IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: P-01(A)-499-08/2024

BETWEEN

1. **ZAKARIA BIN ISMAIL** (NRIC NO.: 570828-07-5593)
   Mendakwa bagi pihak sendiri dan bagi pihak nelayan-nelayan lain yang tinggal dan/atau menjalankan aktiviti perikanan di selatan pantai Pulau Pinang yang terjejas akibat Projek Penambakan Pulau Pinang Selatan [Penang South Reclamation (PSR)]

2. **IBRAHIM BIN CHE ROSE** (NRIC NO.: 660208-07-5209)

3. **AZHAR BIN NAJAMUDIN** (NRIC NO.: 711026-07-5045)

4. **MOHD ISMAIL BIN AHMAD** (NRIC NO.: 610811-07-5291)

5. **MOHD SHAHRIL BIN ROSLI** (NRIC NO.: 840812-07-5457)

6. **OMAR BIN HASSAN** (NRIC NO.: 581113-07-5219)

7. **RAMDZAN BIN ISHAK** (NRIC NO.: 610222-07-5189)

8. **MAGESWARI SANGARALINGAM** (NRIC NO.: 680313-07-5620)
   Mendakwa sebagai Setiausaha Kehormat bagi pihak Sahabat Alam Malaysia

(No. Pendaftaran Pertubuhan: PPM-002-07-27091977)

9. **KHOO SU NIN** (NRIC NO.: 630113-07-5284)
Mendakwa sebagai Presiden bagi pihak Jaringan Ekologi dan Iklim
(No. Pendaftaran Pertubuhan: PPM-0170-07-11082020)

... **APPELLANTS**

AND

1. **PENGARAH JABATAN PERANCANGAN BANDAR DAN DESA PULAU PINANG**

2. **JAWATANKUASA PERANCANG NEGERI PULAU PINANG**

3. **KERAJAAN NEGERI PULAU PINANG**

4. **SRS CONSORTIUM SDN. BHD.** (CO. NO.: 1245608-K)

5. **SILICON ISLAND DEVELOPMENT SDN. BHD.**
(CO. NO.: 1501368-T)

... **RESPONDENTS**

[In the matter of High Court of Malaya at Penang
Judicial Review Application No.: PA-25-101-12/2023

Between

1. Zakaria bin Ismail (NRIC No.: 570828-07-5593)
Mendakwa bagi pihak sendiri dan bagi pihak nelayan-nelayan lain yang tinggal dan/atau menjalankan aktiviti perikanan di selatan

pantai Pulau Pinang yang terjejas akibat Projek Penambakan Pulau Pinang Selatan [Penang South Reclamation (PSR)]

2. Ibrahim bin Che Rose (NRIC No.: 660208-07-5209)

3. Azhar bin Najamudin (NRIC No.: 711026-07-5045)

4. Mohd Ismail bin Ahmad (NRIC No.: 610811-07-5291)

5. Mohd Shahril bin Rosli (NRIC No.: 840812-07-5457)

6. Omar bin Hassan (NRIC No.: 581113-07-5219)

7. Ramdzan bin Ishak (NRIC No.: 610222-07-5189)

8. Mageswari Sangaralingam (NRIC No.: 680313-07-5620)
Mendakwa Sebagai Setiausaha Kehormat bagi pihak Sahabat Alam Malaysia
(No. Pendaftaran Pertubuhan: PPM-002-07-27091977)

9. Khoo Su Nin (NRIC No.: 630113-07-5284)
Mendakwa sebagai Presiden bagi pihak Jaringan Ekologi dan Iklim (No. Pendaftaran Pertubuhan: PPM-0170-07-11082020)

... Applicants

And

1. Pengarah Jabatan Perancangan Bandar dan Desa Pulau Pinang

2. Jawatankuasa Perancang Negeri Pulau Pinang

3. Kerajaan Negeri Pulau Pinang

4. SRS Consortium Sdn. Bhd. (Co. No.: 1245608-K)

5. Silicon Island Development Sdn. Bhd.
(Co. No.: 1501368-T) ... Respondents]

CORAM:

AZIMAH BINTI OMAR, FCJ
WONG KIAN KHEONG, JCA
ISMAIL BIN BRAHIM, JCA

JUDGMENT OF THE COURT

A. Introduction

1. This judgment discusses, among others, a novel question of whether a "*local planning authority*" [defined in s 2(1) of the Town and Country Planning Act 1976 (**TCPA**)] has the power under s 22(3) TCPA to grant a "*planning permission*" (**PP**) for a land reclamation from the "*territorial sea*" [as understood in s 3(1) to (3) of the Territorial Sea Act 2012 (**TSA**) read with s 5(1) of the Baseline of Maritime Zones Act 2006 (**BMZA**)] off the southern coast of Penang island (**Novel Question**).

B. Background

2. The first to seventh appellants ("**1st Appellant**" to "**7th Appellant**") are fishermen in Sungai Batu and Teluk Tempoyak, Penang.

3. The eighth and ninth appellants ("**8th Appellant**" to "**9th Appellant**") are non-profit and non-governmental organisations which are concern with environmental matters. This judgment shall refer to the 1st to 9th Appellants as the "**Appellants**".

4. On 28.6.2007, the Penang Structure Plan 2020 (**SP2020**) was gazetted by the Penang State Government, the third respondent in this case (**3rd Respondent**). The SP2020 did not provide for the "*Penang South Reclamation Project*" (**PSR Project**).

5. In 2014, the 3rd Respondent issued a "*Request for Proposal*" which invited proposals for the "*Roads and Public Transport Projects in Penang*" in relation to the Penang's "*Transport Master Plan Strategy 2013-2030*" (**TMP**). Consequently -

   (1) the 3rd Respondent accepted the TMP's proposal by the fourth respondent company (**4th Respondent**);

   (2) the 4th Respondent was appointed by the 3rd Respondent to be the 3rd Respondent's "*Project Delivery Partner*" for the TMP; and

   (3) the fifth respondent company (**5th Respondent**) was incorporated to be the "*Special Purpose Vehicle*" for the PSR Project.

6. The 3rd Respondent submitted a "*Master Plan* for the PSR Project [**Master Plan (PSR Project)**] to the second respondent (**2nd**

Respondent) on 7.4.2016. According to the Master Plan (PSR Project) -

(1) there would be a reclamation of 4,500 acres from the territorial sea off the southern coast of Penang island; and

(2) three man-made islands ("**Island A**", "**Island B**" and "**Island C**") would be built on the reclaimed land. Islands A to C shall be collectively referred to in this judgment as the "**3 Islands**".

7. On 27.5.2016, the 2nd Respondent approved the Master Plan (PSR Project) and referred the Master Plan (PSR Project) to the National Physical Planning Council (**NPPC**) for NPPC's advice on the Master Plan (PSR Project).

8. The Draft Structure Plan 2030 for Penang (**DSP2030**) had been prepared and included, among others, the PSR Project.

9. On 14.3.2019, the 2nd Respondent approved the DSP2030 and referred the DSP2030 to the NPPC for NPPC's advice on the DSP2030.

10. The Master Plan (PSR Project) was presented to the Working Group of the NPPC [**WG (NPPC)**] on 13.10.2016. However, the WG (NPPC) decided to postpone the submission of the Master Plan (PSR Project) to NPPC until all the technical reports regarding the Master Plan (PSR Project) had been updated.

11. On 18.4.2019, the NPPC gave an "*18-point advice*" on the DSP2030 (which included the PSR Project) [**NPPC's 18-Point Advice (18.4.2019)**].

12. The Director General of Environmental Quality (**DGEQ**) [as defined in ss 2 and 3(1) of the Environmental Quality Act 1974 (**EQA**)] approved on 25.6.2019 the "*Environmental Impact Assessment*" report (**EIA Report**) submitted for the PSR Project (**DGEQ's 1st Approval**). On appeal by the Appellants against the DGEQ's 1st Approval to the Appeal Board under the EQA [**Appeal Board (EQA)**], the Appeal Board (EQA) set aside the DGEQ's 1st Approval on 8.9.2021.

13. On 29.8.2019, the first respondent (**1st Respondent**) approved the "*Social Impact Assessment*" report for the PSR Project.

14. The 3rd Respondent gazetted the DSP2030 on 24.10.2019. This judgment would hereinafter refer to the DSP2030 as the "**SP2030**".

15. An amended Master Plan (PSR Project) [**Amended Master Plan (PSR Project)**] was submitted by the 3rd Respondent to the 2nd Respondent on 21.1.2022. The 2nd Respondent approved the Amended Master Plan (PSR Project) on 27.6.2022.

16. On 11.4.2023, the DGEQ gave a fresh approval for the second EIA Report (**2nd EIA Report**) submitted with regard to the PSR Project (**DGEQ's 2nd Approval**). The Appellants had appealed against the DGEQ's 2nd Approval to the Appeal Board (EQA) [**2nd Appeal**

(EQA)]. However, the 2nd Appeal (EQA) had yet to be heard by the Appeal Board (EQA).

17. The 3rd Respondent issued a statement on 11.5.2023 which stated as follows, among others:

    (1) the PSR Project would be reduced to a reclamation of 2,300 acres from the territorial sea (**Reclamation**);

    (2) after the completion of the Reclamation, only Island A would be built on the reclaimed land; and

    (3) Island B and Island C (which involved a reclamation of 2,200 acres of land from the territorial sea) would be "*shelved*".

18. On 21.8.2023, the 1st Respondent granted PP [**PP (Reclamation)**] for the 3rd Respondent's PP application with regard to the Reclamation [**3rd Respondent's PP Application (Reclamation)**].

19. By way of a letter dated 9.6.2023, the Appellants' solicitors had written to the 1st Respondent and requested for information regarding the PP for the PSR Project [**Appellants' Letter (9.6.2023)**].

20. The Penang Chief Minister made a press statement on 1.9.2023 [**Press Statement (1.9.2023)**]. According to the CM's Press Statement (1.9.2023) reported in the Malay Mail, among others -

(1) "***With the approvals from the relevant agencies, preliminary reclamation preparations for the [PSR Project] will start today and will continue until completion***" (emphasis added);

(2) "***the Environmental Management Plan (EMP) for the Silicon Island Project was approved by the Penang DoE on July 21. The approval came after the [EIA Report] for the Penang South Island (PSI) project was given an approval with 71 conditions by the DoE on April 11***" (emphasis added);

(3) the "*PSI, also known as [PSR Project], was scaled down from the proposed three artificial islands to only one island. Only Island A, rebranded as Silicon Island, that measured about 920 ha will be reclaimed*"; and

(4) "*The decision was made after Prime Minister Datuk Seri Anwar Ibrahim asked the state government to scale down the PSI Project*".

21. Pursuant to the CM's Press Statement (1.9.2023), the Appellants' solicitors sent a letter dated 1.9.2023 to the 1st Respondent and requested for information regarding the PP for the PSR Project [**Appellants' Letter (1.9.2023)**].

22. The 3rd Respondent applied to the 1st Respondent on 7.9.2023 for a PP with regard to the topside development of Island A [**3rd**

Respondent's PP Application (Topside Development of Island A)]. On 25.4.2024, the 1st Respondent presented the 3rd Respondent's PP Application (Development of Island A) to the NPPC for advice.

23. On 3.10.2023, pursuant to the Penang Freedom of Information Enactment 2010), the 9th Appellant had applied for information pertaining to the PP in respect of the PSR Project.

24. On 25.10.2023, the 9th Appellant received a letter from the 1st Respondent which enclosed a copy of the PP (Reclamation).

25. In reply to the Appellants' Letter (1.9.2023), the 1st Respondent sent a letter dated 17.10.2023 to the Appellants' solicitors which stated that the PP (Reclamation) had been granted on 21.8.2023 [**1st Respondent's Letter (17.10.2023)**]. The Appellants' solicitors only received the 1st Respondent's Letter (17.10.2023) on 1.11.2023.

C. <u>Proceedings in the High Court</u>

26. On 29.12.2023, the Appellants filed a Judicial Review application (**JRA**) in the High Court against the 1st to 4th Respondents. The JRA prayed for, among others -

    (1) leave of the High Court to apply for an order of *certiorari* to quash the PP (Reclamation) (**Leave Prayer**); and

(2) "*as a matter of abundant caution*", an extension of time (**EOT**) from the High Court to file a JRA pursuant to O 53 r 3(7) of the Rules of Court 2012 (**RC**) because the decision regarding the PP (Reclamation) was only communicated to the Appellants by way of the 1st Respondent's Letter (17.10.2023) (**EOT Prayer**).

27. When the JRA was first heard on 5.2.2024 before the learned High Court Judge -

(1) the Appellants did not proceed with the EOT Prayer;

(2) the Appellants only proceeded with the Leave Prayer;

(3) the learned Senior Federal Counsel from the Attorney General's Chambers (**AGC**) did not object to the Leave Prayer (**No Objection from the AGC to the Leave Prayer**); and

(4) the High Court granted leave for the JRA [**High Court's Leave (JRA)**].

28. On 27.6.2024, the 5th Respondent obtained leave of the High Court to intervene in the JRA. This judgment shall refer to the 1st to 5th Respondents collectively as the "**Respondents**".

29. After hearing the substantive JRA on its merits, the High Court dismissed the JRA on 11.7.2024 with no order as to costs (**High Court's Decision**).

30. According to the "*Grounds of Decision*" of the learned High Court Judge, among others -

(1) the JRA had been filed out of time under O 53 r 3(6) RC because -

(a) by reason of the CM's Press Statement (1.9.2023), the Appellants knew of the PP (Reclamation) on 1.9.2023; and

(b) the three-month time period stipulated in O 53 r 3(6) RC {**Three-Month Time Period [O 53 r 3(6) RC]**}, started to run on 1.9.2023 and lapsed on 1.12.2023;

(2) the Appellants had elected to proceed with the Leave Prayer and not with the EOT Prayer; and

(3) even if the JRA was filed within the Three-Month Time Period [O 53 r 3(6) RC], the learned High Court Judge dismissed the substantive JRA on its merits due to the following grounds -

(a) the SP2030 was approved and gazetted on 24.10.2019. The Appellants were out of time to challenge the validity of the SP2030. Furthermore, the 2nd Respondent had consulted the NPPC with regard to the SP2030 before the 2nd Respondent submitted the SP2030 to the 3rd

Respondent's State Executive Council (**State EXCO**) for the approval of the SP2030 by the State EXCO;

(b) this JRA did not seek to invalidate the Amended Master Plan (PSR Project) which was approved by the 2nd Respondent on 27.6.2022. In any event, the Appellants were time-barred from challenging the validity of the Amended Master Plan (PSR Project);

(c) s 20B TCPA was introduced by the Town and Country Planning (Amendment) Act 2017 (**Act A1522**). Act A1522 came into force in Penang on 28.11.2018 and did not apply retrospectively to the Master Plan (PSR Project) which was submitted to the NPPC on 23.9.2016. Moreover, s 20B TCPA falls under Part IV TCPA regarding "*Planning Control*" and does not apply to the Master Plan (PSR Project);

(d) the "*statement*" in support of the JRA pursuant to O 53 r 3(2) RC (**Appellants' Statement**) only challenged the validity of the PP (Reclamation) and not the validity of the Master Plan (PSR Project). As such, the Appellants were bound by the Appellants' Statement;

(e) the PSR Project involved two aspects, namely -

(i) the Reclamation; and

(ii) the topside development with regard to Island A (**Topside Development Project**).

Section 22(2A)(a) to (c) TCPA did not concern the Reclamation. In any event, NPPC's 18-Point Advice (18.4.2019) had been issued for the Master Plan (PSR Project) based on the SP2030;

(f) Islands B and C in the PSR Project were subsequently "*shelved*" [**Shelving (Islands B and C)**]. The Shelving (Islands B and C) did not require public participation under ss 11 and 11B TCPA. Furthermore, the PSR Project regarding Island A did not contravene the SP2030;

(g) the PP (Reclamation) was based on the 2nd EIA Report for which the DGEQ's 2nd Approval had been granted. The Shelving (Islands B and C) did not require a third EIA report or third approval from the DGEQ.

It was up to the Appellants to apply to the Appeal Board (EQA) for a hearing of the 2nd Appeal (EQA). The High Court could not usurp the jurisdiction of the Appeal Board (EQA) and decide on the 2nd Appeal (EQA) with regard to the 2nd EIA Report;

(h) the High Court could not consider the alleged adverse impact of the PSR Project on fishery resources and the

livelihood of fishermen [**Alleged Adverse Impact (PSR Project)**] because the Alleged Adverse Impact (PSR Project) concerned policy considerations which required technical expertise beyond the competence of the court;

(i) the PP (Reclamation) was neither irrational nor unreasonable;

(j) before issuing the PP (Reclamation), the 1st Respondent had taken into account all the relevant considerations, including the Appellants' objections. The 1st Respondent had considered various mitigation measures to minimise -

  (i) the environmental impact due to the PSR Project (as stated in the 2nd EIA Report); and

  (ii) the effect of the PSR Project on the livelihood of the fishermen;

(k) there was no procedural impropriety regarding the 1st Respondent's issuance of the PP (Reclamation) in this case;

(l) with regard to the PSR Project, the 3rd Respondent had not breached its fiduciary duty owed to the 3rd Respondent's subjects;

(m) according to Indian cases, the "*Public Trust*" Doctrine states that all public and natural resources of a country are held in trust by the government for the benefit of the country's citizens (**Public Trust Doctrine**). The learned High Court Judge decided that the Public Trust Doctrine does not apply in Malaysia; and

(n) Malaysia is only bound by obligations under international environmental treaties (which had been acceded to or ratified by Malaysia) [**Obligations (International Environmental Treaties)**] if the Obligations (International Environmental Treaties) have been incorporated into our domestic law.

D. Issues

31. An appeal had been filed to the Court of Appeal against the High Court's Decision by the Appellants (**This Appeal**).

32. In addition to the Novel Question, This Appeal shall determine the following issues:

(1) had the JRA been filed within the Three-Month Time Period [O 53 r 3(6) RC]?; and

(2) if the JRA had not been filed within the Three-Month Time Period [O 53 r 3(6) RC] -

(a) whether the fact that there was No Objection by the AGC to the Leave Prayer, in itself, meant that the High Court had the jurisdiction to decide on the substantive JRA in this case;

(b) in view of the adversarial nature of our litigation process and the election by the Appellants to proceed with the Leave Prayer and not with the EOT Prayer, did the High Court err in law by not considering the EOT Prayer in this case?;

(c) whether the Respondents were barred from objecting to the substantive JRA on the ground of non-compliance with the Three-Month Time Period [O 53 r 3(6) RC] because -

(i) the High Court's Leave (JRA) had already been granted; and

(ii) the Respondents did not appeal to the Court of Appeal against the High Court's Leave (JRA); and

(d) was there "*a good reason*" for the High Court to extend the Three-Month Time Period [O 53 r 3(6) RC] pursuant to O 53 r 3(7) RC?

OUR DECISION

E. Whether a local planning authority can grant a planning permission under s 22(3) TPCA for land reclamation from the "*territorial sea*"

33. We reproduce below -

(1) the following provisions in the TCPA -

(a) the definitions of "*development*", "*engineering operation*", "*land*", "*planning permission*" and "*use*" in s 2(1);

(b) s 5(1) and (2);

(c) s 6(1)(a); and

(d) s 22(2A)(a) and (3);

(2) the definition of "*baselines*" in s 2, ss 3(1) to (3), 4 and 6 TSA;

(3) s 5(1) BMZA; and

(4) the definition of "*territorial waters*" in s 5 of the National Land Code (**NLC**)

"*TCPA*

s 2(1)

...

***"development" means the carrying out of any** building, **engineering**, mining, industrial, **or other similar operation in, on, over or under land, the making of any material change in the use of any land** or building **or any part thereof**, or the subdivision or amalgamation of lands; **and "develop" shall be construed accordingly**;*

...

***"engineering operation" includes the formation** or levelling **of land**, the formation or laying out of means of access to a road, and the laying out of cables, mains, or means of water supply or drainage;*

...

***"land" includes** -*

(a) the surface, and all substances forming the surface, of the earth;

(b) all substances below the surface of the earth;

(c) all vegetation and other natural products, whether or not requiring periodical application of labour to their production, and whether on or below the surface of the earth;

(d) all things, whether on or below the surface of the earth, that are attached to the earth or permanently fastened to any thing attached to the earth;

*(e) **land covered by water**; and*

(f) any estate or interest in, or right over, land;

...

***"planning permission" means permission granted, with or without condition, to carry out development**;*

"use", in relation to any land, means any use of the land other than merely for the keeping or storage of materials and equipment intended to be employed in the construction or

***erection of a building on the land**, or as a site for temporary buildings for the accommodation of workers involved in the construction or erection of the building;*

s 5. ***Local planning authorities***

(1) ***Every local authority shall be the local planning authority for the area of the local authority.***

(2) ***For any area in the State that does not form part of the area of any local authority, the State Director shall be the local planning authority,** and references to the "local planning authority" in this Act shall be deemed to include the State Director whenever he performs the functions of the local planning authority in relation to that area.*

s 6. ***Functions of local planning authorities***

(1) ***The functions of a local planning authority shall be -***

(a) ***to regulate, control and plan the development and use of all lands and buildings within its area;***

...

s 22(2A)

Where an application submitted under this section involves -

(a) ***the development of a new township for a population exceeding ten thousand, or covering an area of more than one hundred hectares, or both;***

(b) a development for the construction of any major infrastructure or utility; or

(c) a development affecting hill tops or hill slopes, in an area designated as environmentally sensitive in a development plan,

the Committee [2nd Respondent] shall request from the Council [NPPC] its advice on the application submitted.

...

(3) ***After taking into consideration the matters specified in subsection (2), the local planning authority may, subject to***

***subsection (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose**, or refuse to grant planning permission.*

TSA

s 2

...
"baselines" means the baselines as defined under section 2 [BMZA].

s 3. ***Limits of territorial sea***
(1) ***Subject to the provisions of this Act, the breadth of the territorial sea of Malaysia shall for all purposes be 12 nautical miles.***

(2) ***The baselines from which the breadth of that territorial sea is to be measured shall for all purposes be those established in accordance with s 5 [BMZA].***

(3) ***For the purposes of** the Continental Shelf Act 1966, the Petroleum Mining Act 1966, **the [NLC]** and any written law relating to land in force in Sabah and Sarawak, **any reference to territorial sea therein shall in relation to any territory be construed as a reference to such part of the sea adjacent to the coast thereof not exceeding 3 nautical miles measured from the low-water line.***

s 4. ***Sovereignty in respect of the territorial sea***
The sovereignty in respect of the territorial sea, and in respect of its bed and subsoil, is vested in and exercisable by the Yang di-Pertuan Agong in right of Malaysia.

s 6. ***References to territorial waters in any other written law,*** *etc.*

Any reference made in any other written law, *arrangement or instruments* ***to "territorial waters" shall in so far as such reference affects federal law means "territorial sea" and shall be construed subject to the provisions of this Act.***

BMZA

s 5. ***Baselines***

(1) ***Subject to subsection (2), the baselines for the purpose of determining the maritime zones of Malaysia shall be -***

(a) ***the low-water line along the coast as marked on large scale charts;***

(b) ***the seaward low-water line of a reef as shown by the appropriate symbol on charts; or***

(c) ***the low-water line on a low-tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island.***

NLC

s 5

...

"territorial waters" has the meaning assigned to it in subsection 3(3) [TSA];"

(emphasis added).

34. The Appellants' learned counsel submitted that the PP (Reclamation) had to comply with s 22(2A)(a) TPCA because the Reclamation was part of the PSR Project regarding the "*development of a new township for a population exceeding ten*

thousand". According to the Appellants' learned counsel, among others -

(1) the definition of "*land*" in s 2(1) TPCA included "*land covered by water*"; and

(2) the Reclamation fell within the definition of "*development*" as understood in s 2(1) TPCA because the Reclamation -

(a) constituted an "*engineering operation*" under s 2(1) TPCA, namely, the Reclamation concerned the "*formation*" of "*land*"; and

(b) involved the making of a "*material change in the use*" of the "*land*" (which included "*land covered by water*").

35. We are of the view that the 1st and/or 2nd Respondents had no power to issue the PP (Reclamation). Our reasons are as follows:

(1) by virtue of s 1(2) TSA, the TSA applies throughout Malaysia, including Penang. According to the following provisions of written law, the Reclamation takes place in the "*territorial sea*" off the Penang coast -

(a) s 3(1) TSA states that the breadth (maximum distance) of "*territorial sea*" of Malaysia "*shall for all purposes*" be 12 nautical miles. It is to be emphasised that our legislature had employed a mandatory term "*shall*" in s 3(1) TSA.

The "*baselines*" from which the breadth of Malaysian "*territorial sea*" is to be measured, "*shall for all purposes*" be established in accordance with s 5 BMZA - please refer to the definition of "*baselines*" in s 2 TSA read with s 3(2) TSA and s 5(1) BMZA;

(b) s 3(3) TSA has expressly provided that for the purposes of, among others, the NLC (which applies to Penang), "*any reference to territorial sea therein shall in relation to any territory be construed as a reference to such part of the sea adjacent to the coast thereof not exceeding 3 nautical miles measured from the low-water line*". Once again, Parliament had used an imperative term "*shall*" in s 3(3) TSA;

(c) s 6 TSA has explicitly stated that any reference in "*any other written law*" (including the TCPA and all subsidiary legislation made pursuant to the TCPA) to *"territorial waters"* "*shall*" in so far as such reference affects federal law, means *"territorial sea"* and "*shall be construed subject to the provisions*" of TSA. A mandatory term "*shall*" had been applied by our legislature, not once but twice, in s 6 TSA. In other words, by reason of s 6 TSA, the meaning of "*territorial sea*" in the TSA, "*shall*" prevail over all "*other written law*" (except the Federal Constitution which is the supreme law of this country); and

(d) according to s 5 NLC, the definition of *"territorial waters"* has the meaning assigned to it in s 3(3) TSA;

(2) s 4 TSA has specifically stated that the "*sovereignty in respect of the territorial sea, and in respect of its bed and subsoil, is vested in and exercisable by the Yang di-Pertuan Agong in right of Malaysia*". It is clear from s 4 TSA, until the completion of the Reclamation, the ownership of "*territorial sea*", its "*bed and subsoil*" [referred collectively in this judgment as the "**Territorial Sea (Including its Bed/Subsoil)**"], is vested solely in the Federal Government (not the 3rd Respondent);

(3) by virtue of s 5(1) TCPA, every "*local authority*" [defined in s 2(1) TCPA] shall be the "*local planning authority*" for the "*area of the local authority*". According to s 5(2) TCPA, for "*any area in the State*" that does not form part of the "*area of any local authority*", the 1st Respondent shall be the "*local planning authority*" [as understood in s 2(1) TCPA]. Section 6(1)(a) TCPA has provided that the functions of a local planning authority "*shall*" be to regulate, control and plan the development and use of "*all lands and buildings within its area*".

As explained in the above sub-paragraphs (1) to (2), the Territorial Sea (Including its Bed/Subsoil) is owned by the Federal Government and cannot constitute the "*area of the local authority*" within the meaning of ss 5(1), (2) and 6(1)(a) TCPA. Consequently, a "*local planning authority*" cannot

"*regulate, control and plan the development and use*" of the Territorial Sea (Including its Bed/Subsoil) as understood in s 6(1)(a) TCPA; and

(4) the general definitions of "*development*", "*engineering operation*", "*land*" and "*use*" in s 2(1) TPCA, cannot override the mandatory, specific and subsequent statutory provisions regarding the Territorial Sea (Including its Bed/Subsoil) in ss 3(1) to (3), 4 and 6 TSA read with s 5(1) BMZA. In this regard, we rely on the following two maxims of construction -

(a) by reason of the rule of interpretation, *generalia specialibus non derogant*, the specific provisions of ss 3(1) to (3), 4 and 6 TSA read with s 5(1) BMZA shall prevail over the general definitions of "*development*", "*engineering operation*", "*land*" and "*use*" in s 2(1) TPCA; and

(b) TSA was enacted in 2012 while Parliament passed BMZA in 2006. As such, ss 3(1) to (3), 4 and 6 TSA read with s 5(1) BMZA, had been enacted by our Parliament subsequent to the definitions of "*development*", "*engineering operation*", "*land*" and "*use*" in s 2(1) TPCA (enacted in 1976). As such, according to the maxim of construction, *lex posterior derogat priori*, the subsequent statutory provisions in ss 3(1) to (3), 4 and 6 TSA read with s 5(1) BMZA, shall override the earlier definitions of

"*development*", "*engineering operation*", "*land*" and "*use*" in s 2(1) TPCA.

36. As the 1st and/or 2nd Respondents had no power to grant the PP (Reclamation) in this case (please refer to the above paragraph 35), on this ground alone -

(1) This Appeal should be dismissed; and

(2) the High Court's Decision should be upheld.

F. Had the JRA been filed within the Three-Month Time Period [O 53 r 3(6) RC]?

F(1). Construction of O 53 r 3(6) and (7) RC

37. O 53 r 3(6) to (8) RC state as follows:

> "*O 53 r 3(6)* ***An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.***
>
> *(7)* ***The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.***
>
> *(8)* ***An application to extend time must be served on all respondents and shall be heard inter partes.***"

(emphasis added).

38. We are of the following view regarding O 53 r 3(6) RC:

(1) there are two separate limbs of O 53 r 3(6) RC {**2 Limbs [O 53 r 3(6) RC]**}, namely -

(a) the Three-Month Time Period [O 53 r 3(6) RC] commences "*when the grounds of [JRA] first arose*" {**1st Limb [O 53 r 3(6) RC]**}; and

(b) the Three-Month Time Period [O 53 r 3(6) RC] begins to run on the date "*when the decision [subject matter of the JRA] is first communicated to the applicant*" {**2nd Limb [O 53 r 3(6) RC]**}.

The 2 Limbs [O 53 r 3(6) RC] had been explained by Abdul Rahman Sebli JCA (as he then was) in the following judgment of the Court of Appeal in **P Maradeveran a/l Periasamy & Ors v Suruhanjaya Pilihan Raya & Anor** [2019] 2 MLJ 70, at [19], [21], [24] and [25] -

> "*[19]* ***There is a vital difference between the date 'when the grounds of application first arose' and the date 'when the decision is first communicated to the applicant'. The factual element that underlies the first alternative date is the 'grounds of application' whereas the factual element that underlies the second is 'communication' of the decision.***

...

[21] ***The significance of the difference in the two cut off dates is that it provides for two different timelines for the filing of a judicial review application. On the premise that the two cut off dates were intended by the rules committee to operate in the alternative by the use of the disjunctive 'or' in O 53 r 3(6), it is safe to say that the two dates apply independently of each other and the first is not intended to supersede the second and vice versa. What the court needs to do to determine the commencement date of the limitation period is to determine which of the two dates applies on the facts and circumstances of the case.***

...

[24] ***We were referred to the Federal Court case of Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors [2016] 1 MLJ 200 where it was held as follows*** *at para [60]:*

> *[60]* ***In the present case before us we are interpreting O 53 r 3(6) of the RHC [Rules of the High Court 1980], where the key words under consideration are 'when the decision is first communicated to the applicant'. The wordings of the Order must be read together with the specific mandatory provisions in the LAA [Land Acquisition Act 1960], particularly ss 10, 11, 52 and 53, relating to service of notification or declaration on acquisition of land by the state authority in Form E on the registered proprietor, the occupier of such land, or any interested persons. The clear effect of those provisions is that the relevant notice or declaration relating to acquisition must be brought to the actual knowledge (as opposed to constructive notice by***

> ***way of a publication in the gazette) of the persons concerned; only then, the interested persons can exercise their right to challenge the acquisition decision by way of judicial review proceedings under O 53 r 3(6) of the RHC 1980 within the prescribed time period.***
>
> *[25]* ***It was a case on the [LAA], but in our view it is relevant for the purposes of the present appeal as it dealt directly with O 53 r 3(6) [RHC]. We were therefore unable to accede to the learned senior federal counsel's argument that the case has no application and should be disregarded.***"

(emphasis added);

(2) the 1st Limb [O 53 r 3(6) RC] is different from the 2nd Limb [O 53 r 3(6) RC] as follows -

(a) the 1st Limb [O 53 r 3(6) RC] concerns when the grounds for a JRA [**Grounds (JRA)**] "*first arose*". The 1st Limb [O 53 r 3(6) RC] does not concern the decision which forms the subject matter of the JRA [**Decision (JRA)**]. The 2nd Limb [O 53 r 3(6) RC] however concerns when the Decision (JRA) was "*first communicated*" to an applicant for the JRA [**Applicant (JRA)**]; and

(b) notwithstanding the fact that an Applicant (JRA) had no actual knowledge or actual notice of the Decision (JRA) in question (**Actual Knowledge/Notice**), the Three-Month

Time Period [O 53 r 3(6) RC] in the 1st Limb [O 53 r 3(6) RC] commenced from the date when the Grounds (JRA) first arose. This is distinct from the 2nd Limb [O 53 r 3(6) RC] wherein the Three-Month Time Period [O 53 r 3(6) RC] only begun to run when the Decision (JRA) was "*first communicated*" to the Applicant (JRA);

(3) the phrase "*when the [Decision (JRA)] is first communicated to the applicant*" in the 2nd Limb [O 53 r 3(6) RC], had been explained by the following four appellate judgments (**Quadrilogy**) -

(a) the 2-1 majority judgment of the Federal Court (delivered by Ramly Ali FCJ) in **Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors** [2016] 1 MLJ 200. **Tunku Yaacob Holdings** concerned the application of the then 40 days period to file a JRA pursuant to O 53 r 3(6) of the Rules of the High Court 1980 (**RHC**). According to Ramly Ali FCJ in **Tunku Yaacob Holdings**, at [24] to [26], [29], [30], [48] and [62] -

> "*[24] In the present application for judicial review, the decision being challenged is the state authority's acquisition of the appellant's lands and the conduct of the land acquisition proceedings as reflected in Form E issued to the appellant. It is crucial to first identify definitely what is the decision that is being challenged.* ***The question that arose pertaining to whether the application by the appellant was out of time vis-a-vis the said decision***

was first communicated to the appellant. This would determine when the prescribed 40 days period for filing the application for judicial review under O 53 r 3(6) [RHC] should begin to run.

[25] ***The word 'communicate' is not expressly defined in the [RHC]. It is also not expressly defined in the LAA [Land Acquisition Act 1960]. In the New Shorter Oxford English Dictionary the verb 'communicate' is given the meaning of 'convey or exchange information etc succeed in invoking understanding'. The Oxford Advanced Learner's Dictionary defines 'communicate' as 'to make something known to somebody'; 'to pass something on; to transmit something'; 'to make one's idea, feelings etc clear to others'. In the Macmillan English Dictionary for Advanced Learners (New Edition), the word 'communicate' is explained as 'to express thoughts, feelings, or information to another person ... for example by speaking or writing'; 'to let someone knew what you are feeling or thinking.' It is further explained as 'when people communicate; it is as if their thoughts and ideas travel between one person and the other; or are sent from one person to another.'***

[26] ***In the case of Sh Gurbanchan Singh v SM Jagiro 1956 AIR Vol 43, Punjab Section, p 254, Bhandari CJ, ruled that the expression 'communicate' is not synonymous with the expression 'publish' which mean 'to make public'. It means 'to bestow convey make known, recount, to import as to communicate information to anyone'.***

...

[29] ***The clear indication in the above case is that 'the day on which it is communicated to the person concerned' as stipulated in the relevant s 39(2) of the CPC, refers to the day when a copy of the notification was actually sent and bought to the actual notice of the magistrate concerned on 8 February 1955, and not the day when the said notification was issued on 3 January 1955, nor the day when it was published in the official Gazette on 18 February 1955.***

[30] ***The above decision is clearly in line with the literal meaning of the word 'communicate' as defined in the various dictionaries cited above. ...***

...

[48] ***With the comprehensive and elaborate provisions in ss 10, 11, 52, 53 and 54 [LAA], we can safely conclude that a mere publication in the Gazette of a notification or declaration in Form D under s 8(1) of the LAA is clearly insufficient for the purpose of communicating the decision relating to the lands acquisition to the interested persons concerned. Our view is that for the purpose of O 53 r 3(6) [RHC], Form E of the LAA which commences proceedings for the acquisition of lands and served on the interested persons in the manner prescribed by the relevant express specific provisions in the LAA, can be construed as the first communication to the appellant, being the registered proprietor of the lands in question, of the decision by the state authority to acquire its lands in question. To borrow the words of Bhandari CJ in the case of Sh Gurbachan Singh v SM Jagiro, the expression 'communicate' is not synonymous with the expression 'publish' which mean 'to make public'.***

...

[62] ***There are a number of authorities locally to support the above findings ie in applying O 53 r 3(6) [RHC], the time would only start to run against an applicant for judicial review when the applicant had actual knowledge of the relevant decision or that the applicant had been served with the relevant notices in accordance with relevant provisions of the LAA.***"

(emphasis added);

(b) in **Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor** [2016] 1 MLJ 544, at [83] and [110], Ramly Ali FCJ delivered the following 4-1 majority judgment of the Federal Court -

"*[83]* *Judicial review application was at the relevant time governed by O53 [RHC 1980] (now the Rules of Court 2012).* ***Order 53 r 3(6) [RHC] provides that an application for judicial review shall be made promptly, and in any event, within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant. In relation to matters relating to land acquisition under the LAA, an applicant can only exercise his right to apply for judicial review when the decision which he intends to challenge is communicated to him. In other words, the decision must have been brought to his actual notice or knowledge in order for him to prepare his case.***

...

[110] By the acquisitions of the land, the appellant was deprived of its right to own the property. As such it would only be just and fair that the decision to acquire the lands be brought to the appellant's actual knowledge by way of communicating the same to the appellant. The rights of a citizen to property under art 13 of the Federal Constitution could only be deprived in accordance with law and that an actual or express notice (as opposed to a constructive notice by way of a gazette) of such deprivation ought to have been given to the citizen. ***The appellant cannot be expected to apply for leave to commence judicial review to challenge the deprivation of its rights to the property unless it has knowledge or is made aware of such deprivation and this could only happen when the appellant is served with the actual or express notice that its right has been infringed****. The first written notice (in the form of Form E) required to be issued and served on the appellant, as registered proprietor of the said lands, under the LAA is Form E issued pursuant to s 10(1) of the Act."*

(emphasis added);

(c) in the Court of Appeal case of **Ratna Sari Arif & Ors v The Mayor of the City of Kota Kinabalu & Ors** [2016] 3 MLJ 769, at [49] to [52] and [55], Zaharah Ibrahim JCA (as she then was) decided as follows -

"*[49]* ***Contrary to the interpretation given by the learned High Court judge to the contents of the letters, while the applicants knew of the hoarding and the***

earthworks activities which indicated that some development was being undertaken on the subject land, that knowledge could not be equated to knowledge that approval had in fact been given by the authorities. That lack of knowledge was precisely the reason for their requests for information through those letters.

[50] ***The first respondent's response came by way of a press statement as published in the newspapers on 9 November 2012.***

[51] ***In that statement the first respondent referred to the approval which was given in 1994 on the rezoning of the area and to the planning approvals which had been given earlier (presumably the 2007 and 2009 approvals which the first respondent indicated in his letter as mentioned above had lapsed). The first respondent stated in the press statement that 'what the City Hall did was only to revalidate what has already been approved and all procedures were adhered to.***

[52] ***In our considered view, given all the relevant evidence in relation to this issue, the applicants were correct when they contended that until the first respondent confirmed by his press statement as published on 9 November 2012 that approvals had in fact been given (by way of validation of earlier lapsed approvals), the grounds for making an application under O 53 had not arisen.***

...

[55] ***In our considered view, if the evidence had been properly and sufficiently evaluated, it would be***

clear that the period of three months in O53 r 3 para (6) could only begin to run from that point in time when the applicants knew for certain that such approval and rezoning decision had been made."

(emphasis added); and

(d) according to the Court of Appeal in **Tan Bun Teet v Jawatankuasa Perancang Negeri Pahang & Ors** [2026] 5 CLJ 657, at [45] and [47] -

"*[45]* ***Based on the facts before us, we find that the appellant has been actively involved in challenging the construction of the PDF facility at almost every stage of its development. In fact, the evidence disclosed that the appellant was aware of the commencement of construction at the PDF, as he himself conceded that he would pass through the site daily. He must know that construction can only begin after the planning permission has been obtained. Planning permission is, after all, a precondition to carrying out any development.***

...

[47] ***We agree that based on the aforesaid, the appellant must surely have known, at the time the EIA appeal was filed or by the time the appellant filed his grounds of appeal and an amended notice of appeal, that the planning permission had already been issued as otherwise the appellant would not have raised the issues relating to the purported non-compliances with ss. 20B and 22(2A)(b) [TCPA] in the EIA appeal which are the same issues raised by the appellant in this JR***

application. Accordingly, when the appellant filed the JR application on 19 July 2022, more than four to five months had already lapsed."

(emphasis added).

Based on the Quadrilogy, when a Decision (JRA) had been "*first communicated*" to the Applicant (JR) depended on when the Decision (JRA) had been brought to the Actual Knowledge/Notice of the Applicant (JR). This is a question of fact wherein the court may make any factual finding and/or draw any inference from the evidence in question;

(4) O 53 r 3(6) RC has provided for a JRA to be made "*promptly*" (**Promptness**). In **Tan Bun Teet**, at [49] to [54], the Court of Appeal decided as follows -

"*[49]* ***In any case, it is our view that even if the JR application was filed within the three-month stipulation in O. 53, that is, that the time starts to run from 26 April 2022 when the appellant collected the letter dated 21 April 2022 from the second respondent, that may not be sufficient by itself. Under O. 53, an applicant must act "promptly", and the failure to act promptly is independently fatal, even if the application is technically filed within time. The rationale is stated in Hardy v. Pembrokeshire County Council [2006] EWCA Civ 240, para. [10] as follows: It is important that those parties, and indeed the public generally, should be able to proceed on the basis that the decision is valid and***

can be relied on, and that they can plan their lives and make personal and business decisions accordingly.

[50] ***We also draw support from the case of Finn-Kelcey v. Milton Keynes Council [2008] EWCA Civ 1067 (HL) and Re Musgrave Retail Partners (NI) Limited; Re Department Of The Environment (Planning Services) [2012] NIQB 109. In this regard, the appellant contends that Finn-Kelcey ought to be distinguished because the statutory provision referred to and applied therein, namely r. 54.5 of the Civil Procedure Rules 1998 (UK) ("CPR (UK)"), prescribes that different timelines apply to judicially review the decision(s) of different authorities (eg, three months for a decision made by the planning authorities, six weeks for a decision made by the secretary of State, etc).***

[51] ***We respectfully disagree. Notwithstanding the differing timelines that may apply to judicially review the decision(s) of different authorities, the critical requirement of r. 54.5 of the CPR (UK) is that a judicial review application be filed "promptly". Consequently, such a distinction is irrelevant as both r. 54.5 of the CPR (UK) and O. 53 r. 3(6) of the ROC 2012 require a judicial review application to be filed "promptly", and the same interpretation of the word ought to apply. That the court in Finn-Kelcey had arrived at the requirement of promptness from the word "promptly" in r. 54.5 of the CPR (UK) and not the six week timeline in the TCPA (UK) can be seen in para. [29] of the judgment:***

...

[52] ***Taking the receipt of the letter informing the appellant about the planning permission on 26 April 2022 as the starting date, the appellant also did not act promptly, but filed the JR application just a few days before the***

expiry of the three months. In this connection, we respectfully disagree with counsel for the appellant's contention that we should not follow the UK position that makes "prompt" filing an independent requirement. We are of the view that the word "promptly" in O. 53 is not inserted purely for ornamental value. In fact, this court has in Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805; [2008] 6 MLJ 704 adopted the jurisprudence set out by the House of Lords in Griffiths & Anor v. Secretary Of State For The Environment & Anor [1983] 2 WLR 172 (HL) as to why prompt action is needed, especially in planning cases:

...

[53] ***In short, because planning decisions involve public interest, investment, and reliance on approvals, any undue delay may prejudice third parties and can result in dismissal on grounds of laches even if the substantive complaint has merits. Thus, where an EIA is conducted, or construction has commenced, the court will scrutinise any delay closely and may refuse relief on grounds of delay alone.***

[54] ***We find that the facts of this case, as enumerated, support our conclusion that the JR application has not been filed promptly. This means that the court did not have the necessary jurisdiction to hear the matter right from the beginning. (See: Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861; [2016] 1 MLJ 544).***"

(emphasis added).

With respect, we opine that Promptness is not a mandatory requirement in O 53 r 3(6) RC. This opinion is premised on the following reasons -

(a) according to the two Federal decisions in **Tunku Yaacob Holdings** and **Kijal Resort** (**2 Federal Court Judgments**), if an Applicant (JRA) is able to satisfy either one of the 2 Limbs [O 53 r 3(6) RC] without proving Promptness, the Three-Month Time Period [O 53 r 3(6) RC] is fulfilled. These 2 Federal Court Judgments, did not allude to, let alone apply, Promptness as a mandatory requirement of O 53 r 3(6) RC. From the view point of the doctrine of *stare decisis*, all Malaysian courts (other than the Federal Court) are bound by the 2 Federal Court Judgments regarding the 2 Limbs [O 53 r 3(6) RC] [without Promptness as a mandatory requirement in O 53 r 3(6) RC]; and

(b) the Rules Committee had employed the phrase "*in any event*" in O 53 r 3(6) RC. If Promptness is a mandatory requirement in O 53 r 3(6) RC, this will render nugatory -

(ii)(a) the words "*in any event*"; and

(ii)(b) the 2 Limbs [O 53 r 3(6) RC]

- in O 53 r 3(6) RC.

It is a canon of interpretation that the Rules Committee did not legislate in vain the phrase "*in any event*" and the 2 Limbs [O 53 r 3(6) RC] in O 53 r 3(6) RC; and

(5) the policy reasons for the Three-Month Time Period [O 53 r 3(6) RC] [**Policy Reasons (Three-Month Time Period)**] had been explained by James Foong Chee Yuen FCJ in the Federal Court case of **Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors** [2010] 3 MLJ 145, at [16], as follows -

> *"[16]* ***One may ask what is the purpose of these conditions? The basic objective is to protect those entrusted with the enforcement of public duties 'against groundless, unmeritorious or tardy harassment that were accorded to statutory tribunals or decision making public authorities by O 53, and which might have resulted in the summary, and would in any event have resulted in the speedy disposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration ...' as described in the celebrated case of O'Reilly v Mackman [1982] 3 All ER 1124 at p 1133. Further, there is also the need to reduce the delay in resolving such application in the interest of good administration. As Lord Diplock in O'Reilly v Mackman reiterated, 'The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making***

powers for any longer period than is absolutely necessary in fairness to the person affected by the decision'."

(emphasis added).

39. With regard to the Three-Month Time Period [O 53 r 3(6) RC], if an Applicant (JRA) is not able to satisfy the 2 Limbs [O 53 r 3(6) RC], we express the following view regarding O 53 r 3(7) and (8) RC:

(1) in the interest of a just, expedient and economical disposal of the JRA, the three main purposes of the RC -

(a) an Applicant (JRA) should file only one JRA in "*Form 109*" (please refer to Appendix A to RC) as provided in O 53 r 2(1) RC (**Form 109**); and

(b) Form 109 should contain **both** the Leave Prayer and EOT Prayer (as had been filed by the Appellants in the High Court).

The above procedure had been recognised by Su Tiang Joo JC (as he then was) in the High Court in **Menaka Deivarayan v Pentadbir Tanah Daerah Bagan Datuk, Perak & Ors** [2021] 7 MLJ 232, at [41] to [43];

(2) Form 109 and all cause papers should be served on the AGC [pursuant to O 53 r 3(3) RC] and all the respondents (to enable an *inter partes* hearing of the EOT Prayer);

(3) in accordance with O 53 r 3(7) and (8) RC, the High Court should first hear the EOT Prayer on an *inter partes* basis, ie., the AGC and all the respondents in the JRA are entitled to file affidavits and to submit (in writing or orally) against the EOT Prayer;

(4) if the High Court decides that the affidavit(s) of the Applicant (JRA) has/have disclosed "*a good reason*" for an EOT of the Three-Month Time Period [O 53 r 3(6) RC], the High Court may exercise its discretion to grant an EOT pursuant to O 53 r 3(7) RC for the filing of the JRA (**Court's EOT**). The existence of the court's discretion in O 53 r 3(7) RC to grant the Court's EOT, is clear from the directory term "*may*" which has been employed in O 53 r 3(7) RC. After the granting of the Court's EOT, the High Court can then consider the Leave Prayer and inquire from the AGC on whether the AGC has any objection to the Leave Prayer or not. The High Court will then decide the Leave Prayer;

(5) if the High Court declines to exercise its discretion to grant the Court's EOT pursuant to O 53 r 3(7) RC, the High Court should thereafter dismiss Form 109;

(6) as the Rules Committee had expressly provided for the court's discretionary power to grant the Court's EOT in O 53 r 3(7) RC, there cannot be any resort to O 92 r 4 RC, the High Court's inherent jurisdiction and/or inherent power to extend

the Three-Month Time Period [O 53 r 3(6) RC]. In this regard, we rely on the following two judgments of our apex courts:

(a) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in **Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors** [1988] 1 MLJ 178, at 181; and

(b) the judgment of Zulkefli Ahmad Makinudin FCJ (as he then was) in the Federal Court case of **Majlis Agama Islam Selangor v Bong Boon Chuen** [2009] 6 MLJ 307, at [28]; and

(7) unlike O 3 r 5(3) RC (which allows parties to consent in writing for an EOT for certain matters), O 53 r 3(7) and (8) RC does not permit parties to agree in writing for an EOT of the Three-Month Time Period [O 53 r 3(6) RC]. This is understandable in view of the Policy Reasons (Three-Month Time Period).

40. If a JRA is filed beyond the Three-Month Time Period [O 53 r 3(6) RC] as stipulated in the 2 Limbs [O 53 r 3(6) RC] and no Court's EOT has been obtained pursuant to O 53 r 3(7) RC -

(1) the court has no jurisdiction to hear the JRA - please refer to the judgment of the Federal Court delivered by Raus Sharif PCA (as he then was) in **Wong Kin Hoong & Anor (suing for themselves and on behalf of all the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor** [2013] 4 MLJ 161, at [30];

(2) parties cannot agree, consent, elect, waive or acquiesce to a substantive hearing of the JRA; and

(3) the doctrine of equitable estoppel cannot be invoked to confer jurisdiction on the court to hear the substantive JRA. This is because the equitable doctrine of estoppel cannot bar the application of express provisions of written law in the form of O 53 r 3(6) and (7) RC - please refer to the judgment of the Court of Appeal in **Sabah Development Bank Bhd v TYL Land & Development Sdn Bhd** [2024] 6 MLJ 433, at [46(1)].

F(2). <u>Had the JRA been filed within the Three-Month Time Period [O 53 r 3(6) RC]?</u>

41. Firstly, an objective reading of the entire CM's Press Statement (1.9.2023) (please refer to the above paragraph 20), clearly disclosed that the Grounds (JRA) "*first arose*" on 1.9.2023. Consequently -

(1) for the purpose of the 1st Limb [O 53 r 3(6) RC], the Three-Month Time Period [O 53 r 3(6) RC] commenced on 1.9.2023; and

(2) the JRA in this case (filed on 29.12.2023), had been filed beyond the Three-Month Time Period [O 53 r 3(6) RC] as stipulated in the 1st Limb [O 53 r 3(6) RC].

42. Secondly, we have no hesitation to affirm the High Court's Decision that the PP (Reclamation) was "*first communicated*" to the Appellants by way of the CM's Press Statement (1.9.2023). The following evidence and reasons support this factual decision:

(1) when the DGEQ's 2nd Approval was announced by way of a press statement by the DGEQ on 27.4.2023 [**DGEQ's Press Statement (27.4.2023)**] -

(a) the Appellants acted on the DGEQ's Press Statement (27.4.2023) and instructed their solicitors to write two letters dated 28.4.2023 and 12.5.2023 to the DGEQ [**Appellants' 2 Letters (DGEQ)**];

(b) the Appellants' 2 Letters (DGEQ) applied for a copy of the DGEQ's 2nd Approval;

(c) there was no reply by the DGEQ to the Appellants' 2 Letters (DGEQ); and

(d) acting solely on the DGEQ's Press Statement (27.4.2023) and without a copy of the DGEQ's 2nd Approval, the Appellants instructed their solicitors to file the 2nd Appeal (EQA) on 25.5.2023

- please refer to paragraphs 34(c) and 35(a) to (c) of the first affidavit in support of the JRA (affirmed by the 1st Appellant on 27.12.2023).

It was clear from the above that the Appellants had previously filed the 2nd Appeal (EQA) based solely on the DGEQ's Press Statement (27.4.2023);

(2) the Appellants had always been proactive regarding their objection to the PSR Project. For example, even before the CM's Press Statement (1.9.2023), the Appellants' Letter (9.6.2023) had been sent to the 1st Respondent which requested for information relating to the PP for the PSR Project;

(3) before the issuance of the CM's Press Statement (1.9.2023), the Appellants had been legally represented. In other words, the Appellants had the benefit of legal advice at all material times; and

(4) premised on the evidence and reasons stated in the above sub-paragraphs (1) to (3) -

(a) as explained in the Quadrilogy, after the issuance of the CM's Press Statement (1.9.2023), the Appellants had Actual Knowledge/Notice of the PP (Reclamation);

(b) the PP (Reclamation) had been "*first communicated*" to the Appellants by way of the CM's Press Statement (1.9.2023); and

(c) the JRA in this case had been filed beyond the Three-Month Time Period [O 53 r 3(6) RC] as provided in the 2nd Limb [O 53 r 3(6) RC].

G. Effect of No Objection by the AGC to the Leave Prayer

43. O 53 r 3(3) RC states as follows:

> "***The applicant must give notice of the application for leave not later than three days before the hearing date to the [AGC] and must at the same time lodge in those Chambers copies of the statement and affidavits.***"
>
> (emphasis added).

44. The Appellants' learned counsel had contended that, among others, the fact that there was No Objection by the AGC to the Leave Prayer, in itself, meant that the High Court had the jurisdiction to decide on the substantive JRA in this case. We are not able to accede to this submission on the following grounds:

(1) the Federal Court had clearly decided in **Wong Kin Hoong**, at [30], that the High Court has no jurisdiction to hear a substantive JRA which has been filed beyond the Three-Month Time Period [O 53 r 3(6) RC]. Premised on **Wong Kin Hoong**, the mere fact that there was No Objection by the AGC to the Leave Prayer, cannot confer jurisdiction on the High Court to hear a substantive JRA which had been filed contrary to the 2 Limbs [O 53 r 3(6) RC];

(2) there is nothing in O 53 r 3(3) RC or in any rule in O 53 RC which provides that if a JRA has failed to comply the 2 Limbs [O 53 r 3(6) RC] and if there is no Court's EOT pursuant to O 53 r 3(7) RC, the No Objection by the AGC to the Leave Prayer, *per se*, can confer jurisdiction on the High Court to hear a substantive JRA;

(3) O 53 r 3(3) RC mandatorily requires an Applicant (JRA) to serve Form 109 and all cause papers regarding the Form 109 on the AGC not later than three days before the hearing of the Form 109. The purpose of O 53 r 3(3) RC {**Purpose [O 53 r 3(3) RC]**} has been explained by the Court of Appeal in **Nor Hazliza bt Ismail & Anor v Mohamed Yusoff bin Shaik Madar** [2024] 4 MLJ 770, at [67], as follows:

> *"[67]* ***In my view, once the nature of a dispute concerns*** *-*
>
> *(1)* ***public law matters only; or***
>
> *(2)* ***predominantly public law matters***
>
> *-* ***a claimant cannot be allowed to circumvent three mandatory requirements in a JRA as stipulated in O 53 rr 3(1) to (3) and (6) RC (3 Mandatory Requirements). The 3 Mandatory Requirements are as follows*** *-*
>
> *(a) in accordance with O 53 r 3(1) and (2) RC, an applicant in a JRA (**Applicant**) has to obtain prior leave of the High Court (**1st Mandatory Requirement**). The 1st Mandatory*

Requirement is clear from the use of the following imperative terms -

(i) a mandatory term "shall" is used in O 53 r 3(1) RC; and

(ii) O 53 r 3(2) RC employs the word "must".

The rationale of the 1st Mandatory Requirement is to enable the High Court to sieve JRAs and ensure that frivolous, vexatious or baseless JRAs have not been filed;

(b) ***O 53 r 3(3) mandatorily requires an Applicant to serve all cause papers regarding the JRA on the Attorney General's Chambers (2nd Mandatory Requirement). Once again, the Rules Committee has employed an imperative term "must" in O 53 r 3(3) RC. The object of the 2nd Mandatory Requirement is obvious, ie., the Attorney General (AG) is the custodian of public interest and should be informed in writing of any application to the High Court for leave to commence a JRA (Leave Application). In the exercise of the AG's public functions and duties, the AG has a discretion to accede or object to any Leave Application****; and*

(c) ***an Applicant has to comply with the mandatory time period to file a JRA (Limitation Period) as provided in O 53 r 3(6) RC (3rd Mandatory Requirement). The 3rd Mandatory Requirement is clear due to the employment of an imperative term "shall" in O 53 r 3(6) RC. As JRAs concern public law matters, it is in the public interest as well as it is in the interest of the Applicants for JRAs to be filed expeditiously. Hence, the purpose of the 3rd Mandatory Requirement.***

If an Applicant has exceeded the Limitation Period, the Applicant has to obtain leave of the High Court pursuant to O 53 r 3(7) RC to file the JRA."

(emphasis added).

The Purpose [O 53 r 3(3) RC] is solely to enable the Attorney General, as the custodian of public interest, to object to a Leave Prayer when the Form 109 is frivolous, vexatious or baseless. If the No Objection by the AGC to the Leave Prayer, can confer jurisdiction on the High Court to hear a substantive JRA, this will unlawfully exceed the Purpose [O 53 r 3(3) RC]; and

(4) if we have accepted the above contention by the Appellants' learned counsel, this will defeat the Policy Reasons (Three-Month Time Period).

H. <u>Should the High Court consider the EOT Prayer?</u>

45. According to the Appellants' learned counsel, the learned High Court Judge in this case should have considered the EOT Prayer. We cannot accept this contention because -

(1) the adversarial nature of our litigation process is not disputed. At the hearing of Form 109, the Appellants' learned counsel had freely elected to proceed with the Leave Prayer only (**Appellants' Election**). The Appellants' Election was fortified by the following conduct by the Appellants -

(a) the High Court's Leave (JRA) was sealed by the Appellants; and

(b) the Appellants proceeded with the substantive JRA on its merits;

(2) by reason of the Appellants' Election and conduct [as explained in the above sub-paragraph (1)], the Appellants cannot now complain that the High Court should have considered the EOT Prayer; and

(3) once Form 109 was heard on the Leave Prayer only and upon the granting of the High Court's Leave (JRA), the EOT Prayer had already been "*spent*" and the learned High Court Judge did not have any power to hear, let alone decide, the EOT Prayer.

I. <u>Could the Respondents object to the substantive JRA on the ground of the Appellants' failure to comply with the 2 Limbs [O 53 r 3(6) RC]?</u>

46. The Appellants' learned counsel had invited us to decide that the Respondents were barred from objecting to the substantive JRA on the ground of non-compliance with the Three-Month Time Period [O 53 r 3(6) RC] because -

(1) the High Court's Leave (JRA) had already been granted; and

(2) the Respondents did not appeal to the Court of Appeal against the High Court's Leave (JRA).

47. We do not find favour with the above submission due to the following reasons:

(1) the High Court's Leave (JRA) was granted without the Respondents being given a right to -

(a) file affidavits; and

(b) submit (in writing and orally)

- regarding the Appellants' non-compliance with the 2 Limbs [O 53 r 3(6) RC];

(2) in **Wong Kin Hoong**, at [30], our highest court, ie., the Federal Court had decided, that the High Court has no jurisdiction to hear a substantive JRA which has been filed beyond the Three-Month Time Period [O 53 r 3(6) RC]. An objection that a court has no jurisdiction to adjudicate a matter, can be raised at any time. We rely on the following judgment of Idrus Harun FCJ in the Federal Court case of **Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Anor** [2021] 1 MLRA 683, at [16] to [18] -

"*[16]* ***On behalf of the respondents, learned counsel begins his submission under this rubric by drawing our attention to the fact that the issue of whether the decision of the High Court in allowing the appellant's amendment application is appealable was never raised in the court below us and comes up for the first time before this court on the hearing of the full appeal****. His submission also asserts the position that the decision of the High Court is appealable. This is because the High Court's decision in allowing the appellant's amendment application was given at the conclusion of the hearing of an interlocutory application on its merits. Accordingly, the respondents, being the aggrieved party, cannot be denied the right of appeal as it was not a ruling made in the course of hearing the interlocutory application but rather a decision made at the conclusion of the interlocutory application on its merits.*

[17] ***I should start off with the first point taken on jurisdiction. The issue is whether the preliminary issue can be raised on an appeal before this court when this issue was not raised at all by the appellant before the Court of Appeal. For my part, I fully accept the propositions advanced by learned counsel for the appellant on the law concerning jurisdiction as broadly correct. In fact, it would not be an exaggeration for me to say that there is always unavoidable and strong inclination on the part of the courts to allow jurisdiction challenge at any stage of proceedings. In saying that I should emphasise as a matter of law, that the court is competent to entertain and try a suit if it was competently brought. However, where no jurisdiction exists or the court has no inherent jurisdiction, the suit is not competently brought and the court therefore has no power to take one more step. In other words, the court is***

not perfectly competent to entertain and try the suit. Jurisdiction it is often said, does not originate in consent or acquiescence of the parties and cannot be established, where it is absent, by such consent, acquiescence or waiver of rights. A consideration of the authorities such as Datuk TP Murugasu v. Wong Hung Nung [1988] 1 MLRA 153; [1988] 1 MLJ 291; [1988] 1 CLJ (Rep) 30; Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2018] 6 MLRA 210; [2018] 4 MLJ 496; [2018] 2 CLJ 163, COA and Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd And Another Appeal [2019] 5 MLRA 584; [2019] 8 CLJ 433, FC; confirms the propositions which I have expressed.

[18] ***It is relevant to note that as a general rule, a judicial decision made in want of jurisdiction or in breach of statute would be considered a nullity that is amenable to review at any stage of the proceedings and that the court has inherent powers to set aside non-appealable orders exercisable on its own motion and even if parties did not raise objections as to want of jurisdiction or tacitly acquiesce in the matter or brought by the party which the order purports to affect for that purpose (Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 1 MLRA 183; [1998] 1 MLJ 393; [1998] 2 CLJ 75; [1998] 1 AMR 909). Accordingly, while the respondents are quite correct to regard the preliminary issue was raised at the eleventh hour, I see nothing in the respondents' protestation that the preliminary point was not raised in the intermediate appellate court below us to entitle this court to refuse to hear it. I reject their argument.***"

(emphasis added);

(3) the fact that the Respondents did not appeal to the Court of Appeal against the High Court's Leave (JRA), did not confer jurisdiction on the High Court to hear the substantive JRA. This is because it is incumbent on an Applicant (JRA) to satisfy the court that the JRA had complied with either one of the 2 Limbs [O 53 r 3(6) RC]. A party's agreement, consent, election, waiver, acquiescence and conduct cannot confer jurisdiction on the High Court to hear a time-barred JRA; and

(4) an acceptance of the above contention by the Appellants' learned counsel, will nullify the Policy Reasons (Three-Month Time Period).

J. Was there "*a good reason*" for the High Court to extend the Three-Month Time Period [O 53 r 3(6) RC]?

48. The Appellants' learned counsel had urged the court to find that there was "*a good reason*" to extend the Three-Month Time Period [O 53 r 3(6) RC] pursuant to O 53 r 3(7) RC. We are unable to accept this submission. Our reasons are as follows:

(1) as explained in the above sub-paragraphs 45(1) and (3) -

(a) by reason of the Appellants' Election, Form 109 in this case had been heard solely on the Leave Prayer; and

(b) when the High Court's Leave (JRA) was granted, the EOT Prayer had already been "*spent*". Consequently, the High Court had no power to decide on the EOT Prayer; and

(2) there was no "*good reason*" for the Court's EOT to be given under O 53 r 3(7) RC simply because the 1st and/or 2nd Respondents had no power to grant the PP (Reclamation) - please refer to the above paragraph 35.

K. Should we decide on the merits of the JRA?

49. In view of our decision in Parts E to J, we dismiss This Appeal and affirm the High Court's Decision on either one or both of the following grounds:

(1) the 1st and/or 2nd Respondents had no power to grant the PP (Reclamation); **and/or**

(2) the JRA had been filed beyond the Three-Month Time Period [O 53 r 3(6) RC] and there was no "*good reason*" for the Court's EOT to be granted pursuant to O 53 r 3(7) RC.

50. In view of the above decision, we have decided not to discuss the merits of the JRA. We cite the following judgment of the Federal Court in **Wong Kin Hoong**, at [30]:

> "*[30]* ***In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had***

rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant."

(emphasis added).

L. Costs of This Appeal

51. In view of the public importance of this case, in the exercise of our discretion under s 70 of the Courts of Judicature Act 1964 read with rr 54 and 96 of the Rules of the Court of Appeal 1994, we make no order as to costs for This Appeal.

M. Conclusion

52. We end this judgment with our gratitude to all learned counsel who had ably assisted us in This Appeal.

53. A draft copy of this judgment (**Draft**) had been previously forwarded by me to Azimah bt. Omar FCJ and Ismail bin Brahim JCA. Both my learned sister and brother had agreed with the Draft.

DATE: 30 June 2026

WONG KIAN KHEONG

Judge

Court of Appeal

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