Duta Enclave Case Saga: Manifest Miscarriage Of Justice

by

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Introduction

In 1956, the government (defendants) acquired around 250 acres of land owned by Semantan Estate (1952) Ltd (plaintiffs) for public purpose under the Land Acquisition Enactment ('Enactment'). The declaration published in the Government Gazette stated that 225 acres were required for public purpose but, at the enquiry, the Collector produced a plan indicating the area to be acquired was 250 acres. The Collector made an award of RM1,320,500 for 250 acres but the plaintiffs wanted RM3,250,000. They accepted the compensation under protest as to the sufficiency of the amount and required him to refer the matter to court under s. 22(1) of the Enactment. They did not dispute the legality of the acquisition but only the amount of compensation. On 3 December 1956 the Government took possession of 250 acres of the land.

On 1 August 1958, the plaintiffs' solicitors wrote to the Attorney General to settle all the procedural matters as set out in the letter, provided the defendants confirmed the agreement. The defendants replied confirming the proposal. Among the matters agreed was that the area of land acquired was 263.272 acres and that further compensation at the rate of RM5,282 per acre is payable on the additional 13.272 acres plus 6% interest from 3 December 1956, the date the defendants took possession of the land.

Pursuant to the above agreement between the parties, on 29 May 1956, a reference was made to the High Court, at the request of the plaintiffs, to decide the amount of compensation to be paid for acquiring 263.272 acres of land *vide* GN 401/56. The judge HS Ong dismissed the reference on the ground that it did not comply with s. 22 of the Enactment and therefore he had no jurisdiction. The Collector's award was not set aside, nor did the plaintiffs appeal against the court decision.

On 18 January 1963, the Ruler-in-Council granted the acquired land measuring 263.272 acres to the Federal Lands Commissioner, and separate titles were issued and registered on 20 February 1963.

Twenty years later, on 9 August 1983, the plaintiffs applied to the High Court for leave to apply for an order of *mandamus* requiring the Collector to complete the acquisition proceedings by holding an enquiry and determining the amount of compensation to be paid for 263.272 acres. Leave was granted but the defendants applied to strike out the substantial application for

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mandamus and succeeded. The plaintiffs' appeal to the Supreme Court (now the Federal Court) was dismissed on the ground, *inter alia,* that the plaintiffs had elected to accept the *status quo* by not appealing against the decision of Justice HS Ong.

Thirty-three years after the collector's award, and 26 years after the land was subdivided and 33 new tittles issued and registered in the name of the Federal Lands Commissioner, the plaintiffs filed a writ against the defendants alleging continuing trespass since 3 December 1956, the date the Collector notified the plaintiffs that he had taken possession of the land pursuant to s. 22 of the Enactment. The government applied to strike out the writ and Justice Dr Zakaria Yatim allowed the application. In his written grounds of judgment, His Lordship stated that it was time barred as well as estopped by the doctrine of *res judicata*. His Lordship also held that since the Collector's award was not set aside the government was in lawful possession.

The decision was reversed by the Federal Court which did not provide its grounds of judgment for overruling Justice Zakaria's decision which was based on the earlier Supreme Court decision in the same case.

The case was then heard by Zura Yahya JC who decided that the award was invalid and, therefore, the Government had remained in wrongful possession of the land. The Court of Appeal upheld JC Zura's decision and the Federal Court refused leave to the defendants to appeal. The defendants' application to the Federal Court to review its decision denying leave to appeal was also rejected.

The decision of the High Court as upheld by the Court of Appeal, as well as the decision of the Federal Court denying the defendants the opportunity to present their appeal on the stated relevant grounds, were potentially flawed for the reasons stated herein. They might have resulted in manifest miscarriage of justice with serious financial consequences for the Government and our people. In 1963, the land was acquired and the Government paid RM1.3 million as compensation. Now it is valued at RM4.6 billion. The plaintiffs are also claiming mesne profits of over RM3 billion, which is yet to be decided by the court. This could be a case of transfer of public money to the pockets of a few property owners as a result of flawed judicial decisions.

Analysis Of The Duta Enclave Judgments

Case 1 – High Court Judgment

Semantan Estate (1952) Ltd v. Collector Of Land Revenue [1960] CLJU 124; [1960] 1 LNS 124

On 29 May 1959 a reference was made to the High Court at the request of the plaintiffs to decide the amount of compensation to be paid for acquiring 263.272 acres of land *vide* GN 401/56. Counsel for the defendants,

Mr Ramani, argued that the award was invalid because the Collector failed to make an apportionment of compensation in favour of a known interested party. On the other hand, the plaintiffs' counsel, Mr Rintuol, defending the Colector's award, submitted that the omission was only an irregularity that did not vitiate the award. Ong J said it was not necessary to decide this point as, on other grounds, he did not have jurisdiction. He explained that 'the additional acquisition under GN117/58 of 6 March 1958 cannot possibly be included in the award of 27 November 1956, or in the reference as has been done'. He held that he had 'no jurisdiction under the Enactment to entertain the reference because it is not, in fact, a reference based upon the award of November 1956, or any award'. The plaintiffs did not appeal against the said decision.

Case 2 – Supreme Court Judgment

Semantan Estate (1952) Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329

After Justice Ong's decision, on 27 February 1961 the plaintiffs' solicitors wrote to the solicitors for the Collector requiring him to make an award in respect of proceedings initiated under GN/56 for 202 acres. If he maintained that he made a valid award then to make a reference to the High Court under s. 22(1) pursuant to their letter dated 10 January 1957. Also, they required him to make an award in respect of 60 acres acquired *vide* GN 117/58.

The Collector's solicitors replied that it was not competent for him to take steps required of him so long as his award remained. Only award that existed was the one relating to 250 acres and the plaintiffs had received compensation for 263.272 acres. The only reservation made by them was to the amount, *ie*, the rate per acre. If they wanted the Collector to refer the matter to the court, they should obtain leave to enlarge time under s. 22(iv).

Instead of appealing against the High Court decision or complying with the suggestion by the Collector's solicitors, the plaintiffs, 22 years later, on 9 August 1983, applied by originating motion to the High Court for leave to apply for an order of *mandamus* directed to the Collector requiring him to complete the acquisition proceedings by holding an enquiry and determining the amount of compensation to be paid for 263.272 acres. There was no allegation, nearly three decades after the defendants had taken possession of the land and developing it, that they were trespassing. What the plaintiffs were concerned about was only the amount of compensation and not the legality of the defendants taking possession of the land.

Leave was granted to proceed with the case. The government applied to strike out the originating motion and the High Court allowed it on the ground that it was time-barred and affected by inordinate delay. The plaintiffs

appealed to the Supreme Court which upheld the High Court decision to strike out the motion. In a unanimous written judgment, Lee Hun Hoe CJ (Borneo) explained:

> When a person feels aggrieved at the hands of the authority concerned in respect of his rights, he wants a remedy and redress of his grievance. In this case there are difficulties. The conduct of the appellant must be taken into consideration. The matter happened so long ago and also the fact that the appellant had agreed to waive certain irregularities no doubt to facilitate the making of a decision. The respondent had made an award which was much lower than what the appellant asked for. The High Court had declined jurisdiction as the reference was not expressly made within the provision of s. 22 of the Enactment. The appellant had a right of appeal against that decision but had apparently been advised not to appeal. In effect the appellant had a remedy but had never availed himself of it. Instead, he applied for an order of *mandamus* long after his right to the remedy lapsed. *There must be an end to litigation and the process of the Court should not be allowed to be abused. Under such circumstances, he must be regarded as having elected to accept the status quo since he did not enforce his right by appealing against the decision of the High Court in declining jurisdiction. He must take the consequence of his election.*

It must be noted that the plaintiffs applied to the High Court for leave to apply for an order of *mandamus* 23 years after Justice Ong' decision and, even then, there was no allegation that the government was in unlawful possession of the land and committing trespass. Three years after the Supreme Court decision, they filed a case against the government alleging trespass for the first and only time.

Case 3 – High Court Judgment – Metamorphosis Of A Claim For Increased Compensation To One For Damages For Trespass

On 2 March 1989, the plaintiffs filed a writ against the defendants alleging trespass – 33 years after they took possession of the land and invested money in developing it by constructing offices, courts, roads and other buildings with the full knowledge of the plaintiffs. In their statement of claim, they alleged that, on or about 3 December 1956, the Government took possession of the said land wrongfully and/or without any legal right to do so. The particulars of wrongful possession stated in the writ were:

(i) the award was invalid and *ultra vires* as it was based on 250 acres and not the gazetted 225 acres.

(ii) the award was irregular and null and void for the collector's failure to comply with ss. 8, 9(ii), and 11(i) of the Enactment.

The contention of the plaintiffs was that the alleged invalid award of compensation rendered the defendants' possession of the land unlawful. No authorities were cited in support of the proposition of law.

Application To Strike Out Writ Before Justice Dr Zakaria Yatim

Semantan Estate (1952) Sdn Bhd v. The Government Of Malaysia [1994] 3 CLJ 496

The defendants applied to strike out the writ. At the hearing of the application on 17 July 1991, Justice Dr Zakaria Yatim allowed the striking out and gave written grounds for his decision.

He adopted the reasoning of Chief Justice Lee Hun Hoe in the second *Semantan* case and held:

(i) in the present case the plaintiff is claiming a declaration and damages. The present suit is covered by s. (2a) of the Public Authorities Protection Act 1948. The word suit in the section not be given a restrictive meaning.

(ii) *the Collector in making the award was exercising a quasi-judicial function. Once the award was made, he was functus officio. He cannot set aside his own award. The power of setting aside the award is vested in the High Court. Since the award has not been set aside the defendant is still in lawful possession of the land. Therefore, the question of trespass or continuing trespass does not arise in this case.*

(iii) since the same matter has been litigated earlier in the second *Semantan* case, the principle of *res judicata* applies to the present case. There are no special circumstances in the present case. The appellant had a remedy but never availed himself of it. In the present case there has been actual decision by the High Court and the Supreme Court in the second *Semantan* case. The parties are the same and the basic issue raised before the Supreme Court and in the present case is the same pertaining to the acquisition of the said land.

The plaintiffs appealed and Dr Zakaria Yatim's decision was overturned by the Federal Court which did not give any written grounds for their decision. The parties and the public are entitled to know the basis on which they rejected the High Court judge's inferences and conclusions. Their unexplained decision is in conflict with the earlier Supreme Court judgment in the same case which held that there must be an end to litigation since the plaintiff must be regarded as having made an election to accept the *status quo* by not appealing against the High Court decision.

Trial Before Judicial Commissioner Zura Yahya

Semantan Estate (1952) Sdn Bhd v. The Government of Malaysia [2011] 2 CLJ 257

Zura Yahya JC decided that, from the documentary evidence, the Collector had failed to comply with several provisions of the Enactment, namely, ss. 8, 9(ii) and 11(i), and therefore the award is invalid and the plaintiffs

remained in wrongful possession of the land. The learned Judicial Commisioner failed to appreciate the effect of the different stages in the process of compulsory acquisition of land for public purpose, and the conduct of the parties.

In the first stage, the Collector notifies under s. 4(i) of the Enactment that a specified area of the proprietor's land is needed for a public purpose and then under s. 6(i) he publishes a declaration to that effect. He takes possession of the land after service of the award on the landowner in normal cases, and, in urgent cases, he can take possession regardless of whether any award has been made in respect of the land at that stage. The award can be made later.

If the landowner wants to challenge the legality of the acquisition then he should commence a writ action for an order that the declaration of intended acquisition is null and void. In the instant case the plaintiffs did not adopt such a course. Therefore, the irrefutable inference from their conduct is that they accepted the legality of the acquisition of their land for public purpose, and its occupation by the defendants. They only wanted higher compensation.

In the second stage, an inquiry is held to determine the compensation for the acquired land and the Collector makes an award. Thus, taking possession of the land after publication of the declaration that the land is needed for public purpose is distinct from the process for fixing the compensation. The Collector's alleged invalid award does not *ipso facto* render the Government's taking possession of the land unlawful and a trespass. The award relates to the compensation to be paid for the acquisition of the land and not to the legality of its possession under the Enactment.

If the landowner disputes the compensation, he can request the Collector to make a reference to the High Court whose decision on compensation is final and cannot be appealed to a higher court. The landowner needs to pursue a claim for compensation by adhering to the procedure prescribed in the Enactment and not by way of an action extraneous to the Enactment, for example by way of a writ action for a declaration or damages. In *Tan Yoke Kwee & Ors v. Sistem Lingkaran Lebuhraya Sdn Bhd & Ors* [2010] 2 CLJ 653, the Appeal Court expounded the legal principles to be followed in land acquisition cases:

> The grievance of the plaintiffs whose lands had been compulsorily acquired clearly relates to the amount of compensation that should be payable to them. That being so, the procedure that should have been followed by these plaintiffs must necessarily be that as prescribed under s. 36, 37 and 38 of the Act. Their claim by way of originating summons was clearly misconceived.

In the instant case the plaintiff followed the procedure but when the High Court declined to hear the reference they did not take steps to appeal or to set aside the Collector's award. Instead, three decades later, they commenced a writ action claiming a declaration and damages for trespass which, based on the above said legal principles, they are barred from doing so.

The defendants appealed against JC Zura Yahya's judgment in the Court of Appeal which dismissed the appeal and confirmed the High Court decision on identical grounds. They did not refer to, and consider, the judgments in land acquisition cases, including those decided by the Court of Appeal, which have held that landowners must follow the procedure set out in the Enactment for obtaining fair compensation and not file an action in court.

For the following reasons, their judgments that the defendants were in illegal possession of the land and trespassing is unsustainable, without basis in law and contradicted by the conduct of the parties.

Land Compulsorily Acquired By Government Under Statutory Power

The Collector took possession of the land on 3 December 1956 pursuant to the powers invested in him by s. 22 of the Enactment. He served Form K on the plaintiffs stating that he has taken possession of the acquired land. There was no objection to it from them.

The statutory power of the Government to compulsorily acquire land even before an award was made is clearly illustrated by the case *Ng Chee Keong and Anor v. Lembaga Letrik Negara and Anor* [1991] 3 CLJ (Rep) 323. The first defendant had entered into negotiations with the family of the deceased owner of land for acquiring a portion. Although no agreement was executed and compensation was not paid, between 1960-1962, the defendants entered into the land and built an access road which was continued to be used as access to and from Tanah Rata. The second defendant subsequently acquired the land in 1972 and paid compensation into court. The plaintiffs, executors of the deceased's estate, filed a writ in 1989 alleging trespass against the defendants and claiming compensation at market value.

The judge decided that as the said portion was compulsorily acquired and ownership had been transferred to the first defendant and duly registered the plaintiff's cause of action which was anchored solely on trespass cannot in any way be sustainable. Similarly, in the instant case, the land was compulsorily acquired in 1956 and ownership transferred to the Federal Lands Commissioner and duly registered in 1963.

The Court of Appeal, in *Konsortium Lebuhraya Utara-Timur Sdn Bhd v. Liew Choong Kin* [2018] 6 CLJ 217, endorsed and applied the decision of Justice Lim Beng Choon in the above case.

In that case (*Konsortium)*, the respondent was the owner of a piece of land which was acquired for the construction of a highway in 2005. No award was made to the respondent when the land acquisition enquiry was conducted in 2005. The highway, part of which ran across the land, was constructed and completed in 2009. There was no response to his query about the status of the acquisition. Thus, in June 2013, he sought compensation. Then, the first defendant commenced a second land acquisition proceeding and conducted an enquiry which the respondent attended and accepted the award without protest. He, subsequently, filed an action for trespass for the period between 2005 and 2015. The appellant applied to strike out the action but was unsuccessful. They appealed to the Court of Appeal and it was allowed.

The Court Appeal held that: "It is indeed an irrefragable fact that part of the highway runs across the subject land. *Thus, any entry to the subject land by the appellant was in the exercise of their statutory right pursuant to the said acquisition. The appellant could not therefore be said to have trespassed on the subject land.* Now that the process of the acquisition was completed following the second declaration under s. 8 of the Act in 2014 and the award of compensation had already been made based on the respondent's valuation report, he should have followed through all aspects of the statutory process under the Act including requiring by way of an application under ss. 37 and 38, that the Land Administrator refers the matter to the court for its determination." (para 22)

In the instant case, the plaintiff attended the collector's enquiry, accepted his award under protest and required him to submit a reference to the High Court on the adequacy of the compensation. The Collector took possession of the acquired land on 3 December 1956 pursuant to his statutory powers under the Enactment. When the reference was dismissed by the High Court they did not appeal or take steps to set aside the award and order a fresh enquiry. Thus, as stated by the Supreme Court in its aforesaid decision, the plaintiffs must bear the consequences of not taking appropriate action to claim a higher compensation than what was awarded by the collector.

Principle Of Law – Not Possible To Approbate And Reprobate

The court in *Konsortium* also held that: 'Based on the above actual facts, the respondent could be said to be taking a different stance before the court in this action and under the law he was not allowed to blow hot and cold in the attitude that he adopts. The learned judge failed to consider that the respondent's claim for trespass and the claim he had already made at the second enquiry arose from the same facts. He should accordingly be estoppel from commencing this action. *The respondent having made a choice at the second enquiry could be treated as having made an election from which position he should not be allowed to abandon. He had taken a benefit arising out of the course of conduct which he had pursued earlier and with which his subsequent conduct was inconsistent with his election. The respondent should not be at liberty to approbate and reprobate having taken a particular position.*' (para 25)

In the words of Sir Nicolas Browne-Wilknson: 'There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.' (*Express Newspaper plc v. News (UK) Ltd and others* [1990] 3 All ER 376, at pp. 383-384).

In the instant case, the plaintiffs took the stance of claiming only compensation under the Enactment which means that they were not disputing the legality of the acquisition, and the Government taking possession of the land. Three decades later, they make a U-turn and alleged that the Government has been in unlawful possession since 3 December 1956. They must not be allowed to blow hot and cold, approbate and reprobate, having taken a position of seeking only compensation for the acquired land, and not challenging the legality of the acquisition and the defendants taking possession of the said land. It is because of their own negligence that they failed to take steps to refer the matter again to the High Court, after Justice Ong declined jurisdiction to hear the reference for seeking higher compensation than what has been awarded.

Ignoring Supreme Court Decision In The Same Matter

Justice Ong declined jurisdiction, and the plaintiffs did not appeal. Twenty-two years later they applied for an order of *mandamus* but the High Court struck it out and it was upheld by the Supreme Court which stated that *'There must be an end to litigation and the process of the Court should not be allowed to be abused. Under the circumstances, he (Semantan) must be regarded as having elected to accept the status quo since he did not enforce his right by appealing against the decision of the High Court in declining jurisdiction. He must take the consequence of his election'*.

The decision of the High Court, upheld by the Court of Appeal, that the plaintiffs are the beneficial owners of the land is inconsistent and in direct conflict with the earlier Supreme Court decision. It unanimously held, based on the conduct of the plaintiffs and their inordinate delay, that they had made an election and accepted the *status quo* which included the government's possession of the land and its development over three decades.

Despite the clear and unequivocal verdict of the Supreme Court, involving the same parties and based on identical factual background, the plaintiffs, later, filed a case in trespass against the defendants and succeeded. Both the the High Court and the Court of Appeal totally ignored the decision of the Supreme Court, and earlier decisions on the legal principles governing the procedure to be followed for claiming compensation in land acquisition cases. Thus, the decisions of the High Court and the Court of Appeal must be regarded as *per incuriam*.

Collector's Award Is Effective Until Set Aside

The Collector's award, assuming it is invalid, is still effective until set aside by a court of competent jurisdiction.

In *Smith v. East Elloe Rural District Council* [1956] AC 736 at 739, Lord Radcliffe said: "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.) (*HWR Wade and CF Forsyth, Administrative Law*, 9th edn, p. 304)

The plaintiffs took no steps to set the Collector's award aside. As the Collector's solicitors had pointed out, he could not set aside his own award as he was *functus officio*. Therefore, the legal consequence of the award was that the Government's possession of the land was lawful, and could not constitute a trespass.

The High Court and Court of Appeal held that the Collector's lawyer's letter admitting that the award was invalid supported their finding of trespass. Both courts did not advert to any legal authority to support their decision. It is also contrary to the established legal principle that an invalid order must be set aside by a competent court for it not to have any effect. Their view is misconceived because neither the parties nor the court is bound by the lawyer's admissions as to matters of law or legal conclusions. (*Himalayan Coop, Group Housing Society v. Balwan Singh* [2015] 7 SCC 373).

Estoppel By Conduct

On 1 December 2056, the Collector served on the plaintiffs his award and, two days later, the Government was let into possession of the land by them. By letter dated 22 December 1956, the plaintiffs *informed the defendants that they received the award under protest as to the sufficiency of the amount, and would be applying under s. 22 for a reference to the court. There was no objection to the government taking possession of 250 acres of the said land.* The only issue left in the acquisition process was to make a reference to the court to decide the competing claims as to the compensation to be paid to the plaintiffs.

By letter to the Attorney General dated 2 August 1958, the plaintiffs' solicitors informed the Attorney General that they agreed that the procedural matters be settled in the manner set out in the letter which included that the area acquired was 263.272 acres. The Government accepted the terms and the only issue was the amount of compensation to be paid for the acquired area. On this agreed basis, reference was made to the High Court.

At the hearing, Justice Ong held that he had no jurisdiction to hear the reference because it did not comply with s. 22 of the Enactment. He did not set aside the Collector's award, which, until it is set aside by a court of

competent jurisdiction, has legal consequences. What is the legal effect of the agreement between the parties? It may not invest jurisdiction in the court to hear the reference but it is effective, among other things, as an agreement by the parties on the acreage of the acquired land which the defendants had taken possession for public purpose, and the compensation claimed by the plaintiffs to be decided by the court.

By this date, the Government had been in possession of the land for about four years and invested a lot of resources developing it, to the knowledge of the plaintiffs. There were no objections to it, and the legality of the acquisition was not disputed at all by them. So, what is the basis for them contending, and the courts holding, 33 years later, that the Government's possession of the land was unlawful and constituted trespass?

Three years after the Supreme Court decision upholding the High Court's striking out the plaintiffs' application for writ of *mandamus*, on 2 March 1989, the plaintiffs a writ against the government for trespass and claiming a declaration and mesne profits. This was the first, and only time, they had alleged trespass against the Government. In all these 33 years they were trying to get a higher compensation and did not question the legality of the Government's occupation of the land. The only inference that one can draw from their conduct is that they acquiesced in the government taking possession and developing the land but contested the amount of compensation. By their conduct over three decades, they are estopped from challenging the legality of the Government's possession of the acquired land. It is surprising that this obvious fact had escaped the attention of the judges of the High Court and Court of Appeal.

Proceedings In The Federal Court

Dismissal Of The Defendants' Application For Leave

Dissatisfied with the decision of the Court of Appeal, the defendants filed an application to the Federal Court for leave to appeal against it. They wanted the court to decide a number of questions of law which included:

(i) whether an invalid award of compensation will nullify the whole of the land acquisition process;

(ii) whether an objection to the adequacy of the award of compensation can translate into a challenge of the land acquisition process;

(iii) whether the award of compensation not properly made in substantial conformity of the Enactment would render the land acquisition unlawful;

(iv) whether the landowner who is no longer the registered owner of the land can claim for trespass and seek mesne profits;

(v) whether the court can come to the finding that the Federal Lands Commissioner is in wrongful possession of the land and is a trespasser when the landowner has failed to set aside the irregular award of compensation;

(vi) whether the respondent has a requisite locus standi to claim for trespass given that the land has been acquired and the title thereto been transferred to the FLC;

(vii) whether the respondent retains beneficial interest in the land given that the land has been acquired and title thereto been transferred to the FLC.

The Federal Court refused to grant leave without providing any written grounds for their decision. The above questions of law are important ones which need definitive answers from the highest court. For example, the issues:

(i) whether an objection to the adequacy of the award of compensation can translate into a challenge of the land acquisition process;

(ii) whether the respondent retains beneficial interest in the land given that the land has been acquired and title thereto been transferred to the FLC

were not considered and decided by both the High Court and the Court of Appeal. In fact, at the time of the refusal of leave there were already existing court decisions on land acquisition which held that when land was compulsorily acquired and ownership transferred to the authorities and duly registered an action in trespass cannot in any way be sustainable. They also declared that a claim for compensation must follow the procedure embodied in the Enactment and not by way of an action for a declaration, damages or other remedies, which would constitute an abuse of process. (See the cases *Ng Chee Keong, Consortium* and *Tan Yoke Kwee* above cited). Surprisingly, in the instant case, none of these important authorities were considered by the judges. Basing their judgments without considering the established law would necessarily render them *per incuriam*.

On the importance of judges giving reasons for their decisions, the Court of Appeal in *Low Oo Hoi v. Pentadbir tanah Wilayah Persekutuan Kuala Lumpur* [2023] 5 CLJ 376 explained:

> … we are of the opinion that giving reasons in a judgment is an essential requirement of the rule of law. *A non-reasoned judgment can be held as a judgment not according to law* … …a reasoned decision will act as a guard against any non-application of the mind and arbitrariness by the judge. Above all, reasons for judgment run parallel with the basic principle that justice must not only bedone, it must appear to be done.

The denial of leave to appeal may constitute clear violation of s. 96 of the Courts of Judicature Act 1964 which provides for appeal to the Federal Court with leave 'from any judgment involving a question of general principle decided for the first time or a question of importance upon which

further argument and a decision of the Federal Court would be to public advantage'. It may even amount to case of judicial abdication to consider and decide a legal issue which is of vital importance to not only to the parties but also the public.

Dismissal Of The Defendants' Application For Review

Kerajaan Malaysia v. Semantan Estates (1952) Sdn Bhd [2019] 2 CLJ 145

The defendants applied to the Federal Court to exercise their inherent power under r. 137 to review their decision denying the defendants leave to appeal. Its object is to prevent an injustice or an abuse of process. Among the grounds stated in the application for review were the following questions of law:

(i) dismissing the application for leave to appeal had denied the defendants the opportunity to be heard in an appeal resulting in gross injustice.

(ii) The Court of Appeal had very serious legal implication on the process of land acquisition, the position of the defendants as the registered owners of the land and their occupation of the same.

(iii) by dismissing the application for leave to appeal, the court has denied the opportunity to be heard on whether the defendants could be found to have remained in wrongful possession of the land which was registered in the name of the Federal Lands Commissioner in 1963.

The Federal Court dismissed the application for review on the ground that the 'issues raised by the defendant had been raised, litigated and decided in Semantan 1, Semantan 2, and Semantan 3.' This reasoning maybe misconceived, because, as we have discussed earlier, the judgments in the three cases did not discuss and decide the issues of law raised by the defendants in their application to the Federal Court for leave to appeal, and also those raised in their review application. It seems to ignore the earlier Court of Appeal decision on the procedure to be followed for claiming compensation for land acquired under the Enactment for public purpose, which bars bringing actions for trespass. It is also unfortunate that not a single authority was referred to by the judges which justify, in land acquisition cases, filing a writ action claiming a declaration and damages for trespass.

The Federal Court further said that none of the grounds raised by the defendant was sufficient to justify a review under r. 137. With the greatest of respect, the learned judges, in so asserting, may have misunderstood the purport and significance of the grounds raised by the defendants. The Federal Court regurgitated the principles governing the scope of review but did not seem to apply them to the case in hand. The decision of the High Court, affirmed by the Court of Appeal, and the denial of leave to appeal by the Federal Court may have thus resulted in manifest miscarriage of justice for which r. 137 of the Courts of Judicature Act provides the route to rectify the errors so that justice will prevail.

Appendix

Plaintiffs: Semantan Estates (1952) Sdn Bhd

Defendants: Kerajaan Malaysia

Chronology of Significant Facts

20 October 1956	By GN577/56 it was declared, pursuant to s. 6(1) of the Land Acquisition Enactment, that 225 acres of the plaintiff's land was needed for public purpose, namely a Diplomatic Enclave.
27 November 1956	During the Collector's enquiry, the plaintiff claimed compensation at the rate of RM of 13,000 per acre and also delivered a letter to the Collector stating that Anglo (Thai) Corporation limited of Singapore was an interested party. It had an option to purchase 63 acres of the land. The Collector made an award of compensation to the plaintiff at the rate of RM5,282 per acre for the 250 acres even though the acres gazetted to be acquired was only 225 acres. The total amount awarded was RM1,320,500 in respect of 250 acres.
3 December 1956	The Collector took possession of 250 acres. Form K under the Enactment was served on the plaintiff.
22 December 1956	By letter to Collector, the plaintiff informed him that it received the award under protest as to the sufficiency of the amount, and would be applying to him under s. 22 of the Enactment for a reference to the court.
10 January 1957	The plaintiff notified the Collector that they did not accept the award and required him to refer the matter to court under s. 22(1) of the Enactment.
22 January 1958	By GN 61/58 the defendant declared withdrawal of around 22 acres of land from the acquisition *vide* GN 577/56.
25 January 1958	By GN 117/58 it was declared 25 plus acres of plaintiff's land was additionally needed for extension of the Diplomatic Enclave. Possession of the 60 acres was taken by the Collector without holding an enquiry or paying any compensation.

3 May 1958	Letter from the Collector to the plaintiff's solicitors admitting: (a) the award was invalid (b) the enquiry of 27 November was a nullity By the same letter, the Collector informed the plaintiff's solicitors that notices under ss. 9(i), (iii), (iv) and 10(i) stating that the Government intended to take possession of 202 acres 2 roods and 16 poles of CT 12530 were given to the plaintiff. Acquisition hearing scheduled for 18 May 1958 was postponed to 15 August 1958 and eventually abandoned on 24 March 1959. The area that the Government finally took possession was 263.272 acres.
1 August 1958	The plaintiff's solicitors wrote to AG that all procedural matters be settled in the manner set out in the letter provided the Government confirmed the agreement.
2 August 1958	The plaintiff's solicitors wrote to the Collector not to pursue the hearing fixed on 15 August 1958 in view of their above letter to AG.
5 January 1959	The defendant replied to the plaintiff's lawyers confirming the arrangement set out in the latter's letter: a) The whole area now taken by the Government was acquired by virtue of GN 401/56 b) Areas "A", "C" and "D" shown in the plan referred to letter dated 5 May 1958 were acquired under GN 401/56. c) No proceedings were taken in respect of area "B" d) Collector's award for "A", "C" and "D" was at the rate of RM5,282 per acre but the plaintiff asked for RM13,000 per acre e) The plaintiff was entitled to make additional claim under s. 29(i) and/or (i)(d) in respect of severance or injurious affection

	f) Total area of "A", "B", "C" and "D" 263.272 acres g) Further compensation at the rate of RM5,282 per acre is payable on the additional 13.272 acres plus 6% interest from 3 December 1956 h) The second acquisition proceedings would be withdrawn by the defendant and should be treated by both sides as never having occurred.
29 May 1959	Reference was made to High Court in respect of purported acquisition of 263.272 acres under s. 22 *vide* GN 401/56 Ong J dismissed the action and held, *inter alia*, that the conditions in s. 22 must be complied with before the Collector can make the reference and the court have jurisdiction to act on it.
27 January 1961	The plaintiff's solicitors wrote to the the Collector's solicitors requiring the Collector make an award in respect of proceedings initiated under GN/56 for 202 acres. Alternatively, if the Collector maintained that he made a valid reward then make a reference to HC under s. 22(1) pursuant to plaintiff solicitors letter dated 10 January 1957. They also required the Collector to make an award in GN 117/58 in respect of 60 acres.
14 March 1961	The Collector's solicitors replied that it was not competent for the Collector to take steps required of him by the plaintiff so long as his reward remained. Only award that existed was the one relating to 250 acres and Semantan had received compensation for 263.272 acres. Only reservation made by the plaitiff was to the amount, *ie*, the rate per acre. If Semantan wanted the Collector to refer the matter to Court, they should obtain leave to enlarge time under s. 22(iv) of the Enactment.
25 April 1961	The plaintiff informed the Collector that they were in the midst of preparing the final draft of application under s. 44 of Specific Relief Ordinance as indicated in the plaintiff's letter of 27 February 1961

18 January 1963	The Ruler-in-Council granted 263.272 acres to Federal Lands Commissioner.
20 February 1963	38 separate titles were issued, and the Federal Lands Commissioner was Registered as the proprietor.
9 August 1983	The plaintiff applied to court for leave to apply for an order of *mandamus* directed to the Collector requiring him to complete the acquisition proceedings by holding an enquiry and determining the amount of compensation to be paid for 263.272 acres.
8 December 1983	Leave granted.
12 October 1984	The defendant applied to strike out the application for *mandamus*.
9 May 1985	Application struck out on the ground of limitation.
28 February 1986	The plaintiff's appeal to the Supreme Court was dismissed. [1987] CLJ (Rep) 329
15 February 1989	The Land Administrator sent letter to Semantan enclosing Borang L to surrender the title deed to the land held under CT17038
2 March 1989	Around 33 years after the defendant taking possession of the land subject to acquisition pursuant statutory powers under the Enactment and expending a lot of money and resources on developing it, the plaintiff filed a writ against the government alleging trespass.
14 June 1994	The defendant applied to the High Court to strike out the writ of summons and the court allowed it based *inter alia* on the said Supreme Court decision in the same case. [1994] 3 CLJ 496
3 October 1994	The Federal Court reversed the decision but did not give any written grounds, although the High Court had given written grounds.
29 December 2019	On trial before the High Court, Zura Yahya JC held that the defendant was in unlawful possession of the said land. [2011] 2 CLJ 257

18 May 2012	The defendant's appeal to the Court of Appeal was rejected. [2012] 1 LNS 635
21 November 2012	The defendant's application for leave to appeal to the Federal Court was dismissed.
22 November 2018	The defendant's application for review against dismissal of application for leave to appeal was dismissed by the Federal Court.