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ORTUS EXPERT WHITE SDN BHD V NOR YANNI BT ADOM & ANOR: A MORE STRINGENT TEST OF TRADEMARK INFRINGEMENT

by Kenny Lam Kian Yip

Recently, the Federal Court in ***Ortus Expert White Sdn Bhd v Nor Yanni bt Adom & Anor*** [2022] 2 MLJ 67 refined the principles of assessing trademark infringements in the context of disclaimers. Disclaimers are included in trademark registrations which prevent the registered owner from claiming monopoly on generic and/or descriptive words of their goods and/or services.

The key question for consideration in this case was whether the court ought to consider the disclaimed words in juxtaposition or in combination with the essential features in the registered trademark to decide whether there is a likelihood of confusion and/or deception?

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The trademarks in question were:

Plaintiff's Trademark

Defendants' Trademarks

('Real Expert White Mark')

Key Facts

The plaintiff was a distributing company for 'Royal Expert' beauty products. The products bore a 'Royal Expert White' trademark above which had been registered in the Register of Trade Marks under the Trade Marks Act 1976 (TMA) for goods in Class 3 (inter alia, creams for wrinkles and skin whitening). The words 'Royal' and 'Expert White' were disclaimed from use.

The Defendants had sold skin whitening cream bearing the trademark 'Real Expert White' as well as packaging which was allegedly similar to the plaintiff's products.

The Plaintiff sued the Defendants for, among others, trademark infringement of the Plaintiff's trademark under Section 38(1)(a) of the Trade Marks Act 1976 (now repealed by the Trademarks Act 2019). It is interesting to note that in the present case, the Defendants elected not to call any witness to testify during the trial.

The High Court's Decision

The High Court decided, among others, that the Defendants infringed the Plaintiff's trademark because the ingredients for trademark infringement under Section 38(1)(a) of the Trade Marks Act 1976 had been fulfilled:

a. As the Defendants chose not to produce oral evidence, the Plaintiff's evidence must be assumed to be true as decided in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2010] 1 CLJ 381.

b. The Defendants had used the Real Expert White mark which so nearly resembled the Plaintiff's registered trademark so as to cause a likelihood of confusion or deception between the consumers of the Plaintiff's products and Real Expert White products.

c. The Defendants were neither the registered proprietors nor the registered users of the Plaintiff's registered trademark.

d. The Defendants had used Real Expert White mark in the course of trade.

e. The Defendants had used Real Expert White products within the scope of registration of the Plaintiff's registered trademark.

f. The Defendants had used Real Expert White mark in such a manner as to render its use likely to be taken as being used as a trademark or as importing a reference to the Plaintiff or the Plaintiff's registered trademark.

The fact that the Defendant led no evidence or called any witness does not absolve the Plaintiff from discharging its burden to prove its claim in law. The evidence adduced by the Plaintiff must be sufficient to prove the claim as decided in Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 396.

The Court of Appeal's Decision

On appeal, the Court of Appeal reversed the High Court's decision and held that the Defendants did not infringe the Plaintiff's trademark because:

a. The fact that the Defendant led no evidence or called any witness does not absolve the Plaintiff from discharging its burden to prove its claim in law. The evidence adduced by the Plaintiff must be sufficient to prove the claim as decided in *Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 396.

b. The only striking similarity between the two marks was the disclaimed words 'Expert White', which were not protected under the Plaintiff's trademark registration.

c. On visual comparison, the Plaintiff's registered trademark has a crown device, while the Defendants' Real Expert White mark has a Diamond-shape device. Therefore, they were not similar.

d. The ideas and concepts of the words 'Royal' and 'Real' were completely distinct and different, as the word 'Royal' connotes ideas of kings, queens, majestic, royalty and regal grandiosity. On the other hand, 'Real' means true, actual, authentic, genuine and physical, and in Bahasa Malaysia, benar, betul, sebenar, etc.

e. Mere similarity phonetically in one of two words marks was not sufficient to make a case of infringement of trademark. 'Royal' has two syllables that start with the sound 'Ro'. On the other hand, 'Real' has a single syllable that starts with the sound 'Ray'.

The Federal Court's Decision

The Federal Court granted leave to the following question of law:

Whether in a trademark infringement action, the court ought to consider the disclaimed words in juxtaposition or in combination with the essential features in the registered trademark for the purpose of deciding whether there is a likelihood of confusion and/or deception?

The Federal Court answered question in the affirmative and summarised the applicable principles as follows:

a. In a trademark infringement action, the court ought to consider disclaimed words in juxtaposition or in combination with the essential features in the registered trademark for the purpose of deciding whether there is a likelihood of confusion and/or deception.

b. The court cannot decide the issues of infringement of trademark and likelihood of confusion and/or deception solely upon the basis of the use of disclaimed words.

c. Disclaimed words cannot be regarded as essential features.

d. The court can consider disclaimed words in terms of phonetic, visual, and trade channel aspects for comparison to decide whether there is a likelihood of confusion and/or deception; and

e. The court shall consider the marks as wholes and not disregard the disclaimed words, and whether their collocation and arrangement all inserted in similar form and similar position or arrangement so as to make the whole so similar as to be calculated to confuse and/or deceive. The end purpose is whether the mark is so similar as to be calculated to cause confusion and/or deception.

Interestingly, the Federal Court affirmed the High Court's decision and reversed the Court of Appeal decision on the premise that the Defendants infringed the Plaintiff's trademark because:

a. Real Expert White mark's diamond-shaped device was similarly confusing and/or deceptive as the Crown Device of the Plaintiff's and the Diamond-shaped device is placed at the top and the middle of Real Expert White mark, which was the same position as the Crown-shaped device in the plaintiff's registered trademark.

b. The Defendants' Real Expert White mark had a rectangle which contains the words 'Expert White', same as the Plaintiff's registered trademark, and such rectangle is one of the essential features of the Plaintiff's registered trademark.

c. Both the plaintiff and defendants focus their business within the same market and target the same segment of the public.

2 *See Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd [2005] 1 MLJ 311; Crest Worldwide Resources Sdn Bhd v Fu Sum Hou Dan Satu Lagi [2019] MLJU 512.*

d. The consumers of both the Plaintiff and Defendants were of the same category, as indicated by the Plaintiff's evidence that there was a drop in its gross profit and sales.

e. The trade channel or distributor of the Plaintiff and Defendants was the same.

f. The evidence of similarity of idea and concept between the Plaintiff's registered trademark and the Defendants' Real Expert White mark as both were applied in similar positioning on the box package of the goods. The idea or concept of the Plaintiff's and Defendants' marks was the same which connotes exclusivity and class.

> The court shall consider the marks as wholes and not disregard the disclaimed words, and whether their collocation and arrangement all inserted in similar form and similar position or arrangement so as to make the whole so similar as to be calculated to confuse and/or deceive. The end purpose is whether the mark is so similar as to be calculated to cause confusion and/or deception.

Conclusion

The Federal Court's ruling in *Ortus White* indicates that in trademark infringement actions, notwithstanding that there were disclaimers in the owner's trademark registrations, court was prepared to consider the disclaimed features by comparing both registered and infringing marks in their entirety. It is interesting to note that the Federal Court has decided that the positions and outlining shapes of disclaimed features can be considered as essential features when compared with the infringing trademarks as whole, thus suggesting that Courts may apply trademark infringements tests in a narrower and more stringent manner.

In any event, the undeniable facts of the present case were that channel for sale and customers of the Plaintiff and Defendant were almost identical, which was rightly considered by the Federal Court as an additional ground in finding that there was trademark infringement by the Defendants.

Business owners should be diligent by placing more effort to ensure the distinctiveness of their trademarks from their competitors not only to avoid trademark infringement actions but to set their brands apart from the rest.

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SUSTAINABLE ESG MANUFACTURING PRACTICES IN MALAYSIA

by Annabel Kok

In recent years, it has become crucial for manufacturers to adopt more sustainable and ethical business practices including integrating Environmental, Social and Governance (ESG) initiatives into their operations in order to remain profitable in today's competitive economic climate. Globally, regulators, consumers and investors have grown increasingly stringent about a company's ESG practices, with consumers becoming more aware of sustainable goods, business to business (B2B) purchases, creating a drive for greater revenue, thereby reducing costs and imposing further pressure on supply chains and their ESG practices..

According to Ernst & Young Global Limited, the pandemic has reinforced the importance of ESG issues and accelerated the transition to a more inclusive capitalism, and investors increasingly believe that companies that perform well on ESG are less risky, better positioned for the long term and better prepared for uncertainty[1].

In his new year's speech this year, Prime Minister Datuk Seri Ismail Sabri has vowed that the country is ready to create an ecosystem that is capable of generating activities and a job market with an economy and society that are ESG-friendly and asserted that Malaysia is committed to achieving 'carbon neutral nation' status by 2050.

Effects Of Non-Compliance

Non-compliance with ESG practices by organisations such as human rights violations, environmental ruthlessness or other ethical infringements have resulted in major financial and reputational implication on companies.

In 2021, a sharp sell down in stocks of electronics manufacturing services (EMS) providers occurred when news of forced labour involving manufacturing companies came to light in Malaysia. As news of potential labour problems at VS Industry Bhd spread in late-2021, the Employees Provident Fund reacted swiftly, selling 21.67 million

1 *'ESG-compliance is pivotal for Malaysia to navigate challenges in 2022 and beyond' (BERNAMA) <https://www.thesundaily.my/home/esg-compliance-is-pivotal-for-malaysia-to-navigate-challenges-in-2022-and-beyond-AI8875673>*

shares in the EMS counter and ceasing to be a substantial shareholder the very same day, with Kumpulan Wang Persaraan (Diperbadankan) following suit thereafter, disposing of 6.58 million shares in the company[2].

Further, Nike, one of the world's leading shoe manufacturers has been a victim of unfavourable media exposure in relation to its labour practices since the 1990s, with claims of low wages, poor working conditions and the use of child labour being circulated amongst the public. Nike imposed countermeasures and implemented several ESG initiatives such as increasing minimum wage rates and the minimum age requirements of workers and performing audits on their factories globally whilst working with NGOs to actively monitor factories. Subsequently in 2005, Nike became the first in its sector to publish a report on wages and working conditions in their factories and continues to post its commitments, the standards it complies with and audit data in its corporate responsibility report[3].

ESG integration into a company's valuation model significantly improves its non-financial indicators such as consumer satisfaction, market acceptance, lower cost of debt and the societal values it brings to its stakeholders.

It is therefore clear from case studies and recent practices that ESG integration into a company's valuation model significantly improves its non-financial indicators such as consumer satisfaction, market acceptance, lower cost of debt and the societal values it brings to its stakeholders[4]. Hence, a firm's competitive advantage may grow over the years of its operation and several studies have demonstrated that after integrating ESG factors into valuation and the company's investment decisions, there is a significant increase in its equity premium and value.

ESG Practices In The Manufacturing Sector

The manufacturing sector covers a wide range of industry players, specialities, geographic scope, and organisation size which range from automobile makers to electronic component manufacturers to makers of heavy equipment, medical devices, tools, clothing, toys – even agriculture and food processing.

On the other hand, ESG is a set of framework used to assess the impact of a company's sustainable and ethical practices on its financial performance and operations. One of the core areas of ESG centers on the environmental impact which encompasses several different areas including the following in relation to manufacturing companies[5]:

- Sources of energy (whether clean or carbon-based)
- Type of materials used in manufacturing (whether they can be recycled or not)
- The type of waste products generated by manufacturing (and how they are disposed of)
- Other ways that the company's manufacturing process affects the air, water, and soil.

2 *'ESG investing makes an impact', The Edge Malaysia (Authored by Jenny Ng) <https://www.theedgemarkets.com/article/esg-investing-makes-impact>*

3 *See Page 14 of the Sustainability Reporting Guide (1st Edition), issued by Bursa Malaysia in 2015*

4 *Environmental, Social and Governance (ESG) disclosure, competitive advantage and performance of firms in Malaysia' (Authored by Wan Masliza Wan Mohammad and Shaista Wasiuzzaman) https://www.sciencedirect.com/science/article/pii/S2666789421000076*

5 *'ESG and Manufacturing' (Authored by: Ken Forster) https://www.momenta.one/insights/esg-manufacturing-impact-on-venture-capital*

A corporation's purpose, the role and makeup of boards of directors, shareholder rights and how corporate performance is measured are core elements of corporate governance structures.

The environmental impact of production by manufacturing companies has been wide-ranging, including air pollution, toxic wastewater, and significant greenhouse gas emissions. The manufacture of clothing also involves the use of multiple types of chemicals, many of them toxic, along with the manufacture of cosmetics and skincare. Food production is also a notable contributor to greenhouse gasses.

Companies should consider the climate impact brought by the production and manufacture of goods, energy and resources and material use. This would include carbon/greenhouse gas (GHG) accounting and audits, energy assessments, water usage, environmental certifications and conducting environmental impact analysis. Some recent initiatives include automotive manufacturers pledging to go green and major oil and gas companies working to help the world achieve net zero emissions, as investors are turning away from companies that carry out practices which pollute the environment, cause deforestation or engage in forced labour in their supply chain.

A survey conducted by Mergermarket, an independent M&A proprietary intelligence tool in 2019 demonstrated that ESG due diligence has become a core element of the recent M&A process which is in line with the growing emphasis on ESG for investment decision-making.

Social Concerns Relating To Labour Force

As the manufacturing industry (particularly in the electronics and apparel sector) commonly relies on human labour, social concerns most typically arise in countries where labour regulations are not well developed. Unethical treatment of workers, allegations of forced labour and appalling working conditions have been brought to light in recent years as well. In this regard, manufacturers have been advised to actively protect human rights, labour relations and employee safety across every aspect of their operations and supply chain.

Governance Issues

The "G" in ESG relate to the governance factors of decision-making including the rules and procedures of corporations. A corporation's purpose, the role and makeup of boards of directors, shareholder rights and how corporate performance is measured are core elements of corporate governance structures. Areas of governance also include ethics and compliance, supply chain management, product quality, cybersecurity and data protection.

ESG In Malaysia

As the ESG criterion is increasingly becoming an important part of the investment and risk management decision process, Bursa Malaysia had launched the F4GBM Index in December

2014 which is aimed to:

- Support investors in making ESG investments in Malaysian listed companies;
- Increase the profile and exposure of companies with leading ESG practices;
- Encourage best practice disclosure; and
- Support the transition to lower carbon and more sustainable economy.

Although aimed at listed companies, private companies alike should strive to adhere to the industry practices as set out in Bursa Malaysia's index, guide and codes to meet the ESG standards.

Further, in July 2021, Bursa Malaysia and FTSE Russell launched the FTSE4Good Bursa Malaysia Shariah (F4GBMS) Index to cater to investor demand for ESG and Shariah-compliant index solutions. The F4GBMS index is designed to track constituents in the F4GBM Index that are Shariah-compliant.

In 2015, Bursa Malaysia published the Sustainability Reporting Guide (2015 Guide) to assist listed issuers in embedding sustainability policy and practices in their organisations and identifying, evaluating and managing economic, environmental, social risks and opportunities. The 2015 Guide was later replaced by the Sustainability Reporting Guide 2018 (2nd edition).

The Malaysian Code on Corporate Governance (MCCG) was also revised in 2017 to include good industry practices to be adopted by companies which emphasises the need for joint action by the board and senior management and to address the need for companies to manage ESG risks and opportunities with a view to reinforce the ecosystem for sustainable and responsible investment goals. Although aimed at listed companies, private companies alike should strive to adhere to the industry practices as set out in Bursa Malaysia's index, guide and codes to meet the ESG standards.

Conclusion

In view of ESG policies becoming increasingly important, manufacturing and development companies should consider implementing a formal ESG policy which is in line with the company's values and commitments. Executive management and the Board should be in agreement on the value proposition to encourage buy-in and establish a strong tone at the top for ESG in the organisation.

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REINVESTMENT ALLOWANCE FOR THE MANUFACTURING OF ELECTRICITY

by S. Saravana Kumar & Nur Amira Ahmad Azhar

This article analyses what is likely to be the first tax case of its kind in Malaysia, namely whether the generation, transmission and distribution of electricity constitute manufacturing. The High Court held that the activities undertaken by the national electricity company, Tenaga Nasional Berhad, to produce electricity is indeed manufacturing for the purposes of income tax law.

Background

The sole issue to be determined by the High Court was whether the Director General of Inland Revenue (DGIR) was right in law in rejecting the taxpayer's reinvestment allowance claim. The taxpayer's business compromises an integral system of manufacturing electricity, which includes power generation.

The taxpayer claimed reinvestment allowance on the capital expenditure, which was disallowed by the DGIR. The DGIR raised a notice of additional assessment for RM 1.8 billion in additional tax.

The taxpayer had invested in manufacturing infrastructure such as power generation plants and substations which were designed for manufacturing electric energy to meet the nation's ever-growing demand for electricity. The taxpayer serves an estimated 9.3 million customers in Peninsular Malaysia.

In 2018, the taxpayer incurred capital expenditure for the installation and reinforcement of existing lines to expand and strengthen the transmission of electricity. It also incurred substantial expenditure for the installation and reinforcement of new lines and substations to increase the capacity for distribution for electricity. Accordingly, the taxpayer claimed reinvestment allowance on the capital expenditure, which was disallowed by the DGIR. The DGIR raised a notice of additional assessment for RM 1.8 billion in additional tax.

The DGIR's Stance

The DGIR's only basis for rejecting the taxpayer's reinvestment allowance claim was that the taxpayer was not in the business of manufacturing electricity. The DGIR claimed that the taxpayer was a service provider.

The Prerequisite For Claiming Reinvestment Allowance

To begin with, pursuant to paragraph 1 of Schedule 7A of the Income Tax Act 1967 ("ITA"), a taxpayer is entitled to claim for reinvestment allowance where the taxpayer is a company is a resident in Malaysia with operation not less than 36 months and has incurred capital expenditure on a factory, plant or machinery for the purposes of a qualifying project. In this present matter, there was no dispute that:

(a) The taxpayer is a company for the purposes of the ITA (see the wide meaning of the word "company" under Section 2(1) of the ITA);

(b) The taxpayer is a Malaysian resident and has been in operation for not less than 36 months;

(c) The taxpayer had incurred a substantial amount of capital expenditure for the generation, transmission and distribution of electricity in Malaysia; and

(d) The taxpayer did not claim any incentives listed at paragraph 7 of Schedule 7A of the ITA.

What Is A Qualifying Project?

A qualifying project is defined in paragraph 8(a) of Schedule 7A of the ITA as a project undertaken by a company, in expanding, modernising or automating its existing business in respect of manufacturing of a product or any related product within the same industry or in diversifying its existing business into any related product within the same industry.

In this regard, paragraph 9 of Schedule 7A defines the following:

(a) "automating" refers to a process whereby manual operations are substituted by mechanical operations with minimal or reduced human intervention;

(b) "expanding" refers to an increase of a product capacity or expansion of factory area;

(c) "diversifying" means to enlarge or vary the range of products of a company related to the same industry;

(d) "modernizing" means upgrading manufacturing equipment and process; and

(e) "manufacturing" amongst others means conversion by manual or mechanical means of organic or inorganic materials into a new product by changing the composition, nature or quality of such materials; assembly of parts into a piece of machinery or products; or mixing of materials by a chemical reaction process including biochemical process that changes the structure of a molecule by the breaking of the intramolecular bonds. However, does not include the items listed at paragraph 9 (aa) to (ii).

The Taxpayer Is In The Business Of Manufacturing

As stated above, a qualifying project refers to the expansion, modernisation and automating an existing business in respect of manufacturing a product or related product. The definition of manufacturing is provided under paragraph 9 of Schedule 7A. It must be noted that a taxpayer must be in the business of manufacturing in order to claim RA.

The taxpayer's vested rights as of YA 2003, cannot be taken away from the taxpayer. In other words, the DGIR cannot impose a definition which affects or impairs the taxpayer's existing rights.

The taxpayer submitted that the definition of manufacturing pursuant to paragraph 9 of Schedule 7A does not apply to the taxpayer. This is because the taxpayer first claimed reinvestment allowance in the year of assessment (YA) 2003, there was no definition of manufacturing in Schedule 7A. As the taxpayer was originally entitled to claim RA for 15 years pursuant to paragraph 2B of Schedule 7A of the ITA, the taxpayer was entitled to claim reinvestment allowance for the YA 2018 as well. The taxpayer's vested rights as of YA 2003, cannot be taken away from the taxpayer. In other words, the DGIR cannot impose a definition which affects or impairs the taxpayer's existing rights.

Hence, in the absence of a definition, the ordinary meaning of the word "manufacturing" shall apply. The Oxford English Dictionary has defined the word manufacturing as to make something on a large-scale using machinery; make or produce (something abstract) in a merely mechanical way.

Additionally, the taxpayer highlighted that the Federal Court in *Majlis Perbandaran Seberang Perai v Tenaga Nasional Bhd* [2005] 1 MLJ 1 has settled the law that the taxpayer is in the business of manufacturing:

> "***In other words, the power station for all intent and purpose can be considered as a factory for the production of an article, that is electricity just like any other manufacturing plants or factories that manufacture goods or articles.*** *The article, that is, electricity is for sale to the consumers, large and small and there. Or the respondent to that extent is involved in commercial/business activity peculiar in its own way.*"

Further, several Commonwealth cases had supported the contention above, i.e. the taxpayer was indeed involved in the business of manufacturing electricity. Amongst others, the House of Lords in *Nuclear Electric PLC v Bradley (H.M. Inspector of Taxes)* 1 68 TC 670 discussed and acknowledged the act of manufacturing electricity from nuclear energy.

Meanwhile, the Canadian Supreme Court in *Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.) v. Quebec (Hydro-Electric Commission)*, [1970] S.C.R. 30 held that Hydro Quebec was in the business of manufacture, production and sale of electricity where the following passage is instructive:

> ***"The electrical energy produced by the applicant is not a commodity which is ordinarily used by or sold to its customers until it has been transformed; it exists, prior to such transformation, in a form which is not generally marketable because it is unsuited for the use of most customers.***
>
> ***Because it is the transformation in an issue that turns the electrical energy into a form that can be used by the customer, this transformation must be considered to be part of the manufacture and production of electricity.*** *Because the transformation* of voltage is done exclusively in the transformers and by the transformers, they are apparatus sold to or imported by the applicant for use by it directly in the manufacture or production of goods."

Further, the Indian High Court in *Board of Councillors, Bhatpara Municipality v Cesc Ltd and Ors* 2007 CAL 186 held that the act of "generating, transforming and distribution" was a part of the manufacturing process of electricity.

In light of these authorities, the taxpayer submitted that a holistic approach must be taken in determining the taxpayer's principal activities. Based on the cases highlighted, the law was settled with regard to whether the activity of generation, transmission and distribution of electricity amounts to manufacturing electricity as highlighted by the Federal Court and the Courts in the Commonwealth countries. Hence, it was clear that the taxpayer manufactured electricity by generating, transmitting and distributing the electricity.

Activities Excluded From The Definition Of Manufacturing

Furthermore, the Minister of Finance had issued the Income Tax (Prescription Of Activity Excluded From The Definition Of Manufacturing) Rules 2012 where there were 20 activities which were excluded as not being manufacturing. Again, the activity of manufacturing or generation of electricity was absent in the exclusion list.

Had Parliament or by extension, the Minister, intended to exclude the manufacturing or generation of electricity from the reinvestment allowance scheme, Parliament would have surely stipulated this in the order. In interpreting a taxing statute, one must bear in mind the trite rule of interpretation that a taxing statute must be interpreted strictly.

The Law On Reinvestment Allowance And Definition Of 'Manufacturing' Must Be Read Purposively

The law on reinvestment allowance and the definition of manufacturing must be read purposively to give the effect of the actual intent of Parliament in enacting the law. Section 17A of the Interpretation Acts 1948 and 1967 states that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act should be adopted.

Paragraph 9 of Schedule 7A must be read in light of the purpose of Schedule 7A itself. The purpose of the introduction of Schedule 7A is to encourage businesses to plan for the modernisation of their businesses and to also increase their production capacity as evident in the Hansard reports.

Reinvestment allowance is a special incentive available to taxpayers who wish to grow their business and has accordingly, incurred qualifying capital expenditure on factory, plant or machinery for the expansion of production capacity, modernisation and upgrading of production facilities, and diversification into related products and automation of production facilities.

The DGIR's Internal Interpretation Of Schedule 7A Has No Force In Law

The DGIR in disallowing the taxpayer's RA claim stated that the taxpayer did not produce a new product. The taxpayer submitted that the DGIR's internal interpretation of Schedule 7A has no force in law as evident in the case of *KPHDN v Success Electronics & Transformer Manufacture Sdn Bhd* (2012) MSTC 30-039

which held that the DGIR's interpretation of the law has no force in law. There was no requirement to produce a new product under Schedule 7A.

The DGIR's internal interpretation and policy including its Public Rulings do not have any legal authority and are not binding on the taxpayer.

Taxpayers would note that the DGIR conducts audits on a regular basis. In claiming reinvestment allowance, we strongly advise taxpayers to keep records in a detailed manner in support of the reinvestment allowance claim.

Landmark Decision

The High Court in allowing the taxpayer's reinvestment allowance was guided by the Canadian Supreme Court case of *Quebec (Hydro-Electric Commission)* (supra), which held that *"because it is the transformation in issue that turns the electrical energy into a form that can be used by the customer, this transformation must be considered to be part of the manufacture and production of electricity".*

The High Court added that the definition of manufacturing that came into effect in 2009 could not be imposed on the taxpayer as it would affect or impair the taxpayer's vested right in 2003 where there was no restrictive definition of manufacturing. Finally, the High Court also ruled that the DGIR's internal interpretation and policies do not bind the taxpayer.

This is a landmark decision as it highlights that the DGIR cannot read and apply a tax incentive provision narrowly so as to defeat its purpose. This win certainly puts the taxpayer in a favourable position in relation to its other ongoing tax appeals for different years on the same issue.

Further, this case reiterates that despite taking account of the government's need to realise taxes, the court is prepared to protect taxpayers from incorrect assessments.

Reinvestment Allowance Documentations

Finally, taxpayers would note that the DGIR conducts audits on a regular basis. In claiming reinvestment allowance, we strongly advise taxpayers to keep records in a detailed manner in support of the reinvestment allowance claim. Documents should include amongst others, project papers of the qualifying project including a detailed explanation on the manufacturing process. It would be helpful to include a detailed explanation on whether the project is in relation to expansion, modernisation, automation or diversification. A feasibility study, business plan or market research could be included to support the reinvestment allowance claim.

For example, if the qualifying project would result in an increase in the production capacity or performance in the form of saving in the use of time, material or labour, or results in better quality products or any other improvement as compared to before undertaking the qualifying projects. This increase or improvement should be substantiated with supporting documents i.e.: reports from engineers or technicians.

Taxpayers should also keep a proper listing of the capital expenditure incurred, invoices on the capital expenditure incurred and any other relevant supporting documents for the reinvestment allowance claim. This will prepare and keep taxpayers abreast in substantiating their reinvestment allowance claim if the DGIR comes to conduct an audit.

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PRODUCT LIABILITY: ARE YOU AN EXPERT?

by Kong Xin Qing

The industrial revolution in the 18th century marked a major turning point in history in almost every aspect of daily life. Among other things, it has brought about major technological developments in the manufacturing sector, to which mass production was made possible. This was followed by the 2nd industrial revolution in the 19th century. The technological changes brought forward by the industrial revolutions have, inevitably, triggered the rise of product liability law globally.

The product liability law found its root in the tort of negligence, where originally, a plaintiff is required to prove negligence on the part of the defendant (the manufacturer or the retailer) and to overcome the defence of lack of privity of contract (as the manufacturer often is not the contracting party who sells the products to the consumer). This can be seen in the classic English House of Lords case of *Donoghue v Stevenson* [1932] UKHL 100.

These revolutions, from a global perspective, have influenced some jurisdictions to shift towards a no-fault or strict liability approach, where the plaintiff is only required to prove only causation and damages. In 1999, the Government introduced a strict product liability regime through the Consumer Protection Act 1999 (CPA 1999). Today, product liability can be founded on contract, the tort of negligence and/or a breach of the statutory regime of the CPA 1999. This article will explore the importance of expert witnesses and opinions in product liability proceedings.

Role Of Expert Witness Or Opinions In Legal Proceedings

The role of an expert witness in court proceedings is concisely encapsulated in the judgment by the Federal Court in *Wong Swee Chin v Public Prosecutor* [1971] 1 MLJ 212:

> *"In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh*

all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion."

This brings us to the question: When would the court require the assistance of expert witnesses or opinions?

The answer lies within Section 45 of the Evidence Act 1950 (EA 1950), which provides that the court may take guidance from expert opinions in respect of questions concerning foreign law, science or art, or genuineness of handwriting or finger impressions. For completeness, Section 45 of the EA 1950 is reproduced as follows:

"Opinions of experts

45 (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts."

Section 46 of the EA 1950 also provides that evidence may be admitted to support or to oppose an expert opinion.

With the technicalities involved and the science behind modern days' products, expert opinions prove to be important evidence in many product liability proceedings. The Court of Appeal in *Batu Kemas Industri Sdn Bhd v. Kerajaan Malaysia & Anor* [2015] 5 MLJ and the Federal Court in *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580 ruled that court may take guidance from such expert subject to the qualifications below:

(a) The expert witness must be truly independent; and

(b) The expert witness must be skilled in the area in which he is giving evidence.

Recent Applications Of The Law Regarding Expert Evidence

The principles laid down in *Batu Kemas (supra)* and *U Television (supra)* have been followed by the High Court case of *Brijnandan Singh Bhar@Brijnandan Singh Bhar A/L Gurcharan Singh v BMW Malaysia Sdn Bhd and 3 Ors* I [2019] 1 LNS 1737 which arose from a motor vehicle accident. In an earlier suit back in 2013, Mr Brijnandan (the

owner of the subject motor vehicle) had commenced an accident claim against the driver of the motor lorry his car had collided with. The court granted a judgment in favour of Mr Brijnandan that the motor lorry was 100% liable for the accident. Mr Brijnandan had also been compensated from the insurer for the tort of his car.

Five years after the accident, Mr Brijnandan initiated this action against the local representative, the assembler, the distributor as well as the sales agent of a motor vehicle company based on the allegation that his airbags failed to inflate. The defendants successfully defended the action initiated by Mr Brijnandan in the Sessions Court and the High Court. The High Court ruled that Mr Brijnandan is estopped from bringing the later suit as it would amount to a re-litigation of the same issues and double claiming.

Before accepting evidence of an expert witness, the court must be satisfied that an expert witness must be specially qualified, armed with the necessary skill and experience and has a vast knowledge in the field of enquiry carried out by him.

Nevertheless, the High Court proceeded to assess evidence from the parties' expert witnesses and made the following observations.

An Expert Witness Must Be Qualified In The Field Of Enquiry Carried Out By Him

Before accepting evidence of an expert witness, the court must be satisfied that an expert witness must be specially qualified, armed with the necessary skill and experience and has a vast knowledge in the field of enquiry carried out by him. To do so, the court may refer to the background of the "expert", his occupation and in which court he has testified.

In *Brijnandan Singh (supra)*, the Vehicle Collision Investigation Report prepared by the plaintiff's "expert" witness (PW2) was rejected. Both the Sessions Court and the High Court found that PW2 was not an expert in the field of the automobile safety system.

This is notwithstanding the fact that PW2 was a forensic consultant with various working experiences and had attended various courses relating to his work, none of those experiences and courses is relevant and related to the field of airbags installed in automobiles. The court found that PW2's expertise was limited to investigations regarding fire, explosion, and arson. As such, the court decided that PW2 was not an "expert" witness in respect of the function of airbags.

In arriving at its decision, the High Court also drew guidance from the Court of Appeal case of *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2011] 4 MLJ 805 where it was held as follows:

Where there are more than one expert witness to be called to give evidence, the Court often orders for "hot tubbing" of the expert witnesses under Order 40A r.5 RC 2012. "Hot tubbing" is a procedure where the expert witnesses will give evidence simultaneously rather than sequentially.

"[52] ***It Is the duty of the court to satisfy itself that the "expert" is indeed an expert specially qualified, armed with the necessary skill and experience and has a vast knowledge in the field of enquiry carried out by him. The court would also want to know the duration of time the "expert" has engaged himself in his field of expertise and whether that is his only occupation and in which court he has testified. Generally, the court is interested to know the expert's background. The purpose is simply to show the competency of the expert.*** *It is for these reasons that the expert will be asked about his general and technical education together with the special studies which he may have undertaken.*

[55] Section 51 of the Evidence Act 1950 states that whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant. The courts have said, time and again, that a bare expression of opinion has no evidentiary value at all (Sim Ah Song & Anor. v. Rex [1951] 1 LNS 83; [1951] MLJ 150; Lai Yong Koon v. Public Prosecutor [1962] 1 LNS 74; [1962] MLJ 327; and Public Prosecutor v. Yiau Swee Tung [1998] 1 LNS 355; [1999] 3 MLJ 353). Brown, Acting CJ in Sim Ah Song & Anor. v. Rex (supra) at p. 151 aptly said:

> *The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all.* ***Unless he gives an explanation which supplies the understanding of the subject which the Court lacks, the Court is in no better position than it was before to determine the question which it is its duty to determine, and if the Court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the Court.***

[56] So, the court must be vigilant and must satisfy itself that the "expert" is indeed an expert specially qualified. Here, the "expert" report tendered by the first defendant's trial counsel failed to comply with the simple preliminary requirements of establishing the "expert's" qualifications and for this reason, it should be disregarded."

As it was not disputed that Mr Brijnandan's case was wholly and entirely dependent on the evidence of PW2, Mr Brijnandan's case was dismissed with the disqualification of PW2 as an expert witness.

An Expert Witness Must Be Truly Independent

The Federal Court in *U Television Sdn Bhd (supra)* held that for a witness to be an expert, he must also be truly independent.

In *Brijnandan Singh (supra)*, the court was faced with conflicting "expert" evidence from the plaintiff and the defendants. For the defendants, the expert witness (DW3) called was an employee of BMW Germany who worked for the Product Analysis Department. Mr Brijnandan mounted his challenge on the fact that DW3 was employed by BMW Germany for 24 years and contended that DW3 is not independent. This argument was rejected by the High Court. The High Court relied to the Federal Court case of *Spind Malaysia Sdn Bhd v Justrade Marketing Sdn Bhd & Anor* [2018] 4 MLJ 34 which held that even if the expert witness is a party to the suit, it does not in itself render the evidence of the expert witness inadmissible, and the trial judge may accord proper weight for the evidence.

Hot Tubbing Of Expert Witnesses

Furthermore, the court is empowered under Order 40A of the Rules of Court 2012 (RC 2012) to give direction to limit the number of expert witnesses who may be called at trial. Order 40A RC 2012 requires expert evidence to be tendered in a written report exhibited in an affidavit affirmed by the expert, testifying that the report is his and he accepts full responsibility of the report.

Order 40A also requires an expert's report to comply with various requirements, to name a few, to give details of the expert's qualifications, details of any material which the expert has relied on in making the report, issues which he has been asked to consider and the basis upon which the evidence was given, a summary of the conclusions reached and his reasons in arriving at the same. These requirements resonate with the principles laid down in *Yoong Sze Fatt (supra)*.

Where there are more than one expert witness to be called to give evidence, the Court often orders for "hot tubbing" of the expert witnesses under Order 40A r.5 RC 2012. "Hot tubbing" is a procedure where the expert witnesses will give evidence

"Hot tubbing" is a procedure where the expert witnesses will give evidence simultaneously rather than sequentially. The principal benefit of this exercise is so that the experts would address their points of disagreement on a point-by-point basis, which would greatly assist the court in understanding the various points raised in respect of the same issue.

simultaneously rather than sequentially. The principal benefit of this exercise is so that the experts would address their points of disagreement on a point-by-point basis, which would greatly assist the court in understanding the various points raised in respect of the same issue (see *Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors* [2019] 1 LNS 1735). Like any other evidence, the court will look into all circumstances of the case and may accord proper weight for the evidence accordingly.

Conclusion

Expert evidence can be very important in legal proceedings which involve technical science and knowledge. It could be as complex as a case of patent infringement/ invalidation, it could also be a seemingly more straightforward case of product liability. That said, litigants must ensure that the experts they engage are properly qualified in the relevant skills in the art and that the experts are truly independent. On top of that, the provisions in the EA 1950, RC 2012 and any Court directions must be strictly complied with.

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ANALYSIS OF SECTION 3(1)(A) OF THE LAND ACQUISITION ACT 1960– A PROVISION TO ACQUIRE PRIVATE LAND FOR MANUFACTURING & INDUSTRIAL PURPOSE?

by Amiratu Al Amirat

The right to property is a fundamental right enshrined in the Federal Constitution.

Article 13 of the Federal Constitution states:

> *"Rights to property*
>
> *13. (1) No person shall be deprived of property save in accordance with the law.*
> *(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation."*

The right to property enjoins with it the right to exploit its use without interference. Nonetheless, the State may compulsorily acquire land in the manner prescribed by the Land Acquisition Act 1960 (LAA 1960). Consequently, a question may arise as to whether a link can be established between the right to compulsorily acquire lands and the growth of the manufacturing and industrial sectors.

Manufacturing and industrial activities require a broad range of functions to operate. This includes infrastructure, logistics, materials procurement as well as sites for building factories. This article seeks to analyse whether Section 3(1)(a) of the LAA 1960 can be used to acquire lands for manufacturing and industrial purpose.

Relationship Between Land Acquisition And Industrial Growth

As the manufacturing sector grows and is encouraged to grow further, there is a parallel need for more land. This is especially since Malaysia's manufacturing sector continues to play a vital role in the country's economic transformation. According to the Malaysian Investment Development Authority (MIDA), there are now over 600 industrial parks and estates throughout the country[1].

1 *Infrastructure Management. (2022). Retrieved 8 April 2022, from https://www.mida.gov.my/setting-up-content/infrastructure-support/*

In 2021, Malaysia's manufacturing sector secured RM195 billion worth of investments which is 114% more than that in 2020. This performance emanated a statement from the MIDA stating that *"the manufacturing sector continued to be the mainstay of the economy for 2021, generating significant multiplier effects on the nation's activities and growth"*. Despite the global challenges posed after the Covid-19 pandemic, it signals that Malaysia's manufacturing sector is only set to grow even bigger. As a proportional relationship has been established between land acquisition and industrial growth, this means that inevitably, more land will be required to sustain its growth. Hence, when the State Authority seeks to acquire land for its own use and control or for public-private partnership projects, or for the use of private companies, the LAA 1960 stipulates the procedures and circumstances where these are permitted.

The law however does not give the State a carte blanche right to acquire lands in contravention of the law.

Land Acquisition Act 1960

As a matter of law, the State Authority may compulsorily acquire land in the manner prescribed by the LAA 1960. When this right is exercised by the State Authority, it results in the dispossession of landowners from their properties. The law however does not give the State a carte blanche right to acquire lands in contravention of the law. In this regard, the LAA 1960 has extensively laid down the procedural requirements to be complied with.

The power of the State Authority to acquire land is conferred by Section 3 of LAA 1960. The purpose for which land may be acquired is enumerated in the same section:

> *"3. Acqui sition of land*
> *(1) The **State Authority may acquire any land** which 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."*

Quite clearly from the above, an acquisition under Section 3(1)(a) of the LAA 1960 can only be made for land that is needed for a public purpose. However,

"public purpose" is not defined under the LAA 1960. The courts have then shouldered the task to carefully interpret "public purpose", limiting the ambiguity within its scope. On that point, precedents have time and again adopted the test in determining the meaning of "public purpose" as held in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204:

> *"The expression 'public purpose' is incapable of a precise definition. No one in fact has attempted to define it successfully. What all the textbooks have done is to suggest the tests to be applied in determining whether a purpose is a public purpose. Various tests have been suggested. But in my view it is still best to employ a simple common sense test, that is, to see* ***whether the purpose serves the general interest of the community.****"*

Although the LAA 1960 does not define public purpose, it does define "public utility" to include any road, rail transportation, water and electricity supply, gas pipeline, telecommunications, street lighting, sewerage system, drainage system, public works, and any other similar public service or convenience[2].

This is different with acquisitions made under Section 3(1)(b) and Section 3(1)(c) of the LAA 1960 where it requires mandatory compliance with Section 3A to Section 3E of the LAA 1960. Before elaborating further on Section 3A to Section 3E of the LAA 1960, it should be noted that the aforementioned sections were amendment provisions that were only included in 1999. Parliament, as can be seen from the Hansard (Dewan Rakyat proceedings on 15 May 1997) appreciated the need for more land in the future – either for the growth of the manufacturing and industrial sectors or for the purpose of economic development[3]:

> *"Tuan Yang di-Pertua, ekonorni negara kita telah mencatatkan pertumbuhan yang mantap lagi pantas bagi dekad ini dan dijangka ianya akan berterusan pada dekad yang akan datang sehingga menjangkaui tahun 2020. Pembangunan ekonomi negara yang pesat ini menunjukkan peningkatan kepada faktor faktor pengeluaran seperti modal, tenaga kerja dan keusahawanan.* ***Walau bagaimanapun, satu lagi faktor pengeluaran yang penting tidak berkembang selari dengan lain-lain faktor, faktor itu ialah tanah. Secara relatifnya, dengan izin, 'land has shrunk'.*** *Oleh kerana itu,* ***permintaan terhadap tanah akan terus rneningkat sedangkan sumbernya adalah terhad. Untuk mengatasi masalah ini, penggunaan tanah yang optimum dan pengurusan pentadbiran tanah yang cekap adalah diperlukan."***

To ensure orderly administration of land whilst acknowledging its scarcity, Parliament realised that certain safeguards needed to be introduced to protect

2 *Section 2 LAA 1960*

3 *Parliamentary Debates, Representative, Ninth Parliament, Third Session, First Meeting, 15 May 1997, page 1.*

the interests of landowners. These safeguards came in the form of Section 3A to Section 3E of the LAA 1960:

> *"Pemohon pengambilan tanah dikehendaki mengemukakan bersama-sama borang permohonannya dokumen-dokumen seperti cadangan projek, pelan tataatur dan pelan pengambilan tanah, laporan awal nilaian tanah, bayaran pemprosesan dan deposit.* ***Ini adalah bagi memastikan hanya pemohon yang tulen sahaja akan memohon pengambilan tanah bagi maksud pembangunan ekonomi yang dinyatakan di bawah seksyen 3(1)(b) dan (c)****.*
>
> *...*
>
> *Tuan Yang di-Pertua, seperti yang telah diterangkan,* ***matlamat pindaan Akta Pengambilan Tanah 1960 adalah untuk mewujudkan ketelusan dalam prosedur pengambilan tanah di samping memberikan keadilan kepada rakyat sesuai dengan kehendak Perkara 13 Perlembagaan Persekutuan.*** *Pindaan-pindaan yang dicadangkan adalah berlandaskan kepada dengan izin, principle of rationality and accountability."*

Briefly, Section 3(1)(b) and Section 3(1)(c) of the LAA 1960 requires an application to be made to the Land Administrator accompanied by the following:

a) The project proposal;

b) The layout and land acquisition plan;

c) The preliminary Government valuation report of the land to be acquired; and

d) Such fee and deposit may be prescribed in the Land Acquisition Rules.

This triggers the application of Section 3A to Section 3E of the LAA 1960 which in essence requires the State Economic Planning Unit to consider whether it is appropriate in those circumstances for the registered proprietor to participate in the project for which the land is intended to be acquired. This begs the question – in light of Section 3(1)(b) and Section 3(1)(c) of the LAA 1960, can the land acquired for manufacturing or industrial purposes under Section 3(1)(a) of the LAA 1960 be challenged?

Challenging Acquisition – Is It Really For Public Purpose?

Whether acquisitions can be challenged was addressed by the Federal Court in *S Kulasingam & Anor (supra)*. In this case, a piece of land vested in the appellant,

the Tamilian's Physical Culture Association, was acquired for a public purpose, namely for the purpose of building a hockey stadium. The appellant argued that various sporting events had in fact been held there and since the present use of the land already constitutes use for a public purpose, it negates the requirement for compulsory acquisition. The Federal Court took note of Section 8(3) of the LAA 1960 and held:

> *"The conclusive evidence clause in section 8(3) which we have mentioned in effect provides that* ***the decision of the State Authority that the land is needed for the purpose specified under section 8(1) is final and conclusive and cannot be questioned*** *(Wijeyesekera v Festing AIR 1919 PC 155). The Privy Council however held in Syed Omar Alsagoff & Anor v Government of the State of Johore [1979] 1 MLJ 49 (on page 50) that it may be possible to treat a declaration under section 8 as a nullity if it is shown that the* ***acquiring authority has misconstrued its statutory powers*** *or that the* ***purpose stated therein does not come within section 3*** *or if* ***bad faith can be established****. The purpose of the acquisition can therefore be questioned but only to this extent."*

It may be possible to treat a declaration under section 8 as a nullity if it is shown that the acquiring authority has misconstrued its statutory powers or that the purpose stated therein does not come within section 3 or if bad faith can be established.

In other words, the Federal Court held that the purpose of the compulsory acquisition could only be questioned if it can be shown that the acquiring authority has misconstrued its statutory powers or if bad faith is established. In this case, however, the Federal Court held that even if public sporting events had been held on the land, it did not constitute use for a public purpose as the use was at the discretion of the association and subject to the payment of fees. Therefore, the land in that case could be acquired for the public purpose stated.

Although it may seem clear that any acquisition apart for public purpose should be made under Section 3(1)(b) or Section 3(1)(c), there have been instances where the State Authority acquires land under Section 3(1)(a) in an attempt to cut corners and circumvent procedural requirements. This is because an acquisition made under Section 3(1)(b) or Section 3(1)(c) of the LAA 1960 as mentioned above requires mandatory compliance of Section 3A to Section 3E LAA of the 1960. The need to comply with the mandatory provisions under Section 3A to Section 3E of the LAA 1960 was discussed and reaffirmed by the Federal Court in *Tenaga Nasional Bhd v. Unggul Tangkas Sdn Bhd & Anor* and *Other Appeals* [2018] 4 CLJ 285.

It may be argued that in those instances, acquisitions are masked under Section 3(1)(a) of the LAA 1960 to avoid compliance with Section 3A to Section 3E LAA of the 1960. Hence, it is important to look at the true intent of the acquisition.

Oblique Motive Disguised As Public Purpose

Whilst the above contention may appear speculative at first blush, the High Court in *United Development Company Sdn Bhd v The State Government of Sabah & Anor* [2011] 7 MLJ 209 have cautioned the possibility of this happening. In this case, a piece of land was acquired in 1979, purportedly for the purpose of developing a project known as "*Skim Penempatan Semula*". The compensation price for the land was fixed at RM1 million although the plaintiff had asked for RM1.5 million. Via a letter dated 21 March 2001, the plaintiff had requested for the return of the said land for a consideration sum of RM1 million on the ground that the land was still not developed despite a lapse of 22 years since the acquisition in 1979. The plaintiff was then informed of the State Government's refusal to return the land. Hence, the plaintiff commenced an action against the State Government.

The High Court in holding that the acquisition was unlawful and ordering for the return of the land to the plaintiff held:

> *"In my judgment, the State Government's failure to implement the 'Skim Penempatan Semula di Kawang, Daerah Papar' until today is* ***evidence of mala fide on its part.*** *It is clear that the State Government has no intention to put the said land to use for the purpose it was acquired in 1979."*

In holding the above, the High Court held that the spirit of the Sabah Land Acquisition Ordinance was to allow the State Government to acquire lands for specific purposes. It does not give the State Government latitude to deal with the acquired lands in any manner it deems fit post-acquisition. The High Court further held that the State Authority does not have unfettered discretion to deal with the land in any way it liked after acquisition. This would be in direct contravention of the Sabah Land Acquisition Ordinance which makes it mandatory for the State Authority to specify in the declaration the purpose of the acquisition. Cautious of the consequences this may have on the compensation of land, the High Court held:

> *"To allow the* ***government to change the land use at its whim after the acquisition****, even for a public purpose is not only illegal but unjust to the landowner because when he negotiated for compensation it was on the understanding that his land was to be used for a particular public purpose, not any public purpose. The wide powers of the government to compel private individuals to give up their lands, albeit with compensation must not only be* ***exercised in good faith*** *but*

must ***manifestly be seen to be exercised in good faith. Landowners must be protected against compulsory deprivation of their properties for some oblique motive disguised as 'public purpose'****. The possibility of this happening cannot be discounted as the State Government in the present case in fact tried to alienate the said land to a third party in 1996 as can be seen from the document at p 2 of encl 47."*

Land acquisition that is confiscatory in nature must always be done in accordance with the rule of law.

Although this case involved land acquisition made under the Sabah Land Acquisition Ordinance and not the LAA 1960, it is noteworthy to reiterate the caution by High Court – landowners must be protected against compulsory deprivation of their properties for some oblique motive disguised as *'public purpose'*.

Another situation arose in *Sime Darby Plantation Bhd v Pengarah Tanah dan Galian Negeri Melaka & Ors* [2020] 7 MLJ 776. Here, the applicant sought leave of the High Court to apply for judicial review against the decision of the respondents to acquire the applicant's 185.5 acre land, which was part of the applicant's Kempas Estate in Merlimau. The applicant contended that the acquisition was done without due regard to law and procedure and that the land was not acquired for a public purpose but for the benefit of the fourth respondent, a foreign-controlled property investment company. A letter from the 1st and 2nd respondents showed that the acquisition was allegedly made on behalf of Majlis Perbandaran Jasin. This, the applicant argued, was only to give flavor as if the acquisition was made for a public purpose.

The High Court granted the applicant leave to commence judicial review. Before it could proceed to the substantive stage, the parties resolved the matter and recorded a consent order in the High Court which entailed the withdrawal of the compulsory acquisition order.

Conclusion

The above encapsulates the application of Section 3(1)(a) of the LAA 1960 in the exercise by State Authority to acquire lands for any other purpose including manufacturing and industrial purpose. The land acquisition that is confiscatory in nature must always be done in accordance with the rule of law. The act of land grabbing by the authorities must be stopped otherwise it would render the safeguards and procedures in the Federal Constitution and LAA 1960 inoperative.

Whilst it cannot be denied that the LAA 1960 is the legislation that empowers the State Authority to deprive a person of his property, the LAA 1960 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 courts constitute the channel through which justice is dispensed and when faced with such clear violations by a public authority, it must therefore necessarily be the ultimate bulwark against the excesses of the executive – *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 2 MLJ 168.

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