

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO: W-01-62-2005

ANTARA

SISTEM PENYURAIAN TRAFIK KL BARAT
SDN BHD

... PERAYU

DAN

(1) KENNY HEIGHTS DEVELOPMENT SDN BHD
(2) PENTADBIR TANAH WILAYAH PERSEKUTUAN
KUALA LUMPUR

... RESPONDEN-
RESPONDEN

(DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR)
(BAHAGIAN SIVIL)

PERMOHONAN GUAMAN NO: S3-15-03-2001

ANTARA

KENNY HEIGHTS DEVELOPMENT
SDN BHD

... PERAYU

DAN

PENTADBIR TANAH WILAYAH
PERSEKUTUAN KUALA LUMPUR

... PENENTANG

DAN

SISTEM PENYURAIAN TRAFIK KL
BARAT SDN BHD

... PENCELAH

CORAM:

- (1) LOW HOP BING, JCA
- (2) ABDUL MALIK BIN ISHAK, JCA
- (3) NIHRUMALA SEGARA A/L M.K. PILLAY, JCA

JUDGMENT OF ABDUL MALIK BIN ISHAK, JCA**INTRODUCTION**

[1] This was an appeal by the appellant – Sistem Penyuraian Trafik KL Barat Sdn Bhd (hereinafter referred to as “**SPRINT**”), against the decision of the High Court judge who disallowed SPRINT’s application to intervene in a land reference matter which arose upon the first respondent’s ---- Kenny Heights Development Sdn Bhd (hereinafter referred to as “**Kenny Heights**”), objection to the quantum of compensation awarded by the second respondent ---- Pentadbir Tanah Wilayah Persekutuan, Kuala Lumpur (hereinafter referred to as “**the land administrator**”), for the compulsory acquisition of Kenny Heights’ lands.

[2] By way of a privatization agreement dated 23.10.1997 between SPRINT and the Federal Government, SPRINT was appointed as the concessionaire of the Highway. This meant that SPRINT, by virtue of the privatization agreement, bears the burden of

paying the compensation arising out of the compulsory acquisition of Kenny Heights' lands. It must be borne in mind that Kenny Heights knew, from the outset, that the compensation has to be paid by SPRINT. Thus, it was not surprising that SPRINT sought to intervene as a party. Kenny Heights objected to SPRINT's application to intervene while the land administrator supported it.

ANALYSIS

[3] The High Court judge refused to recognise the privatization agreement notwithstanding the fact that all the affidavits alluded to the existence of the privatization agreement.

[4] Under clause 6.3.1 of the privatization agreement, SPRINT was legally obliged to bear the costs of any land acquired for the purposes of the construction of the highway project and thus SPRINT can be said to be a person interested in the compensation payable upon such acquisition.

[5] As a concessionaire under the privatization agreement, SPRINT has a direct legal interest in the matter of the compensation payable to Kenny Heights as a result of the acquisition of Kenny Heights' lands and should be granted leave to intervene and be allowed to lodge the necessary Form "N" under the Land Acquisition Act 1960 in the land reference.

[6] SPRINT was, in fact, a “**person interested**” in the compensation payable to Kenny Heights. Section 2 of the Land Acquisition Act 1960 defines a “**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.**”

[7] It is my considered view, based on the authorities, that this definition is not intended to be exhaustive. Any person claiming an interest in compensation does not mean that the claim must be a valid claim. It is the duty of the Land Administrator to scrutinise at every claim and in the event he is uncertain whether the claim is valid or otherwise he may by virtue of section 36(2) of the Land Acquisition Act 1960 refer the matter to the High Court for its determination.

[8] It is appropriate, at this juncture, to itemise the different categories of persons interested under the Land Acquisition Act 1960.

I shall do so now:

- (a) A company, whether corporate or incorporate, could be a person interested in accordance with the meaning ascribed to the word “**person**” in the Interpretation Acts 1948 and 1967 – Consolidated and Revised 1989, Reprint 2000.
- (b) According to the case of **Krishna Das Roy v. The Land Acquisition Collector of Pabna [1911-12] 16 C.W.N. 327,**

an owner of the subject land is a person interested. The same recognition is also given to a mortgagee (**Martin v. London Chatham And Dover Railway Company [1865-66] 1 Ch App 501**). And a lessee with a fixed term is also said to be a person interested (**Mehar Bassa v Collector of Lahore [1901] 2 PLR No: 184**; and **Swarnamanjuri Dassi v. Secy. of State [1928] A.I.R. Calcutta 522**). So too would a reversioner be accorded the same status (**Mt. Gangi v. Santu and others [1929] A.I.R. Lahore 736**).

- (c) A person who has entered into a contract to purchase a piece of land which is a subject of compulsory acquisition is a person interested because he is said to be the beneficial owner (**J. C. Galstaun, Objector v. Secretary of State for India In Council & ors. [1905-1906] 10 C.W.N. 195**). Likewise, the other party to the contract is also considered as a person interested (**Dr. G. H. Grant (In all the Appeals) v. The State of Bihar (In all the Appeals) [1966] AIR SC 237 (V 53 C 52)**).
- (d) According to **Oppenheimer v. Minister of Transport [1941] 3 All ER 485**, an option holder has an interest in the land and that makes him a person interested.

(e) According to **K. S. Banerjee v. Jatindra Nath Paul and others [1928] A.I.R. Calcutta 475**, where a trust proper has been acquired by the government, those persons having legal and equitable interests in the acquired property are classified as persons interested.

[9] These are some of the personalities that can be said to be persons interested under the Land Acquisition Act 1960 and the list is not exhaustive nor is it closed. SPRINT would definitely fall in the category of a **“person interested”** within the meaning of the Land Acquisition Act 1960.

[10] According to Order 15 rule 6(2) of the Rules of the High Court 1980 (**“RHC”**), there is no time limit for SPRINT to intervene but the authorities which I will allude to in due course would show otherwise. However, one thing is certain. It is this. That under Order 15 rule 6(2)(b) of the RHC, SPRINT as a **“person interested”** should rightly be added as a party in the land reference proceedings.

[11] Order 15 rule 6(2)(b) of the RHC states as follows:

“6 Misjoinder and non-joinder of parties (O 15 r 6)

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –

(b) order any of the following persons to be added as a party, namely –

(i) any person who ought to have been joined as a party or whose presence before the Court is

necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter; but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.”

[12] It is quite obvious that the main object of Order 15 rule 6(2) of the RHC is to prevent a multiplicity of proceedings. This court is vested with a wide discretion to make an order so that all matters in dispute can be effectually and completely determined and adjudicated upon (**Kuala Lumpur Finance Bhd v Azmi Co Sdn Bhd dan satu lagi [1996] 4 MLJ 650**).

[13] In the context of an intervention in a judicial review proceeding, I had this to say in **Majlis Agama Islam Selangor v Bong Boon Chuen & 150 Ors [2008] 6 AMR 449 at 473, [2008] 6 MLJ 488 at 515**:

“[91] The court has a broader and wider discretion to allow intervention under Order 15 r 6(2)(b)(ii) of the RHC. It is comforting to know that there is such a provision in the RHC. It makes sense to have such an enabling provision because sometimes a joinder of a person may not be strictly necessary *but it may be convenient and must therefore be just to allow such a joinder*.

[92] The need for more flexibility is shown in the case of **Vandervell Trustees Ltd v White & Ors [1971] AC 912, HL**. That

case concerned a dispute between trustees and executors in respect of the ownership of certain trust assets. The Inland Revenue was concerned in the matter because it had made a tax assessment concerning the trust assets which was related to the issue of their ownership. Allowing the joinder of the Inland Revenue, Lord Reid had this to say at pp 929 to 930:

'I find this so strange as to be inexplicable if it is not competent to make a rule of court bringing in the revenue and so preventing the same issue from being raised again before the special commissioners.'

[93] Buckley J in *Tetra Molectric Ltd v Japan Imports Ltd* [1976] RPC 541 had this to say in regard to paragraph (b)(ii) of r 6(2) of Order 15 of the RSC:

'it widens the discretion of the court to a great extent, for now the court may add any person ... if the question or issue involved is one which in the opinion of the court it would be just and convenient to determine as between the applicant and the present party ... as well as between the parties to the proceedings themselves.'

[94] So long as it is '*just and convenient*', and it is so in this appeal, it would be appropriate to add MAIS as a party to the judicial review proceedings."

[14] The court retains a discretionary power to refuse an application to intervene. In **Chan Kern Miang v Kea Resources Pte Ltd** [1999] 1 SLR 145, C.A., for instance, the court refused the application of the defendant to add another party as a defendant because that party had been sued separately by the plaintiff previously and a settlement agreement had been reached in that case which barred the plaintiff from claiming any further reliefs from that party.

[15] In an action for breach of contract and misrepresentation where the plaintiff had already assigned his rights under the contract to a bank, I had while sitting on the High Court bench in **Chan Min**

Swee v Melawangi Sdn Bhd [2000] 4 AMR 3855, ordered a stay of the proceedings to allow the plaintiff to include the assignee bank as a party to the action simply because both the plaintiff and the bank had rights in the chose in action via the assignment and I too held that the court would not be in a position to decide the issue in the absence of the bank as any decision on the issue would not bind the bank. Here, we have exercised, by way of majority, our discretion by allowing SPRINT to intervene.

[16] The case of **Hee Awa & Ors. v. Syed Muhammad Sazalay & Anor [1988] 1 M.L.J. 300** accepted the test laid down by the case of **Pegang Mining Co. Ltd. v. Choong Sam & Ors. [1969] 2 M.L.J. 52, P.C.** in determining whether a person ought to be added as a party to the action. And the test is as follows (see page 56 of **Pegang Mining**):

“will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?”

[17] Here, the rights of SPRINT under the privatization agreement to pay Kenny Heights for the acquisition of Kenny Heights' lands would directly be affected if SPRINT was not allowed to intervene.

[18] Having considered the relevant authorities, I am of the opinion that the following propositions may be taken as well settled.

[19] Firstly, that the phrase “**at any stage of the proceedings**” appearing in Order 15 rule 6(2) of the RHC means at any stage before the final order is made and not after it has been perfected and extracted (**Hongkong & Shanghai Banking Corp, The v Hj Salam bin Hj Daud (Mohd Azni bin Sudin, Auction Purchaser; RHB Bank Bhd, Intervenor) [2002] 3 MLJ 483**).

[20] Secondly, the court has all along been magnanimous in allowing an applicant who has an interest in the subject matter the right to intervene even after final judgment has been entered (**EON Bank Bhd v Pung Chong Thai [2001] 5 MLJ 409**; and **Ang Tun Cheong v Lim Yeok Beng (Public Bank, Intervenor) [2002] 6 MLJ 198**).

[21] Thirdly, if the addition of new parties may cause fresh expense and necessitates new evidence, the court would still entertain such an application (**Byrne And Another v. Brown [1889] 22 Q.B.D. 657, C.A.**) so that all matters in dispute may be effectually and completely determined and adjudicated upon (**Van Gelder, Apsimon & Co. v. Sowerby Bridge United District Flour Society [1890] 44 Ch. D. 374, C.A.**; **Montgomery v. Foy, Morgan & Co.**

[1895] 2 Q.B. 321, C.A.; and **Ideal Films, Limited v. Richards And Others [1927] 1 K.B. 374, C.A.).**

[22] Fourthly, for intervention to be legitimate it must fulfill the conditions prescribed by Order 15 rule 6(2)(b)(i) or (ii) of the RHC.

[23] Fifthly, the Privy Council in **Pegang Mining Co. Ltd. v. Choong Sam & Ors. (supra)** demonstrates the wide powers of the court in dealing with an application to intervene, like the one before us now. There, Lord Diplock at page 55 aptly said:

“The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships’ view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.”

[24] Sixthly, our Supreme Court dutifully followed **Pegang Mining in Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis [1991] 2 MLJ 27** and held that there must be a flexibility of approach in construing Order 15 rule 6(2)(b)(i) or (ii) of the RHC.

[25] Seventhly, a party may be added if his legal interest will be affected by the judgment in the action but he will not be added as a party when his commercial interest only would be affected (**Moser**

v. Marsden [1892] 1 Ch. 487; In Re I.G. Farbenindustrie A.G. Agreement [1944] 1 Ch. 41; Sanders Lead Co. Inc. v. Entores Metal Brokers Ltd. [1984] 1 W.L.R. 452, C.A.; Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1989] 2 MLJ 298; Lee Meow Lim v Lee Meow Nyin t/a Cheong Fatt Merchant (Nabisco Brands (M) Sdn Bhd, Intervener) [1990] 3 MLJ 123; and Eh Riyid v. Eh Tek [1976] 1 M.L.J. 262).

[26] Eighthly, that a mere shareholder, a fortiori, a minority shareholder has no interest, legal or equitable, in the property of a company and has no right to intervene **(Macaura v. Northern Assurance Company, Limited, And Others [1925] A.C. 619, H.L., at page 626).**

[27] Ninthly, the objects of Order 15 rule 6(2)(b) of the RHC may be stated as follows:

- (i) “to prevent multiplicity of actions and to enable the court to determine disputes between all parties to them in one action” (Malite Sdn. Bhd. v. Abdul Karim bin Gendut & Ors. [1981] 2 M.L.J. 29); and**
- (ii) “to prevent the same or substantially the same questions or issues being tried twice with possibly**

different results” (Tajjul Ariffin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143).

[28] Reverting back to the factual matrix of the case, I must categorically say that the High Court judge misdirected himself when he questioned the validity of the privatization agreement notwithstanding the fact that the existence of that agreement completes the whole picture on how the Highway Authority (“LLM”) under the Highway Authority Malaysia (Incorporation) Act 1980 acquires the scheduled land for the purposes of the public highway without the Federal Government expending its own fund.

[29] LLM as the representative of the Federal Government did not dispute the existence of the privatization agreement nor did it dispute SPRINT’s obligation to pay the compensation to Kenny Heights. All these have amply been set out in the additional affidavit of Md. Sani bin Dawam that was affirmed on 3.8.2001. His additional affidavit confirmed that LLM was merely a conduit for the payment of the compensation which was payable by SPRINT and that the legal interest of SPRINT was a direct interest arising from its actual legal obligation under the privatization agreement notwithstanding section 22 of the Highway Authority Malaysia (Incorporation) Act 1980.

[30] Obligations under the privatization agreement cannot be ignored. They constitute a contract where the obligations are capable of being enforced or recognised under the law. They are based on the agreement of the contracting parties. Section 10(1) of the Contracts Act 1950 enacts as follows:

“What agreements are contracts

10. (1) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”

[31] A contract is nothing more than an instrument by which the separate and conflicting interests of the parties have been reconciled and brought to a common goal. It sets out the respective responsibilities of the parties and the standard of performance to be expected of the parties. It allows the economic risks involved in the transaction to be identified in advance between the parties. And it may also provide for contingencies, for example, what is to happen if things go wrong. In other words, the purpose of a contract is to facilitate forward planning of the transaction and to make the necessary provision for future contingencies **(Stein, Forbes & Co. v. County Tailoring Co. [1917] 86 L.J.K.B. 448; Maclean v. Dunn and Watkins, who survived Austin [1828] WL 2863 (CCP), [1828] 4 Bingham New Cases 722, 130 E.R. 947; Howe v. Smith [1884]**

27 Ch. D. 89, C.A.; **Leslie Shipping Company v. Welstead (The Raithwaite.)** [1921] 3 K.B. 420; **Hyundai Heavy Industries Co. Ltd. (formerly Hyundai Shipbuilding And Heavy Industries Co. Ltd.) v. Papadopoulos And Others** [1980] 1 W.L.R. 1129, H.L.; **Stocznia Gdanska S.A. v. Latvian Shipping Co., Latreefers Inc. And Others** [1996] 2 Lloyd's Rep 132, C.A.; **Dies And Another v. British And International Mining And Finance Corporation, Limited** [1939] 1 K.B. 724; **McDonald And Another v. Dennys Lascelles Limited** [1933] 48 C.L.R. 457 at page 477; **Chinery v. Viall** [1860] 5 Hurlstone and Norman 288; **Hinton v. Sparkes** [1867-68] 3 L.R.C.P. 161 at page 166; **Damon Compania Naviera S.A. v. Hapag-Lloyd International S.A.** [1985] 1 W.L.R. 435, C.A., at page 451; **Rover International Ltd. And Others v. Cannon Film Sales Ltd.** [1989] 1 W.L.R. 912, C.A., at page 924; **Taylor v. Laird** [1856] 25 L.J. Ex. 329, [1856] 1 Hurlstone and Norman 266; **Boston Deep Sea Fishing and Ice Company v. Ansell** [1888] 39 Ch.D. 339, C.A.; and **Moriarty v. Regent's Garage And Engineering Company, Limited** [1921] 1 K.B. 423).

[32] Seen in this context, the privatization agreement must be adhered to and we, accordingly, by way of majority, give effect to it.

[33] Next, the High Court judge erred in law and in fact when he drew an adverse inference against SPRINT for failing to produce the privatization agreement in its entirety. Illustration (g) to section 114 of the Evidence Act 1950 states that the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. But, the illustration is not mandatory. It depends on the circumstances of the case, and, in a criminal case, for instance, the materiality of the witnesses not produced may activate the adverse inference rule (**Lau Song Seng & Ors v Public Prosecutor [1998] 1 SLR 663, C.A.; Munusamy v. Public Prosecutor [1987] 1 M.L.J. 492, S.C.**). While sitting on the High Court bench in the case of **Public Prosecutor v Guan Sheng Trading Sdn Bhd [1997] 4 MLJ 20**, I said that an adverse inference can only be drawn if there was withholding of evidence and not merely on account of failure to obtain evidence.

[34] Here, the High Court judge failed to give sufficient and/or any consideration to the following facts:

- (a) that the privatization agreement contained a confidentiality clause which prohibited the disclosure of the privatization agreement and notwithstanding this prohibition, some parts

of the privatization agreement were produced as can be seen at pages 420 to 441 of the appeal record;

- (b) that clause 33.1 of the privatization agreement as seen at page 440 of the appeal record carried the confidentiality clause worded in this way:

“33.1 Confidentiality

This Agreement and all matters pertaining hereto shall be considered a confidential matter and shall not be disclosed to any third party without prior mutual agreement (which agreement shall not be unreasonably withheld) unless the same is required by law.”

- (c) that the letter from the Ministry of Works addressed to SPRINT dated 8.9.2003 spoke of the confidentiality in this way (see pages 346 to 347 of the appeal record):

“2. Dimaklumkan bahawa memandangkan klausa ‘confidentiality’ dalam Perjanjian Penswastaan bertarikh 23hb. Oktober 1997 (seterusnya dikenali sebagai ‘Perjanjian Penswastaan’ tersebut) tidak membenarkan isi kandungan Perjanjian Penswastaan tersebut didedahkan (*disclose*) kepada mana-mana pihak, pihak kami hanya dapat mengesahkan bahawa Sistem Penyuraian Trafik KL Barat Sdn Bhd (seterusnya dikenali sebagai ‘Syarikat Konsesi’) telah diberikan konsesi oleh Kerajaan untuk mereka, membina dan menguruskan lebuh raya yang dikenali sebagai ‘Lebuhraya SPRINT’.

3. Pihak kami juga mengesahkan bahawa di bawah terma Perjanjian Penswastaan tersebut, semua kos yang terlibat dalam pengambilan balik tanah untuk Lebuhraya SPRINT adalah ditanggung sepenuhnya oleh Syarikat Konsesi.”

(d) that SPRINT had in fact requested the permission of the Ministry of Works to disclose the relevant parts of the privatization agreement as reflected in the letter dated 8.6.2004 from the Ministry of Works to SPRINT as seen at page 378 of the appeal record and that letter was worded in this way:

**“Per: PERJANJIAN PENSWASTAAN BERTARIKH
23HB. OKTOBER 1997
MAHKAMAH TINGGI KUALA LUMPUR
NO: S3-15-03-01
Kenny Heights Development Sdn Bhd lwn.
Pentadbir Tanah Wilayah Persekutuan**

Dengan hormatnya saya merujuk kepada perkara di atas dan surat kami bertariikh 30 April 2004.

2. Permohonan tuan untuk mengemukakan klausa-klausa yang disebut itu iaitu:

- 1. Muka Surat depan**
- 2. Kesemua recital A, B dan C**
- 3. Klausa 1.1**
- 4. Kesemua Klausa 2**
- 5. Kesemua Klausa 6**
- 6. Kesemua Klausa 27**
- 7. Klausa 33.1**
- 8. Muka surat tandatangan kedua-dua pihak**

bagi tujuan kes Mahkamah berkenaan dibenarkan.

3. Walau bagaimanapun kebenaran ini diberi dengan syarat tuan hendaklah membuat akujanji untuk mempergunakannya hanya untuk kes tersebut di atas sahaja dan bukan untuk kegunaan lain-lain kes atau lain-lain perkara.”

- (e) that the parts of the privatization agreement disclosed by SPRINT with the consent of Ministry of Works to the court by way of affidavits contained the specific clauses on SPRINT's obligation in respect of the land acquisitions and its obligation to bear the costs of such acquisitions and/or pay the necessary compensation and that there was therefore sufficient material before the court to enable it to exercise its powers under Order 15 rule 6(2)(b) of the RHC; and
- (f) that the Ministry of Works had initially denied permission to SPRINT to disclose the privatization agreement and had thereafter agreed to allow selected clauses of the privatization agreement to be disclosed upon further requests by SPRINT and, consequently, SPRINT was constrained from producing the privatization agreement in its entirety by extraneous factors beyond its control.

[35] For these varied reasons, we hold, by way of majority, that in all the circumstances, this was not a fit and proper case for adverse inference rule to be invoked against SPRINT.

CONCLUSION

[36] I have had the advantage of reading the judgment in draft of my learned brother Low Hop Bing, JCA and I agree with what his Lordship has said. I too agree with all the orders made by his Lordship and I too make those orders which we have made, by way of majority, in open court.

21 January 2009

Dato' Abdul Malik bin Ishak
Judge, Court of Appeal
Putrajaya

Counsel

- | | |
|---|---|
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