DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO: B-01(A)-416-07/2018

ANTARA

MUTIARA RINI SDN BHD **... PERAYU**
(NO. SYARIKAT: 311297-H)

DAN

PENTADBIR TANAH DAERAH PETALING **...RESPONDEN**

[Dalam Mahkamah Tinggi Malaya di Shah Alam
Rujukan Tanah No: BA-15-243-12/2016

ANTARA

MUTIARA RINI SDN BHD
(NO. SYARIKAT: 311297-H) **... PEMOHON**

DAN

PENTADBIR TANAH DAERAH PETALING **... RESPONDEN]**

CORAM

HAMID SULTAN BIN ABU BACKER, JCA
HANIPAH BINTI FARIKULLAH, JCA
LAU BEE LAN, JCA

GROUNDS OF DECISION

Introduction

[1] This appeal was brought by the Appellant/Applicant against the decision of the learned High Court Judge made on 22/5/2018 wherein the Appellant/ Applicant's land reference was partly allowed with no order as to costs as follows:

(a) award for land value is increased from RM12,840.00 to RM13,455.00 per square meter;

(b) additional compensation of RM432,345.00 for land value;

(c) additional compensation of RM2,846,777.64 for injurious affection;

(d) interest at 8% on the amount of the increased compensation from the date of *Borang K* until full payment;

(e) the costs of the private and government assessor of RM500.00, each to be paid by the Appellant; and

(f) the deposit of RM3,000.00 to be returned to the Appellant/Applicant.

[2] We shall refer to the parties as they were in the Court below.

[3] Having heard and considered the respective parties' oral and written submissions, we unanimously dismissed the appeal. These are our reasons in respect of the appeal.

Brief Facts

[4] The brief facts relevant to this appeal are these. The Applicant, Mutiara Rini Sdn Bhd is the land owner of Lot 67335 GRN 111872 Mukim Sungai Buloh Daerah Petaling ('**the said Land**') with an acreage of 7081 square meters, freehold, category land use " building" with the express restriction "commercial building" *("bangunan perniagaan")*. The said Land was zoned for commercial and service use.

[5] An area of 703 square meters was acquired by the Government for the elevated highway project known as *"Projek Penswastaan Lebuhraya Bertingkat Damansara – Shah Alam (DASH)"*.

[6] The said Land was compulsorily acquired through a gazette declaration i.e. Warta Kerajaan Negeri Selangor No. 2802 dated 23/7/2015 pursuant to s. 8 of the Land Acquisition Act 1960 (Act 486) ('**Act 486**').

[7] The Applicant had secured a Development Order from Majlis Bandaraya Petaling Jaya ('**MBPJ**') on 30/10/2015 to build 2 office towers comprising 15 and 20 storey buildings respectively and a 5 storey basement parking on the said Land.

[8] On 15/2/2016 Messrs. Arkitek submitted a revised development plan for one office tower comprising 18 storey building of 17 office floors, one floor of M&E and a 5 storey basement parking on the said Land.

[9] The Applicant claimed compensation of RM13, 455.00 per square meters for the 703 square meters acquired from the said Land. A comparison of the Applicant's claim amounting to RM76,477,404.00 vis a vis the Land Administrator's award is tabulated below-

	Applicant's Claim	Land Administrator's Award
For land value	RM9,458,865.00 @ RM13,455.00 psm	RM9,026,520.00 @ RM12,840.00 psm
For Injurious affection	RM13,612,154.00 (50% from the Land value claimed)	RM2,598,084.00 (10% from the land value awarded)
Loss of Profits	RM53,406,385.00	-
	RM76,477,404.00	**RM11,624,602.12**

[10] Aggrieved with the decision of the Land Administrator, the Applicant filed its objection under s. 37 Act 486 to the High Court on the grounds contained in Form N made pursuant to s. 38 of Act 486 that the compensation awarded by the Land Administrator –

(i) the value of the land acquired was low compared to the market value;

(ii) for injurious affection (IA) was exceedingly low and did not reflect the actual effect of the injurious affection("tidak menggambarkan nilai kesan kemudaratan sebenar"); and

(iii) failed to consider the loss of profits.

[11] Dissatisfied with the High Court decision stated in para 1 above, the Applicant appealed to this Court against part of the decision.

Primary grounds in this appeal

[12] The grounds in the Memorandum of Appeal of the Applicant can be summarised to 3 main issues -

(a) non- compliance of the mandatory provisions of s. 47 of Act 486 (**1st issue**);

(b) the learned Judge had disregarded the principles in **Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526** (**2nd issue**) ; and

(c) the learned Judge's findings were erroneous and against the weight of the evidence (**3rd issue**).

Our Decision

[13] On the 1st issue, the Applicant contended that the learned Judge erred when the Grounds of Judgment dated was solely signed by him contrary to the mandatory provision of s. 47 of Act 486 which reads as follows:

"Award to be in writing

47. (1) Every decision made under this Part shall be in writing signed by the Judge and the assessors."

[14] There is no doubt that that the Grounds of Judgment of the learned Judge is in writing. Having perused the Notes of Proceeding on the hearing of the land reference held on 16/4/2018, it is obvious that there were 2 assessors present, the Government valuer, Encik Mohd Zam Zam bin Abu and the private sector valuer, Encik Sallehuddin bin Mohd Iskan which is in accordance to s. 40A (2) of Act 486. Based on the facts of this case, we are of the view that the appeal ought not be disposed merely on technical objection but ought to be considered on its merits. Regard may be had to the cases of -

(a) **Mokhtar Amin v. Mohamed Moktar Omar [2001] 4 CLJ 489** at pp.493 and 494, where this Court held that non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice (per Gopal Sri Ram JCA (as he then was)) ; and

(b) **Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97** where at pp.114 and 115, the Federal Court held that the Court's task is to adopt that course which will produce complete justice as between the parties and should not for a moment allow any technicality to stand in its way of achieving that end (per Gopal Sri Ram JCA (as he then was)).

[15] In the circumstances the Respondent was directed by the Panel to secure the signatures of the 2 aforementioned assessors who were present at the hearing on 16/4/2018. This direction was duly adhered to by the Respondent by 27/6/2019.

2nd and 3rd issues

[16] For completeness there is no appeal by the Applicant as regard compensation for the value of the land acquired. For land value, the learned Judge awarded what the Applicant claimed for, namely RM9,458,865.00 computed as follows:

"RM13,455.00 x 703 mp = RM9,458,865.00 ". The learned Judge allowed "Award Tambahan RM 432,345.00" instead of the Land Administrator's award of RM9,026,520.

[17] We will now turn to the merits of the appeal. The 2nd and 3rd issues which are pertaining to injurious affection and loss of profits respectively are dealt together as they relate to each other as the discussion which follow will demonstrate.

[18] Learned Assistant State Legal Advisor ('**ALA**') for the Respondent submitted that that injurious affection and loss of profits are issues pertaining to the quantum of compensation and the Applicant is precluded from appealing against the award of compensation premised on –

(i) s. 40D (3) of Act 486 which states-

"Decision of the Court on compensation

...

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

(ii) s. 49 of Act 486 which states-

"Appeal from decision as to compensation

49.(1) Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted 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)

(iii) **Syed Hussain Syed Junid & Ors v. Pentadbir Tanah Negeri Perlis [2013] 9 CLJ 152** where Raus Sharif PCA (as he then was) delivering the judgment of the Federal Court at 158 [21], 159[18], [19] and [20] endorsed the view in **Calamas Sdn Bhd v. Pentadbir Tanah Batang Padang [2011] 5 CLJ 125 (at 159 [21])** where Hashim Yusof FCJ (as he then was) speaking for the Federal Court said as follows:

"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. 40(D)(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 compensation issued by the learned trial judge."

(iv) **Koriah Sudar v. Pendabir Tanah Kuala Langat [2013] 5 CLJ 571** at 577[14] and [15] where this Court followed the principle in **Calamas** (supra);

(v) s. 68 (1) of the Courts of Judicature Act 1964 (Act 91) ('**CJA**') which, among others, states-

"68. (1) No appeal shall be brought to the Court of Appeal in any of the following cases."

(vi) **Koriah Sudar** (supra) at 578[16] for the proposition that the appeal was not maintainable by reason of the express provision in s. 68(1) (d) CJA; and

(vii) **Polywell Development Sdn Bhd v. Pendtadbir Tanah Daerah Johor Bahru, Johor [2014] 5 CLJ 129** where this Court held that –

"Section 40D of the Act expressly provides that the final arbiter on the amount of compensation payable under the Act shall be the high Court. The appeal herein was against the amount of compensation awarded. It was patently clear from."

[19] The Federal Court in the landmark case of **Semenyih Jaya** had discussed the cases of **Syed Hussain Syed Junid** and **Calamas** at 568 [140] to 571[155] under the heading " *The Bar To Appeal In Subsection 49(1)*". At 571[155], Zainun Ali FCJ (as Her Ladyship then was) delivering the judgment of the Federal Court at 571[155] concluded -

"[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."

[20] Mindful of the preceding dicta of the Federal Court in **Semenyih Jaya** we will now examine whether there is any merit in the Applicant's contention that the learned Judge had disregarded the principles in **Semenyih Jaya.** In its submission the Applicant argued that-

(a) The learned Judge had only made reference to **Semenyih Jaya** in regard to the following principle, " *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*" as seen in para 44 of his Grounds of Judgment which reads-

"*44. Saya menolak tuntutan kehilangan keuntungan kerana kehilangan keuntungan yang dituntut hendaklah diambilkira dalam nilaian hartanah.*"

(b) The learned Judge erred when he misapplied the aforementioned principle in **Semenyih Jaya** to the facts of this case as the present claim for loss of profit pertained to the remaining portion of the Land which cannot be developed as planned and not the partial area acquired for the DASH project.

(c) The learned Judge did not consider the following principles in **Semenyih Jaya –**

(i) "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";

(ii) "the Act is sufficiently flexible to allow for the determination of equivalent compensation in the circumstances of the present case"; and

(iii) "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 to the owners and occupants. A rigid application of detailed provisions may result in landowners and occupants not being compensated for losses that that are not expressly identified in the legislation."

[21] With respect we are of the considered opinion that there is no merit in the aforesaid submission of the Applicant. The pronouncement of the Federal Court in **Semenyih Jaya** in para 20 (c) (i) above is found at 582 [209] of the Report. According to the Federal Court, by the principle of equivalence "*the affected landowners 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.*"(at 580[199]).

[22] The Federal Court then at 580 [200] held an assessment of compensation arising out of an acquisition is governed by the First Schedule to Act 486 and is underpinned by the principle of equivalence wherein the affected landowners and occupants are entitled not only to the market value of the land but also to compensation for the loss and disturbance arising out of the acquisition.

[23] We observed immediately following the pronouncement of the Federal Court in **Semenyih Jaya** in para 20 (c) (i) above, the Federal Court at 582 [210] of the Report stated-

> "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 Tiau Hong v. Collector of Land Revenue, Gombak* [1984] 1 CLJ 350; [1984] 1 CLJ (Rep) 289; [1984] 2 MLJ 35 where Syed Agil Barakhah 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."

[24] Thereafter at 582 [212], the Federal Court said-

> "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 of 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."
(Emphasis added)

[25] Immediately thereafter it was followed by the pronouncement of the Federal Court at para 20 (c) (ii) and (iii) above which is found at 582 [213] of the Report.

[26] Applying the principles enunciated by the Federal Court which we have discussed in paras 21-25 above to the factual matrix of the appeal before us, we find that the learned Judge had not erred when in the assessment of loss of profits, he stated, *" Saya menolak tuntutan kehilangan keuntungan kerana kehilangan keuntungan yang di tuntut hendaklah diambilkira dalam nilaian tanah."* (para 44 of the Grounds of Judgment). This is because His Lordship in his prior assessment of the land value was conscious of the principle he had to adhere to in the determination of loss of profits when he stated " *Mahkamah Persekutuan dalam kes Semenyih Jaya memutuskan, kadar kehilangan keuntungan perlu diambilkira dalam pengiraan nilaian tanah."* (para 28 of the Grounds of Judgment).

[27] The learned Judge decided "*kadar nilaian tanah yang munasabah adalah sebanyak RM12,766.00 semeter persegi.*" (para 26 of the Grounds of Judgment). In so doing, the learned Judge had considered the following matters:

(i) "Fakta menunjukkan tanah tersebut telah pun diluluskan untuk pembinaan dua blok bangunan. Ekoran pengambilan sebahagian daripada tanah Pemohon, baki tanah hanya boleh dibina satu blok bangunan." (para 27 of the Grounds of Judgment).

(ii) "Pemohon hanya mendapat kelulusan kebenaran merancang daripada MBPJ selepas tarikh gazet. Berdasarkan fakta ini, saya memutuskan kadar 5 % diberikan atas kehilangan keuntungan. The figure of 5 % was arrived after His Lordship considered the case of **Talent-Vest Development Sdn Bhd v. Pentadbir Tanah Daerah Raub** (Unreported) and no citation found but was cited in **Nikmat Masyhur Sdn Bhd v Kerajaan Negeri Johor Darul Ta'zim [2014] I MLJcon 213** (HC) and **Tan Hee Hong v. Pentadbir Tanah Daerah Lipis** (Unreported), where the Temerloh High Court *"memutuskan kadar 10% diberi ke atas kehilangan keuntungan kerana semasa kontrak ditamatkan , pemaju hanya sempat menjalankan kerja-kerja tanah sahaja ."* (paras 29 and 30 of the Grounds of Judgment).

[28] Thereafter the learned Judge computed the land value after factoring in *" harga nilaian pada kadar RM12,766 dan penambahan 5% diberi ke atas kehilangan keuntungan "* as follows:

"Pengiraan

32. RM12,766 x 703 mp	=	RM8,974,498
(+) 5% kehilangan keuntungan	=	RM2,670,319.25
		RM11,644,817.25
(-) Award Pentadbir	=	RM9,026,520

Tuntutan Pemohon = RM13,455 x 703 mp = RM9,458,865"

To reiterate the learned Judge had allowed the Applicant's claim for land value of RM9,458.865 and there was no appeal by the Applicant.

[29] The Applicant submitted " the learned judge had remarked that the Appellant's claim for loss of profit should have been included in its claim for land value *for the partly acquired land area*, **[1st limb]** contrary to

the Appellant's evidence that the said claim was pertaining to the remaining portion of the said Land which cannot be developed as planned. This inability to continue with the Project is directly caused by the acquisition.**[2nd limb]**" .

[30] We have for easy reference divided the aforesaid submission of the Applicant's submission into 1st and 2nd limbs. We find the Applicant's submission on the 1st limb inaccurate and is debunked as the learned Judge said "*Saya menolak tuntutan kehilangan keuntungan kerana kehilangan keuntungan yang dituntut* ***hendaklah diambilkira dalam nilaian tanah.".***

[31] In so far as the 2nd limb of the Applicant's submission is concerned, we find it flawed for 2 reasons. We find the learned Judge had taken the Applicant's concern into consideration first, as reflected in para 27 (i) and (ii) above and secondly, in his determination of injurious affection which is one of the factors to be considered in determining the amount of compensation to be awarded in land acquisition(para 2 (d) First Schedule of Act 486) as discussed below.

[32] In assessing the Applicant's claim for injurious affection the learned Judge had stated the following in his Grounds of Judgment which we find it necessary to reproduce:

> *"36. Pengapit Kerajaan berpendapat Pemohon tidak wajar diawardkan sebarang IA, alasannya, kerana baki tanah selepas pengambilan masih sesuai untuk dibangunkan bagi pembangunan perdagangan. Tambahan pula, kebenaran merancang hanya diperolehi selepas daripada tarikh pewartaan.*
>
> *37. Sebaliknya Pengapit Swasta berpendapat Pemohon wajar diawardkan IA pada kadar 30%. Setelah pengambilan berlaku, lot subjek hanya sesuai dibina dengan satu lot pejabat sahaja di mana bahaian A sudah tidak sesuai*

untuk dibina dengan bangunan tinggi. Keadaan ini telah menjejaskan potensi pembangunan di bahagian A dan menyebabkan nilainya menurun. Pengapir Swasta berpendapat penurunan yang munasabah adalah sebanyak 30% di mana tanah di bahagian A masih lagi sesuai untuk digunakan sebagai lot perniagaan lain seperti ruang pameran dan restoran.

38. Saya mendapati bahagian A sudah tidak mempunyai potensi pembanguan kerana sudah tidak boleh lagi dibina satu blok bangunan sebagaimana pelan yang dikemukakan oleh Arkitek kepada MSPJ. Baki bahagian A hanya sesuai untuk dibina bangunan perniagaan yang terhad sepeti ruang pameran dan restoran.

39. Saya mendapati kadar 50% yang dipohon oleh Pemohon adalah ***berasaskan kadar harga rumah kediaman pada tahun 2014. (sila rujuk muka surat 16 dan 17 Laporan penilaian Swasta)****.*

40. Saya bersetuju dengan Pendapat Swasta bahawa baki tanah A hanya sesuai untuk dibina bangunan perniagaan yang terhad. Saya mendapati ***kadar perniagaan biasa adalah RM10,213.58 semeter persegi dengan merujuk muka surat 14 Laporan Penilaian Swasta pada tahun yang sama.***

41. Nilaian yang munasabah untuk tanah baki adalah di antara nilai lot rumah sesebuah dengan nilai tanah pembangunan perniagaan yang berdensiti tinggi. ***Saya telah merujuk kepada muka surat 16 dan 17 Laporan Penilaian Swasta yang menunjukkn harga tanah kediaman adalah RM5,849.20 semeter persegi pada tahun 2014. Manakala bagi perniagaan biasa adalah RM10,213.58 semeter persegi dengan merujuk muka surat 14 Laporan Penilaian Swasta pada ahun yang sama.***

42. Pada asalnya tanah Pemohon dicadangkan untuk pembangunan dua blok bangunan pejabat. Oleh kerana baki tanah A sudah tidak sesuai untuk dibinakan satu blok bangunan, ianya hanya sesuai untuk dibina pembangunan perdagangan terhad. Nilai tanah untuk perdagangan terhad adalah di antara nilai tanah kediaman. Saya memutuskan pengurangan kadar sebanyak 20% daripada tanah bangunan perniagaan adalah wajar dan munasabah.

43. Pengiraan award tambahan

20% x RM13,455 x 2,023.36 mp	=	*RM5,444,861.76*
Award Pentadbir	=	*RM2,598,084.12*
Award tambahan	=	*RM2,846,777.64"*

(Emphasis added)

[33] We find the learned Judge 's reasoning at paras 38 ,40 and 42 of his Grounds of Judgment showed that His Lordship had considered the factors mentioned in the dicta of the Federal Court in **Ng Tiau Hong** (supra) alluded in 582[210] of **Semenyih Jaya** which we referred at para 23 above. Hence we are of the considered view that the Applicant's submission regarding the 2nd limb in para 29 above holds no water. For the same reasons, we find the Applicant's submission that *"The learned Judge placed reliance on Semenyih Jaya's case in arriving at his decision, [i.e 1st limb in para 29 above]. However the facts have to be distinguished wherein in Semenyih Jaya's case, the claim for loss of profit was in respect of the acquired land portion. In the present case, the Applicant 's claim for loss of profit is in respect of the remaining area after the acquisition by the State Authority."* is misplaced.

[34] In submission the Applicant claimed the Grounds of Judgment of the learned Judge made no reference to the material evidence tendered by the Appellant in respect of its claim for loss of profit, particularly, the Applicant's valuer's *"Nota Penjelasan"* exhibited in the valuer's affidavit dated 27/10/2018 (RR Bahagian C Jld 2-(2) – at pp.95 to 130) and the same data is found in the Applicant's valuer's valuation report dated 11/8/2016 (RR Bahagian C Jld 2-(8) – at pp. 732 & 748 to 751).

[35] With respect we are of the view that the preceding submission of the Applicant is misconceived. We single out the emboldened parts in paras 39, 40 and 41 of the Grounds of Judgment which has been spelled out in para 32 above. We observed the following:

(a) that the learned Judge's reference to *"(sila rujuk muka surat 16 dan 17 Laporan Penilaian Swasta)"* in para 39 correspond with pp. 735 and 736 of the Applicant's valuer's valuation report;

(b) that the learned Judge's reference to *"Saya mendapati kadar perniagaan biasa adalah RM10,213.58 semeter persegi dengan merujuk muka surat 14 Laporan Penilaian Swasta pada tahun yang sama"* in para 40 corresponds to 733 of the Applicant's valuer's valuation report; and

(c) that the learned Judge's reference to *"Saya telah merujuk kepada muka surat 16 dan 17 Laporan Penilaian Swasta yang menunjukkan harga tanah kediaman RM5,849.20 semeter persegi pada tahun 2014. Manakala bagi perniagaan biasa adalah RM10,213.58 semeter persegi dengan merujuk kepada 14 Laporan Penilaian Swasta pada tahun yang sama."* in para 41 corresponds respectively to pp. 735 and 736 and p.733 of the Applicant's valuer's valuation report.

Hence we find there is no failure by the learned Judge to consider material evidence and neither do we find the findings of the learned Judge erroneous and against the weight of evidence as submitted by the Applicant.

[36] It is crystal clear that regarding the matter of injurious affection, from the Grounds of Judgment, we observed the learned Judge had considered the opinions of the 2 assessors (paras 36 and 37), the potentialities of the land pre and post acquisition (paras 38, 40 and 42) and the basis used by him in reducing the Applicant's claim for injurious affection based on 50% of the land value claimed to 20%, allowing an increase in the award of RM2,846,777.64, which he considered to be reasonable (paras 39, 40, 41, 42 and 43).

Conclusion

[37] For the foregoing reasons we find the Applicant's appeal has no merit. Accordingly, the appeal was dismissed with costs of RM10,000.00. No order for payment of allocatur was made because the Respondent is a government agency.

Dated: 11/06/2020

LAU BEE LAN
Judge
Court of Appeal Malaysia
Putrajaya

COUNSEL:

Ghazi bin Ishak and Amar Auzirul Anuar for the Appellant
[Messrs. Ghazi & Lim]

Tharsini Sivadass and Etty Eliany Tesno for the Respondent
[Kamar Penasihat Undang-Undang Negeri Selangor Darul Ehsan]