

DATO' MOHAMAD YUSOF A BAKAR & ANOR
v.
DATUK BANDAR KUALA LUMPUR & ANOR

High Court Malaya, Kuala Lumpur
Amarjeet Singh Serjit Singh J
[Judicial Review No: WA-25-221-08/2020]
14 May 2025

Case(s) referred to:

Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals [2023] 4 MLRA 114; [2023] 3 MLJ 829; [2023] 5 CLJ 167 (refd)
Finn-Kelcey v. Milton Keynes Borough Council [2008] EWCA Civ 1607 (refd)
Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors [2017] 6 MLRA 334; [2017] 5 MLJ 63 (refd)
Pegum Negara Malaysia v. Nurul Izzah Anwar & Ors [2017] 6 MLRA 572; [2017] 4 MLJ 656; [2017] 5 CLJ 595 (refd)
Re Musgrave Retail Partners (NI) Limited; Re Department of the Environment (Planning Services) [2012] NIQB 109 (refd)
Steeple v. Derbyshire County Council [1984] 3 All ER 468 (refd)
Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 3 MLRA 525; [2013] 4 MLJ 161; [2013] 4 CLJ 193; [2013] 4 AMR 211 (refd)

Legislation referred to:

Federal Territory (Planning) Act 1982, s 22(4)
Planning (Development) Rules 1970, r 5(6)
Rules of Court 2012, O 53 rr 3(6), (7), 6(7)

Counsel:

For the applicants: David Samuel (R Thanasegar Ramasamy Leonard Parthiban and Banushaa Narenthiran with him); M/s Chambers of Firdaus
For the 1st respondent: Thangaraj Balasundram (Nalani Murugiah with him); M/s Thangaraj & Associates
For the 2nd respondent: Michael Chow Keat Thye (together with Neoh Kai Sheng); M/s Michael Chow

[Dismissed the application for judicial review.]

Case Progression:

High Court: [2023] MLRHU 189
High Court: [2021] MLRHU 1459

JUDGMENT

Amarjeet Singh Serjit Singh J:



Introduction

[1] The application for leave to commence judicial review in the instant case was filed on 6 August 2020. Leave was granted in the main to commence an order of *certiorari* to quash the decision, by the 1st respondent ("the DBKL"), granting a development order dated 20 December 2019 ("the Development Order") to the 2nd respondent known as "Cadangan membina 1 blok pangsapuri 49 tingkat (720 unit) termasuk 5 tingkat podium yang mengandungi 5 tingkat tempat letak kereta, kemudahan penduduk dan villa tiga tingkat (23 unit) serta 1 blok villa 4 tingkat (2 unit) di atas Lot Lot PT 9885, Jalan 3/51B, Mukim Setapak, Wilayah Persekutuan Kuala Lumpur" together with an order seeking a declaration to declare the Development Order null and void ("2nd JR Application").

[2] On 17 September 2024, I dismissed the application, ie, the 2nd JR Application. The reasons for my decision are as follows.

Background Facts

[3] The DBKL is the planning authority in charge of the control and planning in the City of Kuala Lumpur under the Federal Territory (Planning) Act 1982 ("FTP Act"). The applicants are the registered owners of Lot 16622 and Lot 16587 Taman Tiara Titiwangsa, Kuala Lumpur, respectively. They claim that their properties on the said lots are adjoining Lot PT 9885 in respect of which the Development Order was granted.

[4] Lot PT 9885 was alienated to the Yayasan Wilayah Persekutuan ("YWP") on 8 September 2014 with an express condition that the land is to be developed as a mixed development. YWP entered into a joint venture agreement dated 16 November 2015 with the 2nd respondent to develop the land. On 1 June 2016, the 2nd respondent had submitted a proposal for development for 1532 units of apartments and affordable homes ("1st Proposed Development").

[5] Since the 1st Proposed Development involves an increase in residential density per acre, the application of r 5 of the Planning (Development) Rules 1970 ("Planning Rules 1970") is triggered in light of the fact that the local plan for Kuala Lumpur is yet to be gazetted. Rule 5 of the Planning Rules 1970 requires a hearing of objections to be conducted in view of the residential density increase.

[6] In the circumstances, the DBKL agreed to consider the 1st Proposed Development subject to the following conditions: (a) hearing of objections under r 5 of the Planning (Development) Rules 1970 ("Planning Rules 1970"); (b) the 2nd respondent to submit a Traffic Impact Assessment Report ("TIA Report"); and (c) the 2nd respondent to bear the costs of upgrading the infrastructure and road network around the proposed development.

[7] Objections were heard against the proposed development, including written objections by the applicants. A notice was then issued under sub-rule 5(6) of



the Planning Rules inviting objectors to attend a meeting scheduled on 27 February 2017 by the Pengarah Jabatan Perancangan Bandaraya ("JPB"). All objections taken at the said meeting were presented to the DBKL.

[8] Before the DBKL could make any decision on the 1st Proposed Development, the applicants filed a judicial review application seeking a declaration that the meeting to hear objections held on 27 February 2017 was null and void and an order of prohibition to prohibit the DBKL on taking any further action and/or making a decision on the 1st Proposed Development ("the 1st JR Application").

[9] On 26 June 2018, the High Court dismissed the 1st JR Application. Dissatisfied, the applicants filed an appeal to the Court of Appeal ("CA Civil Appeal No 437"). The Court of Appeal, on 13 March 2019, allowed the appeal and granted the declaration nullifying the said objection hearing. In the grounds of judgment, the only ground for allowing the appeal was the failure to furnish the technical reports of the proposed development to the objectors before the objection hearing had deprived the objectors of a full and impartial hearing.

[10] Leave was granted by the Federal Court on 1 September 2021 allowing the DBKL to appeal the decision of the Court of Appeal on 2 questions: (i) whether an objection hearing under r 5 of the Planning Rules 1970 is susceptible to judicial review; and (ii) whether objectors are to be supplied with the technical reports prior to the objection hearing under r 5 of the Planning Rules 1970.

[11] Meanwhile, the local plan for the City of Kuala Lumpur was gazetted on 30 October 2018 ("KLCP 2020"). After the KLCP 2020 had been gazetted, there was no longer the requirement to conduct an objection hearing under r 5 of the Planning Rules 1970. In view of this development, the 2nd respondent, on 11 June 2019, submitted a new application for a planning permission to develop Lot PT 9885 in accordance with the KLCP 2020. On 20 December, the DBKL approved the Development Order made pursuant to the application for permission under s 22 of the FTP Act.

[12] At the hearing of the substantive appeal in the Federal Court ("FC Appeal No 15") the applicants raised a preliminary objection, to wit, that the appeal had been rendered academic with the coming into force of the KLCP 2020 which dispenses with an objection hearing under r 5 of the Planning Rules 1970 and that the DBKL had approved a development order to develop Lot PT 9885 in accordance with the KLCP 2020. On 4 July 2022, the Federal Court allowed the preliminary objection and dismissed the DBKL's appeal.

2nd JR Application

[13] Sometime in March 2020, it came to the knowledge of the applicants that some works were commenced on Lot PT 9885. On 21 April 2020, the applicants' solicitors sought from the DBKL's solicitors clarification on the status of the proposed development on the said lot. In a letter dated 8 May



2020, the applicants' solicitors were informed and served with a copy of the Development Order. In the letter the following information was also given: (i) the KLCP 2020 was gazetted on 30 October 2018; (ii) in the KLCP 2020, Lot PT 9885 has been designated for residential development with a density of 400 people per acre; (iii) after KLCP was gazetted, the 2nd respondent made a new application to develop Lot PT 9885 in line with the new population density; and (iv) the Development Order was granted in accordance with the KLCP 2020.

[14] On 6 August 2020, the applicants applied for and was granted leave to challenge the Development Order dated 20 December 2019 (the subject matter of the instant judicial review application), which is referred to as the 2nd JR Application. It is observed that in this second application, the 2nd respondent was made a party to the proceedings. The 2nd respondent was not a party in the 1st JR Application.

[15] The Development Order was challenged on the following grounds:

- (a) the DBKL should not have proceeded to approve the new application made by the 2nd respondent and grant the Development Order with reference to the effect of the decision in CA Civil Appeal No 437;
- (b) the DBKL ought to have waited for the outcome of the application for leave to appeal against the decision in CA Civil Appeal No 437;
- (c) the DBKL had granted the Development Order based on a new application by the 2nd respondent after the gazettelement of the KLCP 2020, when the KLCP 2020 is being challenged in Judicial Review Application No WA-25-69-02/2019 dated 8 February 2019 ("JR No 69");
- (d) the DBKL acted *mala fide* in granting the Development Order, being aware that the new application made under the KLCP 2020 did not require a public hearing under r 5 of the Planning Rules 1970;
- (e) the DBKL, being a party to JR No 69, failed to consider the fact that the applicants in that JR application are seeking to declare KLCP 2020 as invalid, null, and void, and if KLCP was declared null and void, the Development Order based on the KLCP 2020 will also be null and void.
- (f) the DBKL had breached the applicants' legitimate expectation by granting the Development Order;
- (g) the DBKL is in a position of conflict of interest in granting the development order, as Dato' Nor Hisham bin Ahmad Dahlan, who was then the Datuk Bandar, was also a trustee of YWP when the decision to grant the Development Order was made.



[16] The applicants' application to stay the Development Order was on 20 April 2021 dismissed by the High Court. On 30 September 2022, the applicants' appeal against the High Court's decision to refuse a stay was dismissed by the Court of Appeal.

[17] The proposed development was estimated to be completed within 6 months, with 60% of the units sold to third- party purchasers as at 26 October 2023 (Enclosure 166, para 10 and Exhibit KSK-3). The development would have been completed by now.

Analysis And Decision

[18] I will now address the issues raised by the parties, beginning with the failure to comply with time under O 53 r 3(6) of the Rules of Court 2012. I will begin with the preliminary objections by the DBKL and the 2nd respondent.

2nd JR Application Not Filed Within 3 Months

[19] The 2nd respondent, who was granted with the Development Order, strenuously argued that the 2nd JR Application was not filed within time under O 53 r 3(6) of the Rules of Court 2012, which provides as follows:

"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".

[20] In this regard, it is necessary to set out the chronology of events:

30 October 2018: KLCP 2020 was gazetted

8 February 2019: JR No 69 filed challenge KLCP 2020

20 December 2019: Development Order granted to 2nd respondent for Lot PT 9885

4 February 2020: 2nd respondent obtained approval to commence earthworks

3 March 2020: 2nd respondent conducted "town Hall" discussions with residents adjoining Lot PT 9885 before commencing earthworks

9 March 2020: Project signboard for earthworks erected

21 April 2020: Applicants' solicitors wrote to inquire development status of Lot PT 9885

8 May 2020: DBKL solicitors responded, informing Development Order has been granted



6 August 2020: Applicants filed the instant 2nd JR Application

6 January 2021: Leave to commence judicial review proceedings granted

[21] Of importance is that, prior to 21 April 2020, the applicants had been informed by the planning department of DBKL, verbally, that the Development Order has been granted in December 2019 and to write in officially to obtain a copy of the Development Order (see the applicants' solicitors own letter dated 21 April 2020). This is the clearest evidence that the applicants knew of the Development Order prior to or on 21 April 2020. The 2nd JR Application was only filed on 5 August 2020. Even taking 21 April 2020 as the date when the grounds of application first arose (there being no duty to communicate in writing to the applicants as proprietors of adjoining properties), the filing of the 2nd JR Application was out of time by 15 days.

[22] The law is trite. The Federal Court in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 3 MLRA 525; [2013] 4 MLJ 161; [2013] 4 CLJ 193; [2013] 4 AMR 211 established that the application for leave must be made promptly within three months from the date the grounds of the decision first arose or when the decision is first communicated to the Applicant. If the application for leave is not filed within the time stipulated, ie, in the context of the instant case, within 3 months from the date the grounds of the decision first arose, the High Court has no jurisdiction to hear the application. The Federal Court made it clear that the merit of the application is not relevant at this stage. The principle was stated in *Wong Kin Hoong* in the following terms:

"In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction, and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not is irrelevant".

[23] The applicants took the position that the application was filed within the 3-month time line time by taking the date of the DBKL's letter dated 8 May 2020. Thus, the issue of providing a good reason to extend time under O 53 r 3(7) of the Rules of Court 2012 did not arise as the applicants submitted that they were within time.

[24] I disagree. The 2nd JR Application was out of time as the correct date when time begins to run for the 3-month period in O 53 r 3(6) of the Rules of Court 2012 was 21 April 2020, ie, the date when the grounds of application first arose (as shown above). In the circumstances, the Court had no jurisdiction to hear the application. Since there were no good reasons provided as required by O 53 r 6(7) of the Rules of Court 2012, this Court cannot extend time in vacuity. On this ground alone, the 2nd JR Application must be



dismissed.

2nd JR Application Not Filed Promptly

[25] The applicants submitted that they were within the 3-month period as they had filed the 2nd JR Application on the eve of the expiry of the 3-month period, ie, on 6 August 2020. I have not accepted this submission as addressed in the preceding paragraphs.

[26] However, the DBKL and the 2nd respondent had submitted that even taking the date 8 May 2020, the applicants had not filed the 2nd JR Application promptly as required by O 53 r 3(6) of the Rules of Court 2012. The provision uses the words "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".

[27] The principle with regard to this point was stated in *Re Musgrave Retail Partners (NI) Limited; Re Department of the Environment (Planning Services)* [2012] NIQB 109 as follows [Emphasis Added]:

[13] The need for the speed in the initiation of judicial review proceedings has long been recognised. Primarily, this is because decisions by public authorities will usually have impacts on the rights and interests of third parties who are affected by them. There is, in these circumstances, an obvious need for any challenge to the legality of public law decision-making to occur without delay, and it is important that a point in time is arrived at which it can confidently be said that a public law decision is beyond question.

[14] In areas such as the grant of planning permission the need for early certainty is well recognised and the courts have generally adopted the view that the requirement of promptitude as the criterion reconciling the need for finality in this sphere with the ability of an applicant to challenge a planning permission should be interpreted with a degree of strictness. This has been recognised in numerous cases and was expressed in clear terms in the Court of Appeal in Northern Ireland in *Re Hill's Application* [2007] NICA 1 by Kerr LCJ (as he then was) when he said at paragraph [33] that there was "need for great expedition in the presentation of applications for leave to apply for judicial review in planning cases". The same approach has also been taken by courts in England and Wales, as evidenced for example, in *Finn-Kelcey v. Milton Keynes Borough Council* [2008] EWCA Civ 1607 at paragraphs [21] to [25] and *R (Berky) v. Newport City Council* [2012] EWCA Civ 378 at paragraphs [34]-[35] and [49].

[15] While every case will depend on its own facts, and there is no rule of thumb as to what constitutes a timely application, great expedition will normally require that the application be made well within the outer time limit for judicial review applications of three months. This will especially be so if the challenger is an entity which is well aware



of a trade competitor's application for planning permission and has objected to it and monitored its progress.

[28] Filing an application within 3 months does not necessarily mean filing promptly. The need for an applicant 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 applicant and the decision-maker (see *Finn-Kelcey v. Milton Keynes Borough Council* [2008] EWCA Civ 1607 para [21]). The rationale is stated in *Hardy v. Pembrokeshire County Council* [2006] EWCA Civ 240, para [10] as follows [Emphasis Added]:

"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".

[29] On 8 May 2020, the applicant was already aware that earthworks had commenced at the Lot PT 9885 since March 2020, and the fact that the Development Order had been granted to the 2nd respondent on 20 December 2019. These facts required the applicants to file their application to quash the Development Order promptly. The 2nd respondent and third-party purchasers ought to have been in contemplation of the applicant, who had proceeded on the basis that the decision is valid and can be relied on. The 2nd respondent and the third-party purchasers had as a result planned their business and lives by making make business and personal decisions which would affect them financially.

[30] However, there is nothing stated by the applicants as to their actions from the 8 May 2020 until they filed the 2nd JR Application of not acting promptly. The 2nd respondent, once the Development Order is granted, is on a timeline and would have expended monies in terms of construction costs and consultant fees.

[31] I hold that on the totality of the facts and circumstances before me, this is a case where the applicants had not acted promptly to pursue its challenge against the granting of the Development Order. On this separate ground, the application ought to be dismissed.

[32] I will now proceed to the grounds of review raised by the applicants.

1st Ground

Failure To Consider The Effect Of CA Civil Appeal No 437 And The Outcome Of The Appeal Pending At The Federal Court

[33] It was contended that DBKL ought to have considered the effect of CA Civil Appeal No 437 and waited for the outcome of the appeal against the decision of the Court of Appeal pending at the Federal Court. I found this contention irrelevant to the granting of the Development Order to the 2nd



respondent and dismissed it.

[34] The effect of CA Civil Appeal No 437 is that the public hearing ought to be scheduled again, as the earlier public hearing was in breach of natural justice. The outcome of the appeal would be either that the hearing was valid or invalid. At all times, the 2nd respondent was not a party to the proceedings, and the function of the DBKL was to hold a public hearing in accordance with r 5 of the Planning Rules 1970, which were applicable then.

[35] The 2nd respondent had the right to make a new application that is in accordance with the KLCP 2020 in respect of the development of Lot PT 9885. The earlier application for planning permission was obviously not in accordance with the KLCP 2020 since it was made before KLCP 2020 came into force on 31 October 2018. The new application, which was submitted on 11 June 2019, was no longer subject to the requirements of r 5 of the Planning Rules 1970. With the coming into force of the KLCP 2020, r 5 of the Planning Rules 1970 was no longer applicable.

[36] The Federal Court decision in *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 4 MLRA 114; [2023] 3 MLJ 829; [2023] 5 CLJ 167 look care of the ground raised as the public hearings were no longer relevant, and to hold a public hearing would be contrary to the express provisions of the FTP Act. The relevant paragraphs in the Federal Court's judgment read as follows:

[224]... The FT Act envisages a period of objections from the public prior to the gazettment of the structure plan and local plan (and in the event of variations to the same), but not thereafter.

[225] Therefore, to continue to hold 'objection hearings' under r 5(3) of the 1970 Rules (which is consonant with the repealed method of dealing with planning permissions) is contrary to the express provisions of the FT Act, not to mention the purpose and object of the Act.

[356]... We reiterate our arguments earlier to conclude that reliance on r 5(3) is misplaced as it cannot be utilised in view of its fundamental inconsistency with the statutory development plan, the structure plan, and the object and purpose of the FT Act as a whole.

[37] Perbadanan Pengurusan Trellises is clear. The requirement of the public hearing is no longer required when KLCP 2020 was gazetted. In the circumstances, the DBKL was not impeded but under a duty to comply with the KLCP 2020 when approving the new planning permission and granting the Development Order.

[38] Perbadanan Pengurusan Trellises also put to the contention that the DBKL acted *mala fide* in granting the Development Order after being aware that the new application made under the KLCP 2020 did not require an objection hearing under r 5 of the Planning Rules 1970. There can be no *mala*



fides on the part of the DBKL when the FTP Act, according to Perbadanan Pengurusan Trellises, requires the DBKL to comply strictly with the KLCP 2020 when approving a planning permission. DBKL was acting in accordance with the law.

2nd Ground

Failure To Consider And Await The Outcome Of JR No 69

[39] In JR No 69, the validity of KLCP 2020 was being challenged, and the applicants therein (which includes the 2nd applicant herein) were seeking a declaration that KLCP 2020 is illegal, null, and void. The DBKL is also a party to JR No 69.

[40] It was submitted that the DBKL acted irrationally in considering and approving the Development Order based on KLCP 2020 when the same was being challenged in JR No 69. DBKL being aware that Lot PT 9885's density and zoning was being challenged the proper thing to do was to await the outcome and decision of JR No 69 and only then considering whether to approve or not to approve the Development Order.

[41] It was submitted that the applicants were judicially estopped from pursuing the above position, having in JR No 69 taken a different stance on the validity of the development orders that were already granted under KLCP 2020. The applicants took the position that the intention of JR No 69 was not to quash development orders which had been granted under KLCP 2020. In other words, the development orders already granted remained intact.

[42] The applicants are in the circumstances estopped from raising the ground in the instant judicial review when in JR No 69 it was asserted that the development orders granted under KLCP 2020 are intact. The law of judicial estoppel prevents the applicants in the instant case to take an opposite stance, namely, that the validity of the Development Order was still in issue.

[43] If authority is need, one need only refer to *Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors* [2017] 6 MLRA 334; [2017] 5 MLJ 63 and *Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors* [2017] 6 MLRA 572; [2017] 4 MLJ 656; [2017] 5 CLJ 595. The ground is therefore devoid of merit.

3rd Ground

Conflict Of Interest And/Or Bias

[44] The ground of allegation of conflict of interest and/or bias was the main ground of the applicants' focus during oral submissions before me.

[45] The YWP is a foundation set up to improve the living standards of underprivileged citizens in the Federal Territory of Kuala Lumpur. One of the projects of the foundation is to provide affordable housing in the City of Kuala Lumpur. The YWP entered into a joint venture agreement with the 2nd



respondent to develop Lot PT 9885. The DBKL by virtue of this position, is one of the eight trustees of YWP.

[46] The DBKL is the authority to issue development orders for housing projects in the City of Kuala Lumpur, which is carried out by a committee and not personally by the DBKL. At the time the Development Order was granted, one Dato' Nor Hisham bin Ahmad Dahlan ("Dato' Nor Hisham") was holding the position of DBKL, and was also a trustee of YWP. There is no allegation that Dato' Nor Hisham himself approved the application or has any personal or pecuniary interest in the development project.

[47] The applicants solely relied on the Federal Court's decision in *Perbadanan Pengurusan Trellises*, which it was submitted is on all fours with the present case. The ground relied on is "institutional" conflict of interest and/or bias propounded by the. The Federal Court, on the facts of the case, reasoned that it is the institution of the DBKL that carries out the discretion under s 22(4) of the FTP Act and not the person holding the office of DBKL. Thus, it was stated that the delegation of and sitting out of meetings, by the person holding the office of DBKL, from approving planning permissions, does not cure the institutional conflict of interest and/or bias.

[48] In this regard, the Federal Court considered planning cases of similar ilk and ultimately accepted the test in *Steeple v. Derbyshire County Council* [1984] 3 All ER 468 para [307], which was summarised as follows [Emphasis Added]:

"Whether it is probable that a reasonable man not having been present at the meeting when the decision was made, and not knowing of the conclusion as to the actual fairness of it but knowing of the existence and of all the terms of the contract, would think that there was a real likelihood that those provisions in the contract which required the administrative authority to use their best endeavours to obtain planning permission, had a material and significant effect on the planning committee's decision to grant the permission".

[49] The test there was established. The planning committee had exercised discretion provided by the statute, which is equivalent with our law for approving a planning permission. Our law is provided in s 22(4) of the FTP Act, which reads as follows:

"The Commissioner, in dealing with an application for planning permission, shall take into consideration such matters as are in his discretion expedient or necessary for purposes of proper planning, and in this connection, but without prejudice to the discretion of the Commissioner to deal with such application, the Commissioner shall, as far as practicable, have regard to:

- (a) the provisions of the development plan and where the local plan has not been adopted, the Comprehensive Development Plan; and



(b) any other material consideration:

Provided that, in the event of there being no local plan for an area and the Commissioner is satisfied that any application for planning permission should not be considered in the interest of proper planning until the local plans for the area have been prepared and adopted under this Act then the Commissioner may either reject or suspend the application".

[50] The Federal Court said that a reasonable person who was not present at the meeting approving the issuance of the development order, and not knowing of the actual fairness of the conclusion reached, but who was aware of the terms and conditions of the joint venture agreement between the YKL and the housing developer company is very likely to conclude that the contractual provisions which required DBKL to utilise its best endeavours to grant the planning permission for the development had a material and significant effect on the planning committee's decision to grant the permission.

[51] In *Perbadanan Pengurusan Trellises* the Federal Court said that there were additional material facts, that were considered: (a) the manner in which the alienation and the rezoning of the land use from 'open space for public use' to 'mixed development' was effected by the DBKL in favour of YKL; and (b) the presence of the power of attorney given by YKL to the developer had the effect of the housing developer being an agent for the applicant.

[52] The relevant paragraphs of the judgment in *Perbadanan Pengurusan Trellises* are as follows:

[313] Therefore, applying the test in *Steeple* namely that in the eyes of a reasonable person who was not present at the meeting and did not know the actual fairness of the decision reached, the facts here taken collectively warrant the conclusion that there was a real likelihood that the provisions in the JVA which required, *inter alia*, Yayasan to use its best endeavours to obtain planning permission, did have a material and significant effect on the Datuk Bandar as an institution, to grant the planning permission. This means that the exercise of discretion was not independent, fair or in accordance with the law.

[316] By contrast, the test in *Steeple*, requires the adjudicator or the court to 'step back' as it were, and assess, on an objective basis, whether the notional fair-minded member of the public could reasonably entertain suspicion or an apprehension of bias, even if the court is satisfied that there was no bias in fact.

[53] The adoption of the reasonable apprehension or suspicion of bias test brings with it the question: (i) who is a fair-minded member of the public; and (ii) what knowledge should be imputed on such a person. The Federal Court provided the answer in the following words:



[321] In response to the second question, namely, what is the knowledge to be imputed to this fair-minded member of the public, the answer is that he is taken to know of all matters, whether in fact known or available to the public or not, which are in evidence at the trial.

[323] In the context of the present appeals, therefore, when applying the test, the entire factual matrix of the Datuk Bandar's involvement should be assumed to be known to the public for the purposes of applying the test to ascertain whether it was in a position of a conflict of interest or bias.

[54] In applying the foregoing test, the Federal Court said that the provisions in the joint venture agreement requiring the YKL to assist in the succouring of the development order when the DBKL is a trustee of YKL would be a fetter on the discretion conferred in s 22(4) of the FTP Act. Such fetter, a fair-minded person would regard as being likely to have a material and significant effect on the outcome of the decision in question.

[55] The question before me is whether the test in *Steeple* has been satisfied. Applying the test, I found that the test was not satisfied and therefore the ground of conflict of interest and/or bias is not made out. My reason is as follows.

[56] There is a critical distinction which sets *Perbadanan Pengurusan Trellises* apart from the instant case. The distinction is this. In *Perbadanan Pengurusan Trellises*, there was an exercise of discretion by DBKL to depart from the KL Structure Plan, and therefore, the exercise of discretion under s 22(4) of the FTP Act gave rise to the issue of conflict of interest and/or bias. However, the Federal Court had also held that once the KL Structure Plan has come into force, it has the force of law and requires 'slavish compliance' in relation to statutory development plans. In this regard, the following paragraph of the judgment is instructive [Emphasis Added]:

[167] Continuity, control, and regulation of town planning in the Federal Territory is achieved when a development plan is gazetted and given the force of law. This is the only intention of Parliament that can reasonably be inferred from the fact that Parliament is going one step further than the English provisions. It therefore follows that, having the force of law, 'slavish compliance' is required in relation to statutory development plans, as set out in the FT Act, including the KL Structure Plan.

[57] In applying the test, the knowledge that is imputed on a fair-minded member of the public includes the fact that the law requires the 'slavish compliance' of the KL Structure Plan, which does away with the discretion conferred under s 22(4) of the FTP Act. The DBKL has no discretion but to approve the planning permission according to the KL Structure Plan. Therefore, the fetter imposed on the YWP by the provisions of the joint



venture agreement is neutralized, and to a fair-minded such a provision would have no effect on the issuance of the granting of the development order. The development order will be granted if the application complies with the conditions of the KL Structure Plan. As observed above, there is no evidence that the conditions of the KL Structure Plan were not complied with.

[58] Similarly, the granting of the development order based on the KLCP 2020 is not an exercise of discretion. The application for the development order is either in conformity with the KLCP 2020 or it is not. The DBKL has no discretion in the matter. The BDKL must approve if the application for the development order is in conformity with the KLCP 2020. Conflict of interest and/or bias does not arise where the DBKL acts in a purely mechanical manner.

[59] In the context and the facts and circumstances of the instant case, the ground of conflict of interest and/or bias fails.

Conclusion

[60] For the above reasons, the application for judicial review is dismissed.

