

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA  
(BIDANGKUASA RAYUAN)  
RAYUAN SIVIL NO. 01(f)-47-11/2013 (B)**

**&**

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA  
(BIDANGKUASA ASAL)  
RUJUKAN NO. 06-3-05/2013 (B)**

**ANTARA**

**SEMENYIH JAYA SDN BHD**

**... APPELLANT**

**AND**

**PENTADBIR TANAH DAERAH HULU LANGAT**

**... RESPONDENT**

**DAN**

**ANTARA**

**1. AMITABHA GUHA  
(sebagai wasi bagi harta pusaka  
MADHABENDRA MOHAN GUHA)**

**... APPLICANTS**

**2. PARUL RANI PAUL**

**AND**

**PENTADBIR TANAH DAERAH HULU LANGAT ... RESPONDENT**

**[In the matter of Civil Appeal No: B-01-653-11/2012  
In the Court of Appeal of Malaysia at Putrajaya**

**&**

[In the matter of Civil Appeal No: B-01-40-11  
In the Court of Appeal of Malaysia at Putrajaya

Between

Semenyih Jaya Sdn Bhd

... Appellant

And

Pentadbir Tanah Daerah Hulu Langat

... Respondent

And

1. Amitabha Guha  
(sebagai wasi bagi harta pusaka  
MADHABENDRA MOHAN GUHA)

... Appellants

2. Parul Rani Paul

And

Pentadbir Tanah Daerah Hulu Langat

... Respondent

**CORAM**

**ZULKEFLI AHMAD MAKINUDIN, CJM  
HASAN LAH, FCJ  
ZAINUN ALI, FCJ  
ABU SAMAH NORDIN, FCJ  
ZAHARAH IBRAHIM, FCJ**

## JUDGMENT

This is our unanimous decision

### INTRODUCTION

1. The Appellant in Appeal no 01(f)-47-11/2013(B) (**“the Appeal”**) and the Applicants in Reference no. 06-3-05/2013(B) (**“the Reference”**) before us seek to challenge the constitutional vires of the Land Acquisition Act, 1960 (**“the Act”**), made by way of the Land Acquisition (Amendment) Act 1997 (**“Act A999”**). Act A999 came into force on 01.03.1998.
2. The Appellant in this appeal and the Applicants in the Reference filed objections against the Land Administrator’s award disputing the amount of compensation awarded arising out of the acquisition of part of their land. Dissatisfied with the decisions of the High Court, they appealed to the Court of Appeal.
3. The Appellant in the appeal was granted leave by the order of this Court dated 07.10.2013 to appeal against the decision of the Court of Appeal dated 26.04.2013. The Reference before us is a reference of constitutional questions by the Court of Appeal. By a Consent Order dated 17.04.2013, the Applicants’ appeal in the Court of Appeal is stayed pending determination of the constitutional questions referred to this Court. For the Reference, it was agreed, as reflected in the order of this Court dated 01.12.2013, that the decision in the Appeal will bind the parties in the Reference.

4. The Appeal and the Reference focus on the changes made to the Act by Act A999, in particular section 40D which empowers assessors sitting with the Judge in the High Court to make the final determination on the amount of reasonable compensation for the acquisition of land under the Act; and subsection 40D(3) and the provision to subsection 49(1) which preclude appeals against the High Court decision on the amount of compensation.
5. In addition to those issues, the Appellant in the Appeal also poses to this Court questions on the effect of non-compliance with section 40C and the adequacy of compensation under Article 13 of the Federal Constitution in relation to its claim for loss of profit as a result of business extinguishment.
6. The question of law framed before this Court for the Appeal are as follows:
  - (1) Whether there is a right of appeal to the Court of Appeal against a decision of the High Court (consisting of a Judge and 2 assessors) involving compensation for land acquisition **on a question of law** in the light of section 40D (3) and the proviso to section 49 of the Land Acquisition Act, 1960 ("the Act") as amended by Act A999?;
  - (2) Whether the amendment to the Act by amendment Act A999 which came into effect on 1-3-1998 would apply **to land acquisitions instituted prior to the amendment** with the effect of changing radically the hearing process as regards the role of the assessors and further limiting a vested right of appeal?

- (3) Whether the amended section 40D is constitutionally valid in providing for a **conclusive determination by the assessors** (as opposed to the Judge) as to the amount of compensation in the face of Article 121 of the Federal Constitution that contemplates that the judicial power of the courts should be exercised by judges only?
- (4) Whether section 40D (3) could validly apply to limit appeals if the decision-making process provided for in section 40D (3) is constitutionally invalid?
- (5) *Whether the limitation of appeals in section 40D(3) or the proviso to section 49 could apply in the absence of strict compliance with the new procedure envisaged in section 40C and section 40D?*
- (6) Whether the safeguard of "adequate compensation" in Article 13(2) of the Federal Constitution is met where the Land Administrator refuses to take account of the development value or profit value of the land acquired where the subject land at the time of acquisition is already being commercially developed for profit?

7. The constitutional questions referred to this Court for the Reference are as follows:-

- (1) Whether section 40D(3) and the proviso to section 49(1) of the Land Acquisition Act 1960 are ultra vires Article 121(1B) of the Federal Constitution particularly when read in the context of Article 13 of the Federal Constitution.

(2) Whether sections 40D(1) and (2) of the Land Acquisition Act 1960 are ultra vires Article 121 of the Federal Constitution read in the context of Article 13 of the Federal Constitution.

8. As the issues of law are common to both cases, we shall discuss the legal position comprehensively since they will apply with equal force to the questions posed in the two matters before us.
9. In view of this Court's order dated 01.12.2013, our discussion and analysis in this judgment will focus on the Appeal unless the context otherwise requires (in respect of the Reference).

### **THE FACTUAL BACKGROUND**

10. The Appellant was the registered proprietor of a piece of land known as C.T. 14408, Lots No. 1883 and 1884, Mukim Semenyih, District of Ulu Langat, Selangor. Sometime in January 1997, the Appellant commenced construction works on part of the Land i.e. Lot 1883 for an industrial project known as "Kajang 181 Park". The project comprised 1 ½ storey terrace, 2 ½ storey semi-detached and 3 ½ storey factory lots totalling 128 units with 3 pieces of vacant land to be sold separately as industrial plots.
11. The Appellant's land was subject to acquisition under the Act for the purpose of constructing the Kajang-Seremban Highway. On 10.04.1998, the Appellant received Forms D and E from the Land Administrator of the Hulu Langat Land Office

informing the Appellant that part of Lot 1883 (8.394 hectare from a total area of 9.156 hectare) would be acquired for the above purpose and that an enquiry would be held on 06.05.1998.

12. The Land Administrator conducted an enquiry pursuant to section 12 of the Act to determine the amount of compensation payable to the Appellant arising from the said acquisition. At the conclusion of the enquiry, the Land Administrator awarded compensation to the Appellant in the sum of RM20,862,281.75 for the acquisition of part of Lot 1883. The amount of RM20,862,281.75 comprises RM17,627,400.00 being the value of the land acquired (8.394 hectare from 9.156 hectare) and RM3,234,881.75 being compensation for the loss suffered from the termination of the project namely piling works, building works, preliminary expenses incurred for mobilisation and setting up of the construction site, advertisement fees and marketing fees.
13. The Appellant objected to the amount of compensation awarded by the Land Administrator by filing Form N requesting the Land Administrator to refer the matter to the court for its determination pursuant to section 38 of the Act. The Appellant contended that the compensation awarded was inadequate because, amongst others, the Land Administrator failed to consider the "other claims" of the Appellant which comprise the loss of profits and the costs and expenses incurred by the Appellant arising out of the termination of its commercial

project on part of Lot 1883 acquired by the State Authority. The Appellant's claim for loss of profits was in respect of the sale of 57 industrial units in the project to purchasers prior to acquisition. It was the Appellant's case that when Form A was published in the *Gazette* on 14.08.1997, the Appellant had already entered into 42 sale and purchase agreements with third party purchasers for the sale of the factory units being built. It had collected a deposit of 10% of the purchase price and had expended funds for the development works.

14. By the time Form D was published in the *Gazette* on 12.02.1998, the Appellant had completed the earthworks and piling works, the Appellant had started the construction works and executed another 15 sale and purchase agreements. The compulsory acquisition of the subject land had wiped out the Appellant's commercial project. Thus the Appellant contended that it has to be compensated for loss of profits in respect of the sale of the 57 units. The other claims of the Appellant which had been dismissed by the Land Administrator included the development costs for the project, payment of professional fees to third parties, compensation paid to contractors, management fees and other miscellaneous expenses which were the losses suffered from the termination of its development project due to the acquisition.

**(note:** The particulars of the Appellant's claim for compensation has been summarised in Annexure A in the written submissions for the Appellant).



15. The Land Administrator then referred the matter to the High Court at Shah Alam by submitting Form O, which was duly registered on 25.02.1999 as Shah Alam High Court Land Reference No. MT3 10-15-37-1999.

### **Decision of the High Court**

16. The High Court judge hearing the land reference sat with two assessors ie, Encik Amran bin Mat Yaacob ("the Government Valuer") and Puan Khamsiah bt Shamsuddin ("the Private Valuer") to determine the adequacy of the compensation payable to the Appellant.
17. After hearing the evidence and submissions of parties, the Land Reference Court agreed with the award of the Land Administrator in respect of the valuation of part of Lot 1883 acquired by the State. However the High Court was of the view that the Appellant was also entitled to receive compensation for severance and injurious affection in the sum of RM1,160,020.00 in view of the remaining Lot 1883 which has now become less valuable due to the acquisition and the construction and use of the acquired land by the authority. However the other claims for compensation were dismissed by the High Court. There was no opinion in writing given by either of the assessors in respect of the award as required under section 40C of the Act. The learned judge in his judgment dated 28 September 2011 also gave no reasons on the dismissal of these claims. The High Court delivered its decision in the manner as shown below:-

*“(iii) Lain-lain tuntutan tidak dipertimbangkan selain dari yang telah dibayar oleh pihak Pentadbir Tanah”.*

### **Decision of the Court of Appeal**

18. The Appellant appealed to the Court of Appeal against the order of the High Court on the ground that the High Court erred in failing to decide or consider the “other claims” of the Appellant in the total sum of RM18.2 million.
19. Learned counsel for the Appellant submitted that the fact that the High Court had stated “lain-lain tuntutan tidak dipertimbangkan” must have been taken to mean that the High Court did not consider it at all and that there was a dereliction of duty by the High Court. In addition the Appellant was deprived of the opinion of the assessors under section 40C of the Act. Section 40C of the Act clearly provides that the opinion of each assessor on the various heads of compensation shall be given in writing and shall be recorded by the judge. Non-compliance of section 40C of the Act and failure of the Judge to consider the evidence amounts to a misdirection which merits appellate intervention.
20. On 26.04.2013 the Court of Appeal dismissed the Appellant’s appeal. It held that:-

*“We could not agree with counsel’s submission that “tidak dipertimbangkan” means failure of the court to consider. It has always been known and understood that the Malay style of speaking and expressing rejection has always been expressed in the most gracious manner... “Tidak dipertimbangkan” in the instant case does not and can never be understood as not considered at all.*

*What the learned trial Judge said and meant was that the claims had been considered but not allowed. It has to be understood that way.”*

21. On the Appellant’s right to appeal against the award made by the Land Administrator, the Court held that:-

*“ The law on the right of appeals against an award of compensation is clear. Nothing is clearer than the words expressed by Parliament in section 40D and 49 of the Act. On the same note, we also do not see any valid distinction can be made between this appeal and **Calamas**. The substratum of the Appellant’s appeal is against the decision of the High Court on the amount of compensation. The Appellant is unhappy in that all the heads of claims put forth before the land administrator and the High Court had not been fully satisfied. This appeal is but an attempt to circumvent the decision of the Federal Court in **Calamas**”.*

#### **Issues in this appeal;**

22. In view of the multifarious legal arguments presented before us, the issues will be categorised into four (4) parts:-

i. Part A (The Constitutional issue) –

Question 3 seeks to challenge the constitutionality of section 40D of the Act which confers power on the assessors to decide on the amount of compensation in the face of Article 121 of the Federal Constitution. The same issue is raised in Question 2 in respect of the Reference.

ii. Part B (Provisions limiting appeals under the Act)-

a. Questions 1, 4, 5 involve the application of subsection 40D(3) and subsection 49(1) of the Act which preclude

appeals from the decision of the High Court on compensation.

- b. Question 1 in the Reference challenges the constitutionality of subsection 40D(3) and subsection 49(1) of the Act in view of Article 121(1B) of the Federal Constitution.
- c. Question 5 raises the issue of whether an appeal can be limited if there is non-compliance of section 40C of the Act.
- iii. Part C (Claim for loss of profit) - Question 6 is in respect of the claim for loss of profit as a result of business extinguishment.
- iv. Part D (Application of the Amending Act A999) - Question 2 raises an issue whether the new amendments apply to cases where Form D was published in the Gazette before the coming into force of Act A999 on 01.03.1998.

## **PART A (THE CONSTITUTIONAL ISSUE)**

- 23. Section 40D of the Act brought about a far-reaching change in the decision-making process in the High Court with regard to appeals in compensation. The consequent frisson was to be expected, since by the said amendment, two assessors who are valuers are to sit in the High Court with the Judge and by the provisions of section 40D of the Act, they and not the judge are the final arbiters on the amount of compensation.

24. The Appellant now challenges the constitutionality of section 40D of the Act in view of the adjudicative function exercised by the assessors in a land reference. The issue is whether such a provision contravenes Article 121(1) of the Federal Constitution which declares that judicial power to decide a dispute brought before the courts is vested in the courts.
25. At this juncture a look at the Constitutional provision regarding the right to property would be instructive.

### **The Constitutional Right to Property**

26. Article 13 of the Federal Constitution reads:-

- 1) *No person shall be deprived of property save in accordance with law.*
- 2) *No law shall provide for the compulsory acquisition or use of property without adequate compensation.*

27. The right to acquire, hold and enjoy property is a fundamental right guaranteed by the Federal Constitution. However it is not an absolute right since ownership of property is subject to what is provided for in the Federal Constitution. One's property can be acquired by the State. However that acquisition would have to be carried out in **accordance with law**. The Federal Constitution also safeguards the land owner's right to receive **adequate compensation** as a result of his land being acquired. Article 13(2) specifically makes provisions for payment of adequate compensation for the property acquired.

## The Land Reference Court

28. By section 37 of the Act an aggrieved party has a legal right to object to the award of the Land Administrator by way of a land reference to the High Court provided that the total amount awarded in compensation in respect of the acquired land is not less than three thousand ringgit. Subsection 37(1) of the Act stipulates four grounds for an objection to be made. The ground in paragraph (b) of subsection 37(1) of the Act is in respect of the amount of compensation.
29. Subsection 36(4) of the Act confers jurisdiction to the High Court to determine any objection in respect of an award made by the Land Administrator under section 14 of the Act.

Subsection 36(4) of the Act reads:-

After an award has been made under section 14 the Land Administrator shall **refer to the Court for determination any objection** to such award duly made in accordance with this Part

*(our emphasis)*

30. By the definition provided in section 2, the word "Court" in the Act means the "High Court". In exercising its jurisdiction under subsection 36(4) of the Act, the High Court is governed by the provisions in Part V of the Act. The High Court here is referred to as the land reference court (**The Royal Selangor Golf Club v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur - [2012] 5 MLJ 364**).

## The Land Acquisition Act 1960- Background and relevant amendments on the provisions involving assessors

### Before 1984

31. Before 1984, section 42 of the Act contained a provision for assessors to aid the Judge on the issue of compensation. The then subsections 42(2) and (3) of the Act provided that whilst the assessors played a vital role in advising the judge, it was the judge who was seised with the judicial power to decide on issues arising out of the reference proceedings as well as the amount of compensation to be paid in respect of the land acquired.

Section 42 of the Act stated that :-

- “(1) The Opinion of each assessor shall be given orally, and shall be recorded in writing by the Judge.
- (2) In case of a difference of opinion between the Judge and the assessors or either of them upon a question of law or practice, or of usage having the force of law, the opinion of the Judge shall prevail.
- (3) In case of difference of opinion between the Judge and both of the assessors as to the amount of compensation or as to the amount of any item thereof **the decision of the Judge shall prevail.**”

(our emphasis)

### **The 1984 Amendment**

32. Vide Act A575, which came into force on 20.01.1984 sections 40-42 of the Act were deleted, thus completely removing the role of the assessors in the land reference court.

### **The 1997 Amendment (present position)**

33. The role of the assessors was however, restored by Act A999, which came into force on 01.03.1998. By Act A999, various amendments were made to the Act with new provisions being introduced governing matters on the determination of compensation and the payment thereof. According to the parliamentary debates during the passage of the Bill for Act A999, the objectives of the amendments vide Act A999 were, inter alia, to determine the basis for assessing compensation accurately, quickly and fairly to reflect the true value of the land acquired.

### **The new provisions**

#### **Section 40A of the Act**

##### **Constitution of the Court**

- (1) Except as provided in this section the Court shall consist of a Judge sitting alone.
- (2) Where the objection before the Court is in regard to the amount of compensation, the Court shall appoint two assessors (one of whom shall be a valuation officer employed by the Government) **for the**



**purpose of aiding the Judge** in determining the objection and in arriving at a fair and reasonable amount of compensation.

- (3) For the purpose of subsection (2) the Court shall appoint the two assessors from the lists of names submitted to the Court under subsection (4) and (5).

(4) ...

(5) ...

(our emphasis)

34. Subsection 40A(1) stipulates that the objections raised in a land reference matter is to be heard before a single judge. However, subsection 40A(2) states that if the objection stems from the inadequacy of the amount of compensation awarded in respect of the acquired land, the law imposes upon the Court the appointment of two assessors “for the purpose of aiding the Judge in determining the objection and in arriving at a fair and reasonable amount of compensation”.

35. On the face of it, the above provisions are perfectly in order. However there is a definite shift in momentum in the subsequent provision i.e. in section 40D of the Act. Section 40D of the Act announces a sea-change to matters involving the determination of compensation. Unlike the position prior to 1984 where the role of assessors was limited to assisting the judge on technical issues, **the present provision empowers the assessors to decide on the amount of compensation to be awarded arising out of the acquisition.** The decision made under subsection 40D(3) of the Act is **final** and **non-appealable**. The provision of finality is further fortified by the

introduction of the proviso to subsection 49(1) of the Act to preclude appeals against compensation.

### **Who are the assessors?**

36. At this juncture, it is necessary to firstly ascertain who the assessors are and what their duties may be in the land acquisition regime.
37. Under the common law, the practice of appointing assessors could be traced back to the second half of the 18<sup>th</sup> century when assessors were appointed to advise judges on nautical and technical issues in admiralty proceedings (see **Folkes v Chadd** (1782) 3 Douglas K.B. Rep. 152; 99 E.R. 589; **Johnstone v Sutton** (1785) 1 Durnford and East's Term Rep. K.B. 510; 99 E.R. 1225)
38. The word "assessor" is a latin word, *assessor*, meaning one who sits with another, or who is an assistant. The term "assessor" is used to designate a person who by virtue of some special skills, knowledge or experience he possesses, sits with a judge during judicial proceedings in order to answer any question which might be put to him by the judge on the subject in which he is an expert. (see **The Beryl** (1884) 9 P.D. 137 and **Owners Of Steamship Singleton Abbey v Owners Of Steamship Paludina, The Paludina** [1927] A.C. 16).
39. Although they are sources of information on matters concerning their own special skill or knowledge, assessors are

not to be treated as expert witnesses since their advice does not constitute evidence. They are not subject to cross examination, especially when the assessors are appointed by the court instead of by the parties. In the words of Viscount Simon L.C. in **Richardson v. Redpath, Brown & Co. Ltd** [1944] AC 62, at p 70:-

*" To treat . . . any assessor, as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross-examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence."*

40. Under the common law, the role of assessors is to help the judge to fully appreciate the specialist evidence taken. They "take no part in the judgment whatever, they are not responsible for it, and have nothing to do with it" (see the decision of Brett M.R in **The Beryl** (supra)).
41. The use of assessors would be particularly beneficial and appropriate in complex matters. It is believed that the presence of persons having the requisite skill and knowledge assisting the Bench would win public confidence in the judicial system.
42. In Malaysia, the use of court appointed assessors is not a novel practice. Nevertheless they are rarely used in both civil and criminal matters and perhaps the best known utilisation of their

services is found in land matters. Assessors are appointed when there is a provision in a statute that warrants their appointment. The role and function of assessors are governed by the relevant statute.

43. In fact, prior to 1995, Chapters XXI, XXII and XXIII of the Criminal Procedure Code (CPC) contained provisions relating to trials by jury and trials with the aid of assessors in the High Court. However the said provisions were deleted by the Criminal Procedure Code (Amendment) Act 1995 (Act A908). With the amendment, all criminal proceedings in the High Court thereafter shall be heard and disposed of before a single judge.

#### **Court-appointed assessors in land reference proceedings**

44. The role and functions of assessors in land reference proceedings are predicated on matters of opinion and experience. Their appointment is governed by subsection 40A(2) of the Act. The language of subsection 40A(2) of the Act is unequivocal in its provision that assessors form an integral part of the reference court, for otherwise, the land reference court would be not properly constituted.
45. The appointment of the two assessors (one of whom shall be a valuation officer employed by the Government) becomes mandatory when the objection referred to the court is with regard to the reasonable amount of compensation for the acquired land. In **The Royal Selangor Golf Club v Pentadbir**

**Tanah Wilayah Persekutuan Kuala Lumpur - [2012] 5 MLJ 364**, the Court of Appeal speaking through Abd Wahab Patail JCA held that:-

*“The land reference court is a creature of statute under the Land Acquisition Act 1960. On matters affecting compensation a judge sitting alone has no jurisdiction.”*

46. As provided for in subsection 40A(1)(2) of the Act, assessors are appointed by the court “for the purpose of aiding the Judge in determining the objection and in arriving at a fair and reasonable amount of compensation”.
47. This resembles the role and functions of assessors in the common law of providing assistance to the Judge.
48. Prior to 1984, the court was required to record the opinion of assessors which was given orally. However, by the present section 40C of the Act, assessors are required to give their opinion in writing in respect of claims for compensation which will then be recorded by the court.

Section 40C of the Act reads:-

*The opinion of each assessor on the various heads of compensation claimed by all persons interested shall be given in writing and shall be recorded by the Judge.*

49. By section 40D of the Act, “the amount of compensation to be awarded shall be the amount decided upon by the two

assessors". It would appear that section 40D of the Act has broadened the ordinary role of assessors from being advisors to that of fact finders and adjudicators.

Section 40D of the Act reads:-

*"(1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.*

*(2) Where the assessors have each arrived at a decision which differs from each other then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.*

*(3) Any decision made under this section is final and there shall be not further appeal to a higher Court on the matter."*

50. Section 40D of the Act thus imposes on the judge a duty to adopt the opinion of the two assessors or elect to concur with the decision of either of them if their decision differ from each other in respect of the amount of reasonable compensation arising out of the acquisition. The legislative intent is clear and unambiguous. As highlighted by the Court of Appeal in **Jitender Singh Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan & Another Appeal** [2012] 2 CLJ 165 a High Court judge cannot come to a valuation different from that of the assessors, or if different, from either one of them.

51. Wherefore now stands the Judge? It would appear that he sits by the sideline and dutifully anoints the assessors' decision.

52. Section 40D of the Act therefore effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it. This power to decide a matter which is brought before the court is known as judicial power and herein lies the rub. What is “judicial power”?
53. Before discussing the dialectics of judicial power, a brief outline on the exigencies of judicial function would be helpful. Other than the civil courts, bodies such as the Industrial Court, the Special Commissioner of Income Tax, as well as other inferior tribunals, perform a function which is judicial or quasi-judicial in nature. They can grant orders such as certiorari, mandamus etc. Thus it is recognised that judicial functions (as opposed to judicial powers) are not the monopoly of the judiciary. These inferior tribunals are necessary and they exist to lend weight to their specialist skills in issues which come up before them. The adjudicators of these inferior tribunals are, for the most part, lay persons and so their adjudicative powers are confined to their relevant spheres.
54. One has to hold this up against the position of adjudicators in the Superior Courts. The key question should be: Who can exercise judicial powers, i.e. decision-making powers, in the civil courts (as opposed to tribunals such as the Industrial Court)? The answer is obvious. Only judges as appointed under Article 122B of the Federal Constitution and no other,

can exercise decision making powers in our Courts – for the definition of “court” in the Act is the **High Court**.

55. At this juncture, one might question the validity of the jury system which once became part and parcel of our judicial system. A jury, acting under the directions of a judge, is the final tribunal to determine the facts of the case and to decide, either unanimously or by majority, whether the accused is guilty of the alleged offence. The jury system is firmly entrenched in the English common law. It was imported into the Straits Settlements by the Charters of Justice. Article 4(1) of the Federal Constitution declares that any law passed after Merdeka Day must not be inconsistent with the provisions in the Federal Constitution. Thus the jury system, being a pre-merdeka law, was saved by Article 4(1) of the Federal Constitution until it was abolished in 1995.

56. Be that as it may, it is axiomatic that under the common law, jury trials are very much part of the rights of an accused person who is charged with an offence in a criminal court. The right to a trial by jury which was enshrined in the Magna Carta, was based on the notion that anyone who is accused of a crime should have the right to be tried before their peers.

### **JUDICIAL POWER**

57. A discussion on judicial power of the Court is inevitable.



58. When the High Courts came into existence by virtue of Article 121 of the Federal Constitution on Merdeka Day, they were equipped with the necessary powers to fulfil their function as the Superior Courts of Malaya and subsequently of Malaysia.
59. Judicial power is the power every sovereign state must of necessity have, to decide controversies between its subjects or between itself and its subjects, whether the rights related to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give an authoritative decision which is binding (whether subject to appeal or not) is called upon to take action. (See **Dato' Seri Anwar Ibrahim v PP** [2010] 7 CLJ 397 at 485).
60. Judicial power is best described in **PP v Dato' Yap Peng** [1987] 1 CLJ 550, as being the power vested in the court to adjudicate on civil and criminal matters brought to it. (See also the dissenting view of Richard Malanjum CJSS in **Public Prosecutor v Kok Wah Kuan** [2008] 1 MLJ 1).
61. Article 121 of the Federal Constitution reads:-

**Judicial power of the Federation**

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely-

*(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and*

*(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;*

*(c) (Repealed).*

*and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.*

62. A notable observation is that the words “judicial power” do not form part of the provision of Article 121(1) of the Federal Constitution. The words were in fact deleted from the text of Article 121(1) by the Constitution (Amendment) Act 1988 [Act A704] effectively on 10 June 1988. However they remained in the marginal note to that article, and subsequently when the Federal Constitution was reprinted, the current version has those words in the shoulder note of the Article.

63. The original text of Article 121 (1) in the 1957 Constitution of the Federation of Malaya reads as follows:-

*The judicial power of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law.*

64. The phrase “the judicial power of the Federation shall be vested” was taken by the framers of our Constitution from section 71 of the Australian Constitution (see the decision of the Court of Appeal in **Kok Wah Kuan v. PP** [2007] 4 CLJ 454). The phrase was interpreted by Griffith CJ in **Huddart, Parker**

**and Co Proprietary Ltd v. Moorehead** [1908-1909] 8 CLR 330, to mean:-

*“... the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision... is called upon to take action.”*

65. This definition was cited with approval by the Privy Council in **Shell Co of Australia Ltd v. Federal Commissioner of Taxation** [1931] AC 275.

#### Judicial power is vested in the courts

66. In **Dato' Seri Anwar bin Ibrahim v Public Prosecutor** - [2010] 5 MLJ 145, the Federal Court held that the provision of Article 121 of the Constitution is to be read in connection with its shoulder note (which contains the words 'judicial power') and interpreted in this light. The shoulder note in a written Constitution therefore furnishes some clue as to the meaning and purpose of the Article. (see also **Kok Wah Kuan** (CA) (supra) and **Bengal Immunity Co. Ltd v. State of Bihar** AIR [1955] SC 661.

67. The legal consequence is that Article 121(1) of the Federal Constitution states that judicial power or the power to adjudicate in civil and criminal matters brought to the court is

vested only in the court. The same position was adopted in an earlier decision of the Federal Court in the dissenting view of Richard Malanjum (CJSS) in **Kok Wah Kuan** (FC)(supra) and curiously, as did the majority of the Court of Appeal in the same case; **Kok Wah Kuan v. PP** (CA) (supra).

68. With respect, the majority decision of the Federal Court in **Kok Wah Kuan** (FC) (supra) appears to have given a narrow interpretation of Article 121(1) of the Federal Constitution. It held that Article 121(1) of the Federal Constitution merely declares that the High Courts “shall have such jurisdiction and powers as may be conferred by or under federal law”. At page 14-15 of the judgment, Abdul Hamid Mohamad PCA (as he then was) stated that :-

“There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked 'Was the judicial power of the Federation vested in the two High Courts?' The answer has to be 'yes' because that was what the Constitution provided. Whatever the words 'judicial power' mean is a matter of interpretation. Having made the declaration in general terms, the provision went on to say 'and the High Courts ... shall have jurisdiction and powers as may be conferred by or under federal law.' In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law.

After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High Courts. **If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment.** That is the difference and that is the effect of the

amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?"

(emphasis added)

69. The narrow compass within which the Federal Court in **Kok Wah Kuan** (supra) above approached Article 121(1) of the Federal Constitution suggests that the provision merely identifies the **sources** from which the High Courts derive their jurisdiction, namely from federal law. Whilst it is correct to say that the powers of the High Courts to adjudicate legal disputes are those which have been conferred by federal laws, in our view the legal implication of Article 121(1) extends well beyond that. In this connection, there is a general acceptance that the Federal Constitution has to be interpreted organically and with less rigidity (see the principle of law in **Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus** [1981] 1 MLJ 29).

70. It is pertinent to now focus on the observation made by Richard Malanjum (CJSS) in his judgment in **Kok Wah Kuan** (FC) (supra). His Lordship took the position that the specific provision on the vesting of judicial power with the High Courts in Article 121(1) of the Federal Constitution represents an important feature in a democratic system of government. The courts which form the third branch of the government has a duty "to ensure that there is a 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them." His Lordship observed that:-

“At any rate I am unable to accede to the proposition that with the amendment of Art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.

The amendment which states that '*the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country...”

71. An astute observation on 'judicial power' was made by Eusoffe Abdoolcader SCJ in the majority judgment of **Public Prosecutor v Dato' Yap Peng** [1987] 2 MLJ 311, where His Lordship said that :-

*“... Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the right and liabilities of one or more parties ...”*

72. It is acknowledged that it would be virtually impossible to formulate a completely exhaustive conceptual definition of that term (judicial power), whether inclusive or otherwise.

73. The concept seems to transcend purely abstract conceptual analysis as was famously observed by Windeyer J in **The Queen v Trade Practices Tribunal, Ex parte Tasmanian Breweries Pty Ltd** [1970] 123 CLR 361.

74. Thus it is clear to us that the 1988 Amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution:-

- i. The doctrine of separation of powers; and
- ii. The independence of the Judiciary.

75. With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in Article 4(1).

Article 4(1) of the Federal Constitution provides :-

“This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”

76. It is worthwhile reiterating that Parliament does not have power to amend the Federal Constitution to the effect of undermining the features as stated in (i) and (ii) above for the following reasons:-

The effect of subsection 8(a) of the amending Act A704 appeared to establish Parliamentary supremacy; this consequentially subordinated the Judiciary to Parliament, where by virtue of the amendment, Parliament has the power to circumscribe the jurisdiction of the High Court.

77. Consequentially this has the unfortunate effect of allowing the executive a fair amount of influence over the matter of the jurisdiction of the High Court.

78. In the past, the apex court has consistently rejected Parliamentary supremacy in giving its continuing endorsement and faint praise to the Federal Court decision in **Ah Thian v. Government of Malaysia** [1976] 2 MLJ 112, in which Tun Suffian the Lord President had, in strong terms, said that :-

“The doctrine of Parliamentary supremacy does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislation in Malaysia is limited by the Constitution, and they cannot make any new law they please.”

79. And again in another case, that of **Sivarasa Rasiah v. Badan Peguam Malaysia & another** [2010] 2 MLJ 333, the Federal Court speaking through Gopal Sri Ram FCJ said at page 342 that :-

“... Further it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution that offends the basic structure may be struck down as unconstitutional. ... Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal



Constitution. See **Keshavananda Bharati v. State of Kerala** AIR 1973 SC 1461.”

80. **Sivarasa** (supra) made a clear departure from an earlier Federal Court decision of **Loh Kooi Choon v. Government of Malaysia** [1977] 2 MLJ 187, which in effect concluded that as long as an amendment to the Federal Constitution is effected in the manner required by Article 159 of the Federal Constitution, that amendment was effective regardless of its effect insofar as the basic structure of the Constitution was concerned.

81. Thus **Sivarasa** (supra) made a frontal attack on **Loh Kooi Choon** (supra) where the Federal Court in **Sivarasa** tersely observed that :-

“... the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that **Parliament cannot enact laws (including Act amending the Constitution) that violate the basic structure.**”

(our emphasis)

82. The authority of **Liyanage v The Queen** [1967] 1 AC 259 probably summed up the concept concisely. The Privy Council in **Liyanage** (supra) held that the impugned legislation involving a usurpation and infringement by the legislature of judicial powers is inconsistent with the written Constitution of Ceylon which, while not in terms vesting judicial functions in the judiciary, manifested an intention to secure in the judiciary a freedom from political, legislative and executive control and in effect left untouched the judicial system established by the

Charter of Justice of 1833. The legislation was struck down as void.

83. The Privy Council observed inter alia that powers in countries with Written Constitutions must be exercised in accordance with the terms of the constitution from which they were derived. Reference was made to the provisions in the Constitution for appointment of judges by the Judicial Service Commission and it was pointed out that these provisions patently displayed an intention to secure in the judiciary a freedom from political, legislative and executive control. It was said that these provisions were wholly appropriate in a constitution by which it was intended that judicial power shall vest only in the Judicature; and they would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature.

84. Thus given the strong observations made on the true nature and purpose of the impugned enactment, any alterations made in the judicial functions would tantamount to a grave and deliberate incursion in the judicial sphere.

85. In fact the subsequent passage in **Liyanage** (supra) is illuminating. There the court observed that:-

“... If such Acts as these were valid the judicial power could be wholly absorbed by the legislation and taken out of the hands of the judges. It is appreciated that the legislature has no such general intention. It was set by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the

Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution.”

86. Thus to put it in perspective, the judicial power of the court resides in the judiciary and no other as is explicit in Article 121(1) of the Constitution.

87. The principles laid down in **Keshavananda Bharati v State of Kerala** AIR 1973 SC 146 were reviewed and affirmed by the Supreme Court in **Indira Nehru Gandhi v Raj Narain** AIR 1975 SC 2299. The Supreme Court emphasised the sanctity of the doctrine of separation of powers and the exclusivity of judicial power. Khanna J, in concurring with the majority *inter alia* held at pages 2340-2347 that:-

*“... A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislation function have been demarcated and it **is not permissible for the legislature to encroach upon the judicial sphere**. It has accordingly been held that a legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the legislature to declare the judgment of the court to be void or not binding.”*

(our emphasis)

88. The judiciary is thus entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers.

89. This is essentially the basis upon which rests the edifice of judicial power.
90. The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.
91. The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus an effective check and balance mechanism is in place to ensure that the executive and the legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex court had prescribed that the powers of the executive and the legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in ensuring that the powers of the executive and the legislature are to be kept within their intended limit. (See **Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd** [1979] 1 MLJ 135).

#### **The Constitutionality of Section 40D of the Act**

92. Before proceeding further, since the Appellant is moving this court to determine the constitutionality of the impugned provisions, it is necessary to briefly state the principle of statutory interpretation.

93. The preliminary position is that there is always a strong presumption in favour of the constitutionality of provisions in a statute. This is premised on the principle that Parliament cannot be presumed to intend an unconstitutional action. The burden is upon him who challenges the provision to show that they are unconstitutional (**Public Prosecutor v. Pung Chen Choon** [1994] 1 MLJ 566, **Ooi Kean Thong & Anor v Public Prosecutor** [2006] 3 MLJ 389 , **PP v Azmi Sharom** [2015] 8 CLJ 921). The court's function is merely to test the legality of an action against principles and standards established by the Constitution. Unless it is found that there has been a clear transgression of constitutional principles, the court would refrain from declaring the law as legislated by the Legislature to be invalid.

#### **Adequacy of compensation is to be determined by the Judge**

94. Counsel for the Respondent referred to the decision of the Court of Appeal in **Jitender Singh** (supra) where it was held that limiting the discretion of a High Court judge hearing a land reference to the opinion of the assessors appointed to assist him, does not infringe Article 13 of the Federal Constitution. The relevant paragraph in the judgment of the court states that:-

*"After careful consideration of the impugned provisions and art. 13 of the Federal Constitution as well as the submissions presented before us, we are of the view that limiting the discretion of a High Court judge hearing a Land Reference to the opinion of the assessors appointed to assist him, alternatively, by the opinion of one of the assessors, does not infringe art. 13 of the Federal Constitution. We are of the opinion that such a provision is valid and of full legal effect. In our considered opinion the limitation requiring*

*him to be guided by such an opinion is warranted as a High Court Judge is no expert in determining the value of land. Valuation of land clearly is not a mathematical process."*

95. However in our view, section 40D of the Act has a wider reach. The implications of the language of sections 40D(1) and (2) of the Act is that the assessors in effect take over the judicial power of the Court enshrined under Article 121(1) of the Federal Constitution in deciding on a reasonable amount of compensation in land reference matters. The judicial power to award compensation has been whittled away from the High Court Judge to the assessors in breach of Article 121 of the Federal Constitution.
96. Counsel for the Respondent referred to the parliamentary debates of Act A999 (dated 05.06.1997) and averred that the introduction of section 40D by Act A999 was in line with one of the objectives of Act A999, namely to have a strong foundation for assessment of compensation payable to land owners. Hence the appointment of court appointed assessors was basically to ensure that compensation is made accurately, quickly and fairly to reflect the true value of the land acquired.
97. Be that as it may, whilst the intent and purposes of the above provision is commendable, it leaves open the question of whether this can be done at the expense of judicial independence and power. The constitutional compulsions would need to be realigned. The crux of the matter lies in the

implication of section 40D of the Act being contrary to Article 121 of the Federal Constitution.

98. In view of the foregoing, by virtue of Article 121(1) of the Federal Constitution, the power to award compensation in land reference proceedings is **a judicial power that is vested in the High Court Judge** sitting in the land reference court. This argument is fortified by the provisions of subsection 36(4) and section 2 of the Act. It imposes on the Land Administrator the right to refer to the High Court Judge who is seised with judicial power to adjudicate.

99. The case of **PP v Yap Peng** (supra) highlights that the exercise of judicial power carries two features. The first is that judicial power is exercised in accordance with the judicial process of the judicature.

This is also illustrated by Gaudron J, in **Wilson v Minister for Aboriginal Affairs** [1996] 189 CLR 1 at 22 when he said that:-

*“For the moment it is sufficient to note that the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the courts in which that power is vested. And public confidence depends on two things. It depends on the courts acting in accordance with the judicial process. More precisely, it depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process. So critical is the judicial process to the exercise of judicial power that it forms part of the definition of that power. Thus, judicial power is not simply a power to settle justiciable controversies, but a power which must be and must be seen to be exercised in accordance with the judicial process.”*

(our emphasis)

100. In view of section 40D of the Act, a conundrum presents itself in that the discharge of the judicial power and function to determine adequate compensation is now assigned to assessors and not the Judge. It is pertinent to note that the act of determining the amount of compensation payable arising out of land acquisition cases involves **judicial assessments**, for example, whether a particular head of claim is allowed, evidential issues, whether a response to a valuer's report is permitted etc. **Hence the power to award compensation in land reference proceedings is a judicial power that should rightly be exercised by a judge and no other.**

101. The second feature is that judicial power is vested only in persons appointed to hold judicial office. Therefore, a non-judicial personage (i.e. a non-member of the judicature) has no right to exercise judicial power. In **Yap Peng** (supra), the former Supreme Court struck down the power conferred on the Attorney General by section 418A of the Criminal Procedure Code which empowered him at any time to transfer (by way of a certificate) a case from the Subordinate Court to the High Court, which the Federal Court classified as essentially a judicial function. Mohd Azmi SCJ held that :-

*"Clearly, judicial power to transfer cases from a Subordinate Court of competent jurisdiction as presently provided by section 418A cannot be conferred on any organ of government other than the Judiciary."*

(our emphasis)



102. Also, as observed by Lord Diplock in **Hinds v The Queen** [1976] AC 195 at 213 :-

*“What, however is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution.”*

103. In an equally well known authority, the Privy Council upheld the decision of the High Court Australia when it struck down a legislation that united in a single body, (not a court) functions that were both judicial and non-judicial. (See **AG Australia v The Queen & The Boilermakers Society** [1957] AC 288).
104. In a subsequent case, the Constitutional Court of South Africa struck down a provision of their Insolvency Act that conferred power on a non-judicial officer (a public servant) to issue a warrant of punishment on any person at a creditor's meeting who defies a direction to produce books and accounts. (See **De Lange v Smuts** [1998] 3 SA 785).
105. We are of the view that the discharge of judicial power by non-qualified persons (and not by Judges or judicial officers) or non-judicial personages render the said exercise ultra vires Article 121 of the Federal Constitution.

106. This observation is fortified by the other provisions in the Federal Constitution such as are found in Article 122AA.

- a) Article 122AA provides that each of the High Courts (of Malaya & Sabah/Sarawak) **'shall consist of the Chief Judge and other Judges.'**

(our emphasis)

In our view, the peremptory provision in Article 122AA is explicit in its truism in that it is not permissible for assessors (as non-judicial personages) to sit in the High Court.

- b) This is further emphasised by Article 122AA(2) where the composition of the High Court shall be of judges 'designated' to sit in the High Court. These are persons entitled and qualified for appointment as provided for in Article 122B.
- c) By Article 122B(5) of the Federal Constitution, it is clear that a person designated to sit as a judge of a High Court shall be a person qualified under Article 123 and appointed under Article 122B.
- d) Article 122B of the Federal Constitution provides for the appointment of Judicial Commissioners to perform functions of a High Court Judge. However there is no provision in the Constitution that allows assessors to perform the functions of a High Court Judge.

107. In essence, it was contended that the courts in the past had tried to lessen the impact of subsections 40D(1) and (2) of the Act by holding that the role of the Judge is not to merely rubber stamp the decision of the assessor, the judge should also be satisfied that the assessors, in forming their opinion, had considered all relevant matters (see decision of Zaleha Zahari JCA (as her Ladyship then was) in **Jitender Singh** (supra).
108. However in looking at the Judge's grounds in this appeal as in others (under this provision) it is apparent to us that it is bereft of judicial reasoning. With respect, the judge did exactly what the court in **Jitender Singh** said it should not do i.e. it merely rubber-stamped the decision of the assessors, which is not only a breach of section 47 of the Act but more importantly, it violates Article 121 of the Federal Constitution.
109. Clearly, subsections 40D (1) and (2) of the Act **do not** empower the High Court Judge to disagree with the assessors or give them directions or instructions. Thus, even if the High Court Judge records his dissatisfaction against the decision of the assessors, it would be an exercise in futility since the aggrieved landowner is left without any recourse, as the assessors' decision is final.
110. The sting of unfairness of subsections 40D(1) and (2) of the Act bites further in subsection 40D(3) and the proviso to subsection 49(1) of the Act when landowners are prevented from appealing the decision of the assessors.

111. However this provision on appeal will be expanded latterly. Meanwhile, our view is that subsections 40D (1) and (2) of the Act, ignores the role of Judges as defenders of the Constitution and renders the constitutional guarantee of adequate compensation illusory since judges 'abdicate' their constitutional role, for the guarantee of adequate compensation is now in the hands of two lay assessors.
112. Thus, within the ambit of Articles 13 and 121 of the Federal Constitution, the premise of a constitutional challenge is Article 4(1) of the Constitution.
113. By virtue of Article 4(1) of the Federal Constitution, this Court may hold the provisions of any law passed after Merdeka as void and of no effect if such laws are inconsistent with the Federal Constitution.
114. Our Federal Constitution affirms the polemic that judicial power is exercisable only by judges sitting in a court of law; and that the judicial process is administered by them and no other.
115. For all the reasons above, we find section 40D of the Act to be ultra vires the Federal Constitution and that it should be struck down.
116. What then would the consequence be if section 40D of the Act is struck down?

Since the preceding sections 40A, 40B and 40C of the Act are not impugned, a proposed **new** section 40D would have to be put in place, without affecting the efficacy and legality of sections 40A, 40B and 40C. The new section 40D of the Act would have to take into account the following:-

Any objection as against the amount of compensation awarded by the Land Administration would continue to be determined by a judge sitting in a land reference court. The provision of subsection 36(4) of the Act is to be given full effect. Only that this time, the role of the assessors would have to be redefined.

117. In this new provision the assessors are expected to listen to the proceedings and evaluate the evidence. They may also be required to answer any questions of fact within their competence, consonant with their role as advisors under subsection 40(2) of the Act.
118. At the end of the proceedings, they are required to give their opinion as to the appropriate amount of compensation to be awarded in a particular case.
119. At the conclusion of the proceedings, it is requisite under section 40C of the Act that they put their opinion in writing as to the appropriate amount of compensation to be awarded in a particular case.

120. It is then for the judge and the judge alone to deliberate on the issue of quantum before him, after taking into account all the issues.
121. In so doing, it is not uncommon for the judge to give weight to the opinion of the assessors, for as experts in valuation of property, their opinion stand persuasively to be considered by the judge.
122. However the assessors have no more role as soon as they put their opinion in writing. At the risk of tedium, it bears repeating that it is for the judge and the judge alone to exercise his mind and determine the issues before him, based on the advice given him by the assessors.
123. It is reiterated that the opinion of the assessors are not binding on the judge. In the event the assessors disagree (as between themselves regarding the amount of compensation to be awarded in a particular case), the judge may, after considering both opinions, elect to consider which of the two opinions in his view is appropriate in the circumstances of the case. However he is not bound by either one of the opinions. Should the judge finds himself in disagreement with the opinion of both the assessors, he is at liberty to decide the matter, giving his reasons for so doing.

These then are to be made clear in place in the proposed new section 40D.

124. It would in no small way, emphasise the punctilious nature of the assessors' advice and the value their role represents.

125. At the end of it, the sanctity of judicial power is preserved. The judge and the judge alone determines the outcome of the objections as to the amount of compensation after affording the person or persons interested ample opportunity to ventilate his or their concern.

### **Prospective Overruling**

126. As regards the present section 40D of the Act, since we have declared it to be unconstitutional, our decision is to have prospective effect. The doctrine of prospective overruling will apply here so as not to give retrospective effect to the declaration made.

127. As a matter of principle, a court judgment is "retrospective in effect unless a specific direction of prospectivity is expressed". This principle has been decided by the Federal Court in **Public Prosecutor v Mohd Radzi Bin Abu Bakar** - [2005] 6 MLJ 393.

128. In **Mohd Radzi** (supra), the Federal Court had occasion to explain on the application of the doctrine of prospective overruling. Reference was made to the decision of the House of Lords in **National Westminster Bank plc v Spectrum Plus**

**Ltd** [2005] UKHL 41. In the words of Lord Nicholls of Birkenhead:

“People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling', sometimes described as 'non-retroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for court rulings on points of law which, to greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions.”

129. In **Mohd Radzi** (supra), the Court of Appeal set aside the conviction of the High Court against the respondent for the offence of trafficking in dangerous drugs under subsection 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA). The issue before the Federal Court is whether the Court of Appeal was entitled to apply the decision of the Federal Court in **Muhammed bin Hassan v PP** [1998] 2 MLJ 273 on the rule against double presumptions in subsection 37(d) of the DDA read with subsection 37(da) of the DDA, when such decision came much later, after the High Court convicted the respondent.

130. In answering the above issue in the affirmative, the Federal Court in **Mohd Radzi** (supra) made the following remark:

“When the learned judge at first instance tried the respondent and handed down his decision, *Muhammed bin Hassan* was yet to be decided. However, the judgment of this court in *Muhammed bin Hassan* had been handed down before the respondent's appeal against his conviction was heard by the Court of Appeal. It then became necessary for the Court of Appeal, in accordance with the principles adverted to by Lord Nicholls in *Spectrum Plus*, to apply *Muhammed bin Hassan* to this case. It is in this way that the



declaration of the common law by a superior court operates retrospectively.”

131. The doctrine of prospective overruling was also applied in the case of **PP v. Dato’ Yap Peng** [1987] 2 MLJ 311. The Supreme Court by a majority (Tun Mohamed Salleh Abas L.P., and Tan Sri Hashim Yeop A. Sani S.C.J. dissenting) declared section 418A of the Criminal Procedure Code to be unconstitutional and void as being an infringement of the provisions of article 121(1) of the Federal Constitution. The Court then applied the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of the judgment in that matter would remain undisturbed and not be affected.
132. Referring to the Appeal before us, we found that section 40D is ultra vires the Federal Constitution and should be invalid. By precedent, declarations of invalidity are made prospectively so as not to affect previous decisions made under the invalid law (See **PP v Dato’ Yap Peng** (supra)).
133. In that case, all proceedings involving compensation in land acquisition matters which had taken place and been determined under this provision prior to the date of this judgment will remain status quo.

134. For the avoidance of any doubts, such a declaration will bind pending cases at first instance or at the appellate stage (see **PP v. Mohd Radzi Abu Bakar** (supra)).

## **PART B ( THE BAR TO APPEAL)**

### **THE RIGHT OF APPEAL**

135. A perusal of the provisions limiting appeals under the Act is called for here.

Subsection 40D(3) of the Act reads:-

“(3) Any decision made under this section is final and there shall be no further appeal to a Higher Court on the matter.”

Subsection 49(1) of the Act and its proviso reads:-

(1) Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court:-

Provided that where the **decision comprises an award of compensation** there shall be no appeal therefrom.

(our emphasis)

136. We take the position that the word “decision” mentioned in subsection 40D(3) of the Act flows from the decision-making process described in its preceding subsections which we have held to be unconstitutional. However our finding of unconstitutionality of section 40D of the Act is because of the

decision-making process only, i.e. the determination of the amount of compensation by the assessors. No more no less.

137. The provision limiting appeal is in our view, a separate and distinct issue. It does not contribute to the invalidity of subsection 40D(3) of the Act. To hold otherwise would be contrary to subsection 68(1)(d) of the Court of Judicature Act 1964 (CJA). The law recognises the power of the legislature to enact laws limiting appeals by declaring the finality of a High Court order. Subsection 68(1)(d) reads:-

No appeal shall be brought to the Court Of Appeal in any of the following cases:-

- (a) – (c); and
- (d) Where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.

138. An important component in the issue of the bar to appeal in subsection 40D(3) of the Act is the proviso to subsection 49(1). Paragraph 25 of the Explanatory Statement to the Bill for Act A999 states that subsection 49(1) was amended so as to include the provision limiting appeals as a result of the introduction of subsection 40D(3) of the Act.

139. Hence despite the fact that section 40D has been declared unconstitutional, its discussion is material in the context of the proviso to subsection 49(1) of the Act. Subsection 40D(3) of the Act is a finality clause. It declares that any decision made by the Land Reference Court under section 40D i.e. on the amount of compensation is “final.” Consequently, a decision

made under section 40D of the Act ends in the High Court. The law restricts appeals to be brought against the “amount of compensation”.

### **The Bar to appeal in subsection 49(1)**

140. The application of subsection 49(1) of the Act has been set out by this court in **Syed Hussain Syed Junid & others v Pentadbir Tanah Melayu Negeri Perlis** [2013] 6 MLJ 626. It was held that based on subsection 49(1), an aggrieved party has the right to appeal to the Court of Appeal and therefore to the Federal Court without having to resort to the leave process under subsection 96(a) of CJA (per Raus Sharif PCA).

141. On the other hand, the proviso to subsection 49(1) seeks to qualify a full right of appeal (which is given in the body of the section) in that there can be no appeal “where the decision comprises an award of compensation.”

142. The proviso should not be construed to disembody the section. A proviso has to be read as being part of the main section and not independent of it. As Viscount Dilhorne said in the Privy Council in **Commission of Stamp Duties v Atwill** [1973] 1 All ER 576 at 579 :-

“... It is the substance and content of the enactment, not its form, which has to be considered, and that which is expressed to be a

proviso may itself add to and not merely limit or qualify that which precedes it.

**“DECISION COMPRISES AN AWARD OF COMPENSATION” IN  
SUBSECTION 49(1) OF THE ACT**

143. The proviso to subsection 49(1) of the Act explicitly sets out a limitation on the content of the appeal – in that there can be no appeal “where the decision comprises an award of compensation”.
144. A literal reading of the proviso to section 49 of the Act would mean that there is a complete bar on all appeals to the Court of Appeal from the High Court on a question of compensation.
145. On behalf of the Respondent, the Senior Federal Counsel submitted that the language of the proviso to subsection 49(1) is clear and unequivocal in that where the High Court’s decision is grounded on compensation, no appeal can be brought against that decision. The courts must give effect to the clear provisions of the law.
146. The above contention finds support in two decisions of the Federal Court. In **Calamas Sdn Bhd v Pentadbir Tanah Batang Padang** [2011] 5 CLJ 125, the Federal Court inter alia, held that:-

*“... In the instant appeal I do not see anything ambiguous in ss40D and 49(1) of the Act. In view of this, I am of the view that the Appellant is precluded from appealing **against the order of compensation** issued by the learned judge.”*

147. A similar pronouncement was made in the case of **Syed Hussain** (supra) where His Lordship Raus Sharif PCA said:-

*“With the introduction of section 40D and the amendment to the proviso of section 49(1) the intention of Parliament is very clear, i.e. to preclude any party from appealing **against the order of compensation** made by the High Court ...”*

(our emphasis)

148. We are of the view that this purported ouster of the right of appeal in respect of compensation ought to be narrowly and strictly construed. One has to revert to the tangible weight of the wording of Article 13(1) of the Federal Constitution where the safeguards are that an acquisition must be “in accordance with law” and that the compensation should be “adequate compensation.” The proviso to subsection 49(1) of the Act must be strictly interpreted in favour of the person who has been deprived of its property so as to give meaning to the constitutional protection of a person’s right to his property.

149. It is axiomatic that a right of appeal is statutory. What then is the effect of this? First, it simply means that when conferred by statute, the right of appeal becomes a vested right. Correspondingly the jurisdiction of the Court to hear appeals is also conferred by statute (See **Auto Dunia Sdn Bhd v Wong Sai Fatt & Others** [1995] 2 MLJ 549); **Wan**

**Sagar bin Wan Embong v Harun bin Talib & Ors** [2008] 4 MLJ 473).

150. A fortiori, the nature of the appeal depends on the terms of the statute conferring that right. It is a matter of construction to be given to the provisions conferring the right to appeal. Legislative intention can also be found by examining the legislation as a whole. Limiting the right to bring an appeal is a way of encouraging finality. If an examination of the language and policy of the Act granting the right of appeal concludes that Parliament intends to limit an appeal, the court must give effect to it.
151. We have perused the facts and the decisions of this Court in **Calamas** (supra) and **Syed Hussain** (supra). The cases do not represent a bar to appeal against any decision of the High Court on compensation. Even if **Calamas** (supra) and **Syed Hussain** (supra) represent a bar to appeal against any decision which comprises compensation, the Federal Court in these two cases were not invited to consider issues of constitutionality or the restrictive dimension of subsection 49(1) in the face of Article 13 of the Federal Constitution, since it was never raised there. Instead the issues in these two cases merely revolved around the construction of subsection 40D(3) and subsection 49(1) of the Act.
152. In our view, what needs clarification here is the phrase “against the order of compensation made by the High Court” which was

used by the Federal Court, both in **Calamas** (supra) and **Syed Hussain** (supra). The question is whether such expression denotes any decision issued by the High Court with regard to compensation.

153. In our view this does not appear to be the case. It is obvious that the subject matter of the appeals in both cases was purely on the inadequacy of quantum of compensation awarded by the High Court. It was on this basis that Hashim Yussof FCJ in **Calamas** (supra), concluded that:-

“It would appear that from the grounds of judgment of the Court of Appeal (at p. 16 appeal record volume I), the issue put forward before the court was whether the learned judge was correct in determining the **amount of compensation** to be awarded to the appellant (emphasis added).

... I am of the view that the said section clearly stipulates that “Any decision made under this section is final and there shall be no further appeal to a higher court on the matter.”

It is trite law that courts must give effect to the clear provisions of the law. In the instant appeal I do not see anything ambiguous in ss. 40D(3) and 49(1) of the Act. In view of this, I am of the view that the appellant is precluded from appealing against the order of compensation issued by the learned trial judge.”

154. The position is reinforced by the restrictive approach taken by the Federal Court in the interpretation of the proviso to subsection 49(1) of the Act. In **Syed Hussain** (supra), his Lordship Raus Sharif PCA held that because of its legislative background, the proviso to subsection 49(1) of the Act must be read together with the provision of subsection 40D(3) of the Act. The intention of Parliament is clear. There can be no



appeal against the decision of the High Court on the amount of compensation. The relevant part of the judgment reads:-

“Thus while section 49(1) of the LAA allows any interested person to appeal against the decision of the High Court to the Court of Appeal, section 40D appears to have restricted the ambit of such an appeal. Section 40D(3) clearly provides that any decision as to the amount of compensation award shall be final and there shall be no further appeal to the higher Court on the matter. This non-appealable provision of section 40D(3) is further reinforced by the proviso of section 49(1) which reads:-

Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.

Historically speaking, s 40D is a new section introduced by the Land Acquisition (Amendment) Act 1997 (Amendment Act 1997). The Amendment Act 1997 had also inter alia amended the proviso of s 49(1) of the LAA.”

155. To sum up, the proviso to subsection 49(1) of the Act does not represent a complete bar on all appeals to the Court of Appeal from the High Court on all questions of compensation. Instead the bar to appeal in subsection 49(1) of the Act is limited to issues of fact on ground of quantum of compensation. Therefore an aggrieved party has the right to appeal against the decision of the High Court on questions of law.

**Whether the provision limiting appeal under the Act is ultra vires Article 121(1B) and Article 13 of the Constitution**

156 Before us, Counsel for the Applicants in the Reference, submitted that the provisions limiting appeals under the Act are unconstitutional because they contravene Article 121(1B) of the Federal Constitution.

Article 121(1B) reads:-

(1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:-

- (a) jurisdiction **to determine appeals** from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
- (b) such other jurisdiction as may be conferred by or under federal law.

(our emphasis)

157. Counsel for the Applicants has approached this Court to view the word “appeals” in Article 121(1B)(a) of the Federal Constitution in a general context so as to denote “all appeals”. In effect, it was submitted that Article 121(1B)(a) confers the Court of Appeal the power to determine all appeals arising from the High Court without limitation. The legal implication is that, the right of the Applicants to appeal against the decision of the High Court is guaranteed by Article 121(1B)(a) of the Federal Constitution.

158. The above interpretation of Article 121(1B) of the Federal Constitution was applied by the minority judgment of the Court of Appeal in **Yong Teck Lee v Harris Mohd Salleh & anor** [2002] 3 MLJ 230. In that case a challenge was made against section 36 of the Election Offences Act 1954, which purported to exclude the appellate jurisdiction of the Court of Appeal.

K.C. Vohrah JCA, in his dissenting view, held that the word “appeals” in Article 121(1B) must refer to “all appeals” and that Article 121(1B) confers jurisdiction on the Court of Appeal to determine all appeals from decisions of the High Court. Therefore in his lordship’s view, “the Court of Appeal’s appellate jurisdiction cannot be abrogated, limited or restricted”. This is so, because if Parliament intends to limit the appellate jurisdiction of the Court of Appeal as provided in Article 121(1B)(a), it would have said so by expressly introducing a provision to that effect. But such restriction can only be found in the Constitution in respect of the appellate jurisdiction of the Federal Court. By Article 128(3), Parliament makes it certain that the jurisdiction of the Federal Court to hear appeals from the Court of Appeal or the High Court is what has been conferred by federal law.

Article 128(3) reads:-

The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

159. However we find that the view presented above is too rigid. It fails to consider the legislative background of Article 121(1B). It must be reiterated that Article 121(1B) was introduced in the Constitution by Act A885 upon the creation of the Court of Appeal. The provision of Article 121(1B) came into force on the same day with Act A886 which amended sections 50, 67 and 68 of the CJA, i.e. the provisions governing the jurisdiction of the Court of Appeal in criminal and civil matters.

160. Having said that, the intention of the legislature is clear. Article 121(1B) of the Federal Constitution must be read together with the provisions in the CJA which set out the appellate jurisdiction of the Court of Appeal. This was the position taken by the majority decision of the Court of Appeal in **Yong Teck Lee (supra)** and approved later by the Federal Court in **Dr Koay Cheng Boon v Majlis Perubatan Malaysia** [2012] 3 MLJ 173).

161. What is the significance of Article 121(1B) of the Federal Constitution? Article 121(1B) is a general provision relating to the jurisdiction of the Court of Appeal. It is an empowering provision declaring that the Court of Appeal has the jurisdiction to determine appeals from decisions of the High Court. A provision similar to that is Article 121(2)(a) of the Federal Constitution which provides for the appellate jurisdiction of the Federal Court. It is clear that Article 121(1B) is in substance, in pari materia with Article 121(2)(a).

162. Article 121(2)(a) reads:-

“There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Federal Court shall have the following jurisdiction, that is to say—

- (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;

163. Article 121(2) of the Federal Constitution has been interpreted by this Court in **Megat Najmuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd** [2002] 1 MLJ 385. The term "jurisdiction to determine appeals" in the said provision was given its ordinary meaning. It was held that the absence of the word "all" preceding the word "decisions" can only mean that Parliament intended that not all decisions are appealable. Steve Shim CJ (Sabah & Sarawak) in delivering the judgment of the Court, emphasised that:-

*"In my view, art 121(2) of the Federal Constitution is a general provision relating to the jurisdiction of the Federal Court. It is an empowering provision which states that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal and the High Court. It is pertinent to note the conspicuous absence of the word 'all' or 'any' preceding the word 'decisions' in the provision. If it was the intention of Parliament to confer jurisdiction on the Federal Court to hear appeals from all decisions of the Court of Appeal, the word 'all' or 'any' would have been included therein. The exclusion of those words, in my view, was clearly deliberate. It was intended that not all decisions are appealable."*

164. We are of the view that since the wording of clauses (1B)(a) and (2)(a) of Article 121 of the Federal Constitution, in so far as they are material for the present discussion, is identical, the same interpretation given by this Court in **Megat Najmuddin** (supra) to clause (2) of Article 121 must be made applicable to clause (1B) of the same Article.

165. In view of the above, we hold that the proviso to subsection 49(1) of the Act is not ultra vires Article 121(1B) of the Federal Constitution. Article 121(1B) is a general provision

empowering the Court of Appeal to hear appeals from decisions of the High Court. The jurisdiction of the Court of Appeal to hear appeals from the High Court should be exercised by reference to the CJA. The bar to appeal against the amount of compensation awarded by the High Court as contained in the proviso to subsection 49(1) operates within the framework of subsection 68(1)(d) of the CJA.

166. Counsel for the Appellants then submitted that the bar to appeal in subsection 49(1) must be read restrictively in view of the safeguards in Article 13(2) that payment of compensation arising out acquisition must be “adequate”.

We are of the view that filing an appeal is one of the means of ensuring that the award of the High Court on compensation has been given adequate consideration. However, being statutory in nature, Parliament has restricted the right of appeal on the amount of compensation. Courts would naturally accede to Parliament’s wisdom.

167. In view of the safeguards in Article 13(2), the legislature must ensure that there is an appropriate balance between finality of decision on one hand, and accurate fact-finding and correct interpretation of the law on the other. Putting this in a nutshell, when the law limits an appeal to be filed by a party in a proceeding, the provisions with regard to due process of hearing and decision making on assessment of compensation under the Act must be satisfactory in order that the

constitutional safeguards are upheld. A question then arises: Has this been achieved?

168. In this regard, it is incumbent upon us to examine the process of adjudication taken before the Land Administrator and the High Court on issues of compensation. An overview of the Act provides that a determination of an award of compensation involves two stages of hearings-

- i. The first hearing is the enquiry held by a Land Administrator. Based on subsection 13(1) of the Act, the Land Administrator in hearing an enquiry is equipped with the power to summon witnesses and compel the production of documents. Both parties are entitled to produce evidence on the valuation of the acquired land. The proviso to section 12 of the Act also states that the Land Administrator may obtain written opinion on the value of the land acquired before arriving at his decision.
- ii. The second stage of hearing takes place if the award of the Land Administrator is referred to the High Court under subsection 36(4) of the Act. Section 45 of the Act and the Third Schedule to the Act confer jurisdiction on the High Court to review the Land Administrator's award.

169. A perusal of section 45 and the Third Schedule discloses that a reference proceeding before the High Court takes the form

of a hearing where parties are at liberty to ventilate issues in the reference and give evidence in court.

170. Each party can bring their experts to court to prove his claims (on the amount of compensation payable arising out of the acquisition). Evidence is adduced in court by way of affidavit. Despite that, the opinion given by valuers in their valuation reports is subject to cross-examination and re-examination by oral evidence.

171. It is also seen that the legislature, by Act A999, has considered that in arriving at an award of compensation, a High Court Judge can no longer rely on the traditional adjudicative method of weighing up the evidence adduced. Greater professionalism is required since the assessment of compensation would involve empirical evidence and is increasingly complex. In the circumstances, the introduction of sections 40A, 40B and 40C of the Act has brought about a radical, if not drastic change, to the decision-making process of the High Court.

172. Under this new regime, the appointment of the assessors in a land reference court proceeding serves a vital role in assisting the High Court Judge to decide on issues of compensation and what is appropriate in the circumstances of the particular case. The assessors' expertise is of great probative value. In



this the Act demands transparency in the decision-making process.

173. Thus by section 40C of the Act, the opinion of each of the assessors on compensation are to be made in writing and are to be recorded by the Judge. It is evident that the relevant provisions brought about by Act A999, attempted to strike an appropriate balance between finality of decision which bars appeals against quantum of compensation and the procedures for hearing described under the Act before the Judge can arrive at an appropriate amount of compensation. The provisions in the Act serve to protect the rights and interests of interested persons in matters arising out of the compensation.

#### **Non-compliance with section 40C of the Act**

174. Counsel for the Appellant averred that due to non-compliance with section 40C of the Act, the Appellant's constitutional right to fair and reasonable compensation arising from the compulsory acquisition has been violated.

175. Section 40C provides that "*the opinion of each assessor on the various heads of compensation claimed by all persons interested shall be given in writing and shall be recorded by the judge.*"

176. In this Appeal, the substratum of the Appellant's objection before the High Court was grounded on claims for loss of profits and other expenses incurred by the Appellant arising out of the termination of the industrial project as a result of the acquisition of part of Lot 1883. The decision of the High Court even though signed by both assessors, made no reference whatsoever to any opinion of the assessors for not allowing these claims. There was no reason given as to why the court dismissed the claims made under these headings, save for a statement in the grounds of judgment which reads: *"lain-lain tuntutan tidak dipertimbangkan selain dari yang telah dibayar oleh pihak Pentadbir Tanah"*.

177. It can be discerned from the grounds of judgment of the Court of Appeal that the issue of non-compliance of section 40C of the Act was canvassed before the Court of Appeal. However there was no ruling by the court on this issue. Instead the court went on to inquire into the meaning of the words "tidak dipertimbangkan" used by the High Court, and held that they were merely reflective of the usual Malay courtesy when communicating a rejection, so as to inform parties that "the claims had been considered but not allowed".

178. We are of the view that non-compliance with section 40C of the Act amounts to a misdirection which merits appellate intervention. In the present case, the court's decision appears to be incomplete in that although it was attested to by the assessors, it contains no opinion in relation to the decision, as

envisaged by section 40C of the Act. The Appellant's constitutional right to a fair and reasonable compensation arising from compulsory acquisition has been violated because the statutory safeguards to determine the amount of compensation awarded as stated in section 40C of the Act was not complied with.

179. Case laws have shown that breaches of peremptory orders would suffer the fate of it having to be set aside. In **Kee Ah Mok & Others v Pentadbir Tanah Daerah Seremban & Anor** [2009] 4 CLJ 611 for instance, the Court of Appeal held that an order made in contravention of section 45 of the Act "was tainted" and ought to be set aside.
180. Similarly the contravention of section 40C of the Act should attract the same legal repercussion, as section 40C is a mandatory provision of the Act.
181. In another Court of Appeal decision, **Ee Chong Pang & Ors v Land Administration Alor Gajah** [2013] 2 MLJ 16, it was held that the non-issuance of Form A was a breach of procedure and that there was infringement of Article 13. Emphasis was given that in proceedings for the deprivation of property under the Act, there has to be strict compliance with its provisions, for otherwise, Article 13(1) of the Federal Constitution would have been violated.

182. Thus, in cases where there is failure to observe the procedure as set out in the Act as in the instant appeal, there is a breach of the safeguards provided for in Article 13(1) of the Federal Constitution, of the principle couched therein, which is “save in accordance with law.” Can appeals be limited if there is non-compliance with section 40C of the Act? The answer must be in the negative. The bar to appeal in subsection 49(1) does not operate when there is non-compliance with the statutory provisions of the Act.
183. It has to be reiterated that section 40C of the Act is mandatory. What then is the significance of section 40C? Section 40C reflects the vital role and duties of assessors who sit with a High Court Judge in a land reference proceeding.
184. The law in section 40C of the Act imposes on the assessors a duty to consider the various heads of compensation claimed by the interested persons and form their expert opinion. It is a statutory safeguard to protect the landowners and interested persons in matters comprising compensations.
185. Section 40C of the Act also makes it mandatory that the opinion of the assessors on the heads of compensation be given in writing. It has to be remembered that the valuation of the land and assessment of compensation arising out of the acquisition are not a mathematical process. The requisites of valuation and assessment are pertinent, to show that the opinion given on the amount of compensation is well founded.

186. Another important requirement imposed by section 40C of the Act is that the written opinion of assessors is to be recorded by the Judge. In the circumstance the Judge has to be satisfied that the assessors had, in forming their opinions, considered all matters that ought to be considered under the Act. This is another statutory safeguard under Article 13 of the Federal Constitution.

187. The importance of section 40C of the Act also lies in the transparency of the decision making process. In the words of Viscount Simon L.C. in **Richardson v. Redpath, Brown & Co. Ltd** (supra):-

“It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice which he has received.”

The opinion of the assessors serves to inform the interested persons that the Court has considered all issues brought before the court and sought professional views before arriving at its decision. The provision in section 40C of the Act is also significant in view of the bar to appeal provided for in subsection 49(1) of the Act.

188. The written opinion of the assessors also serves to facilitate the appellate courts in the event an appeal is filed. The advice given by the assessors in the High Court must be made available to the appellate courts.

189. In conclusion, section 40C of the Act forms an important component of the decision making process in land reference proceedings. It sets out the requirements to be observed by the assessors and the Judge before decision is arrived at. Therefore non-observance of section 40C of the Act amounts to a misdirection of the court which renders the decision invalid. Suffice to say that for this reason alone, this Appeal must be allowed.

## **PART C (CLAIM FOR LOSS OF PROFIT)**

### **Award of compensation**

190. We will now deal with the issue of the award of compensation. In this Appeal the award of compensation made by the Land Administrator and the High Court can be summarised as follows:-

- i. Market value of the land (part of Lot 1883):  
RM17,627,400.00.
- ii. Consequential loss: RM3,234,881.75 being compensation for the loss suffered from termination of the project namely piling works, building works, preliminary expenses incurred for mobilisation and setting up of construction site, advertisement fees and marketing fees.

- iii. Severance and injurious affection: RM1,160,020.00

**What are the Appellant's complaints?**

- 191 The Appellant's complaint is that at the time of acquisition, the Appellant had already embarked on commercially developing the land. Earthworks and piling works had commenced. The Appellant had entered into 57 sale and purchase agreements with third party buyers of the factory units being built. It had collected the 10% deposit and had expended funds for the development works.
192. However the acquisition had extinguished the Appellant's ongoing business on the land. The Appellant lost the profits that it was in the course of making at the time of acquisition.
193. Counsel for the Appellant submitted that adequate compensation denotes "a fair and reasonable compensation" (see **Jais Chee v Superintendant of Lands & Survey Kuching Division Kuching** [2014] 3 CLJ 467). It was also averred that the safeguard of "adequate compensation" in Article 13(2) of the Federal Constitution means that the compensation has to be on the basis of "just equivalent of what the owner has been deprived of" (see **State of West Bengal v Bella Banerjee** AIR 1954 SC 170).
194. It was also submitted that based on the principle of "equivalence", the Appellant is to be compensated for its loss of business arising out of the acquisition, and that the Court

should recognise this claim as one falling under the safeguard of “adequate compensation” under Article 13(2) of the Federal Constitution.

In view of the above it was submitted that the term “market value” in the First Schedule must satisfy the test of a full and fair money equivalent or just equivalent of the property acquired. It cannot be read restrictively as being limited only to comparable sales of land in the vicinity within two years prior to acquisition.

195. The Appellant relied heavily on the decision of the Privy Council in **Director of Buildings and Lands v Shun Fung Ironworks Ltd** [1995] 2 A.C. 111. It was submitted that adequate compensation requires that the Appellant be compensated for its loss of business on the land. Compensation should cover the value of the land to the Appellant i.e. the loss of business on the land, as well as the market value of the land itself.

The case of **Shun Fung Ironworks** (supra) involved an acquisition of land in Hong Kong where a steel-mill was located. The acquisition extinguished the business of the landowner carried out on the land. In the circumstances, Lord Nicholls made the following observation:-

“Land may, of course, have a special value to a claimant over and above the price it would fetch if sold in the open market. Fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority. As already noted, this is well established. If he is using the land to carry on a business, the value of the land to him will include the value of his being able to conduct his business there without



disturbance. Compensation should cover this disturbance loss as well as the market value of the land itself. The authority which takes the land on resumption or compulsory acquisition does not acquire the business, but the resumption or acquisition prevents the claimant from continuing his business on the land. So the claimant loses the land and, with it, the special value it had for him as the site of his business. The expenses and any losses he incurs in moving his business to a new site will ordinarily be the measure of the special loss he sustains by being deprived of the land and disturbed in his enjoyment of it. If, exceptionally, the business cannot be moved elsewhere, so it simply has to close down, *prima facie* his loss will be measured by the value of the business as a going concern. In practice it is customary and convenient to assess the value of the land and the disturbance loss separately, but strictly in law these are no more than two inseparable elements of a single whole in that together they make up the value of the land to the owner: see **Hughes v. Doncaster Metropolitan Borough Council** [1991] 1 A.C. 382 , 392, *per* Lord Bridge of Harwich."

196. In the above case, the Privy Council awarded compensation on the extinguishment basis on a finding that the acquisition had extinguished the business of the appellant on the land acquired.

How would this decision relate to the instant appeal? A pertinent issue would be the question of adequate compensation.

### **Adequate Compensation**

197. Article 13(2) is a constitutional safeguard to land owners to receive "adequate compensation" upon acquisition. Even as the Act authorises the State to acquire land from land owners, the law provides that the person deprived of his property must be adequately compensated.

198. But what is adequate compensation for a person who has been deprived of his or her property? The term “adequate compensation” is not defined in the Act. In **Pentadbir Tanah Daerah Gombak v Huat Heng (Lim Low & Sons) Sdn Bhd** - [1990] 3 MLJ 282, the Supreme Court held that “the basic principle governing compensation is that the sum awarded should, as far as practicable, place the person in the same financial position as he would have been in had there been no question of his land being compulsorily acquired”. (see “*Compulsory Acquisition and Compensation*” by Sir Frederick Corfield QC and RJA Carnwath).

199. The above principle is known as the principle of equivalence. By this principle, the affected land owners and occupants are entitled to be compensated fairly for their loss. But they should receive compensation that is no more or no less than the loss resulting from the compulsory acquisition of their land.

### **Assessment of compensation under the Act**

200. An assessment of compensation arising out of an acquisition is governed by the First Schedule to the Act. Based on the First Schedule, the quantum of compensation is based on the market value of the land acquired plus the consequential loss suffered by the affected land owners and occupants. Thus an assessment of compensation is underpinned by the principle of equivalence. The affected land owners and occupants are entitled not only to the market value of the land but also to compensation for the loss and disturbance occasioned, arising

out of the acquisition. For a claim to be allowed, it must fall within the heads of compensation listed in paragraph 2 of the First Schedule.

201. Based on paragraph 2 of the First Schedule there are 6 matters (heads of compensation) which are to be taken into consideration when compensation is determined. The heads of compensation are: (a) market value; (b) increase in value of the other land of the person from whom land is acquired; (c) damage caused by severance from any other land of the person from whom the land is acquired; (d) injurious affection; (e) forced change of residence or place of business due to acquisition; and (f) where only part of the land is acquired, any undertaking given by the state authority for the provision of facilities for the portion left unacquired.

Paragraph 1 of the First Schedule is the market value rule. Generally, the market value of an acquired land comprises the value of the land acquired based on comparable sales in the vicinity of the acquired land and the condition of the land having regard to the existence of any buildings, improvements to the land and any encumbrances and restrictions in the title.

202. By paragraph 3, any matter which falls within the descriptions provided in the paragraph must not be taken into consideration in assessing the amount of compensation. Such matters include the urgency in acquiring the land and any depreciation

or increase in the value of the land acquired as a result of the acquisition.

The question then arises, would compensation for loss of business be allowed under the Act?

### **Business Compensation**

203. The principle of business compensation has been explained by the Privy Council in the case of **Shun Fung Ironworks** (supra). If a person's business located on an acquired land is affected by the acquisition, he is entitled to claim for business compensation. If the business can be relocated, compensation is assessed on a relocation basis. However, if the business is incapable of being relocated, compensation is assessed on an extinguishment basis.

In relocation basis, a claimant is entitled to claim for loss of profits and incidental costs of relocation. Loss of profits is to be assessed for the reasonable time it takes to relocate a business in a new place. However such costs must not be unreasonable and that relocation must be reasonably practicable. There is an obligation on the claimants to take all reasonable steps to ensure that their losses are kept to a minimum. Thus where a higher price is paid for the relocation premises, there is a presumption of value for money. (**Shun Fung Ironworks Ltd (supra)**).

204. Compensation for the relocation of a business should generally not exceed the compensation that would be determined for the extinguishment of the business. This was the position in **Shun Fung Ironworks** (supra).
205. In cases where relocation is impracticable (as in the Appeal), no compensation is to be determined for loss of future profits. Instead the claim is to be considered based on “the extinguishment basis”. The loss of business goodwill is contained within the market value of the land. The claim does not therefore form the basis for an item of consequential loss.
206. The general principle governing the extent of compensation claimable for consequential loss is that such loss must not be too remote and that it is the natural and reasonable consequence of the acquisition (**Harvey v Crawley Development Corporation** [1957] 1 QB 485).
207. Paragraph 2(e) of the First Schedule provides that a claimant is entitled to “reasonable expenses” incurred by him if he is compelled to change his residence or place of business. Such claim covers the actual cost of shifting to new premises and costs “incidental to such change”. However the First Schedule makes no reference to a claim for loss of business goodwill when relocation is impractical.
208. The Senior Federal Counsel on behalf of the Respondent averred that the Appellant is not entitled to a claim for loss of

business profits in the absence of any explicit provision in the Act with regard to such claim. Paragraph 2 has made it clear that, "in determining the amount of compensation to be awarded for any scheduled land acquired under this Act there shall be taken into consideration the following matters and no others". It was submitted that a claim for compensation can only be awarded if it falls within the heads of compensation described in paragraph 2 of the First Schedule and "no others".

209. It is our finding that the principle of equivalence requires that the Appellant is compensated for his true loss. This must include compensation for loss of its business. Applying the principle laid down in **Shun Fung Ironworks Ltd** (supra), such claim falls under the heading "market value" of the land as stated in paragraph 2(a) and paragraph 1 of the First Schedule.
210. We are of the view that the value of the land in its actual condition together with its profit value should be considered in determining market value of the acquired land. This was also decided by the Federal Court in **Ng Tiou Hong v Collector of Land Revenue, Gombak** - [1984] 2 MLJ 35 where Syed Agil , Barakbah FJ held that:-

"... its potentialities must be taken into account. The nature of the land and the use to which it is being put at the time of acquisition have to be taken into account together with the likelihood to which it is reasonably capable of being put to use in the future e.g. the possibility of it being used for building or other developments."

211. It needs emphasis that the market value rule in paragraph 1 must not be construed rigidly. It is noteworthy that paragraph 1 of the First Schedule itself does not define the term market value. Instead it enumerates the process of determining market value of the land. Apart from the price of comparable sales of the acquired land in the vicinity, the conditions of the land forms a basis in the computation of market value. Thus any restrictions in title, any specification and category in the land use ought to be considered in determining the market value of the land. Similarly, any improvement made by the owner to the land (subject to the restriction imposed in paragraph 1) and the existence of any building on the subject land are also to be considered.

212. In the present case, what was the actual condition of the Appellant's land at the time of acquisition? Clearly, the Appellant had already embarked on commercially developing the land into an industrial area. Thus the Appellant's loss of business is to be incorporated in the development value or profit value of the land forming part of the market value of the acquired land. In determining **market value of the land** as stated in paragraph 2(a) of the First Schedule, the Land Administrator and the court must give consideration to the profit value of the land at the time of acquisition.

213. It can be seen that the Act is sufficiently flexible to allow for the determination of equivalent compensation in the

circumstances of the present case. Compensation should be for loss of any land acquired, for buildings and other improvements to the land acquired, for the reduction in value of any land retained as a result of acquisition and for any consequential losses to the livelihoods of the owners and occupants. A rigid application of detailed provisions may result in landowners and occupants not being compensated for losses that are not expressly identified in the legislation.

214. A pertinent observation is that paragraph 1(1A) in the First Schedule was inserted by Act A999 so as to allow flexibility when assessing the amount of market value of a land acquired.

Paragraph 1(1A) reads:-

In assessing the market value of any scheduled land, the valuer may use **any suitable method of valuation** to arrive at the market value provided that regard may be had to the prices paid for the recent sales of lands with similar characteristics as the scheduled land which are situated within the vicinity of the scheduled land and with particular consideration being given to the last transaction on the scheduled land within two years from the date with reference to which the scheduled land is to be assessed under subparagraph (1).

215. In view of the above, although comparable sales in the vicinity of the acquired land is an important component in the computation of market value of an acquired land, “any suitable method of valuation” is also allowed. Therefore any appropriate method that serves to provide equivalent compensation to affected persons can be applied. Such methods may include compensation paid on the basis of replacement costs.



216. Thus a judicious approach is called for in dealing with the development of the law on property rights as compared to other Commonwealth jurisdictions. Business compensation consequent to acquisition has received recognition in some jurisdictions including the United Kingdom, Australia and New Zealand. We find that the principles on business compensation as explained earlier are to be applied persuasively so as to arrive at a decision that is consonant with the development of our constitutional law rights to property and one which would sit well with international standards and expectations.

**Question 6 is thus answered in the negative.**

#### **PART D (APPLICATION OF THE AMENDING ACT A999) –**

217. In the present appeal, the Appellant averred that the Amending Act A999 does not apply. The Appellant's case was referred to court on 25.2.1999 after the coming into force of Act A999 i.e. 1.3.1998. However, the declaration of the decision to acquire the land was made via Form D and published in the *Gazette* on 12.2.1998 i.e. before the coming into force of Act A999.

218. It was submitted by the Appellant that the provisions in Act A999 cannot apply retrospectively, since it would affect cases in which acquisition proceedings were instituted **before** Act 999 came into force. Therefore the Court of Appeal was in error in having relied on the amended provisions and in dismissing the appeal.

219. It was also submitted that statutory amendments which affect substantive rights do not operate retrospectively. The substantive rights of the Appellant here is the right of appeal and the determination of compensation by the Judge (and not by assessors).

220. We are not in agreement with the Appellant's submission on this issue. It is axiomatic that the Court is to have regard to "the intention of the legislature as expressed in the wording of the statute" in order to determine whether a provision in a statute has a retrospective or prospective effect. (see the decision of the Privy Council in **Yew Bon Tew v Kenderaan Bas Mara** [1983] 1 MLJ 1).

221. We agree with the Respondent that Act A999 is prospective in its application. This is borne out in subsection 1(2) of the Amending Act A999 which states that:-

The amendments in sections 23,24 and 25 and paragraph 27(b) shall apply only to land acquisition cases referred to the Court after the date of coming into force of this Act.

222. The provisions in sections 23, 24 and 25 and paragraph 27(b) of Act 999 stated above are in respect of the insertion of the new sections 40A, 40B, 40C, 40D in the Act and the amendment made to the proviso of subsection 49(1) of the Act. Subsection 1(2) of the Act clearly states that such amendments applies "only to land acquisition cases referred to

the Court **after** the date of coming into force” of Act A999. Hence, the application of the new amendments is subject to the date the land acquisition case was referred to court. The date of the acquisition is irrelevant.

(our emphasis)

## CONCLUSIONS

223. In view of the foregoing therefore, our answers to the questions posed in the Appeal are as follows:

Question 1: In the affirmative

Question 2: In the affirmative

Question 3: In the negative

Question 4: In the negative

Question 5: In the negative

Question 6: In the negative

224. For all the above reasons, this Appeal is allowed with no order as to costs and we order that the case be remitted to the High Court for a proper determination of issues as found herein. It is ordered that:

- a. By section 40A, the matters are to be heard before a single judge. The Court shall appoint two assessors to assist the Judge in determining the objection made by the

Appellants against the amount of compensation awarded by the Land Administrator.

- b. At the end of the proceedings, the assessors are required to give their opinions in writing as to the appropriate amount of compensation to be awarded in this case pursuant to section 40C of the Act. The assessors must give due consideration to all the heads of compensation claimed by the Appellant under the Act.
- c. The opinion of the assessors are to be recorded by the Judge. The judge has a duty to consider both of the opinions of the assessors. The judge is to exercise his mind in determining the amount of compensation to be awarded to the Appellant, based on the principle of equivalence.
- d. The provisions of subsection 36(4) of the Act are to be given full effect. The judge shall not be bound to conform to the opinions of the assessors. In the event of any disagreement between the assessors with regard to the amount of compensation, the judge may elect to consider which of the two opinions in his view is appropriate in the circumstances of the case. The judge is also at liberty to depart from the opinion of either of the assessors and decide on the reasonable amount of compensation to be awarded to the Appellant by giving reasons for so doing.

225. Our answers to the constitutional questions referred to this Court in the Reference are as follows:

Question 1: In the negative

Question 2: In the affirmative

The Reference is remitted to the Court of Appeal for the Court to decide on the Applicants' appeal in accordance with the determination of this Court in respect of the constitutional questions. There is no order as to costs.

Dated: 20 April, 2017.

t.t.

**TAN SRI DATUK ZAINUN ALI**  
**Federal Court Judge**  
**Malaysia.**

Salinan diakui sah

  
ROHANI BT. ISMAIL  
Setiausaha kepada  
Y.A. Tan Sri Datuk Zainun binti Ali  
Hakim Mahkamah Persekutuan Malaysia  
Putrajaya

**CIVIL APPEAL NO. 01(f)-47-11/2013 (B)**

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**CIVIL APPEAL NO. 06-3-05/2013 (B)**

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