Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-47–11 OF 2013 (B) AND REFERENCE NO 06–3–05 OF 2013 (B)
ZULKEFLI CJ (MALAYA), HASAN LAH, ZAINUN ALI, ABU SAMAH NORDIN AND ZAHARAH IBRAHIM FCJJ
20 APRIL 2017

Constitutional Law — Courts — Judicial power — Whether judicial power of courts resided in judiciary and no other — Article 121(1) of the Federal Constitution ('the Constitution') — Whether only judges appointed under art 122B of the Constitution could exercise decision-making powers in superior courts — Whether exercise of judicial power by non-judges or non-judicial officers in superior courts was ultra vires art 121 of the Constitution

Constitutional Law — Legislation — Validity of impugned legislation — Section 40D of the Land Acquisition Act 1960 ('the LAA') — Whether s 40D ultra vires art 121(1) of the Constitution for allowing lay assessors sitting with the High Court judge to conclusively determine amount of compensation to be awarded in land reference — Whether judicial power to decide any dispute in land reference resided with judge alone — Whether s 40D(3) and proviso to s 49(1) of the LAA not unconstitutional for declaring decision made on award of compensation in land reference non-appealable — Whether Legislature had power to enact laws limiting appeals by declaring finality of judgment/order — Whether proviso to s 49(1) of the LAA only barred appeals against issues of fact affecting quantum of compensation but not appeals on questions of law — Whether non-compliance with mandatory provision of s 40C of the LAA rendered decision of land reference court invalid

Land Law — Acquisition of land — Compensation — Land at time of acquisition being developed into industrial area — Whether landowner had to be compensated for loss of business resulting from acquisition — Whether development/profit value of land at time of acquisition formed part of market value of land

The appellant owned a piece of land on part of which it commenced construction works for an industrial project ('the project') in January 1997. In April the following year, the land administrator ('the LA') notified the appellant that part of the land on which the construction works were ongoing would be compulsorily acquired for a highway project. Following an enquiry to

determine the compensation payable, the LA awarded the appellant RM20,862,281.75 comprising RM17,627,400 for the value of the land and RM3,234,881.75 for the loss suffered from the termination of the project including monies spent on piling and building works, mobilisation and setting up of the construction site and advertisement and marketing fees. The LA did not consider the appellant's 'other claims' for loss of business profits and other development costs it had incurred. The appellant had entered into several sale and purchase agreements with third party buyers for the sale of factory units being built, collected deposits towards their purchase prices and incurred professional fees to third parties, compensation to contractors, management fees and other miscellaneous expenses. The LA referred the appellant's objection to his award to the High Court for its determination under ss 36(4) and 38 of the Land Acquisition Act 1960 ('the LAA'). Pursuant to s 40D of the LAA, the High Court that heard the land reference comprised a High Court judge sitting with two assessors — a government valuer and a private valuer. After hearing the evidence and submissions, the court affirmed the LA's award, awarded an additional RM1,160,020 for severance and injurious affection caused by the diminution in value of the unacquired portion of the land affected by the acquisition and dismissed all the 'other claims' of the appellant which amounted to about RM18.2m. Contrary to s 40C of the LAA, no opinion in writing was given by either of the assessors in respect of the award. The judge also did not give any reason for the dismissal of the appellant's 'other claims'. The Court of Appeal ('the COA') dismissed the appellant's appeal against the decision of the land reference court holding that the court had considered, but rejected, the appellant's 'other claims' and that the appellant's appeal was, in any event, barred by s 40D(3) and the proviso to s 49(1) of the LAA. Section 40D(3) was a finality clause that barred any appeal against a decision made under s 40D(1) and (2) while the proviso to s 49(1) stated that a decision against an award of compensation was non-appealable. The Federal Court granted the appellant leave to appeal against the COA's decision on the following questions of law: (a) whether s 40D(3) and the proviso to s 49(1) of the LAA extinguished a right of appeal to the COA against a land reference decision concerning compensation on a question of law; (b) whether in view of art 121 of the Federal Constitution ('the Constitution'), which contemplated judicial power being exercised by judges alone, s 40D was constitutionally invalid in allowing lay assessors, instead of the judge, to conclusively determine the amount of compensation payable; (c) whether s 40D(3) and the proviso to s 49(1) of the LAA could bar an appeal where s 40C of the LAA had not been complied with and where the decision-making process prescribed in s 40D was constitutionally invalid; (d) whether the LA's failure to consider the development or profit value of the acquired land, given that it was being commercially developed for profit at the time of the acquisition, had breached the safeguard of 'adequate compensation' under art 13(2) of the Constitution; and (e) whether ss 40A, 40B, 40C, 40D and the amendment to the proviso to s 49(1) of the LAA — all of which came into effect on 1 March 1998 — applied

to land that had been compulsorily acquired before that date. Jointly with the instant appeal, the Federal Court also heard two constitutional questions referred to it by the COA after the latter had stayed an appeal by the applicants herein disputing the LA's award of compensation on a land acquisition. The two constitutional questions similarly challenged the constitutionality of s 40D and the proviso to s 49(1) of the LAA in view of arts 121 and 13 of the Constitution. It was agreed that the decision in the appeal would bind the parties in the reference. The appellant's complaint regarding s 40D was that pursuant to art 121(1) of the Constitution judicial power to decide a dispute in the superior courts resided with the courts and was exercisable only by judges appointed under s 122B of the Constitution, but s 40D(1) allowed two lay assessors, and not the judge with whom they sat, to conclusively determine the amount of compensation in a land reference matter. Section 40D(2) provided that where the assessors disagreed on the amount of compensation, the judge could only concur with either one of them and the decision of the assessor with whom the judge had concurred would prevail. Section 40D(3) declared any decision made under s 40D(1) and (2) to be final and non-appealable. This was fortified by the proviso to s 49(1) of the LAA which declared that the decision of the land reference court on an award of compensation was non-appealable. The appellant contended that based on the principle of 'equivalence' and the safeguard of 'adequate compensation' under art 13(2) of the Constitution, it should be compensated for its loss of business profits resulting from the acquisition; that the 'market value' of the land should not be limited to comparable prices at which other lands in the vicinity had been sold but should also include the development/profit value of the land to the appellant at the time of the acquisition.

Held, allowing the appeal, declaring s 40D of the LAA to be unconstitutional with prospective effect and remitting the case back to the High Court for re-determination of issues subject to the following orders: that, by s 40A of the LAA, the objection against the LA's award be heard before a single judge assisted by two assessors; that pursuant to s 40C of the LAA, the assessors, after duly considering all heads of compensation claimed by the appellant, give their opinions in writing as to the appropriate amount of compensation to be awarded; the opinions of the assessors be recorded by the judge who should consider the assessors' opinions before determining the amount of compensation to be awarded based on the principle of equivalence; the provisions of s 36(4) of the LAA to be given full effect in that the judge was not to be bound by the opinion of either assessor; if there was disagreement between the assessors, the judge could elect to consider which of the two opinions in his view was appropriate in the circumstances of the case; if the judge disagreed with the opinions of both the assessors, he was at liberty to decide on a reasonable amount of compensation and give his reasons for so finding. The reference was remitted back to the COA for it to decide on the applicants' appeal in accordance with the instant decision of the Federal Court:

(1) Section 40D of the LAA was ultra vires the Constitution and had to be struck down. This ruling would not affect proceedings involving compensation in land acquisition matters which had taken place and been determined pursuant to s 40D prior to the date of this judgment but would bind pending cases at first instance or at the appellate stage. By virtue of art 121(1) of the Federal Constitution, the power to award compensation in land reference proceedings was a judicial power that was vested in the High Court judge sitting in the land reference court. This argument was fortified by the provisions of ss 36(4) and 2 of the LAA. It imposed on the land administrator ('the LA') the right to refer to the High Court judge who was seized with judicial power to adjudicate. The act of determining the amount of compensation payable arising from land acquisition involved judicial assessments, eg whether a particular head of claim was to be allowed, evidential issues, whether a response to a valuer's report was to be permitted etc. In breach of art 121 of the Constitution, s 40D had effectively usurped the power of the court in allowing persons other than the judge to decide on the reference before it (see paras 52, 95, 98, 115 & 133–134).

(2) The judicial power of the court resided in the Judiciary and no other as was explicit in art 121(1) of the Constitution. In the superior courts, only judges appointed under art 122B of the Federal Constitution, and no other, could exercise decision-making powers. The discharge of judicial power by non-qualified persons (and not by judges or judicial officers) or non-judicial personages rendered the said exercise ultra vires art 121 of the Constitution (see paras 54, 86 & 105).

(3) The grounds of the judge in the land reference in this appeal was bereft of judicial reasoning. The judge had merely rubber-stamped the decision of the assessors, which was not only a breach of s 47 of the LAA, but more importantly, it violated art 121 of the Constitution. Sections 40D(1) and (2) of the LAA did not empower the High Court judge to disagree with the assessors or give them directions or instructions. Even if the judge recorded his dissatisfaction against the decision of the assessors, it was an exercise in futility as the assessors' decision was final and the aggrieved landowner was left without any recourse. The sting of unfairness of sub-s 40D(1) and (2) bit further in s 40D(3) and the proviso to s 49(1) under which landowners were prevented from appealing the decision of the assessors (see paras 108–110).

(4) Sections 40D(1) and (2) of the LAA ignored the role of judges as defenders of the Constitution and rendered the constitutional guarantee of 'adequate compensation' illusory since that guarantee was now in the hands of two lay assessors. A new s 40D had to be put in place, this time redefining the role of the assessors but providing that it was for the judge alone to deliberate on the issue of quantum after taking into account all

the issues including the advice given by the assessors. The opinion of the assessors should not be binding on the judge. If the assessors disagreed on the amount of compensation, the judge could elect to consider which of the two opinions was appropriate in the circumstances of the case. If the judge disagreed with the opinions of both the assessors, he should be at liberty to decide the matter giving his reasons for so doing (see paras 111, 116, 120 & 122–123).

(5) The unconstitutionality of s 40D of the LAA was only because of the decision-making process, ie the determination of the amount of compensation by the assessors. The provision limiting appeal in s 40D(3) was a separate and distinct issue . Section 40D(3) was a finality clause which declared any decision made under s 40D to be final. It did not contribute to the invalidity of s 40D. To hold otherwise would be contrary to s 68(1)(d) of the Courts of Judicature Act 1964 ('the CJA'). The law recognised the Legislature's power to enact laws limiting appeals by declaring the finality of a High Court order. On the other hand, the ouster of the right of appeal in respect of an award of compensation under the proviso to s 49(1) of the LAA had to be narrowly and strictly construed to give meaning to the constitutional protection afforded to a person's right to his property. The proviso to s 49(1) was not a complete bar to all appeals to the Court of Appeal from the High Court on all questions of compensation. The bar to appeal was limited to issues of fact on ground of quantum of compensation. An aggrieved party had the right to appeal against the decision of the High Court on questions of law (see paras 136–137, 139, 148 & 155).

(6) The proviso to s 49(1) of the LAA was not ultra vires art 121(1B) of the Constitution. The latter was a general provision empowering the Court of Appeal to hear appeals from the High Court. The jurisdiction of the Court of Appeal to hear appeals from the High Court should be exercised by reference to the CJA. The bar to appeal against the amount of compensation awarded by the High Court as contained in the proviso to s 49(1) operated within the framework of s 68(1)(d) of the CJA (see para 165).

(7) Section 40C of the LAA was mandatory and formed an important component of the decision-making process in land reference proceedings. It set out the requirements to be observed by the assessors and the judge before a decision was arrived at. Non-observance of s 40C amounted to a misdirection which rendered the decision invalid. The appellant's constitutional right to a fair and reasonable compensation arising from compulsory acquisition had been violated because the statutory safeguards to determine the compensation awarded as stated in s 40C were not complied with. The bar to appeal in s 49(1) would not

operate when there was non-compliance with the statutory provisions of the LAA (see paras 178, 182–183 & 189).

(8) The principle of equivalence required that the appellant was compensated for its true loss. This had to include compensation for loss of its business. Such claim fell under the heading of 'market value' of the land as stated in paras 1 and 2(a) of the First Schedule. The value of the land in its actual condition together with its profit value should be considered in determining the market value of the acquired land. At the time of acquisition, the appellant had embarked on commercially developing the land into an industrial area. Thus, its loss of business should be incorporated in the development value or profit value of the land forming part of the market value of the acquired land. In determining market value of the land as stated in paras 2(a) of the First Schedule, the LA and the court must give consideration to the profit value of the land at the time of acquisition (see paras 209–210 & 212).

(9) The Land Acquisition (Amendment) Act 1997, which brought ss 40A, 40B, 40C, 40D and the amendment to the proviso in s 49(1) of the LAA into effect from 1 March 1998 applied prospectively to land acquisition cases that were referred to the court after that date. The date of acquisition was irrelevant. In the present case, although the declaration of the decision to acquire the appellant's land was made via Form D and published in the *gazette* before 1 March 1998, the appellant's case was referred to court well after that date; hence the provisions of the said Amendment Act applied to the appellant (see paras 217 & 220–222).

[Bahasa Malaysia summary

Perayu memiliki sebidang tanah yang digunakan bagi tujuan kerja-kerja pembinaan untuk projek perindustrian ('projek tersebut') pada bulan Januari 1997. Pada bulan April tahun berikutnya, pentadbir tanah ('PT') memaklumkan kepada perayu bahawa bahagian tanah perayu yang digunakan bagi kerja-kerja pembinaan akan diperoleh secara wajib untuk projek lebuhraya. Berikutan siasatan yang dijalankan bagi menentukan pampasan yang perlu dibayar, PT telah mengawardkan kepada perayu RM20,862,281.75 yang terdiri daripada RM17,627,400 bagi nilai tanah dan RM3,234,881.75 bagi kerugian yang ditanggung akibat daripada pembatalan projek termasuk perbelanjaan kerja-kerja pembinaan cerucuk dan bangunan, penggerudian, penyediaan tapak pembinaan dan bayaran pengiklanan dan pemasaran. PT tidak mengambil kira 'tuntutan-tuntutan lain' oleh perayu iaitu kehilangan keuntungan perniagaan dan lain-lain kos pembinaan yang ditanggung oleh perayu. Perayu telah memasuki perjanjian jual beli dengan beberapa pembeli bagi unit-unit kilang yang sedang dibina, perayu juga telah menerima bayaran deposit bagi pembelian tersebut dan menanggung: fi profesional dengan pihak-pihak ketiga; pampasan kepada kontraktor-kontraktor, fi pengurusan dan lain-lain perbelanjaan pelbagai. PT telah merujuk bantahan perayu

terhadap award yang diberikan olehnya kepada Mahkamah Tinggi selaras dengan ss 36(4) dan 38 Akta Pengambilan Semula Tanah 1960 ('APST'). Berdasarkan s 40D APST, Mahkamah Tinggi yang mendengar kes rujukan tanah terdiri daripada hakim Mahkamah Tinggi bersidang bersama dua orang penilai-penilai kerajaan dan penilai persendirian. Setelah mendengar bukti dan hujahan-hujahan, mahkamah telah mengesahkan award yang diberikan oleh PT, mengawardkan tambahan sebanyak RM1,160,020 bagi pemutusan dan kesan mudarat yang disebabkan oleh pengurangan nilai bagi tanah yang tidak diperoleh secara wajib dan menolak semua 'tuntutan-tuntutan lain' perayu yang berjumlah RM18.2 juta. Bertentangan dengan peruntukan s 40C APST, tiada pendapat secara bertulis diberikan oleh kedua-dua penilai berkaitan dengan award tersebut. Hakim juga tidak memberikan apa-apa sebab penolakan 'tuntutan-tuntutan lain' perayu. Mahkamah Rayuan menolak rayuan perayu terhadap keputusan mahkamah rujukan tanah dan memutuskan bahawa mahkamah tersebut telah mengambil kira, tetapi menolak, 'tuntutan-tuntutan lain' perayu dan bahawa rayuan perayu adalah, dalam apa keadaan sekali pun, dihalang oleh s 40D(3) dan proviso kepada s 49(1) APST. Seksyen 40D(3) adalah klausa akhir yang menghalang apa-apa rayuan terhadap keputusan yang dibuat di bawah s 40D(1) dan (2) sementara proviso kepada s 49(1) menyatakan bahawa keputusan terhadap award pampasan tidak boleh dirayu. Mahkamah Persekutuan memberikan kebenaran kepada perayu untuk merayu terhadap keputusan Mahkamah Rayuan di atas persoalan-persoalan undang-undang berikut: (a) sama ada s 40D(3) dan proviso s 49(1) APST menghapuskan hak merayu kepada Mahkamah Rayuan terhadap keputusan rujukan tanah berkaitan pampasan di atas persoalan undang-undang; (b) berdasarkan perkara 121 Perlembagaan Persekutuan ('Perlembagaan') yang memperuntukkan agar kuasa kehakiman hanya dilaksanakan oleh hakim sahaja, sama ada s 40D adalah tidak sah berdasarkan Perlembagaan dalam membenarkan penilai-penilai biasa dan bukan hakim untuk menentukan secara muktamad nilai pampasan yang perlu dibayar; (c) sama ada s 40D(3) dan proviso s 49(1) APST boleh melarang rayuan dimana s 40C APST tidak dipatuhi dan proses membuat keputusan yang dinyatakan di dalam s 40D adalah tidak sah berdasarkan Perlembagaan; (d) sama ada kegagalan PT untuk mengambil kira nilai pembangunan atau keuntungan bagi tanah yang diperoleh secara wajib, memandangkan tanah tersebut telah dibangunkan secara komersial bagi mendapatkan keuntungan semasa pengambilan tersebut, telah melanggar keperluan 'pampasan yang memadai' di bawah perkara 13(2) Perlembagaan; dan (e) sama ada ss 40A, 40B, 40C, 40D dan pindaan terhadap proviso s 49(1) APST — kesemuanya berkuat kuasa pada 1 Mac 1998 — terpakai terhadap tanah yang telah diperoleh secara wajib sebelum tarikh tersebut. Bersama-sama dengan rayuan semasa, Mahkamah Persekutuan juga mendengar dua persoalan perlembagaan yang dirujuk kepadanya oleh Mahkamah Rayuan selepas Mahkamah Rayuan menggantung rayuan pemohon-pemohon yang mempersoalkan pampasan terhadap pengambilan yang diberikan oleh PT. Kedua-dua persoalan

perlembagaan tersebut juga mencabar keperlembagaan s 40D dan proviso s 49(1) APST berdasarkan perkara 121 dan 13 Perlembagaan. Pihak-pihak bersetuju bahawa keputusan di dalam rayuan akan mengikat pihak-pihak di dalam tindakan rujukan. Aduan perayu berkenaan s 40D adalah bahawa, berdasarkan perkara 121(1) Perlembagaan, kuasa kehakiman untuk memutuskan permasalahan di dalam mahkamah atasan terletak pada mahkamah dan hanya boleh dilaksanakan oleh hakim yang dilantik di bawah perkara 122B Perlembagaan, tetapi s 40D(1) membenarkan dua orang penilai, dan bukan hakim yang bersidang bersama untuk menentukan secara muktamad nilai pampasan di dalam kes rujukan tanah. Seksyen 40D(2) memperuntukkan bahawa, jika penilai-penilai tidak bersetuju dengan nilai pampasan, hakim hanya boleh bersetuju dengan salah satu daripada mereka dan keputusan penilai yang dipersetujui oleh hakim akan diguna pakai. Seksyen 40D(3) menyatakan bahawa apa-apa keputusan yang dibuat di bawah s 40D(1) dan (2) adalah muktamad dan tidak boleh dirayu. Ini diperkuatkan lagi oleh proviso s 49(1) APST yang memperuntukkan bahawa keputusan mahkamah rujukan tanah berkaitan dengan pampasan adalah tidak boleh dirayu. Perayu berhujah bahawa berdasarkan prinsip 'kesetaraan' dan keperluan 'pampasan yang memadai' di bawah perkara 13(2) Perlembagaan, perayu patut diberikan pampasan di atas kehilangan keuntungan perniagaan yang berpunca daripada pengambilan tersebut; 'nilai pasaran' tanah tersebut tidak patut dihadkan kepada harga-harga setanding tanah-tanah lain di dalam kawasan tersebut yang telah dijual tetapi perlu juga mengambil kira nilai pembangunan/keuntungan tanah tersebut terhadap perayu semasa pengambilan tersebut.

Diputuskan, sebulat suara membenarkan rayuan, mengisytiharkan s 40D APST tidak berpelembagaan dengan kesan prospektif dan meremit semula kes ke Mahkamah Tinggi bagi penentuan semula isu-isu tertakluk kepada perintah-perintah berikut: bahawa, melalui s 40A APST, bantahan terhadap award oleh PT didengar oleh seorang hakim dibantu oleh dua orang penilai; bahawa berdasarkan s 40C APST, penilai-penilai, selepas mempertimbangkan sewajarnya kesemua pampasan yang dituntut oleh perayu, memberikan pendapat mereka secara bertulis berkaitan dengan nilai pampasan yang sepatutnya diawardkan; pendapat-pendapat penilai-penilai tersebut direkodkan oleh hakim yang perlu mempertimbangkan pendapat penilai-penilai sebelum menentukan nilai pampasan yang perlu diawardkan berdasarkan prinsip 'kesetaraaan'; peruntukan s 36(4) APST diberikan kesan penuh dimana hakim adalah tidak tertakluk dengan pendapat kedua-dua penilai; jika terdapat ketidaksepakatan di antara penilai-penilai, mahkamah boleh memilih untuk mengambil kira salah satu pendapat yang menurutnya bersesuaian didalam keadaan kes; jika hakim tidak bersetuju dengan pendapat kedua-dua penilai, hakim bebas untuk memutuskan nilai pampasan yang munasabah dan memberikan alasan-alasan bagi dapatan tersebut. Tindakan rujukan diremitkan semula kepada Mahkamah Rayuan untuk memutuskan

rayuan pemohon-pemohon mengikut keputusan semasa Mahkamah Persekutuan:

(1) Seksyen 40D APST adalah ultra vires Perlembagaan dan terpaksa dibatalkan. Keputusan ini tidak akan menjejaskan prosiding yang melibatkan pampasan dalam hal-hal pengambilan tanah yang telah berlaku dan telah ditentukan menurut s 40D sebelum tarikh penghakiman ini tetapi akan mengikat kes tertunggak pada peringkat pertama atau pada peringkat rayuan. Berdasarkan perkara 121(1) Perlembagaan, kuasa untuk memberi pampasan dalam prosiding rujukan tanah adalah kuasa kehakiman yang terletak pada hakim Mahkamah Tinggi yang bersidang di mahkamah rujukan tanah. Hujah ini diperkuat dengan peruntukan ss 36(4) dan 2 APST. Ia memberikan hak ke atas PT untuk merujuk kepada hakim Mahkamah Tinggi yang diberikan kuasa kehakiman untuk menilai. Tindakan menentukan jumlah pampasan yang perlu dibayar daripada pengambilan tanah melibatkan penilaian kehakiman, sebagai contoh, sama ada tuntutan tertentu dibenarkan, isu-isu yang jelas, sama ada tindak balas kepada laporan penilai itu dibenarkan dan sebagainya. Bertentangan dengan perkara 121 Perlembagaan, s 40D telah merampas kuasa mahkamah dengan membenarkan orang selain daripada hakim untuk memutuskan rujukan kes (lihat perenggan 52, 95, 98, 115 & 133–134).

(2) Kuasa kehakiman mahkamah berada di dalam badan kehakiman dan bukan yang lain seperti yang termaktub dalam perkara 121(1) Perlembagaan. Di mahkamah atasan, hanya hakim yang dilantik di bawah perkara 122B Perlembagaan, dan tidak ada yang lain, boleh menjalankan kuasa untuk membuat keputusan. Pelaksanaan kuasa kehakiman oleh orang yang tidak berkelayakan (dan bukan oleh hakim atau pegawai kehakiman) atau individu bukan kehakiman mengakibatkan pelaksanaan tersebut ultra vires perkara 121 Perlembagaan (lihat perenggan 54, 86 & 105).

(3) Alasan hakim dalam rujukan tanah dalam rayuan ini tidak mempunyai alasan kehakiman. Hakim hanya memeteraikan keputusan penilai, yang bukan hanya melanggar s 47 APST, tetapi lebih penting lagi, ia mencabuli perkara 121 Perlembagaan. Seksyen 40D(1) dan (2) APST tidak memberi kuasa kepada hakim Mahkamah Tinggi untuk tidak bersetuju dengan penilai atau memberi arahan kepadanya. Walaupun hakim mencatatkan ketidakpuasannya terhadap keputusan penilai, ia adalah suatu usaha yang sia-sia kerana keputusan penilai adalah muktamad dan pemilik tanah yang terkilan tidak diberikan apa-apa pertolongan. Kesan ketidakadilan subseksyen 40D(1) dan (2) memberi impak selanjutnya ke dalam s 40D(3) dan proviso kepada s 49(1) di mana pemilik tanah dihalang daripada merayu terhadap keputusan penilai-penilai (lihat perenggan 108–110).

(4) Seksyen 40D(1) dan (2) APST mengabaikan peranan hakim sebagai pembela Perlembagaan dan menjadikan jaminan Perlembagaan berkaitan dengan 'pampasan yang memadai' sebagai khayalan memandangkan jaminan tersebut kini terletak pada penilai-penilai. Seksyen 40D yang baru perlu dibuat, kali ini mentakrifkan semula peranan para penilai tetapi dengan syarat hanya hakim sahaja untuk membincangkan isu kuantum selepas mengambil kira semua isu termasuk nasihat yang diberikan oleh penilai. Pendapat penilai tidak boleh mengikat hakim. Jika penilai tidak bersetuju dengan jumlah pampasan, hakim boleh memilih untuk mempertimbangkan mana dari kedua-dua pendapat itu adalah wajar dalam keadaan kes itu. Jika hakim tidak bersetuju dengan pendapat kedua-dua penilai, hakim bebas untuk memutuskan perkara tersebut dengan memberikan alasan bagi keputusan tersebut (lihat perenggan 111, 116, 120 & 122–123).

(5) Ketidakperlembagaan s 40D APST hanya disebabkan oleh proses membuat keputusan, iaitu penentuan jumlah pampasan oleh penilai-penilai. Peruntukan yang mengehadkan rayuan dalam s 40D(3) adalah isu yang berasingan dan berbeza. Seksyen 40D(3) adalah fasal akhir yang mengisytiharkan apa-apa keputusan yang dibuat di bawah s 40D menjadi muktamad. Ia tidak menyumbang kepada ketidaksahan s 40D. Untuk memutuskan sebaliknya adalah bertentangan dengan s 68(1)(d) Akta Mahkamah Kehakiman 1964 ('AMK'). Undang-undang mengiktiraf kuasa badan perundangan untuk menggubal undang-undang yang membataskan rayuan dengan mengisytiharkan perintah Mahkamah Tinggi sebagai muktamad. Sebaliknya, pemansuhan hak rayuan berkenaan dengan pemberian pampasan di bawah proviso kepada s 49(1) APST perlu ditafsirkan dengan sempit dan tegas untuk memberikan makna kepada perlindungan Perlembagaan yang diberikan kepada hak seseorang kepada hartanya. Proviso kepada s 49(1) bukanlah halangan yang menyeluruh bagi semua rayuan kepada Mahkamah Rayuan dari Mahkamah Tinggi mengenai semua persoalan berkaitan dengan pampasan. Halangan untuk merayu adalah terhad kepada isu fakta berdasarkan kuantum pampasan. Pihak yang terkilan mempunyai hak untuk merayu terhadap keputusan Mahkamah Tinggi atas persoalan undang-undang (lihat perenggan 136–137, 139, 148 & 155).

(6) Proviso kepada s 49(1) APST tidak ultra vires perkara 121(1B) Perlembagaan. Perkara 121(1B) Perlembagaan adalah peruntukan umum yang memberikan kuasa kepada Mahkamah Rayuan untuk mendengar rayuan-rayuan daripada Mahkamah Tinggi. Bidang kuasa Mahkamah Rayuan untuk mendengar rayuan-rayuan daripada Mahkamah Tinggi harus dilaksanakan dengan merujuk kepada Akta Mahkamah Kehakiman 1964. Halangan merayu terhadap nilai pampasan yang diberikan oleh Mahkamah Tinggi seperti yang

termaktub di dalam proviso kepada s 49(1) adalah bertepatan dengan s 68(1)(d) AMK (lihat perenggan 165).

(7) Seksyen 40C APST adalah mandatori dan membentuk komponen penting dalam proses membuat keputusan berkaitan dengan kes rujukan tanah. Ia menyatakan keperluan-keperluan yang perlu diperhatikan oleh penilai-penilai dan hakim sebelum membuat keputusan. Ketidakpatuhan kepada s 40C mengakibatkan salah arah yang menyebabkan keputusan menjadi tidak sah. Hak perlembagaan perayu untuk pampasan yang adil dan munasabah bagi pengambilalihan secara wajib telah dilanggar kerana pelindungan untuk menentukan pampasan seperti yang dinyatakan dalam s 40C telah tidak dipatuhi. Halangan merayu di dalam s 49(1) APST tidak akan beroperasi apabila terdapat ketidakpatuhan kepada peruntukan perundangan di dalam APST (lihat perenggan 178, 182–183 & 189).

(8) Prinsip kesetaraan memerlukan perayu untuk diberikan pampasan bagi kehilangannya yang sebenar. Ini termasuk pampasan bagi kehilangan perniagaan. Tuntutan tersebut jatuh di bawah tajuk 'nilai pasaran' tanah seperti yang dinyatakan di dalam perenggan 1 dan 2(a) dalam Jadual Pertama. Nilai tanah dalam keadaannya yang sebenar berserta dengan nilai keuntungannya harus diambil kira dalam menentukan nilai pasaran tanah yang diambil. Semasa pengambilan, perayu telah memulakan untuk membangunkan secara komersial tanah tersebut sebagai kawasan industri. Oleh itu, kehilangan perniagaan perayu harus dimasukkan ke dalam nilai pembangunan atau nilai keuntungan tanah yang menjadi sebahagian daripada nilai pasaran tanah yang diambil tersebut. Dalam menentukan nilai pasaran tanah tersebut seperti yang dinyatakan dalam perenggan 2(a) Jadual Pertama, PT dan mahkamah perlu mengambil kira nilai keuntungan tanah semasa pengambilan dilakukan (lihat perenggan 209–210 & 212).

(9) Akta Pengambilalihan Tanah (Pindaan) 1997, yang menguatkuasakan ss 40A, 40B, 40C, 40D dan pindaan kepada proviso dalam s 49(1) APST dari 1 Mac 1998 terpakai secara prospektif untuk kes-kes pengambilan tanah yang dirujuk kepada mahkamah selepas tarikh tersebut. Tarikh pemerolehan tidak relevan. Dalam kes ini, walaupun pengisytiharan keputusan untuk memperoleh tanah perayu dibuat melalui Borang D dan diterbitkan dalam *warta* sebelum 1 Mac 1998, kes perayu telah dirujuk kepada mahkamah selepas tarikh tersebut; maka peruntukan Akta Pindaan tersebut terpakai kepada perayu (lihat perenggan 221–222, 217 & 220).]

Notes

For a case on judicial power, see 3(2) *Mallal's Digest* (5th Ed, 2015) para 2532.
For cases on compensation, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2345–2404.
For cases on validity of impugned legislation, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2989–2998.

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)
Attorney-General of The Commonwealth of Australia v Reginam and The Boilermakers' Society of Australia and Others; Kirby and Others v Reginam and The Boilermakers' Society of Australia and Others [1957] 2 All ER 45; [1957] AC 288, PC (refd)
Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549, FC (refd)
Beryl, The (1884) 9 PD 137, CA (refd)
Calamas Sdn Bhd v Pentadbir Tanah Batang Padang [2011] MLJU 1528; [2011] 5 CLJ 125, FC (refd)
Commissioner of Stamp Duties v Atwill and others [1973] 1 All ER 576, PC (refd)
Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2011] 1 MLJ 158; [2010] 7 CLJ 397, FC (refd)
De Lange v Smuts and others 1998 (3) SA 785 (refd)
Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 1 All ER 846; [1995] 2 AC 111, PC (folld)
Dr Koay Cheng Boon v Majlis Perubatan Malaysia [2012] 3 MLJ 173, FC (refd)
Ee Chong Pang & Ors v The Land Administrator of the District of Alor Gajah & Anor [2013] 2 MLJ 16, CA (refd)
Folkes v Chadd (1782) 3 Doug KB 157; 99 ER 589 (refd)
Harvey v Crawley Development Corporation [1957] 1 QB 485, CA (refd)
Hinds and others v The Queen; Director of Public Prosecutions v Jackson; Attorney General of Jamaica (intervener) [1976] 1 All ER 353; [1977] AC 195, PC (refd)
Huddart, Parker and Co Pty Ltd v Moorehead (1909) 8 CLR 330, HC (refd)
Indira Nehru Gandhi v Shri Raj Narain & Anr AIR 1975 SC 2299, SC (refd)
Jais bin Chee & Ors v Superintendent of Lands and Surveys Kuching Division, Kuching [2014] 6 MLJ 439; [2014] 3 CLJ 467, CA (refd)
Jitender Singh a/l Pagar Singh & Ors v Pentadbir Tanah Wilayah Persekutuan and another appeal [2012] 1 MLJ 56; [2012] 2 CLJ 165, CA (refd)
Johnstone v Sutton [1775–1802] All ER Rep 170; (1786) 1 Term Rep 510; 99 ER 1225 (refd)
Kesavananda Bharati v State of Kerala AIR 1973 SC 146, SC (refd)
Kok Wah Kuan v PP [2007] 5 MLJ 174; [2007] 4 CLJ 454, CA (refd)

A *Lee Ah Mok & Ors v Pentadbir Tanah Daerah Seremban & Anor* [2009] 5 MLJ 422; [2009] 4 CLJ 611, CA (refd)
Liyanage and Others v Reginam [1966] 1 All ER 650; [1967] 1 AC 259, PC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
B *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385, FC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35, FC (refd)
C *Ooi Kean Thong & Anor v PP* [2006] 3 MLJ 389, FC (refd)
Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
Pentadbir Tanah Daerah Gombak lwn Huat Heng (Lim Low & Sons) Sdn Bhd [1990] 3 MLJ 282, SC (refd)
D *PP v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921, FC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311; [1987] 1 CLJ 550, SC (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)
E *Richardson v Redpath Brown & Co Ltd* [1944] 1 All ER 110; [1944] AC 62, HL (refd)
Shell Co of Australia, Ltd v Federal Commissioner of Taxation [1930] All ER Rep 671; [1931] AC 275, PC (refd)
Singleton Abbey (Owners) v Paludina (Owners); The Paludina [1926] All ER
F Rep 220; [1927] AC 16, HL (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)
Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others, Re [2005] UKHL 41, HL (refd)
G *Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal* [2013] 6 MLJ 626, FC (refd)
The Bengal Immunity Company v The State of Bihar and others AIR 1955 SC 661, SC (refd)
The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd
H (1970) 123 CLR 361, HC (refd)
The Royal Selangor Golf Club v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur [2012] 5 MLJ 364, CA (refd)
The State of West Bengal v Mrs Bela Banerjee and others 1954 AIR 170, SC (refd)
Wan Sagar bin Wan Embong v Harun bin Taib & Ors [2008] 4 MLJ 473, FC
I (refd)
Wilson and Ors v The Minister For Aboriginal and Torres Strait Islander Affairs and Anor (1996) 189 CLR 1, HC (refd)
Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1, PC (refd)
Yong Teck Lee v Harris Mohd Salleh & Ors [2002] 3 MLJ 230, CA (refd)

Legislation referred to

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Courts of Judicature Act 1964 ss 50, 67, 68, 68(1)(d), 96(a)
Criminal Procedure Code s 418A, Chapters XXI, XXII, XXIII
Dangerous Drugs Act 1952 ss 37(d), (da), 39B(1)(a)
Election Offences Act 1954 s 36
Federal Constitution arts 4(1), 13, 13(1), (2), 121, 121(1), (1B), (1B)(a), (2), (2)(a), 122AA, 122AA(2), 122B, 122B(5), 123, 128(3), 159
Insolvency Act 1936 [ZA]
Land Acquisition Act 1960 ss 2, 12, 13(1), 14, 36(4), 37, 37(1), (1)(b), 38, 40A, 40A(1), (2), 40B, 40C, 40D, 40D(1), (2), (3), 45, 47, 49, 49(1), Part V, First Schedule, paras 1, 1(1A), 2, 2(a), (e), 3, Third Schedule, Forms A, D, E, N, O

Appeal from: Civil Appeal Nos B-01–653–11 of 2011 and B-01–40–11 of 2011 (Court of Appeal, Putrajaya)

Cyrus Das (Chan Kok Keong and Samuel Tan Lih Yau with him) (Shook Lin & Bok) in Civil Appeal No 01(f)-47–11 of 2013 (B) for the appellant.
Hj Nik Suhaimi bin Nik Sulaiman (Ahmad Fuad bin Othman, Rafiqha Hanim bt Mohd Rosli and Mohd Abdul Hakim bin Ali with him) (Selangor Legal Advisors Office) in Civil Appeal No 01(f)-47–11 of 2013 (B) and Reference No 06–3–05 of 2013 (B) for the respondent.
Ambiga Sreenevasan (Shireen Selvaratnam, Heng Yee Keat and James Au Wei-Wern with her) (Lee Ong & Kandiah) in Reference No 06–3–05 of 2013 (B) for the applicants.
Malik Imtiaz Sarwar watching brief for Bar Council.
Alice Loke Yee Ching, Shaiful Nizam bin Shahrin and Kasturi a/p Arumugam as amicus curiae.

Zainun Ali FCJ:

This is our unanimous decision

INTRODUCTION

[1] The appellant in Appeal No 01(f)-47–11 of 2013(B) ('the appeal') and the applicants in Reference No 06–3–05 of 2013(B) ('the reference') before us seek to challenge the constitutional vires of the Land Acquisition Act 1960 ('the Act'), made by way of the Land Acquisition (Amendment) Act 1997 ('Act A999'). Act A999 came into force on 1 March 1998.

[2] The appellant in this appeal and the applicants in the reference filed objections against the land administrator's award disputing the amount of

compensation awarded arising out of the acquisition of part of their land. Dissatisfied with the decisions of the High Court, they appealed to the Court of Appeal.

[3] The appellant in the appeal was granted leave by the order of this court dated 7 October 2013 to appeal against the decision of the Court of Appeal dated 26 April 2013. The reference before us is a reference of constitutional questions by the Court of Appeal. By a consent order dated 17 April 2013, the applicants' appeal in the Court of Appeal is stayed pending determination of the constitutional questions referred to this court. For the reference, it was agreed, as reflected in the order of this court dated 1 December 2013, that the decision in the appeal will bind the parties in the reference.

[4] The appeal and the reference focus on the changes made to the Act by Act A999, in particular s 40D which empowers assessors sitting with the judge in the High Court to make the final determination on the amount of reasonable compensation for the acquisition of land under the Act; and sub-s 40D(3) and the provision to sub-s 49(1) which preclude appeals against the High Court decision on the amount of compensation.

[5] In addition to those issues, the appellant in the appeal also poses to this court questions on the effect of non-compliance with s 40C and the adequacy of compensation under art 13 of the Federal Constitution in relation to its claim for loss of profit as a result of business extinguishment.

[6] The question of law framed before this court for the appeal are as follows:

(1) whether there is a right of appeal to the Court of Appeal against a decision of the High Court (consisting of a judge and two assessors) involving compensation for land acquisition *on a question of law* in the light of s 40D(3) and the proviso to s 49 of the Land Acquisition Act 1960 ('the Act') as amended by Act A999?

(2) whether the amendment to the Act by amendment Act A999 which came into effect on 1 March 1998 would apply *to land acquisitions instituted prior to the amendment* with the effect of changing radically the hearing process as regards the role of the assessors and further limiting a vested right of appeal?

(3) whether the amended s 40D is constitutionally valid in providing for a *conclusive determination by the assessors* (as opposed to the judge) as to the amount of compensation in the face of art 121 of the Federal Constitution that contemplates that the judicial power of the courts should be exercised by judges only?

(4) whether s 40D(3) could validly apply to limit appeals if the decision-making process provided for in s 40D(3) is constitutionally invalid? A

(5) whether the limitation of appeals in s 40D(3) or the proviso to s 49 could apply in the absence of strict compliance with the new procedure envisaged in ss 40C and 40D? and B

(6) whether the safeguard of 'adequate compensation' in art 13(2) of the Federal Constitution is met where the land administrator refuses to take account of the development value or profit value of the land acquired where the subject land at the time of acquisition is already being commercially developed for profit? C

[7] The constitutional questions referred to this court for the reference are as follows: D

(1) whether s 40D(3) and the proviso to s 49(1) of the Land Acquisition Act 1960 are ultra vires art 121(1B) of the Federal Constitution particularly when read in the context of art 13 of the Federal Constitution; and

(2) whether s 40D(1) and (2) of the Land Acquisition Act 1960 are ultra vires art 121 of the Federal Constitution read in the context of art 13 of the Federal Constitution. E

[8] As the issues of law are common to both cases, we shall discuss the legal position comprehensively since they will apply with equal force to the questions posed in the two matters before us. F

[9] In view of this court's order dated 1 December 2013, our discussion and analysis in this judgment will focus on the appeal unless the context otherwise requires (in respect of the reference). G

THE FACTUAL BACKGROUND

[10] The appellant was the registered proprietor of a piece of land known as CT 14408, Lot Nos 1883 and 1884, Mukim Semenyih, District of Ulu Langat, Selangor. Sometime in January 1997, the appellant commenced construction works on part of the land ie Lot 1883 for an industrial project known as 'Kajang 181 Park'. The project comprised 1 1/2 storey terrace, 2 1/2 storey semi-detached and 3 1/2 storey factory lots totalling 128 units with three pieces of vacant land to be sold separately as industrial plots. H I

[11] The appellant's land was subject to acquisition under the Act for the purpose of constructing the Kajang-Seremban Highway. On 10 April 1998, the appellant received Forms D and E from the land administrator of the Hulu

Langat Land Office informing the appellant that part of Lot 1883 (8.394 hectare from a total area of 9.156 hectare) would be acquired for the above purpose and that an enquiry would be held on 6 May 1998.

[12] The land administrator conducted an enquiry pursuant to s 12 of the Act to determine the amount of compensation payable to the appellant arising from the said acquisition. At the conclusion of the enquiry, the land administrator awarded compensation to the appellant in the sum of RM20,862,281.75 for the acquisition of part of Lot 1883. The amount of RM20,862,281.75 comprises RM17,627,400 being the value of the land acquired (8.394 hectare from 9.156 hectare) and RM3,234,881.75 being compensation for the loss suffered from the termination of the project namely piling works, building works, preliminary expenses incurred for mobilisation and setting up of the construction site, advertisement fees and marketing fees.

[13] The appellant objected to the amount of compensation awarded by the land administrator by filing Form N requesting the land administrator to refer the matter to the court for its determination pursuant to s 38 of the Act. The appellant contended that the compensation awarded was inadequate because, amongst others, the land administrator failed to consider the 'other claims' of the appellant which comprise the loss of profits and the costs and expenses incurred by the appellant arising out of the termination of its commercial project on part of Lot 1883 acquired by the state authority. The appellant's claim for loss of profits was in respect of the sale of 57 industrial units in the project to purchasers prior to acquisition. It was the appellant's case that when Form A was published in the *gazette* on 14 August 1997, the appellant had already entered into 42 sale and purchase agreements with third party purchasers for the sale of the factory units being built. It had collected a deposit of 10% of the purchase price and had expended funds for the development works.

[14] By the time Form D was published in the *gazette* on 12 February 1998, the appellant had completed the earthworks and piling works, the appellant had started the construction works and executed another 15 sale and purchase agreements. The compulsory acquisition of the subject land had wiped out the appellant's commercial project. Thus the appellant contended that it has to be compensated for loss of profits in respect of the sale of the 57 units. The other claims of the appellant which had been dismissed by the land administrator included the development costs for the project, payment of professional fees to third parties, compensation paid to contractors, management fees and other miscellaneous expenses which were the losses suffered from the termination of its development project due to the acquisition.

(*Note*: The particulars of the appellant's claim for compensation has been summarised in Annexure A in the written submissions for the appellant).

[15] The land administrator then referred the matter to the High Court at Shah Alam by submitting Form O, which was duly registered on 25 February 1999 as Shah Alam High Court Land Reference No MT3 10–15–37 of 1999.

Decision of the High Court

[16] The High Court judge hearing the land reference sat with two assessors ie, Encik Amran bin Mat Yaacob ('the government valuer') and Puan Khamsiah bt Shamsuddin ('the private valuer') to determine the adequacy of the compensation payable to the appellant.

[17] After hearing the evidence and submissions of parties, the Land Reference Court agreed with the award of the land administrator in respect of the valuation of part of Lot 1883 acquired by the state. However the High Court was of the view that the appellant was also entitled to receive compensation for severance and injurious affection in the sum of RM1,160,020 in view of the remaining Lot 1883 which has now became less valuable due to the acquisition and the construction and use of the acquired land by the authority. However the other claims for compensation were dismissed by the High Court. There was no opinion in writing given by either of the assessors in respect of the award as required under s 40C of the Act. The learned judge in his judgment dated 28 September 2011 also gave no reasons on the dismissal of these claims. The High Court delivered its decision in the manner as shown below:

> (iii) Lain-lain tuntutan tidak dipertimbangkan selain dari yang telah dibayar oleh pihak Pentadbir Tanah.

Decision of the Court of Appeal

[18] The appellant appealed to the Court of Appeal against the order of the High Court on the ground that the High Court erred in failing to decide or consider the 'other claims' of the appellant in the total sum of RM18.2m.

[19] Learned counsel for the appellant submitted that the fact that the High Court had stated 'lain-lain tuntutan tidak dipertimbangkan' must have been taken to mean that the High Court did not consider it at all and that there was a dereliction of duty by the High Court. In addition the appellant was deprived of the opinion of the assessors under s 40C of the Act. Section 40C of the Act clearly provides that the opinion of each assessor on the various heads of compensation shall be given in writing and shall be recorded by the judge. Non-compliance of s 40C of the Act and failure of the judge to consider the evidence amounts to a misdirection which merits appellate intervention.

[20] On 26 April 2013 the Court of Appeal dismissed the appellant's appeal.

It held that:

> We could not agree with counsel's submission that 'tidak dipertimbangkan' means failure of the court to consider. It has always been known and understood that the Malay style of speaking and expressing rejection has always been expressed in the most gracious manner ... 'Tidak dipertimbangkan' in the instant case does not and can never be understood as not considered at all. What the learned trial judge said and meant was that the claims had been considered but not allowed. It has to be understood that way.

[21] On the appellant's right to appeal against the award made by the land administrator, the court held that:

> The law on the right of appeals against an award of compensation is clear. Nothing is clearer than the words expressed by Parliament in section 40D and 49 of the Act. On the same note, we also do not see any valid distinction can be made between this appeal and *Calamas*. The substratum of the appellant's appeal is against the decision of the High Court on the amount of compensation. The appellant is unhappy in that all the heads of claims put forth before the land administrator and the High Court had not been fully satisfied. This appeal is but an attempt to circumvent the decision of the Federal Court in *Calamas*.

Issues in this appeal

[22] In view of the multifarious legal arguments presented before us, the issues will be categorised into four parts:

(a) Part A (the constitutional issue):

Question 3 seeks to challenge the constitutionality of s 40D of the Act which confers power on the assessors to decide on the amount of compensation in the face of art 121 of the Federal Constitution. The same issue is raised in Question 2 in respect of the reference;

(b) Part B (provisions limiting appeals under the Act):

(i) Questions 1, 4, 5 involve the application of sub-s 40D(3) and sub-s 49(1) of the Act which preclude appeals from the decision of the High Court on compensation;

(ii) Question 1 in the reference challenges the constitutionality of sub-s 40D(3) and sub-s 49(1) of the Act in view of art 121(1B) of the Federal Constitution; and

(iii) Question 5 raises the issue of whether an appeal can be limited if there is non-compliance of s 40C of the Act;

(c) Part C (claim for loss of profit):

Question 6 is in respect of the claim for loss of profit as a result of business extinguishment; and

(d) Part D (application of the Amending Act A999):

Question 2 raises an issue whether the new amendments apply to cases where Form D was published in the *gazette* before the coming into force of Act A999 on 1 March 1998.

PART A (THE CONSTITUTIONAL ISSUE)

[23] Section 40D of the Act brought about a far-reaching change in the decision-making process in the High Court with regard to appeals in compensation. The consequent frisson was to be expected, since by the said amendment, two assessors who are valuers are to sit in the High Court with the judge and by the provisions of s 40D of the Act, they and not the judge are the final arbiters on the amount of compensation.

[24] The appellant now challenges the constitutionality of s 40D of the Act in view of the adjudicative function exercised by the assessors in a land reference. The issue is whether such a provision contravenes art 121(1) of the Federal Constitution which declares that judicial power to decide a dispute brought before the courts is vested in the courts.

[25] At this juncture a look at the constitutional provision regarding the right to property would be instructive.

The constitutional right to property

[26] Article 13 of the Federal Constitution reads:

(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.

[27] The right to acquire, hold and enjoy property is a fundamental right guaranteed by the Federal Constitution. However it is not an absolute right since ownership of property is subject to what is provided for in the Federal Constitution. One's property can be acquired by the state. However that acquisition would have to be carried out in *accordance with law*. The Federal Constitution also safeguards the land owner's right to receive *adequate compensation* as a result of his land being acquired. Article 13(2) specifically makes provisions for payment of adequate compensation for the property acquired.

The Land Reference Court

[28] By s 37 of the Act an aggrieved party has a legal right to object to the

award of the land administrator by way of a land reference to the High Court provided that the total amount awarded in compensation in respect of the acquired land is not less than three thousand ringgit. Subsection 37(1) of the Act stipulates four grounds for an objection to be made. The ground in para (b) of sub-s 37(1) of the Act is in respect of the amount of compensation.

[29] Subsection 36(4) of the Act confers jurisdiction to the High Court to determine any objection in respect of an award made by the land administrator under s 14 of the Act.

Subsection 36(4) of the Act reads:

> After an award has been made under section 14 the Land Administrator shall *refer to the Court for determination any objection* to such award duly made in accordance with this Part. (Emphasis added.)

[30] By the definition provided in s 2, the word 'Court' in the Act means the 'High Court'. In exercising its jurisdiction under sub-s 36(4) of the Act, the High Court is governed by the provisions in Part V of the Act. The High Court here is referred to as the land reference court (*The Royal Selangor Golf Club v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur* [2012] 5 MLJ 364).

The Land Acquisition Act 1960 — Background and relevant amendments on the provisions involving assessors

Before 1984

[31] Before 1984, s 42 of the Act contained a provision for assessors to aid the judge on the issue of compensation. The then sub-ss 42(2) and (3) of the Act provided that whilst the assessors played a vital role in advising the judge, it was the judge who was seised with the judicial power to decide on issues arising out of the reference proceedings as well as the amount of compensation to be paid in respect of the land acquired.

Section 42 of the Act stated that:

> (1) The Opinion of each assessor shall be given orally, and shall be recorded in writing by the Judge.
>
> (2) In case of a difference of opinion between the Judge and the assessors or either of them upon a question of law or practice, or of usage having the force of law, the opinion of the Judge shall prevail.
>
> (3) In case of difference of opinion between the Judge and both of the assessors as to the amount of compensation or as to the amount of any item thereof *the decision of the Judge shall prevail*. (Emphasis added.)

The 1984 Amendment

[32] Vide Act A575, which came into force on 20 January 1984 ss 40–42 of the Act were deleted, thus completely removing the role of the assessors in the land reference court.

The 1997 Amendment (present position)

[33] The role of the assessors was however, restored by Act A999, which came into force on 1 March 1998. By Act A999, various amendments were made to the Act with new provisions being introduced governing matters on the determination of compensation and the payment thereof. According to the parliamentary debates during the passage of the Bill for Act A999, the objectives of the amendments vide Act A999 were, inter alia, to determine the basis for assessing compensation accurately, quickly and fairly to reflect the true value of the land acquired.

The new provisions

Section 40A of the Act:

> Constitution of the Court
>
> (1) Except as provided in this section the Court shall consist of a Judge sitting alone.
>
> (2) Where the objection before the Court is in regard to the amount of compensation, the Court shall appoint two assessors (one of whom shall be a valuation officer employed by the Government) *for the purpose of aiding the Judge* in determining the objection and in arriving at a fair and reasonable amount of compensation.
>
> (3) For the purpose of subsection (2) the Court shall appoint the two assessors from the lists of names submitted to the Court under subsection (4) and (5).
>
> (4) ...
>
> (5) ... (Emphasis added.)

[34] Subsection 40A(1) stipulates that the objections raised in a land reference matter is to be heard before a single judge. However, sub-s 40A(2) states that if the objection stems from the inadequacy of the amount of compensation awarded in respect of the acquired land, the law imposes upon the court the appointment of two assessors 'for the purpose of aiding the Judge in determining the objection and in arriving at a fair and reasonable amount of compensation'.

[35] On the face of it, the above provisions are perfectly in order. However

there is a definite shift in momentum in the subsequent provision ie in s 40D of the Act. Section 40D of the Act announces a sea-change to matters involving the determination of compensation. Unlike the position prior to 1984 where the role of assessors was limited to assisting the judge on technical issues, *the present provision empowers the assessors to decide on the amount of compensation to be awarded arising out of the acquisition*. The decision made under sub-s 40D(3) of the Act is *final* and *non-appealable*. The provision of finality is further fortified by the introduction of the proviso to sub-s 49(1) of the Act to preclude appeals against compensation.

Who are the assessors?

[36] At this juncture, it is necessary to firstly ascertain who the assessors are and what their duties may be in the land acquisition regime.

[37] Under the common law, the practice of appointing assessors could be traced back to the second half of the 18th Century when assessors were appointed to advice judges on nautical and technical issues in admiralty proceedings (see *Folkes v Chadd* (1782) 3 Doug KB 157; 99 ER 589; *Johnstone v Sutton* [1775–1802] All ER Rep 170; (1786) 1 Term Rep 510; 99 ER 1225).

[38] The word 'assessor' is a Latin word, *assessor*, meaning one who sits with another, or who is an assistant. The term 'assessor' is used to designate a person who by virtue of some special skills, knowledge or experience he possesses, sits with a judge during judicial proceedings in order to answer any question which might be put to him by the judge on the subject in which he is an expert (see *The Beryl* (1884) 9 PD 137 and *Singleton Abbey (Owners) v Paludina (Owners); The Paludina* [1926] All ER Rep 220; [1927] AC 16).

[39] Although they are sources of information on matters concerning their own special skill or knowledge, assessors are not to be treated as expert witnesses since their advice does not constitute evidence. They are not subject to cross-examination, especially when the assessors are appointed by the court instead of by the parties. In the words of Viscount Simon LC in *Richardson v Redpath Brown & Co Ltd* [1944] 1 All ER 110 at p 113; [1944] AC 62 at p 70:

> To treat ... any assessor, as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross-examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence.

[40] Under the common law, the role of assessors is to help the judge to fully appreciate the specialist evidence taken. They 'take no part in the judgment whatever, they are not responsible for it, and have nothing to do with it' (see the decision of Brett MR in *The Beryl*).

[41] The use of assessors would be particularly beneficial and appropriate in complex matters. It is believed that the presence of persons having the requisite skill and knowledge assisting the Bench would win public confidence in the judicial system.

[42] In Malaysia, the use of court appointed assessors is not a novel practice. Nevertheless they are rarely used in both civil and criminal matters and perhaps the best known utilisation of their services is found in land matters. Assessors are appointed when there is a provision in a statute that warrants their appointment. The role and function of assessors are governed by the relevant statute.

[43] In fact, prior to 1995, Chapters XXI, XXII and XXIII of the Criminal Procedure Code ('the CPC') contained provisions relating to trials by jury and trials with the aid of assessors in the High Court. However the said provisions were deleted by the Criminal Procedure Code (Amendment) Act 1995 (Act A908). With the amendment, all criminal proceedings in the High Court thereafter shall be heard and disposed of before a single judge.

Court-appointed assessors in land reference proceedings

[44] The role and functions of assessors in land reference proceedings are predicated on matters of opinion and experience. Their appointment is governed by sub-s 40A(2) of the Act. The language of sub-s 40A(2) of the Act is unequivocal in its provision that assessors form an integral part of the reference court, for otherwise, the land reference court would be not properly constituted.

[45] The appointment of the two assessors (one of whom shall be a valuation officer employed by the government) becomes mandatory when the objection referred to the court is with regard to the reasonable amount of compensation for the acquired land. In *The Royal Selangor Golf Club v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur* [2012] 5 MLJ 364, the Court of Appeal speaking through Abdul Wahab Patail JCA held that:

> The land reference court is a creature of statute under the Land Acquisition Act 1960. On matters affecting compensation a judge sitting alone has no jurisdiction.

[46] As provided for in sub-s 40A(2) of the Act, assessors are appointed by the court 'for the purpose of aiding the Judge in determining the objection and

in arriving at a fair and reasonable amount of compensation'.

[47] This resembles the role and functions of assessors in the common law of providing assistance to the judge.

[48] Prior to 1984, the court was required to record the opinion of assessors which was given orally. However, by the present s 40C of the Act, assessors are required to give their opinion in writing in respect of claims for compensation which will then be recorded by the court.

Section 40C of the Act reads:

> The opinion of each assessor on the various heads of compensation claimed by all persons interested shall be given in writing and shall be recorded by the Judge.

[49] By s 40D of the Act, 'the amount of compensation to be awarded shall be the amount decided upon by the two assessors'. It would appear that s 40D of the Act has broadened the ordinary role of assessors from being advisors to that of fact finders and adjudicators.

Section 40D of the Act reads:

> (1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.
>
> (2) Where the assessors have each arrived at a decision which differs from each other then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.
>
> (3) Any decision made under this section is final and there shall be not further appeal to a higher Court on the matter.

[50] Section 40D of the Act thus imposes on the judge a duty to adopt the opinion of the two assessors or elect to concur with the decision of either of them if their decision differ from each other in respect of the amount of reasonable compensation arising out of the acquisition. The legislative intent is clear and unambiguous. As highlighted by the Court of Appeal in *Jitender Singh a/l Pagar Singh & Ors v Pentadbir Tanah Wilayah Persekutuan and another appeal* [2012] 1 MLJ 56; [2012] 2 CLJ 165 a High Court judge cannot come to a valuation different from that of the assessors, or if different, from either one of them.

[51] Wherefore now stands the judge? It would appear that he sits by the sideline and dutifully anoints the assessors' decision.

[52] Section 40D of the Act therefore effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it. This power to decide a matter which is brought before the court is known as judicial power and herein lies the rub. What is 'judicial power'?

[53] Before discussing the dialectics of judicial power, a brief outline on the exigencies of judicial function would be helpful. Other than the civil courts, bodies such as the Industrial Court, the Special Commissioner of Income Tax, as well as other inferior tribunals, perform a function which is judicial or quasi-judicial in nature. They can grant orders such as certiorari, mandamus etc. Thus it is recognised that judicial functions (as opposed to judicial powers) are not the monopoly of the Judiciary. These inferior tribunals are necessary and they exist to lend weight to their specialist skills in issues which come up before them. The adjudicators of these inferior tribunals are, for the most part, lay persons and so their adjudicative powers are confined to their relevant spheres.

[54] One has to hold this up against the position of adjudicators in the Superior Courts. The key question should be: Who can exercise judicial powers, ie decision-making powers, in the civil courts (as opposed to tribunals such as the Industrial Court)? The answer is obvious. Only judges as appointed under art 122B of the Federal Constitution and no other, can exercise decision making powers in our courts — for the definition of 'court' in the Act is the *High Court*.

[55] At this juncture, one might question the validity of the jury system which once became part and parcel of our judicial system. A jury, acting under the directions of a judge, is the final tribunal to determine the facts of the case and to decide, either unanimously or by majority, whether the accused is guilty of the alleged offence. The jury system is firmly entrenched in the English common law. It was imported into the Straits Settlements by the Charters of Justice. Article 4(1) of the Federal Constitution declares that any law passed after Merdeka Day must not be inconsistent with the provisions in the Federal Constitution. Thus the jury system, being a pre-Merdeka law, was saved by art 4(1) of the Federal Constitution until it was abolished in 1995.

[56] Be that as it may, it is axiomatic that under the common law, jury trials are very much part of the rights of an accused person who is charged with an offence in a criminal court. The right to a trial by jury which was enshrined in the Magna Carta, was based on the notion that anyone who is accused of a crime should have the right to be tried before their peers.

A JUDICIAL POWER

[57] A discussion on judicial power of the court is inevitable.

B **[58]** When the High Courts came into existence by virtue of art 121 of the Federal Constitution on Merdeka Day, they were equipped with the necessary powers to fulfil their function as the Superior Courts of Malaya and subsequently of Malaysia.

C **[59]** Judicial power is the power every sovereign state must of necessity have, to decide controversies between its subjects or between itself and its subjects, whether the rights related to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give an authoritative decision which is binding (whether subject to appeal or not) is called upon to D take action (see *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 at p 237; [2010] 7 CLJ 397 at p 485).

[60] Judicial power is best described in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 CLJ 550, as being the power vested in the court E to adjudicate on civil and criminal matters brought to it (see also the dissenting view of Richard Malanjum CJ (Sabah and Sarawak) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1).

[61] Article 121 of the Federal Constitution reads:

F *Judicial power of the Federation*

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —

(a) one in the States of Malaya, which shall be known as the High G Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal H registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed)

and such inferior courts as may be provided by federal law; and the High Courts I and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

[62] A notable observation is that the words 'judicial power' do not form part of the provision of art 121(1) of the Federal Constitution. The words were in

fact deleted from the text of art 121(1) by the Constitution (Amendment) Act 1988 (Act A704) effectively on 10 June 1988. However they remained in the marginal note to that article, and subsequently when the Federal Constitution was reprinted, the current version has those words in the shoulder note of the article.

[63] The original text of art 121(1) in the 1957 Constitution of the Federation of Malaya reads as follows:

> The judicial power of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law.

[64] The phrase 'the judicial power of the Federation shall be vested' was taken by the framers of our Constitution from s 71 of the Australian Constitution (see the decision of the Court of Appeal in *Kok Wah Kuan v Public Prosecutor* [2007] 5 MLJ 174; [2007] 4 CLJ 454). The phrase was interpreted by Griffith CJ in *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, to mean:

> ... the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision ... is called upon to take action.

[65] This definition was cited with approval by the Privy Council in *Shell Co of Australia, Ltd v Federal Commissioner of Taxation* [1930] All ER Rep 671; [1931] AC 275.

Judicial power is vested in the courts

[66] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158, the Federal Court held that the provision of art 121 of the Constitution is to be read in connection with its shoulder note (which contains the words 'judicial power') and interpreted in this light. The shoulder note in a written Constitution therefore furnishes some clue as to the meaning and purpose of the article (see also *Kok Wah Kuan* (CA) and *The Bengal Immunity Company v The State of Bihar and others* AIR 1955 SC 661).

[67] The legal consequence is that art 121(1) of the Federal Constitution states that judicial power or the power to adjudicate in civil and criminal matters brought to the court is vested only in the court. The same position was adopted in an earlier decision of the Federal Court in the dissenting view of Richard Malanjum CJ (Sabah and Sarawak) in *Kok Wah Kuan* (FC) and curiously, as did the majority of the Court of Appeal in the same case; *Kok Wah Kuan v Public Prosecutor* (CA).

[68] With respect, the majority decision of the Federal Court in *Kok Wah Kuan* (FC) appears to have given a narrow interpretation of art 121(1) of the Federal Constitution. It held that art 121(1) of the Federal Constitution merely declares that the High Courts 'shall have such jurisdiction and powers as may be conferred by or under federal law'. At pp 14–15 of the judgment, Abdul Hamid Mohamad PCA (as he then was) stated that:

> There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked 'Was the judicial power of the Federation vested in the two High Courts?' The answer has to be 'yes' because that was what the Constitution provided. Whatever the words 'judicial power' mean is a matter of interpretation. Having made the declaration in general terms, the provision went of to say 'and the High Courts ... shall have jurisdiction and powers as may be conferred by or under federal law'. In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law.
>
> After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High Courts. *If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment*. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent? (Emphasis added.)

[69] The narrow compass within which the Federal Court in *Kok Wah Kuan* above approached art 121(1) of the Federal Constitution suggests that the provision merely identifies the *sources* from which the High Courts derive their jurisdiction, namely from federal law. Whilst it is correct to say that the powers of the High Courts to adjudicate legal disputes are those which have been conferred by federal laws, in our view the legal implication of art 121(1) extends well beyond that. In this connection, there is a general acceptance that the Federal Constitution has to be interpreted organically and with less rigidity (see the principle of law in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29).

[70] It is pertinent to now focus on the observation made by Richard Malanjum CJ (Sabah and Sarawak) in his judgment in *Kok Wah Kuan* (FC). His Lordship took the position that the specific provision on the vesting of judicial power with the High Courts in art 121(1) of the Federal Constitution represents an important feature in a democratic system of government. The courts which form the third branch of the government has a duty 'to ensure that there is a 'check and balance' in the system including the crucial duty to

dispense justice according to law for those who come before them'. His Lordship observed that:

> At any rate I am unable to accede to the proposition that with the amendment of art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.
>
> The amendment which states that '*the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.
>
> It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country ...

[71] An astute observation on 'judicial power' was made by Eusoffe Abdoolcader SCJ in the majority judgment of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, where His Lordship said that:

> ... Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the right and liabilities of one or more parties ...

[72] It is acknowledged that it would be virtually impossible to formulate a completely exhaustive conceptual definition of that term (judicial power), whether inclusive or otherwise.

[73] The concept seems to transcend purely abstract conceptual analysis as was famously observed by Windeyer J in *The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

[74] Thus it is clear to us that the 1988 Amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution:

(i) the doctrine of separation of powers; and

(ii) the independence of the Judiciary.

[75] With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in art 4(1).

Article 4(1) of the Federal Constitution provides:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[76] It is worthwhile reiterating that Parliament does not have power to amend the Federal Constitution to the effect of undermining the features as stated in (i) and (ii) above for the following reasons:

The effect of sub-s 8(a) of the amending Act A704 appeared to establish Parliamentary supremacy; this consequentially suborned the Judiciary to Parliament, where by virtue of the amendment, Parliament has the power to circumscribe the jurisdiction of the High Court.

[77] Consequentially this has the unfortunate effect of allowing the Executive a fair amount of influence over the matter of the jurisdiction of the High Court.

[78] In the past, the apex court has consistently rejected Parliamentary supremacy in giving its continuing endorsement and faint praise to the Federal Court decision in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, in which Tun Suffian the Lord President had, in strong terms, said that:

> The doctrine of Parliamentary supremacy does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislation in Malaysia is limited by the Constitution, and they cannot make any new law they please.

[79] And again in another case, that of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, the Federal Court speaking through Gopal Sri Ram FCJ said at p 342 that:

> ... Further it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution that offends the basic structure may be struck down as unconstitutional. ... Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461.

[80] *Sivarasa* made a clear departure from an earlier Federal Court decision

of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, which in effect concluded that as long as an amendment to the Federal Constitution is effected in the manner required by art 159 of the Federal Constitution, that amendment was effective regardless of its effect insofar as the basic structure of the Constitution was concerned.

[81] Thus *Sivarasa* made a frontal attack on *Loh Kooi Choon* where the Federal Court in *Sivarasa* tersely observed that:

> ... the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that *Parliament cannot enact laws (including Act amending the Constitution) that violate the basic structure*. (Emphasis added.)

[82] The authority of *Liyanage and Others v Reginam* [1966] 1 All ER 650; [1967] 1 AC 259 probably summed up the concept concisely. The Privy Council in *Liyanage* held that the impugned legislation involving a usurpation and infringement by the Legislature of judicial powers is inconsistent with the written Constitution of Ceylon which, while not in terms vesting judicial functions in the Judiciary, manifested an intention to secure in the Judiciary a freedom from political, legislative and Executive control and in effect left untouched the judicial system established by the Charter of Justice of 1833. The legislation was struck down as void.

[83] The Privy Council observed, inter alia, that powers in countries with written Constitutions must be exercised in accordance with the terms of the constitution from which they were derived. Reference was made to the provisions in the Constitution for appointment of judges by the Judicial Service Commission and it was pointed out that these provisions patently displayed an intention to secure in the Judiciary a freedom from political, Legislative and Executive control. It was said that these provisions were wholly appropriate in a constitution by which it was intended that judicial power shall vest only in the judicature; and they would be inappropriate in a constitution by which it was intended that judicial power should be shared by the Executive or the Legislature.

[84] Thus given the strong observations made on the true nature and purpose of the impugned enactment, any alterations made in the judicial functions would tantamount to a grave and deliberate incursion in the judicial sphere.

[85] In fact the subsequent passage in *Liyanage* is illuminating. There the court observed that:

> ... If such Acts as these were valid the judicial power could be wholly absorbed by the legislation and taken out of the hands of the judges. It is appreciated that the

A legislature has no such general intention. It was be set by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus
B judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution.

[86] Thus to put it in perspective, the judicial power of the court resides in the Judiciary and no other as is explicit in art 121(1) of the Constitution.
C

[87] The principles laid down in *Kesavananda Bharati v State of Kerala* AIR 1973 SC 146 were reviewed and affirmed by the Supreme Court in *Indira Nehru Gandhi v Shri Raj Narain & Anr* AIR 1975 SC 2299. The Supreme
D Court emphasised the sanctity of the doctrine of separation of powers and the exclusivity of judicial power. Khanne J, in concurring with the majority, inter alia, held at pp 2340–2347 that:

... A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the
E Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislation function have been demarcated and it *is not permissible for the legislature to encroach upon the judicial sphere*. It has accordingly been held that a legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the
F legislature to declare the judgment of the court to be void or not binding. (Emphasis added.)

[88] The Judiciary is thus entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of the
G independence of the Judiciary is the foundation of the principles of the separation of powers.

[89] This is essentially the basis upon which rests the edifice of judicial power.
H

[90] The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.

I **[91]** The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus an effective check and balance mechanism is in place to ensure that the Executive and the Legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex court had prescribed that the powers of the Executive and the

Legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in ensuring that the powers of the Executive and the Legislature are to be kept within their intended limit (see *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135).

The constitutionality of s 40D of the Act

[92] Before proceeding further, since the appellant is moving this court to determine the constitutionality of the impugned provisions, it is necessary to briefly state the principle of statutory interpretation.

[93] The preliminary position is that there is always a strong presumption in favour of the constitutionality of provisions in a statute. This is premised on the principle that Parliament cannot be presumed to intend an unconstitutional action. The burden is upon him who challenges the provision to show that they are unconstitutional (*Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389, *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921). The court's function is merely to test the legality of an action against principles and standards established by the Constitution. Unless it is found that there has been a clear transgression of constitutional principles, the court would refrain from declaring the law as legislated by the Legislature to be invalid.

Adequacy of compensation is to be determined by the judge

[94] Counsel for the respondent referred to the decision of the Court of Appeal in *Jitender Singh* where it was held that limiting the discretion of a High Court judge hearing a land reference to the opinion of the assessors appointed to assist him, does not infringe art 13 of the Federal Constitution. The relevant paragraph in the judgment of the court states that:

> After careful consideration of the impugned provisions and art 13 of the Federal Constitution as well as the submissions presented before us, we are of the view that limiting the discretion of a High Court judge hearing a land reference to the opinion of the assessors appointed to assist him, alternatively, by the opinion of one of the assessors, does not infringe art 13 of the Federal Constitution. We are of the opinion that such a provision is valid and of full legal effect. In our considered opinion the limitation requiring him to be guided by such an opinion is warranted as a High Court judge is no expert in determining the value of land. Valuation of land clearly is not a mathematical process.

[95] However in our view, s 40D of the Act has a wider reach. The implications of the language of s 40D(1) and (2) of the Act is that the assessors in effect take over the judicial power of the court enshrined under art 121(1) of the Federal Constitution in deciding on a reasonable amount of compensation

in land reference matters. The judicial power to award compensation has been whittled away from the High Court judge to the assessors in breach of art 121 of the Federal Constitution.

[96] Counsel for the respondent referred to the parliamentary debates of Act A999 (dated 5 June 1997) and averred that the introduction of s 40D by Act A999 was in line with one of the objectives of Act A999, namely to have a strong foundation for assessment of compensation payable to land owners. Hence the appointment of court appointed assessors was basically to ensure that compensation is made accurately, quickly and fairly to reflect the true value of the land acquired.

[97] Be that as it may, whilst the intent and purposes of the above provision is commendable, it leaves open the question of whether this can be done at the expense of judicial independence and power. The constitutional compulsions would need to be realigned. The crux of the matter lies in the implication of s 40D of the Act being contrary to art 121 of the Federal Constitution.

[98] In view of the foregoing, by virtue of art 121(1) of the Federal Constitution, the power to award compensation in land reference proceedings is *a judicial power that is vested in the High Court judge* sitting in the land reference court. This argument is fortified by the provisions of sub-s 36(4) and s 2 of the Act. It imposes on the land administrator the right to refer to the High Court judge who is seised with judicial power to adjudicate.

[99] The case of *Public Prosecutor v Dato' Yap Peng* highlights that the exercise of judicial power carries two features. The first is that judicial power is exercised in accordance with the judicial process of the judicature.

This is also illustrated by Gaudron J, in *Wilson and Ors v The Minister For Aboriginal and Torres Strait Islander Affairs and Anor* (1996) 189 CLR 1 at p 22 when he said that:

> For the moment it is sufficient to note that the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the courts in which that power is vested. And public confidence depends on two things. *It depends on the courts acting in accordance with the judicial process*. More precisely, it depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process.
>
> So critical is the judicial process to the exercise of judicial power that it forms part of the definition of that power. Thus, *judicial power is not simply a power to settle justiciable controversies, but a power which must be and must be seen to be exercised in accordance with the judicial process*. (Emphasis added.)

[100] In view of s 40D of the Act, a conundrum presents itself in that the discharge of the judicial power and function to determine adequate compensation is now assigned to assessors and not the judge. It is pertinent to note that the act of determining the amount of compensation payable arising out of land acquisition cases involves *judicial assessments*, for example, whether a particular head of claim is allowed, evidential issues, whether a response to a valuer's report is permitted etc. *Hence the power to award compensation in land reference proceedings is a judicial power that should rightly be exercised by a judge and no other*.

[101] The second feature is that judicial power is vested only in persons appointed to hold judicial office. Therefore, a non-judicial personage (ie a non-member of the judicature) has no right to exercise judicial power. In *Dato' Yap Peng*, the former Supreme Court struck down the power conferred on the attorney general by s 418A of the Criminal Procedure Code which empowered him at any time to transfer (by way of a certificate) a case from the subordinate court to the High Court, which the Federal Court classified as essentially a judicial function. Mohd Azmi SCJ held that:

> Clearly, judicial power to transfer cases from a subordinate court of competent jurisdiction as presently provided by s 418A *cannot be conferred on any organ of government other than the Judiciary*. (Emphasis added.)

[102] Also, as observed by Lord Diplock in *Hinds and others v The Queen; Director of Public Prosecutions v Jackson; Attorney General of Jamaica (intervener)* [1976] 1 All ER 353 at p 360; [1977] AC 195 at p 213:

> What, however is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution.

[103] In an equally well known authority, the Privy Council upheld the decision of the High Court Australia when it struck down a legislation that united in a single body, (not a court) functions that were both judicial and non-judicial (see *Attorney-General of The Commonwealth of Australia v Reginam and The Boilermakers' Society of Australia and Others; Kirby and Others v Reginam and The Boilermakers' Society of Australia and Others* [1957] 2 All ER 45; [1957] AC 288).

[104] In a subsequent case, the Constitutional Court of South Africa struck down a provision of their Insolvency Act 1936 that conferred power on a non-judicial officer (a public servant) to issue a warrant of punishment on any person at a creditor's meeting who defies a direction to produce books and accounts (see *De Lange v Smuts and others* 1998 (3) SA 785).

[105] We are of the view that the discharge of judicial power by non-qualified persons (and not by judges or judicial officers) or non-judicial personages render the said exercise ultra vires art 121 of the Federal Constitution.

[106] This observation is fortified by the other provisions in the Federal Constitution such as are found in art 122AA:

(a) art 122AA provides that each of the High Courts (of Malaya and Sabah and Sarawak) '*shall consist of the Chief Judge and other Judges*'. (Emphasis added.)

In our view, the peremptory provision in art 122AA is explicit in its truism in that it is not permissible for assessors (as non-judicial personages) to sit in the High Court;

(b) this is further emphasised by art 122AA(2) where the composition of the High Court shall be of judges 'designated' to sit in the High Court. These are persons entitled and qualified for appointment as provided for in art 122B;

(c) by art 122B(5) of the Federal Constitution, it is clear that a person designated to sit as a judge of a High Court shall be a person qualified under art 123 and appointed under art 122B; and

(d) art 122B of the Federal Constitution provides for the appointment of judicial commissioners to perform functions of a High Court judge. However there is no provision in the Constitution that allows assessors to perform the functions of a High Court judge.

[107] In essence, it was contended that the courts in the past had tried to lessen the impact of sub-ss 40D(1) and (2) of the Act by holding that the role of the judge is not to merely rubber stamp the decision of the assessor, the judge should also be satisfied that the assessors, in forming their opinion, had considered all relevant matters (see decision of Zaleha Zahari JCA (as Her Ladyship then was) in *Jitender Singh*).

[108] However in looking at the judge's grounds in this appeal as in others (under this provision) it is apparent to us that it is bereft of judicial reasoning. With respect, the judge did exactly what the court in *Jitender Singh* said it should not do ie it merely rubber-stamped the decision of the assessors, which is not only a breach of s 47 of the Act but more importantly, it violates art 121 of the Federal Constitution.

[109] Clearly, sub-ss 40D(1) and (2) of the Act *do not* empower the High Court judge to disagree with the assessors or give them directions or instructions. Thus, even if the High Court judge records his dissatisfaction against the decision of the assessors, it would be an exercise in futility since the

aggrieved landowner is left without any recourse, as the assessors' decision is final.

[110] The sting of unfairness of sub-ss 40D(1) and (2) of the Act bites further in sub-s 40D(3) and the proviso to sub-s 49(1) of the Act when landowners are prevented from appealing the decision of the assessors.

[111] However this provision on appeal will be expanded latterly. Meanwhile, our view is that sub-ss 40D(1) and (2) of the Act, ignores the role of judges as defenders of the Constitution and renders the constitutional guarantee of adequate compensation illusory since judges 'abdicate' their constitutional role, for the guarantee of adequate compensation is now in the hands of two lay assessors.

[112] Thus, within the ambit of arts 13 and 121 of the Federal Constitution, the premise of a constitutional challenge is art 4(1) of the Constitution.

[113] By virtue of art 4(1) of the Federal Constitution, this court may hold the provisions of any law passed after Merdeka as void and of no effect if such laws are inconsistent with the Federal Constitution.

[114] Our Federal Constitution affirms the polemic that judicial power is exercisable only by judges sitting in a court of law; and that the judicial process is administered by them and no other.

[115] For all the reasons above, we find s 40D of the Act to be ultra vires the Federal Constitution and that it should be struck down.

[116] What then would the consequence be if s 40D of the Act is struck down?

Since the preceding ss 40A, 40B and 40C of the Act are not impugned, a proposed *new* s 40D would have to be put in place, without affecting the efficacy and legality of ss 40A, 40B and 40C. The new s 40D of the Act would have to take into account the following:

Any objection as against the amount of compensation awarded by the land administration would continue to be determined by a judge sitting in a land reference court. The provision of sub-s 36(4) of the Act is to be given full effect. Only that this time, the role of the assessors would have to be redefined.

[117] In this new provision the assessors are expected to listen to the proceedings and evaluate the evidence. They may also be required to answer any questions of fact within their competence, consonant with their role as advisors under sub-s 40(2) of the Act.

[118] At the end of the proceedings, they are required to give their opinion as to the appropriate amount of compensation to be awarded in a particular case.

[119] At the conclusion of the proceedings, it is requisite under s 40C of the Act that they put their opinion in writing as to the appropriate amount of compensation to be awarded in a particular case.

[120] It is then for the judge and the judge alone to deliberate on the issue of quantum before him, after taking into account all the issues.

[121] In so doing, it is not uncommon for the judge to give weight to the opinion of the assessors, for as experts in valuation of property, their opinion stand persuasively to be considered by the judge.

[122] However the assessors have no more role as soon as they put their opinion in writing. At the risk of tedium, it bears repeating that it is for the judge and the judge alone to exercise his mind and determine the issues before him, based on the advice given him by the assessors.

[123] It is reiterated that the opinion of the assessors are not binding on the judge. In the event the assessors disagree (as between themselves regarding the amount of compensation to be awarded in a particular case), the judge may, after considering both opinions, elect to consider which of the two opinions in his view is appropriate in the circumstances of the case. However he is not bound by either one of the opinions. Should the judge finds himself in disagreement with the opinion of both the assessors, he is at liberty to decide the matter, giving his reasons for so doing.

These then are to be made clear in place in the proposed new s 40D.

[124] It would in no small way, emphasise the punctilious nature of the assessors' advice and the value their role represents.

[125] At the end of it, the sanctity of judicial power is preserved. The judge and the judge alone determines the outcome of the objections as to the amount of compensation after affording the person or persons interested ample opportunity to ventilate his or their concern.

Prospective overruling

[126] As regards the present s 40D of the Act, since we have declared it to be unconstitutional, our decision is to have prospective effect. The doctrine of prospective overruling will apply here so as not to give retrospective effect to the declaration made.

[127] As a matter of principle, a court judgment is 'retrospective in effect unless a specific direction of prospectivity is expressed'. This principle has been decided by the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393.

[128] In *Mohd Radzi*, the Federal Court had occasion to explain on the application of the doctrine of prospective overruling. Reference was made to the decision of the House of Lords in *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] UKHL 41. In the words of Lord Nicholls of Birkenhead:

> People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling', sometimes described as 'non-retroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for court rulings on points of law which, to greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions.

[129] In *Mohd Radzi*, the Court of Appeal set aside the conviction of the High Court against the respondent for the offence of trafficking in dangerous drugs under sub-s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The issue before the Federal Court is whether the Court of Appeal was entitled to apply the decision of the Federal Court in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 on the rule against double presumptions in sub-s 37(d) of the DDA read with sub-s 37(da) of the DDA, when such decision came much later, after the High Court convicted the respondent.

[130] In answering the above issue in the affirmative, the Federal Court in *Mohd Radzi* made the following remark:

> When the learned judge at first instance tried the respondent and handed down his decision, *Muhammed bin Hassan* was yet to be decided. However, the judgment of this court in *Muhammed bin Hassan* had been handed down before the respondent's appeal against his conviction was heard by the Court of Appeal. It then became necessary for the Court of Appeal, in accordance with the principles adverted to by Lord Nicholls in *Spectrum Plus*, to apply *Muhammed bin Hassan* to this case. It is in this way that the declaration of the common law by a superior court operates retrospectively.

[131] The doctrine of prospective overruling was also applied in the case of

Public Prosecutor v Dato' Yap Peng [1987] 2 MLJ 311. The Supreme Court by a majority (Tun Mohamed Salleh Abas LP and Tan Sri Hashim Yeop A Sani SCJ dissenting) declared s 418A of the Criminal Procedure Code to be unconstitutional and void as being an infringement of the provisions of art 121(1) of the Federal Constitution. The court then applied the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of the judgment in that matter would remain undisturbed and not be affected.

[132] Referring to the appeal before us, we found that s 40D is ultra vires the Federal Constitution and should be invalid. By precedent, declarations of invalidity are made prospectively so as not to affect previous decisions made under the invalid law (see *Public Prosecutor v Dato' Yap Peng*).

[133] In that case, all proceedings involving compensation in land acquisition matters which had taken place and been determined under this provision prior to the date of this judgment will remain status quo.

[134] For the avoidance of any doubts, such a declaration will bind pending cases at first instance or at the appellate stage (see *Public Prosecutor v Mohd Radzi bin Abu Bakar*).

PART B (THE BAR TO APPEAL)

The right of appeal

[135] A perusal of the provisions limiting appeals under the Act is called for here:

Subsection 40D(3) of the Act reads:

> (3) Any decision made under this section is final and there shall be no further appeal to a Higher Court on the matter.

Subsection 49(1) of the Act and its proviso reads:

> (1) Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court:
>
> Provided that where the *decision comprises an award of compensation* there shall be no appeal therefrom. (Emphasis added.)

[136] We take the position that the word 'decision' mentioned in sub-s

40D(3) of the Act flows from the decision-making process described in its preceding subsections which we have held to be unconstitutional. However our finding of unconstitutionality of s 40D of the Act is because of the decision-making process only, ie the determination of the amount of compensation by the assessors. No more no less.

[137] The provision limiting appeal is in our view, a separate and distinct issue. It does not contribute to the invalidity of sub-s 40D(3) of the Act. To hold otherwise would be contrary to sub-s 68(1)(d) of the Courts of Judicature Act 1964 ('the CJA'). The law recognises the power of the Legislature to enact laws limiting appeals by declaring the finality of a High Court order. Subsection 68(1)(d) reads:

> No appeal shall be brought to the Court Of Appeal in any of the following cases:
>
> (a)–(c); and
>
> (d) Where, by any written law for the time bring in force, the judgment or order of the High Court is expressly declared to be final.

[138] An important component in the issue of the bar to appeal in sub-s 40D(3) of the Act is the proviso to sub-s 49(1). Paragraph 25 of the explanatory statement to the Bill for Act A999 states that sub-s 49(1) was amended so as to include the provision limiting appeals as a result of the introduction of sub-s 40D(3) of the Act.

[139] Hence despite the fact that s 40D has been declared unconstitutional, its discussion is material in the context of the proviso to sub-s 49(1) of the Act. Subsection 40D(3) of the Act is a finality clause. It declares that any decision made by the Land Reference Court under s 40D ie on the amount of compensation is 'final'. Consequently, a decision made under s 40D of the Act ends in the High Court. The law restricts appeals to be brought against the 'amount of compensation'.

The bar to appeal in sub-s 49(1)

[140] The application of sub-s 49(1) of the Act has been set out by this court in *Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal* [2013] 6 MLJ 626. It was held that based on sub-s 49(1), an aggrieved party has the right to appeal to the Court of Appeal and therefore to the Federal Court without having to resort to the leave process under sub-s 96(a) of the CJA (per Raus Sharif PCA).

[141] On the other hand, the proviso to sub-s 49(1) seeks to qualify a full right of appeal (which is given in the body of the section) in that there can be no appeal 'where the decision comprises an award of compensation'.

[142] The proviso should not be construed to disembody the section. A proviso has to be read as being part of the main section and not independent of it. As Viscount Dilhorne said in the Privy Council in *Commissioner of Stamp Duties v Atwill and others* [1973] 1 All ER 576 at p 579:

> ... It is the substance and content of the enactment, not its form, which has to be considered, and that which is expressed to be a proviso may itself add to and not merely limit or qualify that which precedes it.

'DECISION COMPRISES AN AWARD OF COMPENSATION' IN SUB-S 49(1) OF THE ACT

[143] The proviso to sub-s 49(1) of the Act explicitly sets out a limitation on the content of the appeal — in that there can be no appeal 'where the decision comprises an award of compensation'.

[144] A literal reading of the proviso to s 49 of the Act would mean that there is a complete bar on all appeals to the Court of Appeal from the High Court on a question of compensation.

[145] On behalf of the respondent, the senior federal counsel submitted that the language of the proviso to sub-s 49(1) is clear and unequivocal in that where the High Court's decision is grounded on compensation, no appeal can be brought against that decision. The courts must give effect to the clear provisions of the law.

[146] The above contention finds support in two decisions of the Federal Court. In *Calamas Sdn Bhd v Pentadbir Tanah Batang Padang* [2011] MLJU 1528; [2011] 5 CLJ 125, the Federal Court, inter alia, held that:

> ... In the instant appeal I do not see anything ambiguous in ss 40D and 49(1) of the Act. In view of this, I am of the view that the Appellant is precluded from appealing *against the order of compensation* issued by the learned judge.

[147] A similar pronouncement was made in the case of *Syed Hussain* where His Lordship Raus Sharif PCA said:

> With the introduction of s 40D and the amendment to the proviso of s 49(1) the intention of Parliament is very clear, ie to preclude any party from appealing *against the order of compensation* made by the High Court ... (Emphasis added.)

[148] We are of the view that this purported ouster of the right of appeal in respect of compensation ought to be narrowly and strictly construed. One has to revert to the tangible weight of the wording of art 13(1) of the Federal Constitution where the safeguards are that an acquisition must be 'in accordance with law' and that the compensation should be 'adequate

compensation'. The proviso to sub-s 49(1) of the Act must be strictly interpreted in favour of the person who has been deprived of its property so as to give meaning to the constitutional protection of a person's right to his property.

[149] It is axiomatic that a right of appeal is statutory. What then is the effect of this? First, it simply means that when conferred by statute, the right of appeal becomes a vested right. Correspondingly the jurisdiction of the court to hear appeals is also conferred by statute (see *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549; *Wan Sagar bin Wan Embong v Harun bin Taib & Ors* [2008] 4 MLJ 473).

[150] A fortiori, the nature of the appeal depends on the terms of the statute conferring that right. It is a matter of construction to be given to the provisions conferring the right to appeal. Legislative intention can also be found by examining the legislation as a whole. Limiting the right to bring an appeal is a way of encouraging finality. If an examination of the language and policy of the Act granting the right of appeal concludes that Parliament intends to limit an appeal, the court must give effect to it.

[151] We have perused the facts and the decisions of this court in *Calamas* and *Syed Hussain*. The cases do not represent a bar to appeal against any decision of the High Court on compensation. Even if *Calamas* and *Syed Hussain* represent a bar to appeal against any decision which comprises compensation, the Federal Court in these two cases were not invited to consider issues of constitutionality or the restrictive dimension of sub-s 49(1) in the face of art 13 of the Federal Constitution, since it was never raised there. Instead the issues in these two cases merely revolved around the construction of sub-s 40D(3) and sub-s 49(1) of the Act.

[152] In our view, what needs clarification here is the phrase 'against the order of compensation made by the High Court' which was used by the Federal Court, both in *Calamas* and *Syed Hussain*. The question is whether such expression denotes any decision issued by the High Court with regard to compensation.

[153] In our view this does not appear to be the case. It is obvious that the subject matter of the appeals in both cases was purely on the inadequacy of quantum of compensation awarded by the High Court. It was on this basis that Hashim Yussof FCJ in *Calamas*, concluded that:

> It would appear that from the grounds of judgment of the Court of Appeal (at p 16 appeal record volume I), the issue put forward before the court was whether the learned judge was correct in determining the *amount of compensation* to be awarded to the appellant. (Emphasis added.)

> ... I am of the view that the said section clearly stipulates that 'Any decision made under this section is final and there shall be no further appeal to a higher court on the matter'.
>
> It is trite law that courts must give effect to the clear provisions of the law. In the instant appeal I do not see anything ambiguous in ss 40D(3) and 49(1) of the Act. In view of this, I am of the view that the appellant is precluded from appealing against the order of compensation issued by the learned trial judge.

[154] The position is reinforced by the restrictive approach taken by the Federal Court in the interpretation of the proviso to sub-s 49(1) of the Act. In *Syed Hussain*, His Lordship Raus Sharif PCA held that because of its legislative background, the proviso to sub-s 49(1) of the Act must be read together with the provision of sub-s 40D(3) of the Act. The intention of Parliament is clear. There can be no appeal against the decision of the High Court on the amount of compensation. The relevant part of the judgment reads:

> Thus while s 49(1) of the LAA allows any interested person to appeal against the decision of the High Court to the Court of Appeal, section 40D appears to have restricted the ambit of such an appeal. Section 40D(3) clearly provides that any decision as to the amount of compensation award shall be final and there shall be no further appeal to the higher Court on the matter. This non-appealable provision of s 40D(3) is further reinforced by the proviso of s 49(1) which reads:
>
> > Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.
>
> Historically speaking, s 40D is a new section introduced by the Land Acquisition (Amendment) Act 1997 (Amendment Act 1997). The Amendment Act 1997 had also, inter alia, amended the proviso of s 49(1) of the LAA.

[155] To sum up, the proviso to sub-s 49(1) of the Act does not represent a complete bar on all appeals to the Court of Appeal from the High Court on all questions of compensation. Instead the bar to appeal in sub-s 49(1) of the Act is limited to issues of fact on ground of quantum of compensation. Therefore an aggrieved party has the right to appeal against the decision of the High Court on questions of law.

Whether the provision limiting appeal under the Act is ultra vires arts 121(1B) and 13 of the Constitution

[156] Before us, counsel for the applicants in the reference, submitted that the provisions limiting appeals under the Act are unconstitutional because they contravene art 121(1B) of the Federal Constitution.

Article 121(1B) reads:

(1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:

(a) jurisdiction *to determine appeals* from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and

(b) such other jurisdiction as may be conferred by or under federal law. (Emphasis added.)

[157] Counsel for the applicants has approached this court to view the word 'appeals' in art 121(1B)(a) of the Federal Constitution in a general context so as to denote 'all appeals'. In effect, it was submitted that art 121(1B)(a) confers the Court of Appeal the power to determine all appeals arising from the High Court without limitation. The legal implication is that, the right of the applicants to appeal against the decision of the High Court is guaranteed by art 121(1B)(a) of the Federal Constitution.

[158] The above interpretation of art 121(1B) of the Federal Constitution was applied by the minority judgment of the Court of Appeal in *Yong Teck Lee v Harris Mohd Salleh & Ors* [2002] 3 MLJ 230. In that case a challenge was made against s 36 of the Election Offences Act 1954, which purported to exclude the appellate jurisdiction of the Court of Appeal. KC Vohrah JCA, in his dissenting view, held that the word 'appeals' in art 121(1B) must refer to 'all appeals' and that art 121(1B) confers jurisdiction on the Court of Appeal to determine all appeals from decisions of the High Court. Therefore in His Lordship's view, 'the Court of Appeal's appellate jurisdiction cannot be abrogated, limited or restricted'. This is so, because if Parliament intends to limit the appellate jurisdiction of the Court of Appeal as provided in art 121(1B)(a), it would have said so by expressly introducing a provision to that effect. But such restriction can only be found in the Constitution in respect of the appellate jurisdiction of the Federal Court. By art 128(3), Parliament makes it certain that the jurisdiction of the Federal Court to hear appeals from the Court of Appeal or the High Court is what has been conferred by federal law.

Article 128(3) reads:

The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

[159] However we find that the view presented above is too rigid. It fails to consider the legislative background of art 121(1B). It must be reiterated that

art 121(1B) was introduced in the Constitution by Act A885 upon the creation of the Court of Appeal. The provision of art 121(1B) came into force on the same day with Act A886 which amended ss 50, 67 and 68 of the CJA, ie the provisions governing the jurisdiction of the Court of Appeal in criminal and civil matters.

[160] Having said that, the intention of the Legislature is clear. Article 121(1B) of the Federal Constitution must be read together with the provisions in the CJA which set out the appellate jurisdiction of the Court of Appeal. This was the position taken by the majority decision of the Court of Appeal in *Yong Teck Lee* and approved later by the Federal Court in *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173.

[161] What is the significance of art 121(1B) of the Federal Constitution? Article 121(1B) is a general provision relating to the jurisdiction of the Court of Appeal. It is an empowering provision declaring that the Court of Appeal has the jurisdiction to determine appeals from decisions of the High Court. A provision similar to that is art 121(2)(a) of the Federal Constitution which provides for the appellate jurisdiction of the Federal Court. It is clear that art 121(1B) is in substance, in pari materia with art 121(2)(a).

[162] Article 121(2)(a) reads:

> There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Federal Court shall have the following jurisdiction, that is to say —
>
> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;

[163] Article 121(2) of the Federal Constitution has been interpreted by this court in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385. The term 'jurisdiction to determine appeals' in the said provision was given its ordinary meaning. It was held that the absence of the word 'all' preceding the word 'decisions' can only mean that Parliament intended that not all decisions are appealable. Steve Shim CJ (Sabah and Sarawak) in delivering the judgment of the court, emphasised that:

> In my view, art 121(2) of the Federal Constitution is a general provision relating to the jurisdiction of the Federal Court. It is an empowering provision which states that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal and the High Court. It is pertinent to note the conspicuous absence of the word 'all' or 'any' preceding the word 'decisions' in the provision. If it was the intention of Parliament to confer jurisdiction on the Federal Court to hear appeals from all decisions of the Court of Appeal, the word 'all' or 'any' would have

been included therein. The exclusion of those words, in my view, was clearly deliberate. It was intended that not all decisions are appealable.

[164] We are of the view that since the wording of cll (1B)(a) and (2)(a) of art 121 of the Federal Constitution, in so far as they are material for the present discussion, is identical, the same interpretation given by this court in *Megat Najmuddin* to cl (2) of art 121 must be made applicable to cl (1B) of the same article.

[165] In view of the above, we hold that the proviso to sub-s 49(1) of the Act is not ultra vires art 121(1B) of the Federal Constitution. Article 121(1B) is a general provision empowering the Court of Appeal to hear appeals from decisions of the High Court. The jurisdiction of the Court of Appeal to hear appeals from the High Court should be exercised by reference to the CJA. The bar to appeal against the amount of compensation awarded by the High Court as contained in the proviso to sub-s 49(1) operates within the framework of sub-s 68(1)(d) of the CJA.

[166] Counsel for the appellants then submitted that the bar to appeal in sub-s 49(1) must be read restrictively in view of the safeguards in art 13(2) that payment of compensation arising out acquisition must be 'adequate'.

We are of the view that filing an appeal is one of the means of ensuring that the award of the High Court on compensation has been given adequate consideration. However, being statutory in nature, Parliament has restricted the right of appeal on the amount of compensation. Courts would naturally accede to Parliament's wisdom.

[167] In view of the safeguards in art 13(2), the Legislature must ensure that there is an appropriate balance between finality of decision on one hand, and accurate fact-finding and correct interpretation of the law on the other. Putting this in a nutshell, when the law limits an appeal to be filed by a party in a proceeding, the provisions with regard to due process of hearing and decision making on assessment of compensation under the Act must be satisfactory in order that the constitutional safeguards are upheld. A question then arises: Has this been achieved?

[168] In this regard, it is incumbent upon us to examine the process of adjudication taken before the land administrator and the High Court on issues of compensation. An overview of the Act provides that a determination of an award of compensation involves two stages of hearings:

(a) the first hearing is the enquiry held by a land administrator. Based on sub-s 13(1) of the Act, the land administrator in hearing an enquiry is equipped with the power to summon witnesses and compel the

production of documents. Both parties are entitled to produce evidence on the valuation of the acquired land. The proviso to s 12 of the Act also states that the land administrator may obtain written opinion on the value of the land acquired before arriving at his decision; and

(b) the second stage of hearing takes place if the award of the land administrator is referred to the High Court under sub-s 36(4) of the Act. Section 45 of the Act and the Third Schedule to the Act confer jurisdiction on the High Court to review the land administrator's award.

[169] A perusal of s 45 and the Third Schedule discloses that a reference proceeding before the High Court takes the form of a hearing where parties are at liberty to ventilate issues in the reference and give evidence in court.

[170] Each party can bring their experts to court to prove his claims (on the amount of compensation payable arising out of the acquisition). Evidence is adduced in court by way of affidavit. Despite that, the opinion given by valuers in their valuation reports is subject to cross-examination and re-examination by oral evidence.

[171] It is also seen that the Legislature, by Act A999, has considered that in arriving at an award of compensation, a High Court judge can no longer rely on the traditional adjudicative method of weighing up the evidence adduced. Greater professionalism is required since the assessment of compensation would involve empirical evidence and is increasingly complex. In the circumstances, the introduction of ss 40A, 40B and 40C of the Act has brought about a radical, if not drastic change, to the decision-making process of the High Court.

[172] Under this new regime, the appointment of the assessors in a land reference court proceeding serves a vital role in assisting the High Court judge to decide on issues of compensation and what is appropriate in the circumstances of the particular case. The assessors' expertise is of great probative value. In this the Act demands transparency in the decision-making process.

[173] Thus by s 40C of the Act, the opinion of each of the assessors on compensation are to be made in writing and are to be recorded by the judge. It is evident that the relevant provisions brought about by Act A999, attempted to strike an appropriate balance between finality of decision which bars appeals against quantum of compensation and the procedures for hearing described under the Act before the judge can arrive at an appropriate amount of compensation. The provisions in the Act serve to protect the rights and interests of interested persons in matters arising out of the compensation.

Non-compliance with s 40C of the Act

[174] Counsel for the appellant averred that due to non-compliance with s 40C of the Act, the appellant's constitutional right to fair and reasonable compensation arising from the compulsory acquisition has been violated.

[175] Section 40C provides that 'the opinion of each assessor on the various heads of compensation claimed by all persons interested shall be given in writing and shall be recorded by the judge'.

[176] In this appeal, the substratum of the appellant's objection before the High Court was grounded on claims for loss of profits and other expenses incurred by the appellant arising out of the termination of the industrial project as a result of the acquisition of part of Lot 1883. The decision of the High Court even though signed by both assessors, made no reference whatsoever to any opinion of the assessors for not allowing these claims. There was no reason given as to why the court dismissed the claims made under these headings, save for a statement in the grounds of judgment which reads: 'lain-lain tuntutan tidak dipertimbangkan selain dari yang telah dibayar oleh pihak Pentadbir Tanah'.

[177] It can be discerned from the grounds of judgment of the Court of Appeal that the issue of non-compliance of s 40C of the Act was canvassed before the Court of Appeal. However there was no ruling by the court on this issue. Instead the court went on to inquire into the meaning of the words 'tidak dipertimbangkan' used by the High Court, and held that they were merely reflective of the usual Malay courtesy when communicating a rejection, so as to inform parties that 'the claims had been considered but not allowed'.

[178] We are of the view that non-compliance with s 40C of the Act amounts to a misdirection which merits appellate intervention. In the present case, the court's decision appears to be incomplete in that although it was attested to by the assessors, it contains no opinion in relation to the decision, as envisaged by s 40C of the Act. The appellant's constitutional right to a fair and reasonable compensation arising from compulsory acquisition has been violated because the statutory safeguards to determine the amount of compensation awarded as stated in s 40C of the Act was not complied with.

[179] Case laws have shown that breaches of peremptory orders would suffer the fate of it having to be set aside. In *Lee Ah Mok & Ors v Pentadbir Tanah Daerah Seremban & Anor* [2009] 5 MLJ 422; [2009] 4 CLJ 611 for instance, the Court of Appeal held that an order made in contravention of s 45 of the Act 'was tainted' and ought to be set aside.

[180] Similarly the contravention of s 40C of the Act should attract the same legal repercussion, as s 40C is a mandatory provision of the Act.

[181] In another Court of Appeal decision, *Ee Chong Pang & Ors v The Land Administrator of the District of Alor Gajah & Anor* [2013] 2 MLJ 16, it was held that the non-issuance of Form A was a breach of procedure and that there was infringement of art 13. Emphasis was given that in proceedings for the deprivation of property under the Act, there has to be strict compliance with its provisions, for otherwise, art 13(1) of the Federal Constitution would have been violated.

[182] Thus, in cases where there is failure to observe the procedure as set out in the Act as in the instant appeal, there is a breach of the safeguards provided for in art 13(1) of the Federal Constitution, of the principle couched therein, which is 'save in accordance with law'. Can appeals be limited if there is non-compliance with s 40C of the Act? The answer must be in the negative. The bar to appeal in sub-s 49(1) does not operate when there is non-compliance with the statutory provisions of the Act.

[183] It has to be reiterated that s 40C of the Act is mandatory. What then is the significance of s 40C? Section 40C reflects the vital role and duties of assessors who sit with a High Court judge in a land reference proceeding.

[184] The law in s 40C of the Act imposes on the assessors a duty to consider the various heads of compensation claimed by the interested persons and form their expert opinion. It is a statutory safeguard to protect the landowners and interested persons in matters comprising compensations.

[185] Section 40C of the Act also makes it mandatory that the opinion of the assessors on the heads of compensation be given in writing. It has to be remembered that the valuation of the land and assessment of compensation arising out of the acquisition are not a mathematical process. The requisites of valuation and assessment are pertinent, to show that the opinion given on the amount of compensation is well founded.

[186] Another important requirement imposed by s 40C of the Act is that the written opinion of assessors is to be recorded by the judge. In the circumstance the judge has to be satisfied that the assessors had, in forming their opinions, considered all matters that ought to be considered under the Act. This is another statutory safeguard under art 13 of the Federal Constitution.

[187] The importance of s 40C of the Act also lies in the transparency of the decision making process. In the words of Viscount Simon LC in *Richardson v Redpath Brown & Co Ltd*:

> It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice which he has received.

The opinion of the assessors serves to inform the interested persons that the court has considered all issues brought before the court and sought professional views before arriving at its decision. The provision in s 40C of the Act is also significant in view of the bar to appeal provided for in sub-s 49(1) of the Act.

[188] The written opinion of the assessors also serves to facilitate the appellate courts in the event an appeal is filed. The advice given by the assessors in the High Court must be made available to the appellate courts.

[189] In conclusion, s 40C of the Act forms an important component of the decision making process in land reference proceedings. It sets out the requirements to be observed by the assessors and the judge before decision is arrived at. Therefore non-observance of s 40C of the Act amounts to a misdirection of the court which renders the decision invalid. Suffice to say that for this reason alone, this appeal must be allowed.

PART C (CLAIM FOR LOSS OF PROFIT)

Award of compensation

[190] We will now deal with the issue of the award of compensation.

In this appeal the award of compensation made by the land administrator and the High Court can be summarised as follows:

(a) market value of the land (part of Lot 1883): RM17,627,400;

(b) consequential loss: RM3,234,881.75 being compensation for the loss suffered from termination of the project namely piling works, building works, preliminary expenses incurred for mobilisation and setting up of construction site, advertisement fees and marketing fees; and

(c) severance and injurious affection: RM1,160,020.

What are the appellant's complaints?

[191] The appellant's complaint is that at the time of acquisition, the appellant had already embarked on commercially developing the land. Earthworks and piling works had commenced. The appellant had entered into 57 sale and purchase agreements with third party buyers of the factory units being built. It had collected the 10% deposit and had expended funds for the development works.

[192] However the acquisition had extinguished the appellant's ongoing business on the land. The appellant lost the profits that it was in the course of making at the time of acquisition.

[193] Counsel for the appellant submitted that adequate compensation denotes 'a fair and reasonable compensation' (see *Jais bin Chee & Ors v Superintendent of Lands and Surveys Kuching Division, Kuching* [2014] 6 MLJ 439; [2014] 3 CLJ 467). It was also averred that the safeguard of 'adequate compensation' in art 13(2) of the Federal Constitution means that the compensation has to be on the basis of 'just equivalent of what the owner has been deprived of' (see *The State of West Bengal v Mrs Bela Banerjee and others* 1954 AIR 170).

[194] It was also submitted that based on the principle of 'equivalence', the appellant is to be compensated for its loss of business arising out of the acquisition, and that the court should recognise this claim as one falling under the safeguard of 'adequate compensation' under art 13(2) of the Federal Constitution.

In view of the above it was submitted that the term 'market value' in the First Schedule must satisfy the test of a full and fair money equivalent or just equivalent of the property acquired. It cannot be read restrictively as being limited only to comparable sales of land in the vicinity within two years prior to acquisition.

[195] The appellant relied heavily on the decision of the Privy Council in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846; [1995] 2 AC 111. It was submitted that adequate compensation requires that the appellant be compensated for its loss of business on the land. Compensation should cover the value of the land to the appellant ie the loss of business on the land, as well as the market value of the land itself.

The case of *Shun Fung Ironworks Ltd* involved an acquisition of land in Hong Kong where a steel-mill was located. The acquisition extinguished the business of the landowner carried out on the land. In the circumstances, Lord Nicholls made the following observation:

> Land may, of course, have a special value to a claimant over and above the price it would fetch if sold in the open market. Fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority. As already noted, this is well established. If he is using the land to carry on a business, the value of the land to him will include the value of his being able to conduct his business there without disturbance. Compensation should cover this disturbance loss as well as the market value of the land itself. The authority which takes the land on resumption or compulsory acquisition does not acquire the business, but the resumption or acquisition prevents the claimant from continuing his business on the land. So the claimant loses the land and, with it, the special value

it had for him as the site of his business. The expenses and any losses he incurs in moving his business to a new site will ordinarily be the measure of the special loss he sustains by being deprived of the land and disturbed in his enjoyment of it. If, exceptionally, the business cannot be moved elsewhere, so it simply has to close down, prima facie his loss will be measured by the value of the business as a going concern. In practice it is customary and convenient to assess the value of the land and the disturbance loss separately, but strictly in law these are no more than two inseparable elements of a single whole in that together they make up the value of the land to the owner: see *Hughes v Doncaster Metropolitan Borough Council* [1991] 1 AC 382 at p 392, per Lord Bridge of Harwich.

[196] In the above case, the Privy Council awarded compensation on the extinguishment basis on a finding that the acquisition had extinguished the business of the appellant on the land acquired.

How would this decision relate to the instant appeal? A pertinent issue would be the question of adequate compensation.

Adequate Compensation

[197] Article 13(2) is a constitutional safeguard to land owners to receive 'adequate compensation' upon acquisition. Even as the Act authorises the state to acquire land from land owners, the law provides that the person deprived of his property must be adequately compensated.

[198] But what is adequate compensation for a person who has been deprived of his or her property? The term 'adequate compensation' is not defined in the Act. In *Pentadbir Tanah Daerah Gombak lwn Huat Heng (Lim Low & Sons) Sdn Bhd* [1990] 3 MLJ 282, the Supreme Court held that 'the basic principle governing compensation is that the sum awarded should, as far as practicable, place the person in the same financial position as he would have been in had there been no question of his land being compulsorily acquired' (see *Compulsory Acquisition and Compensation* by Sir Frederick Corfield QC and RJA Carnwath).

[199] The above principle is known as the principle of equivalence. By this principle, the affected land owners and occupants are entitled to be compensated fairly for their loss. But they should receive compensation that is no more or no less than the loss resulting from the compulsory acquisition of their land.

Assessment of compensation under the Act

[200] An assessment of compensation arising out of an acquisition is governed by the First Schedule to the Act. Based on the First Schedule, the quantum of

compensation is based on the market value of the land acquired plus the consequential loss suffered by the affected land owners and occupants. Thus an assessment of compensation is underpinned by the principle of equivalence. The affected land owners and occupants are entitled not only to the market value of the land but also to compensation for the loss and disturbance occasioned, arising out of the acquisition. For a claim to be allowed, it must fall within the heads of compensation listed in para 2 of the First Schedule.

[201] Based on para 2 of the First Schedule there are six matters (heads of compensation) which are to be taken into consideration when compensation is determined. The heads of compensation are: (a) market value; (b) increase in value of the other land of the person from whom land is acquired; (c) damage caused by severance from any other land of the person from whom the land is acquired; (d) injurious affection; (e) forced change of residence or place of business due to acquisition; and (f) where only part of the land is acquired, any undertaking given by the state authority for the provision of facilities for the portion left unacquired.

Paragraph 1 of the First Schedule is the market value rule. Generally, the market value of an acquired land comprises the value of the land acquired based on comparable sales in the vicinity of the acquired land and the condition of the land having regard to the existence of any buildings, improvements to the land and any encumbrances and restrictions in the title.

[202] By para 3, any matter which falls within the descriptions provided in the paragraph must not be taken into consideration in assessing the amount of compensation. Such matters include the urgency in acquiring the land and any depreciation or increase in the value of the land acquired as a result of the acquisition.

The question then arises, would compensation for loss of business be allowed under the Act?

Business compensation

[203] The principle of business compensation has been explained by the Privy Council in the case of *Shun Fung Ironworks Ltd*. If a person's business located on an acquired land is affected by the acquisition, he is entitled to claim for business compensation. If the business can be relocated, compensation is assessed on a relocation basis. However, if the business is incapable of being relocated, compensation is assessed on an extinguishment basis.

In relocation basis, a claimant is entitled to claim for loss of profits and incidental costs of relocation. Loss of profits is to be assessed for the reasonable time it takes to relocate a business in a new place. However such costs must not

be unreasonable and that relocation must be reasonably practicable. There is an obligation on the claimants to take all reasonable steps to ensure that their losses are kept to a minimum. Thus where a higher price is paid for the relocation premises, there is a presumption of value for money (*Shun Fung Ironworks Ltd*).

[204] Compensation for the relocation of a business should generally not exceed the compensation that would be determined for the extinguishment of the business. This was the position in *Shun Fung Ironworks Ltd*.

[205] In cases where relocation is impracticable (as in the appeal), no compensation is to be determined for loss of future profits. Instead the claim is to be considered based on 'the extinguishment basis'. The loss of business goodwill is contained within the market value of the land. The claim does not therefore form the basis for an item of consequential loss.

[206] The general principle governing the extent of compensation claimable for consequential loss is that such loss must not be too remote and that it is the natural and reasonable consequence of the acquisition (*Harvey v Crawley Development Corporation* [1957] 1 QB 485).

[207] Paragraph 2(e) of the First Schedule provides that a claimant is entitled to 'reasonable expenses' incurred by him if he is compelled to change his residence or place of business. Such claim covers the actual cost of shifting to new premises and costs 'incidental to such change'. However the First Schedule makes no reference to a claim for loss of business goodwill when relocation is impractical.

[208] The senior federal counsel on behalf of the respondent averred that the appellant is not entitled to a claim for loss of business profits in the absence of any explicit provision in the Act with regard to such claim. Paragraph 2 has made it clear that, 'in determining the amount of compensation to be awarded for any scheduled land acquired under this Act there shall be taken into consideration the following matters and no others'. It was submitted that a claim for compensation can only be awarded if it falls within the heads of compensation described in para 2 of the First Schedule and 'no others'.

[209] It is our finding that the principle of equivalence requires that the appellant is compensated for his true loss. This must include compensation for loss of its business. Applying the principle laid down in *Shun Fung Ironworks Ltd*, such claim falls under the heading 'market value' of the land as stated in para 2(a) and para 1 of the First Schedule.

[210] We are of the view that the value of the land in its actual condition

together with its profit value should be considered in determining market value of the acquired land. This was also decided by the Federal Court in *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 where Syed Agil Barakbah FJ held that:

> ... its potentialities must be taken into account. The nature of the land and the use to which it is being put at the time of acquisition have to be taken into account together with the likelihood to which it is reasonably capable of being put to use in the future e.g. the possibility of it being used for building or other developments.

[211] It needs emphasis that the market value rule in para 1 must not be construed rigidly. It is noteworthy that para 1 of the First Schedule itself does not define the term market value. Instead it enumerates the process of determining market value of the land. Apart from the price of comparable sales of the acquired land in the vicinity, the conditions of the land forms a basis in the computation of market value. Thus any restrictions in title, any specification and category in the land use ought to be considered in determining the market value of the land. Similarly, any improvement made by the owner to the land (subject to the restriction imposed in para 1) and the existence of any building on the subject land are also to be considered.

[212] In the present case, what was the actual condition of the appellant's land at the time of acquisition? Clearly, the appellant had already embarked on commercially developing the land into an industrial area. Thus the appellant's loss of business is to be incorporated in the development value or profit value of the land forming part of the market value of the acquired land. In determining *market value of the land* as stated in para 2(a) of the First Schedule, the land administrator and the court must give consideration to the profit value of the land at the time of acquisition.

[213] It can be seen that the Act is sufficiently flexible to allow for the determination of equivalent compensation in the circumstances of the present case. Compensation should be for loss of any land acquired, for buildings and other improvements to the land acquired, for the reduction in value of any land retained as a result of acquisition and for any consequential losses to the livelihoods of the owners and occupants. A rigid application of detailed provisions may result in landowners and occupants not being compensated for losses that are not expressly identified in the legislation.

[214] A pertinent observation is that para 1(1A) in the First Schedule was inserted by Act A999 so as to allow flexibility when assessing the amount of market value of a land acquired.

Paragraph 1(1A) reads:

> In assessing the market value of any scheduled land, the valuer may use *any suitable method of valuation* to arrive at the market value provided that regard may be had to the prices paid for the recent sales of lands with similar characteristics as the scheduled land which are situated within the vicinity of the scheduled land and with particular consideration being given to the last transaction on the scheduled land within two years from the date with reference to which the scheduled land is to be assessed under subparagraph (1).

[215] In view of the above, although comparable sales in the vicinity of the acquired land is an important component in the computation of market value of an acquired land, 'any suitable method of valuation' is also allowed. Therefore any appropriate method that serves to provide equivalent compensation to affected persons can be applied. Such methods may include compensation paid on the basis of replacement costs.

[216] Thus a judicious approach is called for in dealing with the development of the law on property rights as compared to other Commonwealth jurisdictions. Business compensation consequent to acquisition has received recognition in some jurisdictions including the United Kingdom, Australia and New Zealand. We find that the principles on business compensation as explained earlier are to be applied persuasively so as to arrive at a decision that is consonant with the development of our constitutional law rights to property and one which would sit well with international standards and expectations.

Question 6 is thus answered in the negative.

PART D (APPLICATION OF THE AMENDING ACT A999)

[217] In the present appeal, the appellant averred that the Amending Act A999 does not apply. The appellant's case was referred to court on 25 February 1999 after the coming into force of Act A999 ie 1 March 1998. However, the declaration of the decision to acquire the land was made via Form D and published in the *gazette* on 12 February 1998 ie before the coming into force of Act A999.

[218] It was submitted by the appellant that the provisions in Act A999 cannot apply retrospectively, since it would affect cases in which acquisition proceedings were instituted *before* Act 999 came into force. Therefore the Court of Appeal was in error in having relied on the amended provisions and in dismissing the appeal.

[219] It was also submitted that statutory amendments which affect substantive rights do not operate retrospectively. The substantive rights of the

appellant here is the right of appeal and the determination of compensation by the judge (and not by assessors).

[220] We are not in agreement with the appellant's submission on this issue. It is axiomatic that the court is to have regard to 'the intention of the legislature as expressed in the wording of the statute' in order to determine whether a provision in a statute has a retrospective or prospective effect (see the decision of the Privy Council in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1).

[221] We agree with the respondent that Act A999 is prospective in its application. This is borne out in sub-s 1(2) of the Amending Act A999 which states that:

> The amendments in sections 23, 24 and 25 and paragraph 27(b) shall apply only to land acquisition cases referred to the Court after the date of coming into force of this Act.

[222] The provisions in ss 23, 24 and 25 and para 27(b) of Act A999 stated above are in respect of the insertion of the new ss 40A, 40B, 40C, 40D in the Act and the amendment made to the proviso of sub-s 49(1) of the Act. Subsection 1(2) of the Act clearly states that such amendments applies 'only to land acquisition cases referred to the court *after* the date of coming into force' of Act A999. Hence, the application of the new amendments is subject to the date the land acquisition case was referred to court. The date of the acquisition is irrelevant. (Emphasis added.)

CONCLUSIONS

[223] In view of the foregoing therefore, our answers to the questions posed in the appeal are as follows:

Question 1: In the affirmative

Question 2: In the affirmative

Question 3: In the negative

Question 4: In the negative

Question 5: In the negative

Question 6: In the negative

[224] For all the above reasons, this appeal is allowed with no order as to costs and we order that the case be remitted to the High Court for a proper determination of issues as found herein. It is ordered that:

(a) by s 40A, the matters are to be heard before a single judge. The court shall appoint two assessors to assist the judge in determining the objection made by the appellants against the amount of compensation awarded by the land administrator;

(b) at the end of the proceedings, the assessors are required to give their opinions in writing as to the appropriate amount of compensation to be awarded in this case pursuant to s 40C of the Act. The assessors must give due consideration to all the heads of compensation claimed by the appellant under the Act;

(c) the opinion of the assessors are to be recorded by the judge. The judge has a duty to consider both of the opinions of the assessors. The judge is to exercise his mind in determining the amount of compensation to be awarded to the appellant, based on the principle of equivalence; and

(d) the provisions of sub-s 36(4) of the Act are to be given full effect. The judge shall not be bound to conform to the opinions of the assessors. In the event of any disagreement between the assessors with regard to the amount of compensation, the judge may elect to consider which of the two opinions in his view is appropriate in the circumstances of the case. The judge is also at liberty to depart from the opinion of either of the assessors and decide on the reasonable amount of compensation to be awarded to the appellant by giving reasons for so doing.

[225] Our answers to the constitutional questions referred to this court in the reference are as follows:

Question 1: In the negative

Question 2: In the affirmative

The reference is remitted to the Court of Appeal for the court to decide on the applicants' appeal in accordance with the determination of this court in respect of the constitutional questions. There is no order as to costs.

Order accordingly.

Reported by Ashok Kumar