicial review gain the right to object and to bring the present action, i.e. **Rule 5(3) of the Planning Rules 1970**.

345. It was also submitted for the developer, Memang Perkasa, that the Court of Appeal misread the case of **QSR Brands Bhd v Suruhanjaya Sekuriti [2006] 3 MLJ 164; [2006] 3 AMR 320; [2006] 2 CLJ 532** ('**QSR**'), when the Court of Appeal construed that decision as having abolished the the distinction between threshold and substantive *locus standi*.

E. The Longhouse Settlers

346. Counsel for the longhouse settlers, in addition to the above views, also contends that the 1st to 5th Respondents are not "person(s)" as envisioned by **Order 53 rule 2(4) RC 2012** and relies on the case of ***Amber Court Management & 5 Ors(menyaman dalam Kapasiti sebagai Ahli Jawatankuasa Amber Court Management Corp Management Committee) v Hong Gan Gui & Anor***

(and Another Appeal) [2016] 2 MLJ 85; [2016] 1 AMR 633; [2016] 2 CLJ 751 to say that in the absence of express statutory provisions, the 1st to 5th Respondents cannot file a judicial review application.

F. The 1st to 10th Respondents Collectively

347. Counsel for the 1st to 10 Respondents conversely take the view that the Respondents all have *locus standi*. In particular, with respect to the 1st to 5th Respondents comprising management corporations and a joint management body of strata housing, counsel:

(a) Agrees with the Court of Appeal's finding that the 1st to 5th Respondents would be adversely affected by the proposed development;

(b) Contends that as the 1st, 2nd & 6th Respondents were given notice to attend the objection hearing vis-à-vis the Proposed Development, this shows that the Datuk Bandar had accepted that they had *locus standi* and is now estopped and precluded from contending otherwise;

(c) Submits that under **sections 4, 17(1), 17B, 34(1)(a) of the Strata Titles Act 1985** and by **sections 21(1)(i), 21(1)(h) and 143(2) of the Strata Management Act 2013** and by necessary implication from these provisions, the 1st to 5th Respondents

possess the necessary standing to institute the present proceedings.

348. We shall expand further on the submissions of the respective parties in the course of the legal arguments in our analysis.

G. Our Analysis

The Issue

349. The question at issue in this appeal is whether the respondents had a sufficient interest within the meaning of **Order 53 Rule 2(4) RC** to apply for a judicial review against the issuance of the Development Order by the Datuk Bandar.

350. The nub of the Appellants' collective submission is that the Court of Appeal erred in utilising **Order 53 r2(4)** to determine standing to sue, as this issue is governed entirely by **Rule 5(3) of the Planning Rules 1970** instead.

351. The Appellants' argument in gist is that only registered adjoining landowners to the subject land are entitled to object to the proposed development pursuant to **Rule 5(3)**. Since the Respondents do not fall into the categories of persons stipulated under the Rule they are not persons who are 'adversely affected' and therefore have no *locus standi* under **Order 53 Rule 2(4)**.

352. Put another way, their contention effectively amounts to the proposition that the application of **Order 53 Rule 2(4)** for the purposes of determining standing to sue is statutorily defined and confined to **Rule 5(3) of the Planning Rules 1970.** Reliance for this proposition is centred on the 1966 decision of ***District Council Province Wellesley v Yegappan [1966] 2 MLJ 177 [1966] 1 LNS 46*** (***'Yegappan')***

353. Indeed the Respondents collectively are not owners of adjoining lands to the subject land. Their standing or locus has been described above. They claim to be 'adversely affected' by the Datuk Bandar's decision by reason of their being neighbouring persons or entities, living in the vicinity of Taman Rimba Kiara. As the effect of the Development Order is to carve out the subject land from this public park, all people living in the vicinity of the subject land would lose access to nearly half of the area of the park. They are directly affected by the alienation of this public area by the Datuk Bandar to Yayasan and Memang Perkasa for private purposes, namely the construction of a mixed commercial development.

354. The Court of Appeal did not agree with the Appellants' line of reasoning, holding *inter alia* that **Rule 5(3)** did not determine the Respondents' *locus standi*. It held at paragraph 75:-

".....there is only one single test, that is whether the appellants are adversely affected by the impugned decision. This is apparent from the decision where the Federal Court in Malayan Trade Union expressly approved the wider and more flexible approach that was adopted in Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 CLJ 697, [2002] 2 MLJ 413 agreeing with the Court of Appeal that the previous position was too narrow and restrictive and that the amendments to Order 53 r.2(4) (as it stands today) was to cure that mischief of its "precursor" which had resulted in unfairness and injustice. As judicial review proceedings are brought in the area of public law, to attend to grievances of abuses or complaints of wrongs by public authorities including the Datuk Bandar, in order to offer redress of public injury, Rules of Court must be read more liberally and with greater flexibility. We have no intention of reading otherwise and regressing with this appeal. We must not attempt to reset that bar or test for judicial review which unfortunately the learned judge unwittingly, did."

355. We respectfully concur with the judgement of the Court of Appeal in this context.

H. The Validity of Rule 5(3) of the Planning Rules 1970 to establish *Locus Standi*

356. We have analysed the use of **Rule 5(3) of the Planning Rules 1970** earlier on in this judgement *in extenso* at paragraphs 217 to 229. We reiterate our arguments earlier to conclude that reliance on **Rule 5(3)** is misplaced as it cannot be utilised in view of its fundamental

inconsistency with the statutory development plan, the Structure Plan and the object and purpose of the **FT Act** as a whole.

357. To recap, the **Planning Rules 1970 [P.U.(A) 7/1971]** were made by the Authority with the approval of the Minister in the exercise of powers conferred by **section 47** of the **Emergency (Essential Powers) Ordinance No. 46, 1970**. Under this **Ordinance** in **section 2**, 'Authority' is defined as the Federal Capital Planning Authority.

358. **Ordinance No. 46 of 1970** was repealed by **section 48(1) of the City of Kuala Lumpur (Planning) Act 1973 [Act 107]**, which came into force on 21 May 1973. By way of a saving provision under **section 48(2)** of the same Act, it was stipulated that any rule made under the repealed law would continue to have force as if it were made under **Act 107** insofar as it is not inconsistent with **Act 107**. In other words, the Rules would continue to have force so long as there was no inconsistency with the purpose and object of **Act 107**.

359. Next **Act 107**, was repealed by **section 65(1) of the Federal Territory Planning) Act 1982 [Act 267]** which came into force on 25 August 1982. **Section 65(2)** is the savings provision and it similarly saves the **Planning Rules 1970** by providing that any rule made under the repealed law would continue to have force as if it were

made under **Act 267** insofar as it is not inconsistent with **Act 267**.

360. The **FT Act** in its long title sets out its purpose:

> *"An Act to make provisions for the control and regulating of proper planning in the Federal Territory, for the levying of development charges, and for purposes connected therewith or ancillary thereto."*

361. Under **section 64(1)** of the **FT Act** the Commissioner, i.e. the Datuk Bandar may, with the approval of the Minister make rules generally for the better carrying out of the provisions of the Act. This includes rules to provide for the regulation of the development of land in relation to proper planning, the control of residential density, floor area, plot ratio, plinth area, and the use of buildings or land and any other matters for the smooth execution of the development plan.

362. In summary the **Planning Rules 1970 including Rule 5(3)** took their origin from **Ordinance No. 46, 1970,** and were retained (with amendments) in **Act 107** through to the present **Act 267**, the **FT Act** with the proviso that these Rules were applicable so long as they are not inconsistent with the prevailing Act in force at the material time.

363. **Rule 5(3)** itself was amended twice in 1994 and 2011. The purpose of the Rule was to give notice of a proposed development and to accord a right to object to initially the neighbouring registered owner, and later with the amendments, to a wider group of neighbouring persons, culminating in its 2011 form of according notice to a wider group of persons.

364. However the proviso to **Rule 5(3)** as contained in **section 65** is that it is applicable only and insofar as it is not inconsistent with the purpose and object of its parent act. In the instant case that would refer to **Act 267** or the **FT Act** which has as its primary object and purpose the regulation of planning or proper planning which is achieved by the use of statutory development plans, as we have explained exhaustively earlier on. The statutory development plans require public participation as we have also explained at length. The statutory development plans are not gazetted until objections from the public are fully heard and disposed of. The KL Structure Plan then becomes the basis for land use and zoning until its expiry. The Datuk Bandar, as set out in **section 22(4)** and explained earlier, has a discretion to depart from the statutory plan but within the strict confines of that section and subject to the conditions set out there. Moreover other sections in the **FT Act** require that any alteration to the Structure Plan be achieved after notification to the public and re-gazetting.

365. The point being made is that it is clear from the above that the categorization and restriction of persons who may object to a development as set out in **Rule 5(3)** of the **Planning Rule 1970** is inconsistent with the purpose, object and express statutory provisions in the **FT Act**. It is clear that the statutory provisions of the **FT Act** prevail over **Rule 5(3)**, where such inconsistency arises.

366. The inconsistency itself is this: The **FT Act** provides the public with the opportunity to participate and contribute to the proper planning of the Federal Territories. After such contribution has been considered, evaluated and determined the final Structure Plan and the Local Plan ensue to govern the development of the area. As such the giving of notice to a restricted group of people as envisioned in **Rule 5(3)** becomes irrelevant and devoid of purpose.

367. This is because all objections have been considered not from a limited category of people as envisioned under **Rule 5(3)**, but from the public at large. As they have been heard in full, where then does the need to give a second hearing to a limited category of persons arise? That is why **Rule 5(3)** remained a savings provision to be utilised so long as it was not inconsistent with the parent Act. And that limited time during which it would be relevant was prior to the gazetting of the Structure Plan and/or the Local Plan. In the instant appeals, the Structure Plan was in force at the material time. The draft local plan was

ready but not gazetted (for a considerable number of years) as well. In these circumstances the reliance on the inconsistent **Rule 5(3)** is unjustified and inexplicable.

368. The Datuk Bandar submitted, it will be recalled that **Rule 5(3) of the Planning 1970** was used to hold objection hearings because it placed reliance on the **Comprehensive Development Plan** by virtue of its reading of **subsection (a) of section 22 (4)**. We reiterate, as we have concluded earlier in relation to the exercise of discretion by the Datuk Bandar, that it erred in giving effect to the **CDP** and thereby **Rule 5(3)** given the clear inconsistency between the rule and the **FT Act** read holistically.

369. Turning to the case-law on this subject, the Appellants rely on ***Yegappan*** to contend that the 1st to 10th Appellants enjoy no statutory right to object as they do not fall within the purview of **Rule 5(3) of the Planning Rules 1970**, and therefore have no standing to sue.

370. Firstly, for the reasons set out above relating to the inapplicability of **Rule 5(3)**, which has been superseded and overridden as a consequence of **section 65** of the **FT Act**, the contention that standing to sue is determined by **Rule 5(3)** is a flawed and erroneous argument. If **Rule 5(3)** is inapplicable as it cannot function as a saving provision in light of the purpose and object of the **FT Act**,

it equally cannot comprise valid basis for the purposes of ascertaining standing to sue.

371. More significantly, however, we respectfully concur with the Court of Appeal that it is unnecessary for the Respondents to fall within the categories of landowners set out in **Rule 5(3**) as **Order 53 Rule 2(4)** does not stipulate that the Respondents need to establish a statutory right in order to meet the requirements of *locus standi*.

372. **Order 53 Rule 2(4)** lays down the basis or test for standing to sue, in that it stipulates that a person seeking the various reliefs under that provision should meet the threshold test of being 'adversely affected'. Whether a person is 'adversely affected' remains a question or issue for the determination of the Court, having regard to the factual and legal matrix of the grievance. The legal matrix refers to such relevant legislation that is subsisting and applicable at the material time.

373. The determination of standing remains a matter for adjudication by the courts. The courts undertake this task by applying a broad and flexible approach (see both ***QSR*** and ***MTUC***) in the context of the legal and factual matrix subsisting. The legal matrix in the present appeals, refers to the **FT Act**, and the factual matrix, to the events leading up to and causing the applicants to bring the proceedings.

374. For the purposes of development of the subject land it is the provisions of the **FT Act** that are relevant and applicable. The **FT Act** endorses public participation, which then becomes the basis for evaluating whether a person is 'adversely affected' or not.

I. Case-Law

375. The Appellants rely on ***Yegappan***, ***Ramachandran*** and ***Muziadi*** to contend that the Court of Appeal erred when it 'disregarded' the fact that only applicants falling within the statutory framework of **Rule 5(3)** have standing to sue or have the right to object and bring the present action.

376. In ***Yegappan***, the applicant for judicial review argued that he was entitled to the expectation that the proposed development would be in compliance with the relevant by-laws and sections of the **Municipal Ordinance**. While the High Court found that ***Yegappan*** had locus standi by reason of the breaches of the by-laws, the Federal Court led by Thomson LP held otherwise. The Court was of the view that as there was nothing in the **Municipal Ordinance** requiring that ***Yegappan*** be consulted he did not have standing. A considerable part of the judgement relates to the conduct of the applicant. The Court found that the applicant was bent on preventing the developers making use of their land in a way he did not like and that he was trying to obtain compensation for some 'minor illegalities' in the prepared plans. These breaches it was

held did not affect the objector so as to give him locus to bring proceedings.

377. The case of ***Yegappan*** dates back to 1966 when the **Municipal Ordinance** was in force. The present-day law has evolved considerably, as *locus standi* today is to be accorded a broad definition, taking into account the grievance in the context of the legal and factual matrix of a case. ***Yegappan's*** case is entirely distinguishable on the basis of the law applicable then and now, as well as the wholly different approach towards standing to sue as entrenched in **Order 53,** read within the context of the Municipal Ordinance. It would be regressive to return to ***Yegappan*** to determine standing to sue, in light of the revolution in the law relating to development as it presently stands under the **FT Act**, as well as the test relating to standing to sue as set out in current case law like **QSR** and **MTUC** (which are examined below). In other words, ***Yegappan*** is inapplicable in view of the legal matrix then prevailing namely the **Municipal Ordinance**, as well as the test then subsisting in order to bring judicial review proceedings, which were very much more stringent and required the establishment of actual damage suffered by the applicant. Additionally, the conduct of the applicant was also to be taken into account. Such a position in law is untenable today.

378. The approach taken in ***Yegappan*** to restrict participation to the categories of persons itemised in **Rule 5(3)** would,

in any event yield an entirely different result, given the content of the **FT Act** which is predicated on statutory development plans which require public participation. To rely on the provisions of the **Municipal Ordinance** which underscored the basis for that decision rather than the **FT Act** would be wrong in law.

379. In **S.M. Thio's 'Locus standi and judicial review' (Singapore University Press, 1971)** at page 232 *Yegappan* has been cited as an example of "*…judicial pre-occupation with private law concepts" that has been "responsible for an unduly restrictive approach on many occasions, denying a person adversely affected locus standi to seek review action."*

380. And in **MP Jain's Administrative Law of Malaysia and Singapore (4th Edn, updated by Dr Damien Creman, LexisNexis 2011) ('MP Jain)** the author said: *"The Yegappan ruling cannot be regarded as satisfactory. It is not clear why the applicant, a ratepayer to the District Council, could not challenge an action of the council on the ground of its illegality. The Blackburn case, cited above, furnishes a model for such an approach."*

381. For all the reasons above, ***Yegappan*** is no longer good law for the purposes of determining standing to sue.

382. Ultimately, the basis for determining who has standing to sue is grounded on **Order 53 Rule 2(4)** in the context of

the relevant law. Standing to sue or *locus standi* is available to persons who are adversely affected within the context of that law. That is a question that is to be determined by the Court on a prima facie examination of the grievance in the context of the legal and factual matrix of the case. It has been described in **MTUC** as having a genuine or real interest in the subject matter of the claim. There is no necessity to establish actual or special damage personally.

J. ***Ramachandran***

383. In ***Ramachandran*** the Court of Appeal construed the Datuk Bandar's powers under **section 22(4) FT Act**:-

> *"[98] It was crystal clear, particularly in view of the underlined words, that under sub-s 22(4) of the FTPA wide discretion is granted to the Datuk Bandar. There is no requirement in that subsection for the Datuk Bandar to conduct a hearing or even to consult owners of neighbouring land before he makes his decision on an application for planning permission or before he issues a development order.*
>
> *[99] The requirement for such consultation and hearing is provided for in r 5 which has been discussed above, and which we found to be inapplicable in this case."*

384. In ***Ramachandran*** the appellants were owners of properties adjoining the subject land. They applied for judicial review to quash the development order on the

grounds that the development order was issued without conducting a public hearing and was therefore void. The amended version of Rule 5 did not provide for a hearing where the development did not involve an increase in density or change of use of land. Therefore, the Court held that the appellants there did not acquire a right of hearing under the rule.

385. ***Ramachandran***, with respect, was determined on the basis of a construction of **section 22(4)** alone, together with **Rule 5(3)** of the **Planning Rules 1970**. There was no consideration of the purpose and object of the **FT Act**. There was no appreciation of the fact that the KL Structure Plan prevails and that as long the development complied with the KL Structure Plan there was no necessity for any hearing to take place, because all that had been dealt with prior to the KL Structure Plan being gazetted.

386. There was also, with respect, no scrutiny or analysis whether **Rule 5(3)** was applicable in light of the entirety of the provisions of the **FT Act**. This was understandably so, as even the appellants relied on **Rule 5(3)**, so there was no challenge before the Court. Therefore, while the decision is technically correct, it tacitly approves the use of **Rule 5(3)**, which is erroneous. In these circumstances it is not applicable here.

K. *Muziadi*

387. ***Muziadi*** was a security guard employed by a local authority which terminated his service without benefits due to a previous criminal conviction. He was not given a right to be heard as no show cause letter was issued to him. He succeeded in his claim at all three levels of the courts. The decision was premised primarily on a breach of natural justice. However, another issue that arose was whether **sub-regulation 24(2) of the Public Officers (Conduct and Discipline) Municipal Council of Province Wellesley Regulations 1995** was *ultra vires* **section 16(4) of the Local Government Act 1976 read with section 17(1)** of the same Act.

388. This Court unanimously held that **sub-regulation 24(2)** was *ultra vires* the Act. Zawawi Salleh FCJ held that just as *"the stream cannot rise above its source"* so too *"subsidiary/delegated legislation cannot be broader than the parent Act*".

389. No such question arises in the context of the present appeals and its relevance is uncertain. Even if the legal contention sought to be established was that the **Planning Rules 1970** prevail over the **RC 2012**, this was not clear. There is no special wording in that rule that provides that it would prevail over **Order 53**. In any event, as **Rule 5(3)** is effectively ousted on a reading of the **FT Act**, particularly **section 65**, this is an untenable

proposition, given our exposition of the law above. ***Muziaidi*** does not assist us in the present appeals.

390. The three cases cited by the Appellants to establish standing to sue in the present appeals are, as we have discussed, not relevant and, if anything, serve to throw the proverbial 'red herring' into the mix, and that too, without the cover of the 'thick white sauce' so aptly referred to by Abdoolcader FCJ in ***Government of Malaysia v Lim Kit Siang & Another Case [1988] 2 MLJ 12;[1988] 1 CLJ 219; [1988] 1 CLJ Rep 63 ('Lim Kit Siang')***

391. We therefore reiterate that the issue of *locus standi* or standing to sue in the instant appeals remains a matter for the Court to determine under **Order 53 rule 2(4)** by determining whether the Respondents are persons who are *'adversely affected'* under the relevant legislation, here the **FT Act**. **Order 53** is not circumscribed, limited or qualified by the **Planning Development Rules 1970,** *inter alia*, because those rules comprising subsidiary legislation are simply not applicable in the context of these appeals.

392. As such the Respondents are not required to bring themselves within the category of **Rule 5(3).** The issue to be considered is whether the Respondents are 'adversely affected' within the purview of the **FT Act** construed as a whole.

393. This leaves us with the question of whether the Respondents are indeed persons *'adversely affected'* by the issuance of the Development Order by the Datuk Bandar under the **FT Act**. It is important to emphasise in this context that it is not simply a question of construing **Order 53 Rule 2(4)** *in vacuo* and without the benefit of the context in which a person is 'adversely affected'. The words 'adversely affected' in **Order 53 Rule 2(4)** have to be construed in the context of the particular legislation that is under scrutiny.

394. This requires reference to **Order 53 Rule 2(4)** and the law relating to it.

L. RC 2012

395. In order to determine *locus standi* in the instant appeals, first of all we must look at our own law where **Order 53 RC 2012** provides the statutory procedure for making judicial review applications. **Section 25(2)** read with **para 1 of the Schedule to the Court of Judicature Act (CJA)** sets out the reliefs which the court may grant. **Order 53** as well as the latter two provisions reads as follows:-

> *"**Applications (O. 53, r. 2) ... (4)** Any person who is adversely affected by the decision of any public authority shall be entitled to make the application"*

"***Section 25(2)*** *Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:*

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same."

"***Para 1 Schedule****. Prerogative writs*

Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose."

396. **Order 53** was made by the Rules Committee pursuant to powers conferred upon them under **section 17 CJA**

397. Rules of court made under the **CJA** are concerned with procedure and practice; they cannot alter substantive law, nor can they extend the jurisdiction of the High Court. The Courts however, in the fields of administrative and public law, when deciding whether or not to grant a remedy as provided under **section 25(2)** read with **para 1 of the Schedule to the CJA,** are conferred with, and possess a discretion to decide whether or not to issue an order quashing or preventing an act, conduct or omission which has been shown to be *ultra vires* or unlawful.

398. At the very outset, the question of what qualifications an applicant must show before the court will entertain his application for a particular kind of order against a particular public officer or authority has evolved, particularly in the United Kingdom, as a matter of practice rather than jurisdiction. This is significant because Malaysian case law relies heavily on English law by way of precedent.

399. In this jurisdiction, the **RC 2012 and section 25(2) read together with paragraph 1 of the Schedule to the CJA** provide the basis for relief in terms of certiorari, mandamus, prohibition, quo warranto and such other relief as may be required to provide a remedy for a contravention of the fundamental rights in **Part II of the Federal Constitution** as well as *'**any other purpose'***. This last phrase allows for remedies in respect of, *inter alia*, the contravention of other rights conferred by, amongst others, statute. This includes protection from public authorities in the event of any breach of a right entrenched by statute.

400. In Malaysia therefore, citizens may seek the remedies specified under the **CJA** against acts which are unlawful or *ultra vires* for both constitutional contraventions of fundamental rights under our **Federal Constitution,** as well as administrative breaches of statutory law by public officers and/or authorities. The **CJA** goes further to

enable the Courts to fashion or mould a remedy as may be required (see ***Ramachandran***).

401. As such the availability of remedies to a citizen in the field of public law, albeit in the form of prerogative writs or otherwise, in this jurisdiction are provided for in the **Federal Constitution** and the **CJA.**

402. That is the macroscopic position. In practice, in order to give effect to a claim for such a remedy, a litigant has to bring an action in the manner and form specified by the **RC 2012**. However, to achieve the standing to sue, the prospective litigant is required *vide* **Order 53 Rule 2(4)** to fall within the category of persons who are *'adversely affected'*.

403. Who is a person who is 'adversely affected'? There is no statutory definition of persons who fall within the category of being 'adversely affected'. It is not to be found in any statute. Instead, the rules relating to standing were and continue to be made by judges. These rules have accordingly changed and evolved over the years to meet and maintain the integrity of the rule of law, notwithstanding changes to the social structure reflected in the form of rapid industrial progress, scientific development and globalisation.

404. If the term 'adversely affected' is construed narrowly, this serves to restrict the body of persons who can initiate

such actions. If construed broadly it expands the body of persons who can bring such an action. The determination of whether a person is 'adversely affected' is primarily a matter of construction by the Courts predicated on case law and statute as it stands presently. This requires a comprehension of how standing has been dealt with in Malaysia over the years.

405. This issue of standing comprises the subject matter of question number 1 and makes specific reference to the cases of **QSR**, ***Othman Saat*** and **MTUC**. However, it is not possible to consider these cases without comprehending the evolution of *locus standi* in Malaysia.

M. Evolution of Case-Law in Malaysia on Standing to Sue

Lim Kit Siang

406. At the outset it should be pointed out that at the time, the relevant provision pertaining to legal standing was in the form of **Order 53 rule 3(5)** of the Rules of the Supreme Court, which had come into effect in January 1978.

407. It read: *'the court shall not grant leave unless it considers that the* ***applicant has a sufficient interest*** in the matter to which the application relates.'

(Emphasis ours)

408. For that reason, the case law then dealt with the issue of the assessment of a '*sufficient interest'*.

409. The present provision requires that the applicant be *'adversely affected'.*

410. In summary, *Lim Kit Siang* was a Member of Parliament and the Leader of the Opposition who applied for a declaration that a letter of intent issued by the government to United Engineers (M) Bhd ('UEM') in respect of the North and South Highway contract was invalid. He also sought a permanent injunction to restrain UEM from signing the contract with the government. An ex parte interim injunction was granted at first instance with an order for early trial. The application to have the interim injunction set aside and the suits struck out on the grounds of a lack of a reasonable cause of action and a lack of *locus standi* was dismissed.

411. The matter proceeded to the Supreme Court where a majority of 3 out of 5 judges allowed the appeals by the Government and UEM, meaning that the Highway contract was allowed to proceed. The remaining two judges delivered a strong dissent. Of significance to these appeals is the position taken by the Supreme Court on *locus standi* or standing to sue.

N. Judgment of the Supreme Court in *Lim Kit Siang*

412. **Salleh Abbas LP** held that the rule as to *locus standi* applicable in Malaysia was that utilised in England prior to the enactment of **Order 53 of the English Rules of the Supreme Court.** This meant that the learned judge took the position that the rule as enunciated in **Boyce v Paddington Borough Council [1903] 1 Ch 109 ('Boyce')** was to prevail, despite it having been effectively overruled in the United Kingdom. Reliance was also placed on the case of **Gouriet v Union of Post Office Workers and Others [1977] 3 All ER 70 ('Gouriet')**.

413. Both **Boyce** and **Gouriet** took a narrow, restricted view on standing to sue, more particularly in relation to an individual who sought a remedy of a declaration or an injunction in respect of the infringement of a public law right. At that time, the remedies of a declaration and injunction were classified by the courts as private law remedies. As such, these remedies could only be obtained in a public law action or proceeding by the Attorney-General or upon his relator. The test for threshold standing in private law was very strict. It was governed by the judgment of Buckley J in Boyce where he said:-

> *'A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (eg where an obstruction is so placed in a highway that the owner of premises abutting upon the highway*

is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.'

414. A similar stance was adopted in **Gouriet**.

415. At the time when *Lim Kit Siang* was being adjudicated the case of **Inland Revenue Commissioners, Ex parte National Federation of self-Employed & Small Businesses Ltd ('National Federation'),** which reflected the more recent liberal shift towards standing had been handed down in England. It essentially decried **Boyce** and **Gouriet**, the latter on the grounds that it related to a private law action.

416. However, in this jurisdiction, **Salleh Abbas LP** held that *National Federation* could not be applied, since the law in England had been amended, while that in Malaysia remained in its original form, namely that the applicant had to show a 'sufficient interest'. He concluded that the test that had been applied in England under its pre-amended law namely **Boyce** and **Gouriet** had to be followed.

417. The more liberal test applied by Lord Diplock in **R v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed & Small Businesses Ltd**

Taman Rimba [1982] AC 617 ('National Federation'), namely that it was not necessary to establish detriment or prejudice to the applicant personally in a public law matter, was held to be inapplicable.

418. The Lord President made reference to ***Lim Cho Hock v Government of the State of Perak and Others [1980] 2 MLJ 148; [1980] 1 LNS 43 ('Lim Cho Hock')*** and ***Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177; [1982]1 LNS 2 ('Othman Saat')*** where Abdoolcader FCJ had examined and analysed the law relating to standing to sue in considerable depth**.** In the course of his analysis in these two cases, Abdoolcader had considered **Boyce, Gouriet** and distinguished them, opting for the broader approach adopted in **National Federation**. *Salleh Abbas LP* and the other majority judges distinguished these two cases. The learned Lord President described these cases as representing the *'high water marks of the law of locus standi in Malaysia, beyond which the court should be careful to tread'*.

419. These cases were distinguished on the basis that the plaintiffs there had a genuine **private** interest to be furthered and protected, whereas *Lim Kit Siang* did not have such standing to sue, whether as a politician, Member of Parliament, a road highway user or a taxpayer. **Salleh Abbas LP** came to this conclusion as he predicated *Lim Kit Siang*'s entire action as a private law action and not a public law matter. This meant that the far

more stringent test of actual detriment suffered by the applicant had to be established at the threshold stage.

420. **Abdul Hamid CJ Malaya** also took a stringent stance in relation to standing to sue. He held that apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings. Secondly, where the private plaintiff relies on an interest in the enforcement of a public right and not a private right, standing will be denied unless the Attorney-General consents to a relator action or the plaintiff can demonstrate some special interest beyond that possessed by the public generally. As there was no provision then in the Malaysian rules of court equivalent to the English Order 53, there was a stringent requirement that to acquire locus standi an applicant had to establish the infringement of a private right or suffering of special damage.

421. Hashim Yeop Sani SCJ concurred that the principles laid down in **Boyce** *(above)* and **Gouriet** were applicable in Malaysia.

422. George Seah SCJ dissenting, defined *locus standi inter alia* as a 'procedural barrier erected by the judges to prevent the court's time and public money from being wasted by a multiplicity of frivolous and vexatious litigations brought by busybodies whose actions are bound to fail *in limine* and also to prevent abuse of the

legal process. Relying on Diplock LJ and Scarman's LJ statements in *National Federation*, he stated that standing to sue is *'not governed by any statutory enactment but is a rule of practice and procedure laid down by the judges in the public interest. Like all rules of practice they are liable to be altered by the judges to suit the changing times.'*

423. Citing ***Othman Saat***, the learned judge held that as *Lim Kit Siang* was an elected Member of Parliament who when returned sits in Parliament and serves the whole realm, he had a duty not only to his electorate but to the Dewan Rakyat and the peoples of the country. He therefore clearly had standing to sue. He stated: *' ...In the field of public law where the court has a discretion whether or not to make an order preventing conduct by a public officer or governmental authority that has been shown to be ultra vires or unlawful, the question of what qualifications a plaintiff must show before the court will entertain his application for a declaratory order or judgment seems to me to be one of practice rather than jurisdiction. .....*

424. *.....the rule of locus standi must be developed to meet the changing times. In broadening the requirements that must be met to give a plaintiff a standing in a public interest litigation, the High Court must always bear in mind that under the Federal Constitution of Malaysia, the judicial power is vested in the judges. And judicial power includes judicial control or review of governmental/executive actions except when the*

jurisdiction of the High Court is expressly excluded by the Constitution….."

425. And in relation to the use of the **Boyce test** and **Gouriet**, the learned judge found that the test laid down in **Boyce** was made long before the passing of the English Crown Proceedings Act 1947. The test was no longer relevant in light of *National Federation* and was described as a misleading guide to the law in 1982 in England. Further the acceptance of the **Boyce** test would result in impliedly overruling ***Lim Cho Hock*** *(above)* and ***Othman Saat*** *(above)***.** That was, in point of fact, the effect of the majority decision in ***Lim Kit Siang***.

O. *Lim Cho Hock*

426. A brief digression from ***Lim Kit Siang*** is necessary to comprehend how standing to sue was defined in the cases of ***Lim Cho Hock*** by Abdoolcader J. (then High Court) and ***Othman Saat***, again Abdoolcader, but as FCJ, writing for the Federal Court.

427. In ***Lim Cho Hock***, the proceedings arose by reason of the appointment by the State Authority of the Menteri Besar of Perak as president of the Ipoh Municipal Council. Lim sought declarations that the offices of Menteri Besar and President of the Council could not be held by the same individual, and that the appointment of the Menteri Besar as president of the Council was inoperative and void. Lim

was a member of Parliament for Ipoh and a member of the Perak State Legislative Assembly for Kapayang and a ratepayer within the Council area. It was in this latter capacity as a ratepayer that locus standi was granted to Lim.

428. Abdoolcader J., in according Lim standing to sue in these proceedings, traced the position in England historically from 1955 onwards. Initially a ratepayer was only competent to seek relief against illegal acts of public authorities if his private right had been invaded or where he had sustained special damage in respect of his public right. After 1955, as borne out by case-law, the rule was loosened.

429. In the Privy council case of **Durayappah v Fernando [1967] 2 AC 337**, it was indicated that, as regards void administrative actions taken against a local council, ***'any councillor, ratepayer or other person having a legitimate interest in the conduct of the council 'would have standing to sue***.'

430. The **Blackburn cases** in England were considered, as was ***National Federation*** , all of which showed a clear move towards the grant of standing to sue where the applicant had a genuine grievance. Having considered the case law in the United Kingdom and Canada, the learned judge concluded that *Lim Cho Hock* had locus standi to bring the proceedings as the challenge is related to the

appointment by the State Authority of the Menteri Besar to the public office of President of the Council.

P. *Othman Saat*

431. The respondent, Mohamed bin Ismail and 183 other persons applied for land in Mersing Johor but received no response for 8 years. The land was found to have been alienated to various persons, including the appellant who was, at the material time, the Menteri Besar of Johor. The respondent sought declarations impugning the validity of the alienation of the land. A challenge was brought against the respondent's standing to sue, amongst other procedural objections.

432. Standing to sue was denied by the High Court and this issue went on appeal to the Federal Court. The Federal Court held that the respondent was alleging an abuse of power and sought to impugn the validity of the alienation of the land in question. This was a case of a person having a special or substantial interest in the subject matter of the proceedings he had instituted and whose legal interest was particularly affected. This gave him the capacity to sue and there was no justification in debarring him from doing so.

433. ***Lim Cho Hock*** was expressly accepted and approved in the following terms: *".....and accept and approve the discussion in the judgement in that case on the question*

of locus standi and endorse the concept of liberalizing the scope of individual standing……."

434. What is evident from ***Lim Cho Hock*** and ***Othman Saat*** is that *locus standi* was assessed by considering whether the **applicant had a genuine and real interest in the matter**. Although that test has now been altered to that of 'adversely affected' the substance of what is considered by the courts remains relatively unchanged, namely:-

Is there a genuine grievance levelled by the applicant against the public official or authority? This in turn is established, amongst other things, by the applicant being able to point to something which shows that he has been affected prejudicially or adversely. Ultimately standing to sue is an issue for the court's judicial assessment, taking into account the factual matrix and the legal background to the grievance.

Q. Abdoolcader's Dissent in *Lim Kit Siang*

435. Reverting back to *Lim Kit Siang*, **Abdoolcader SCJ** in vigorous dissent acknowledged that the pivotal issue on which the appeals were argued turned on *locus standi*. He relied on his earlier decisions in ***Lim Cho Hock*** and ***Othman Saat*****,** which was a decision of the Federal Court and saw no reason to depart from the principles expounded there. He alluded to the concept of liberalizing

the scope of individual standing in line with other jurisdictions.

436. He stated that the dispute in *Lim Kit Siang* was attributable to the failure and conflation of the distinction between public law and private law cases. Dismissing the use of **Boyce** and **Gouriet**, Abdoolcader made reference to *National Federation* in the House of Lords, and pointed to the judgments of Diplock, Scarman and Roskill which distinguished **Gouriet** on the basis that it concerned only private law. The error arose from the English Court of Appeal having determined the threshold issue of standing to sue in isolation from the legal and factual context of the case.

437. To quote from Abdoolcader's judgment: *"...This is where the bifurcation into public law and private law aspects of litigation assumes vital significance in determining the issue. The general conclusion to be drawn from National Federation is that the majority thought the issue of standing should usually be considered along with the merits, as it is now a matter for the court's discretion – the graver the illegality, the less insistence on showing standing....."*

438. There was a reminder of the passage in ***National Federation*** that even a single public-spirited taxpayer could bring a matter to the attention of the court to vindicate the rule of law and get unlawful conduct

stopped. The fear of a deluge of applications for judicial review by public spirited citizens, he pointed out, did not seem to have occurred in practice.

Significantly he pointed out:

> *"...To deny locus standi in the instant proceedings would in my view be a retrograde step in the present stage of development of administrative law and a retreat into antiquity. The merits of the complaint are an entirely different matter.....**The principle that transcends every other consideration must ex necessitate be that of not closing the door to the ventilation of a genuine public grievance and more particularly so where the disbursement of public funds is in issue, subject always of course to a judicial discretion preclude the phantom busybody or ghostly intermeddler.***

(Emphasis ours)

R. Is *Lim Kit Siang* Applicable as a Precedent in Present Times?

439. An issue that requires attention is the applicability of ***Lim Kit Siang*** in the context of assessing standing to sue. This is important for clarity in the law relating to this issue.

440. Apart from the change brought about in **Order 53 rule 2(4)**, requiring an applicant to show that he has been 'adversely affected', rather than having to show a

"genuine interest" in order to meet the threshold requirement for standing to sue, all of which are seemingly different phrases to be met on a procedural basis, it is clear that in determining such applications, it is the courts that retain the discretion to set the bar on standing to sue. It is the courts that decide on the extent of the filter, so to speak, in allowing proceedings to continue by way of judicial review.

441. It is also equally clear that in most jurisdictions this threshold issue has, and continues to evolve in manner that is consonant with a broad, liberal and flexible approach rather than the converse. This, in turn, is in keeping with the rule of law which requires that in order to maintain an equitable ordering between the citizenry and the government at various levels, the law must be relevant and effective in maintaining a check and balance for the ultimate benefit of the populace.

442. This brings to the fore the question of whether ***Lim Kit Siang*** remains applicable law at the present time. We have considered **QSR Brands** as well as **MTUC**, and note that while those decisions by the Court of Appeal and this Court have moved away from ***Lim Kit Siang***, this is primarily on the basis of the amendment to **Order 53** from its initial provisions to its present form. However, the correctness of the position in law of the majority decision in ***Lim Kit Siang*** was not considered in either **QSR** or **MTUC**.

443. Having given full consideration to this issue, the majority decision in ***Lim Kit Siang*** no longer represents the law relating to locus standi or standing to sue, particularly in relation to public interest litigation. We so conclude for the following reasons:-

(i) The deliberate reliance on, and use of the test in **Boyce**, which was narrow and restrictive, when the position in England had moved on as reflected in the decision in *National Federation*, denotes that the majority judges in ***Lim Kit Siang***, failed or refused to accept that the standards and test outlined in **Boyce** was less than acceptable or correct in terms of its stringent requirements, as expressly acknowledged by the English Courts. Notwithstanding this, our courts chose to rely on what had been effectively overruled in England;

(ii) As explained in *National Federation*, **Gouriet** was not a public law matter but one relating to a private law action. The majority in ***Lim Kit Siang*** viewed or categorised the case brought by Lim as a private civil law claim on the basis that it was initiated by way of originating summons and sought a declaration. With the greatest of respect, the determination of the nature of an action as being a private law claim or a public law claim should be assessed and analysed

on the basis of the substance of the claim rather than its adjectival form.

(iii) The question needs to be asked – is this claim brought to procure personal relief for the claimant? Or is it brought in a representative capacity for another, or for the public, or in the public interest? Does the remedy sought ultimately benefit only the claimant or a category of persons or the public at large?

(iv) A perusal of the case discloses that ***Lim Kit Siang***, in his various capacities, initiated the action for a declaration in the interests of the public as a whole, a matter which the minority dissenting judges appreciated. The majority, with the greatest respect, failed to consider or appreciate the importance of substantially reviewing and assessing the basis for the proceedings. This is an issue which is of importance today and for the future because it is incumbent on the Courts to appreciate correctly the nature of a claim by having regard to the substance of the claim, rather than the mode of initiation of the proceedings from an adjectival perspective;

(v) The application by the majority judges of what was in effect a private law standard, and that too one that was outdated, resulted in the courts in this jurisdiction being compelled to accept a far more

stringent test for standing, predicated on private law, to seek relief in relation to the accountability of public officials, public authorities and the government, on the basis that the law remained as it had been prior to the amendment to the English Rules of Court;

(vi) In this jurisdiction we enjoy a written constitution which specifies clearly the fundamental rights of citizens and provides remedies not only for constitutional infringements, but also administrative acts or omissions, with a view to ensuring a check and balance on executive action. Given the breadth and the constitutionally entrenched rights of judicial review available to the citizenry, both constitutional and administrative, it was not tenable, with the greatest of respect, to then construe **Order 53**, a procedural rule, rigidly and inflexibly so as to hinder or restrict the constitutionally sanctioned right of judicial review;

(vii) The majority in ***Lim Kit Siang*** failed to give sufficient or adequate consideration to the judicial reasoning in the Federal Court decision in ***Othman Saat*** and the High Court decision in ***Lim Cho Hock*** which was expressly accepted as good law in ***Othman Saat***, a decision of the same court.

444. As a result, public interest litigation has not been consonant with the rest of the jurisdictions in the common law or civil law world. This becomes a matter of considerable concern as it precludes or prohibits an essential feature of the Federal Constitution, namely the right of the citizenry to challenge and/or seek remedies where there are serious omissions or acts which appear to be unlawful or *ultra vires*, using the reason of a lack of standing to sue.

445. For these reasons we reiterate that the dissenting decision of the minority judges, particularly as reflected in the judgment of **Abdoolcader SCJ**, reflects the correct position in law and ought to be followed. His decision outlines the fundamental requirements that are to be considered by a court when determining whether or not to grant leave for judicial review. The cases of ***Lim Cho Hock*** and ***Othman Saat*** provide a sound basis for the evolution of the law on standing to sue from that period to the present as it presents a rational and coherent development/progression.

S. 'Adversely Affected'

QSR

446. In the Court of Appeal decision of **QSR**, the issue of *locus standi* was considered in the context of a target company, **QSR**, in a take-over bid, challenging the Securities

Commission's refusal of an extension of time for the target company's board to take steps with regard to the take-over bid. The Take-Over Code required the relevant steps to be undertaken by the second respondent, Kulim (Malaysia) Berhad, as it was the company that had made the bid.

447. The application was refused *inter alia* on the grounds that **QSR** was not 'adversely affected'.

448. On appeal the issue of standing to sue was considered. The Court of Appeal did not address the approach adopted in ***Lim Kit Siang*** and analyse the same. However, Gopal Sri Ram JCA approved the reasoning of Abdul Hamid CJ Malaya in ***Lim Kit Siang*** that identified 'self-interest' as an element in the determination of *locus standi*, for a declaration and injunction in what was essentially a public law cause of action:

> *"[14] This is entirely in keeping with the principles governing standing to obtain private law remedies in a public law context. It demonstrates the approach to locus standi in private law proceedings."*

449. Although subsequently in the judgement the learned judge goes on to explain and accept that this confusing dichotomy between private law and public law actions gave rise to confusion and injustice, there was no

correction of the application of this dichotomous and outmoded approach in ***Lim Kit Siang***.

450. Gopal Sri Ram JCA went on to explain that this dichotomy was put to rest with the introduction of **Order 53** in its current form, which requires the **single test** of a person being 'adversely affected' whether the proceedings are brought in respect of a public law or private law action, and whether the remedy sought is certiorari, mandamus, prohibition or a declaration, injunction or other relief. The test it is explained is flexible in that it encompasses a wide array of cases, from those where the applicant has an obviously sufficient person interest in the legality of the action impugned to cases where the complaint relates to more general infringements which relate not only to the applicant but also to the public at large.

451. Therefore while **QSR** provided clarification that the test to be utilised in relation to 'adversely affected' is a liberal and broad test which does not require that the applicant suffer special or actual prejudice or damage, it tacitly approves the majority decision in ***Lim Kit Siang***.

T. *Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145; [2014] 2 CLJ 525; [2014] 2 AMR 101 ('MTUC')*

452. This is the most recent case on how 'adversely affected' is to be construed. The facts of the case relate to a judicial

review application brought by **MTUC** and other applicants wishing to have sight of documents pertaining to an increase in water tariffs. **MTUC** and the other applicants claimed to have been 'adversely affected' by the refusal of the minister to disclose the documents. Ultimately a majority of the Federal Court held that **MTUC**, having expressly requested for the documents, met the threshold in respect of standing to sue. The other applicants did not. On the merits however, the application was refused.

453. In the course of the judgement of the Court, two matters require mention:-

(1) First, the majority decision in ***Lim Kit Siang*** was dealt with as follows:

'[53] It is to be noted that the test in Lim Kim Siang's case was not propounded in respect of judicial review proceedings. The claim brought by Mr Lim Kit Siang was in private law. Hence the Boyce test, as opined by the majority in the National Federation, is not applicable to such proceedings.'

a) Therefore the current position that prevails is that where an applicant brings what is in essence a public law claim, meaning a claim which has public law elements relating to the acts or omissions of a public officer or public body, but frames his claim by way of an originating summons and seeks a declaration or

an injunction, he runs the risk of being made subject to the stringent requirements of a private law action, simply on the basis of the mode in which he chose to bring the action, by reason of ***Lim Kit Siang***.

b) The substance or real character of the proceedings which are essentially to seek accountability from a public official or public authority, becomes less relevant than the form of the claim. Although it may well be said that this risk is relatively low as the courts are bound to adhere to **Order 53** which provides a single threshold test to ascertain *locus standi*, there remains the possibility of such a construction prevailing where the proceedings are **not** brought pursuant to **Order 53** specifically. The reality is that a challenge to executive action, omission or error can be brought otherwise than by way of **Order 53** only. It would still qualify as a public law challenge seeking the remedy of a declaration, albeit by way of originating summons or writ. This is the case for example in relation to misfeasance in public office which is a public law tort. It subsists as a valid public law challenge to abuse in public office.

(2) The second and more important point is that the Federal Court decision in **MTUC** has provided a

definitive answer that the 'adversely affected' test as enunciated in **QSR Brands** comprises the single threshold test for all remedies provided under **Order 53** (see paragraph 53).

454. The Court also held that the term 'adversely affected' does not have the same meaning as 'sufficient interest' under the English Order 53, and to that extent, caution has to be exercised in applying the English cases. The definition of 'adversely affected' it was held meant that the applicant had to possess a 'real and genuine' interest in the matter. It is not necessary for an applicant to establish an infringement of a private law right or the suffering of special damage.

455. To that extent ***Lim Kit Siang*** is impliedly overruled.

456. A final aspect of the law that requires consideration is the issue of *locus standi* in relation to planning and environmental law.

U. *Locus Standi* in the Context of Planning and Environmental Law

457. There are a dearth of cases on *locus standi* in the context of planning and environmental law in this jurisdiction. It is valuable to consider the position in law in other jurisdictions as to the basis to establish *locus standi*, while bearing in mind the particularity of legislation in

each jurisdiction. A leading case which originated from Scotland is that of **Walton v Scottish Ministers 2012 UKSC 44, [2013] PTSR 51 (‘*Walton*’)**.

458. It stemmed from an application by the applicant, ***Walton*** under specific legislation relating to roads in Scotland. He sought to challenge the validity of schemes and orders made by the Scottish Ministers under specific legislation to allow the construction of a new road network in the vicinity of Aberdeen which would include a new carriageway , on the basis that the relevant ministers failed to comply with the requirements of a specific directive of the European Union namely the **Strategic Environmental Assessment Directive (2001/42/EC, OJ 2001 L197/30) (‘the Directive’)** as well as the common law requirements of fairness.

459. ***Walton*** raised objections in his capacity as chairman of Road Sense, an organisation consisting of private individuals drawn mainly from settlements situated along, and close to the chosen route who were opposed to the new road network. He also instituted the review application in his personal capacity, on the grounds that the need for the new network had not been demonstrated and that there had allegedly been no public consultation on the route. It must be said that *locus standi* was not raised as an issue.

460. ***Walton*** did not succeed in his review at the first level and on appeal. However the appellate court went further than the court of first instance and held that ***Walton*** failed to demonstrate that he was a 'person aggrieved' by the schemes and orders within the special legislation that permitted the road network. Neither had he shown that he had been substantially prejudiced within the meaning of that legislation.

461. On final appeal to the Supreme Court, ***Walton's*** appeal was dismissed but the Supreme Court held that ***Walton*** did have standing as a 'person aggrieved' as per the relevant Scottish legislation under scrutiny. On the question of standing to sue, the judgement of Lord Hope is of relevance:

> *"[152] I think with respect that this* (referring to the views of the Scottish appeal court) *is to take too narrow a view of the situations in which it is permissible for an individual to challenge a scheme or order on grounds relating to the protection of the environment. An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not of that character. Take for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any*

> *individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone.* ***The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.****"*

(Emphasis ours)

462. In short, standing to sue, particularly in environmental law requires a broad approach. This is epitomised by ***Walton***: Who will speak for the osprey?

463. Planning law is intrinsically connected to the environment. The grant or refusal of planning permission is a matter which affects a great many subjects including wildlife, trees and birds. Therefore a wide construction to standing to sue is required in the context of the **FT Act**. With respect to the present appeals which relate to the grant of planning permission in respect of park land which has been alienated for a private mixed commercial development, the corollary would be 'Who will speak for the hornbill?'

464. ***Walton*** was approved in the ***Supreme Court decision of R (on the application of CPRE Kent) v Dover District***

Council and another [2017] UKSC 79, [2018] 2 All ER 121 ('Dover District Council') by Lord Carnwarth:

> *" In this respect, I see discretion to some extent as a necessary counterbalance to the widening of rules of standing. The courts may properly accept as 'aggrieved' or has having a 'sufficient interest' those who, though not themselves directly affected are legitimately concerned about damage to wider public interests, such as the protection of the environment. However, if it does so, it is important that those interests should be seen not in isolation, but rather in the context of the many other interests, public and private, which are in play in relation to a major scheme such as the AWPR."*

465. With respect, this puts into perspective the importance of balancing development and proper planning against environmental interests. While standing may be accorded more latitude so as to allow a greater number of persons to make a challenge, that latitude is balanced in relation to the merits of the application by ensuring that other interests, public and private are put into the equation by the Court in its final adjudication.

466. In this context, Lord Carnwarth relying on **De Smith's Judicial Review**, summarises the distinction drawn between substantive and procedural grounds, namely that an applicant will be refused a remedy where they complain only of a procedural failure and that failure caused him personally no substantial prejudice, whereas once a

substantive defect is established, going to the scope of the statutory powers under which a development was promoted, or its legality or rationality as explained in **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374**, the court's discretion to refuse a remedy will be much more limited.

467. The position advocated in the United Kingdom certainly, appears to be that standing to sue ought to be broadened to allow persons with a genuine environmental grievance to challenge planning permission, even if they cannot establish a personal grievance which affects them specially. While this may appear to be unduly wide it does not detract from the fact that the applicant still has to demonstrate a genuine interest in aspects of the environment in respect of which protection is sought, apart from having basis to act in a representative capacity in the public interest. As stated in ***Walton***:

> *"[153] Of course, this must not be seen as an invitation to the busybody to question the validity of a scheme or order under the statute just because he objects to the scheme of the development. Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence a representative apcity. There is, after all, no shortage of well-informed bodies that are equipped to raise issues of this kind,……*

> *So there has to be some room for individuals who are sufficiently concerned, and sufficiently well-informed, to do this too. It will be for the court to judge in each case whether these requirements are satisfied."*

468. What then is the position in this jurisdiction? First of all regard has to be had to the particular legislation in respect of which the Respondents contend that they are 'adversely affected' under **Order 53**, according them standing to sue under the **FT Act**.

469. As we have pointed out at some length in relation to the construction of the **FT Act** earlier, it is legislation which hones in on public participation as a cornerstone of its purpose and object. The statutory development plan system provides and ensures public participation in the development of the Federal Territories. There is public participation prior to the gazetting of the **Structure Plan and Local Plan**. There is further public participation if there is any amendment or variation to these statutory plans.

470. This element of public inclusion naturally broadens the categories of persons who may challenge a development order, particularly where the development does not conform to the Structure Plan. If the public participated in the implementation of the statutory development plan as the legislature has seen fit to provide, then indubitably a member of the public can challenge a development which

fails to conform to the statutory development plan, if he has a genuine interest. This is particularly so when the local authority gives no reason for varying or altering the features of the Structure Plan, and does not follow the prescribed statutory provisions for variation or alteration as provided for under the **FT Act**.

471. Put another way, the words 'adversely affected' in **Order 53** in the instant appeals has to be construed in the light of the **FT Act.** The **FT Act** envisages public participation in the statutory development process at the inception, resulting in the gazetting of the same, followed by further public participation in the event of any alteration or variation of the statutory development plans. Therefore, standing to sue should, in like manner, extend to members of the public who can show a genuine interest in the matter, again in the public interest and with the expertise or knowledge to raise objections in relation to proper planning. Whether or not the challenge succeeds on the substantive merits is a different issue.

V. Do the Respondents Possess Standing to Sue In the Context of the Present Appeals

472. Given the construction above, the pivotal question is whether the Respondents possess standing to sue?

473. By way of reminder, the **1st to 5th Respondents** are the Management Corporations and Joint Management Body,

representing parcel proprietors of the condominiums/apartments adjoining the Proposed Development. As such, they are the owners or vested with the control of the common properties of their respective residential complexes.

474. The **6th Respondent** is a public officer of the registered residents' association for TTDI.

475. The **7th to 10th Respondents** are long-time residents and frequent users of Taman Rimba Kiara.

476. The subject matter of the claim relates to alleged illegalities by the Datuk Bandar with consequential effects on the environment and the previously categorised public space known as Taman Rimba, approximately half of which has been alienated for private development purposes.

477. It would follow from our analysis above that all the Respondents do enjoy standing to sue. This is because the 1st to 5th respondents represent parcel proprietors in developments close to or neighbouring the subject land. These parcel proprietors, being residents close to the subject land which was a public space comprising a park for public use, are adversely affected by the appropriation of half such space for the purposes of a private development. They have a genuine interest in such appropriation and alienation of public land for private

development. It encroaches onto their rights of enjoyment of the public space as a park. Similarly so with the 6th to 10th Respondents who are similarly placed to enjoy their individual rights to utilise the subject land as a public park.

478. As such these Respondents all fall within category of persons who are adversely affected because they are able to show a genuine interest in the subject land and its development otherwise than in conformity with the KL Structure Plan which was gazetted in 2004. There is no necessity as borne out by ***MTUC*** and ***QSR Brands*** for these parties to prove that they have suffered special detriment or prejudice which is personal to them. In point of fact the Respondents can and have established this as they have all lost their rights to utilisation and enjoyment of the light, air and environment of the public space previously comprising a public park, namely Taman Rimba, which has since been alienated and now utilised for private development.

479. Each of the Respondents has standing to sue by reason of their complaint of an encroachment into their private rights as well as their rights as a member of the public. Each of them claims a loss of a private right to enjoy their rights of access to part of what was a public park. This is a private right. They also in their capacity as members of the public who have a right to contribute towards the development of their area via the KL Structure Plan and

in that context enjoy a public law right. Both appear to have been affected, for purposes of standing to sue, in the present appeals.

W. Title to Sue

480. However with respect to the 1st to 5th Respondents, a material issue that arises is whether the Management Corporations ('MCs') and the Joint Management Body ('JMB') can represent the parcel proprietors under the individual statutes which circumscribe their powers. **The specific difficulty which arises concerns the capacity of the body to commence legal proceedings.**

481. It is important to appreciate **the difference between *locus standi* and the capacity of a management corporation or a joint management body to commence legal proceedings.** While each of the registered parcel proprietors in the various developments may well have standing to sue, the issue for consideration here is whether the management corporations in question or the joint management body has the capacity, both statutorily and procedurally, to represent each registered parcel proprietor's grievance. This is different from the issue of whether as individual registered parcel proprietors, each of these persons enjoys standing to sue. It is evident from our analysis above that each parcel proprietor does have the standing to sue, as their individual rights or interests have been prejudiced by the development of what was

once a public park and public space, still marked as such under the KL Structure Plan, has now been converted to private use as a mixed commercial development. However can the management corporation or the joint management body sue on the behalf of each of the registered parcel proprietors collectively?

482. The 1st to 4th Respondents are management corporations ('MCs') established between 2000 and 2009. The 1st Respondent is the MC of Trellises, the 2nd Respondent the MC of Kiara Green, the 3rd Respondent the MC of The Residence, and the 4th Respondent the MC of TTDI Plaza. These management corporations were established under the now-repealed **section 39 of the Strata Titles Act ('STA')** via the **Strata Titles (Amendment) Act 2013** in view of the introduction of the **Strata Management Act 2013 ('SMA')** which came into force on 1 June 2015.

483. The 5th Respondent, the Joint Management Body ('JMB') of The Greens was incorporated under **section 17 of the SMA** on 23 January 2017.

484. The 1st to 5th Respondents, as management corporations and a joint management body, are statutory corporations. Their purpose of incorporation is the maintenance and a management of strata property under them, collectively meaning to take charge and control of the organised functions of a strata building to preserve these buildings from deterioration. Their general duties and powers are

provided for in **sections 21(1) and (2), and 59(1) and (2) of the SMA 2013**.

485. As stated in **Halsbury's Laws of England 4th Ed Vol. 9 para 1333** at page 779:

> *"The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly required as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited."*

486. This passage was approved and applied in the Supreme Court decision of ***Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd ; [1985] 2 MLJ 359; [1985] CLJ (Rep) 206; [1985] 2 CLJ 427 relying on Abdoolcader J's decision in Datuk Haji Harun Bin Haji Idris v Public Prosecutor [1977] 1 MLJ 180. (See also Bank Pertanian Malaysia Berhad v Koperasi Permodalan Melayu Negeri Johor [2015] 9 CLJ 1; [2015] 6 MLJ 149; [2015] 6 AMR 213 and Penang Development Corporation v Teoh Eng Huat & Anor [1992] 3 CLJ Rep 204; [1993] 2 CLJ 283; [1993] 2 MLJ 97; [1993] 1 AMR 953 ('Teoh Eng Huat'), Prestaharta Sdn Bhd v Badan Pengurusan Bersama Riviera Bay***

***Condominium And Another Appeal [2017] 1 LNS 1393) ('Prestaharta')*.**

487. There is a long line of authority which establishes that a joint management body and a management corporation, cannot act beyond that which is authorised by the specific legislation creating them, albeit expressly or impliedly.

488. Having examined the relevant legislation fully, there is nothing in the relevant legislation that expressly allows the 1st to 5th Respondents to file these judicial review applications in their own right and in a representative capacity for the owners and residents of the property to quash the development order made by the Datuk Bandar in respect of the subject land. The question is whether the power to do so can be implied into the relevant legislation and whether a court can read such a power into the relevant legislation.

489. The Court of Appeal relied on ***Badan Pengurusan Tiara Duta v Timeout Resources Sdn Bhd [2014] 1 MLJ 110; [2014] 8 CLJ 133; [2014] 1 LNS 471; [2014] AMEJ 0739 ('Tiara Duta')*** where it was held the absence of an express provision giving the joint management body power to sell, lease or rent out common property in **section 8(2) of the Building and Common Property (Maintenance and Management) Act 2007** did not necessarily mean that a joint management body did not have the power to do so as such a power could be implied.

Reliance was then placed on the provision relating to the powers and duties of a joint management body. It was deemed to be wide enough to allow the sale, lease or rental of common property by implication from the words *"to do all things reasonably necessary for the performance of its duties under the Act".* This liberal interpretation was accorded in order to legalise agreements signed by a former chairman and secretary on behalf of a joint management body to lease out common property, namely the club house, restaurant, car parks and the surrounding areas to a company.

490. Notwithstanding the lease, the residents, it was held, could still enjoy the use of the common property and that it was for the JMB to supervise the company holding the lease to ensure that the common property was maintained. The court there reasoned that the rentals collected could *"no doubt be applied to reduce maintenance and management charges"* despite a lack of evidence to support such a conclusion. The common practice of a joint management body or management corporation leasing out parking bays to generate income was also taken into consideration. It was concluded there that a strict interpretation of **section 8(2)** would make no commercial sense.

491. In the instant appeals the Court of Appeal relied on this case to hold that **section 21(1)(i) SMA** is equivalent to

section 8(2)(g), and it should therefore be given a similar construction:

> *"...(i)to do such things as may be expedient or necessary for the proper maintenance and management of the buildings or lands intended for subdivision into parcels and the common property."*

492. We are of the view, with the greatest respect, that the Court of Appeal below erred in relying on *Tiara Duta* to adopt the reasoning there for the following reasons:

(i) **Section 21(1)(i)** as reproduced above, on a plain reading permits the management corporation to do all that is necessary for the maintenance and management of the buildings, lands and the common property. However, it does not extend further than that to enable the management corporation to act in a representative capacity for the purposes of instituting judicial review proceedings on behalf of all the registered parcel proprietors or lessees.

(ii) The management corporation or joint management body does not possess the capacity to commence legal proceedings because it has not been granted such capacity or power under the statute. Such a power or capacity cannot be implied under or into **section 21(1)(i) SMA**;

(iii) When a statute has conferred standing or *locus standi* to any association or persons who may not have a direct personal interest, an action for judicial review can be maintained, if it is established that the statutory body has been conferred such a right under the statute. For example such right is conferred under the **Industrial Relations Act 1967** for a trade union to file an application to espouse the cause of individual workmen, where the workman's rights have been infringed. The **STA** does not confer such a statutory right to either management corporations or the joint management bodies save for the very limited powers specified in the Act;

(iv) If such a power is to be read into **section 21(1)(i)** it would confer upon a management corporation or a joint management body, powers beyond that statutorily provided for in other aspects of the law. In order to do so it would be necessary to read such a power as an 'incidental power' to those conferred expressly by statute under **section 21(1)(i)**. As stated by Edgar Joseph Jr J in **Teoh Eng Huat & Anor [1992] 3 CLJ Rep 204**:

> *".....When the question arises whether a power is fairly incidental to those expressly given by the incorporating statute thought it must be determined reasonably, the Courts will not strain the language of the statute to enable the corporation to engage in activities never contemplated by the legislature....."*

And in **Prestaharta**:

> *"[27] Further we must not forget that JMB-RBC is a creature of legislation and as such it is prohibited from doing anything unless sanctioned by the very statute which gives its existence. Unlike a natural being, he or she is allowed to do anything unless prohibited by law. In other words, JMB-RBC can only do what is expressly allowed by Act 663, nothing more nothing less."*

(v) The management corporation or joint management body is not an entity that can be said to be an 'adversely affected' person under the **Order 53** read in the context of the **FT Act**, as it has no capacity under the law.

(vi) Judicial review proceedings could have been brought *vide* a representative action where the interests of each and every registered proprietor or lessee in each of the condominiums could have been ventilated and adjudicated upon. There is express provision under the law for such an action to be brought.

(vii) **R v Secretary of State for Environment, ex p Rose Theatre Co. (1990) 1 All ER 754**, it was held that the applicant company which had been set up with the object or preserving the remains of the Rose Theatre and making them accessible to the public, had no

sufficient interest to challenge by way of judicial review, the Secretary of State's decision not to list the remains in a Schedule of Monuments made under the **Ancient Monuments and Archaeological Area Act 1979**.

(viii) It remains to be considered whether estoppel is available to the registered parcel proprietors and lessees of the various condominium developments who sought to bring their applications through their individual management corporations and joint management bodies in the form of the 1st to 5th Respondents. However, the trite and accepted position in this context is that estoppel is ineffective in the face of statute or the law. If the law requires that something is to be done in a particular way, in this instance through a representative action, rather than through the management corporations or joint management bodies because there is no statutory right or capacity granted to these statutory bodies to bring judicial review proceedings in court, on behalf of the residents of their condominiums, then the law should be complied with. In this context, the question of standing goes to the jurisdiction of the court.(see **R v Secretary of State for Social Services, ex parte Child Poverty Action Group (1989) 1 All ER 1047).** It is not correct to confer standing by the use of estoppel or consent where a statue gives no such capacity to a statutory body. Jurisdiction of the Court

cannot be conferred by estoppel or consent. Put another way, estoppel cannot override the law.

(ix) We are cognisant that based on **section 143(2) and (3) of the SMA**, if the parcel owners or proprietors of the parcels are jointly entitled to take 'proceedings' for or with respect to common property the same may be taken by the management corporation or the joint management body. However, this right conferred on the joint management body and the management corporation is specifically in relation to proceedings for or in respect of common property and no more. The present factual matrix relating to standing to sue of each of the parcel proprietors in relation to a neighbouring development which they contend adversely affects them, does not fall within the section.

493. For these reasons we are constrained to conclude as the power to initiate judicial review proceedings cannot be implied into **section 21(1)(i) of the STA**. As such, by reason of the fact that the 1st to 5th Respondents lack capacity to bring these proceedings, as they cannot represent each individual parcel proprietor or lessee in their individual condominiums, they lack the requisite standing to bring these proceedings. We reiterate that it is not the lack of standing of the individual registered parcel proprietor or lessee's entitlement to bring proceedings but the manner in which such proceedings

have been brought. Although it might appear to be a 'procedural' matter it is in reality the lack of a substantive entitlement or right under statute to bring such judicial review proceedings. These proceedings could have been undertaken by way of a representative action as provided for under **Order 15 rule 12 of the RC 2012** which provides in **sub-rule 12(1)** that: "*Where numerous persons have the same interest in any proceedings.....*"

X. The Questions of Law in Relation to *Locus Standi*

494. Having examined the law and its applicability to the present proceedings, we now turn to the four questions of law:-

> Question 1. Whether Order 53 rule 2(4) of the Rules of Court is confined to the determination of threshold *locus standi* or whether it extends to confer substantive *locus standi* upon an applicant in an application for judicial review having regard to the decisions of the Court of Appeal in QSR Brands Bhd v Suruhanjaya Sekuriti [2006] 3 MLJ 164; [2006] 3 AMR 320; [2006] 2 CLJ 532 and of the Federal Court in Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177; and in Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145?
>
> Answer: For the reasons we have set out above, particularly in relation to the law relating to *locus standi* in this jurisdiction, from Lim Kit Siang and Othman bin Saat to QSR and MTUC, Order 53 Rule 2(4) relates to threshold *locus*

standi. The reference to substantive *locus standi* is, effectively a reference to the substantive merits of the case, which allows the Court to review its finding on threshold *locus standi* in view of the factual and legal matrix of the entirety of the matter. A person or entity may well fall within the broad approach to 'adversely affected' as envisaged under Order 53 rule 2(4) in the context of the particular area of law or statute dealing with the subject matter of a case, but yet may not succeed on a substantive examination of the matter because when the entirety of the legal and factual matrix is analysed, he may not have met the requirements to warrant the grant of the various remedies available under judicial review. Therefore Order 53 rule 2(4) relates to the threshold test. The term 'adversely affected' is to be construed in the context of the legal and factual matrix within which the application is made. The term 'adversely affected' ought not to be construed in vacuo.

Question 2: Whether an applicant seeking judicial review of a development order is required to come within the terms of Rule 5(3) of the Planning (Development) Rules 1970 before he or she may be granted relief having regard to the decision in District Council Province Wellesly v Yegappan [1966] 2 MLJ 177?

Answer: No. We have explained that firstly, Rule 5(3) of the Planning (Development) Rules 1970 are inapplicable in view of the fact that the subject land does not fall within the Comprehensive Development Plan. As such Rule 5(3) simply does not come into play.

Secondly, Rule 5(3) is wholly inconsistent with the statutory development plan namely the Structure Plan and therefore is inapplicable by virtue of section 65 of the FT Act.

Thirdly reliance on section 22(4) of the FT Act, which mentions the Comprehensive Development Plan, to justify the use of Rule 5(3) is erroneous in light of the inapplicability of the CDP to the subject land. More importantly, the discretion granted to the Datuk Bandar to diverge from the statutory development plan does not equate to reliance on Rule 5(3) of the Planning and Development Rules 1970. The Datuk Bandar moreover failed to establish whether and how he gave due consideration to the Structure Plan before choosing to rely on the CDP which, in any event is inapplicable in relation to the subject land. There is nothing in the affidavits of the Datuk Bandar which explain or state how he came to his decision. Accordingly an applicant seeking judicial review of a development order need not come within the terms of Rule 5(3) of the Planning (Development) Rules 1970.

Question 3: Whether the requirement of *locus standi* in judicial review proceedings set out in Order 53 rule 2(4) of the Rules of Court 2012 may override the provisions of Rule 5(3) of the Planning (Development) Rules 1970, the latter being written law, having regard to the decision of the Federal Court in Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang perai v Muziadi bin Mukhtar [2020] 1 MLJ 141?

Answer: This question is misconceived because of the inapplicability of the Planning (Development) Rules 1970 in light of the object and purpose of the FT Act which is predicated on statutory development plans. This means that when a court is assessing whether or not a person is

'adversely affected' within the meaning of Order 53 rule 2(4), the court does so in the context of the FT Act, not in vacuo. Order 53 rule 2(4) comprises the vehicle which enables a person who is adversely affected or has a genuine interest in a matter to initiate judicial proceedings. The judicial proceedings necessarily relate to a particular area of the law. In the present appeals the proceedings relate to whether a person or persons are 'adversely affected' within the legal context of the FT Act, given the factual matrix that subsists. There is therefore no question of Order 53 'overriding' Rule 5(3).

Question 4: In law whether a management corporation (1st to 4th Respondent) or joint management body (5th Respondent) established pursuant to Section *39 of the Strata Titles Act 1985* and *Section 17 of Strata Management Act 2013* has:-

4.1 the necessary power to initiate judicial review proceeding to challenge a planning permission granted on a neighbouring land?

4.2 the locus standi to initiate a judicial review proceeding on matters which does not concern the common property of the management corporation or joint management body?

4.3 the power to institute a representative action on behalf of all the proprietors on matters which are not relevant to the common property?"

Answer to Question 4 including 4.1, 4.2 and 4.3: No

XI. DUTY TO HEAR AND CONSULT: DUTY TO GIVE REASONS

495. Finally, we turn to consider leave Questions No. 6 and No. 7 which respectively read as follows:

> Question 6:"Whether, in the absence of a statutory direction to the contrary, a planning authority in deciding to issue a development order is under a duty at common law to give any or any adequate reasons for its decision to persons objecting to the grant of the development order having regard to the decisions in Public Service Board of New South Wales v Osmond (1986) 159 CLR 656, of the Federal Court in Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 4 CLJ 105; [2002] 3 AMR 2871 and that of the Court of Appeal in The State Minerals Management Authority, Sarawak & Ors v Gegah Optima Resources Sdn Bhd [2021] 1 MLJ 268; [2020] 6 CLJ 279; [2020] 1 LNS 495?"
>
> Question 7: "If the answer to Leave Question No. 6 above is in the affirmative, then whether the reasons must be conveyed to the objectors at the time of its communication or whether reasons may be given in an affidavit opposing judicial review proceedings?"

A. Decisions of the Courts Below

496. The findings out of the courts below on whether a duty to hear and a duty to give reasons subsist are summarised below.

(a) High Court

There is no statutory duty imposed on Datuk Bandar to give reason under the **FT Act** or the **Planning Rules 1970** except under **section 22(5) of the FT Act** that require reasons to be given by the Datuk Bandar whenever application for planning permission is granted with conditions or refused as decided in ***Nadzaruddin***

(b) Court of Appeal

(i) There is a common law duty to inform the adjoining landowners of a hearing and of their right to attend and express their concerns at the hearing and give reason to those who attended of the decision made, the outcome of the hearing and the response to their objections and/or concerns.

(ii) Even if there is no provision specifically requiring the decision-maker to give reasons, it does not mean that such duty does not exist.

(iii) The law on this issue is clear and settled:

(1) ***Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390; [1988] 1 CLJ 559 ('Rohana')*** – a 'reasoned

decision can be an additional constituent of the concept of fairness' and where the reasons have to be given so that the right of appeal may be properly and meaningfully exercised;

(2) ***Sungai Gelugor*** - There is a duty to give reasons even if there is no express provision for such duty.

(3) This duty emanates from the concept of fairness (see also ***Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590; [2017] 4 CLJ 265; [2017] 3 AMR 340 ('Kesatuan Pekerja')*** and ***Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia [2017] 6 MLJ 586; [2017] 10 CLJ 36 ('Hassan')*** (see discussions of the same in **Save Britain's Heritage v Secretary of State for the Environment and others [1991] 2 All ER 10**).

B. Crux of the Issues

497. The commonality of the Appellants' grievances here are two-fold. One, that the Court of Appeal erred in imposing a common law duty on the Datuk Bandar to consult and hear objections from the 1st to 10th Respondents who do not fall within the purview of **rule 5(3) of the Planning Rules 1970** which restricts such right of consultation to a

specific class of persons who do not include the 1st to 10th Respondents.

498. Secondly, the Appellants complain that the Court of Appeal erred in deciding that:

(a) the Datuk Bandar has a duty to give reasons for its decisions to objectors, notwithstanding the absence of a statutory provision requiring them to do so;

(b) the reasons for this decision must be conveyed to the objectors at the time the decision is communicated;

(c) there is a common law duty to inform the objectors of the outcome of the hearing and to respond to the objections raised; and

(d) the Datuk Bandar is precluded from supplementing its reasons for granting the Impugned Development Order by way of other facts only deposed by way of affidavit evidence in judicial review proceedings.

499. The issue here centres on whether the Datuk Bandar is under a duty to give reasons where there is nothing expressly stipulated in the **FT Act** to this effect. In this context, it is worth reiterating that the need to give reasons does not arise when all opportunity to raise objections and to give reasons for development of the region in a particular manner is dealt with prior to the

gazetting of the statutory development plans. Once the Structure Plan (and ideally the local plan) are gazetted, there ought to be no reason to deviate from the same, unless the Datuk Bandar in the exercise of its discretion under **section 22(4)** decides that it is necessary to do so. As stated elsewhere, **section 22(4)** does not obviate or oust the requirement comply with the procedures inherent in varying or altering the Structure Plan under **section 10 of the FT Act**. At this juncture, questions will be raised and answers given.

500. In the event the procedure for variation or alteration under the **FT Act** is not complied with, then we are left with a situation where the Datuk Bandar in the exercise of its discretion deems it necessary to allow a development that does not adhere to the statutory development plans. Is there then a duty to give reasons?

C. Answer to Question 6 and 7

Duty to Give Reasons where there is Deviation from the Statutory Development Plans

501. Case-law on this particular subject is scarce. The general stance adopted is that, there is no duty to give reasons as there is no express statutory provision requiring so. We also heard from counsel that a finding that there could be a duty to give reasons in the absence of statute expressly

providing so, would be a grave and unprecedented finding.

502. However, the lack of an express statutory provision requiring a local authority to give reasons for its approval does not equate to a conclusion that there is absolutely no duty to give reasons at all. A failure to give any reason at all for the grant of a Development Order reduces transparency in the decision-making process.

503. The duty to give reasons is determined on case by case basis as decided by the Privy Council in the case of **Stefan v General Medical Council [1999] 1 WLR 1293 –**

> *"**The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current developments towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis** (Reg. v. Royal Borough of Kensington and Chelsea, Ex parte Grillo (1996) 28 H.L.R. 94), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers. **It was reaffirmed in Reg v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531, 564, that the law does not at present recognise a general duty to give reasons for administrative decisions. But it is well established that there are exceptions where the giving of reasons will be required as a matter of fairness and openness. These may occur through the particular*

> ***circumstances of a particular case.*** *Or, as was recognised in Reg. v. Higher Education Funding Council, Ex parte Institute of Dental Surgery [1994] 1 W.L.R. 242, 263,* ***there may be classes of cases where the duty to give reasons may exist in all cases of that class. Those classes may be defined by factors relating to the particular character or quality of the decisions, as where they appear aberrant, or to factors relating to the particular character or particular jurisdiction of a decision-making body, as where it is concerned with matters of special importance, such as personal liberty.*** *There is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions. But the general rule has not been departed from and their Lordships do not consider that the present case provides an appropriate opportunity to explore the possibility of such a departure…".*
>
> (Emphasis ours)

504. The same stance has been adopted by the Malaysian courts as will be discussed further below.

505. The sentiment that there cannot be any duty to give reasons runs awry of the general purpose and object of the Act which statutorily embeds the right of public participation in the land planning process. Where such public participation has been ignored or not followed, then it must follow that the those persons be accorded an opportunity to be heard. This is particularly so when the

Act accords a minimum level of publicity that statutory development plans must go through before they are gazetted.

506. The statutorily given rights of the public would be diluted and rendered nugatory if the Datuk Bandar's discretion may override the statutory development plans if no reasons were provided for the deviation from the Structure Plan and for the grant of planning permission in relation to a development. This is particularly so in relation to a public park which is converted for use as a private development.

507. To fail to recognise and enforce an obligation to give reasons to third parties to an application of planning permission, such as the Respondents, particularly where there is a departure from the KL Structure Plan, as provided for under **section 7 of the FT Act,** would be inimical to the purpose and object of this statutory provision.

508. It is also of importance that persons who enjoy such standing comprehend why a particular decision was made by a local authority so as to ascertain whether such a decision was lawfully made and to challenge such decision if they are of the view that it was not.

509. In this context, the decision of the UK Supreme Court in ***Supreme Court decision of R (on the application of***

CPRE Kent) v Dover District Council and another [2017] UKSC 79, [2018] 2 All ER 121 ('Dover District Council') considered the issue of the duty to give reasons in administrative law. Although the legislation in the UK is not on all fours with our legislation, the underlying principle relating to the duty to give reasons in planning law and the concept of "fairness" in a statutory context and its applicability is relevant. It is relevant because it explains the need to provide reasons as a matter of transparency and fairness to objectors, as well as to enable the courts to undertake their essential supervisory function where challenges to the legality of the local authority's decision are made.

510. In ***Dover District Council***, the English Supreme Court acknowledged that there was no general duty to give reasons at common law yet it was trite that fairness may, in some circumstances, require the giving of reasons even where no express duty is imposed by statute. The Supreme Court then referred to **R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531 ("Doody")**, where it was held that the prisoner concerned was entitled to the reasons for the Home Secretary's decision, before noting that the principal reason for imposing such a duty was to reveal any error that would entitle a court to intervene:

> *"To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the*

penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene…"

511. The Supreme Court then concluded that the decision of **Doody** established the general law of imposing a duty to giving reasons:

"[54]… Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. Doody itself involved such an application of the common law principle of "fairness" in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts. Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision.

[55] Doody concerned fairness as between the state and an individual citizen. The same principle is relevant also to planning decisions, the legality of which may be of legitimate interest to a much wider range of parties, private and public: see Walton v Scottish Ministers [2013] PTSR 51, paras 152–153 per Lord Hope of Craighead DPSC. Here a further common law principle is in play. Lord Bridge saw the statutory duty to give reasons as the analogue of the common law principle that "justice should not only be done, but also be seen to be done" (see para 25 above). That principle of open justice or transparency extends as much to statutory inquiries and procedures as it does to the courts: see Kennedy v

Information Comr (Secretary of State for Justice intervening) [2015] AC 455, para 47 per Lord Mance JSC, para 127 per Lord Toulson JSC."

512. In short, a common law duty of "fairness" inherent in the statute gave rise to an obligation to give reasons for an administrative decision. It also enabled an affected individual to then challenge the legality of that decision. The statutory duty to give reasons is analogous to the common law principle that justice should not only be done but be seen to be done.

513. In the present appeal, Yayasan contend, among others, that the judgment of the Court of Appeal in reliance to several cases i.e. ***Hassan*** and ***Rohana*** is misconceived on the ground that the Datuk Bandar in granting the development order had acted in accordance with law (see paragraphs 207(c) and 215(e) of Yayasan's submission). As we have concluded before, there is a deviation from the statutory development plan and contravention of **section 22(4) FT Act**. Thus, the Court of Appeal has not erred in referring to these cases.

514. Accordingly, along the same path, this Court in **Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal [2023] MLJU 98; [2023] 2 CLJ 333; [2023] 1 LNS 98** states that **–**

"228. Although the legislation in the UK is not on all fours with our legislation, ***the underlying principle relating to the duty to give reasons in planning law and the concept of "fairness" in a statutory context and its applicability, is relevant. It is relevant because it explains the need to provide reasons as a matter of transparency and fairness to objectors, as well as to enable the courts to undertake their essential supervisory function where challenges to the legality of the local authority's decision are made****."*

"[236] ***The decision of the local authority in the instant case*** *involved development on hill lands, which the neighbouring landowners maintain,* ***did not comply with, and possibly contravened the Structure Plan. It would require very strong reasons for the local authority to deviate from the Structure Plan and it follows that affected persons, such as the Appellants here, have a right to be told why the local authority considers the Sunway development as justified notwithstanding its adverse effect on the hill lands."***

(Emphasis ours)

D. Where there is no Statutory Provision to Give Reasons – Does it mean there is never an Obligation to do so?

Common Law Position

515. Generally, there is no duty to give reasons and such obligation arises when it is provided for in the statute. Be that as it may, there are exceptional or special circumstances that requires the authorities to give

reasons for its decision. Gibbs CJ. in **Public Service Board of New South Wales v Osmond (1986) 159 CLR 656 ('Osmond') –**

> *"The immigration appeal tribunal from whose decision an appeal was brought in that case was also under a statutory obligation to give reasons for its decision: see The Immigration Appeals (Procedure) Rules 1972 (U.K.), par . 39 (Halsbury's Statutory Instruments (1979), vol. 2, p. 40).* ***It would be wrong to think that any of these three cases made any departure from established principle or recognized the existence of a duty at common law to give reasons for administrative decisions; the obligation to give reasons depended on statute****.*
>
> *...*
>
> *It remains to consider whether,* ***notwithstanding that there is no general obligation to give reasons for an administrative decision, the circumstances make this a special case in which natural justice required reasons to be given.*** *The rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see how the fairness of an administrative decision can be affected by what is done after the decision has been made. However, assuming that in special circumstances natural justice may require reasons to be given, the present is not such a case."*

In similar vein, Deane J, in **Osmond** observed that if the statute does not provide for the duty to give reasons, such duty is an implied statutory duty if it involves environment matters or special circumstances that adversely affect other person's property, rights or legitimate expectations –

On the other hand, it is trite law that the common law rules of natural justice or procedural fair play are neither standardized nor immutable. The procedural consequences of their application depend upon the particular statutory framework within which they apply and upon the exigencies of the particular case. Their content may vary with changes in contemporary practice and standards. That being so, ***the statutory developments referred to in the judgments of Kirby P and Priestley JA in the Court of Appeal in the present case are conducive to an environment within which the courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision maker should be under a duty to give reasons or to accept that special circumstances might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision maker provide reasons for a decision to a person whose property, rights or legitimate expectations are adversely affected by it****. Where such circumstances exist, statutory provisions conferring the relevant decision-making power should, in the absence of a clear intent to the contrary, be construed so as to impose upon the decision maker an implied statutory duty to provide such reasons****. As has been said however, the circumstances in which natural justice or procedural fair play requires that an administrative decision-maker give reasons for his decision are special, that is to say, exceptional"*

(Emphasis ours)

.

516. The Supreme Court in ***Dover District Council*** then went on to endorse the decision of ***Oakley v South Cambridgeshire DC [2017] EWCA Civ 71 ('Oakley')***, where the Court of Appeal held *'although there is no statutory obligation to give reasons where permission is granted, it does not follow that there is never any obligation to do so'*.

517. The Court of Appeal expressed that there were powerful reasons for administrative bodies to give reasons for their decisions and these reasons in our mind benefit both the administrative body and the public at large:

> *"26. There are powerful reasons why it is desirable for administrative bodies to give reasons for their decisions. They include improving the quality of decisions by focusing the mind of the decision-making body and thereby increasing the likelihood that the decision will be lawfully made; promoting public confidence in the decision-making process; providing, or at least facilitating, the opportunity for those affected to consider whether the decision was lawfully reached, thereby facilitating the process of judicial review or the exercise of any right of appeal; and respecting the individual's interest in understanding - and perhaps thereby more readily accepting - why a decision affecting him has been made. This last consideration is reinforced where an interested third party has taken an active part in the decision making-process, for example by making representations in the course of consultations. Indeed, the process of consultation is arguably undermined if potential consultees are left in the dark as to what influence, if any, their representations had."*

518. This was especially so in the special circumstances of the case, namely that there was a departure from the development plan and the Green Belt policies. As such, openness and fairness to the objectors required reasons to be stated for *'it was impossible to infer the reasons from their report or other material available to the public'* in the view of the Supreme Court. It is telling that in the instant appeals there was a mere letter with no explanation to the objectors as to the reason for granting planning permission which deviated from the Structure Plan.

519. We endorse these principles iterated in ***Oakley***. The giving of reasons where there is a departure from the statutory development plans, will improve the quality of decision-making by our administrative bodies and increase the likelihood that the ultimate decision will be lawfully made. Public confidence in the decision-making process will increase as will public receptivity to decisions of administrative authorities. The giving of reasons ensures that statutory provisions that galvanized the entrenched requirements of public participation are not just empty statutory provisions.

520. With regards to the criticism that by requiring reasons for decisions granting planning permission, the Supreme Court in ***Dover District Council*** may leave open uncertainty as to what particular factors are sufficient to

trigger the common law duty, Lord Carnwath addressed this as follows:

> *"[58] This endorsement of the Court of Appeal's approach may be open to the criticism that it leaves some uncertainty about what particular factors are sufficient to trigger the common law duty.... The answer to the latter must lie in the relationship of the common law and the statutory framework. The court should respect the exercise of ministerial discretion, in designating certain categories of decision for a formal statement of reasons. But it may also take account of the fact that the present system of rules has developed piecemeal and without any apparent pretence of overall coherence. It is appropriate for the common law to fill the gaps, but to limit that intervention to circumstances where the legal policy reasons are particularly strong.*
>
> *[59] As to the charge of uncertainty, it would be wrong to be over-prescriptive, in a judgment on a single case and a single set of policies. However it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in Oakley and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance… Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases.*

> *[60] ... the debate is not about the necessity for a planning authority to make its decision on rational grounds, but about when it is required to disclose the reasons for those decisions, going beyond the documentation that already exists as part of the decision-making process. Members are of course entitled to depart from their officers' recommendation for good reasons, but their reasons for doing so need to be capable of articulation, and open to public scrutiny. There is nothing novel or unduly burdensome about this."*
>
> (Emphasis ours)

521. We have considered the legal rationale above, and now endorse these principles. Openness or transparency comprises a rational basis on which to require that a local authority gives reasons, as much as effective supervision by the courts. They are separate rationales for the duty to give reasons.

522. As such, why should local authorities like the Datuk Bandar provide reasons for its decisions? Indeed, departures from the development plan are permissible in our **FT Act** where there are proper planning principles to warrant it but **section 22** is silent on whether the proper planning principles ought to be disclosed as reasons.

523. It is legally coherent, as suggested by Lord Carnwarth for the common law to fill the gaps but limit that intervention to circumstances where the legal policy reasons are particularly strong. As **section 22(4) of the FT Act** allows

the Datuk Bandar the discretion to override provisions of the development plan where it is deemed necessary or expedient for proper planning, it is reasonable to imply that what constitutes proper planning may be easily translated into reasons to be disclosed for public scrutiny, and that such reasons are capable of articulation, being reasons which the Datuk Bandar itself took into consideration in granting planning permission for a development that deviates from the statutory development plans. Otherwise, the purpose of mandating a public participatory process and the hearing of objections before the gazettement of development plans will be entirely nugatory.

524. The instant appeals comprise an apt example, where planning permission has galvanized public opposition and therefore the circumstances warrant public explanation.

525. The giving of reasons promotes the purpose of ensuring that decisions of the local authority are transparent under the **FT Act**, for *'where the public interest in ensuring that the relevant decision-maker has considered matters properly is especially pressing… requiring the giving of reasons is a way of ensuring that the decision-maker has given careful consideration to such a sensitive matter'* per ***Oakley*** at [79].

526. **MP Jain** in **Administrative Law of Malaysia** (LexisNexis 2020) at page 306 identified certain types of situations

where a duty to give reasons is imposed on adjudicatory bodies by the British courts, which among others are –

(i) when a person has a right of appeal from the decision of a body, and such right may be frustrated in the absence of reasons being given by the concerned body;

(ii) there may exist legitimate expectation that the deciding authority would give reasons for its decision;

(iii) when the decision **adversely affects a cherished interest** like personal liberty;

(iv) when the decision appears to be aberrant on its face; and

(v) reasons are to be given as a matter of natural justice.

E. Malaysian Position

527. A similar approach is adopted by the Malaysian courts as borne out in the following judgments:

(1) Edgar Joseph Jr J in ***Rohana*** mentioned that the authority has a duty to give reason in a situation where someone's livelihood is at stake on fairness basis –

"In the present case, it was argued, and I agree, that in a university environment, the exercise of reason and intellect are encouraged. The applicants are academics and should be told of the scope of free speech and interaction with students and why their defences were rejected. ***The giving of reasons for decision in a situation such as this would also serve as a guide to other academics in the position of the applicants. Moreover, the applicants' livelihood was at stake****. As was well put by Lord Denning in Breen's case [1971] 2 KB 175 at p 191:*

If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149. ***But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard.***

In certain circumstances, which I have endeavoured to indicate, ***a reasoned decision can be an additional constituent of the concept of fairness.*** *I am satisfied that having regard to all the circumstances the present case was such a case. The applicants are also entitled to succeed on this ground since neither the disciplinary authority nor the university council gave any reasons for their decision.";*

(Emphasis ours)

(2) in ***Sungai Gelugor***, the Federal Court decided that the authority has a duty to give reasons in exceptional circumstances –

"We endorse the principles enunciated by the Privy Council in Dr Stefan and say that ***in the exceptional circumstances of this case and having regard to the trend towards increased openness in matters of Government and administration, as a matter of fairness, reasons should have been given by the Council*** *as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition. In so holding, we should like to place special stress on the Council's earlier statement, when responding to a plea by members of the Society regarding pricing, that pricing was an internal matter and did not concern it. To put it mildly,* ***the circumstances here were such as to cry out for an explanation from the Council as to its departure from its earlier stance****, yet none was vouchsafed to the Society until after proceedings had been commenced in Court. That belated explanation, as we have already indicated, left much to be desired.";*

(Emphasis ours)

(3) **Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 4 CLJ 105; [2002] 3 AMR 2871 –**

"In considering the words in s 65(1)(c), it is clear that there is no express statutory duty imposed on the state authority to give reasons to the respondent. ***Insofar as the common law***

position is concerned, we adopt the proposition that was stated in Marta Stefan that the trend of the law is towards giving reasons, but on a case by case basis*. However, that trend has not lost sight of the established position of the law that there is no general duty universally imposed on all decision makers.";*

(Emphasis ours)

(4) ***Hassan–***

"[57] In considering whether there were exceptional or particular circumstances where the duty to give reasons may in fact exist, the learned judge ought to have taken into account the fact that this was an application for optional retirement under s 12(1) of the Statutory and Local Authorities Pensions Act 1980. That Act has to be read together with the appropriate service circulars issued by the public services department and which have been adopted for application by statutory bodies such as the respondent….";

(5) the Federal Court in the case of ***Kesatuan Pekerja*** stipulates that the Director General of Trade Union has a duty to give reason for the decision that he has made in relation to the registration of the appellant as a trade union **–**

"[89] In our view, in exercising his powers and/or discretion and making a decision under s. 12 of TUA 1959 the DG must have a reason for that decision. It is not a fanciful decision and the discretion can never be exercised willy nilly. ***Being in that position, it is reasonable and appropriate to imply that he ought to have given reason/s for his decision****. He*

did not do so, for he was under the erroneous belief (as stated in his affidavit in reply) that he has "kuasa budi bicara yang mutlak". He has not.";

(Emphasis ours)

(6) **The State Minerals Management Authority, Sarawak & Ors v Gegah Optima Resources Sdn Bhd [2021] 1 MLJ 268; [2020] 6 CLJ 279; [2020] 1 LNS 495 ("Gegah Optima") –**

"[65] Following thus the Federal Court in Majlis Perbandaran Pulau Pinang and the Privy Council decision in Dr Stefan, ***a reasoned decision is really an additional constituent of the concept of fairness as opposed to being in itself and on its own, without more, a common law duty to provide reasons. There is no universal common law duty to give reasons. It is a matter of fairness and the trend towards increased openness proceeds on a case by case basis. In a case where there are no express or implied requirement to provide reasons, and it cannot be inferred such a power too, then it is whether there are exceptional circumstances for this requirement****; whether as was the case in Majlis Perbandaran Pulau Pinang, a 'cry out for an explanation' as was so in Mohamad Hassan Zakaria.*

...

[61] We are prepared to agree with the learned judge that ***whilst the Ordinance may be silent on the requirement of giving reasons, the factual matrix and the scheme of the Ordinance are valid basis for the proposition that at the very least, reasons ought to have been forthcoming to the respondent at some point or other. It certainly makes for***

transparency and better administration of the Ordinance in particular and for good governance generally. But, that is still far from saying that 'it would appear that the duty to give reasons has now become part of lawful decision-making process,' that there exists a common law right to be given reasons for any decision made and that there is a common law right of an opportunity to be heard before that decision is made; and that any failure to comply with either requirement renders decisions reached invalid and ripe for the court's exercise of its supervisory powers."

(Emphasis ours)

F. The Present Appeal: Was there a Duty to Give Reasons?

528. The decision of the Datuk Bandar in the instant case was to grant planning permission on land that formed part of a green open space known as Taman Rimba Kiara. Taman Rimba Kiara has a history of being viewed and utilised as a public park. The planning permission granted also contravened provisions of the KL Structure Plan as well as the Draft KL Local Plan as was presented to the public and subjected to objection hearings. It would therefore require very strong reasons for the local authority to contravene the KL Structure Plan and it follows that as affected persons, such as the Respondents here, have a right to be told why the local authority considers the Impugned Development Order as justified notwithstanding its adverse effect on Taman Rimba Kiara.

529. The public interest element that is implicit in the **FT Act**, demonstrated by the Act mandating a minimum level of publicity amongst others, requires that the relevant decision maker has considered matters properly is put into sharp focus in a case such as this where the grant of planning permission is a departure from the KL Structure Plan. That in itself warrants the giving of reasons for such departure.

530. The giving of reasons ensures that the decision maker has given sufficient and careful consideration of proper planning principles as termed by the **FT Act**. This is in line with the general expectation of the public that local authority decisions will comply with the KL Structure Plan. While in certain circumstances development which deviates from the KL Structure Plan may be required and to that extent is not aberrant or irrational, it will remain important for the Datuk Bandar as the decision maker to explain or justify the decision, in terms of why such development should override the KL Structure Plan.

531. In summary therefore, particularly on the facts of these matters, namely the deviation from the KL Structure Plan, the use of the gazetted KL Local Plan that departs significantly from the Draft KL Local Plan, and the use of **rule 5 of the Planning (Development) Rules 1970** notwithstanding the adoption and gazettement of the KL Structure Plan, require that reasons should have been

given, *inter alia*, to the Respondents for the Datuk Bandar's decision to grant the Impugned Development Order.

532. For these reasons we answer **Question 6 in the affirmative**. Reasons in writing ought to be given, *inter alia,* in the circumstances we have delineated above, including where there is a deviation from the statutory development plans at the discretion of the Datuk Bandar.

533. This is so, even in the absence of an express statutory provision requiring that the Datuk Bandar do so for the reasons we have set out above. It is relevant that there is no express statutory provision stipulating that the Datuk Bandar 'shall not' give reasons for its decision. Reasons are of considerable importance where the Datuk Bandar deviates from the statutory development plans in the exercise of its discretion under **section 22(4) FT Act** for reasons of transparency, objectivity and secondly to allow persons who claim to be 'adversely affected' to challenge the decision in Court. All these matters ultimately serve to comply with the rule of law which requires that statutory bodies act within the confines of their legislated authority and not *ultra vires*. It also enables the Courts to adjudicate on the validity of such decisions in keeping with the supervisory function of the courts in relation to statutory bodies and tribunals to ensure the fundamentals of the rule of law are adhered to, in the interests of the public.

534. As for **Question 7, namely when such reasons are to be given, the answer is at the time when a decision is communicated to the objectors, rather than when a challenge has been brought and the Datuk Bandar explains its actions**. This is to enable the objectors to comprehend why a decision has been taken in a particular way. The reasons given should be adequate without the need to descend to the minutiae of every step in the process of determination. The reasons should however be sufficient to enable the objectors to make an informed decision as to whether or not the decision in relation to planning permission is to be challenged or not.

535. The Appellants contended that the Court of Appeal erred in deciding that the decision **ought to have been communicated at the time when it is made** based on the case of **R v Westminster City Council, ex parte Ermakov [1996] 2 All ER 302** as such duty is provided for in the statute. As decided by Hutchison LJ at page 315 –

> *"(1) It is unrealistic to seek to draw any significant distinction, in the context of s 64, between the decision and the communication of the decision with reasons, or to treat the giving of reasons as purely procedural. In reaching this conclusion I am influenced by the fact that* ***the section in terms*** ***requires reasons to be given at the same time as the decision is communicated****; by Schiemann J's observations in Ex p Shield; and by the many cases in which*

such decisions have been quashed for inadequacy of reasons.".

536. In this jurisdiction the **FT Act** contains no express provision for reasons to be communicated at the time of the decision. This is because public participation is already embedded vide the statutory development plans. However, **section 22(4)** allows the Datuk Bandar to deviate from the statutory development plans, where it is deemed necessary or expedient for proper planning. This discretion which allows for a variation in the statutory development plans approved by the public, therefore requires reasons to be afforded to the public for such deviation or variation. This is more so when such a decision affects a public space.

537. The Datuk Bandar and Memang Perkasa submit that a decision-maker may explain their reasons for making the decision subsequent to the time of the decision, and when challenged in court proceedings, by way of an affidavit. As such it is contended that a failure to provide reasons at the point when the decision is made, is not fatal. They rely on **Gegah Optima**.

"[66] The learned judge took it to be the law that there is now a common law duty to give reasons when as we can see there is none. The invocation of that duty is through a careful process and only in exceptional circumstances. ***It is our view that the appellants' failure to state reasons at the material time is not fatal.*** *The conditions in Dr Stefan as endorsed in*

Majlis Perbandaran Pulau Pinang are not presented in this appeal. Section 44 is explicit and clear in its requirements and we also do not find any room for any inference of a duty to give reasons for any decision reached. We further find no reason or room to infer such a power the breach of which renders the decisions reached invalid.

[72] The learned judge did not address any of these reasons at all; taking the position that because no reasons were given at the time of the issuance of the impugned letters, a reasonable inference that the first appellant had not exercised discretion in accordance with the law, was triggered. This understanding and application of the law, too, is incorrect. ***Although the reasons may not have been given at the material time of the letters, the fact remains that the reasons were made known at the time of consideration by His Lordship. Once placed before the court, we are duty bound to examine and consider those reasons with a view to ascertaining if the allegations of breaches of the rules of natural justice have been made out****; that the decisions reached were devoid of reason and invalid under the Wednesbury principles and discretion must be exercised in favour of quashing those decisions."*

(Emphasis ours)

538. We are of the view that the correct approach to be adopted, in line with the purpose and object of the **FT Act** is for the Datuk Bandar to provide reasons for any variation or deviation from the statutory development plans at the time when a decision is made to deviate or vary. To that extent we differ from the **Gegah Optima**

(above). It is important that reasons are accorded by the decision maker, here the Datuk Bandar at the time of the decision because:

(a) The Act requires that the public, including the objectors in the instant case comprehend the reasons for the deviation which are undertaken for proper planning purposes;

(b) In the event no reasons are given at the time when the decision is made, this places the burden on members of the public to file proceedings in order to comprehend why a particular variation or deviation from the statutory development plan has been made by the Datuk Bandar;

(c) The duty to give reasons is consonant with the object and purpose of the FT Act which provides for public participation in the development of the region. That participation is reflected in the statutory development plans. So when there is a variation, and there is no amendment made to the structure plan, which would allow the public to give their views, it becomes incumbent upon the Datuk Bandar to explain the deviation or variation to the public. This would include the objectors in the instant appeals.

(d) This duty to give reasons at the time when the decision is made is separate from the duty of a court

to examine the reasoning given by the authorities in the course of a judicial review. The affidavits filed at that juncture serve to defend the decision maker's decision. That is different from the duty to explain to the public which is entrenched in the FT Act.

539. In the present appeals, there was no such explanation nor reasons afforded by the Datuk Bandar to the public at the time when the decision was made, notwithstanding the objections specifically put forward by the objectors. Neither was there any explanation given subsequently by the Datuk Bandar in its affidavits or submissions. Those material considerations that the Datuk Bandar took into consideration as outweighing the need to follow the statutory developments plans needed to be outlined in order to comprehend why the variation from the Structure Plan is necessary. Instead, the Impugned Development Order was issued by relying solely on the CDP and other Rules, which are entirely inapplicable as explained earlier.

540. This brings us to the duty of disclosure incumbent on the Datuk Bandar once the matter has been referred to Court. The local authority such as the Datuk Bandar is under a duty to provide full disclosure of all relevant facts and documents relating to the final decision. This is the subject matter of question 7.

G. Duty of Disclosure on the part of the Datuk Bandar in Judicial Review Proceedings

541. The duty of disclosure has been aptly described in the English case of ***Tweed v Parades Commission*** **[2006] UKHL 53 ('Tweed')**. It explains that the need for disclosure enables the High Court in the exercise of its supervisory function *'to have regard to the nature of the rights purported to have been infringed by the actions of the public authority'.*

542. The duty of disclosure on the part of a local authority was explained:

> *"[54] All this is very well known and the subject of copious jurisprudence and academic commentary. Lord Steyn's judgment in R v Secretary of State for the Home Dept, ex p Daly [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532(quoted extensively by Lord Carswell in his opinion (at [35], above)) has attained near-classic status. Plainly nowadays, in cases like the present, a more intensive review, a closer factual analysis of the justification for restrictions imposed, is required than used to be undertaken on judicial review challenges. But it is important too to recognise that even in proportionality cases judicial review still remains a very different process from the sort of litigation in which disclosure orders are ordinarily made. The challenge by definition goes to the legality of the decision impugned. Generally no fact-finding will be necessary—unless perhaps in procedural challenges where it may be necessary to establish what happened in the course of the decision-making*

> *process rather than what material was before the decision-maker. And it is a well-established principle that once permission to bring a claim for judicial review has been given public authorities are under a duty of candour to lay before the court all the relevant facts and reasoning underlying the decision under challenge. Even, moreover, where proportionality is an issue, as Lord Steyn remarks towards the end of the passage cited from his judgment in Ex p Daly (at [28]): 'This does not mean that there has been a shift to merits review. On the contrary . . . the respective roles of judges and administrators are fundamentally distinct and will remain so . . .'"*
>
> (Emphasis ours)

543. We are concerned here with the legality of the Impugned Development Order granted by the Datuk Bandar (i.e., the 1st Appellant) sitting as a public authority. Public authorities act in the public's interest. As such a public authority owes a duty of candour in judicial review proceedings to make full and fair disclosure of all relevant materials.

544. This duty of candour is a duty that public authorities should exercise, not least because they are expected to assist the court with *'full and accurate explanations of all the facts relevant to the issue which the court must dec*ide' and that this duty extends to disclosure of *'materials which are reasonably required for the court to arrive at an accurate decision'*.

545. We cite with approval from ***R (on the application of Bancoult (No 2)) v Secretary of State for Foreign and Commonwealth Affairs*** **[2016] UKSC 35**:

"DUTY OF CANDOUR

[183] A respondent's duty of candour in judicial review proceedings is summarised at p 125 of Fordham's Judicial Review Handbook *(Sixth Edition 2012):*

"A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground; and (3) disclosure at the permission stage if permission is resisted. … A main reason why disclosure is not ordered in judicial review is because courts trust public authorities to discharge this self-policing duty, which is why such anxious concern is expressed where it transpires that they have not done so."

[184] In R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409 at para 50 Laws LJ said, "There is a …very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue which the court must decide." The duty extends to disclosure of "materials which are reasonably required for the court to arrive at an accurate decision" - Graham v Police Service Commission*[2011] UKPC 46 at para 18.*
The purpose of disclosure is to "explain the full facts and reasoning underlying the decision challenged, and to disclose relevant documents, unless, in the particular circumstances

of the case, other factors, including those which may fall short of public interest immunity, may exclude their disclosure - R (AHK) v Secretary of State for Home Department (No 2) [2012] EWHC 1117 at para 22."

(Emphasis ours)

546. As expressed in ***R v Lancashire CC, ex p Huddleston*** **[1986] 2 All ER 941 at 945**, it is for an applicant *'to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands'.*

H. The Role of the Court When A Material Fact is not Disclosed

547. This transitions to an important point, namely that the courts do not condone contraventions of the law, be it under the **FT Act** or any other law. The fact that a material issue was not disclosed by the parties does not preclude this Court, upon becoming appraised of the issue, whether from its own research or it having been pointed out by the parties, to raise and rule on the same, at any stage of the proceedings, particularly where it relates to a possible contravention of the law.

548. This is an established position of law, particularly in relation to illegality. Illegality encompasses contraventions of statute. This is particularly pertinent in the case of planning cases, where the court's supervisory role in relation to judicial review is to ascertain whether acts or omissions have occurred outside the purview of the relevant statute. The duty of disclosure is of fundamental importance because it goes to the root of the Court's ability to exercise its supervisory function. See *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265*; *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] All ER (D) 450* and *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2018] EWHC 1508 (Admin)*.

549. In the instant appeals, it was not disclosed to the Court that the Datuk Bandar by reason of the provisions of the **National Land Code** sat, as a matter of fact, on the Executive Committee that determined the alienation of the subject land from the State to Yayasan.

550. When the Court ascertained this requirement in law under the **National Land Code**, *vide* its own research, this issue was specifically raised by the Court with the parties, particularly the Datuk Bandar, during the course of the hearing of these appeals. The Datuk Bandar and the other parties were accorded an opportunity to respond to the

same. This is a material fact and is of relevance, as we saw earlier, in relation to the factual and legal matrix of the appeals in relation to the allegation of a conflict of interest and/or bias.

551. Disclosure is of significance in matters such as the present, relating to planning approvals and the process of granting the same, as these matters have consequences on larger issues with vested public interest, i.e., the township of Kuala Lumpur, the governance of the Datuk Bandar as a public authority, and environmental protection in general. Full disclosure is of primary importance in the exercise of the Court's supervisory jurisdiction in judicial review, because it is disclosure that enables the court to examine and assess whether a contravention of statute has occurred or not.

552. Possible contraventions of law, in turn, comprise the precise subject matter of judicial review, as it is for a superior court to determine whether a statutory body has acted *ultra vires* its parent Act.

553. Where a Court ascertains that there are issues relevant to the matter at hand which have not been brought to the attention of the Court by the parties through their counsel, the Court is not thereby precluded from making judgments on such issues, provided the judge highlights this to the parties in dispute and gives them an opportunity to submit before the court on these points.

554. As we were of the view that this issue of fact and law was relevant to the case before the Court, and as this fact was not disclosed by the Datuk Bandar, we accorded all parties an opportunity to further submit on this point, in accordance with the rules of natural justice. However, it should be stressed that in compliance with the duty of disclosure it was incumbent upon the Datuk Bandar and any other party that was aware of this fact, and the law relating to it, to provide disclosure.

555. This issue is to be distinguished from a new matter which was not pleaded or ascertained at trial, and is subsequently "pulled out" at the final appellate stage. This was not a question of fact which was "sprung" upon the parties so as to take either the Datuk Bandar or the other parties by surprise. It was a matter well within the Datuk Bandar's knowledge as well as a matter required by law under the **National Land Code**. This was exemplified by the Datuk Bandar's ready acquiescence and acceptance of the same both as a fact and under the law.

556. The objection to the consideration of this material fact and law by the Court emanated largely from the other Appellants who sought to contend that as this matter had not been pleaded it should not be considered. And that secondly the relevant party ought to be joined before this issue could be taken into account in determining these appeals.

557. These objections are, in our view without merit because:-

(a) The involvement of the Datuk Bandar in the alienation of the subject land from the State to Yayasan was a material fact which was within the knowledge of the Datuk Bandar;

(b) The Datuk Bandar chose not to disclose this fact notwithstanding a clear allegation of a conflict of interest and bias being made against it;

(c) There was no issue of surprise because of the Datuk Bandar's knowledge of the fact and the relevant law;

(d) The Datuk Bandar was under a duty to disclose this material fact and law.

558. Therefore, not wanting this material fact to be considered in determining the merits of this appeal, is irrelevant and amounts to avoidance of a material consideration. Avoidance or suppression of this material fact affects the ability of this Court to exercise its supervisory function to ascertain whether or not there was merit in the allegation of a conflict of interest/bias levelled against the Datuk Bandar. This impinged directly on the role and function of a Court to examine any such potential contravention and rule on the same. In the instant appeals this is precisely what happened.

559. In order to dispense justice fully and properly, our adversarial system depends entirely on counsel to conduct themselves with candour, courtesy, and fairness. Ours is a practice where counsel owe, a primary duty to the court besides duty to their client.

560. The duty of counsel to his client is *subject* to his overriding duty to the court, because it is in the public's interest that there is 'a speedy and efficient administration of justice' and thus, a counsel's duty to the court 'epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case' to quote from ***Giannarelli and Others v Wrath and Others* (1988) 81 ALR 417** (per Mason CJ, High Court of Australia).

561. Our adversarial system can only properly function to administer justice, if there is full disclosure by all parties in their capacity as officers of the court. If the court's hands are tied to the selective and piecemeal extraction of facts and law, the result is an artificial advancement of our law based on the private interests of a select few at the expense of justice for all.

XII. SUMMARY

562. As these questions have been answered earlier, we reiterate the answers to the questions posed to us as follows:-

(a) **Leave Question No. 1**

Whether **Order 53 rule 2 (4) of the Rules of Court** is confined to the determination of threshold locus standi or whether it extends to confer substantive locus standi upon an applicant in an application for judicial review having regard to the decisions of the Court of Appeal in *QSR Brands Bhd v Suruhanjaya Sekuriti [2006] 3 MLJ 164* and of the Federal Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177* and in *Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi [2014] 3 MLJ 145*?

Answer: -

(1) **Order 53 Rule 2(4)** relates to threshold locus standi. The reference to substantive locus standi is, effectively a reference to the substantive merits of the case, which allows the Court to review its finding on threshold locus standi in view of the factual and legal matrix of the entirety of the matter.

(2) A person or entity may well fall within the broad approach to 'adversely affected' as envisaged under **Order 53 rule 2(4)** in the context of the particular area of law or statute dealing with the subject matter of a case, but yet may not succeed on a substantive examination of the matter because when the entirety of the legal and factual matrix is analysed, he may not have met the requirements to warrant the grant of the various remedies available under judicial review.

(3) The term 'adversely affected' is to be construed in the context of the legal and factual matrix within which the application is made, not in vacuo.

(b) **Leave Question No. 2**

Whether an applicant seeking judicial review of a development order is required to come within the terms of **Rule 5(3) of the Planning (Development) Rules 1970** before he or she may be granted relief having regard to the decision in *District Council Province Wellesley v Yegappan [1966] 2 MLJ 177*?

Answer:

We answer the question in the negative for the following reasons:-

(1) **Rule 5(3) of the Planning (Development) Rules 1970** does not come into play as the subject land does not fall within the **CDP**.

(2) **Rule 5(3)** is wholly inconsistent with the statutory development plan namely the Structure Plan and therefore is inapplicable by virtue of **section 65 of the FT Act**.

(3) Reliance on **section 22(4) of the FT Act** to justify the use of **Rule 5(3)** is erroneous in light of the inapplicability of the **CDP** to the subject land.

(4) More importantly, the discretion granted to the Datuk Bandar to diverge from the statutory development plan does not equate to reliance on **Rule 5(3)**.

(5) The Datuk Bandar moreover failed to establish whether and how he gave due consideration to the Structure Plan before choosing to rely on the **CDP** which, in any event is inapplicable in relation to the subject land.

(c) **Leave Question No. 3**

Whether the requirement of locus standi in judicial review proceedings set out in **Order 53 Rule 2(4) of the Rules of Court 2012** may override the provisions of **Rule 5(3) of the Planning (Development) Rules 1970**, the latter being written law, having regard to the decision of the Federal Court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai v Muziadi bin Mukhtar [2020] 1 MLJ 141*?

Answer:

This question is misconceived and there is no question of **Order 53** 'overriding' **Rule 5(3)**. **Order 53 rule 2(4)** enables a person who is adversely affected or has a genuine interest in a matter to initiate judicial proceedings. The judicial proceedings necessarily relate to a particular area of the law. This means that in the present case, when a court is assessing whether or not a person is 'adversely affected' within the meaning of **Order 53 rule 2(4)**, the court does so in the context of the **FT Act**, not in vacuo.

(d) **Leave Question No.4**

In law whether a management corporation (1st to 4th Respondent) or joint management body (5th Respondent) established pursuant to **Section 39 of the Strata Titles Act 1985** and **Section 17 of Strata Management Act 2013** has:-

(1) the necessary power to initiate judicial review proceeding to challenge a planning permission granted on a neighbouring land?;

(2) the locus standi to initiate a judicial review proceeding on matters which does not concern the common property of the management corporation or joint management body?; and

(3) the power to institute a representative action on behalf of all the proprietors on matters which are not relevant to the common property?

Answer:

We answer the question in the negative to all 3 parts of Leave Question No. 4 because the capacity to sue cannot be implied into the **STA** and the **SMA**.

(e) **Leave Question No. 5**

Whether the Kuala Lumpur Structure Plan is a legally binding documents which a planning authority must comply with when issuing a development order having regard to the decisions of the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1* and the Court of Appeal in *Perbadanan Pengurusan Sunrise Garden Kondominium vs Sunway City (Penang) (Civil Appeal No. P-01(A)-222-07/2017) and connected appeals*?

Answer:

(1) The Structure Plan is a legally binding document which a planning authority must comply with, insofar as the statutory provisions of **section 22** provides.

(2) Older pieces of legislation which do not sit harmoniously with the **FT Act** ought not to be relied upon or utilised as the prevailing or governing law in determining planning or development post the Structure Plan.

(f) **Leave Question No. 6**

Whether, in the absence of a statutory direction to the contrary, a planning authority in deciding to issue a development order is under a duty at common law to give any or any adequate reasons for its decision to persons objecting to the grant of the development order having regard to the decisions in *Public Service Board of New South Wales v Osmond (1986) 159 CLR 656*, of the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72* and that of the Court of Appeal in *The State Minerals Management Authority, Sarawak & Ors v Gegah Optima Resources Sdn Bhd [2021] 1 MLJ 268*?

Answer:

We answer the question in the affirmative on the facts of this case and in light of the provisions of the **FT Act**.

(g) **Leave Question No. 7**

If the answer to Leave Question No. 6 above is in the affirmative, then whether the reasons must be conveyed to the objectors at the time of its communication or whether reasons may be given in an affidavit opposing judicial review proceedings?

Answer:

Such reasons are to be given at the time when a decision is made and is communicated to the objectors, rather than in an affidavit filed when a court challenge has been brought.

(h) **Leave Question No. 8**

Where the High Court in judicial review proceedings negatives actual bias or a conflict of interest on the part of an authority issuing a development order, is a Court of Appeal entitled to hold that there nevertheless would be a likelihood of bias having regard to the conflicting decisions in *Steeples v Derbyshire Country Council [1984] 3 ALL ER 468*, *R v Sevenoaks District Council, ex parte Terry [1985] 3 All ER 226* and *R v St Edmundsbury Borough Council ex parte Investors in Industry Commercial Properties Ltd [1985] 3 All ER 234*?

Answer:

(1) We decline the tests found in *Edmundsbury* and *Sevenoaks* but prefer the principles enunciated in *Steeples* and to that end uphold the decision of the Court of Appeal which, with respect, correctly applied the case.

(2) We concluded that there was a conflict of interest and/or bias afflicting the decision of the Datuk Bandar, which is a separate and independent ground of challenge. It therefore follows that on this ground alone the Impugned Development Order is void and ought to be set aside.

XIII. CONCLUSION

563. These four appeals centre round a challenge to the grant of a development order which was issued by the Datuk Bandar to enable the construction of a mixed development on land now zoned as 'mixed development' but which was, for some considerable time, zoned as an open space and utilised as a park until the date of the Impugned Development Order.

564. The subject land was owned by the State Authority of the Federal Territory of Kuala Lumpur, before being alienated by that authority to Yayasan for a premium of approximately sixty million ringgit.

565. As the subject land was:

(i) designated as 'open space';

(ii) marked as a green area in the Structure Plan; and

(iii) utilised by the public as a park.

it was held by the State Authority of the Federal Territories of Kuala Lumpur on trust for the public.

566. Natural resources such as parks and forests, water, air are public property and national assets, particularly where it has been carved out as such in the Structure Plan. In the instant appeals the Structure Plan shows that the subject land is designated as "open space". "Open space" is defined in **section 2** of the **FT Act** as any land whether enclosed or not which is laid out (or reserved for laying out) wholly or partly as a public garden, park, sport and recreation ground or pleasure ground or walk, or as a public space".

567. This is of fundamental importance to the public at large. As the alienation, change of land use and issuance of the Development Order, converted the use of the park by the public, to private ownership, it effectively deprives the public of the use of such open space.

568. It may well be said that the current application pertains solely to the grant of the Impugned Development Order and is disparate and separate from the alienation of the public space to private ownership. However, the factual matrix as we have set out in this judgment, disclose that the Impugned Development Order and the alienation of

the subject land to Yayasan, are so inextricably intertwined that they cannot be viewed in isolation. To do so would be illusory. This is so, because the alienation was not undertaken as a separate exercise, long before the joint venture between Yayasan and Memang Perkasa. The two events occurred one after the other, with the joint venture being entered into prior to the alienation itself.

569. It is incumbent upon the Court to protect the public interest when land allocated for open space by the Datuk Bandar and approved by the Minister of the Federal Territories, is removed from public use and utilised for private ownership, to the detriment of the public use. That too, without the knowledge of the public. This is particularly so when the net effect of such use by the issuance of the Impugned Development Order, contravened several sections as well as the purpose and object of the **FT Act**. Fundamentally the Impugned Development Order contravenes the KL Structure Plan as it changes the use of area in question from open space for public use to mixed development. The exercise of discretion by the Datuk Bandar is not in conformity with his duties and obligations as spelt out in **section 22(4)** as well as **sections 10** and **11** of the **FT Act**.

570. The Impugned Development Order not being in conformity with the **FT Act,** it is therefore null and void and was correctly quashed by the Court of Appeal.

571. We therefore affirm the decision of the Court of Appeal save for the issue of title to sue in relation to the first to fifth respondents. We dismiss the four appeals by the appellants against the sixth to tenth respondents with costs. With respect to the first to fifth respondents we are constrained to strike out their claims for judicial review and allow the appeals solely by reason of their lack of title to sue, with no order as to costs.

Signed
NALLINI PATHMANATHAN
Judge
Federal Court of Malaysia

Dated: 18 April 2023

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