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DATUK IR HJ AMRAN MOHD YUSOFF & ORS v. PENGARAH PENYELESAIAN TANAH KELANTAN & ORS

HIGH COURT MALAYA, KOTA BHARU
AZMAN ABDULLAH J
[ORIGINATING SUMMONS NO: 24NCVC-11-01-2015]
B 29 OCTOBER 2015

LAND LAW: *Interest in property – Indefeasibility of title and interests – Portion of land registered under owners' names transferred to claimants – Penolong Pentadbir Tanah Jajahan ('PPTJ') made order under s. 7 of Kelantan Land Settlement Act*
C *1955 resulting in land divided into two – Whether order valid – Whether PPTJ acted in accordance with law – Whether order binding on registered owners – Whether title conferred under registered owners indefeasible – Whether claimants successfully proved interest in land – Whether registered owners suffered damages*

D By way of a sale and purchase agreement ('SPA'), the plaintiffs became the registered owners of a piece of land and later obtained consent of the State Authority to transfer the said land to their names. After the land was registered in the names of the plaintiffs, an inquiry was made at the Pejabat Penyelesaian Tanah Kelantan which resulted in the Penolong Pentadbir Tanah Jajahan ('PPTJ') deciding that 15 hectares of the said land was to be
E transferred to three individuals ('the claimants'). Dissatisfied with the inquiry, the plaintiffs filed a notice of motion at the High Court in which the High Court gave the options to the defendants to (i) replace the said land with another land; (ii) pay some damages with interest; or (iii) transfer the said land into the plaintiffs' names as if there was no order made. Both parties
F appealed against the decision of the High Court. The Court of Appeal reversed the decision and a new inquiry was ordered to be held ('the second inquiry'). During the second inquiry, the PPTJ made an order under s. 7 of the Kelantan Land Settlement Act 1955 ('the Act') and the land was divided into two, namely (i) Plot A, which was declared as State land made as
G Government's land; and (ii) Plot B which was returned to the plaintiffs. Aggrieved by the decision, the plaintiffs requested for a rehearing by the Pejabat Penyelesaian Tanah Kelantan. The rehearing was chaired by the Pengarah Penyelesaian Tanah Kelantan ('PPTK') and the claimants claimed that they had explored and cultivated the said land with rubber trees, but
H nothing was produced during the rehearing to prove their claim. The plaintiffs, on the other hand, produced documentary evidence. The PPTK upheld the decision made by the PPTJ and ordered the claimants to produce statutory declarations, which they did on a much later date. The plaintiffs filed the present claim against the defendants, pursuant to s. 16 of the Act and sought for orders that (i) the decision by the PPTJ under s. 7 of the Act
I was void; (ii) the decision by the PPTK in upholding the decision by the PPTJ was void; and (iii) the decision was not binding on the plaintiffs. The

issues that arose were (i) whether the PPTJ and the PPTK had acted in accordance with the law when they made an order under s. 7 of the Act; and (ii) whether the plaintiffs' should be awarded costs and damages.

Held (allowing plaintiffs' claim):

(1) Section 5(2) of the Act clearly provides for the requirement to be followed by the claimants during the inquiry. It was mandatory for the claimants to produce any instrument affecting the land or interest in which they claimed. During the inquiry, the claimants failed to produce any evidence to show that they were registered owners and had any interest over the said land. As the claimants had not acted in accordance with s. 5(2) of the Act, it clearly showed that the claimants made bare claims. (paras 28, 30 & 31)

(2) The claimants were not persons who, at the date of the enquiry, were or held under a person in occupation of State land under approved application in expectation of registration of title in accordance with the law in force immediately before the commencement of the Code. The land had been registered to the plaintiffs since 9 December 2004. Therefore, s. 7 of the Act was not available to the claimants. The PPTJ should not have made an order under s. 7 of the Act and this clearly showed that he had acted *ultra vires* as the requirement under s. 7 of the Act was not satisfied. (paras 34 & 35)

(3) The order made by the PPTK that the claimants had to produce a declaration of oath should be set aside. Such declaration should be produced during the inquiry and not by the order of the PPTK after the re-hearing. The PPTK should not have made such orders as the claimants had failed to prove that they were the registered owners and had any interest over the land. The declaration should be produced before the order was made in order to prove that the claim made by the claimants was true and not a bare claim. The declaration submitted by the claimants brought no effect to the proceedings as it was tendered under the direction of the PPTK after the decision of the rehearing was made. (paras 36, 37, 38 & 39)

(4) The PPTJ and PPTK had not acted in accordance with the law. The title conferred under the plaintiffs' names was indefeasible and since there was no evidence as to the contrary, the plaintiffs should not be deprived of their right of property under art. 13 of the Federal Constitution. (para 52)

(5) The plaintiffs should not be awarded any damages because they did not adduce any evidence to prove that they suffered any loss or damage due to the defendants' action. No evidence had been produced that they had

A been a party who was interested to purchase the said land and that such a purchase could not be effected due to the defendants' action. The plaintiffs' should also not be awarded costs. (paras 55, 56 & 70)

Case(s) referred to:

B *Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC* ***(refd)***
Bonham-Carter v. Hyde Park Hotel Ltd (1948) 64 TLR 177 ***(refd)***
Dr Bernadine Malini Martin v. MPH Magazine Sdn Bhd & Ors And Another Appeal [2010] 7 CLJ 525 CA ***(refd)***
Guan Soon Tin Mining Company v. Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***
KE Hilborne v. Tan Tiang Quee [1972] 1 LNS 49 HC ***(refd)***
C *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC* ***(refd)***
Pow Hing & Anor v. Registrar of Titles, Malacca [1980] 1 LNS 120 FC ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***

Legislation referred to:

D Evidence Act 1950, ss. 101, 102
Federal Constitution, art. 13
Kelantan Land Settlement Act 1955, ss. 5(1), (2), 7, 16
Kelantan Land Settlement Regulation 1956, reg. 15(1), (2)
National Land Code, s. 340(3)(a), (b)

Other source(s) referred to:

E Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary*, 2nd edn, p 134

For the plaintiffs - Zahari Affendi Abdul Kadir; M/s Muhamad Jailani & Partners
For the defendants - Nooriah Osman, FC; State Legal Advisor's Office, Kelantan

F *Reported by Najib Tamby*

JUDGMENT

Azman Abdullah J:

Introduction

G

[1] This is an appeal against the decision during the inquiry under s. 7 of the Kelantan Land Settlement Act 1955 ("the Act") and it was ordered that a piece of land being registered in the name of three individuals.

[2] The subject matter of this case is 15 hectares out of 301.3 hectares of H land held under PN 3884 Lot 4001 in Mukim Jeli Tepi Sungai, District of Jeli in the State of Kelantan ("the said land") in which the plaintiffs claimed that they were the original owner.

[3] The plaintiffs claimed *inter alia* that they were the lawful registered owner of the said land and the Penolong Pentadbir Tanah Jajahan ("PPTJ") I and Pengarah Penyelesaian Tanah Kelantan ("PPTK") had acted *ultra vires* the provisions of the Act.

[4] The court allowed some of the plaintiffs' claim but there was no order as to damages and cost. A

Brief Facts Of The Case

[5] The plaintiffs in this case were the registered owner of the said land.

[6] The plaintiffs bought the said land from Pertubuhan Peladang Lanas/ Jedok, Batu Gajah, Tanah Merah, Kelantan through a sale and purchase agreement dated 28 July 2004. B

[7] At that time, the said land was charged to Bank Pertanian (now known as Agro Bank). C

[8] After signing the agreement, the plaintiffs made full settlement and the said land was discharged from the Bank Pertanian.

[9] On 1 August 2004, plaintiffs had obtained consent of the State Authority to transfer the said land to their names and the said land was registered in their names on 9 December 2004 as qualified title (hakmilik sementara). D

[10] On 24 July 2006, the said land then was registered in the name of the plaintiffs as a final title (hakmilik muktamad).

[11] However, on 24 July 2011, an inquiry was made at the Pejabat Penyelesaian Tanah Kelantan in which as a result the PPTJ decided that 15 hectares of the said land was to be transferred to three individuals namely; Che Ya bin Samat (NRIC: 490403-03-5131, Zaimah binti Md Nor (NRIC: 590719-03-5312) and Makhtar bin Abdullah (NRIC: 450809-03-5223) ("the claimants"). E

[12] Dissatisfied with the said inquiry, the plaintiffs filed a notis usul in Kota Bharu High Court in which the court had given three options to the defendants, as follows; F

(i) the defendants had to replace the said land with another land; or

(ii) the defendants had to pay a some damages with interest; or G

(iii) the defendants had to transfer the said land into the plaintiffs' names as if there was no order made on 24 July 2011.

[13] Both parties then appealed my decision and the Court of Appeal had reversed my decision and they ordered that a new inquiry ("the second inquiry") should be held. H

[14] During the second inquiry on 28 May 2014, the PPTJ called the claimants and the plaintiffs. The PPTJ, then had made an order under s. 7 of the Kelantan Land Settlement Act in which the said land was divided into two; Plot A and Plot B. I

[15] Plot A (21 hectares of the said land) was declared as State land made as Government's land and another 723 hectares (Plot B) was returned to the plaintiffs.

[16] The plaintiffs dissatisfied with the decision, then had requested for a rehearing (ulang bicara) from Pejabat Penyelesaian Tanah Kelantan which was then held on 14 September 2014 in accordance with reg. 15(1) of Kelantan Land Settlement Regulation 1956.

[17] The rehearing was chaired by Pengarah Penyelesaian Tanah Kelantan ("PPTK") and the three claimants were present together with the plaintiffs. The said individuals claimed that they had explored and cultivated the said land with rubber trees, but nothing was produced during the rehearing to prove their claim as required by the Act.

[18] While on the part of the plaintiffs, they had produced documentary evidence as required by the Act.

[19] Even though the claimants had proved nothing, PPTK on 14 July 2014 had decided to uphold the decision made by PPTJ and ordered them to produce a statutory declaration in support of their claims. Statutory declarations were only produced by the claimants on 28 October 2014.

[20] Plaintiffs on 11 January 2015, filed an originating summons against the defendants under s. 16 of the Act and sought orders from the Kota Bharu High Court that;

(a) the decision by PPTJ on 28 May 2014 under s. 7 of the Act is void;

(b) the decision by the PPTK on 14 July 2014 to upheld the decision by the PPTJ is void; and

(c) the decision made is not binding on the plaintiffs.

[21] The plaintiffs also pray for damages and cost to be awarded.

[22] During the trial, the parties had agreed that there is only one issue to be tried. The issue is whether the PPTJ and PPTK had acted in accordance with the law when they made an order under s. 7 of the Act.

[23] On 29 October 2015, I decided to allow some of the plaintiffs' claims and the decision by the PPTK and the PPTJ is set aside and declared to be void but made no order as to damages and cost.

[24] The notice of appeal by the plaintiffs showed only an appeal against damages and cost.

Findings Of The Court

(A) Whether PPTJ And PPTK Had Acted In Accordance With The Law And Whether The Decision Made By The PPTJ And PPTK Was Not Ultra Vires The Provision Provided Under The Law

[25] I shall refer to a few provisions provided in the Act.

[26] First, s. 5(1) of the Act explains the duties of District Officer at public inquiry. Section 5(1) provides that:

> The District Officer shall at a public enquiry ascertain who is in possession of the land, who is the registered proprietor, who is entitled to be registered as proprietor, whether any person has a registrable interest therein, and the extent of the land over which any interest is exercisable.

[27] Section 5(2) of the Act provides that:

> The claimant may appear in person or by an agent authorised in writing or appointed before the District Officer and shall produce to the District Officer any instrument affecting the land or interest which he claims.

[28] In the case at hand, the claimants during the inquiry had failed to produce any evidence to show that they were the registered owner and had any interest over the said land.

[29] The defendants also asserted that the claimants had the burden to prove whatever they claimed as required by the law.

[30] Section 5(2) of the Act clearly provides for the requirement to be followed by the claimants during the inquiry. It is mandatory for the claimants to produce any instrument affecting the land or interest in which they claimed.

[31] As the claimants had not acted in accordance with s. 5(2) of the Act, it clearly shows that the claimants had made bare claims. They only produce all the necessary documents for the first time when the PPTK had ordered them to produce the statutory declaration.

[32] Section 7 of the Act provides that:

> Whenever the District Officer is satisfied that the person in possession of any land at the date of the enquiry is or holds under a person in occupation of State land under approved application in expectation of registration of title in accordance with the law in force immediately before the commencement of the Code, the District Officer shall make a finding to that effect and, in the manner prescribed, make an order, which shall be presented to the Registrar, directing the registration of the interest so found;
>
> Provided that, where the interest so found is the interest of a person who is or holds under a person in occupation of State Land under approved application as aforesaid, the Registrar shall on the presentation of the order register the title for which the application was approved and an interest corresponding to the interest of any person found to be holding under the applicant.

[33] Section 7 of the Act thus clearly imposed a condition to be satisfied by the District Officer before making any order under this Act.

[34] However, in this case the claimants were not the persons who are at the date of the enquiry are or hold under a person in occupation of State land under approved application in expectation of registration of title in accordance with the law in force immediately before the commencement of the Code. This is because the said land had been registered to the plaintiffs since 9 December 2004. Therefore, s. 7 of the Act is not available to the claimants/ the three individuals named above.

[35] On this point alone, the Assistant of District Officer should not make an order under s. 7 of the Act and this clearly shows that he had acted *ultra vires* as the requirement under s. 7 was not satisfied.

[36] Apart from that, the order made by the PPTK under r. 15(2) Peraturan-peraturan Penyelesaian Tanah Kelantan 1956 should be set aside. Rule 15(2) provides that:

> Pegawai Jajahan boleh mendengar keterangan-keterangan daripada perayu, meminta keterangan yang lebih lanjut yang difikirkan perlu atau mustahak dan mengesahkan atau meminda perintah tersebut.

[37] The order made by the PPTK after the rehearing was that the claimants/ the three individuals named above have to produce declaration of oath.

[38] I am of the opinion that such declaration should be produced during the inquiry and not by the order of the PPTK after the rehearing. The PPTK should not have made such order as the said individuals had failed to prove that they are the registered owner and had any interest over the land. The declaration should be produced before the order was made. This is to prove that the claim made by the claimants was true and not a bare claim.

[39] I am also of the opinion that the declaration submitted by the said individuals on 28 October 2014 brings no effect to the proceeding as it was tendered under the direction of the PPTK after the decision of the rehearing was made.

[40] Apart from that, I agreed with Puan Nooriah Osman, the learned Senior Federal Counsel for the defendants, argued systematically that:

> title already held by the Plaintiffs are good title and do not come under the Act. Other interested parties must challenge the same as provided under s. 340 National Land Code 1965.

[41] The learned Senior Federal Counsel for the defendants further submitted that:

> Berdasarkan takrif penuntut di bawah Akta 460, yang bermaksud seseorang yang mendakwa dirinya tuan tanah atau ada kepentingan dalam kawasan penyelesaian, maka pihak penuntut mempunyai beban untuk mengemukakan keterangan yang sedemikian.

[42] I referred to s. 340 of the National Land Code and also art. 13 of the Malaysian Federal Constitution.

[43] Section 340 of the National Land Code provides that:

> Registration to confer indefeasible title or interest, except in certain circumstances.
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
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> (2) The title or interest of any such person or body shall not be indefeasible-
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2)-
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
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> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent-
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law.

[44] On the matter of interpretation of s. 340, two cases (*Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 and *Tan Ying Hong*) stand out, for different reasons. While *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 changed the law, *Tan Ying Hong* restored it to where it was before. Before *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133, the law on s. 340 could be broadly summarised as follows. Upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land, that is a title or an interest which is free of all adverse claims or encumbrances not noted on the register. The effect of registration then is to defeat all prior

unregistered claims. Indefeasibility is however not absolute. (*Land Law in Malaysia, Cases and Commentary* by Teo Keang Sood & Khaw Lake Tee, 2nd edn. at p. 134). Indefeasibility is subject to the exceptions in s. 340(2). Under s. 340(2), the title or interest shall not be indefeasible (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. A title or interest that is not indefeasible continues to be defeasible and is "liable to be set aside in the hands of any person or body to whom it may subsequently be transferred" (s. 340(3)(a)) and any interest subsequently granted thereout is "liable to be set aside in the hands of any person or body in whom it is for the time being vested" (s. 340(3)(b)). A defensible title or interest continues to be defeasible and will only become indefeasible when title is acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser (proviso to s. 340(3)).

[45] Article 13 of the Malaysian Federal Constitution also provides that:

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

[46] I feel it prudent to again remind the defendants' duty in administering and maintaining an efficient, transparent and a credible approach to safe guard the interests of the registered proprietors of land like the plaintiffs. Due to the conduct of the defendants, the plaintiffs were almost nearly deprived of his property save for the intervention of the court which would have amounted to a breach of the plaintiffs' rights preserved under art. 13 of the Federal Constitution which is a fundamental liberty of the plaintiffs. These fundamental liberties as preserved by the Federal Constitution are the very core of the nation and its citizens. To protect such rights the court must intervene.

[47] Federal Court in *Pow Hing & Anor v. Registrar of Titles, Malacca* [1980] 1 LNS 120; [1981] 1 MLJ 155 at p. 160 the judgment of Abdool Cader J at p. 160 and I quote:

> In tune with the prelude with which we commenced at the outset, we would by way of postlude in restating the message this decision delivers enjoin every official concerned with or involved in exercising powers and duties under the Code and related legislation to regard this judgment as regrettably necessary but solemn caveat, giving warning, loud and clear, against any wanton disregard or sloppy application of express statutory provisions in the exercise of their functions, and one to be understood, marked and digested as such. We would add that they must strive to be

au fait with the law they have to administer and should not hesitate in the course of their statutory duties to seek legal advice whenever necessary from the State Legal Adviser or his confreres and should never put the latter in the invidious and perhaps even an intolerable position they found themselves in these proceedings of having both in the court below and before us to make feeble attempts at *ex post facto* justification for the inexcusable defaults of others on a *post hoc ergo propter hoc premise*, quite apart from unnecessarily constraining the justly aggrieved to pit themselves in curial combat against the massive and bottomless purse of the State - much to the delight, perhaps, of the legal profession.

[48] In *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, Raja Azlan Shah CJ (Malaya) used language that merits recall ever so often to remind ourselves of our constitutional role:

Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (*ante*) (*Pyx Granite Co Ltd v. Ministry of Housing and Local Government* [1958] 1 All ER 625) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Danckwerts LJ in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434, 442.).

(emphasis added.)

[49] What can I see from this case is that the conduct of the officers involved shows a failure to carry out their functions correctly and can hardly be construed to have carried out their duties in good faith.

[50] It is a trite law that when a person make an allegation such person has a burden of proving such allegation. This has been provided under ss. 101 and 102 of the Evidence Act 1950:

101. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

A (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

B

[51] However, in our case, the claimants in this case had failed to prove that the said land belong to them. They had failed to produce any evidence to show that they are the registered owner and has interest over the said land.

[52] I am in the opinion that, the title conferred under the plaintiffs' name C is indefeasible and since there was no evidence as to the contrary the plaintiffs should not be deprived of his right of property under art. 13.

[53] I am fully agreed with Puan Nooriah Osman's submission that:

Tanah Plaintif adalah tanah beri milik dan bukan tanah negeri dan tiada keterangan bahawa pihak penuntut mempunyai apa-apa kepentingan di D bawah approved application.

Walauapapun, perlu ditegaskan bahawa tidak ada mana-mana peruntukkan dalam Akta 460 yang memberi kuasa kepada Penolong Tadbir Tanah mahupun Pengarah Penyelesaian Tanah Kelantan untuk mengisytiharkan tanah beri milik Plaintif menjadi tanah kerajaan.

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Ini bertentangan dengan kuasa Pihak Berkuasa Negeri di bawah Kanun Tanah Negara 1965 dan Akta Pengambilan Tanah 1960. Sesuatu tanah yang diberi milik hanya boleh diambil balik di bawah Akta Pengambilan Tanah 1960 dan peruntukkan undang-undang selanjutnya perlu dipatuhi untuk tanah tersebut menjadi tanah kerajaan akibat F pengambilan balik tanah.

[54] Thus, the PPTJ and PPTK had acted not in accordance with the law.

(B) Whether Damages Should Be Rewarded To The Plaintiffs

[55] I moved on to the issue of damages. As to the damages, I am in the G opinion that the plaintiffs should not be rewarded any damages.

[56] This is because the plaintiffs had not adduced any evidence in this trial to prove that the plaintiffs had suffered any loss or damage due to the defendants' action. No evidence has been produced in this case that they have been a party who is interested to purchase the said land and such a purchase cannot H be effected due to the defendants' action.

[57] Apart from that, only 21 hectares out of 744 hectares involved in this case and the plaintiffs admitted that they had not developed the said land yet.

[58] Even if the plaintiffs had suffered any loss or damage due to the I defendants' action (alleged loss), the plaintiffs must prove that the alleged loss is claimable and is not too remote.

[59] The plaintiffs also had failed to show before the court that due to the defendants' action they had suffered any loss but in my mind they actually had benefited from the land. This is due to the fact that the three individuals named in this case had actually developed the said land into "kebun getah". So, the plaintiffs had nothing to lose. They get back their land and they can gain profit out of it. I personally think that the plaintiffs had not suffered any loss. From the very beginning, there was nothing on the facts of this case showed that due to the defendants' action had prevented the plaintiffs to develop the land.

[60] The plaintiffs failed to prove that the land was damage or cannot be developed due to the defendants' action.

[61] From the reasons enumerated above, I am in the opinion that the issue of damages should not be raised by the plaintiffs as the court had ordered that the defendants to return the land to the plaintiffs.

[62] The situation would be different if the said land was not return to the plaintiffs and no adequate compensation be awarded to the plaintiffs.

[63] In the case of *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374 it is said;

> Section 75 of the Contracts Act 1950 ought to be given a restricted construction rather than a literal one. This is so notwithstanding that the words "whether or not actual damage or loss is proved to have been caused thereby" therein are unambiguous and clear, and that the language used in the words expresses no circumscription of the area of operation. To give the section a literal construction would seem to be beyond the object of the section, which is to abolish the distinction between a penalty and liquidated damages. It will also produce a most unreasonable result in that it will change the existing law, which is that a plaintiff who seeks to recover damages for the actual damage caused ought to prove them, unless he is content with the symbolic award of nominal damages.
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> The words "whether or not actual damage was proved to have been caused thereby" in s. 75 of the Contracts Act are limited to those cases where the Court would find it difficult to assess damages for the actual damage or loss as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove damages or the reasonable compensation for the actual damage or loss in the usual ways.
>
> The precise attributes of such contracts in which it is difficult for a Court to assess damages for the actual damage or loss, are cases where there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently and such loss is not too remote. In such cases the Court ought to award, not nominal damages, but substantial damages not exceeding the sum so named in the contractual provision, a sum which is reasonable and fair according to the Court's good sense and fair play.

A Where there is inherently any actual loss or damage from the evidence or nature of the claim, and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the Court to award such damages, despite the words "whether or not actual damage was proved to have been caused thereby" B in s. 75 of the Contracts Act.

In the present case, the evidence clearly shows some actual loss, damages for which could be assessed by settled rules, as there was evidence that at the material time the appellant was already using the respondent's medical equipment. This is therefore an example where damages could be C proved by settled rules, but evidence has not somehow been brought to prove damages for the said actual loss, as to enable the Court to award at least some damages as compensation for loss of use of the said medical equipment. The damages have not been proved, no compensation could be awarded in this respect.

D **[64]** In another Federal Court's decision in *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43 the apex court quoted Lord Goddard LJ in *Bonham-Carter v. Hyde Park Hotel Ltd* (1948) 64 TLR 177 at p. 178 where it states;

Plaintiff must understand that if they bring actions for damages, it is for E them to prove their damage; it is not enough to write down the particulars and so to speak throw them at the head of the court, saying, "This is what I have lost: I ask you to give me those damages". They have to prove it.

(C) Whether Court Should Grant Cost To The Plaintiffs

F **[65]** The Court of Appeal had on 21 June 2013 had reversed my decision and ordered the parties to hold another inquiry ('the second inquiry'). The second inquiry was held based on an order made by the Court of Appeal.

[66] The defendants had not filed any notice of appeal even when my decision was against them as they had undertook to follow all the outcomes of this case. G

[67] Previously, in 23 October 2012, I had awarded the plaintiffs the cost of RM15,000 which then went to appeal to the Court of Appeal. The plaintiffs had admitted that the Court of Appeal did not touch on my decision but ordered that a fresh inquiry be held in accordance with the Act. The direction of the Court of Appeal was with no order as to cost. H

[68] Apart from that, it is court discretion either to grant cost or not. I referred to case of *Dr Bernadine Malini Martin v. MPH Magazine Sdn Bhd & Ors And Another Appeal* [2010] 7 CLJ 525; [2010] 5 MLJ 755, where the court in this case held that:

I An appellate court seldom interfere in the question of costs, and if they do so, it is done reluctantly. This is because the court below has an absolute discretion except that that discretion must be exercised judicially.

[69] I also referred to the decision held by Wee Chong Jin CJ in *KE Hilborne v. Tan Tiang Quee* [1972] 1 LNS 49; [1972] 2 MLJ 94:

> It has long been well settled that costs are in the discretion of the court. It has also long been well settled that an appellate tribunal is not entitled to interfere with a discretion exercised by a lower court unless it is clearly shown that the discretion has been exercised on wrong principles.

[70] Thus, the plaintiffs should not be awarded with any cost.

Conclusion

[71] For the above reasons, I allowed the plaintiffs' claims where:

(i) decisions made by the Assistant of District Officer under s. 7 of the Kelantan Land Settlement and Pengarah Penyelesaian Tanah Kelantan under reg. 15(2) of the Peraturan-Peraturan Tanah Penyelesaian Kelantan 1956 was invalid and should be set aside;

(ii) plaintiffs are the registered owner of 301.3 hectares of the land held under PN 3884 Lot 4001 in Mukim Jeli Tepi Sungai, District of Jeli in the State of Kelantan; and

(iii) no order as to damages and cost.