A

Sri Maju Mas Sdn Bhd v Majlis Perbandaran Seberang Perai

B

APPEAL BOARD (PULAU PINANG) — APPEAL NO LR/SP/30 OF 2011
YEO YANG POH CH, AMIRUDDIN FAWZI BAHAUDIN AND SAN GANAPHATI
3 DECEMBER 2012

C

Local Government — Town and country planning — Appeal board — Costs — Costs not normally awarded against planning authority — Exceptions — Where impugned decision not made bona fide — Where impugned decision made in thoughtless and capricious manner and causes hardship on appellant

D

Local Government — Town and country planning — Application for planning permission — Appeal against refusal of planning permission — TNB requiring appellant to provide land and construct main distribution substation ('MDS') at appellant's cost — Whether MDS condition imposed for ulterior object — Whether MDS condition not justifiable under s 21(3)(g) of the Town and Country Planning Act 1976 — Whether MDS condition ultra vires and unreasonable

E

Local Government — Town and country planning — Planning considerations — Section 21(3)(g) of the Town and Country Planning Act 1976 to be construed subject to 'Wednesbury' reasonableness test — Planning authority only to impose conditions with sound and valid reason capable of withstanding judicial scrutiny — Town and Country Planning Act 1976 s 21(3)(g)

F

G

Public Authorities — Statutory body — Powers of — Tenaga Nasional Bhd ('TNB') requiring applicant for planning permission to provide land and construct main distribution substation at applicant's own cost — TNB required to pay full compensation for any land it acquires — Whether condition unreasonably imposed — Licensee Supply Regulations 1990 reg 13(1) — Electricity Supply Act 1990

H

The appellant purchased two plots of land ('the land') from the respondent. Under the SPA, the appellant was contractually required to build affordable housing for Penang residents. The respondent also happened to be the planning authority in relation to the land. The appellant submitted its application for planning permission or *kebenaran merancang* ('KM application') to develop the land. In processing the KM application, the respondent obtained the views and feedback of numerous departments. One of the departments, Tenaga Nasional Bhd ('TNB') asked the respondent to

I

impose a requirement on the appellant to provide in the proposed development the following: (i) four electrical substations or pencawang elektrik ('PE'); and (ii) a plot of land measuring 22,500 sqft ('the PPU plot') to be given and transferred to TNB for RM10 for TNB's use to construct a main distribution substation or pencawang pembahagian utama ('PPU'). The appellant agreed with the requirement to provide four units of PE, but it was not agreeable to provide and surrender the PPU plot to TNB practically free of charge. As a result of this, respondent refused the KM application. There was clear admission by the respondent that the requested PPU was not required for the purposes of the appellant's project, but rather: (i) for power supply to others outside the project; and (ii) for future use unrelated to the appellant's project. However, at the hearing, RW2 (a witness of the respondent) testified that the requested PPU was necessary because TNB's capacity of power supply in that area had reached its maximum.

Held, allowing the appeal with costs of RM25,000:

(1) The respondent produced no evidence to support RW2's bare allegation. Even after having been specifically asked, RW2 failed to produce any data and calculation to show that maximum supply capacity had been reached in that area (see para 16).

(2) Even assuming RW2's unsubstantiated allegation that maximum supply capacity had been reached was correct, it did not mean that it became the appellant's responsibility to enable or assist TNB to increase TNB's supply capacity, and to do so at the appellant's expense. Further, the requested PPU, when erected, would cater for at least 15 (and possibly up to 30) PEs. This meant that the requested PPU would be used predominantly for purposes other than the four PEs that the appellant's project required (see para 18).

(3) In planning law it is wrong to impose a condition for an ulterior object, even if the planning authority considers that object to be in the public interest; *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 referred (see para 21).

(4) TNB is not a charitable corporation serving the public interest pro bono but is a profit making corporation and therefore must be treated just like any other company; *Dai-Ichi Electronics (M) Sdn Bhd v TNB* [1996] 4 MLJ 506 referred (see para).

(5) A decision of a planning authority that offends common sense, or that is manifestly oppressive or unfair, will inevitably fall foul of the *Wednesbury* reasonableness test. In *Associated Provincial Picture Houses Ltd v Wednesbury Corpn*, three broad categories of administrative decisions are held to be 'unreasonable' at law. The PPU condition here fells under

A category (c) of the *Wednesbury* reasonableness test, if not also the other categories. It failed the test, by a long mile (see paras 26–27).

(6) A catch-all provision is never meant to be construed as a *carte blanche*. It does not endow a subjective test. It must be construed in the context of the purposes of the entire statute, and it is subject also to all applicable common law legal principles. Hence, s 21(3)(g) of the Town and Country Planning Act 1976 is subject to the principles laid down by the Federal Court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, and the principles in all those cases that apply the Wednesbury reasonableness test. Section 21(3)(g) is not in itself a valid reason for the respondent to impose any condition it likes. Section 21(3)(g) is only an empowering provision that enables the respondent to impose a condition of a nature not specifically mentioned in the Act, if and when the respondent has a sound and valid reason to do so, a reason that must be justifiable at law and that will withstand judicial scrutiny. None such reason existed here (see para 30).

(7) Regulation 13(1) of the Licensee Supply Regulations 1990 does not grant TNB the right to demand free gifts from consumers of electricity. TNB is required by the Electricity Supply Act 1990 to pay full compensation for any land it forceably requires (see para 36).

(8) The PPU condition was clearly ultra vires and unreasonable, and ought not to be imposed. Hence, the board directed the respondent to forthwith grant planning permission ('KM') to the appellant, upon the terms and conditions that were not in dispute between them, and without the PPU condition (see para 45).

(9) Costs are not normally awarded against the respondent planning authority when an appeal succeeds, because the respondent's decisions are made in the course of the performance of its statutory duty. The lone fact that its decision is overturned by this board does not by itself warrant the award of costs against it in every case. But there are exceptions. Firstly when it is demonstrated that the impugned decision was not made in bona fide, and secondly when the impugned decision was made in a thoughtless and capricious manner, and has caused considerable hardship on an appellant. This case fell within the latter category. The respondent did not have to go along with TNB. But it did, thoughtlessly or otherwise. When challenged, the respondent persisted in defending the indefensible, right till the end. Hence, costs of RM25,000 was ordered to be paid by the respondent to the appellant (see paras 46–47).

[Bahasa Malaysia summary

Perayu membeli dua plot tanah ('tanah') daripada responden. Di bawah PJB, perayu secara kontrak diperlukan untuk membina perumahan mampu milik untuk penduduk Pulau Pinang. Responden juga secara kebetulan merupakan

pihak berkuasa perancang berhubung tanah tersebut. Perayu menyerahkan permohonannya untuk planning permission atau kebenaran merancang ('permohonan KM') bagi membangunkan tanah tersebut. Semasa memproses permohonan KM, responden mendapat pandangan dan maklumbalas daripada beberapa jabatan. Salah satu daripada jabatan tersebut, Tenaga Nasional Bhd ('TNB') meminta responden untuk mewajibkan perayu untuk menyediakan pembangunan yang dicadangkan seperti berikut: (i) empat *electrical substations* atau pencawang elektrik ('PE'); dan (ii) satu plot tanah berukuran 22,500 kaki persegi ('plot PPU') untuk diberikan dan dipindah milik kepada TNB untuk RM10 bagi kegunaan TNB untuk membina sebuah *main distribution substation* atau pencawang pembahagian utama ('PPU'). Perayu bersetuju dengan keperluan untuk menyediakan empat unit PE, tetapi tidak bersetuju untuk menyediakan dan menyerahkan plot PPU kepada TNB yang secara praktikalnya adalah percuma. Akibatnya, responden menolak permohonan KM. Terdapat pengakuan jelas responden bahawa PPU yang diminta tidak diperlukan bagi tujuan projek perayu, tetapi sebaliknya: (i) untuk bekalan kuasa kepada orang lain di luar daripada projek; dan (ii) untuk kegunaan masa hadapan yang tidak berkaitan dengan projek perayu. Walau bagaimanapun, semasa pendengaran, SR2 (seorang saksi responden) memberi keterangan bahawa PPU yang diminta adalah penting kerana kapasiti bekalan kuasa TNB di kawasan tersebut telah mencapai maksimum.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM25,000:

(1) Responden tidak mengemukakan keterangan menyokong dakwaan kosong RW2. Walaupun selepas diminta secara spesifik, SR2 gagal untuk mengemukakan apa-apa data dan pengiraan untuk menunjukkan bahawa kapasiti bekalan maksimum telah dicapai di kawasan tersebut (lihat perenggan 16).

(2) Walaupun dengan mengandaikan dakwaan tanpa sokongan RW2 bahawa kapasiti bekalan maksimum telah dicapai adalah benar, ia tidak bermakna bahawa menjadi tanggungjawab perayu untuk membolehkan atau membantu TNB untuk meningkatkan kapasiti bekalan TNB, dan berbuat demikian atas perbelanjaan perayu. Seterusnya, PPU yang diminta, apabila didirikan, akan membekalkan untuk sekurang-kurangnya 15 (dan mungkin sehingga 30) PE. Ini bermakna bahawa PPU yang diminta akan digunakan secara keseluruhannya untuk tujuan selain daripada empat PE yang diperlukan projek perayu (lihat perenggan 18).

(3) Dalam undang-undang perancangan, adalah salah untuk mengenakan satu syarat untuk tujuan tersembunyi, walaupun pihak berkuasa merancang menganggap bahawa tujuan tersebut untuk kepentingan awam; *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 dirujuk (lihat perenggan 21).

A

(4) TNB bukanlah satu pertubuhan berkebajikan yang membantu untuk kepentingan awam secara pro bono tetapi merupakan sebuah pertubuhan berkeuntungan dan oleh itu mesti dilayan seperti mana-mana syarikat lain; *Dai-Ichi Electronics (M) Sdn Bhd v TNB* [1996] 4 MLJ 506 dirujuk (lihat perenggan 21).

B

(5) Satu keputusan pihak berkuasa perancangan yang tidak masuk akal, atau jelas menindas atau tidak adil, tidak akan termasuk dalam ujian kemunasabahan *Wednesbury*. Di dalam kes *Associated Provincial Picture Houses Ltd v Wednesbury Corpn*, tiga kategori besar keputusan pentadbiran diputuskan sebagai 'tidak munasabah' di sisi undang-undang. Syarat PPU di sini terangkum di bawah kategori (c) ujian kemunasabahan *Wednesbury*, jika tidak, juga di dalam kategori lainnya. Syarat tersebut gagal dipenuhi di dalam ujian tersebut, seperti dijangka (lihat perenggan 26–27).

C

D

(6) Satu peruntukan merangkumi semua tidak bertujuan untuk ditafsirkan sebagai satu *carte blanche*. Ia tidak memberikan ujian subjektif. Ia seharusnya ditafsirkan di dalam konteks bagi tujuan keseluruhan statut, dan ia juga tertakluk kepada semua prinsip *common law* terpakai. Oleh itu, s 21(3)(g) Akta Perancangan Bandar dan Desa 1976 tertakluk kepada prinsip-prinsip yang dinyatakan oleh Mahkamah Persekutuan di dalam *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, dan prinsip-prinsip di dalam keseluruhan kes tersebut menggunakan ujian kemunasabahan *Wednesbury*. Seksyen 21(3)(g) dengan sendirinya bukan alasan sah bagi responden untuk mengenakan apa-apa syarat yang dikehendaki. Seksyen 21(3)(g) hanya satu peruntukan memberikan kuasa yang membolehkan responden untuk mengenakan satu syarat yang bersifat tidak disebut secara khusus di dalam Akta, sekiranya dan apabila responden mempunyai alasan wajar dan sah berbuat demikian, alasan yang boleh dijustifikasikan di sisi undang-undang dan mampu bertahan dengan penelitian kehakiman. Tiada alasan tersebut yang wujud di sini (lihat perenggan 30).

E

F

G

H

(7) Peraturan 13(1) Peraturan-Peraturan Bekalan Pemegang Lesen 1990 tidak memberikan hak kepada TNB untuk meminta hadiah percuma daripada pengguna-pengguna elektrik. Di bawah Akta Bekalan Elektrik 1990 TNB perlu membayar ganti rugi penuh untuk mana-mana tanah yang diperlukan secara desakan (lihat perenggan 36).

I

(8) Syarat PPU dengan jelas merupakan ultra vires dan tidak munasabah, dan seharusnya tidak dikenakan. Oleh itu, lembaga mengarahkan responden untuk memberikan kebenaran merancang ('KM') serta-merta kepada perayu, berdasarkan terma-terma dan syarat-syarat yang tidak dipertikaikan di antara mereka, dan tanpa syarat PPU (lihat perenggan 45).

(9) Kos tidak diawardkan secara kebiasaannya terhadap pihak berkuasa perancang responden apabila rayuan berjaya kerana keputusan responden dibuat semasa menjalankan kewajipan statutori. Fakta tunggal bahawa keputusannya ditolak oleh lembaga ini tidak dengan sendirinya membenarkan kos diawardkan terhadapnya di dalam setiap kes. Tetapi terdapat beberapa pengecualian. Pertamanya, apabila ditunjukkan bahawa keputusan yang dipersoalkan tidak dibuat secara bona fide, dan keduanya apabila keputusan yang dipersoalkan dibuat tanpa berfikir terlebih dahulu dan tergesa-gesa dan telah menyebabkan kesusahan yang besar ke atas perayu. Kes ini terangkum dalam kategori kedua. Responden tidak perlu mengikut TNB. Tetapi responden telah berbuat demikian, tanpa berfikir panjang atau sebaliknya. Apabila dicabar responden tegar mempertahankan perkara yang tidak boleh dipertahankan sehingga akhirnya. Oleh itu, kos RM25,000 diperintahkan untuk dibayar oleh responden kepada perayu (lihat perenggan 46–47).]

Notes

For a case on application for planning permission, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 200.

For cases on powers of statutory body, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1936–1942.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1947] 2 All ER 680, CA (folld)

Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Berhad [1996] 4 MLJ 506, HC (refd)

Fawcett Properties Ltd v Buckingham County Council [1960] 3 All ER 503, HL (refd)

Hall & Co Ltd v Shoreham-by-sea Urban District Council and another [1964] 1 All ER 1, CA (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Legislation referred to

Electricity Supply Act 1990 ss 11(1), 16, 24(1)
Federal Constitution art 13
Licensee Supply Regulations 1990 reg 13(1)
Town and Country Planning Act 1976 s 21(3)(g)
Town and Country Planning Act 1947 [UK]

Murgan (Dominic Pillay with him) for the appellant.
Mansur Hashim (Fuad with him) for the respondent.

A

Yeo Yang Poh Ch:

[1] As the relevant facts slowly unfolded during the hearing of this appeal, it became evident that this case was clear cut, and, I might add, rather bizarre.

B

RELEVANT FACTS

[2] The site of the proposed development is situated on two plots of 99-year leasehold land known or identified as Lot 1346 (now Lot 2055) and (part of) Lot 972, Bandar Perai, Daerah Seberang Perai Tengah ('the land'), which the appellant had purchased at a price of approximately RM10m, vide a sale and purchase agreement dated 5 August 2010 ('the SPA'). In fact, the appellant bought the land from the respondent.

C

D

[3] Under the SPA, the type and composition of development to be carried out on the land have been specified by the respondent (who happens to be also the planning authority in relation to the land). The appellant is contractually required to (primarily) build affordable housing, namely medium-cost and low-cost accommodation, for Penang residents. The maximum selling prices for these affordable residential units are also predetermined by the state government, and stipulated in the SPA (see cl 4.7). The mutual intention of the contracting parties, and the public interest element attached to the SPA (in addition to its usual commercial dimensions), are visible.

E

F

[4] In furtherance of the purposes under the SPA, the appellant submitted its application ('KM application') for a planning permission or kebenaran merancang ('KM'), to develop the land. Having executed the SPA with the respondent, it is understandable that the appellant would expect no obstacle to the granting of its KM application, subject of course to the normal conditions and requirements that a planning authority (ie the respondent) might reasonably impose in a development of this nature. Obviously the appellant should not expect special or preferential treatment; but it was reasonable for it to assume that the respondent would not have entered into the SPA if the envisaged development could not in principle be approved (subject to the usual and reasonable conditions).

G

H

[5] Little did the appellant suspect that disappointment was waiting.

I

[6] In processing the KM application, the respondent (in the usual course of things) obtained the views and feedback of numerous departments. One of the departments, Tenaga Nasional Bhd ('TNB'), asked the respondent to impose a

requirement on the appellant to provide in the proposed development the following:

(a) four electrical substations or *pencawang electrik* ('PE'); and

(b) a plot of land measuring 150 feet x 150 feet (ie 22,500sqft) ('the PPU Plot'), to be given and transferred to TNB virtually free of charge (or for RM10 if one needs to be precise), for TNB's use to construct a main distribution substation or *pencawang pembahagian utama* ('PPU').

[7] The appellant had no quarrel with the requirement to provide four units of PE; but it was not agreeable to provide and surrender the PPU plot to TNB practically free of charge. According to the appellant, the current land value of the PPU plot is in the region of RM1m, a figure which the respondent did not seem to dispute. The appellant does not see why it should be obliged to give away for free a plot of land of more than half-an-acre and worth around RM1m. 'Free of charge' and 'for free' are phrases of convenience that I will employ to describe what is asked of the appellant, as it will be sheer cynical pedantry to insist that it is not 'for free', just because ten Ringgit will be paid.

[8] As a result of the appellant's unwillingness to provide the PPU plot for free, the respondent refused the KM application. The sole ground of rejection is that the appellant does not provide the PPU plot as required by TNB('pihak pemaju tidak menyediakan Tapak PPU berukuran 150 kaki x 150 kaki seperti yang disyaratkan oleh pihak TNB') ('the PPU condition') — see p 7 of the *rekod rayuan* ('RR'). This is despite the appellant having agreed to provide four units of PE. Hence, the appellant filed this appeal.

[9] There was a neighbouring land owner who had objected to the KM application. This objector, Mr Lim Heng Sheng, was invited to attend the hearing of this appeal, and to present his objections to the board if he had so wished. He came on the first day of hearing. Midway, however, he informed the board that he did not wish to participate any further in the proceedings, and that he would leave it to the board to decide on this appeal without the benefit of hearing his views.

SUPPLYING ELECTRICITY TO INDIVIDUAL CONSUMERS IN A DEVELOPMENT

[10] Allow me to outline, in layman's language, an aspect of the supply of electricity. Before an individual consumer will be able to enjoy electricity (whether in a house, office or factory), power supply has to be gradually 'stepped down' from its source at a power generating plant (*loji penjana elektrik*), via a series of steps. First, it is stepped down at a transmission main

A intake station or *pencawang masuk utama* ('PMU'). From a PMU, it is then stepped down via a PPU, and then via a PE. From a PE, electricity can then be supplied to individual premises.

[11] A PMU has a load capacity of between 33KV and 132KV, a PPU B between 11KV and 33KV; and a PE between 415V and 11KV. One PMU is able to supply power to 3–4 PPUs. Each PPU is in turn able to supply power to between 15 and 30 PEs.

POWER SUPPLY REQUIREMENT OF THE APPELLANT'S PROJECT

C

[12] It is not disputed by the respondent that, for the purposes of the appellant's project, four units of PE will suffice in order to enable the supply of electricity to the individual premises within that development once they are built. The appellant has made it clear that it is willing to fulfill the condition D relating to the four PEs ('the PE condition'). Hence, this appeal will not examine the nature and extent of the PE condition, since those issues do not arise here. Those are matters for another occasion, if one should arise, when an applicant for planning permission challenges the PE condition itself.

E THE APPELLANT'S CHALLENGE TO THE PPU CONDITION

[13] The appellant strongly questions the validity and reasonableness of the PPU condition. It points out (inter alia) the following, and advances reasons F for its opposition to that condition.

[14] There is clear admission by the respondent that the requested PPU is not required for thepurposes of the appellant's project, but rather: (a) for power supply to others outside the project; and (b) for future use unrelated to the G appellant's project — see RR p 75 at item 35 (especially the words 'di luar kawasan pembangunan pada bila-bila masa di masa hadapan'). These are not the appellant's words. It is part of the respondent's own evidence. For ease of reference hereafter, I shall refer to this clear admission as 'the Respondent's Admission of Unrelatedness'.

H

[15] At the hearing, RW2 (a witness of the respondent) tried to circumvent the respondent's admission of unrelatedness, by saying that the requested PPU was necessary because TNB's capacity of power supply in that area had reached its maximum, suggesting that electricity supply could not be provided to the I appellant's proposed development without a new and additional PPU. Is this true? And, even if true, whose responsibility is it to increase such capacity, and at whose costs?

[16] The respondent was content to close its case by leaving what RW2 said

as what it is — a bare allegation; and an oral allegation that contradicts documentary evidence at that. There was also inconsistency between RW1 and RW2 — RW1 said the situation was nearing maximum capacity, while RW2 said it had already reached maximum capacity. The respondent had all the opportunity it wanted (for it was granted adjournments) to adduce further evidence if it had so wished. But the respondent produced no evidence to support RW2's bare allegation. Even after having been specifically asked, RW2 failed to produce any data and calculation to show that maximum supply capacity had been reached in that area. Surely, if this allegation were true, the relevant data and calculation to substantiate it would have been ready for production, because they must already have been available before TNB (and the respondent) decided to impose the PPU condition; for otherwise the imposition of the PPU condition would have been downright irresponsible and unreasonable even by the respondent's own purported basis. In short, it would have been a simple exercise for TNB to produce the data and calculation that they already had prepared (if any). That was not done.

[17] In the circumstances, it is not unreasonable to assume that, either such data and calculation did not exist, or that they do not substantiate the respondent's contention that maximum capacity had indeed been reached.

[18] More importantly, even if we were to give TNB (and the respondent) the maximum benefit of the doubt, and assume that its unsubstantiated allegation is correct, it does not mean that therefore it becomes the appellant's responsibility to enable or assist TNB to increase TNB's supply capacity, and (on top of it) to do so at the appellant's expense! It is repugnant to common sense for the respondent to maintain that someone else (such as the appellant) must bear part of the costs of TNB's increase in supply capacity to enable TNB to supply electricity to more customers, particularly when TNB charges for electricity supply and (as we shall see) makes a huge profit out of its commercial enterprise. It amounts to requiring X to subsidise part of the costs of Y's business, without X being entitled to share any part of Y's profits from that business. Yet the respondent, throughout the hearing, maintained that mind-boggling position. It argues that statutory provisions empower TNB to do precisely that. I shall examine these statutory provisions later, to see if the respondent is at all right (see paras 32–42 below).

[19] Additionally, from the respondent's own evidence, it is established that the requested PPU, when erected, will cater for at least 15 (and possibly up to 30) PEs. This means that, putting it at its best, the requested PPU will be used predominantly for purposes other than the four PEs that the appellant's project will need. It will cater for at least another 11 (and up to another 26) PEs, all of which will be unrelated to the appellant's project.

A B C D E F G H I

[20] Premised on the above, the appellant says that the PPU condition is a condition that is not related to its proposed development. The condition is imposed for an ulterior object. It is bad in law. For this contention, the appellant relies on the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135; where (at p 145B) the Federal Court held that a condition attached to a planning permission must fairly and reasonably relate to the development concerned. The Federal Court (at p 145G) adopted the House of Lord's reasoning in *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503, that a condition aimed at a different purpose is bad in law:

> The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

I shall, for convenience of reference, call this 'the Ulterior Object Argument'.

[21] The highest courts, both in Malaysia and in England, have opined that in planning law it is wrong to impose a condition for an ulterior object, even if the planning authority considers that object to be in the public interest. The appellant is quick to point out that our case is far worse. TNB is not a charitable corporation serving the public interest pro bono. TNB charges for the supply of electricity. It is a profit making company. Giving the PPU plot to TNB free of charge will benefit TNB, and not the public. The respondent's witnesses, RW1 and RW2 themselves (both officers from TNB), probably realised the inequity of the situation. When the appellant's counsel asked RW1 whether he would agree that TNB is a profit making company and not a charitable organisation, RW1 very strangely avoided answering the question. He simply said: 'I am not able to answer this question'. RW2, when confronted with a similar line of questioning, was less evasive. He admitted that TNB is a profit making corporation.

[22] In fact, TNB's profits are a matter in the public domain. A recent visit to TNB's website (www.tnb.com.my/investors-media/annualreports.html) reveals the following information about TNB's annual profits (all expressed in terms of billions of Ringgit) for the last 12 years:

Year	TNB's Profits (RM)
2011-	0.4186 billion
2010-	2.7085 billion
2009-	1.0707 billion
2008-	2.6636 billion
2007-	3.5145 billion
2006-	1.5359 billion
2005-	1.1636 billion
2004-	1.7598 billion

2003-	1.4642 billion
2002-	1.0962 billion
2001-	2.4681 billion
2000-	1.5734 billion

[23] In the past 12 years, TNB has made an average profit of RM1.7864 billion per year. One can safely say that very few companies in Malaysia can boast of such handsome profits. Yet TNB is seeking (through the respondent) to effectively gain more than half-an-acre of land for free, at the expense of the appellant (a very small company compared to TNB). Something is very wrong and distorted about this picture; short of some perplexingly strange statutory provisions enabling the same that the respondent claims exist (an issue which I will soon investigate). This picture paints the opposite of 'Robin Hood' — taking from those with relatively little, in order to give to the ones already having million times more! Its inequity is obvious, gross and flagrant.

[24] What comes to mind is the advice of the Federal Court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (at p 145I) — that a planning authority 'must produce a result which does not offend against common sense'. In our instant case, common sense seemed to have taken flight, when Robin Hood's arrow was shot in the reverse. The obvious fact that TNB, a profit-oriented company, has no special position and must be treated just like any other company, is confirmed in *Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Berhad* [1996] 4 MLJ 506 at p 512F.

[25] The process of the respondent consulting various specialised departments (including TNB) when processing an application for planning permission is a necessary and desirable practice, even though such consultative process is not expressly spelt out in the Town and Country Planning Act 1976 ('the Act'). But no department should take advantage of this process, and hold to ransom a planning applicant, by laying out conditions that are unfair or unrelated to the project concerned. The respondent, as the planning authority, must not allow such a situation to occur. Sadly, in the present case, the condition that TNB seeks to have is so outrageously unfair, and is unrelated to the appellant's project. It is appalling that the respondent had failed to appreciate this, and had gone ahead to do TNB's bidding. It gives the impression of rubber stamping on the respondent's part, which (if it was the case) is a dereliction of duty. It also lends reason to an observer to wonder whether this might be a reflection of a dangerous and unhealthy culture on the part of some Malaysian public authorities (or some officers in them), which festers the misguided thinking that, 'if you want something from us, even though it is our duty to grant it when it fulfills all reasonable requirements, we

A are entitled to also want something from you'! This is a disheartening phenomenon that I have observed too many times when dealing with planning appeals before this board. It must cease.

[26] A decision of a planning authority that offends common sense, or that B is manifestly oppressive or unfair, will inevitably fall foul of the 'Wednesbury reasonableness test'. In *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1947] 2 All ER 680, three broad categories of administrative decisions are held to be 'unreasonable' at law:

C (a) a decision made without taking into account all matters that are required to be taken into consideration;

(b) a decision made by taking into consideration matters that ought not to have been taken into account; and

D (c) a decision that is so clearly absurd, wrong, unreasonable, unjustified or arbitrary, that no reasonable decision-maker could have so made.

[27] The PPU condition in our case certainly falls under category (c) of the *Wednesbury* reasonableness test, if not also the other categories. It fails the test, E by a long mile.

[28] Ignore not the respondent's primary submission regarding the imposition of the PPU condition. It is an unbelievably simplistic one. The respondent simply says that it is entitled to impose the PPU condition by virtue F of s 21(3)(g) of the Act, which states as follows:

> 21(3) … the local planning authority may give written directions to the applicant in respect of any of the following matters …:
>
> G (g) any other matter that the local planning authority considers necessary for the purposes of planning.

[29] I am surprised that the respondent, who has argued countless cases H before this board, and who is familiar with the legal principles that this board has consistently adopted and applied, would put forth such a weak and overly simplistic argument, seeking to rely on the wording of a 'catch-all provision' as the one found in s 21(3)(g).

I **[30]** A catch-all provision is of necessity worded in broad and general terms. It is frequently inserted at the end of a list of specific things stipulated in a statutory provision, when that list is not intended to be exhaustive. It is, in given circumstances, a desirable and useful creature. But a catch-all provision is never meant to be construed as a *carte blanche*. It does not endow a subjective

test. It must be construed in the context of the purposes of the entire statute, and it is subject also to all applicable common law legal principles. Section 21(3)(g), therefore, is subject (inter alia) to the principles laid down by the Federal Court in *Sri Lempah*, and the principles in all those cases that apply the *Wednesbury* reasonableness test. Hence, reliance on s 21(3)(g) begs (rather than answers) the question; and carries no more weight than if the respondent were to simply assert, sans justification, that it has the discretion to impose the PPU condition because it is the planning authority. Section 21(3)(g) is not in itself a valid reason for the respondent to impose any condition it likes. Section 21(3)(g) is only an empowering provision that enables the respondent to impose a condition of a nature not specifically mentioned in the Act, if and when the respondent has a sound and valid reason to do so, a reason that must be justifiable at law and that will withstand judicial scrutiny. None such reason exists here.

[31] I therefore hold that the appellant succeeds in its ulterior object argument. The PPU condition, having been imposed for purposes unrelated to the appellant's project, is invalid. It scores zero in the *Wednesbury* reasonableness test. It must be set aside, unless the respondent is able to show that in this peculiar instance its imposition is empowered by some statutory stipulations. This is the question that needs to be examined, and answered, next.

IS TNB EMPOWERED BY STATUTE TO DEMAND THE IMPOSITION OF THE PPU CONDITION?

[32] Section 24(1) of the Electricity Supply Act 1990 stipulates as follows:

> 24(1) Subject to the following provisions of this Part and any regulation made thereunder, the licensee shall upon being required to do so by the owner or occupier of any premises —
>
> (a) give a supply of electricity to those premises; and
>
> (b) so far as may be necessary for that purpose, provide supply lines or any electrical plant or equipment.

[33] Under the Electricity Supply Act 1990, the 'licensee' refers to TNB. One thing is clear from s 24(1). The duty to supply electricity to all consumers is squarely on TNB, something which both RW1 and RW2 admitted.TNB is the ultimate monopoly power-supplier in the country, who charges for such supply and, as we have seen, makes profits from it. It follows that it is TNB's duty to do all that is necessary to ensure power supply to all consumers, at TNB's costs and expense. This would include ensuring all increases in supply capacity that TNB may need to have, in order to fulfill its duty of supplying electricity. It will require extremely clear and unambiguous words in a statute to

A shift the burden of costs onto any other person while TNB enjoys its monopoly and derives all the commercial benefits from it.

[34] The respondent says that, unfair as it may seem, statutory empowerment exists for TNB to shift the burden of costs onto a consumer. It
B points to reg 13(1) of the Licensee Supply Regulations 1990, which states as follows:

> 13(1) *In giving supply to a consumer*, the licensee [ie TNB] shall have the right where it deems necessary, to require the consumer to provide for the licensee, a space, a
C compartment, a building or any other type of place or siting, either in the form of leasehold or freehold, for the placement of an installation. (Emphasis added.)

[35] The respondent contends that reg 13(1) gives TNB the right to ask the
D appellant to provide free of charge the PPU plot. If the respondent is right about reg 13(1), then TNB need not stop at asking for a free plot of land only. It can ask the appellant to build, free of charge to TNB, a building to house the PPU installation, since reg 13(1) includes the word 'building' as well. How wonderful that will be, from TNB's point of view; but how unfair and
E oppressive, from the consumer's.

The respondent's argument, if correct, can be taken even further. If there is adequate PPU but inadequate PMU, can TNB rely on reg 13(1) to require a consumer to provide land free of charge for the construction of a PMU as well,
F failing which TNB can refuse to supply electricity, by saying that they have reached maximum supply capacity unless another PMU is built? The answer to this question must be 'yes', if one is to go by the respondent's logic. However, when this scenario was put to RW2 at the hearing, he answered in the negative, perhaps realising how ridiculous a positive answer would have sounded.

G

[36] Fortunately for the sustenance of common sense and fair play, the respondent is not correct. Regulation 13(1) does not say what the respondent contends, or hopes, that it says. Regulation 13(1) does not grant TNB the right to demand free gifts from consumers of electricity, because of the following
H reasons:

(a) nothing in reg 13(1) says that the space, place, building or site (etc) required by TNB must be provided by the consumer to TNB free of charge;

I

(b) reg 13(1) is a subsidiary legislation. It must be read subject to the provisions of the parent Act, and in the context of the parent statute. When provisions of the Electricity Supply Act 1990 are examined, it is clear that no free meal is intended for TNB (see paras 37–38 below). The Electricity Supply Act requires TNB to pay fair and adequate

compensation for any land required by it for the purposes of supplying power. This is consistent with the protection given by art 13 of the Federal Constitution; and

(c) reg 13(1) begins with the words 'in giving supply to a consumer'; meaning that it can apply only in relation to the supply of electricity to that consumer in question, and not for the purposes of power supply to other consumers, as what TNB is seeking to do in our case.

[37] Section 11(1) of the Electricity Supply Act 1990 provides:

> …, whenever it is necessary so to do for the purpose of installing any system of distribution of electricity under this Act, a licensee [TNB] may lay, place or carry on, under or over any land such posts and other equipment as may be necessary …, *paying full compensation* in accordance with section 16 …. (Emphasis added.)

[38] A PPU is without doubt an equipment used in a 'system of distribution of electricity'. The statutory intention is clear — TNB needs to pay full compensation for any land it may require for this purpose. Section 16 of that Act contains provisions for the determination of such compensation through an enquiry, and a process of appeal (with the implied avenue of judicial review). It is not possible for the respondent to argue that reg 13(1), a subsidiary legislation, can override the provisions of its parent Act. TNB is required by that Act to pay full compensation for any land it forceably requires.

[39] None of the above provisions has the effect of 'land-for-free' that the respondent (and TNB) ascribes to them. But even if they somehow do, I agree with the appellant's counsel that they would certainly be unconstitutional and invalid; for art 13 of the Federal Constitution enshrines the following protection for all and sundry against any forceable deprivation or use of property:

> 13(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. (Emphasis added.)

[40] It will be futile for the respondent to argue, on semantics, that TNB is not 'acquiring' a plot of land for a PPU. The constitutional protection under art 13 of the Federal Constitution is not just a protection against compulsory acquisition without compensation; it is also a protection against 'compulsory *use* of property without adequate compensation'.

[41] The idea that one can be forced to give away one's property to another without adequate compensation is universally repugnant. In *Hall & Co Ltd v*

A *Shoreham-by-sea Urban District Council and another* [1964] 1 All ER 1 at 10B, the English Court of Appeal had occasion to make this comment — 'I can certainly find no clear and unambiguous words in the Town and Country Planning Act 1947 authorising the defendants in effect to take away the plaintiffs' rights of property without compensation, by the imposition of B conditions such as those sought to be imposed'. What the respondent in our case has done is not dissimilar. This board must intervene.

[42] The respondent's attempted reliance on reg 13(1) is hopelessly without merit. There is no basis in law for TNB to demand a free ride. It is neither C logical nor fair. TNB's attempt to do that to the appellant is appalling. But TNB could not have done it alone. It needed the respondent to agree to impose the PPU condition. The respondent's active condoning, in that sense, is regrettable and unjustifiable. The intended outcome is one that defies common sense, and goes against the sense of decency and fair play. All members of the D panel cannot help but feel a sense of deep disappointment that the respondent had throughout refused to relinquish a position that holds as much water as could a broken sieve under a running tap.

E **[43]** Towards the end of the hearing of this appeal, the respondent's counsel probably realised how untenable TNB's position was proving to be. He then asked RW2 (TNB's *Ketua Jurutera Negeri Pulau Pinang*), in re-examination, whether TNB really needed a plot as big as 22,500sqft (150 ft x 150 ft), or whether a smaller size of land would suffice for the proposed PPU. RW2 replied F that the land size could be drastically reduced to 100 ft x 100 ft; which is 10,000sqft, or less than half of what TNB had originally insisted on taking (and as a result of which the appellant's KM application was refused).

[44] That sudden turn of events was probably due to an experienced counsel G trying his best to salvage what he perceived to be a case that was developing unfavourably for his client. Such an approach is unobjectionable, as that often forms a part of an advocate's job, thinking quickly on his feet. Unfortunately, and unintended by the respondent's counsel I am sure, RW2's answer shed a negative light on TNB. If the required land size can, willy-nilly, be reduced by H more than half, it must mean that what was originally asked for by TNB was not necessary in the first place! That makes the imposition of the PPU condition seem even more arbitrary and improper; and it cannot be upheld.

THE CONCLUSION

I

[45] The only reason for refusal of the appellant's KM application is the appellant's unwillingness to accept and fulfill the PPU condition. I hold that the PPU condition is clearly ultra vires and unreasonable, and ought not to be imposed. Hence, this board directs the respondent to forthwith grant planning

permission (KM) to the appellant, upon the terms and conditions that are not in dispute between them, and without the PPU condition. Both parties shall have liberty to apply to this board, in the event of any differences or dispute regarding the other conditions of the planning permission.

[46] I come to the issue of costs. Costs are not normally awarded against the respondent planning authority when an appeal succeeds, because the respondent's decisions are made in the course of the performance of its statutory duty. The lone fact that its decision is overturned by this board does not by itself warrant the award of costs against it in every case. But there are exceptions. Two come immediately to mind, firstly when it is demonstrated that the impugned decision was not made in bona fide, and secondlywhen the impugned decision was made in a thoughtless and capricious manner, and has caused considerable hardship on an appellant. This case falls within the latter category.

[47] TNB ought to be thankful that it has the monopoly in supplying power in Malaysia, making huge profits year after year. Its profits come from all Malaysians from all walks of life, who are its customers. Instead of being a responsible corporate citizen and making fair decisions affecting its customers, TNB behaved in a high handed manner in taking advantage of the appellant's situation as an applicant for planning permission, and demanding the imposition of a condition on the appellant that is outrageously unfair and oppressive.

The respondent did not have to go along with TNB. But it did, thoughtlessly or otherwise. When challenged, the respondent persisted in defending the indefensible, right till the end. The appellant is put to all the expense of having to employ counsel, and the trouble of having to file and prosecute this appeal, not to mention the considerable frustrations it is made to undergo, and the delay caused to its intended project. For these reasons, the appellant ought to be compensated at least in terms of costs. I therefore order that the sum of RM25,000 be forthwith paid by the respondent to the appellant as costs of this appeal.

[48] This is a unanimous decision of the board.

Appeal allowed with costs of RM25,000.

Reported by Kanesh Sundrum