

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
RAYUAN SIVIL NO. 02-32-2007(W)

ANTARA
UDA HOLDINGS BHD. ... PERAYU
DAN
KOPERASI PASARAYA MALAYSIA BERHAD ... RESPONDEN

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
RAYUAN SIVIL NO. 02-33-2007(W)

ANTARA
DATO' BANDAR KUALA LUMPUR ... PERAYU
DAN
KOPERASI PASARAYA MALAYSIA BERHAD ... RESPONDEN

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
RAYUAN SIVIL NO. 01-9-2007(W)

ANTARA
KERAJAAN MALAYSIA ... PERAYU
DAN
KOPERASI PASARAYA MALAYSIA BERHAD ... RESPONDEN

KORAM: ZAKI TUN AZMI, CJ
ABDUL AZIZ MOHAMAD, FCJ
ZULKEFLI AHMAD MAKINUDIN, FCJ

JUDGMENT OF ZAKI TUN AZMI, CJ

1. I have read through the judgments of my learned brothers Abdul Aziz Mohamad FCJ and Zulkefli Ahmad Makinudin FCJ. I have decided to express my own opinion on this appeal. For that purpose however, I do not need to delve into the facts in detail. I also am not reciting all the relevant provisions of the legislations. I will as far as possible be using the same terms of reference as used in the two judgments. Wherever relevant, I am also relying on the authorities cited by them.

2. The respondents in all the three appeals, i.e. Koperasi Pasaraya Malaysia Berhad, operated a supermarket along Jalan Haji Husin Kuala Lumpur. Its customers used the entrance to the supermarket and the parking area used by its customers was located along Lorong Haji Husin 3 (“LHH3”). Uda Holdings Berhad (“UDA”), the appellant in Rayuan Sivil 02-32 Tahun 2007 (W) on the other hand owned a piece of land Lot 2347 in the vicinity over which they intended to construct two multi storey buildings. Unfortunately, on that lot 2347 were a number of unlicensed hawkers. For social, economic as well as political reasons, these hawkers had to be relocated during the construction. Working with DBKL, UDA decided that they should be located on LHH3. LHH3 is also a thoroughfare. Apart from being used to access to the supermarket, customers also used that road for purposes of loading and unloading passengers and goods to their vehicles. Along LHH3 were 35 parking places. It is not wrong to presume that the customers of the respondent’s supermarket would use these parking places to park when shopping at the supermarket. The respondent claimed by the closure of LHH3, they lost a substantial number of their customers.

3. UDA working together with DBKL and the Government sought a way to overcome this problem according to the laws as they had interpreted them. So what the two parties i.e. DBKL and the Government of Malaysia did to accommodate UDA was this. LHH3 was a public street. The land on which the road was located was no doubt State Land. In order to utilise that area for the purpose of relocating the hawkers, they can then take steps to close the road. Once it was closed, it would then become a vacant piece of land. Only then could TOL (Temporary Occupation Licence) be given to UDA over the land. However, as can be seen, this was not what happened in this case (see page 5 below).

4. I totally agree with the conclusion of the learned trial judge that this could not have been done without the three parties working in concert. In my view these acts of closing LHH3, declaring its closure and thereafter UDA applying for the TOL would have all been in order. The Government invoked section 70 of the Road Transport Act 1987 ("RTA") to close LHH3 to the traffic. DBKL has no rights of ownership over a public road such as LHH3. With its closure, the road would have become just an empty piece of land. Upon application by UDA made to the Land Administrator Kuala Lumpur (Pentadbir Tanah Kuala Lumpur), a TOL was issued to UDA. All these are fine if no damage was done to anybody. But by doing so, as mentioned above, the respondent's supermarket business had been severely affected financially. Such closure had been detrimental to the business of the respondent's supermarket.
5. The relevant provisions of the laws had to be complied with by DBKL and the Government of Malaysia. However, I noticed from the dates the road was first closed and the issue of the first TOL seems not to be in order. The TOL was issued on 9.9.1996 to be effective from 10.8.1996. Note that it was to run retrospectively. The TOL was subsequently extended from time to time on 2.12.1996, 13.5.1998, 28.6.1999 and 2.7.2001. It was only after the TOL was issued that DBKL after consultation with the Director General of Road Transport by notice issued in the *Gazette* dated 8.5.1997 proposed that LHH3 to be closed to traffic from 22.5.1997 to 31.7.1999. In other words the TOL was issued while LHH3 was still a public road.
6. The respondent did not object to the proposal of DBKL to close the road. By P.U.(A) 311/97, the road was closed. The notice of the development order was dated 29.8.1996, i.e. even before the road was

closed. Properly, the road should have been first closed and the notice for TOL issued before the development order could be issued. The development order was for proposal to build 76 units of temporary stalls. This was where the problem arose because the TOL was issued over LHH3 even before the road was closed to traffic. The nett effect of this was that TOL over LHH3 was granted by the administrator even before the road ceased to become a public road. It would seem that because of the TOL granted to UDA, DBKL became obligated to close the road.

7. It was for this reason that the question posed before us was whether LHH3 had to be closed pursuant to the issuance of the TOL because with its closure it ceases to become a public street. The consequential question that arises is whether DBKL had rightly closed LHH3.
8. I totally agree with my learned brother Aziz Mohamad FCJ that the grant of TOL to UDA cannot be read as imposing an obligation upon DBKL to close LHH3 pursuant to section 46. Must the road be closed because TOL was issued to someone? To me, issuance of TOL and the closing of the road are two separate independent acts. Although not raised in this appeal, I wonder whether it was proper for TOL to be issued in respect of a public street and the street was closed to allow TOL to be issued over that land.
9. Section 12 of the Street, Drainage and Building Act 1974 (Act 133) provides that once a road is declared public street, the local authority is obligated to maintain it. That section is not to be read as imposing an obligation to continue to keep a public street as a public street but rather to keep the street under repair.

10. The TOL was issued for the purpose of constructing stalls for the hawkers. In my view, it cannot impose an obligation on DBKL and the Government to allow UDA to use the land to achieve its objective. The discretion as to whether to close LHH3 and convert it into a shopping area must be considered on a different basis altogether. Section 46 of Act 133 makes it an offence to do the acts listed in the section. The purpose I believe is to prevent obstructions being erected in a public place. In my opinion, LHH3 is a public place for the purpose of section 46. Subsection (4) of that section empowers the local authority to allow temporary erections for purposes of festivals and ceremonies, not for the purpose for which LHH3 was in fact closed. LHH3 was closed to traffic and subsequently development order was granted by DBKL for UDA to achieve its objective. To me this is clearly wrong.
11. My answer to the third question is therefore that sections 12 and 46 of Act 133 do not confer a right to the local authority to close LHH3 just because TOL under section 65 of the National Land Code 1965 had been issued in respect thereof. In other words, the question is answered in the negative.
12. Consequently if the road had wrongly been closed because the TOL was issued, then the first question must be answered in the negative.
13. On the second question regarding pure economic loss, I totally agree with the reasoning of my learned brother Zulkefli FCJ and hold that that question be answered in the positive. In short, the respondent is not entitled to pure economic loss resulting from breach of statutory duty and tort committed by DBKL [appellant in 02-33-2007(W)] and the Government of Malaysia [the appellant in 01-9-2007(W)]. The question does not refer to UDA Holdings Sdn. Bhd.

14. UDA Holdings Sdn Bhd is therefore liable for pure economic loss against the respondent but the award of such loss is limited to only one-third of the total pure economic loss.
15. The net effect of our three judgments is that the appeal in respect of Rayuan Sivil number 02-32-2007 (W) (UDA Holdings) is dismissed but as regards pure economic loss, UDA is liable to only one-third of total economic loss. In respect of Rayuan Sivil number 02-33-2007 (W) (DBKL) and Rayuan Sivil number 01-9-2007 (W) (the Government), the appeals are also dismissed except that DBKL and the Government are not liable for pure economic loss suffered.
16. Costs is awarded to respondents in all three appeals.
17. Deposits to respondent towards costs.

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18. The respondent was also to some extent to be blamed for the losses that he suffered by not responding to the *gazette* notification number 3775 published on 8.5.1997 issued by DBKL pursuant to section 70 of the RTA. The notice was issued calling for objections against the intended closure to traffic of LHH3. It also did not take any action as soon as they became aware that LHH3 was going to be used for relocating the hawkers. Had it taken these actions from the beginning, it may have been able to prevent damage occurring to its business.

Dated : 9 December 2008

ZAKI TUN AZMI
Chief Justice
Malaysia

Appeal No. 02-32-2007(W)

Counsel for the appellant: Zainur Zakaria together with Zulkifli Noordin

Solicitors of the appellant: Zulkifli Noordin & Associates

Appeal No. 02-33-2007(W)

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Appeal No. 01-9-2007(W)

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