Ng Aun Say & Sons Realty Sdn Bhd v Magnasari Sdn Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS A-01–135 OF 2011 AND A-01–141 OF 2011
ABDUL MALIK ISHAK, LINTON ALBERT JJCA, AND MOHAMAD ARIFF J
28 FEBRUARY 2013

Civil Procedure — Appeal — Interference by appellate court — Cases heard on basis of agreed facts and agreed documents — Whether there were major errors of law and misappreciation of evidence by judicial commissioner — Whether appellate court should interfere

Land Law — Acquisition of land — Compulsory acquisition — Whether acquiring authority had complied with statutory procedure — Whether authority misconstrued its powers or acted in bad faith or with gross unreasonableness — Whether acquisition for public purpose — Whether authority had to reject outright application for compulsory acquisition where there was development approval granted to registered proprietor of land intended to be acquired — Land Acquisition Act 1960 ('LAA') ss 3(1)(b), 4 & 3A(2)

Statutory Interpretation — Construction of statutes — Literal approach — Whether committee that considered proposal that PT16225 be compulsorily acquired was legally constituted — Whether plain meaning rule should be adopted in construing s 3C(2)(v) of the Land Acquisition Act 1960

Words and Phrases — Definitions — Public utility — Whether 'public utility' included 'public works' under s 2(1) of the Land Acquisition Act 1960

Ng Aun Say & Sons Realty Sdn Bhd ('NASSR') and Magnasari Sdn Bhd ('Magnasari') were proprietors of adjoining lands in Daerah Manjung. However, NASSR's land, which lay at the back of Magnasari's land, lacked access to the main road. Thus, NASSR applied to the state authority with a proposal that the strip of land with access to the main road that lay on Magnasari's land ('PT16225'), be compulsorily acquired for the purpose of constructing an access road to the housing development on its land. The Majlis Mesyuarat Kerajaan Negeri Perak ('MMKNP') approved the proposed compulsory acquisition for the purpose of a road reserve on condition that NASSR paid Magnasari the compensation sum of RM274,600. Thus,

A PT16225 became the subject matter of a compulsory acquisition under s 3(1)(b) of the Land Acquisition Act 1960 ('the Act'). Magnasari challenged the acquisition by arguing that the acquisition was for the private development project of NASSR at the expense of Magnasari and not for the purpose of any public utility. Consequently, Magansari commenced a writ action against the B state authority and NASSR for a declaration that the decision to compulsorily acquire the land was unlawful as the state authority had misconstrued its powers under the Act, or had acted in bad faith or with gross unreasonableness. Magnasari also submitted that the Majlis Perbandaran Manjung had granted it approval to temporary stalls on its land and that this approval constituted C 'developmental approval'. It was thus Magnasari's contention that in such circumstances the state authority should not have considered NASSR's application for the compulsory acquisition of PT16225. This case was heard by the judicial commissioner ('the JC') on the basis of agreed facts and agreed documents. The JC was of the opinion that the state authority had acted in bad D faith and was biased in approving the application by NASSR. As such, the JC allowed Magnasari's claim for a declaration that the decision of the state authority to acquire the land was unlawful and void, granted an order that the endorsement of the intended compulsory acquisition on the document of title be cancelled and also allowed Magnasari's claim for damages to be assessed by E the Registrar. These two related appeals arose from that decision.

Held, allowing the appeals with costs of RM5,000:

(1) (per **Abdul Malik Ishak JCA**) NASSR's application came within the F purview of s 3(1)(b) of the Act read together with ss 4 and 3A(2) of the same Act where the state authority acquired PT16225 for the purpose of constructing an access road notwithstanding that Magnasari had obtained 'development approval'. In addition, although Majlis Perbandaran Manjung had approved Magnasari's application for G 'gerai-gerai sementara', it was germane to mention that the word 'sementara' meant that the building structures approved to be built on Magnasari's land was for temporary use only (see para 12).

(2) (per **Abdul Malik Ishak JCA**) The argument that there was a defect in H the composition of the committee, which considered proposal that PT16225 be compulsorily acquired, had no merit. Suffice to say that under s 3C(2)(v) of the Act it was for the State Secretary as Chairman of the Committee to decide whether to appoint representatives of related government departments and agencies to sit in the committee. The plain I meaning rule should be adopted in construing s 3C(2)(v) of the Act. Thus, the committee looking into the application was legally constituted and was competent to decide and to receive the recommendation from the State Economic Planning Unit (see paras 15–16).

(3) (per **Mohamad Ariff and Abdul Malik Ishak JJCA**) Although the JC

had made a finding that the acquiring authority was biased and had acted in bad faith, the statutory procedure adopted by the acquiring body was above board and beyond reproach. Further, it was clear from the evidence that it was necessary to have an access road to the main road to allow access to and from the housing development on NASSR's land. This would satisfy the requirement of 'public utility' as the definition of 'public utility' included 'public works' under s 2(1) of the Act (see paras 19–20 & 36).

(4) (per **Mohamad Ariff J**) As this case was heard on the basis of agreed facts and agreed documents there was no question of the High Court having an audio-visual advantage for consideration. In the present case, there were major errors of law and a misappreciation of the evidence by the JC which invited appellate intervention (see para 36).

(5) (per **Mohamad Ariff J**) An acquisition under the Act could not be generally challenged, unless the plaintiff established that the acquiring authority had misconstrued its powers or had acted in bad faith or with gross unreasonableness. In the present there was no basis for the JC to find that the state authority had acted in bad faith or had misconstrued its statutory powers or had acted in gross unreasonableness. When administrative powers were granted to agencies of the government, they had to be properly read against the overall context of the relevant statute, and the various relevant statutory provisions had to be read harmoniously. It would not be the proper function of the court to narrow down an ostensibly broad conferment of administrative powers, since to do so would defeat the statutory objective. Hence, within the context of the Act, it would not be the case that the land administrator had to reject outright an application for compulsory acquisition where there was a development approval granted to the registered proprietor of the land intended to be acquired. The statutory formulae did not prohibit a compulsory acquisition outright simply because there existed a development approval granted in respect of the land, but made the intended acquisition subject to the requirement of 'public utility' and a consideration as to whether it would be appropriate in the circumstances for the registered proprietor to participate in the project. In the present case, the land was to be acquired to construct an access road and as such it was not necessary to have the participation of the registered proprietor since it would not be appropriate in the circumstances (see para 36).

[Bahasa Malaysia summary

Ng Aun Say & Sons Realty Sdn Bhd ('NASSR') dan Magnasari Sdn Bhd ('Magnasari') adalah tuan punya tanah-tanah bersebelahan di Daerah Manjung. Walau bagaimanapun, tanah NASSR, yang terletak di belakang tanah Magnasari, tidak mempunyai akses ke jalan utama. Oleh itu, NASSR telah memohon kepada pihak berkuasa negeri dengan cadangan agar bahagian

A tanah dengan akses kepada jalan utama yang terletak atas tanah Magnasari ('PT16225'), diperoleh secara mutlak bagi tujuan membina jalan akses kepada pembinaan perumahan atas tanahnya. Majlis Mesyuarat Kerajaan Negeri Perak ('MMKNP') telah meluluskan cadangan pemerolehan mutlak itu bagi tujuan rizab jalan dengan syarat bahawa NASSR membayar Magnasari pampasan B sejumlah RM274,600. Oleh itu, PT16225 menjadi hal perkara pemerolehan mutlak di bawah s 3(1)(b) Akta Pengambilan Tanah 1960 ('Akta tersebut'). Magnasari telah mencabar pemerolehan itu dengan berhujah bahawa pemerolehan itu adalah untuk projek pembangunan peribadi NASSR yang tidak menguntungkan Magnasari dan bukan untuk tujuan apa-apa C kemudahan awam. Berikutan itu, Magnasari telah memulakan tindakan writ terhadap pihak berkuasa negeri dan NASSR untuk satu deklarasi bahawa keputusan untuk memperoleh secara mutlak tanah itu adalah menyalahi undang-undang kerana pihak berkuasa negeri telah salah tanggap akan kuasanya di bawah Akta tersebut, atau telah bertindak dengan niat jahat atau D secara tidak munasabah langsung. Magnasari juga berhujah bahawa Majlis Perbandaran Manjung telah memberikannya kelulusan untuk gerai-gerai sementara atas tanahnya dan bahawa kelulusan ini membentuk 'developmental approval'. Oleh itu adalah hujah Magnasari bahawa dalam keadaan sedemikian pihak berkuasa negeri tidak patut mempertimbangkan permohonan NASSR E untuk pemerolehan mutlak PT16225. Kes ini telah didengar oleh pesuruhjaya kehakiman ('PK') berasaskan fakta yang dipersetujui dan dokumen yang dipersetujui. PK berpendapat bahawa pihak berkuasa negeri telah bertindak dengan niat jahat dan berat sebelah dalam meluluskan permohonan NASSR. Oleh itu, PK telah membenarkan tuntutan Magnasari untuk satu deklarasi F bahawa keputusan pihak berkuasa negeri untuk memperoleh tanah itu adalah menyalahi undang-undang dan terbatal, memberikan perintah bahawa pengindorsan pemerolehan mutlak yang diniatkan atas surat ikatan hak milik dibatalkan dan juga membenarkan tuntutan ganti rugi Magnasari ditaksir oleh pendaftar. Kedua-dua rayuan berkaitan telah timbul daripada keputusan G tersebut.

Diputuskan, membenarkan rayuan-rayuan dengan kos RM5,000:

(1) (oleh **Mohamad Ariff H**) Oleh kerana kes ini telah didengar berasaskan fakta yang dipersetujui dan dokumen yang dipersetujui tiada persoalan H tentang Mahkamah Tinggi yang mempunyai kelebihan audio visual untuk pertimbangan. Dalam kes ini, terdapat kesilapan perundangan yang besar dan keterangan yang tidak diberi perhatian oleh PK yang membawa kepada campur tangan mahkamah rayuan (lihat perengan 36).

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(2) (oleh **Mohamad Ariff H**) Satu pemerolehan di bawah Akta tersebut tidak boleh secara amnya dicabar, kecuali jika plaintif telah membuktikan bahawa pihak berkuasa yang memperoleh itu telah salah tanggap kuasanya atau telah bertindak dengan niat jahat atau dengan

tidak munasabah langsung. Di sini tiada asas untuk PK mendapati pihak berkuasa negeri telah bertindak dengan niat jahat atau telah salah tanggap kuasa statutorinya atau bertindak secara tidak munasabah. Apabila kuasa pentadbiran diberikan kepada agensi-agensi kerajaan, ia perlulah dibaca sewajarnya dengan konteks keseluruhan statut berkaitan, dan pelbagai peruntukan statutori perlu dibaca bersama. Ia bukan fungsi sebenar mahkamah untuk memperincikan kuasa pentadbiran luas yang telah diberikan kepadanya memandangkan jika berbuat demikian akan menggagalkan objektif statut. Justeru, dalam konteks Akta tersebut, ia bukan kes untuk pentadbir tanah menolak terus permohonan untuk pemerolehan mutlak di mana terdapat kelulusan pembangunan yang telah diberikan kepada tuan punya berdaftar ke atas tanah yang ingin diperoleh. Formula statutori ini tidak melarang pemerolehan mutlak hanya kerana terdapat kelulusan pembangunan yang sedia ada yang telah diberikan berkaitan tanah tersebut, tetapi menjadikan pemerolehan yang diniatkan itu tertakluk kepada keperluan 'public utility' dan pertimbangan sama ada ia adalah sesuai dalam keadaan berikut untuk tuan punya berdaftar untuk terlibat dalam projek itu. Dalam kes ini, tanah tersebut akan diperoleh untuk membina jalan akses dan oleh itu tidak perlu melibatkan tuan punya berdaftar kerana ia tidak sesuai dalam keadaan tersebut (lihat perenggan 36).

(3) (oleh **Mohamad Ariff H dan Abdul Malik Ishak HHMR**) Walaupun PK telah membuat penemuan bahawa pihak berkuasa yang memperoleh telah berat sebelah dan bertindak dengan niat jahat, prosedur statutori yang digunakan oleh badan yang memperoleh adalah melebihi kuasa dan tiada cacat celanya. Selanjutnya, adalah jelas daripada keterangan bahawa adalah perlu untuk mempunyai jalan akses kepada jalan utama bagi membenarkan akses keluar masuk kepada pembangunan perumahan atas tanah NASSR. Ini memenuhi keperluan 'public utility' kerana definisi 'public utility' termasuklah 'public works' di bawah s 2(1) Akta tersebut (lihat perenggan 19–20 & 36).

(4) (oleh **Abdul Malik Ishak HMR**) Permohonan NASSR adalah dalam skop s 3(1)(b) Akta tersebut dibaca bersama ss 4 dan 3A(2) Akta sama di mana pihak berkuasa negeri telah memperoleh PT16225 bagi tujuan membina jalan akses meskipun Magnasari telah memperoleh 'development approval'. Tambahan, meskipun Majlis Perbandaran Manjung telah meluluskan permohonan Magnasari untuk 'gerai-gerai sementara', adalah relevan untuk menyatakan bahawa perkataan 'sementara' bermaksud bahawa struktur bangunan yang dilulusan untuk dibina atas tanah Magnasari hanya untuk kegunaan sementara (lihat perenggan 12).

(5) (oleh **Abdul Malik Ishak HMR**) Hujah bahawa terdapat kecacatan dalam komposisi jawatankuasa, yang mempertimbangkan cadangan

bahawa PT16225 diperoleh secara mutlak, tidak mempunyai merit. Adalah mencukupi untuk mengatakan bahawa di bawah s 3C(2)(v) Akta tersebut ia adalah untuk Setiausaha Negeri sebagai Pengerusi Jawatankuasa untuk memutuskan sama ada untuk melantik wakil daripada jabatan dan agensi kerajaan berkaitan untuk bersidang dalam jawatankuasa itu. Rukun maksud biasa patut digunakan untuk mentafsirkan s 3C(2)(v) Akta tersebut. Oleh itu, jawatankuasa yang melihat permohonan itu telah ditubuhkan dengan sah dan adalah kompeten untuk memutuskan dan untuk menerima syor Unit Perancangan Ekonomi Negeri (lihat perenggan 15–16).]

Notes

For cases on compulsory acquisition, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2242–2249.

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1217–1245.

For cases on literal approach, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1826–1855.

Cases referred to

Duport Steels Ltd v Sirs [1980] 1 All ER 529, HL (refd)

Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal [1998] 2 MLJ 498, CA (refd)

JP Linahan, Re 138 F2d 650 (1943), CA (refd)

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35, FC (refd)

Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors [1998] 1 MLJ 607, CA (refd)

Sussex Peerage Case (1844) 11 Cl & Fin 85, HL (refd)

Legislation referred to

Land Acquisition Act 1960 ss 2, 2(1), 3(1)(b), 3(6), 3A(1), (1)(a), (b), (c), (d), (2), (3), (7), 3C(2), (2)(a)(i), (ii), (iii), (iv), (v), 4, 8, 8(1), Form D, (3)

Appeal from: Civil Suit No (MT4) 22–8 of 2007 (High Court, Ipoh)

Loong Chet Siean (Loong & Associates) for the appellants.

Mohd Hamzah bin Ismail (State Legal Adviser, State Legal Adviser's Chambers Ipoh) for the appellants.

Nga Hock Cheh (Nga Hock Cheh & Co) for the respondent.

Abdul Malik Ishak JCA (delivering supporting judgment of the court):

[1] Having read the draft judgment of my learned brother Mohamad Ariff bin Md Yusof J (now JCA), I have this to add by way of a supporting judgment. Section 8(3) of the Land Acquisition Act 1960 (Act 486) ('the Act') stipulates that, 'A declaration in Form D shall be conclusive evidence that all the scheduled land referred to therein is needed for the purpose specified therein'. That should put an end to any challenge that may be advanced by the aggrieved land owner whose land has been acquired by the acquiring authority. However, *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal* [1998] 2 MLJ 498, at p 502, a decision of this court, categorically held that the aggrieved land owner could mount a challenge against the acquiring authority by establishing that the latter 'had misconstrued its powers or had acted in bad faith or with gross unreasonableness' in acquiring the land of the aggrieved land owner.

[2] Salleh Abas CJ (Malaya) (later the Lord President of the Federal Court) in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35, aptly said at p 37 that:

> Every exercise of statutory power must not only be in conformity with the express words of the Statute but above all must also comply with certain implied legal requirements. The court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness.

[3] Now, from the very outset, it was Ng Aun Say & Sons Realty Sdn Bhd ('NASSR') who sought the acquisition of PT 16225 for the purpose of constructing an access road to its housing project on Lot 371. The acquisition of PT 16225 was not sought by any government department or public authorities for public purposes in building schools or hospitals for that matter. It was acquired for the simple reason of providing access road to Lot 371 owned by NASSR.

[4] It was emphasised by the chartered land surveyor that the acquisition was not for the purpose of public utility because it served to benefit NASSR as the owner of Lot 371. In its report, the chartered land surveyor remarked that:

> The provision of the said road reserve will shift and enhance the value of Lot 371 as it will now enjoy direct frontage onto the main road and the service road. Further it will render Lot 371 ripe for immediate development.

A [5] That being the case, it was argued that the acquisition cannot be for the purpose of any public utility. It was also argued that the acquisition was for the private development project of NASSR at the expense of Magnasari Sdn Bhd ('Magnasari').

B [6] Sometime in April 2004, Majlis Perbandaran Manjung granted Magnasari's application to build temporary stalls on its land. And this approval constituted a 'development approval' within the meaning of s 2 of the Act, according to Magnasari. It was the stand of Magnasari that since the acquisition C was not for the purpose of public utility and in the light of the development approval already granted to Magnasari prior to the acquisition, the state authority and the land administrator had no other discretion but to reject outright the application made by NASSR to acquire PT 16225. According to Magnasari, the outright rejection is mandated by s 3(6) of the Act which D stipulates as follows:

> Where in respect of any land applied for under subsection (2) there is a development approval granted to the registered proprietor and the acquisition is not for the purpose of public utility, the State Authority shall not consider the application, and in every such case the Land Administrator shall reject the application.

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[7] It was argued that it was inherently wrong and unconscionable for the authorities to favour NASSR at the expense of Magnasari when both parties are developers. It was further argued that there was no justification to deprive F Magnasari of its legitimate expectation of securing profit from the development of PT 16225 if the property was not acquired (*Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607 (CA)).

G [8] By way of a rebuttal, learned counsel for NASSR submitted that no development approval was granted to Magnasari to develop PT 16225. Rather it was an approval by the Majlis Perbandaran Manjung to Magnasari to erect temporary structures which could be easily dismantled.

H [9] Events showed that the proposal by NASSR to acquire PT 16225 was duly considered by the Jawatankuasa Khas Pengambilan Tanah ('JKPT'). In due course, JKPT recommended the compulsory acquisition of entire acreage of PT 16225 under s 3(1)(b) of the Act to the state authority. Section 3(1)(b) of the Act enacts as follows:

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> 3(1) The State Authority may acquire any land which is needed — (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.

[10] The declassified document emanating from the *Pengarah Tanah dan Galian Negeri Perak* to the *Majlis Mesyuarat Kerajaan*, Perak makes for an interesting reading material. Inter alia, it states:

> ... amat perlu untuk kemudahan laluan keluar masuk bagi penduduk di kawasan skim Perumahan berdekatan yang telah siap.

[11] The declaration that PT 16225 was compulsorily acquired was set out in Form D of s 8(1) of the Act and it was duly *gazetted* on 29 May 2006. Such declaration, as stated earlier, constituted 'conclusive evidence' that the scheduled land referred to therein is needed for the purpose specified therein. The compensation sum of RM274,600 was to be paid by NASSR to Magnasari. And for this purpose, NASSR lodged that sum with the High Court.

[12] In considering the issue of whether PT 16225 was validly acquired in accordance with the process of the law, it brings to the forefront the question of whether the state authority had complied with the statutory procedure as set out under the Act in acquiring PT 16225 in favour of NASSR. NASSR's application came within the purview of s 3(1)(b) of the Act read together with ss 4 and 3A(2) of the same Act where the state authority acquired PT 16225 for the purpose of constructing an access road notwithstanding that 'development approval' had been obtained for PT 16225.

[13] Now, the 'development approval' of PT 16225 must be examined in the light of what the planning authority had to say about the 'cadangan gerai-gerai' proposed by Magnasari which was not supported by the planning authority as PT 16225 had been demarcated as 'rizab jalan susur selebar 50 kaki'. The planning authority further stated that any development needs to take into account the 'jalan susur' and the remaining land (left over after taking out 50 feet) was too negligible for any development. Despite the negative remarks from the planning authority, Majlis Perbandaran Manjung had approved Magnasari's application for 'gerai-gerai sementara'.

[14] It is germane to mention that the word 'sementara' is all pervading. It meant that the building structures approved to be built by the Majlis Perbandaran Manjung on Magnasari's land (PT 16225) was meant for temporary use only. It is for this very reason that Magnasari was charged in court for building structures on PT 16225 which were not in compliance with the approval of Majlis Perbandaran Manjung.

[15] In regard to the argument that there was a defect in the composition of

A the JKPT in that there was non-compliance with s 3C(2)(a)(v) of the Act which affected the decision-making process of JKPT, it is ideal to reproduce verbatim s 3C(2) of the Act:

> 3C(2) The Committee shall —
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> B (a) in the case of a State, consist of the following members:
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> (i) the State Secretary, as Chairman;
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> (ii) the State Director of Lands and Mines, as Secretary;
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> C (iii) the Director of the State Economic Planning Unit or his representative;
>
> (iv) the State Director of Town and Country Planning or his representative; and
>
> (v) representatives of other related Government departments or agencies as may be determined by the Chairman.
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> D

[16] It is the state secretary who is the chairman of the committee. And it is he who must decide whether to appoint 'representatives of the related Government departments or agencies' to sit in the committee. The words in E s 3C(2)(a)(v) of the Act 'as may be determined by the Chairman' cannot be swept under the carpet, so to speak, by ignoring the power vested in the chairman to appoint 'representatives of the related Government departments or agencies' to sit in the committee.

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[17] The plain meaning rule should be adopted in construing s 3C(2)(a)(v) of the Act. As Tindal CJ said in the *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at p 143:

> G The rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the Legislature.

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[18] Lord Scarman in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529 (HL), at p 551 aptly said:

> In this field Parliament makes and unmakes the law the judge's duty is to interpret
> I and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge must say so and invite Parliament to reconsider its provision. But he must not deny the statute.

> Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may the judge select the construction which best suits his idea of what justice requires.

[19] The learned judicial commissioner made a finding that the acquiring authority was biased and had acted in bad faith. However, I find that the statutory procedure adopted by the acquiring authority was above board and beyond reproach. At any rate, the constitution of the committee are matters that NASSR has neither control nor knowledge of. The committee was legally constituted and was competent to decide and to receive the recommendation from the State Economic Planning Unit.

[20] It is easy to allege that the committee was biased but it is difficult to prove that the committee was in fact, biased. According to Frank J in *Re JP Linahan* 138 F2d 650 (1943) at p 651 (Circuit Court of Appeals, Second Circuit, Nov 8, 1943):

> If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of a judge, then no one has ever had a fair trial and no one ever will.

[21] For the reasons adumbrated above, I now make those orders that were made by my learned brother Mohamad Ariff bin Md Yusof J (now JCA).

Mohamad Ariff (delivering judgment of the court):

[22] Two related appeals were heard together where the appellants were Kerajaan Negeri Perak, Pentadbir Tanah Daerah Manjung and Ng Aun Say & Sons Realty Sdn Bhd (in Appeal No A-01–141 of 2011) and Ng Aun Say & Sons Realty Sdn Bhd (in Appeal No A-01–135 of 2011) respectively. The respondent in the appeals was Magnasari Sdn Bhd (Magnasari) which was the registered proprietor of a parcel of land (HSD 15332 PT 16225) which became the subject matter of a compulsory acquisition under s 3(1)(b) of the Land Acquisition Act 1960. The appellant in Appeal No A-01–135 of 11, and respectively the third defendant in the writ action in the High Court in Ipoh, was the earlier mentioned Ng Aun Say & Sons Realty Sdn Bhd ('NASSR').

A THE MATERIAL FACTS

[23] The background to the dispute between the parties is sufficiently analysed in the grounds of judgment of the learned judicial commissioner, and requires no extensive repetition. It suffices to summarise in the present grounds B of judgment the following basic facts.

[24] Both NASSR and Magnasari were proprietors of adjoining lands in Daerah Manjung. The respondent's parcel is a rectangular strip of land with a wide frontage bordering the main Pantai Remis/Segari road. In terms of the C exact location, the land belonging to NASSR (Lot 371) lies behind Magnasari's land. The concerned land developed by NASSR lacked access to this main road. NASSR had built 12 units of shops on its land. The evidence showed there was some prior discussion between NASSR and Magnasari during which NASSR had offered to purchase that strip of land from Magnasari but the latter D had requested an unreasonably high price. This observation could be seen in the declassified document from the *Pengarah Tanah dan Galian Negeri Perak* to the *Majlis Mesyuarat Negeri Perak*, reading:

> E Pemohon telah berunding dengan Tuan Tanah Lot 9844 (PT 16225) untuk membeli Tanah tersebut untuk dijadikan simpanan jalan, tetapi Tuan Tanah tidak bersetuju untuk menjualnya malah menawarkan harga yang tidak munasabah. Salah satu cara untuk menyelesaikan masalah tersebut adalah melalui pengambilan balik Tanah di bawah Seksyen 3(1)(b) Akta Pengambilan Tanah 1960.

F [25] NASSR had applied under s 3(1)(b) to the state authority with a proposal that PT 16225 be compulsorily acquired for the purpose of constructing an access road to the development project. The proposal was considered by the *jawatankuasa khas pengambilan tanah* ('JKPT') which G recommended the compulsory acquisition of the entire 0.13 ha of PT 16225 under the abovesaid statutory provision. In para 7 of the earlier mentioned declassified document, it was noted for the consideration of the state authority that the proposed acquisition was, in its own words, 'amat perlu untuk kemudahan laluan keluar masuk bagi penduduk di kawasan skim Perumahan H berdekatan yang telah siap'.

[26] *Majlis Mesyuarat Kerajaan Negeri Perak* approved the proposed compulsory acquisition for the purpose of a road reserve for Mukim Pengkalan Baharu Daerah Manjung. The declaration of intended acquisition was gazetted I on 29 May 2006. See *Gazette* Notification Number 826 published under s 8 of the Act which states:

Land acquisition under paragraph 3 (1)(b) of the Land Acquisition Act 1960 [Act 486] for Simpanan Jalan Hakmilik H.S.(D) 15332 Lot 9844 (PT 16225) Mukim Pengkalan Baharu, Daerah Manjung.

[27] The approval was granted with a condition that NASSR pay compensation to Magnasari. The compensation sum of RM274,600 was to be deposited by NASSR with the High Court.

[28] Lot 9844 (PT 16225) was part of an original lot (Lot 1415) which was originally agricultural land. Following an application for change of land use from agricultural to commercial ('untuk didirikan bangunan perniagaan'), part of the parcel was surrendered to the state government as land reserve for road widening. The remainder of the parcel became Lot 9844 (PT 16225). It was also in evidence that in April 2004 Majlis Perbandaran Manjung had granted Magnasari approval to build temporary stalls on the land. Magnasari submitted that this approval constituted 'development approval' within the meaning of s 2 of the Land Acquisition Act 1960, and this meant that the state authority had to consider the provisions of ss 3A(1) –(3) as well as 3(6) of the Act. Section 3(6), for instance, provides:

(6) Where in respect of any land applied for under subsection (2) there is a development approval granted to the registered proprietor and the acquisition is not for the purpose of public utility, the State Authority shall not consider the application, and in every such case the Land Administrator shall reject the application.

[29] This was a writ action, but parties had consented at the High Court to dispense with calling witnesses and to rely purely on the agreed documents in bundle D, encl 68 which contained the letter from PTG, 'Kertas Mesyuarat Kerajaan' and the State Government Gazette No 826 dated 22 June 2006, together with the agreed facts. The learned judicial commissioner approached the main issue in the case as essentially one of law.

THE ISSUES

[30] The appeal was heard on essentially two main issues, namely (a) whether the procedure followed by the state authority in considering and approving the application by NASSR complied with the statutory procedure under the Land Acquisition Act 1960, and (b) whether the acquiring authority had misconstrued its powers, acted in bad faith or with gross unreasonableness. In the High Court, the learned judicial commissioner had categorised the main issue as 'Sama ada tanah plaintiff telah diambil balik secara sah oleh PBN

A mengikut undang-undang'.

THE HIGH COURT DECISION

B **[31]** In the High Court the learned judicial commissioner allowed Magnasari's claim for a declaration that the decision of the state authority to acquire the land was unlawful and void, granted an order that the endorsement of intended compulsory acquisition on the document of title be cancelled and further ordered that damages as assessed by the registrar be allowed, together
C with costs of the action as assessed/agreed. In the opinion of the learned judicial commissioner, the state authority had acted in bad faith and was biased in approving the application by NASSR, adding that the facts tended to show a propensity of bias towards the third defendant (NASSR) in order to assist it without taking into account the interests and rights of the plaintiff
D (Magnasari). The learned judicial commissioner referred, in this context, to 'keghairahan PTG membuat syor bagi membantu Defendan ...' see in this connection, p 21 of the grounds of judgment, second paragraph. The nub of the decision of the High Court can be extracted from the following passage of the grounds of judgment:

E

> Berdasarkan fakta kes, mahkamah mendapati ada benarnya dakwaan plaintif bahawa alasan keputusan PBN mengambil balik tanah plaintif untuk tujuan public utility adalah sekadar alasan yang tidak menepati maksud s 3(1)(b) Akta. Atas imbangan kebarangkalian, adalah didapati pembinaan jalan akses tersebut bukan
F untuk public utiliti tetapi untuk kemudahan dan faedah defendan ketiga dalam usaha untuk menjamin keuntungan projek pembangunannya. Fakta-fakta yang ada, cenderung menunjukkan sikap bias (berat sebelah) PBN dalam membantu defendan Ketiga tanpa mengira kepentingan dan hak plaintif ... (pp 20–21 of the grounds of judgment).

G

[32] There were several specific findings which led the learned judicial commissioner to allow the plaintiff's claim. From an analysis of the judgment, the following findings emerged:

H (a) the state authority failed to adhere to the mandatory statutory procedure as provided under Part II of the Act, in particular in relation to the consideration, determination and action required of the State Economic Planning Unit ('UPEN') before a recommendation was made to the JKPT ('Jawatankuasa Khas Pengambilan Tanah') under s 3A(7);

I (b) the application by the third defendant (NASSR) was brought under s 3(1)(b) read in conjunction with ss 4 and 3A(2) of the Act whereby the state authority acquired the land for the purpose of 'public utility' to construct a road on a parcel of land which had been given a development approval;

(c) the third defendant had applied to the land administrator with the proposal to acquire the plaintiff's land for the purpose of allowing main road access to the potential occupiers on the shop lots which were built on the adjoining land at the back of the plaintiff's land on the basis that these potential occupiers of the shop lots were included within the meaning of the phrase 'any class of the public' under s 3(1)(b) of the Act;

(d) by the scheme of the Act in Part II, the land administrator was required to forward the application to the State Economic Planning Unit for its consideration in accordance with s 3A(1)(a) –(d) which required the State Economic Planning Unit to consider the application in relation to the aspects of (a) public interest, (b) capacity and capability of the applicant to carry out the purpose for which the land was to be acquired, (c) feasibility of the project, and (d) the development approval granted to the registered proprietor;

(e) since it was established that the registered proprietor, ie the plaintiff, had been granted a development approval to construct the temporary stalls on the land, the State Economic Planning Unit had to determine whether it was appropriate in the circumstances for the registered proprietor to participate 'in the project' for which the land was intended to be acquired, consistent with the statutory requirement under s 3A(2), reading:

> Where there is a development approval granted in respect of any land and the acquisition is for the purpose of public utility, the State Economic Planning Unit ... shall determine whether it is appropriate in the circumstances for the registered proprietor to participate in the project for which the land is intended to be acquired.

(f) reading para 3.3 of the *Kertas Mesyuarat Majlis*, the State Economic Planning Unit had wrongly interpreted the provisions of s 3A and had failed to perform its statutory duties under sub-ss (2)–(3) to come to a determination on whether it was appropriate in the circumstances for the plaintiff to participate in the project ie the construction of the access road. The said para 3.3 read:

> Proses perundingan antara tuan tanah dan Ng Aun Say & Sons Realty Sdn Bhd adalah tidak perlu kerana projek yang akan dilaksanakan adalah bagi tujuan a warn dan tidak sesuai untuk tuan tanah melibatkan diri.

(g) there was a defect in the composition of JKPT since there was non-compliance with s 3C(2)(a) (i)–(v) of the Act which affected the decision-making process of JKPT when it considered the recommendation of the State Economic Planning Unit (UPEN). The state secretary as chairman of the committee, it was argued, had to appoint, consistent with the statutory requirements, 'representatives of

A the related government departments or agencies as may be determined by the Chairman'. Section 3C(2) of the Act provides in full:

> (2) The Committee shall —
>
> (a) in the case of a State, consist of the following members:
>
> (i) the State Secretary, as Chairman;
>
> (ii) the State Director of Land and Mines, as Secretary;
>
> (iii) the Director of the State Economic Planning Unit or his representative;
>
> (iv) the State Director of Town and Country Planning or his representative; and
>
> (v) representatives of the related Government departments or agencies as may be determined by the Chairman.

[33] The learned judicial commissioner found the composition of the committee defective because it had included only the persons listed in sub-s (2)(a)(i)–(iv) with the exclusion of the representatives supposed to have been appointed under (v).

[34] Based on these findings, the learned judicial commissioner concluded that there existed a serious non-compliance with the statutory provisions and a misconstruction of the law in respect of the functions and powers of the agencies of the state authority when it supported the application of NASSR in a case which involved a 'development approval' granted to Magnasari, and in the opinion of the learned judicial commissioner, the state authority could not consider the application and the land commissioner should have dismissed the application without making any recommendation. The learned judicial commissioner quoted expressly s 3(6) of the Act, which read:

> (6) Where in respect of any land applied for under subsection (2) there is a development approval granted to the registered proprietor and the acquisition is not for the purpose of public utility, the State Authority shall not consider the application and in every such case the Land Administrator shall reject the application.

[35] As earlier stated, the learned judicial commissioner also found that the state authority had acted in bad faith with an element of bias in its eagerness to approve the second defendant's application. In support of his conclusions on the facts and the law, the learned judicial commissioner quoted the Federal Court decision in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35 and the Court of Appeal decision in *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor* [1998] 2 MLJ 498. The first authority, *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang*, was cited

for the proposition that the exercise of statutory power is illegal if done for an inadmissible purpose, or on irrelevant grounds, or without regard to relevant considerations, or with gross unreasonableness. *Honan Plantations*, was cited to support the finding that while an acquisition under the Land Acquisition Act could not be challenged generally, such acquisition could still be challenged if a plaintiff established that the acquiring authority 'had misconstrued its powers or had acted in bad faith or with gross unreasonableness'.

THE FINDINGS AND DECISION ON APPEAL

[36] As stated earlier, this case was heard on the basis of agreed facts and agreed documents, and as such no question of the High Court having an audio — visual advantage arose for consideration. In relation to the law, the relevance of the Court of Appeal decision in *Honan Plantations*, was not disputed. Despite s 8(3) of the Act, which provided that a declaration in Form D 'shall be conclusive evidence that all the scheduled land referred to therein' was needed for the purpose specified therein, an acquisition could still be challenged if the aggrieved party could establish that the acquiring party had misconstrued its powers, or acted in bad faith, or acted with gross unreasonableness. The learned judicial commissioner found elements of bad faith, misconstruction of statutory powers and gross unreasonableness established on the evidence based on a reading of the documents and inferences therefrom. We were unable to agree with the learned judicial commissioner's findings and inferences, and particularly with respect to his reading of the provisions in s 3C(2) of the Act, which we found to be central to his decision. The reference in para (v) in sub-s (2) to 'representatives of other related Government departments or agencies *as may be determined by the Chairman*' (Emphasis added) could not on a proper interpretation be taken to mean the chairman *must* appoint representatives from related government departments or agencies. This was a matter of statutory discretion conferred on the chairman and not a compelling mandatory requirement, and unless the context clearly indicated his discretion was a narrow, and not a broad, one, it should be given its broadest signification. Thus we could not agree with the conclusion of the learned judicial commissioner that the committee was incompetent to decide or to receive the recommendation from the State Economic Planning Unit. The same approach should apply in construing the discretionary powers granted to the land administrator and the State Economic Planning Unit when considering ss 3(6) and 3A(2). When administrative powers are granted to agencies of the government, they have to be properly read against the overall context of the relevant statute, and the various relevant statutory provisions have to be read harmoniously. It cannot be the proper function of the court to narrow down an ostensibly broad conferment of administrative powers, since to do so will defeat the statutory objective. Hence, within the context of the Land Acquisition Act, it could not be the case that the land administrator must reject outright an

application for compulsory acquisition where there was a development approval granted to the registered proprietor of the land intended to be acquired. If the acquisition was for the purpose of public utility, and despite the existence of a development approval in respect of the land, the State Economic Planning Unit had to determine 'whether it is appropriate in the circumstances for the registered proprietor to participate in the project for which the land is intended to be acquired'. The statutory formulae did not prohibit a compulsory acquisition outright simply because there existed a development approval granted in respect of the land, but made the intended acquisition subject to the requirement of 'public utility' and a consideration whether it would be appropriate in the circumstances for the registered proprietor 'to participate in the project'. Given the breath of this power, we were of the view that it was lawful, within the statutory context, for the State Economic Planning Unit to have decided that in the circumstances, where the land was to be acquired to construct an access road, it was not necessary to have the participation of the registered proprietor since it would not be appropriate in the circumstances. In regard to the finding that the said authority was biased and acted in bad faith, we could not find any fault in the statutory procedure adopted. It was not as if the registered proprietor was ridden roughshod by the said authority to benefit NASSR. It was clear from the evidence that it was necessary to have an access road to the main road to allow access to, and from, the 12 units of shop houses. This would satisfy the requirement of 'public utility'. We noted that the definition of 'public utility' included 'public works' under s 2(1) of the Land Acquisition Act.

THE CONCLUSION

[37] For the abovestated reasons, there were major errors of law and a misappreciation of the evidence which invited appellate intervention. The evidence in relation to bad faith and bias was singularly absent, and we felt the findings of the learned judicial commissioner were therefore perverse and against the weight of evidence.

[38] Both appeals in *Rayuan Sivil* No A 01–135 of 2011 and *Rayuan Sivil* No A 01–141 of 2011 were thus allowed by unanimous decision with costs of RM5,000. The decision of the High Court was set aside. The deposit was ordered to be refunded to NASSR, being the third appellant in Appeal No A-01–141 of 2011 and the appellant in Appeal No A-01–135 of 2011. This judgment received the concurrence of my learned brother Linton Albert JCA.

[39] My learned brother Abdul Malik bin Ishak JCA has since written a supporting judgment.

Appeals allowed with costs of RM5,000.

Reported by Kohila Nesan