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The Issuance Of Form A In Land Acquisition Procedure

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The right of ownership to property is a fundamental right enshrined in the Federal Constitution. Article 13(1) of the Federal Constitution provides that “*no person shall be deprived of property save in accordance with law*”. Clearly, the right to property is not an absolute one as the State may compulsorily acquire land in the manner prescribed by the Land Acquisition Act 1960 (LAA).

The law however does not give the State a *carte blanche* right to acquire lands in contravention of the law. The LAA has extensively laid down the procedural requirements to be complied with – one of it being the issuance of Form A.

Must Form A Be Issued?

When land is “*likely to be needed*” for any of the purposes mentioned in Section 3 of the LAA, it is provided in Section states that “... *a notification in Form A shall be published in the Gazette*”. Several conflicting court decisions resulted in uncertainty as to the binding effect of that provision. Would the failure of the State Authority to issue Form A render the land acquisition void for non-compliance? Or is the issuance of Form A merely directory, rendering the acquisition valid?

The Conflicting Decisions

Central to the dispute is the Court of Appeal’s decision in *Ng Kim Moi v Pentadbir Tanah Daerah Seremban* [2004] 3 MLJ 301. where the Court considered the legality of the acquisition at great length when there was a failure to issue Form A. The majority in *Ng Kim Moi* held that the issuance of Form A is merely directory despite the clear wordings of merely directory. The Court of Appeal took the view that these consequences are not definitive.

The Court held that the purpose of Form A is to authorise the State Director to enter into any land affected to examine and undertake survey operations. “*But they may not need to carry out such survey operations*”. As such, the consequence of

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such publication is only for the benefit of the acquiring authority.

Although paragraph 1(1)(a) of the First Schedule of the LAA states that the publication of Form A would determine the market value of the land, paragraph 1(1)(b) however states that “*in other cases*”, the market value is at the date of publication of Form D. Thus, the determination of market value can happen at 2 stages, either by the issuance of Form A or Form D. The Court of Appeal interpreted the above to mean that the compensation could be based on the market value at the date Form D was published. Accordingly, the Court of Appeal held that “*if land can be validly acquired in a situation in which the Form A notification is as good as if it had not been made, the Form A notification cannot be mandatory*”.

In dissenting, Justice Gopal Sri Ram JCA (as he then was) held the view that the word “*shall*” in Section 4 must be looked at in context of the whole LAA:

“It may be accepted as settled beyond argument that the object or purpose of the Act in essence is to empower the State to deprive an owner of his immovable property in exchange for fair and reasonable compensation. Since it is a statute that is aimed at the deprivation of property, courts require the acquiring authority to act strictly in accordance with the terms of the Act.”

Consequently, the word “*shall*” denote that the publication of Form A is mandatory. 9 years later, this dissenting judgment was preferred when the Court of Appeal was faced with the same issue in *Ee Chong Pang v Land Administrator of the District of Alor Gajah* [2013] 2 MLJ 16. In holding the majority judgment in *Ng Kim Moi* as highly technical and speculative in nature, the Court of Appeal in *Ee Chong Pang* instead referred to the dissenting judgment of Gopal Sri Ram JCA and held that the non-issuance of Form A is contrary to the spirit of Article 13(1) of the Federal Constitution.

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Misconception Of Law

The respondents in *Ee Chong Pang* then appealed to the Federal Court and the question posed was “*whether Form A must be issued first before Form D is issued in a land acquisition exercise*”. The Federal Court unanimously held in the negative. However, no grounds of judgment were issued.

Consequently, the Federal Court’s decision in *Ee Chong Pang* was misconstrued to be the authority that the publication of Form A under Section 4 is not mandatory, whereas the question before the Federal Court was only in respect of the sequence of Form A and Form D.

This confusion continued to be perpetuated in the case of *Kuala Lumpur Kepong Berhad v Selangor State Government* [2016] MLJU 673, where the High Court held that the land was validly acquired despite the non-issuance of Form A on the basis that it was bound by the Federal Court’s decision in *Ee Chong Pang*.

Setting The Record Straight – United Allied Empire

In *United Allied Empire (UAE) v Pengarah Tanah dan Galian Selangor* [2018] 1 MLJ 661, the Selangor Islamic Religious Council (MAIS) sought to acquire a 26-acre piece of land belonging to the UAE for the purported purpose of building a mosque. UAE challenged the acquisition on grounds, *inter alia*, that the Form A notification was not issued.

MAIS contended that based on *Ee Chong Pang*, Form A was not mandatory and that the compulsory acquisition was valid despite the non-issuance of Form A. The Court of Appeal in UAE distinguished *Ee Chong Pang* and held that the case did not negate completely what was clearly intended by Parliament as expressed in Section 4(1). The Court of Appeal held that:

“That decision by the apex court must therefore, be viewed and understood in its proper context, namely Form D may be issued before Form A was issued, but it did not go to the extent that Form A needed not to be issued at all.”

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Consequently, the Court of Appeal restated the law in the UAE case that Form A is mandatory, and its non-issuance would constitute a fatal non-compliance with the requirements of law which will render the acquisition illegal.

Conclusion

The LAA being legislation that empowers State Authority to deprive a person of his property must be strictly interpreted to safeguard the constitutional right of a person to his property. This principle was re-emphasised in *Md Nahar bin Noordin v Pentadbir Tanah Daerah Hulu Langat* [2018] 8 MLJ 772. in the following words:

"It has often been said that the Land Acquisition Act 1960 is a draconian legislation with specific safeguards built into it where the special provisions of the Land Acquisition Act 1960 must be strictly adhered to by the relevant public authorities and made applicable to all relevant parties. Strict compliance with the prescribed procedures under the Land Acquisition Act 1960 is mandatory and cannot be dispensed with willy-nilly."

The above two judgments illustrate that Article 13(1) of the Federal Constitution emphasises substantive rights and not merely hallowed illusory concepts.

Authored by Amiratu Al Amirat, an associate with the firm's Dispute Resolution team.

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