

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

**RAYUAN SIVIL NO: 01-6-2006(W)**

Antara

**TENAGA NASIONAL BERHAD ... PERAYU**

Dan

**MAJLIS DAERAH DUNGUN ... RESPONDEN**

[DALAM PERKARA MAHKAMAH RAYUAN MALAYSIA  
RAYUAN SIVIL NO. W-01-101-2004

Antara

Majlis Daerah Dungun ... Perayu

Dan

Tenaga Nasional Berhad ... Responden]

(DALAM MAHKAMAH TINGGI DI KUALA LUMPUR  
GUAMAN SIVIL NO. S1-21-81-1996

Antara

Majlis Daerah Dungun ... Perayu

Dan

Tenaga Nasional Berhad ... Responden)

Coram: ALAUDDIN DATO' MOHD. SHERIFF, PCA  
ARIFIN ZAKARIA, CJM  
NIK HASHIM NIK AB. RAHMAN, FCJ  
ABDUL AZIZ MOHAMAD, FCJ  
HASHIM YUSOFF, FCJ

**JUDGMENT**  
**(of Abdul Aziz Mohamad, FCJ)**

1. This case concerns the rates payable under the Local Government Act 1976 (“LGA”) in respect of the Sultan Ismail Paka Power Station (“the Power Station”) which is situated within the jurisdiction of the Majlis Daerah Dungun (“MDD”), a local authority under the LGA and the present respondent, and which comprises land of some 80 hectares and a number of buildings, including a generating power plant, and some machinery on the land. The land and the buildings on it are a “holding” under the LGA. The holding originally belonged to the Lembaga Letrik Negara (“LLN”), a statutory body under the Electricity Act 1949. The Power Station was completed in 1986 and commenced operation to generate electricity in 1987.

2. As the LLN was a public authority under the Federal Constitution, and as the holding was occupied for public purposes, by virtue of Article 156 of that Constitution it was not liable to pay local rates in respect of the holding but had to make contribution in aid of those rates, the amount of which was, in default of agreement, to be determined by a tribunal.

3. On 1 September 1990 all property, rights and liabilities of the LLN became, by operation of section 3 of the Electricity Supply (Successor Company) Act 1990, those of Tenaga Nasional Berhad (“TNB”), a public-listed company and the present appellant. Hence on that date the Power Station became the property of TNB. On the basis that TNB

was not a public authority and therefore the said Article 156 did not apply to it and it was liable to pay local rates, MDD decided to assess and collect rates in respect of the holding. MDD appointed a firm of valuers to assess the annual value of the holding and accepted the firm's assessment at RM123 million. MDD assessed the annual rate in respect of the holding at 5% of the annual value, which came to RM6,150,000.

4. Accordingly, on 13 May 1991 MDD issued, under section 144(2) of the LGA, a notice that MDD intended to amend, on 27 June 1991, the Valuation List, which was the still extant 1988 Valuation List, by including therein, in respect of the holding, the said annual value and annual rate with effect from 1 July 1991.

5. To TNB the annual value of RM123,000,000 for the holding was excessive, and the assessment of the annual value at that amount was *ultra vires* for contravening proviso (b) to the definition of "annual value" in section 2 of the LGA and was therefore null and void, and so therefore was the resulting annual rate. That proviso provides as follows:

- “(b) in estimating the annual value of any holding in or upon which there is any machinery used for any or all of the following purposes –
  - (i) the making of any article or part of an article;
  - (ii) the altering, repairing, ornamenting or finishing of any article;
  - (iii) the adapting for sale of any article,

the enhanced value given to the holding from the presence of such machinery shall not be taken into consideration ...”

To TNB, the annual value as assessed included, contrary to the proviso, the enhanced value given to the holding from the presence of machinery for the generation of electricity and the generation of electricity was the making of electricity, and electricity was an “article” for the purposes of the proviso.

6. According to section 144(3) of the LGA, read with section 142(1)(a), any person aggrieved by the amendment of the Valuation List on the ground that “any holding for which he is rateable is valued beyond its rateable value” may make objection to the local authority not less than ten days before the time fixed in the notice. In the case of TNB, the time to make objection was not less than ten days before 27 June 1991, but it chose not to make any objection under the section. So MDD issued to TNB a bill dated 5 August 1991 for the rates for the second half of 1991 to the tune of RM3,075,000, which was half of the annual rate of RM6,150,000.

7. If TNB had made objection under section 144(3) and was dissatisfied with MDD’s decision, TNB could, under section 145(1), appeal to the High Court, but would have to pay, with the filing of the appeal, the amount of the rate appealed against. From the High Court, TNB could appeal further to the Federal Court under section 145(5) on questions of law.

8. Instead of an objection under section 144(3) and the processes that follow upon such an objection, there ensued a series of negotiations through meetings and letters between TNB's side and MDD's side concerning the rate, which MDD's counsel, at page 6 of his written submission in this appeal, said were "with a view to reaching an amicable settlement". The negotiations commenced sometime in 1991 and went on until 1996 and ended, without reaching any definite settlement in the form of a rate acceptable to both sides, when, on 17 June 1996, MDD served on TNB a demand for payment of arrears of the rate originally imposed. This was followed by a suit brought by MDD on 5 July 1996 to recover the arrears.

9. MDD's claim, which was made by virtue of section 156 of the LGA, was for arrears of rates for the second half of 1991 and for the years 1992 to 1996. At RM6,150,000 per year, the rates for that period came to RM33,825,000. For some reason which had to do with the negotiations, TNB had throughout the same period been paying rates in respect of the holding at RM400,000 per year. The total amount paid was RM2,200,000, which MDD deducted from the total of RM33,825,000, thereby claiming RM31,625,000 for that period. MDD also, by an amendment of 2004, claimed rates at RM6,150,000 per year for subsequent years. MDD specifically pleaded that by TNB's failure to make objection under section 144(3) of the LGA, TNB was deemed to have admitted its liability to pay rates as notified by the notice of amendment of 13 May 1991 under section 144(2).

10. TNB's pleaded defence was that MDD's entire claim was unlawful and invalid on four grounds, but the principal grounds were the aforesaid alleged contravention of proviso (b) to the definition of "annual value", and a contention that MDD's claim based on the notice under section 144(2) had been cancelled and superseded by a bill dated 5 February 1992 and by a letter dated 12 December 1995. That bill and that letter were part of the aforesaid negotiations.

11. In answer to MDD's plea regarding TNB's failure to make objection under section 144(3), TNB's pleaded reply amounted to raising an estoppel against MDD arising from the aforesaid negotiations. It concerned a Tribunal set up pursuant to Article 156 of the Federal Constitution to determine the amount of contribution in aid of rates that was payable in respect of other power stations belonging to TNB in the areas of five other local authorities, including the Majlis Perbandaran Seberang Perai, in respect of the period when they belonged to TNB's predecessor, LLN. TNB pleaded that in the negotiations the parties had agreed that the rate for the holding in Paka was to be based on principles of evaluation enunciated by the Tribunal and therefore MDD was estopped from claiming the rates that it was presently claiming. TNB also pleaded that MDD's point about failure to make objection under section 144(3) was not applicable on the facts of this case because TNB had a legitimate expectation that MDD would act in accordance with its agreement to apply the principles of valuation established by the Tribunal. MDD's reply to this was that estoppel could not operate to defeat the exercise by MDD of powers and discretions conferred on it by the LGA.

12. There was a counterclaim by TNB. TNB had appointed a valuer to value the holding. TNB pleaded that the valuer had applied strictly the principles of valuation of a power station as enunciated by the Tribunal. The valuer assessed the annual value of the holding at RM4,101,780 and the annual rate for the holding at RM205,089, being 5% of the annual value. The rates payable by TNB for the second half of 1991 and for the years 1992 to 1996 should therefore have amounted to, as pleaded, RM1,025,446. As TNB had already paid RM2,200,000 for that period, TNB counterclaimed a refund of the overpayment of RM1,174,554. I notice that the pleaded figure RM1,025,446 is wrong. It should be RM1,127,790.30, so that the amount of the counterclaim should have been RM1,072,010.

13. The learned trial judge, James Foong J (now FCJ), found, upon considering the testimonies of witnesses of both parties and certain documentary evidence pertaining to the negotiations, that although TNB did not make objection under section 144(3) of the LGA, "indulgence was granted by [MDD] to [TNB] to discuss [TNB's] objection for the inclusion of plant and machinery in the Power Station in the Notice when ascertaining Annual Value", and that "parties have entered into an agreement to delay the effect and enforcement of the Notice to subject it to the ruling of the [Tribunal] on whether to exclude plant and machinery in the calculation of Annual Value". He further said: "The Notice has been suspended to await the [Tribunal's decision]. And since such decision has been given, [MDD] is required to amend the Notice to exclude plant and machinery from the calculating [*sic*] Annual

Value. This was what is agreed between the parties. [MDD] cannot [renege] on this". Those are findings of fact by the trial court.

14. The Tribunal's decision had been pronounced on 3 October 1994, while the negotiations were ongoing. It was a decision in Case No. 1/94 in respect of the Majlis Perbandaran Seberang Perai. The learned judge cited the following from the draft of the decision:

“LLN has installed various machinery on the land for the purposes of manufacturing products for generating electricity. These machineries, although attached securely to the land, are nevertheless machineries within the meaning of Section 2 of the Local Government Act 1976. As such the enhanced value of the machineries should not be taken into consideration in assessing the Annual Value of the property and ought to be exempted.”

15. The learned judge dismissed MDD's claim with costs upon this conclusion: “The Notice at the present moment is burdened by the inclusion of plant and machinery, which, by agreement, ought to be excluded. Thus it has no effect for enforcement on [TNB]”.

16. It is to be noted that the learned judge did not make his own finding on the interpretation of proviso (b) to the definition of “annual value”. His decision proceeded on a finding of fact that TNB had agreed to abide by the decision of the Tribunal which, in the event, ruled that the enhanced value of the holding on account of the machinery should not be taken into consideration in assessing its annual value.

17. The learned judge also did not make a finding as to the correct annual value or rate payable. He said that the court was not, at that stage, the proper forum for it. He said that the procedure provided by the LGA had to be exhausted. MDD had to amend the Valuation List again under section 144(1) by giving for the holding an annual value that does not take into consideration the presence of machinery used for the generation of electricity, and the rate based on such annual value, and then give TNB notice under section 144(2) of the intention to amend. If TNB is nonetheless aggrieved by the amendment, it should make objection under section 144(3), and if TNB is dissatisfied with MDD's decision on the objection, TNB could then appeal to the High Court under section 145. Also for the reason that the High Court was not, at that stage, the proper forum for determining the proper annual value and annual rate, the learned judge dismissed with costs TNB's counterclaim, which was based on its own valuer's opinion of the annual value.

18. MDD appealed to the Court of Appeal. TNB cross-appealed on its counterclaim. The Court of Appeal [Mokhtar Sidin, Mohd Ghazali Mohd Yusoff JJA, Augustine Paul JCA (now FCJ)] took the view that the learned trial judge's sole reason for dismissing MDD's claim, which relied primarily on the fact that in the course of the negotiations the parties had agreed to abide by the decision of the Tribunal, amounted to the admission of an estoppel against MDD. As I construe the entire judgment of the Court of Appeal, I would summarize it as follows. By TNB's failure to make objection under section 144(3) of the LGA to the amendment of the Valuation List, the door was closed to TNB to

challenge the annual value and rate determined and imposed by the amendment, on any ground, not even on the ground of estoppel on which the learned trial judge dismissed MDD's claim. The principal authority relied on by the Court of Appeal for this is *The Mayor, Aldermen and Councillors of the Metropolitan Borough of Stepney v John Walker & Sons, Limited* [1934] AC 365 ("the *John Walker case*"). But even if the door was not closed to TNB, the Court of Appeal found that the ground of estoppel on which the learned trial judge entertained and allowed TNB's challenge could not be set up against MDD because "to admit estoppel against [MDD], it being a public authority, would have the effect of nullifying the provisions of the [LGA]". As to why the Court of Appeal said that it would have such an effect, it seems to me that it was because the LGA does not have a provision that allows an owner of a holding to seek the reduction of a rate, which a local authority is under a statutory duty to impose, by way of entering into negotiations with the local authority, and therefore the negotiations that took place in this case, and the agreement to abide by the decision of the Tribunal that arose from the negotiations, were "prohibited by the doctrine of *ultra vires*". For this, the Court of Appeal relied on *Public Textiles Berhad v Lembaga Letrik Negara* [1978] 2 MLJ 58.

19. The Court of Appeal therefore allowed MDD's appeal with costs. The Court of Appeal also dismissed TNB's appeal but with no order as to costs.

20. Leave was granted to TNB to appeal to this court on eleven questions. These are set out in the judgment of my learned brother

Hashim Yusoff FCJ. None of them relates to TNB's counterclaim. TNB has abandoned Question 7. Questions 1, 2 and 3 relate to the door-closed decision of the Court of Appeal, which, as I said, relied principally on the *John Walker* case. I will now deal with that aspect of the appeal.

21. Against *John Walker*, TNB has set up various authorities, but the one that I think is closest in the circumstances to the present case is *Corporation of the City of Victoria v Bishop of Vancouver Island* [1921] 2 AC 384. The Bishop owned land on which stood a church building. The Corporation had assessed municipal rates and taxes on the land for the years 1914 to 1918. Sections 216 and 230 of the Municipal Act, c. 52 of the Statutes of British Columbia 1914 provided – and I quote the words of Lord Atkinson at page 395 since the actual contents of the sections do not appear in the report – “that every person complaining of an ‘ error or omission in regard to himself ’ as having been wrongfully placed upon the assessment roll for general taxes shall have a right of appeal to a Court of Revision, and that the assessment roll as revised confirmed and passed by the Court of Revision except as so far as amended on appeal by one of the tribunals mentioned shall be deemed valid and binding on all persons concerned, notwithstanding any defect or error or mis-statement in the notice required or transcript of such notice”. The Bishop had taken no objection to the assessment rolls for those years and had not exercised his right of appeal under those sections, and the rolls were passed and confirmed by the Court of Revision, but he did not pay the rates and taxes. He instead brought an action against the Corporation for a declaration that no rates and taxes

had been lawfully imposed on the land on the grounds that it was exempted from rates and taxes by virtue of section 197 of the 1914 Act, and for an injunction restraining the Corporation from offering the lands for sale to recover the rates and taxes. The Corporation counterclaimed for the unpaid rates and taxes.

22. The Privy Council found that the land was exempted from rates and taxes. But, relying on the said sections 216 and 230, and as the Bishop had not objected to the assessment rolls or appealed under those provisions, it was “seriously contended” on behalf of the Corporation that the assessment rolls had become valid and binding on the Bishop and that he could not now be permitted to “impeach their accuracy”. To that contention Lord Atkinson, who delivered the judgment of the Privy Council, said as follows:

“... The same considerations apply to each of these two sections. But these sections are merely machinery sections dealing with irregularities, mistakes and errors occurring in the drawing up, shaping and forming of the assessment rolls, and do not by any means empower the Corporation or its officers to assess and tax any kind of property expressly or impliedly exempted from taxation by the provisions of these very statutes from 1914 to 1918, both inclusive. To hold that they did so would amount to holding that the Corporation and its officers had the power of repealing express provisions of these statutes.

The whole question comes back to the proper construction of sub-s. 1 of s. 197 of the Act of 1914. If according to the true construction of that section the land upon which the cathedral stands is exempted from taxation, then if the Corporation or

its officers attempt through the medium of these machinery sections to assess and tax it, their act is ultra vires and illegal, and the respondent is not disabled from assailing it despite the terms of their assessment rolls. In their Lordships' view these sections in no way disentitled the respondent from insisting on the contention that the ground on which the cathedral stands is exempted from general taxation."

23. So the Bishop obtained the declaration and injunction that he sought and the Corporation failed in its counterclaim. The same result in favour of the Bishop would have ensued had the Bishop not brought the action but, instead, as happened in the present case, the Corporation had sued the Bishop to recover the unpaid rates and taxes and the Bishop had claimed in his defence that they had been unlawfully imposed.

24. It was submitted on behalf of MDD that the *City of Victoria* case does not assist TNB in any manner. Several specific reasons were given. First, sections 216 and 230 were not reproduced in full. But the essential effect of these sections were stated by Lord Atkinson. Secondly, as the sections have not been reproduced in full, it is not known whether there was a statutory right of appeal under the 1914 Act. But Lord Atkinson said there was a right of appeal to the Court of Revision. Thirdly, under section 145(1) of our LGA, upon filing an appeal to the High Court from the decision of a local authority on an objection under section 144, the amount of the rate appealed against has to be paid, but it is not known whether there was such a provision in the 1914 Act of British Columbia. I have not been impressed by the

reliance placed on MDD's behalf on the fact of having to pay the rate upon appealing as a factor for denying a person who has not made objection to the rating authority an opportunity to challenge a rate on grounds of illegality. Lastly, the *City of Victoria* case was not a judicial review case. But neither is the present case. I find that MDD's reasons against the application of the *City of Victoria* case to the present case are weak reasons, and I would apply it to the present case.

25. But why do I prefer the *City of Victoria* to *John Walker* as an authority to follow in this case? The reason is the very reason why it was said on behalf of MDD, by way of capping the specific reasons, that the *City of Victoria* ought not to be followed. It was said: "The Privy Council decision was thus a decision on the special circumstances of a colonial legislation which is not found in Malaysia". It is rather the decision in *John Walker* that I would say is a decision on the special provisions of an English legislation that are not found in this country. Before I explain why I would say so, let me briefly set out the provisions of the LGA relating to the process of amendment of a Valuation List because there is a suggestion in paragraph 16 of the written submission on behalf of MDD that *John Walker* is persuasive because the rating provisions in the LGA are modelled on English statutes. These provisions of the LGA are those cited on behalf of MDD itself. Most of them I have mentioned. Provisions relating to the amendment of a Valuation List are the provisions cited because it is through the amendment of the 1988 Valuation List that the rate on TNB's holding was imposed.

26. By section 144(1), the Valuation Officer is empowered, for any of the reasons stated therein, to amend the Valuation List at any time. It provides that rates shall be payable in respect of the holding in question in accordance with the Valuation List as so amended. Section 144(2) requires the giving, to all persons interested in the amendment, of a time at which the amendment is to be made. Section 144(3) gives the right to make objection in writing to the local authority to any person aggrieved by the amendment on any of the grounds specified in section 142. Section 144(5) requires the amendment to be confirmed by the local authority. Section 145(1) gives a right of appeal to the High Court to any person dissatisfied with the decision of the local authority on his objection made under section 144(3) and requires that with the filing of the appeal the amount of the rate appealed against be paid to the local authority. Section 145(5) provides for a further appeal to the Federal Court. Those are all the provisions of the LGA that constitute the process of amendment of a Valuation List. It is a simple and straightforward process.

27. The *John Walker* case was a case where the owners, a company, of four hereditaments, after the Quinquennial Valuation List 1930 had been finally approved and having failed to avail themselves of various opportunities afforded by the Valuation (Metropolis) Act 1869 to object or appeal, sought an order of mandamus directing the rating authority to insert in Part II of the List the four hereditaments which were in Part I on the ground that they were industrial hereditaments. The advantage in a hereditament being in Part II was that the rate under Part II was lower than under Part I. The application was made after it became clear in

law, through a process which it is not necessary to explain, that the hereditaments were industrial hereditaments and should be in Part II. The passage from that case that the Court of Appeal relied on in the present case was the following passage from the opinion of Lord Warrington of Clyffe, at pages 380 and 381:

“... In the Act of 1869 a complete and easily understood code is laid down for the purpose of enabling objections, either by a ratepayer or other specified persons, to acts of the Assessment Committee or the rating authority to be considered and dealt with either by those bodies themselves or, in case of necessity, by judicial authority. In the present case all necessary notices were given so that the respondents were at all times in a position effectually to obtain relief under the statutory provisions. It is difficult to understand why the respondents deliberately, as it is said, abstained from resorting to the statutory provisions. ...

In my opinion this is one of those cases in which the Legislature has provided suitable means whereby persons aggrieved by the action of the rating authorities can obtain the removal of that grievance, and I am of opinion that when that is so it must be inferred that those means are intended to be exclusive: see *Rex v City of London Assessment Committee* [1907] 2 K. B. 764. ...”

28. It is tempting to read the last sentence of the passage, with its mention of the means provided for the removal of grievances as “intended to be exclusive”, as a statement of a rigid and absolute principle that a person who has a grievance about rates but does not avail himself of the means provided by statute to obtain redress cannot ever by whatever other means and on whatever grounds question the

rates. But it is necessary to read the leading judgment of Lord Wright to see that the decision of the House of Lords on the consequence of failure to resort to the statutory means had to do with the procedure in the preparation of the Quinquennial Valuation List 1930 which was regulated by the Valuation (Metropolis) Act 1869.

29. Lord Wright set out in outline the statutory procedure, including objections and appeals, in almost two pages and a half, pages 390 to 392. It is an involved procedure that I find tedious to read and not easy to visualize, and it will serve no useful purpose to set it out here. Lord Macmillan at page 387 described it as an “elaborate mechanism of the statutory procedure”. It is useful only to quote Lord Wright’s reason for the pains taken to summarize the provisions. At page 392 Lord Wright said:

“ I have summarized these provisions so far as relevant in order to show that the Legislature has carefully provided a machinery to ensure that the fullest opportunity is given to any person affected to make objection and to appeal; it is only after such opportunities have been afforded that the Valuation List is conclusive: the only provision made for alteration in consequence of any decision of the High Court is when it is the result of the hearing of a special case or on certiorari. It is of first importance that the list once finally settled should be conclusive, because of the number of persons and bodies whose position is affected by any particular change. No room is then left for interference by mandamus.”

30. It is important to note that “because of the number of persons and bodies whose position is affected by any particular change”, it became

“of first importance that the list once finally settled should be conclusive”, with no room left “for interference by mandamus”, which was what the company sought in the case. As to who were the persons and bodies who would be affected by any particular change and how they would be affected, an idea may be obtained from the following earlier passage at page 391:

“... The only appeal which for present purposes may be noted is that to the Assessment Sessions, now to London Quarter Sessions. This right of appeal was given to any ratepayer or any Surveyor of Taxes and any Overseer who may feel aggrieved by any decision of the Assessment Committee on any objection made by him. The right of appeal is also given to Assessment Committees in the Metropolis or in the County in which is the parish and to other similar bodies. This wide right is given because the decision in regard to any particular hereditament may change the totals by which the various other interested parties are affected. ...”

31. At page 387 Lord Macmillan said that the granting of the mandamus sought would be to interfere with the elaborate mechanism of the statutory procedure and would result in a confusion that had been described to the House of Lords “in sufficiently deterrent terms”. At page 385 Lord Russell of Killowen said it “would throw sand into the rating machinery which the statutes have provided”.

32. At page 394 Lord Wright asked this question:

“... In my opinion the respondents completely failed to avail themselves of the rights of objecting or appealing given to them by the statutes in regard to any complaint: can they in these proceedings

invoke the intervention of the Court by way of mandamus?”

33. After noting “the seriousness of the duties with which the Court is charged in dealing with an application for a writ of mandamus” and the wide discretion that judges have in exercising the remedial jurisdiction to grant the writ of mandamus because it is to enable justice to be done where there is no other means of obtaining justice, Lord Wright answered the question in the following manner at pages 395 and 396:

“ The essence of the respondents’ claim is that they have a right to have their hereditaments put into Part II of the List; but that right can only be based, if it exists at all, on the statutes I have summarized. ... In the present case the right of the respondents to have their hereditaments placed in Part II can only arise under the various Acts, and these also define the corresponding obligations on the part of the rating authorities. The Acts in my opinion have comprehensively and exclusively provided machinery for their enforcement. This I regard as the fundamental matter for the determination of this case ...”

34. Lord Wright at page 396 also referred to the decision of the Court of Appeal in *Rex v City of London Assessment Committee* [1907] 2 K.B. 764, which in the passage that I cited earlier Lord Warrington also referred to, and said that the case was “directly in point on the main principle to be here applied and is correctly decided”. That was a case where it was the Corporation of London who, after neglecting to appeal, applied for a writ of mandamus to order the Assessment Committee to insert the rateable value of certain premises in the Valuation List

because the Assessment Committee had failed in its statutory duty to do so. Lord Wright repeated the following words of Fletcher Moulton L.J. as “directly relevant here and most justly expressed”:

“The Legislature has drawn up a code of procedure, which was intended to be a practical code, for ensuring the substantial accuracy of a valuation list. The preparation of the list is hedged round by various safeguards, which allow persons directly and primarily interested to be heard during the period of its preparation; and when the Legislature has decided what are proper safeguards sufficient to ensure in practice a proper valuation list, it is not for us to add new safeguards. ...”

35. To my understanding it was because of the comprehensiveness and elaborateness of the mechanism of the statutory procedure, which was hedged around by various safeguards which the Legislature was seen as having decided to be sufficient to ensure a proper valuation list, and the undesirable consequences that would arise were the valuation list to be ordered by mandamus to be amended, that it was decided in *John Walker* that mandamus ought not to issue. The same cannot be said about the statutory procedure for amending a Valuation List under the LGA. As I said, it is a simple and straightforward procedure and no undesirable consequences would arise if the Valuation List in this case be further amended to state the proper annual value and annual rate for TNB’s holding pursuant to the agreement reached between TNB and MDD. That is why in my judgment the *John Walker* case ought not to be applied in this case to hold that the door was closed to TNB to question the rates claimed by MDD, and instead the *City of Victoria* case ought to be applied.

36. MDD also relied on section 158(1) of the LGA which provides, inter alia: “No valuation or rate assessed thereon, no charge or demand of any rate ... shall be impeached or affected by reason of any mistake in ... the amount of the rate assessed [on any holding] ... where the requirements of this Part ... are in substance and effect complied with”. But that section cannot apply in this case because it is the contention of TNB that the requirements of “this Part”, that is Part XV of the LGA, have not been complied with. TNB’s contention is that MDD acted contrary to the prohibition of proviso (b) to the definition of “annual value” in section 2. Since the term “annual value” appears at various places in Part XV, the definition of the term, including the provisos, must be treated as part of Part XV.

37. I would therefore answer Questions 1, 2 and 3 in favour of TNB, that is, in the negative. But a decision in favour of TNB on those questions does not mean, as was submitted on behalf of TNB, that this appeal should be allowed. Although the door is not closed to TNB to question the validity of the rates claimed by MDD, there still remains to be considered the Court of Appeal’s decision, which I have set out, on the estoppel question, which depends on the agreement of MDD with TNB to abide by the decision of the Tribunal, on the basis of which the learned trial judge dismissed MDD’s claim. To succeed in the appeal, it is necessary for TNB not only to be able to cross the threshold but also to justify as sustainable the cause that it carries across.

38. Before proceeding to deal with the Court of Appeal’s decision on the estoppel question, I have to state that it has been contended on

MDD's behalf that there was no such agreement. As I said, it was a finding of fact by the learned trial judge that there was such an agreement. The Court of Appeal also accepted that there was such an agreement. This may be seen from this statement at page 50 of the typescript of the judgment. "The amended bills were issued due to the arrangement and agreement between the parties to follow the decision of the said Tribunal in Case 1/94". And after looking at the documentary evidence pertaining to the negotiations I see no reason to disturb these concurrent findings of fact.

39. The Court of Appeal's decision, as I said, relied on *Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58. By way of explaining what the case was essentially about and what was decided, I need only reproduce the headnote to the report, in which Holding (1) is not relevant to the Court of Appeal's decision:

" The respondent Board had contracted to supply electricity to the appellants. By mistake it had considerably undercharged the appellants and they claimed the amount of \$84,624.01 cents from the appellants. The High Court gave judgment in favour of the Board, the learned trial judge holding that the Board was not estopped from claiming the amount although the appellants had utilised the accounts rendered by the Board for the purpose of costing their products. The appellants appealed to the Federal Court.

**Held**, dismissing the appeal: (1) the cases of estoppel by negligence are associated with those cases in which the silence of one under a legal duty to speak or act is regarded as a representation and it is a breach of that duty which is relied upon as

creating an estoppel. The doctrine of estoppel by negligence however has no application to the present case because there was an express representation by the servant or agent on behalf of the representor;

(2) the plea of estoppel by representation cannot be pleaded against a public corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public;

(3) such public corporation cannot indirectly do, by placing itself under the disability of estoppel, what it could not have directly done by reason of statutory prohibitions;

(4) the Electricity Act constituting the Board was founded not so much on considerations of trade as for the benefit of the public in general. The Board had a statutory duty to perform to assess the appellants for rates in accordance with the prescribed tariff for electricity actually supplied and the appellants had a corresponding duty to pay at the scheduled rates for electricity energy consumed. To waive the payment at scheduled rates is prohibited by the doctrine of *ultra vires*. If the plea of estoppel is allowed, the scheduled rates due in respect of the actual amount of electric energy supplied would be indirectly remitted, which the Board could not by any act directly remit. To allow the plea of estoppel would therefore be nullifying the statutory provisions of the Act.”

40. As may be seen, the reason why estoppel by representation was not allowed to be pleaded against the Lembaga Letrik Negara, a public corporation, was because to allow it would amount to waiving payment of the amount undercharged, whereas the waiver was prohibited by the

doctrine of *ultra vires* because it would be to indirectly remit statutory rates which the Lembaga did not have the power to remit.

41. Contrary to the opinion of the Court of Appeal, in my judgment it was not *ultra vires* the LGA for MDD to agree to abide by the decision of the Tribunal in determining the rate for TNB's holding. To determine the rate it was necessary to determine the annual value. The LGA does not lay down any particular medium or route to be used or taken for determining the annual value. MDD in fact resorted to a professional valuer to determine the annual value of TNB's holding. The dispute that subsequently arose centred on the application of proviso (b) to the definition of "annual value". It was a question that was going to arise and be decided by the Tribunal in Case 1/94. On the answer to the question and the proper application of the answer to the case of TNB's holding depended the correct determination of the annual value and the annual rate for the holding. I cannot agree that it was prohibited by the doctrine of *ultra vires* for MDD to agree to adopt a particular course of action to arrive at the correct annual value and annual rate. I do not see what provision of the LGA would, as the Court of Appeal said, be nullified by the agreement. The agreement was not to reduce the amount of the rate that TNB was bound to pay but was to arrive at the correct amount. If MDD was bound, had TNB made written objection to the annual value and annual rate originally determined by MDD, to consider TNB's grounds of objection and to arrive at a considered decision on the objection, I cannot see that MDD was prohibited at the outset to determine the proper annual value and annual rate through negotiations with TNB, thereby avoiding an objection and a subsequent

appeal. As I said, the LGA does not provide any particular medium or route for determining the annual value and yearly rate. The negotiations that the parties entered into and the agreement reached in this case were perfectly in order legally and I agree with the learned trial judge that MDD should not renege on the agreement. The Court of Appeal mentioned the fact that the negotiations did not result in a written agreement duly executed by the parties. But an agreement there was all the same to abide by the decision of the Tribunal. The failure was in the implementation of the agreement to arrive at a determination of the annual value and annual rate acceptable to both parties, as to which side the blame for which lies on has not been made an issue in this appeal.

42. I should mention that at the hearing of this appeal learned counsel for MDD invited us to hear his argument that, even applying proviso (b) to the definition of “annual value”, the annual value and annual rate determined by MDD originally for TNB’s holding were correct. This was objected to by learned counsel for TNB on the principal ground that the question was not one on which leave to appeal had been granted, nor was one that had been considered by the High Court or the Court of Appeal, and therefore ought not to be considered by us. After hearing submissions relating to the objection, we declined the invitation of MDD’s counsel to hear his submission on the question.

43. I would therefore answer Questions 4, 5 and 6 in favour of TNB, that is, Questions 4 and 6 in the affirmative and Question 5 in the negative, and accordingly allow this appeal with costs here and in the

Court of Appeal and set aside the orders of the Court of Appeal, except the order dismissing with no order as to costs TNB's appeal on its counterclaim. The resulting position would be that, as at the High Court, MDD's action stands dismissed.

44. Since TNB succeeds in this appeal on the first six questions, there is no necessity to answer the rest of the questions, which are questions on subsidiary issues on which TNB hoped to succeed in the appeal.

45. Notwithstanding that MDD's claim stands dismissed, the correct rate to be imposed on TNB's holding and to be paid by TNB as from 1 July 1991 has still to be determined. TNB's counsel has suggested that the rate should be that in MDD's bill dated 5 February 1992, which was RM479,550, based on an annual value of RM9,591,000. I am unable to accede to that suggestion because in my view that bill was merely a provisional bill issued so that, pending negotiations, TNB would at least pay something. I think that this court is not in a position in the circumstances of this appeal to decide what the rate should be. I agree with the learned trial judge that the determination of the correct rate should be done by the statutory process, because I cannot think of any other way in which it could be done. It may be too much to hope that the parties would arrive at an agreed figure – which in my judgment they could legally do – perhaps by continuing with the negotiations from where they left off.

46. TNB has been paying the rate at RM400,000 per year from 1 July 1991. As TNB, by its counsel's suggestion, has impliedly volunteered

to pay RM479,550, I would order that, pending the determination of the correct rate, the annual rate for TNB's holding as from 1 July 1991 be RM479,550.

47. The learned President, the learned Chief Judge (Malaya) and my learned brother Nik Hashim Nik Ab. Rahman FCJ have read this judgment in draft and have expressed their agreement with it.

Dated: 21 May 2009

**DATO' ABDUL AZIZ BIN MOHAMAD**

Judge  
Federal Court, Malaysia

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