KNOWLEDGE & INSIGHTS

Land Acquisition Proceedings – The Need for Full Disclosure of the Assesors' Reports & Strict Compliance With Section 40C of the Land Acquisition Act 1960

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INTRODUCTION

In this article we examine the decision of the Federal Court of Malaysia ("**Federal Court**") in *Tegas Sejati Sdn Bhd v Pentadbir Tanah dan Daerah Hulu Langat & Anor and another appeal*[1]. This decision is of significance as to address the need for the High Court of Malaya ("**High Court**") in determining Land Reference proceedings arising from the acquisition of land by the State Government or Federal Government to ensure that there is transparency in the process such that the written reports of the Government Assessor and the Private Assessor who are appointed to assist the High Court are disclosed to all parties concerned in compliance with Section 40C of the Land Acquisition Act 1960.

At the outset, we make disclosure that our Tan Sri Dato' Cecil Abraham, Dato' Sunil Abraham, Noor Muzalifah Binti Shabudin and Mohd Irwan bin Ismail acted for the successful party, Tegas Sejati Sdn Bhd ("**Tegas Sejati**") in the appeals before the Federal Court.

BACKGROUND FACTS

On or about 11th December 1987, Tegas Sejati entered into a joint-venture agreement with Perbadanan Setiausaha Kerajaan Selangor ("**PSKS**") to develop several lots of land located at Section 15, Daerah Hulu Langat in the State of Selangor. PSKS, as the registered proprietor received the entire consideration under the said joint-venture agreement and relinquished its rights to the Tegas Sejati in respect of the land.

Parts of the land in question was then subdivided in Lot 35126, Lot 35127 and Lot 35129. These three (3) subdivided lots were initially acquired by the State Government of Selangor on 23rd July 2015 for the purpose of 'Projek Lebuhraya Bertingkat Sungai Besi — Ulu Kelang (SUKE), Daerah Ulu Langat, Selangor'.

[1] [2024] 3 MLJ 329.

Lembaga Lebuhraya Malaysia ("**LLM**"), (i.e. the 2nd Respondent in the Federal Court) was the alleged paymaster in so far as the land acquisition exercise was concerned. On 9th December 2016, the declaration of acquisition was amended to involve only Lot 35126 and Lot 35127.

Arguments later arose between Tegas Sejati, the Selangor State Government and LLM over compensation in respect of the acquisition. This included a dispute pertaining to the date of valuation and whether it should be by reference to the first date of the land acquisition in 2015 or the later date in 2016. Another issue in dispute was whether development costs are compensable. If so, by reference to which of two dates in question.

An enquiry was initially held before the Land Administrator (i.e. the 1st Respondent in the Federal Court) on 16th May 2017. The Land Administrator found that it was difficult to divide or separate the development costs based on each lot. On the suggestion of Tegas Sejati, the Land Administrator considered these costs as part of the claim for compensation for Lot 35129 whereas the compensation for the remaining two lots would cover only claims for land value and injurious affection. LLM's representatives did not appear to object to such an approach.

On 16th May 2017, the Land Administrator handed down an award for compensation to which both Tegas Sejati and LLM were dissatisfied. The Land Administrator awarded compensation for market value, costs of preliminary works, costs of termination of the contractor and consultant agreements, costs of site replacement and loss of profit amounting to RM59,706,236.85.

High Court Proceedings

Tegas Sejati and LLM filed their respective objections by way of Form N under the Land Acquisition Act 1960. This led to two Land Reference Proceedings having to be determined before the High Court pursuant to Section 36 of the Land Acquisition Act 1960. The two Land Reference Proceedings were consolidated and heard together.

On 22nd September 2020, Tegas Sejati filed an application to strike out LLM's Land Reference Proceedings. This application to strike out was heard together with the substantive Land Reference Proceedings which involved the High Court Judge presiding over the said proceedings assisted by two (2) Assessors (i.e. one Private Assessor and one Government Assessor) in accordance with Section 40A of the Land Acquisition Act 1960.

On 14th December 2020, the High Court delivered its decisions by way of an order or judgment ("**Order/Judgment dated 14th December 2020**") in respect of both the application to strike out and the substantive Land Reference Proceedings. The High Court gave reasons for its decision by way of an initial written grounds judgement ("**1st Written Grounds of Judgment**") which did not include the two (2) opinions of the Assessors or reference their opinions in the 1st Written Grounds of Judgment.

On 22nd December 2020, Tegas Sejati filed two (2) notices of appeal against the whole decision of the High Court. The first appeal pertained to the dismissal of the application to strike out LLM's Land Reference Proceeding. The second appeal pertained to the dismissal of Tegas Sejati's Land Reference Proceeding and

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the allowing of LLM's Land Reference Proceeding. LLM cross-appealed and sought to vary part of the decision of the High Court to allow for the return or repayment of RM31 million together with interest.

Thereafter, on 4th February 2021, the High Court unilaterally delivered a second written grounds of judgment ("**2nd Written Grounds of Judgment**"). The 2nd Written Grounds of Judgment was handed down to purportedly correct certain deficiencies in the 1st Written Grounds of Judgment and to supplement the reasons contained in the 1st Written Grounds of Judgment. In the 2nd Written Grounds of Judgment, the High Court made reference to the two (2) opinions of the Assessors but did not disclose the said opinions with the said 2nd Written Grounds of Judgment or make them available to the parties.

By way of both the 1st Written Grounds of Judgment and the 2nd Written Grounds of Judgment, the High Court (i) dismissed the application to strike out filed by Tegas Sejati, (ii) dismissed the Land Reference Proceedings filed by Tegas Sejati, and (iii) allowed the Land Reference Proceedings filed by LLM in part.

Court of Appeal Proceedings[2]

On 4th October 2022, the Court of Appeal of Malaysia ("**Court of Appeal**") dismissed Tegas Sejati's two (2) appeals. The Court of Appeal also allowed LLM's cross-appeal and directed a refund of the excess sum together with interest.

The Court of Appeal held, inter-alia, that:

(a) The Land Reference Proceedings was a rehearing or original hearing. Hence, an objection could be made or a valuation report tendered for the first time at the Land Reference Proceedings even though the party making the objection or tendering the valuation report did not do so at the initial land inquiry before the Land Administrator. Furthermore, Section 44(2) of the Land Acquisition Act 1960 provided that the High Court may consider the interests of all persons interested who had not accepted the award, whether those persons had themselves made an objection or not;

(b) LLM both as the paymaster and as the corporation on whose behalf the land was acquired, was clearly a 'person interested' within the meaning of Section 37 of the Land Acquisition Act 1960 and had the locus standi to file a Form N objecting to the award of the Land Administrator;

(c) the High Court correctly held that LLM had the locus standi to object/appeal the Land Administrator's award and was a proper party to the Land Reference Proceedings and was permitted to put forward a valuation report thereat. Tegas Sejati's stance that the valuation report must first have been submitted at the land enquiry before it could be relied upon during the Land Reference Proceedings ought to apply only to a proposed intervener seeking to be made a party to and to participate in an existing Land Reference Proceedings. It had no application to LLM which had filed the requisite Form N;

[2] [2023] 3 MLJ 795.

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(d) the High Court fully complied with the requirements of s 40C of the LAA as the opinions of the Assessors who sat with him were included and referred to both in the 1st Written Grounds of Judgment and the 2nd Written Grounds of Judgment;

(e) Tegas Sejati's complaints in relation to the High Court's treatment of the evidence were for all intent and purposes disagreements with the award of compensation and were not questions of law. To such extent, the matter was not appealable under Section 49(1) of the Land Acquisition Act 1960; and

(f) LLM's cross-appeal ought to be allowed both on the principles of restitution and unjust enrichment.

Federal Court Proceedings

Tegas Sejati then lodged two (2) appeals to the Federal Court. The arguments advanced in the two (2) appeals raised the following issues:

(a) whether the 2nd Written Grounds of Judgment is null and void such that the 1st Written Grounds of Judgment is the only final grounds of judgment to be given effect to vis-à-vis the present appeal or is the entire decision of the High Court a nullity?

(b) whether there was a failure on the part of the High Court to comply with s 40C of the Land Acquisition Act 1960?

(c) whether LLM lacks the necessary locus standi to institute the Land Reference Proceeding?

(d) whether the decision of the High Court as upheld by the Court of Appeal failed to abide by the principle of stare decisis?

(e) whether the failure to abide by the principle of stare decisis renders the entire land reference proceedings improper?

(f) whether the payment of the refund can be made directly to LLM by reference to its cross-appeal?

(g) whether the High Court and Court of Appeal misconstrued and/or mis-appreciated Forms N filed by the appellant and LLM? and

(h) whether the High Court and Court of Appeal erred in dismissing Tegas Sejati's heads of claim as a whole?

On 18th August 2023, when the appeal before the Federal Court was called up for hearing, the Federal Court having heard arguments from the parties in part, adjourned proceedings for the sole purpose of ascertaining if there was in fact compliance with Section 40C of the Land Acquisition Act 1960, such that the written opinions of the two (2) Assessors were in fact in existence and available. In this regard, the

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Federal Court directed the Registrar of the Federal Court to request from the registry of the High Court disclosure of the written opinions of the two (2) Assessors. The written opinions of the two (2) Assessors were procured and made available by the registry of the High Court to the Federal Court and the parties on 7th September 2023. On 5th October 2023, Tegas Sejati filed a supplementary record of appeal containing the purported written opinions of the two (2) Assessors.

Tegas Sejati questioned the validity of the two (2) purported written opinions of the two (2) Assessors given that the said written opinions did not appear to have been prepared at the material time or even authored by the Assessors who attended the Land Reference Proceedings as a different name appeared on the written opinion that was made available by the Government Assessor. Tegas Sejati also identified contradictions between the views expressed in these two (2) written opinions of the Assessors when compared to what was attributed to the Assessors in the two (2) Written Grounds of Judgment of the High Court. Tegas Sejati also contended that the failure to make the two (2) written opinions available to the parties for inclusion in the record of appeal at both the Court of Appeal and the Federal Court stage was improper.

The State Legal Advisor for Selangor in appearing for the Land Administrator sought to contend that the requirements of Section 40C of the Land Acquisition Act 1960 had been met notwithstanding that no party, including the Office of the State Legal Advisor, had ever sighted the written opinions of the Assessors before.

LLM in turn contended, inter-alia, that:

(a) there are no provisions in the Land Acquisition Act 1960 that requires the written opinions of the Assessors to be provided to the parties and/or filed in court;

(b) the written opinions are only furnished to the appellate courts by way of 'internal administration'. As such, the opinion ought not to form part of the record of proceedings which parties are to be given access to;

(c) it is incumbent on a party seeking to have sight of the written opinions of the Assessors to have to make a formal disclosure application;

(d) it is not for the appellate courts to scrutinise the merits of the Assessors written opinion and/or differences or inconsistencies between the substantive merits of the said opinions and that of the High Court Judge as they pertain to issues of fact, evaluation of evidence, computation of compensation and/or the application of principles of valuation to facts, which are 'subjective questions of fact' and not appealable; and

(e) in any event, the written opinion of the Assessors are not binding. All that was required under the Land Acquisition Act 1960 was for the written opinion of the Assessors to be given to the High Court Judge and nothing more should be read into the said statute which was not intended by Parliament.

SUMMARY OF THE DECISION OF THE FEDERAL COURT

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In delivering the decision of the Federal Court[3], Justice Mary Lim held, inter-alia, that[4]:

(a) Article 13(1) of the Federal Constitution guarantees that no person shall be deprived of property save in accordance with the law. In this regard, there must be propensity to safeguard as opposed to denying the said guarantee[5];

(b) specifically, and in relation to compulsory acquisition, Article 13(2) of the Federal Constitution provides that:

> "*No law shall provide for the compulsory acquisition or use of property without adequate compensation.*"

(c) in the interpretation and construction of Section 40C of the Land Acquisition Act 1960, which reads as follows, the same approach must be adopted:

> "*Opinion of assessors*
>
> *40C. The opinion of each assessor on the various heads of compensation claimed by all persons interested shall be given in writing and shall be recorded by the Judge.*"

(d) while Section 40C of the Land Acquisition Act 1960 may not provide for every details of how a land reference proceeding is to be conducted, a construction which seeks to preserve and realise that guarantee must be adopted and applied[6]; and

(e) as Parliament has seen to reinsert the inclusion of Assessors throughout Sections 40A to 40D of the Land Acquisition Act 1960 having previously removed these provisions in 1984, the role of the Assessors is first and last to assist the courts in the matter of compensation[7].

Justice Mary Lim went on to expressly state the following in so far as the role of the Assessors are concerned and address the necessity for the written opinions of the Assessors to form part of the formal record in the context of Land Reference Proceedings before the High Court as well as on appeal to the Court of Appeal and/or Federal Court in the interest of transparency[8]:

> **"[28] *The question that arises is where there is an objection over the award of compensation and assessors are appointed, and the law requires them to give written opinions which are then to be recorded by the judge hearing the land reference, are these opinions necessarily for the eyes of that judge alone? That even the Court of Appeal which may hear an appeal emanating from the decision***

[3] The panel of the Federal Court consisted of Chief Justice Tengku Maimun, Justice Nalini Pathmanathan and Justice Mary Lim.
[4] [2024] 3 MLJ 329 at pg. 337 to 338.
[5] *Spicon Products Sdn Bhd v Tenaga Nasional Bhd & Anor* [2022] 2 MLJ 721.
[6] *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60.
[7] *Pentadbir Tanah Daerah Johor v Nusantara Darya Sdn Bhd* [2021] 4 MLJ 570.
[8] [2024] 3 MLJ 329 at pg. 338 to 340.

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of the High Court over that matter of compensation will have to request administratively for sight of such opinions? That, again, when furnished, these written reports are only for the eyes of the three judges at the Court of Appeal whilst the parties are left entirely in the dark?

[29] ***Repeating that process finally at the Federal Court, assuming that there is some question of law arising from that compensation, is the Federal Court expected to request for those opinions 'internally and administratively' and once again, when secured from the High Court, the opinions are for the eyes of the panel of the Federal Court only and not the parties?***

[30] *Going back to where we started, that it is the constitutional right to property, which is under scrutiny, the answers to these posers should become quite obvious.* ***While s 40C may not spell out in detail how the written opinions of the two assessors are to be handled other than to require the opinions to be written and to be recorded by the learned judge, it cannot be denied that the written opinions form part of the proceedings.***

[31] Section 45 *of Act 486 requires all land reference proceedings to be conducted in open court:*

> 45 *Proceedings to be in open Court*
>
> (1) *Every proceeding under this Part shall take place in open Court.*

[32] *In these appeals, the two assessors who were appointed sat throughout the reference proceedings. This is as required under* s 40B*. They would have had access to the valuation reports prepared, exchanged and tendered by the rivalling parties. They would have heard the testimonies of the witnesses called. Not only that, the High Court as well as the assessors would have had the opportunity to clarify. Upon conclusion of hearing evidence and submissions on the question of adequacy of compensation, in particular whether and if so, how compensation for costs of preliminary works, costs of termination of the contractor and consultant agreements should be computed, the assessors would have given their views on these various items, not merely on the principle or the right but also on quantum. These are all matters relevant in determining the matter of adequacy of compensation. That determination of compensation, however, remains entirely with the learned judge.*

[33] *Although assessors attend reference proceedings, they do not determine the matters complained about, not even the amount of compensation — see* s 40D *and the deliberations of this court in Semenyih Jaya and Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat* [2021] 4 MLJ 1; [2021] 3 CLJ 1, *paras [49]–[58]. They are merely there to aid the court in that limited respect, that is, to offer their opinions on the heads of compensation. The court consists of only the judge, sitting alone. This is evident from* s 40A *which must be read in the light of Semenyih Jaya:*

> 40A (1) *Except as provided in this section the Court shall consist of a Judge sitting alone.*

[34] *If judges are required to provide their reasons for arriving at any decision, all the more, the opinion of the assessors, which the law mandates must be in writing must be made available to the*

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parties. ***Although these opinions are intended to assist the court in arriving at a decision on the amount of compensation, it is imperative that parties have the opportunity to consider them and to respond, if necessary. At its most basic level, these opinions form and must be part of the records of the land reference proceedings, aside from the learned judge recording the fact that the written opinions were provided.***

[35] *As part of the records of the proceedings, these opinions become part of the records of appeal, should there be an appeal. The parties can then adequately prepare their appeals and the appellate courts will similarly be able to properly scrutinise these opinions and evaluate the complaints and concerns of the parties and how the same were addressed by the learned judge. See for instance Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487.* ***If these written opinions are not made available, worse not form part of the records of appeal until and unless specifically sought for by any party, how is the question of adequacy of compensation to be properly addressed. How is the right enshrined in art 13(2) to be upheld?***

[36] ***Under art 13 of the Federal Constitution, the High Court in assessing the complaint of adequacy of compensation is bound to balance competing interests of the appellant, the landowner and the second respondent, the acquiring authority or paying master under Act 486. It is therefore necessary that all relevant material is placed before the court for that assessment and determination. Otherwise, the rights of the appellant, as landowner, will not be properly redressed****.*

[37] *Further, the question of adequacy of compensation can only be properly determined according to law if all concerned have had the opportunity to address the reasons, factors or circumstances which are relevant and necessary when computing or calculating that compensation.* ***The opinions of the assessors who attend court and assist the High Court judge in determining the matter of compensation so as to ensure that it is at the end of the day, adequate must thus be made known to the owners and those affected by the compulsory acquisition. The obligation to make known the reasons or factors extends to everyone who has any role to play in that decision, be it the judge or the assessors.***

[38] ***Thus, the availability of these written opinions of the assessors can never be a matter of internal administrative arrangement. Land reference proceedings are open court proceedings and it is integral to the rule of law that there is transparency and fairness not just in the conduct of those proceedings but in the manner any evidence, including opinion evidence is received and treated by the court. The presence of these written opinions must be recorded by the judge hearing the land reference and should the judge see fit, even incorporate the entire or parts of those opinions into the determination. It may even be attached to the learned judge's grounds, should that be seen as appropriate. But, once available, the written opinions must be provided to the parties. These opinions must be included into any record of appeal, in the event there is one.*** *Otherwise, these written opinions are part of the records of the land reference proceedings at the High Court."*

Ultimately, the Federal Court held that there was non-compliance on the part of the High Court vis-à-vis Section 40C of the Land Acquisition Act 1960 as the written opinions of the two (2) Assessors were never

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made available to the parties or even called for by the Court of Appeal. As such, the appeals were allowed and the Land Reference Proceedings remitted to the High Court for rehearing before another judge.

COMMENTARY

The decision of the Federal Court in *Tegas Sejati Sdn Bhd v Pentadbir Tanah dan Daerah Hulu Langat & Anor and another appeal* is significant for the following reasons:

(a) it provides a clear framework for the conduct of Land Reference Proceedings before the High Court in so far as the role of the Assessors are concerned;

(b) it provides strong guidance to the judges of the High Court in determining Land Reference Proceedings by providing a clear directive that the written opinions of the Assessors form part of the formal record and are to be made available to all the parties particularly when computation of the compensation that is to be awarded to an aggrieved party is in issue; and

(c) ultimately, it ensures that there is openness in the conduct of Land Reference Proceedings so as to ensure that the express requirements and intent of Article 13(1) and (2) of the Federal Constitution are properly preserved and respected.

Ultimately, by way of the decision in *Tegas Sejati Sdn Bhd v Pentadbir Tanah dan Daerah Hulu Langat & Anor and another appeal*, the Federal Court has clearly given credence to the earlier dicta of the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case*[9], wherein Justice Zainun Bte Ali held as follows:

> "*[171] It is also seen that the Legislature, by Act A999, has considered that in arriving at an award of compensation, a High Court judge can no longer rely on the traditional adjudicative method of weighing up the evidence adduced. Greater professionalism is required since the assessment of compensation would involve empirical evidence and is increasingly complex. In the circumstances, the introduction of ss 40A, 40B and 40C of the Act has brought about a radical, if not drastic change, to the decision-making process of the High Court.*
>
> *[172]* ***Under this new regime, the appointment of the assessors in a land reference court proceeding serves a vital role in assisting the High Court judge to decide on issues of compensation and what is appropriate in the circumstances of the particular case. The assessors' expertise is of great probative value. In this the Act demands transparency in the decision-making process.***
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> *[173] Thus by s 40C of the Act, the opinion of each of the assessors on compensation are to be made in writing and are to be recorded by the judge. It is evident that the relevant provisions brought about by Act A999, attempted to strike an appropriate balance between finality of decision which bars appeals against quantum of compensation and the procedures for hearing described under the Act before the*

[9] [2017] 3 MLJ 561.

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judge can arrive at an appropriate amount of compensation. The provisions in the Act serve to protect the rights and interests of interested persons in matters arising out of the compensation."

In conclusion, the unequivocal message from the Federal Court is that there must be transparency in the decision-making process particularly when one is dealing with the acquisition of land under the Land Acquisition Act 1960.

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