DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR (BAHAGIAN KUASA-KUASA KHAS) [PERMOHONAN SEMAKAN KEHAKIMAN NO: WA-25-221-08/2020]

Dalam Perkara Perintah Pembangunan bertarikh 20.12.2019 yang diberikan kepada Tetuan Lakaran Ceria Sdn Bhd untuk Cadangan Membina 1 Blok Pangsapuri 49 Tingkat (720 Unit) Termasuk 5 Tingkat Podium Yang Mengandungi 5 Tingkat Tempat Letak Kereta Villa 3 Tingkat (23 Unit) Dan Kemudahan Penduduk Serta 1 Blok Villa 4 Tingkat (23 Unit) Di Atas Plot PT 9885, Jalan 3/51b, Mukim Setapak, Wilayah Persekutuan

Dan

Dalam Perkara Pendengaran Bantahan Pemunya- Pemunya Sama Sempadan di bawah Kaedah 5(4) Kaedah-Kaedah Rancangan (Pembangunan) 1970, yang diadakan oleh Datuk Bandar Kuala Lumpur (DBKL) pada 27.02.2017 bagi Permohonan Kebenaran Merancang (1) cadangan menambah kepadatan penduduk daripada 60 orang seekar kepada 800 orang seekar; dan (2) cadangan membina 3 blok

pangsapuri iaitu Blok A (pangsapuri 52 tingkat); Blok B (pangsapuri 52 tingkat) dan Blok C (pangsapuri 40 tingkat); di atas tanah Hakmilik No: HSD 119612, No Lot: PT 9885, Mukim Setapak Daerah Kuala Lumpur; oleh Lakaran Ceria Sdn Bhd sebagai pemegang Surat Kuasa Wakil Yayasan Wilayah Persekutuan

Dan

Dalam Perkara Permohonan Semakan Kehakiman No: WA-25-139-05/2017, Permohonan

Semakan Kehakiman No: WA-25-69-02/2019 di Mahkamah Tinggi Kuala Lumpur, Rayuan Sivil No: W-01(A)-437-07/2018 di Mahkamah Rayuan dan Permohonan Kebenaran Untuk Merayu No: 08(f)-122-04/2019(W) di Mahkamah Persekutuan

Dan

Dalam Perkara Deraf Pelan Bandar Raya Kuala Lumpur 2020 [DKLCP 2020] dan Pelan Bandar Raya Kuala Lumpur 2020 [KLCP 2020] yang telah diwartakan pada 30.10.2018

Dan

Dalam Perkara Bahagian III dan Bahagian IV Akta (Perancangan) Wilayah Persekutuan Kuala Lumpur 1982

Dan

Dalam Perkara Kaedah-Kaedah Rancangan (Pembangunan) 1970

Dan

Dalam Perkara Permohonan Semakan Kehakiman di bawah Aturan 53, Kaedah-Kaedah Mahkamah 2012, Akta Mahkamah Kehakiman 1964 dan bidangkuasa sedia ada Mahkamah

ANTARA

1. DATO' MOHAMAD YUSOF A. BAKAR

2. LIM CHENG IM **... PEMOHON-PEMOHON**

DAN

1. DATUK BANDAR KUALA LUMPUR

2. LAKARAN CERIA SDN BHD
(No. Syarikat: 931565-M) **... RESPONDEN-RESPONDEN**

JUDGMENT

[1] This is the Applicants' application for a stay of proceedings pursuant to prayer (iii) of Enclosure 1 which is their application for leave for judicial review which has been granted by this Court on 6.1.2021. The stay application was ordered to be heard *inter partes*.

[2] Essentially, the Applicants are seeking to stay all proceedings and action by the 1st Respondent in relation to the Development Order dated 20.12.2019 (the "**DO**") granted in favour of the 2nd Respondent, the developer, pending the disposal of the judicial review at the substantive stage.

Facts

[3] The Applicants are property owners and residents in Taman Tiara Titiwangsa, Kuala Lumpur. The Applicants residential locality consists of 250 bungalow units spread over an area of 50 acres.

[4] The 1st Respondent is the planning authority in charge for the control and planning in the City of Kuala Lumpur in accordance with the Federal Territory (Planning) Act 1982 ('**FTP Act'**).

[5] The 1st Respondent had issued the DO pursuant to section 22 of the FTP Act in relation to the following proposed development to be constructed on the land known as No. HSD 119612 No. Lot PT 9885, Mukim Setapak, Daerah Kuala Lumpur ('**PT 9885'**):

> *"Cadangan membina 1 blok pangsapuri 49 tingkat (720 unit) termasuk 5 tingkat podium yang mengandungi 5 tingkat tempat letak kereta, kemudahan penduduk dan villa 3 tingkat (23 unit) serta satu blok villa 4 tingkat (23 unit) di atas Lot PT 9885, Jalan 3/51B, Mukim Setapak, Wilayah Persekutuan Kuala Lumpur'* ("**Proposed Development"**).

[6] PT 9885 was alienated to Yayasan Wilayah Persekutuan ('**YWP**') on 8.9.2014 with an express condition that the land is to be developed as a mixed development.

[7] YWP then entered into a joint venture agreement with the 2nd Respondent to execute the Proposed Development on PT 9885.

[8] According to the Applicants, they discovered about the Proposed Development through the Chinese local newspaper and on 20.12.2016, a meeting was held between the landowners and representatives of the 1st Respondent. Amongst the issue raised in the meeting was in relation to technical reports as to the Proposed Development which was yet forthcoming. According to the Applicants, 53 land owners sent in their written objections.

[9] On 27.2.2017, the Applicants and other affected land owners attended a Public Hearing.

[10] Dissatisfied with the manner in which the Public Hearing was conducted, the Applicants and other land owners had appointed solicitors to investigate the Proposed Development and to ascertain the Applicants' legal right to object the same.

[11] According to the Applicants, it was then discovered by the Applicants that YWP was issued with the title of PT 9885. It was also discovered that one Mohd Amin Nordin Abdul Aziz who was at the material time the Datuk Bandar Kuala Lumpur was charged with the statutory duty to approve development within the Federal Territory of Kuala Lumpur by virtue of being the Commissioner pursuant to the FTP Act and the Federal Capital Act 1960 and that the same Mohd Amin Nordin Abdul Aziz is also a director and trustee of YWP.

[12] It was also discovered that the then Federal Territory Minister Tengku Adnan Bin Tengku Mansor who sits as Chairman of the

"*Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur* ("**JKT**") which is in charge to determine alienation of land to any party or individual is also a director of YWP. It was further discovered by the Applicants that the JKT had granted ownership of PT 9885 for a premium of RM23 million, a fact which was reported in the Malay Mail newspaper on 13.3.2017.

[13] Upon discovering the above, and some other facts from the newspaper reports, the Applicants through their solicitors sent two letters of demand dated 24.3.2017 and 18.4.2017 to the 1st Respondent to the effect that the Public Hearing is null and void and that the 1st Respondent is to refrain from making any decision or taking any steps in relation to the Proposed Development.

[14] Since no response was forthcoming from the 1st Respondent, the Applicants filed judicial review application WA-25-139-05/2017 in the High Court ("**JR 139**") seeking inter alia the followings:

i. A Declaration that the Public Hearing is null and void;

ii. An order of Prohibition to prohibit the 1st Respondent from taking any steps or making any decision in relation to the objections raised by the Applicants during the Public Hearing;

iii. An order that all proceedings and further action by the 1st Respondent in relation to the objections raised by the Applicant during the Public Hearing, be stayed pending the disposal of the substantive motion of the judicial review.

[15] JR 139 was dismissed by the High Court. On appeal, the Court of Appeal allowed prayer (i) as stated in the above and declared the Public Hearing was null and void.

[16] Dissatisfied with the Court of Appeal's decision, the 1st Respondent sought leave to appeal to the Federal Court and hearing was fixed on 28.4.2021.

[17] While awaiting hearing of the leave application in the Federal Court, the Applicants aver that they had noticed that work was progressing at the construction site of PT 9885. The Solicitors for the Applicants had enquired via letter dated 21.4.2020 to the 1st Respondent's solicitors as to the status of PT9885 and was informed of the followings:

i. That the Draft Kuala Lumpur City Plan 2020 ("**KLCP 2020**") was gazetted on 30.10.2018;

ii. Under the KLCP 2020, PT 9885 was designated as residential with a density of 400 people per acre;

iii. After the gazetting of KLCP 2020, the 2nd Respondent had made a new application to develop PT 9885 in line with the new density requirement;

iv. That the 1st Respondent had approved and had granted the DO to the 2nd Respondent based on the procedural requirement of the KLCP 2020.

[18] The Applicants then filed this present judicial review application to challenge the 1st Respondent's decision inter alia for an order of certiorari to quash the decision made by the 1st Respondent in granting the DO to the 2nd Respondent.

The Applicants' Contentions

[19] The Applicants allude to four (4) reasons to which they submit formed special circumstances on why the stay of proceedings pending

the disposal of the substantive hearing of the judicial review ought to be granted. The 4 reasons are as follows:

i. That they have a legitimate expectation that the 1st Respondent will proceed with JR 139 in the Federal Court;

ii. That the KLCP 2020 is currently being challenged and may be rendered null and void;

iii. That the Court of Appeal has already decided on the issue of conflict of interest pertaining to the 1st Respondent in this case and on the basis of such conflict, has nullified the Public Hearing; and

iv. That the subject matter of litigation will become nugatory or academic

Summary of the Respondents' Contentions

[20] Cumulatively, the 1st and 2nd Respondents' contentions are as follows:

i. That there are no serious issues to be tried and that the Applicants will not suffer any irreparable harm in the absence of a stay order. Instead, it will be the 2nd Respondent who will suffer irreparable damage if stay is granted as the 1st Respondent had granted the DO to the 2nd Respondent to develop the Proposed Development.

ii. The Applicants' case for judicial review does not meet the requisite threshold in terms of merits for the Court to grant the Applicants any form of interim relief including stay. Among other things, the Applicants are estopped from challenging the validity of the said DO granted by the 1st

Respondent to the 2nd Respondent based on their stand taken in the other judicial review proceedings;

iii. The Applicants are guilty of inordinate delay in commencing these proceedings including in seeking the stay;

iv. The balance of convenience lies in favour of the 2nd Respondent.

Findings

[21] Prayer (iii) in the Applicants' application for Judicial Review (Enclosure 1) states:

> *"(iii) Pemohon-Pemohon diberikan satu Perintah Penggantungan menurut Aturan 53 Kaedah 3(5), Kaedah-Kaedah Mahkamah 2012 bahawa semua prosiding lanjut dan tindakan-tindakan Datuk Bandar Kuala Lumpur (DBKL) berkaitan dengan dan berlanjutan daripada Perintah Pembangunan tersebut digantung sehingga pelupusan penuh tindakan semakan kehakiman (substaintif) Pemohon-Pemohon".*

[22] The undisputed fact in this matter is that the 2nd Respondent has been granted with the DO and conferred with the duties and responsibilities to execute the Proposed Development. In *Tan Bun Teet & Ors v. Inovasi Malaysia & Ors* [2013] 3 MLJ 676, the Court of Appeal had held that in deciding whether a stay ought to be granted, the consideration which need to be taken into account is similar to the consideration in the granting of an interlocutory injunction. The Court of Appeal stated as follows:

> *"[9] It is also settled law that the granting of leave for an application for judicial review does not in itself serve an*

automatic stay of the order and/or decision the judicial review proceedings are seeking to quash and/or impugn and/or set aside (see O. 53 r. 3(5) of the Rules of Court 2012). Now, ***the principle which need to be taken into consideration before the granting of a stay in judicial review proceedings is similar to the granting of an application for interlocutory injunction*** *(see Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 4 MLJ 695 and Godfrey Philips (M) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia [2011] 9 CLJ 670)"* [Emphasis added]

[23] In *Tan Bun Teet* (*supra*), the Court of Appeal had relied on the decision in *R v. Inspectorate of Pollution, ex p Greenpeace Ltd* [1994] 4 ALL ER 321 where the Court stated the followings:

'*In my opinion, if the real purpose of interlocutory relief in a judicial review case is to prevent executive action by a third party being carried out pursuant to the decision under attack, the more suitable procedure would be to have the third party in question joined and then to seek an interlocutory injunction against that party, rather than to seek a stay of the decision. If, however, the purpose is pursued as it has been in the present case by an application for a stay of the decision rather than by an application for an interlocutory injunction against the third party, the courts should, in my opinion, look to the substance rather than to the form, and apply the same principles to the application as would have been applicable had the application been for an interlocutory injunction.*

Brooke J. dealt with the application for a stay which was before him in a manner that seems to me to have been indistinguishable from the manner in which he would have dealt with an application for an interlocutory injunction. In dealing with the

application in that way, the judge took into account the possible effect of the stay upon BNFL he took account of the fact that no cross-undertaking in damages had been offered; he took account of the evidence as to the degree of contamination that commissioning might cause, and he took account of the opinion of the Inspectorate of Pollution. In applying himself in that manner to the matter before him, in my judgment, the judge acted correctly and applied the correct principles.'

[24] Having held the above principles, the Court of Appeal concluded that the Applicant in that case has not shown that there was any serious triable issue to justify the stay sought. The Court of Appeal reasoned as follows:

"In our judgment, ***the application to stay the decisions of the two respondents approving the TOL is unsustainable as the TOL had since been issued to the fourth respondent for the LAMP project. Whatever rights, duties and responsibilities accruing under the TOL are now the responsibilities of the fourth respondent****.* ***The position would have been different if the TOL had not been issued. The undisputed fact is that the fourth respondent is now the legal and valid holder of the TOL****. Viewed in this way, it is not possible or practicable for the decision to be stayed*." [Emphasis added]

[25] Although the decision in *Tan Bun Teet* (*supra*) is in the context of the Temporary Operating Licence **('TOL**') which had already been issued to the 4th Respondent therein in respect of the Lynas Plant in Kuantan Pahang, the principles laid down by the Court of Appeal is applicable herein as the matter is similar to the present case. As stated earlier, the undisputed fact is that the DO has already been issued by the 1st Respondent to the 2nd Respondent since 20.12.2019 pursuant to the KLCP 2020 and gazetted on 20.10.2018.

[26] In justifying the stay order sought for, the Applicants rely very much on the outcome of the other suits which they are involved in. One of the Applicants' contentions is that the KLCP 2020 is now being challenged in Court and any decision in the present judicial review application would be in jeopardy if the KLCP 2020 is declared as null and void. Indeed, the KLCP 2020 is the subject of a separate challenge via judicial review proceedings no.: WA-25-69-02/2019 ("**JR 69**") where the 2nd Applicant is also one of the Applicants therein.

[27] It is highlighted to this Court that from the relevant passages of the notes of proceedings in JR 69 exhibited in the 1st Respondent's affidavit (Enclosure 27) the Applicants therein submitted and took the position that the development orders including the DO which is the subject matter herein issued pursuant to the KLCP 2020 would remain valid even if the Court is to quash the KLCP 2020.

[28] In opposing the intervener's application filed by one Memang Perkasa Sdn Bhd, the counsel for the Applicants in JR 69 have submitted that the intention of JR 69 is not to quash the development orders which has been approved by the 1st Respondent under KLCP 2020 of which some of the development is either in progress or completed and sold to purchasers which includes the DO herein. The relevant excerpts of the notes of proceedings of JR 69 are highlighted to this Court and reproduced:

> *"GSN: The first is, it does not involve the same issue.* ***Secondly, we say that the development order is not affected at all because that order was already given and there cannot be a retrospective nullifying of that particular order. It remains completely intact, it's not challenged and this is what we are saying also, that that DO remains intact*** *and the third point we are making is that the, there are no same, similar issues*

involved and we will go through that. So, these are the three basic points that we are making. If I could just invite My Lady to look at my, this three page sheet of paper?

GSN: Because the development order has already been given to the Proposed Intervener. Any new plan that is made that the plan that is squashed, will have absolutely no impact retrospectively. You cannot, it's already a vested right that has accrued, they've already got the development order, they've spent money, they have paid premium, you cannot in a future, in a forward looking plan which is the KL Local Plan that is gazetted, in that future plan reverse something that has already been given and accrued and that is our position, that is our position that you cannot disturb retrospectively. *And we have set out in our little notes* here, *we're saying the KL Local Plan is a forward* looking plan, it plans for things from 2020 to 2040 and for that to show, so it cannot have retrospective effect and for this proposition that it is a forward looking plan, *if I could refer My Lady to the affidavit in reply,* Enclosure 12. Exhibit, it's at page 11. It is Exhibit A15 .

GSN: So what they're saying here is, ***even under the Repeal Law whatever development order has been given is already vested, it is as though it is given under this****. Now, applying this principle, we say very clearly that that right has already,* ***the written law has already made it clear, any development order that has been given to them is intact, we cannot disturb it, nobody can disturb it. In fact if anybody disturbs it, they can bring an action against the authorities for seeking to nullify what they already have as a vested right.*** *They have paid 60 million and so much that they have expended, so nobody can touch that, we cannot touch that.*

GSN: So, even if, assuming that is nothing to do with this case, *there is already a development order that they've* got and the law has changed. The provision makes it very clear that if they got it under the previous law, that it continues to have effect because it affects substantive rights. The written law makes it very clear. So in the same way, development order has already been secured and we, nobody can disturb that because that is, that those are rights.

Unless that development order is held by the Court and that is the subject of the appeal whether or not that development order is or is not rightly given, taking into account the usual administrative law principles was there. Illegal impropriety was there, irrationality was there, a proportionality and was there unreasonableness, that's different. That, we are fighting it there. We are going to appear in November to fight that, the development order, that land. But that has nothing to do with this case and this case has nothing to do with that case, that, we will fight it separately, whether the development order is valid or not .

GSN: But so long as and the High Court has declared it's valid, we have to accept that, that's why we are appealing. ***So long as the development order is valid, it remains intact, it will not be affected by this quashing of the, now my learned friend for the First Respondent has said that we want to quash the addendum. We're not quashing the development order****. We are saying that the addendum that was became part of the gazetting of that plan should not apply. It should be deleted; it should be quashed"*

[29] Having repeatedly taken the stand that the development orders (including the DO which is the subject matter herein) issued pursuant

to the KLCP 2020 would remain valid even if the KLCP 2020 is quashed in JR 69, the Applicants now take a different stand before this Court. This Court agrees with the submission on behalf of the Respondents that the Applicants are bound by the stand taken by the Applicants' counsel in JR 69 and calls for the invocation of judicial estoppel against them. They cannot approbate and reprobate. The master plan for the City of Kuala Lumpur which is KLCP 2020 has been adopted and gazetted on 30.10.2018 and the 2nd Respondent had submitted an application to develop PT 9885 on 11.6.2019 based on the land use and residential density stated in KLCP 2020. As the 2nd Respondent's application was in accordance with KLCP 2020, the planning permission was approved and the DO was issued on 20.12.2019. The stand taken by the Applicants in JR 69 which involves the 2nd Applicant herein amounts to a positive affirmation of the validity of, among others, the DO which is the subject matter herein. The Applicants therefore is judicially estopped from taking inconsistent position herein from that which was asserted in JR 69.

[30] On the issue of judicial estoppel the Court of Appeal's decision in *Leisure Farm Corp Sdn Bhd v. Kabushiki Kaisha Ngu (formerly known as Dai-Ichi Shokai) & Ors* [2017] 5 MLJ 63 is instructive. The Court of Appeal found and stated as follows:

> *"[16] ….Learned counsel's argument directed before us as we understand it, is that, in view of its earlier stand in the committal proceedings, judicial estoppel would operate to now estop the appellant from taking an inconsistent position during the appeal.* ***It is clear to this court that the object of judicial estoppel is to prevent a party who assumes a particular position in litigation to take an inconsistent position in later litigation****. Christopher Clarke J explained the law on judicial estoppel in OJSC Oil Co Yugraneft (in liquidation) v. Abramovich and*

others [2008] EWHC 2613 (Comm) and we now quote the relevant excerpts:

> *The Court of Appeals for the Sixth Circuit explained the position in Edwards v. Aetna Life and Casualty 690 F 2s 595 (1982):*
>
> *The policies supporting judicial estoppel are different from those that support the more common doctrines of issue preclusion, equitable and collateral estoppel. Courts apply equitable estoppel to prevent a party from contradicting a position taken in a prior judicial proceeding ... Equitable estoppel enables a party to avoid litigating, in the second proceeding, claims which are plainly inconsistent with those litigated in the first proceeding. Because the doctrine is intended to ensure fair dealing between the parties, the courts will apply the doctrine only if the party asserting the estoppel was a party in the prior proceeding and if that party has detrimentally relied upon his opponent's prior position. See Id at 689-90.*
>
> *Collateral estoppel prevents relitigation of factual matters that were fully considered and decided in a prior proceeding. Thus, collateral estoppel operates to prevent repetitive litigation.*
>
> *...*
>
> *The doctrine of judicial estoppel applies to a party who has successfully and unequivocally asserted a position in a prior proceeding; he is estopped from asserting an inconsistent position in a subsequent proceeding.... Unlike*

equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist.

... This distinction reflects the difference in the policies served by the two rules. Equitable estoppel protects litigants from less than scrupulous opponents. Judicial estoppel, however, is intended to protect the integrity of the judicial process. ... Scarano v. Central R Co, 203 F 2d 510, 512- 13 (3rd Cir 1953) ('such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the court should not tolerate'). The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery. ... Collateral estoppel is essentially a finality rule, which serves to conserve judicial resources by precluding the litigation of issues previously decided. Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled ...

430. Sibir mounted a claim based on the contention that the receipt by the six offshore companies of the participation interests (knowingly assisted by Mr Abramovich) was unlawful. It failed in that attempt since the BVI Courts, held that the relevant law is the law of Russia, by which law Sibir has no claim. They did so as a result of Sibir's own contention that there was no claim in Russian law by Sibir (or Yugraneft). Now through Yugraneft, its privy, it seeks to bring a claim in knowing

> *receipt against Mr Abramovich and Millhouse, on the footing that the receipt was unlawful in Russian law. Yugraneft also seeks to bring a claim in knowing assistance against Mr Abramovich when Sibir had previously claimed that the BVI court should refuse a stay on the ground that neither it not Yugraneft had any claim. That seems to me an abuse of the process of the courts. Part of the rationale for the doctrine is the protection of the Court's process and avoidance of the harassment of defendants. Sibir's changes of tack and jurisdiction, alleging, at one moment, that the claims are governed by BVI law as the place of receipt, then BVI law as the law of the forum, then English law as the place of enrichment, and that Russian law (a) does not and (b) does afford a remedy, seems to me to offend on both counts. This is not only an example of forum shopping but of issue switching which the courts should not be prepared to tolerate. (Emphasis added.)*

[17] Also cited by learned counsel in the course of his oral submission on this point is this court's decision in the case of Zulpadli bin Mohammad & Ors v. Bank Pertanian Malaysia Bhd [2013] 2 MLJ 915 in which it was held that the respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit showed that the appellants were innocent victims as much as the respondent was. ***The respondent was estopped from taking a position different from that pleaded in its defence in the earlier suit. Clearly, the essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks to address the incongruity of allowing a party to assert a***

position in one court and the opposite in another tribuna*l (Peguam Negara Malaysia v. Nurul Izzah bt Anwar & Ors [2017] MLJU 273)*".

[Emphasis added]

[31] In *Peguam Negara Malaysia v. Nurul Izzah bt Anwar & Ors* [2017] 4 MLJ 656, the Court of Appeal had stated as follows:

"[18] Learned counsel also referred to the Federal Court's decision in Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 which recognised that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case and indeed 'the circumstances in which the doctrine may operate are endless' and that 'the essential nature of the doctrine does not appear to be any different in American equity jurisprudence'. Also cited by learned counsel in the course of his submission was the case of Zulpadli bin Mohammad & Ors v. Bank Pertanian Malaysia Bhd [2013] 2 MLJ 915 in which this court had applied the principle above to estop a litigant from taking a different position from that pleaded in an earlier suit against a different party

.....

[21] ***In any event, in law, the doctrine of judicial estoppel will only apply to a party where the said party, the appellant in this appeal, had successfully and unequivocally persuaded the court on, or asserted, a position in the Selangor Government case so that when that had taken the appellant would be estopped from asserting an inconsistent position in a subsequent proceeding which in this appeal is the application for judicial review****. The essential function of judicial estoppel is*

> *to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery.* ***Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal*** *(Yugraneft at para 429).”* [Emphasis added]

[32] Premised on the authorities above and the stand taken by the Applicants' counsel in JR 69, it is of the considered view that the Proposed Development pursuant to the DO which has been approved under the KLCP 2020 must not be affected by a stay order by this Court.

[33] It is the contention of the Applicants that they have a legitimate expectation that the 1st Respondent will wait for the outcome of the Federal Court Notice of Motion No. 08(f)-122-04/2019 (the '**FC Motion'**) before issuing the DO in relation to the Proposed Development for the development on PT 9885.

[34] However, the issue of the DO for the Proposed Development in respect of PT 9885 is not the subject matter in the JR No. 139 or in the FC Motion as no development order was issued at that material time. The issues in JR 139 relates to the objection hearing conducted by the 1st Respondent on 27.2.2017 and in allowing the appeal, the Court of Appeal decided that it is incumbent on the part of the 1st Respondent to forward the technical reports to the objectors and granted the declaration that the hearing of the objection held by the 1st Respondent on 27.2.2017 pursuant to Rule 5(6) of the Planning (Development) Rules 1970 ("**Planning Rules 1970"**) is null and void. According to the 1st Respondent, they have filed the FC Motion to challenge the decision made by the Court of Appeal as the decision of the Court of Appeal is said to have an impact on future planning decisions to be made by the 1st Respondent when considering an application for planning permission.

[35] This Court finds that the Applicants extensive reliance on the other judicial review proceedings are irrelevant to the present proceedings. Given the stand taken by the Applicants in JR 69, it is of the considered view that the grounds relating to the Applicants' legitimate expectations, the pending challenge to the KLCP 2020 in JR 69, the effect of the earlier decision of the Court of Appeal on the Rule 5 (6) of the Planning (Development) Rules 1970 **('Planning Rules 1970')** hearing and including the issue of the alleged conflict of interest of the personalities in the 1st Respondent are at most matters which go to the merits rather than to the implementation of the DO.

[36] In dealing with an application for stay the effect of which will prevent construction works from being carried out, the High Court in *Dharma Sdn Bhd & Others v. Menteri Kerja Raya & Others* [2017] MLJU 1333 had applied the following test:

> *"[34] Therefore, in the context of this case, in order for this Court to grant the order to stay the construction of Desa Pandan Alignment sought by the applicants, the onus is on the applicants to establish the followings:*
>
> *(i) that they are likely to suffer irreparable harm in the absence of a stay order;*
>
> *(ii) the balance of equity tips in their favour; and*
>
> *(iii) that a stay order is in public interest*"

[37] In the case of *Godfrey Philips (M) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia* [2011] 9 CLJ 670, the High Court had decided that in order to obtain the stay and to restrain and/or prohibit the respondent from acting on its decision, the Applicant must establish that it would likely suffer irreparable harm in the absence of stay and the stay order

was in the public interest. At page 679 of the report, the Court considered as follows:

> *"[29] The court is of the considered opinion that in order to obtain stay and to restrain and/or prohibit the 1st respondent from acting on the Impugned Decision dated 21 January 2010,* ***the applicant must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of stay and/or prohibition order, that the balance of equities tips in its favour, and that a stay and/or prohibition order is in the public interest****. In exercising its discretion, the court should pay particular regard to the public consequences in granting the orders sought by the applicant"* [Emphasis added]

[38] Before this Court, other than stating of their alleged 'legitimate expectation' pending the outcome of the other judicial review applications, the Applicants have in fact failed to show in what way that they are likely to suffer irreparable harm in the absence of a stay order. This Court is compounded by the fact that from the 1st Respondent's Affidavit (3) affirmed by Nurazizi Bin Mohktar on 13.4.2021, it has been revealed inter alia that the Applicants reside in Taman Tasik Titiwangsa and PT 9885 is located in Taman Tiara Titiwangsa, and that the closest points between PT 9885 and Taman Tasik Titiwangsa are 772 metres apart (see exhibit NZ-1 to Nurazizi's Affidavit). Nowhere in the Applicants' affidavit shows that the physical works conducted by the 2nd Respondent in PT9885 are affecting them.

[39] On the other hand, this Court agrees with the Respondents' submission that in fact it is the 2nd Respondent as the developer who will suffer irreparable damage if stay is granted since the Applicants' stay application herein is essentially an injunction to prevent the 2nd

Respondent from carrying out further works in respect of the Proposed Development on PT 9885. The 2nd Respondent has averred that the construction works they have carried out pursuant to the DO are at a relatively advance stage. Thus far, the 2nd Respondent has incurred a sum of RM69,457,473.18 for the Proposed Development and that a sum in excess of RM14 million has been spent. Construction cost is itself a clear indication of the extent of works undertaken. As such, this Court cannot disagree with the 2nd Respondent's submission that the suspension of works would therefore have severe and adverse financial implications on them as well as third parties who have entered into contracts with them to purchase units of the developments from them. As the 2nd Respondent has deposed in its affidavit in reply in Enclosure 28, the delay to the project would in turn cause them to be eventually liable to purchasers for liquidated damages for late delivery. A stay order would effectively delay the whole development process of the Proposed Development and consequently affect the rights of the 2nd Respondent and also the purchasers.

[40] As against the adverse position that will confront the 2nd Respondent if a stay is granted, the Applicants cannot demonstrate any prejudice let alone irreparable harm if a stay is not granted.

[41] O.53 r. 3(6) Rules of Court 2012 states:

> *"An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant."*

[42] Pursuant to the above provision of O. 53 r. 3(6) ROC, a party seeking for a judicial review thereunder must act promptly in filing the application. The issue of delay therefore is a pertinent issue at all stages of the proceedings be it at the leave stage, the substantive

hearing stage or at the stage where the Court is considering interim relief (see: *R v. Diary Tribunal Ex-Parte Caswell* [1990] 2 AC 738).

[43] It could be gleaned from the background of the various judicial review applications filed by the Applicants including this instant matter there had been active engagement by the 2nd Respondent with the residents around PT 9885 since March 2020. Further, information about the said DO had been available on the 1st Respondent's One Stop Center **("OSC")** website in relation to development status of PT 9885 and the project signboard had been erected since 4.3.2020.

[44] On 8.5.2020 the Applicants' solicitors received the DO from the 1st Respondent's solicitors. Pursuant to O. 53 r. 3(6) Rules of Court 2012 the three months period would expire on 7.8.2020. The Applicants chose to file this judicial review application and includes the prayer for stay on the eve of the three-month time frames on 6.8.2020. Although the Applicant have filed the instant application within the time frame, this Court agrees with the Respondents' contention that the Applicants have not acted promptly. This is a case where it involves development order and planning permission etc. where time is of the essence and delay in the execution of the Proposed Development will be detrimental not only to the developer such as the 2nd Respondent but also to the purchasers of the development. As such, it is important for the Applicants to act promptly.

[45] In *R (on the application of Powell) v. Brighton Marina Company Ltd & Ors (2014)* [2014] EWHC 2136 (Admin), the judicial review proceedings were commenced on the eve of the three-month time period and the Court there found that the Applicant had failed to act promptly. The Court in that case made reference to the earlier English case of *R (on the application of Finn-Kelcey) v. Milton Keynes*

Council [2008] All ER (D) 94 (Oct) [2008] EWCA Civ 1067 where the following relevant principles were laid down by the Court:

> *"21. As the wording indicates and as has been emphasised repeatedly in the authorities, the two requirements set out in paragraph (a) and (b) of that rule are separate and independent of each other, and it is not to be assumed that filing within three months necessarily amounts to filing promptly: see R v. Independent Television Commission, ex parte TV Northern Ireland Limited [1996] J.R. 60, [1991] TLR 606 and R v. Cotswold District Council, ex parte Barrington Parish Council [1997] 75 P. and C.R. 515* ***The need for a claimant seeking judicial review to act promptly arises in part from the fact that a public law decision by a public body normally affects the rights of parties other than just the claimant and the decision-maker****. As I put it in Hardy v. Pembrokeshire County Council [2006] EWCA Civ 240, paragraph 10:*
>
> > *"It is important that those parties, and indeed the public generally, should be able to proceed on the basis that the decision is valid and can be relied on, and that they can plan their lives and make personal and business decisions accordingly."*
>
> *In that same case this court rejected a submission that the requirement in CPR 54.5(1) for an application for judicial review to be made "promptly" offended against the principle of "legal certainty" in European law.*
>
> *22.* ***The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission. In R v. Exeter City Council, ex parte J.L. Thomas Co Ltd [1991] 1 QB 471, at 484G, Simon Brown J (as he then was) emphasised the need to proceed***

> ***"with greatest possible celerity", as he did also in R v. Swale Borough Council, ex parte Royal Society for the Protection of Birds [1991] 1 PLR 6 Once a planning permission has been granted, a developer is entitled to proceed to carry out the development and since there are time limits on the validity of a permission will normally wish to proceed to implement it without delay.***" [Emphasis added]

[46] This Court is of the considered view that the special circumstances test set out in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 relied upon by the Applicants in support of their contention for the stay order is not applicable herein. In *Kosma Palm Oil* (*supra*) the application relates to a stay pending execution of judgment. In any event, the question of whether there is anything that remains to be stayed by the Court in a situation such as the present matter where the DO has already been issued to the 2nd Respondent must be subjected to the evaluation and test set out by the Court of Appeal in the *Tan Bun Teet* (*supra*) case, in the manner as cited earlier.

[47] It is of the considered view that a stay order will irreparably harm the 2nd Respondent and the balance of convenience is in their favour. The Applicants have also failed to give any undertaking to pay damages which is critical given the substantial amount of money that has been spent by the 2nd Respondent. In this regard, the Court of Appeal in *Tan Bun Teet* (*supra*) had held that:

> "*The third and fourth respondents have invested a sum of around RM1.7 billion as at 21 March 2012 in the LAMP Project. In light of the huge investments by the third and fourth respondents, it is imperative that the appellants make an undertaking to damages and financial loss to be suffered by the fourth respondent, and not merely the undertaking as to*

> *damages, if any, to be suffered by the first and second respondents. It is trite law that an appellant for interlocutory injunction must provide valuable undertaking to pay damages and further the appellant must show that he has means to fulfill the said undertaking….**In our judgment, the appellants as private individuals have not shown proof of their financial standing to make good their bare undertaking, given under para 9 of the appellant's affidavit in support of the injunction / stay application**". [Emphasis added]

[48] In regards to the Applicants' contention that the subject matter of the litigation will become nugatory and academic if stay is not granted is without merit. No particulars are provided as to how this litigation will become nugatory and academic if stay is not granted. There is therefore nothing that can be stayed as between the Respondents and the DO.

Conclusion

[49] Premised on the above and at this stage, this Court finds that there is no serious triable issue shown by the Applicants to justify a stay order. Prayer (iii) of Enclosure 1 was therefore dismissed.

Dated: 12 AUGUST 2021

(NOORIN BADARUDDIN)
Judge
High Court of Malaya
Kuala Lumpur

COUNSEL:

For the applicant - David Samuel, R Thanasegar & Poh Kuang Horng; M/s Chambers of Firdaus

For the 1st respondent - B Thangaraj & M Nalani - M/s Thangaraj & Associates

For the 2nd respondent - Michael Chow & Wong Zhi Khung; M/s Michael Chow

Case(s) referred to:

Tan Bun Teet & Ors v. Inovasi Malaysia & Ors [2013] 3 MLJ 676

R v. Inspectorate of Pollution, ex p Greenpeace Ltd [1994] 4 ALL ER 321

Leisure Farm Corp Sdn Bhd v. Kabushiki Kaisha Ngu (formerly known as Dai-Ichi Shokai) & Ors [2017] 5 MLJ 63

Peguam Negara Malaysia v. Nurul Izzah bt Anwar & Ors [2017] 4 MLJ 656

Dharma Sdn Bhd & Others v. Menteri Kerja Raya & Others [2017] MLJU 1333

Godfrey Philips (M) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia [2011] 9 CLJ 670

R v. Diary Tribunal Ex-Parte Caswell [1990] 2 AC 738

R (on the application of Powell) v. Brighton Marina Company Ltd & Ors (2014) [2014] EWHC 2136

R (on the application of Finn-Kelcey) v. Milton Keynes Council [2008] All ER (D) 94 (Oct) [2008] EWCA Civ 1067

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1

Legislation referred to:

Federal Territory (Planning) Act 1982, s. 22

Rules of Court 2012, O. 53 r. 3(6)