

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO: J-01-144 TAHUN 2008

ANTARA

LEMBAGA LEBUHRAYA MALAYSIA ... PERAYU

DAN

CAHAYA BARU DEVELOPMENT BERHAD
(No. Syarikat: 275334-P) ... RESPONDEN

(Dalam Mahkamah Tinggi Malaya di Johor Bahru)
(Dalam Perkara Saman Pemula No: 24-377-2007(MT1))

Dalam Perkara Aturan 7 Kaedah-
Kaedah Mahkamah Tinggi 1980

Dan

Dalam Perkara Aturan 15 Kaedah 16
Kaedah-Kaedah Mahkamah Tinggi 1980

Dan

Dalam Perkara Seksyen 41 Akta Relif
Spesifik 1950

Dan

Dalam Perkara Seksyen 3(1)(a)
Seksyen 37(3) dan Seksyen 38 Akta
Pengambilan Tanah 1960

Dan

Dalam Perkara Pengambilan Tanah
Sebahagian Hartanah Yang Dikenali
sebagai PTD 171003 HS(M)2996
Mukim Plentong, Daerah Johor Bahru,
Johor.

Antara

Cahaya Baru Development Berhad
(No. Syarikat: 275334-P) ... Plaintiff

Dan

Lembaga Lebuhraya Malaysia ... Defendan

CORAM:

- (1) TENGKU BAHARUDIN SHAH BIN TENGKU MAHMUD, JCA
- (2) ABDUL MALIK BIN ISHAK, JCA
- (3) JEFFREY TAN KOK WHA, JCA

JUDGMENT OF ABDUL MALIK BIN ISHAK, JCA

The brief facts

[1] The respondent plaintiff owned a piece of land. That land was acquired for the purpose of the Senai Desaru Expressway Project in Johor (“**highway project**”). The Land Administrator made an award in favour of the respondent plaintiff as the landowner in the sum of RM30,794,837.00. The appellant defendant forwarded to the land office the compensation award of RM30,794,837.00.

[2] The land office had initially released to the respondent plaintiff's solicitors a sum of RM23,051,177.25 being 75% of the total award handed down by the Land Administrator. However, a sum of RM7,683,725.75 being 25% of the balance was withheld by the land office because the appellant defendant had filed a notice of objection pertaining to the issue of the quantum of the award by way of Form "N".

[3] Unknown to the respondent plaintiff, the land office had referred the appellant defendant's notice of objection to the award in Form "N" to the High Court on 25.5.2006. The appellant defendant claimed to be a "**person interested**" within the meaning of section 37(1) read with section 37(3) of the Land Acquisition Act 1960 (as amended) ("**LAA 1960**").

[4] Unhappy with the turn of events, the respondent plaintiff filed an originating summons against the appellant defendant and sought for a declaration that the appellant defendant was not entitled to lodge an objection in Form "N" to the award. At the same time, the respondent plaintiff also sought for a declaration that the said Form "N" that was filed was wrong, should be cancelled, invalid and having no effect in law. The respondent plaintiff further sought for an order that the said Form "N" be cancelled and withdrawn from the Johor Bahru land office and with a further order that the Johor Bahru

land office was not required to continue with the reference to the High Court to hear the objections filed by the appellant defendant by way of Form “N”.

[5] On 18.12.2007 the learned Judicial Commissioner allowed the declarations sought for by the respondent plaintiff. Dissatisfied, the appellant defendant filed an appeal to this court.

Analysis

[6] In considering whether the appellant defendant, for whom the Ministry of Public Works acquired the subject land, has a personal interest to be heard in order to object to the quantum of the award as a “**person interested**” within the meaning of section 37 of the LAA 1960 one must take into account that the very initial step that led to the issuance of the declaration that the subject land was required for a public purpose under section 8 of the LAA1960 was when the appellant defendant sent a letter dated 24.8.2004 to the Ministry of Public Works stating that by virtue of the Pekeliling Ketua Pengarah Tanah dan Galian (“**KPTG**”) Bilangan 3/1979 it required a body like the appellant defendant to submit any application for any subject land that was needed to be acquired for any highway project to be made direct through the Ministry of Public Works.

[7] In short, the letter dated 24.8.2004 by the appellant defendant to the Ministry of Public Works explained that the

procedure for acquisition of land under section 3(1)(a) of the LAA 1960 through the Ministry of Public Works must be observed in accordance with the KPTG's circular. It was for this reason that the appellant defendant forwarded to the Ministry of Public Works 25 sets of plans for the lands that were needed to be acquired for the highway project and required the Ministry of Public Works to submit these 25 plans to the KPTG land acquisition division.

[8] This was then followed by the letter dated 2.9.2004 from the Ministry of Public Works to the KPTG wherein the former required the latter to take the relevant steps to acquire the lands from the Johor State Authority and the Ministry of Public Works then proceeded to forward to KPTG the 25 plans together with the KPTG's circular under the appellant defendant's letter dated 24.8.2004.

[9] It was based on these background facts that prompted the Johor Bahru land office to issue the declaration under section 8 of the LAA 1960 declaring that the lands were to be acquired pursuant to section 3(1)(a) of the LAA 1960 for the construction of the highway project for the Ministry of Public Works.

[10] The nexus between the appellant defendant and the Ministry of Public Works and the fact that the appellant defendant is a statutory agency of the Ministry of Public Works by way of a

government gazette dated 24.2.2004 vide P.U.(A) 206 was entirely overlooked by the learned Judicial Commissioner.

[11] It must be borne in mind that by virtue of section 11(1)(a) of the Highway Authority Malaysia (Incorporation) Act 1980, the appellant defendant has a duty to supervise and execute the design, construction and maintenance of highways as determined by the Government of Malaysia.

[12] The appellant defendant's representative attended the enquiry proceedings and participated by raising objections yet the learned Judicial Commissioner in his judgment made a finding that there was nothing in the affidavit evidence of the parties to show that the appellant defendant was present at the enquiry or at all. The documentary evidence especially at paragraph 9 of the appellant defendant's affidavit in reply would show that the appellant defendant had not only averred that the appellant defendant was present at the enquiry but had gone further to raise the issue of estoppel in that the respondent plaintiff had never objected to the presence of the appellant defendant at the enquiry. I shall allude to the issue of estoppel in the later part of this judgment.

[13] The appellant defendant's averment was not disputed by the respondent plaintiff. The latter averred in its affidavit in reply at paragraph 8 to the effect that the appellant defendant's presence at

the enquiry was to obtain the views of the appellant defendant bearing in mind that the latter was to pay to the respondent plaintiff the compensation awarded by the Land Administrator. In that affidavit in reply, the respondent plaintiff conceded that the presence of the appellant defendant at the enquiry was agreed to by the respondent plaintiff.

[14] The learned Judicial Commissioner also failed to consider that by virtue of section 11(1) of the LAA 1960 the decision falls entirely with the Land Administrator whether to serve the Form “E” notice of enquiry to **“any person whom he knows or has reason to believe to be interested therein”**. And Form “E” was served to the appellant defendant to attend the enquiry proceedings which meant that the appellant defendant had an interest to object to the quantum of the award as a **“person interested”** in the context of section 37 of the LAA 1960.

[15] And it must be emphasised that the service of Form “E” onto the appellant defendant was done within the provisions of section 55(1)(a) of the LAA 1960 which stipulates that:

“a copy of every notification, declaration and other document required by this Act to be served upon any person interested in any scheduled land shall also be served upon a representative of any Government, person or corporation on whose behalf the proceedings were instituted pursuant to section 3.”

[16] The appellant defendant's representative had not only attended the enquiry but had made it known, loud and clear, to the Land Administrator as well as to the respondent plaintiff that the appellant defendant had objections to the award in relation to the issues of severance and injurious affection. The land office notes of proceedings would bear this out. Unfortunately, this fact was not made known by the respondent plaintiff to the High Court and the land office notes of proceedings were not transmitted to the High Court.

[17] The written award of the Land Administrator by way of Form "G" was transmitted to the appellant defendant by virtue of section 14 of the LAA 1960. This meant that the land office acknowledged the appellant defendant as a "**person interested**" within the meaning of section 37 of the LAA 1960.

[18] Section 2 of the LAA 1960 defines the term "**person interested**" to include "**every person claiming an interest in compensation to be made on account of the acquisition of land under this Act, but does not include a tenant at will**". As the "**paymaster**" of the highway project, so to speak, the appellant defendant who was served with Form "E" and who attended the enquiry and who objected to the award of compensation by the Land Administrator and having being served with the written award by the

Land Administrator as reflected in Form “**G**” should be construed as a “**person interested**” within the meaning of section 37(1) read with section 37(3) of the LAA 1960.

[19] The respondent plaintiff argued that the appellant defendant has no legal interest under section 37 of the LAA 1960 to lodge an objection because, so it was said, that the appellant defendant was not the party interested. It was submitted that the fact that the appellant defendant was “**hurt**” in its pocket did not make the appellant defendant an interested party or an injured party. The latin phrase *damnum sine injuria* (the rule of law is that the exercise of an ordinary right is no wrong even if it causes damage) was vigorously applied by the learned counsel for the respondent plaintiff.

[20] According to the respondent plaintiff the source of payment emanating from the appellant defendant was immaterial. It cannot confer any right or render the appellant defendant who was the payer as a “**person interested**” in the acquisition. It was argued that the appellant defendant paid the acquisition sum of RM30,794.837.00 on behalf of the Ministry of Public Works and so the objection to the award must emanate from and lodged by the Ministry of Public Works and not the appellant defendant.

[21] The appellant defendant filed Form “**N**” pursuant to section 38(5) of the LAA 1960 which reads as follows:

“On receiving any application under subsection (1) the Land Administrator shall, subject to section 39, (within [six] months) refer the matter to the Court by a reference in Form O.”

[22] It was not disputed that the appellant defendant’s Form “**N**” was filed and accepted by the Land Administrator as having been filed within time. The Land Administrator then rightly referred the appellant defendant’s objections to the court. This court in **Singapore Para Rubber Estate Ltd v. Pentadbir Tanah Daerah Rembau, Negeri Sembilan [2007] 5 CLJ 71, at page 78**, in relation to section 38 of the LAA 1960 said:

“The wordings of section 38 and Form N were crystal clear in that the onus was on the appellant to do the needful, and for the Land Administrator to comply with the directions of the appellant, after having received the completed form.”

[23] It cannot be denied that the appellant defendant had done the needful by filing Form “**N**” within time and had paid the sum of RM3,000.00 as deposit. The Land Administrator had no choice but was obliged under the law to refer the appellant defendant’s objection to the court.

[24] The wordings of section 38 of the LAA 1960 are very clear and explicit and effect must be given to it. As Tindal C.J. said in **Warburton v. Loveland d. Ivie And Others [1824 to 1834] All E.R. Rep. (H.L.) 589, 591:**

“Where the language of the Act is clear and explicit, we must give effect to it whatever may be the consequences, for in that

case the words of the statute speak the intention of the legislature.”

[25] Indeed the words of the legislature must be given effect.

Section 38 of the LAA 1960 cannot be said to be enacted in vain.

[26] Another ground advanced by the appellant defendant was this. When the learned Judicial Commissioner allowed the declarations sought for by the respondent plaintiff on 18.12.2007, the Land Administrator had already referred the appellant defendant's objection to the High Court by way of Form “O” and the High Court at Johor Bahru had already registered Form “O” as the Land Reference Proceedings No: 15-40-2007 even before 18.12.2007. What would be the effect of these two proceedings?

[27] To be fair to the learned Judicial Commissioner, this conflicting factual matrix was not before him when he decided to allow the declarations on 18.12.2007 in favour of the respondent plaintiff.

[28] Six observations must be made here. Firstly, that currently there is a pending Land Reference Proceedings No: 15-40-2007 before the High Court Johor Bahru that must be heard and which has not been heard and disposed of. Secondly, that Form “O” that was issued by the land office and transmitted to the High Court Johor Bahru clearly stated that the appellant defendant was objecting

to the award that was too high and described by the appellant defendant as unreasonable. Thirdly, if the learned Judicial Commissioner's order dated 18.12.2007 allowing the declarations were not set aside then this would mean that there are duplicity of proceedings on the same issue bearing in mind that the Land Reference Proceedings No: 15-40-2007 has not been disposed of yet. Fourthly, in the context of section 37 of the LAA 1960, the issue of whether the appellant defendant had the locus to file Form "N" will have to be determined by the Land Reference Court. Fifthly, had the learned Judicial Commissioner knew of the pending Land Reference Proceedings No: 15-40-2007 he would not have made those declaratory orders on 18.12.2007 because by doing so he would be tantamount to usurping the Land Reference Court. Sixthly, the duplicity of proceedings constitutes an abuse of the process of the court.

[29] As promised, I will now say something about the issue of estoppel. Various textbook writers approach the subject of estoppel in different ways and styles. Thus **Taylor, "A Treatise on the law of Evidence", 12th edition at page 86** regards estoppel as part of the law of evidence and puts them as analogous to presumptions. **Stephen, "A Digest of the Law of Evidence", 12th edition, at page 217** treats estoppel as part and parcel of adjectival law. While

Phipson, “The Law of Evidence”, 11th edition, at page 923 says that estoppel “**may in many cases be regarded as a rule of substantive law**” and in arriving at that conclusion **Phipson** relies on **Low v. Bouverie [1891] 3 Ch. 82; In re Sugden’s Trusts, Sugden v. Walker [1917] 1 Ch. 511; and Williams v. Pinckney [1897] 67 L.J. Ch. 34, C.A. Rupert Cross, DCL, “Evidence”, 4th edition, at pages 306 to 307** classifies estoppel as part of the law of evidence as well as part of the substantive law. **Best, “The Principles of the Law of Evidence”, 12th edition, at page 462** treats estoppel as “**belonging rather to substantive than to adjective law**”.

[30] The views of these textbook writers are quite interesting and they are supported and reinforced by high authority. For starters, I would refer to the case of **London Joint Stock Bank, Limited v. Macmillan And Arthur [1918] A.C. 777 at page 818**, where Viscount Haldane spoke of the principle of estoppel in this way:

“it is hardly a rule of what is called substantive law in the sense of declaring an immediate right or claim. It is rather a rule of evidence, capable not the less on that account of affecting gravely substantive rights.”

[31] This would be followed by the case of **Evans v. Bartlam [1937] 2 All ER 646, at page 653, H.L., [1937] A.C. 473, at page 484**, where Lord Wright had this to say:

“estoppel is a rule of evidence that prevents the person estopped from denying the existence of a fact.”

[32] Next, it would be the case of **Maritime Electric Company, Limited v. General Dairies, Limited [1937] 1 All ER 748, at page 754, [1937] A.C. 610, at page 620**, where Lord Maugham speaking for the Privy Council said:

“This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action.”

[33] In **Low v. Bouverie (supra) at page 105, C.A.**, Bowen L.J. succinctly said:

“Estoppel is only a rule of evidence; you cannot found an action upon estoppel.”

[34] The description of estoppel by Bowen L.J. in **Low v. Bouverie (supra)** was dutifully followed by Hodson L.J. in **Lyle-Meller v. A. Lewis & Co. (Westminster), Ltd. [1956] 1 All ER 247 at 252 to 253**, and by Farwell L.J. in **Harriman v. Harriman [1909] P. 123 at 144, C.A.**

[35] Since estoppel is a rule of evidence, the evidence here showed that the appellant defendant was present at the enquiry but the respondent plaintiff saw it fit not to object and that would definitely trigger the issue of estoppel against the respondent plaintiff. We are concerned here with estoppel by election where A, as an analogy, in his dealing with B, being at liberty to adopt either of two mutually exclusive steps (**Kamins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1970] 2 All ER 871, H.L.**, per Viscount Dilhorne at

page 886, and Lord Diplock, at page 894), proceedings, courses of action, or attitudes, in relation to B, elects to take or adopt one of them, and to reject the other, or to “**waive**” his right in respect thereof, and A’s declaration of such election or “**waiver**” by words, conduct, or inaction, influences B to alter his position to his detriment, A is estopped, as against B, from thereafter resorting to the course of action which he has thus intimated his intention of relinquishing, dispensing with, or “**waiving**”.

[36] But a caveat must be inserted. It is this. That we are now concerned only with the common law doctrine of election and it is quite distinct from, and it has got nothing to do with the equitable doctrine of election which in Scotland is generally referred to by the phrase “**approbate and reprobate**” (see **Snell’s Principles of Equity, 27th edition, at page 484**).

[37] Reverting back to the mainstream of the appeal, the learned Judicial Commissioner came to a finding that the appellant defendant is not a “**person interested**” within the provisions of section 37(3) of the LAA 1960 and he relied on the case of **Menteri Besar Negeri Sembilan (Pemerbadanan) v. Pentadbir Tanah Daerah Seremban & Anor. [1995] 4 CLJ 477**, a decision of this court. With respect, factually speaking, that case can be distinguished from the facts of the present appeal. There, the

Menteri Besar Negeri Sembilan (Pemerbadanan) is a statutory body with powers to undertake ventures of a commercial or industrial nature independently or jointly with another company. Here, the appellant defendant is a statutory agency of the Ministry of Public Works and has a statutory duty to supervise and execute the design, construction and maintenance of Highways as determined by the Government as provided for in section 11(1)(a) of the Highway Authority Malaysia (Incorporation) Act 1980. That case did not show nor indicate whether the Land Administrator had served Form “E” and Form “G” on the appellant there and whether the appellant there had attended the enquiry. Neither did the case there showed as to who was the “paymaster” for the award. In that case too, the Form “D” notice for the proposed acquisition had indicated that the purpose was “**for a public purpose that is the creation of the Nilai New Town**”. This therefore ruled out the involvement of any other person on whose behalf the land was acquired by the State Authority. Moreover, all these issues were decided by the Land Reference Court and not by way of an originating summons like the present appeal at hand wherein the respondent plaintiff sought for the declaratory reliefs against the appellant defendant before the learned Judicial Commissioner.

[38] In **Setia Usaha Tetap Kementerian Pelajaran v. Collector of Land Revenue, Butterworth [1972] 2 M.L.J. 155**, the objection to the collector's award was made not by the landowner but rather by the **Setia Usaha Kementerian Pelajaran** on behalf of the Ministry of Education for whom the land was acquired and such objection was held to be in accordance with section 37(3) of the LAA 1960. Likewise here, the appellant defendant who was the "**paymaster**" objected to the Land Administrator's award and the respondent plaintiff as the landowner had consented, without protest to receive the payment of the compensation after due enquiry by the Land Administrator.

[39] To understand the pith and core of the term "**person interested**" an examination of some relevant authorities will now be undertaken. A liberal approach must be adopted in construing the term "**person interested**" as intended by the legislature. It must be emphasised that the appellant defendant has an interest in the compensation awarded by the Land Administrator and that would make the appellant defendant as a "**person interested**" under section 2 of the LAA 1960.

[40] In **Magasu Sundram T Magasu & Ors v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur [2003] 2 CLJ 422**, the High Court was confronted with an application by the intended

intervener who was appointed to procure a higher award of compensation on behalf of the first claimant and having been promised a 10% share of any additional compensation he could obtain, sought to intervene in the proceedings between the claimants and the land administrator. In deciding whether the intended intervener fell within the scope of the term **“persons interested”** in sections 2 and 14(2) of the LAA 1960, Azmel Ma’amor J. (later FCJ) said at page 425 of the report:

“The term ‘persons interested’ is inconclusive and a person can be said to be a person interested if he has interest in the land either directly or indirectly or if he has an interest in the compensation in respect of the land acquired.”

[41] The Indian Supreme Court in the case of **Himalaya Tiles and Marble (P.) Ltd., v. Francis Victor Coutinho (dead) by LR’s. [1980] AIR 1118, at page 1121**, had this to say in regard to the term **“person interested”**:

“13. Thus, the preponderance of judicial opinion seems to favour the view that the definition of ‘person interested’ must be liberally construed so as to include a body, local authority, or a company for whose benefit the land is acquired and who is bound under an agreement to pay the compensation. In our opinion, this view accords with the principles of equity, justice and good conscience. How can it be said that a person for whose benefit the land is acquired and who is to pay the compensation is not a person interested even though its stake may be extremely vital?”

[42] Again, the Indian Supreme Court in the case of **Sunderlal (In both the appeals) v. Paramsukhdas and others (In both the appeals) [1968] AIR 366, at page 369** had this to say:

“It will be noticed that it is an inclusive definition. It is not necessary that in order to fall within the definition a person should claim an interest in land, which has been acquired. A person becomes a person interested if he claims an interest in compensation to be awarded. It seems to us that **Paramsukhdas** is a ‘person interested’ within Section 3(b) of the Act because he claims an interest in compensation.”

[43] Continuing at page 370, the Indian Supreme Court said in the same case:

“It would be strange to come to the conclusion that the Legislature is keen that a person claiming an interest in compensation should be heard before the land is acquired but is not interested in him after the land is acquired.”

[44] Back home, Richard Talalla JC (later J) in **Ng Kam Loon & Ors v Director of Public Works Department, Johore & Anor** [1990] 2 MLJ 229, at page 231, said:

“It is implicit that the inquiry by the Collector into the value of the land and the assessment of the amount of compensation which in his opinion is appropriate, pursuant to the provisions of s 12, is a function the nature whereof is judicial; a fortiori as by virtue of sub-s 2 of that section, the Collector is required to enquire into the respective interests of all persons claiming compensation or who in his opinion are entitled to compensation in respect of the land in question, and into the objections, if any, by any interested person to the area of the land in question. It seems to me therefore that it cannot be said that the relationship between the defendants is one of principal and agent.”

[45] As the “**paymaster**”, the appellant defendant has the statutory right to file a notice of objection against the quantum of the award by filing Form “**N**”. It would be grossly unfair and inequitable to deprive the appellant defendant of his statutory right to have his objections heard and adjudicated by the Land Reference Court. In

the words of the Indian Supreme Court in the case of **Himalaya Tiles and Marble (P.) Ltd., v. Francis Victor Coutinho (dead) by LR's.** (supra) at page 1121:

“It is enough if he claims an interest in compensation, as distinguished from an interest in the property sought to be acquired. As long as a person claims an interest in the compensation, he is a person interested within the meaning of the definition of that expression.”

[46] The LAA 1960 should be construed according to the intention expressed in the Act itself. The function of the court is to interpret an Act of Parliament and in doing so, according to Lord Parker C.J. in **Capper And Another v. Baldwin [1965] 2 Q.B. 53, 61**, it must be done **“according to the intent of them that made it and the intention must be deduced from the language used”**. In the same vein, Donaldson J., said in **Corocraft Ltd. And Another v. Pan American Airways Inc. [1969] 1 Q.B. 616**, at page 638, that **“The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments”**. Again, in the same vein but worded differently, O'Connor J., in **State of Tasmania v. Commonwealth of Australia And State Of Victoria [1904] 1 C.L.R. 329** said at page 358, **“I do not think that it can be too strongly stated that our duty in interpreting a Statute is to declare and administer the law according to the intention expressed in the Statute itself”**.

[47] Equally germane to the occasion at hand would be the words of Lord Goddard C.J. in **Regina v. Wimbledon Justices, Ex parte Derwent [1953] 1 Q.B. 380, 384:**

“.... although in construing an Act of Parliament the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there, and, if the statute has created a specific offence, it is not for this court to find other offences which do not appear in the statute.”

[48] I have to give effect to the words of the legislature in defining the term **“person interested”** in section 2 of the LAA 1960. The net is thrown wider by including **“every person claiming an interest in compensation to be made on account of the acquisition of land under the LAA 1960”** and it would certainly include the appellant defendant herein. That is the manifest and expressed intention of Parliament (**Attorney-General For Canada And Another v. Hallett & Carey Ld. And Another [1952] A.C. 427 at page 449**).

[49] Next, in regard to the declaratory reliefs which the respondent plaintiff sought for in the originating summons it should not be granted because an alternative remedy existed by way of the Land Reference proceedings which have yet to begin (**Development & Commercial Bank Bhd v Land Administrator, Wilayah Persekutuan & Anor [1991] 2 MLJ 180, S.C.**). The declaratory

reliefs should also not be granted because it would be contrary to public policy (**British Association of Glass Bottle Manufacturers, Lim. v. Forster & Sons, Lim. [1917] 86 L.J. Ch. 489, 494 to 495**).

[50] Finally, in seeking those declaratory reliefs by way of an originating summons without making the Land Administrator as a party when the declaratory reliefs sought would affect the statutory duties and powers of the Land Administrator cannot be condoned by this court. In **Air Express International (M) Sdn Bhd v. MISC Agencies Sdn Bhd [2008] 9 CLJ 209**, the plaintiff sought various declaratory orders against the Customs Department. Since the latter was not made a party and had no opportunity to defend itself, Abdul Wahab Patail, J., rightly refused to grant the declarations against the Customs Department.

[51] The caution that was given by Viscount Maugham in the House of Lords in the case of **London Passenger Transport Board v. Moscrop [1942] A.C. 332, at page 345** should be heeded. There his Lordship said:

“I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration, but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognised that persons interested are or may be

indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made.”

[52] For the reasons adumbrated above, I allowed the appellant defendant’s appeal with costs here and below and I too set aside all the orders of the learned Judicial Commissioner. The deposit should be returned to the appellant defendant.

[53] This is my supporting judgment to that of my learned brother Jeffrey Tan Kok Wha, JCA.

8.6.2009

Dato’ Abdul Malik bin Ishak
Judge, Court of Appeal
Malaysia

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