

9 FEB 2021

1

## Land Acquisition: Revisiting The Validity Period of Form D

### Contact Persons:

Datuk D P Naban  
Senior Partner

+603 6209 5405  
naban@rdslawpartners.com

Rosli Dahlan  
Partner

+603 6209 5420  
rosli@rdslawpartners.com

Kenny Lam Kian Yip  
Senior Associate

+603 6209 5400  
kenny@rdslawpartners.com

Louis Liaw  
Senior Associate

+603 6209 5400  
louis@rdslawpartners.com

Section 3 of the Land Acquisition Act 1960 (Act) empowers the State Authority to acquire any land that is needed:

- (a) for any public purpose;
- (b) by any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public; or
- (c) for the purpose of mining or for residential, agricultural, commercial, industrial or recreational purposes or any combination of such purposes.

The Act reconciles the State's power of expropriation with the individual's fundamental right to property enshrined in Article 13 of the Federal Constitution, by ensuring that adequate compensation is not only paid, but is paid speedily. This is done via Section 8(4) of the Act, which effectively compels the State to compensate the landowner within 2 years. If the Land Administrator fails to make an award within 2 years from the date of publication of the Form D in the *Gazette*, the Form D shall lapse. Form D is a declaration of intended acquisition that is essential for an acquisition to take place. See Section 8(1) of the Act.

Recently, the Federal Court in *Orchard Circle Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Ors*<sup>1</sup> upheld the validity of the Form D which was issued on 10.12.2001 even though a valid award was only made 11 years later on 20.4.2012. This alert analyses this decision.

### Background Facts

On 10.12.2001, the State Authority issued a Form D to compulsorily acquire Orchard Circle's lands (2001 Form D) for the purpose of constructing the SILK Highway. On

---

<sup>1</sup> [2021] 1 CLJ 1

24.12.2002, the award of compensation in the nominal sum of RM1 was issued in favour of Orchard Circle, on the ground that a portion of the lands had already been surrendered to the State Authority (2002 Award). On 30.1.2003, Orchard Circle being dissatisfied with the acquisition, filed for judicial review against the 2002 Award.

The unique feature of this case is that the judicial review application was only resolved on 10.12.2010, 9 years after the issuance of Form D, where the High Court ordered an order of *certiorari* to quash the 2002 Award and an order of *mandamus* to remit the matter back to the land office for a second enquiry.

Between 17.2.2011 and 17.11.2011, the Land Administrator had conducted the second enquiry. On 20.4.2012, the Land Administrator awarded RM514,948 for 1839.10 sqm of the lands and a nominal sum of RM1 for the remainder 17,284.67 sqm, because the latter were already surrendered to the State Authority (2012 Award). On 30.5.2012, Orchard Circle filed a judicial review application against the 2012 Award.

The High Court allowed Orchard Circle's application. The primary basis for the decision is that pursuant to Section 8(4) of the 1960 Act, the validity of the 2001 Form D was only for a period of 2 years; and since the 2012 Award was not made within the 2-year period, the 2001 Form D and all proceedings following thereon were quashed. However, this decision was reversed by the Court of Appeal and Orchard Circle appealed to the Federal Court.

## Federal Court's Decision

The Federal Court dismissed Orchard Circle's appeal and held that the 2001 Form D was valid, as the Federal Court disagreed with the High Court's interpretation of Section 8(4) of the Act. For clarity, Section 8(4) reads:

***"A declaration under subsection (1) shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the Gazette in so far as it relates to any land or part of any land in respect of which the Land Administrator has not made an award under subsection 14(1) within the said period of two***

### OUR EXPERTISE:

Administrative Law

Appellate Advocacy

Competition Law

Civil & Commercial Disputes

Contractual Disputes

Construction & Arbitration

Debt Recovery

Defamation

Employment & Industrial Relations

Intellectual Property

Probate

Judicial Review & Administration Law

Shipping & Maritime

Tax & Customs Disputes

Trusts

***years, and accordingly, all proceedings already taken or being taken in consequence of such declaration in respect of such land or such part of the land shall terminate and be of no effect.***  
(emphasis added)

The Federal Court held that Section 8(4) of the Act must be interpreted purposively to give effect to the true purpose and intent of Parliament – and when so interpreted, Section 8(4) would not apply to the 2001 Form D, because the 2012 Award was made after the 2-year period through no fault of the State Authority. The State Authority and Land Administrator had no control over the judicial review proceedings filed by Orchard Circle in 2003.

Further, a strict literal interpretation of Section 8(4) cannot be preferred because it would lead to absurdity by reason of *inter alia*, the following:

- a) It would create an unhealthy precedent which encourages landowners to file and stall judicial review proceedings until the 2-year period expires;
- b) On 11.6.2004, the construction of SILK Highway on the lands was completed and has been operating ever since. To quash the 2001 Form D based on strict interpretation would create an anomaly where public interest project would vest with private landowners; and
- c) The lands were already vested in the State Authority when Form K was issued on 20.2.2003 – and there is no provision in the 1960 Act to revert the land back to Orchard Circle.

## Commentary

Prior to the *Orchard Circle* case, the authority regarding the validity period of Form D, was the Court of Appeal's decision in *Pengarah Tanah dan Galian Negeri Kedah & Anor v Emico Development Sdn Bhd*<sup>2</sup>. In *Emico*, the Section 8 declaration was published on 3.8.1995 and an award was made on 18.9.1995. On 3.8.1996, the said award was quashed. A

<sup>2</sup> [2000] 1 MLJ 257

### OUR EXPERTISE:

Administrative Law  
Appellate Advocacy  
Competition Law  
Civil & Commercial Disputes  
Contractual Disputes  
Construction & Arbitration  
Debt Recovery  
Defamation  
Employment & Industrial Relations  
Intellectual Property  
Probate  
Judicial Review & Administration Law  
Shipping & Maritime  
Tax & Customs Disputes  
Trusts

second enquiry was held on 4.8.1997 and a second award was made on 6.8.1997. The Court of Appeal held that the 2-year period had expired on 3.8.1997. In the circumstances, the second award was late by 3 days and the High Court was correct in quashing the second award as well as the compulsory acquisition that took place in consequence of the declaration. The Court of Appeal held:

*“... The legislative purpose was obviously to put an end to uncertainty and protracted litigation resulting from long delays between the publication of a declaration in the gazette and the making of an award of compensation. The position today is that a declaration under s.8(1) lapses and becomes ineffective by effluxion of time if no award is made within two years from the date of its publication in the gazette.”*

Notwithstanding the decision in *Orchard Circle*, one may take the view that *Emico* continues to represent the general rule that, a Form D declaration will lapse if no award of compensation was made within 2 years from the date of its publication in the *Gazette*. In our view, *Emico*'s interpretation of Section 8(4) is eminently right because the Act is a law that derogates individual's constitutional and fundamental right to property. It is trite law that provisos that limit or derogate such right must be read restrictively and given strict and narrow constructions, see the Federal Court's decision in *Lee Kwan Woh v Public Prosecutor*<sup>3</sup>.

The Federal Court in *Orchard Circle* did not overrule or disapprove *Emico*, but merely distinguished it factually. As such, the principle in *Orchard Circle* regarding the validity period of a Form D under Section 8(4), will likely only apply in exceptional circumstances.

The exceptional facts in *Orchard Circle* are obvious, namely, it took 7 years for the High Court to resolve the first judicial review application and during this lengthy period, a highway was allowed to be constructed on the land and has been operating since.

<sup>3</sup> [2009] 5 MLJ 301

#### OUR EXPERTISE:

- Administrative Law
- Appellate Advocacy
- Competition Law
- Civil & Commercial Disputes
- Contractual Disputes
- Construction & Arbitration
- Debt Recovery
- Defamation
- Employment & Industrial Relations
- Intellectual Property
- Probate
- Judicial Review & Administration Law
- Shipping & Maritime
- Tax & Customs Disputes
- Trusts

## Contact Persons:

**Datuk D P Naban**

Senior Partner

+603 6209 5405

naban@rdslawpartners.com

**Rosli Dahlan**

Partner

+603 6209 5420

rosli@rdslawpartners.com

**Kenny Lam Kian Yip**

Senior Associate

+603 6209 5400

kenny@rdslawpartners.com

**Louis Liaw**

Senior Associate

+603 6209 5400

louis@rdslawpartners.com



With the introduction of the Rules of Court 2012 which contains elaborate provisions on pre-trial case management, court actions are almost always disposed of justly, economically and expeditiously. In the circumstances, facts similar to those in *Orchard Circle* will hardly arise – and this will further limit the application of the principle in *Orchard Circle*.

Authored by Hayden Tan, an Associate with the firm's Dispute Resolution practice.

## About Us

We are a full-service commercial law firm with a head office in Kuala Lumpur and a branch office in Penang. Our key areas of practice are as follows:-

- Appellate Advocacy
- Banking & Finance (Conventional and Islamic)
- Capital Markets (Debt and Equity)
- Civil & Commercial Disputes
- Competition Law
- Construction & Arbitration
- Corporate Fraud
- Corporate & Commercial
- Personal Data Protection
- Employment & Industrial Relations
- Energy, Infrastructure & Projects
- Construction & Arbitration
- Fintech
- Government & Regulatory Compliance
- Intellectual Property
- Medical Negligence
- Mergers & Acquisitions
- Real Estate Transactions
- Shipping & Maritime
- Tax, SST & Customs
- Tax Incentives
- Trade Facilitation

**REIMAGINING  
LEGAL  
SOLUTIONS**