

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN KUASA-KUASA KHAS)
[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 PT9885, 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 27.2.2017 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-25-139-02-2017, Permohonan Semakan Kehakiman No: WA-25-69-02/2019 di Mahkamah Tinggi Kuala Lumpur, Rayuan Sivil No.: W01(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 [DKLCP2020] 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**

Abstract: The High Court is empowered by O. 53 r. 6 of the Rules of Court 2012 ('ROC') to grant discovery in judicial review applications in accordance with O. 24 of the ROC. However, discovery is granted on a more limited basis than in an ordinary writ action because the function of judicial is to question the decision-making process and not whether the decision is in itself correct. Discovery may be necessary in a judicial review proceeding where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the judicial review application.

CIVIL PROCEDURE: Discovery - Judicial review - Judicial review to quash issuance of development order - Discovery of documents relating to planning permission application - Respondent merely deny relevancy and necessity of documents to judicial review application -

Whether respondent had possession, custody and control of documents relating to planning permission application and proposed development - Whether documents necessary for fair disposal of judicial review application - Whether justice of case may be advanced upon discovery

[Applicants' application allowed.]

Case(s) referred to:

Carlow Kilkeny Radio Ltd v. Broadcasting Commission [2003] 3 IR 528 (refd)

Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 (refd)

Kerajaan Negeri Selangor v. Suruhanjaya Pilihan Raya Malaysia & Ors [2018] 1 CLJ 258 CA (refd)

Rekapacific Bhd v. Securities Commission & Anor & Other Appeals [2005] 2 CLJ 108 CA (refd)

Tan Sri Dato' Sri Khalid Abu Bakar (DIG) & Ors v. Muhammad Farid Muntalib [2015] 1 LNS 15 CA (refd)

Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC (refd)

Legislation referred to:

Rules of Court 2012, O. 24 rr. 3(4), 8, 10, 11, O. 53 r. 6

JUDGMENT

Introduction

[1] This judgment concerns an application for discovery dated 24.1.2022 made pursuant to O. 53 r. 6 of the Rules of Court 2012 (enclosure 90) in this judicial review proceedings. In this judgment all rules hereinafter stated refer to the Rules of Court 2012. The rule allows for discovery and inspection of documents according to O. 24 of the said rules. However, as will be shown shortly, parties in judicial review proceedings face more difficulty seeking discovery compared with parties to ordinary writ actions notwithstanding the incorporation of O. 24 in O. 53 r. 6.

[2] On 7.11.2022, after considering the submissions of the parties and cause papers, I allowed the application in the following terms:

1. The 1st respondent and/or the 2nd respondent within seven (7) from the date of service of this Order produce the following documents:
 - (a) The Joint Venture Agreement entered between Yayasan Wilayah Persekutuan and Lakaran Ceria Sdn Bhd (2nd respondent) (“the JV Agreement”) concerning the “*Proposed construction of 720 apartment units which are housed in one block of 49 stories including a 5 stories podium which consists of 5 stories carpark, 23 units of 3 stories villa, residential facilities and 23 units of 4 stories villa which are housed in one block on Lot 9885, Jalan 3/51b, Mukim Setapak, Wilayah Persekutuan Kuala Lumpur*” (hereinafter referred to as “Proposed Development”) and/or
 - (b) Any legal instruments and/or documents referred to in the JV Agreement in relation to the Proposed Development.

2. In the event, the 1st respondent and/or the 2nd respondent do not have in their possession any documents referred to in paragraph 1(b) above, an affidavit to that effect must be filed by the 1st respondent and the 2nd respondent respectively.

[3] The reasons for my decision are as follows.

Background Facts

[4] The 1st applicant and 2nd applicant (“the applicants”) are residents and property owners in Taman Tiara Titiwangsa which is a residential area comprising 250 bungalow units spread over an area of 50 acres and is adjacent to Taman Tasik Titiwangsa. The properties owned and resided by the applicants is also adjacent a piece of land held under the title No. HSD 119612 No. Lot PT 9885, Mukim Setapak District Kuala Lumpur (“Lot 9885”). This is the piece of land concerned with the Proposed Development.

[5] The 1st respondent is the Datuk Bandar Kuala Lumpur, a body corporate under Federal Capital Act 1960 for the Federal Territory of Kuala Lumpur. The 1st respondent is the authority that is conferred power to consider and approve any proposed developments in areas around the applicants’ properties including Lot 9885. The power is conferred by the Federal Territory (Planning) Act 1982 (“the FTPA”) and Planning (Development) Rules 1970 (“PDR”).

[6] The 2nd respondent, Lakaran Ceria Sdn Bhd is a company carrying on the business of housing development. The land, Lot 9885, is owned and registered under the name of Yayasan Wilayah Persekutuan. The 2nd respondent and Yayasan Wilayah Persekutuan have entered into a Joint Venture Agreement to develop Lot 9885.

[7] On 10.6.2019, the 2nd respondent made an application to the 1st respondent for a planning permission for the development of Lot 9885 according to the Proposed Development. The 1st respondent approved

the application and on 20.12.2019 granted a development order for the Proposed Development. According to the 1st respondent the approval was given as the application was in accordance with Kuala Lumpur City Plan 2020 (“2020 Plan”) on the land use and residential density. It was stated that based on the 2020 Plan and Federal Territory (Planning) (Classes Of Use Of Land And Buildings) (Federal Territory Of Kuala Lumpur) 2018 the land can be developed as a residential development with 400 ppa.

[8] The said development order is the subject matter of this judicial review proceeding. The applicants are seeking, *inter alia*, to quash the 1st respondent’s decision in issuing the development order. It appears that when the 2nd respondent made the application for the planning permission, the 1st respondent’s office position was held by one Dato’ Nor Hisham bin Ahmad Dahlan (“Dato’ Nor Hisham”) who was also a trustee of Yayasan Wilayah Persekutuan. The position was held by Dato’ Nor Hisham from 12.11.2018 until 10.3.2020. It is the applicants’ contention that Dato’ Nor Hisham was a party interested in obtaining the development order for Yayasan Wilayah Persekutuan and was the very party which approved the development order for the Proposed Development. There was therefore serious conflict of interest as the party that was seeking the planning permission was the same party that approved the planning permission.

[9] On 31.12.2021, the solicitors for the applicants served a ‘Notice to Produce Documents Referred to in Pleadings or Affidavits’ on the 1st respondent in accordance with O. 24 r. 10 to produce the JV Agreement. The request was refused. A letter dated 31.12.2021 was served on the respondents seeking discovery of the said JV Agreement in accordance with O. 24 rr. 3 and 11 but to no avail. Thereafter, the applicants filed the instant application for discovery of the documents.

The Law Relating To Discovery

[10] The High Court is empowered by O. 53 r. 6 to grant discovery in judicial review applications in accordance with O. 24. Under O. 24 r. 3(4) the documents that may be ordered discovered are: documents which the party relies or will rely; and (i) documents which could adversely affect the party's own case; (ii) documents that could adversely affect another party's case; or (iii) documents that could support another party's case. However, under O. 24 r. 8 an order for discovery can only be given by the court if the court is of the opinion that discovery is necessary for disposing fairly of the cause or matter or for saving costs.

[11] In order to succeed in its application for discovery, an applicant must establish the following three essential elements set out in *Yekambaran Marimuthu v. Malayawata Steel Bhd* [1994] 2 CLJ 581: firstly, there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

[12] However, discovery in judicial review proceedings is governed by certain principles different to writ actions. The governing principles upon which discovery can be ordered in judicial review proceedings were propounded in *Rekapacific Bhd v. Securities Commission & Anor And Other Appeals* [2005] 2 MLJ 269. These principles were thereafter approved and reiterated in *Tan Sri Dato' Sri Khalid Abu Bakar (DIG) Pengerusi Lembaga Tata tertib Polis Diraja Malaysia v. Muhammad Farid bin Muntalib* [2015] 2 MLJ 783 and *Kerajaan Negeri Selangor v. Suruhanjaya Pilihan Raya Malaysia & Ors* [2018] 1 CLJ 258. The principles referred to are taken from the summation of the applicable principle from Richard Gordon's work *Judicial Review and Crown Office Practice*. The principles (omitting cited case-law) are stated in the following passages of the book as follows:

In general, the following principles appear to govern the grant or refusal of discovery under O. 53:

- (a) Discovery will not be ordered so as to make good defects in the applicant's evidence.
- (b) One will seldom obtain full private law type discovery in a *Wednesbury* challenge.
- (c) By contrast, discovery will be ordered under O. 53 where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the matter, (within the meaning of O. 24 r. 8).
- (d) Discovery will also be ordered to go behind the contents of affidavits if there was some matter before the Court which suggested that the contents of the affidavits were not accurate. By contrast, discovery will not be ordered where there is no reason to doubt the *bona fides* or accuracy of the reasons given on affidavit.

The most authoritative pronouncement remains that of Lord Scarman in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 654. In relation to discovery under O. 53 he indicated that:

... Upon general principles, discovery should not be ordered unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty; and it should be limited strictly to documents relevant to the issue which emerges from the affidavits.

The second limb of this statement is unexceptionable. It is a rule that discovery and inspection must be restricted to matters relevant to an existing dispute.

[13] In *Rekapacific Bhd* the Court of Appeal concluded by saying that the restraint suggested by Lord Scarman in the *National Federation of Self-Employed and Small Businesses Ltd* case should be adopted by our courts when dealing with an application for judicial review. In *Kerajaan Negeri Selangor* it was held that there is nothing to be resolved by discovery where the matter at the substantive hearing is purely a question of law such as where the authority has acted contrary to law, unconstitutionally or unreasonably.

[14] In *Tan Sri Dato' Sri Khalid* the appeal was allowed thereby reversing the order of discovery made on the ground that the respondent has not met, apart from the principles stated in *Yekambaran Marimuthu* and *Rekapacific Bhd* but also the principles stated in *Carlow Kilkeny Radio Ltd v. Broadcasting Commission* [2003] 3 IR 528 at p 537. The principles in *Carlo Kilkeny* were stated in the following passage of the judgment:

... discovery will not normally be regarded as necessary if the judicial review application is based on *procedural impropriety* as ordinarily that can be established without the benefit of discovery. Likewise, if the application for judicial review is on the basis that the decision being impugned was a wholly unreasonable one in the *Wednesbury* sense, discovery will again not normally be necessary because if the decision is clearly wrong it is not necessary to ascertain how it is arrived at. Where discovery will be necessary is where there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate on the application or where there is *prima facie* evidence to the effect, either that a document which ought to have been before the deciding body was not before it or that a

document which ought not to have been before the deciding body was before it.

[15] Thus, the cases show that discovery is granted on a more limited basis than in an ordinary writ action because the function of judicial is to question the decision-making process and not whether the decision is in itself correct. For this reason, discovery in judicial review proceedings will not be allowed where:

- (i) the allegation to resolve is on the basis of *procedural impropriety (including legitimate expectation)*;
- (ii) the allegation concerns the issue of *unreasonableness* in respect of the manner in which the decision is reached (except where there exists dispute of facts in the affidavits);
- (iii) the allegation to resolve is on the basis of *illegality* which is a pure question of law.

[16] Conversely, discovery may be necessary in a judicial review proceeding necessary where:

- (i) the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty (*Inland Revenue Commissioners case*);
- (ii) there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate on the application;
- (iii) where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the matter (within the meaning of O. 24 r. 8)
- (iv) there is *prima facie* evidence to the effect, either that a document which ought to have been before the deciding

body was not before it or that a document which ought not to have been before the deciding body was before it.

[17] The above instances are not exhaustive as in judicial review as there are other allegations could arise, such as *mala fides* and bias which are stand-alone grounds for review and may in appropriate circumstances be necessary for discovery.

Application Of The Law To The Facts

[18] The applicants in the instant judicial review proceedings were given leave to commence judicial review for an order of *certiorari* to quash the development order and/or a declaration that the development order is null and void. The Order 53 statement reveals that there was an earlier application for a planning permission by the 2nd respondent with a different proposed development for Lot 9885. A meeting was held with the adjoining owners of properties as required by law. The same applicants here challenged the meeting as being unlawful. The Court of Appeal allowed their application and granted the following declaration:

A declaration that the meeting/inquiry to hear the objections of registered owners of properties adjoining the proposed development within defined limits conducted by the Datuk Bandar Kuala Lumpur ('DBKL') on 27.2.2017 in respect of the proposal to build three (3) blocks of apartments on Lot PT. 9885, Jalan 3/51B, Mukim Setapak, Kuala Lumpur is null and void;

[19] This meant that the meeting was to be held again. However, the meeting is yet to take place as the 1st respondent filed an application for leave to appeal against the decision of the Court of Appeal at the Federal Court. That application is still pending. The applicants with 6 other owners then filed a judicial review proceeding to challenging the validity of the Kuala Lumpur City Plan 2020 seeking various

declarations and orders of *certiorari vide* Kuala Lumpur High Court Application For Judicial Review No. WA-25-69-02/2019. That proceeding is also pending. Notwithstanding, the pending applications the 1st respondent allowed the planning permission for the present Proposed Development presented by the 2nd respondent.

[20] One of the issues raised in the instant application for judicial review is *mala fides* of both the 1st respondent for approving and the 2nd respondent for applying for the said planning permission. The applicants have applied for the documents sought on the basis of serious conflict of interest and the conduct or action of the 2nd respondent to deprive them of their rights.

The document sought

[21] The JV Agreement is in existence and this is not a disputed fact. The 2nd respondent being a party to JV Agreement would have in their possession, custody and control the JV Agreement. In regard to the 1st respondent, the JV Agreement was part of the planning permission application and the basis of the Proposed Development. This is a strong indication that the JV Agreement is in possession of the 1st respondent. Further, the respondents do not deny the existence of the JV Agreement or that the said agreement is not in their possession, custody or control. In any event the respondents merely deny the relevancy and necessity of the JV Agreement to the present judicial review proceeding. In the circumstances I am satisfied that the first and second elements for making the order of discovery is satisfied.

Whether discovery necessary in this judicial review application

[22] The crucial issue is whether discovery can be allowed in this judicial review application. There is an issue of *mala fides*. It is said that the JV Agreement will show that Dato' Nor Hisham being the 1st respondent was also the director of Yayasan Wilayah Persekutuan had entered into the said JV Agreement. At that time Dato' Nor Hisham

was in a position of conflict of interest and in breach of his fiduciary duty owed to the public to act in a fair and just manner in approving any planning permissions as he was also the director of Yayasan Wilayah Persekutuan. The 2nd respondent had presented the second planning permission for approval when the first planning permission is still to be decided.

[23] I am satisfied that the applicants have brought themselves within the limited area where discovery can be allowed in judicial review proceedings. I find that the evidence reveals reasonable grounds for believing that there has been a breach of public duty by the 1st respondent (see *Inland Revenue Commissioners case*), the JV Agreement ought to be before this Court, and this case is a clear one where the justice of the case may be advanced and where it is necessary for disposing fairly of the instant judicial review application.

[24] In the circumstances, I find that the requirements of *Yekambaran Marimuthu* are satisfied and I allowed the order as stated in paragraph [2] above.

Conclusion

[25] For completeness, suffice to say that I was not persuaded on the other arguments of counsel such there was delay in filing this application or that this application was a fishing expedition.

Dated: 9 FEBRUARY 2023

(Amarjeet Singh Serjit Singh)

Judge

High Court Kuala Lumpur

Counsel:

For the applicant - Chang Wai Lik; M/s Chambers of Firdaus

For the first respondent - M. Nalani; M/s Thangaraj & Associates

For the second respondent - Wong Zhi Khung; M/s Michael Chow