

Administrative Law Issues in Challenging Land Acquisitions

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Introduction

Compulsory land acquisitions of alienated land by State Authorities had, in the past, been challenged on several grounds. A few have ended well for the dispossessed landowners, especially where the challenges have been grounded on inadequacy of compensation, failure or neglect to comply with procedures, and inordinate delay by the Land Administrator in completing the proceeding, but the great majority of these challenges have ended in dismal failure.

Case law to date shows that challenging land acquisitions on the ground of *mala fide* (bad faith) had, for the most part, ended badly for the landowners. The courts have consistently held that mere suspicion of bad faith on the part of the State Authority is not sufficient. There must be cogent proof of such bad faith, which under the circumstances, can be very difficult for the owners to adduce in court.

This short commentary is focussed on some of these leading cases, explaining why they did not end well for the landowners. It then considers whether the conclusion of these same cases would have been any different if the lawyers acting for the landowners had resorted to certain basic principles of administrative law in their quest for justice.

Before going into that, however, a brief introductory background into the law is necessary.

Constitutional Safeguards

What every Land Administrator ought to

remember is that there are fundamental safeguards for every registered landowner in this country. These take the form of Article 13 of the Federal Constitution which states that "No person shall be deprived of property save in accordance with law" (Clause (I) and "No law shall provide for the compulsory acquisition or use of property without adequate compensation" (Clause (2).

That "law" (mentioned in Clause (I)) is of course the Land Acquisition Act 1960, in force since October 13, 1960. Over the last four decades, this law had changed in shape and size, substantially eroding whatever limited rights the landowner had enjoyed at the inception of that law. In this context, the term "law" refers not only to the "substantive" provisions of the law (which set out the rights and duties of each party) but equally (if not more important) to those procedural safeguards built into that law.

With regard to the "adequacy of compensation" as provided in Clause (2) of that Article, reference must be made to the First Schedule of the Act, which sets out in detail the acquired land's "market value" which the State Authority must pay to the dispossessed landowner. The First Schedule, too, had gone through several amendments, as a result of which the dispossessed landowner now will get less than what he would have received when the law first came into force on October 13, 1960.

To be fair to the legislators, not all the amendments had a negative impact on the landowners. As a result of numerous complaints against several past incidents of abuse, amendments were made to tighten up

existing procedures where land is to be acquired from X to be ultimately given to Y via the privatisation process, under section 68A of the Act. These amendments (introduced in 1966) had produced a positive result in putting an end to these abuses. More on this point later.

What should be emphasised at this juncture is that the paramount law regarding compulsory land acquisition is Article 13 of the Federal Constitution, not the Land Acquisition Act. The latter is merely the enabling statute under which the State Authority is empowered to acquire alienated land, but that power is constitutionally circumscribed and limited, not absolute in nature.

Purpose of Acquisition

Under section 3(1) of the Act (as it stands today), the State Authority can acquire any land which is needed -

- a. for any public purpose;
- b. by any person or corporation for the purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof; or
- c. for the purpose of mining, residential, agricultural, commercial, industrial, recreational purposes or any combination of such purposes.

Section 3(1) itself had a chequered history. It began in 1960 as simply section 3. The original paragraph (b) states "by any person or corporation undertaking a work which in the opinion of the State Authority is of public utility", before it was amended by the Land Acquisition (Amendment) Act 1991 (Act A804), in force since September 13, 1991, resulting in its present form.

Likewise, paragraph (c) originally states "for the purpose of mining, residential and industrial purposes" before it was enlarged in an amendment exercise in 1984 to include

agricultural and commercial purposes as well. Finally, under Amendment Act A999, paragraph (c) was enlarged again to attain its present form.

Thus, whilst the draftsman or author of the 1960 Act was contemplating compulsory land acquisition merely for three basic purposes (i.e. "public purpose", public utility, and the trinity of mining, residential and industrial purposes), under the present umbrella of the law, compulsory acquisition can be carried out for virtually any purpose dreamt up by the State Authority. Under the expanded law as it stands today, alienated land can be taken for any purpose, including commercial or recreational purposes, or for any economic purpose considered "beneficial" - even if to only part or a section of the public (and even though it may give rise to adverse effects to some other sections of the public).

Only paragraph (a) has retained its original form, but even here problems of interpretation have surfaced from time to time, as discussed below.

Scope and Meaning of "Public Purpose"

The term "public purpose" in paragraph (a) has eluded clarity and precision of meaning ever since the law came into force. One would have thought that since the Act has chosen not to give it any specific or precise statutory definition, the courts would judicially define or interpret it, thereby resolving any uncertainty as to its scope and meaning. Unfortunately, the local courts had consistently declined to do so, probably following suit the judicial trend in other jurisdictions, particularly India. In *S. Kulasingam & Anor vs. Commissioner of Lands, Federal Territory & Ors.* [1982] 1 MLJ 204, Hashim Yeop A Sani lamented that the "*The expression 'public purpose' is incapable of a precise definition ...*" but nevertheless declined to define or interpret it as the contesting parties in that case had

hoped for. He did say, however, that in determining the meaning of that phrase, "*it is best to employ a simple common test, that is, to see whether the purpose serves the general interest of the community.*"

Judicial reluctance amongst the local judiciary, as apparent in *Kulasingham* (above), reflected a similar judicial trend in India in the 50s. Consider, for example, the reluctance of the Indian court in *Bhagwat Dayal vs. Union of India*, AIR 1959 Punj. 544, as cited by O.P. Aggarwala in his authoritative work, "Commentary on the Land Acquisition Act - Compulsory Acquisition of Land in India", (1995) 7th edition, at page 101.

What the local judiciary might not have overlooked is that in 1984, the Indian statute in question (Land Acquisition Act 1894) had been amended. Any past uncertainty as to the meaning of "public purpose" in that country had been put to rest when the term (found in section 3(f) of the Indian Act) was defined to include -

- a. the provision of village sites, or the extension, planned development or improvement of existing village sites;
- b. the provision of land for town or rural planning;
- c. the provision of land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal thereof in whole or in part of lease, assignment or outright sale worth the object of securing further development;
- d. the provision of land for a Corporation owned or controlled by the state;
- e. the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local Corporation

owned or controlled by the state;

- f. the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government;
- g. the provision of land for any other scheme of development, sponsored by Government or with the prior approval of the appropriate Government, by a local authority;
- h. the provision of any premises or building for locating a public office.

In the light of the legislative development in India, what should have been done over here is that either the Parliament amends the 1960 Act to have the term "public purpose" defined in the light of local conditions and the prevailing circumstances, or failing that, the local judiciary should discontinue its past reluctance and start giving the term a clear and concise judicial interpretation.

It is strange that when Parliament considered it necessary, under the Amendment Act A999 (in force in 1996), to give a precise definition for "*public utility*", it declined to do so for "*public purpose*". Understandably, this state of affairs leads only to unhealthy and unwarranted speculation as to the reasons behind this continued legislative reluctance.

Procedure

Since challenges to land acquisition can be grounded on the Land Administrator's failure to comply with the procedures laid down under the 1960 Act, a brief explanation of the procedure involved is necessary.

A compulsory acquisition proceeding begins when a preliminary notice of intended acquisition under section 3 (in Form A) is published in the Gazette - see section 4. This notification of intended acquisition lapses if the Land Administrator fails to take the next step (making a section 8 declaration in Form

D) within 12 months. Pending that declaration under section 8, the State Director of Lands and Mines can authorise any officer or person, under written authority in Form B, to enter upon any land to do such work as may be specified - section 5. If any damage is caused by such entry, compensation must be paid to the landowner - section 6.

The Land Administrator is then required to prepare and submit to the State Authority a plan of the area of the land to be acquired and a list of such affected lands - section 7.

Where a declaration under section 8 has been made (in Form D), and subsequently published in the Gazette, that declaration becomes "conclusive evidence" that the scheduled land referred to therein "is needed for the purpose specified therein".

What should be remembered then is that time begins to run. An award under section 14 of the Act must be made within 2 years of this declaration. Failure to do so will render the entire acquisition proceeding null and void.

For the purposes of assessing the amount of compensation to be paid to the landowner, the Land Administrator is required to obtain information from the State Director of Town and Country Planning (who will in turn get the information from the local planning authority) as to whether the acquired land is within a local planning authority area, whether it is subject to any development plan, etc. Information so requested must be given within 2 weeks by the local planning authority to the aforesaid State Director, who will in turn pass it on to the Land Administrator. Failure to comply with this time-schedule, however, will not invalidate the land acquisition, as the information sought is only intended to assist the Land Administrator in determining the compensation.

Thereafter the Land Administrator is to commence proceedings for the acquisition of the land, by serving a notice (in Form E) and informing all interested parties regarding the enquiry which is to be held under section 12

of the Act.

At the end of that enquiry (during which the Land Administrator can summon and hear witnesses), the Land Administrator must make his award under section 14. This award must be in writing, in Form G. The award shall then be served on the relevant parties under section 16 (Form H). As said earlier, this award must be made not later than 2 years after the section 8 declaration has been published in the Gazette. When compensation has been paid, the Land Administrator can take possession of the land. Formal possession is taken by the Land Administrator serving a notice in Form K.

A landowner, whose land has been acquired under the Act, may choose to accept it, reject it, or accept it under protest (section 30). If the owner does not wish to accept it, the Land Administrator can make payment into court. If the compensation is accepted under protest by the landowner (who intends to refer the award to the High Court), the Land Administrator is required to release 75 per cent of the amount of the award, withholding the remainder until the final disposition of the case by the High Court - section 29A.

Time of Payment of Compensation

Section 29 of the Act states that after notice of the award in Form H has been served on the landowner, payment must be made "as soon as may be". In the past, the vagueness and lack of clarity of this phrase had led to several abuses where compensation was paid out to the dispossessed landowners after several years.

Under section 32 (revamped under Amendment Act A999), it is provided that if compensation is not paid to the landowners "on or before the due date", late payment charges at the rate of 8 per cent per annum must be paid. The expression "due date" has been defined to mean "the date of taking possession of the land" or a date three months after the service of the award under section 16 (Form H).

Whilst the law is now quite clear, we still

come across newspaper reports of landowners having to wait for a long time before the compensation was actually paid to them.

Challenging The Award/The Acquisition

For the dispossessed landowner, the most obvious ground or reason for challenging the land acquisition proceeding is that the compensation paid to him is not "adequate" in the context of Article 13 of the Federal Constitution, read together with the First Schedule of the 1960 Act. This challenge turns on the quantum of the award, and this will depend whether the High Court (which hears the case) is satisfied that the Land Administrator has taken into consideration all the factors in making up his award.

Apart from that, however, there are other grounds upon which the challenge can be made, and these will focus not on the quantum of the award but on the validity of the entire acquisition proceeding.

Going by case-law, the following grounds have been put forward by the dispossessed landowners to challenge the validity of the acquisition, with varying degrees of success

a. *Ultra vires* the Federal Constitution

In *Kulasingam vs. Commissioner of Federal Capital* [1982] 1 MLJ 204, the landowner challenged the validity of the acquisition proceeding on the ground that he was not given any pre-acquisition hearing. Abdooldader J held that unlike the position in India (which provides for such a procedure), the 1960 Act does not provide for such a hearing. On the question of whether such a denial of pre-acquisition hearing amounts to an infringement of the right to property as enshrined in Article 13 of the Federal Constitution, the Judge held that the legislature "can by clear words" exclude the principles of natural justice in the absence of specific constitution guarantees. The Judge noted that there is

"express provision in the Act for an inquiry and hearing in respect of the quantum of compensation payable but none with regard to the acquisition itself." In the circumstances, the challenge was dismissed.

b. Contrary to Article 13

In *Goh Seng Peow & Sons Realty Sdn Bhd vs. Collector of Land Revenue Wilayah Persekutuan* [1986] 2 MLJ 395, the applicant company became the registered owners of the acquired land on March 3, 1977. In September 1984, whilst in the process of developing the land into a housing estate, they were informed that their land had been compulsorily acquired. Their solicitors immediately wrote to the respondent for further information. The respondent subsequently forwarded to the solicitors copies of Forms E, F, G and H. All these forms named Goh Seng Chong and Goh Seng Peow as the registered proprietors instead of the applicant company.

The applicant company contended that the acquisition proceeding was illegal, null and void because as the registered owners of the land, they had no notice whatsoever of the purported acquisition proceeding and that the necessary notices and documents had not been duly served on them as required by law. The company argued that the acquisition proceeding not only contravened Article 13 of the Constitution but was also in breach of the rules of natural justice. L.C. Vohrah J held that the acquisition proceeding "had taken place contrary to the provisions of the Act and in breach of the fundamental rules of natural justice." Consequently, the acquisition proceeding was held to be null and void.

c. Breach of natural justice

Not all cases where the landowners alleged breach of natural justice ended

favourably for them. In some cases, such as *Ee Kim Kin vs. Collector of Land Revenue Alor Gajah* [1967] 2 MLJ 89, on the facts the challenge was dismissed. However, the challenge succeeded in *Lau Cher Hian vs. Collector of Land Revenue Muar* [1971] 1 MLJ 96, where Ong CJ (Malaya) said that “those in authority should have more tender regard for the fundamentals of fair procedure”.

d. Non-compliance with section 9(1) of the Act

In *Kulasingam vs. Commissioner of Federal Capital* [1982] 1 MLJ 204 (referred to earlier), the landowner also argued, in the alternative, that failure to comply with section 9(1) of the Act (which requires the Land Administrator to mark out the land and to make a note of the intended acquisition on the register document of title) vitiated the entire acquisition proceeding. Unfortunately for the landowner, both the trial judge and the Federal Court held that section 9(1) is only directory and not mandatory. In any case, the court found that the omission was subsequently rectified and the necessary notation was subsequently made on the register document of title. Consequently, the challenge on this ground was also rejected.

e. Mala fide

In *Syed Omar bin Abdullah Rahman Taha Alsagoff and Anor vs. Government of Johore* [1979] 1 MLJ 49, the respondent had acquired some 5,700 acres of land belonging to the appellant, for which only 2,000 acres were actually needed by the respondent for its Pasir Gudang port project. The remaining portion of the land was marked somewhat vaguely as being required for some “special purposes”. The appellant challenged the validity of the acquisition,

alleging that the land was in fact acquired for purposes other than those permitted under the Act. At the Privy Council, Viscount Dilhorne said that “in the absence of bad faith” (which had not been proved in the courts below), section 8(3) of the Act makes it “not possible” to challenge the validity of the acquisition merely by asserting that some of the land was not needed for the purposes stated in the section 9 declaration.

In *Yeap Seok Pen vs. Govt of Kelantan* [1986] 1 MLJ 449, another case which went up on appeal as far as the Privy Council, the appellant’s father ran a goldsmith’s business for 45 years in a rented shophouse in Kota Bahru. In 1979 the shophouse owner sold it to the appellant. In March 1980, when the instrument of transfer was presented for registration, the appellant was informed that there was some delay as the authorities were in the process of determining whether the appellant was a native of Kelantan. In July 1980, the transfer was registered. Three months later, in October, the Kelantan Government published a section 8 declaration in the Gazette stating that the shophouse was needed for the purposes of office and commercial space for the Kelantan Foundation. The appellant challenged the acquisition on several grounds, including mala fide.

In the proceedings before the Federal Court, Suffian LP considered the submission by the appellant that the real reason of the acquisition was not that the property was needed by the Kelantan Foundation, but that it was to prevent the property from falling into the hands of a non-Malay purchaser, even though the appellant is a native of Kelantan. Expressing sympathy for the appellant, and agreeing with her that the Kelantan Foundation “could easily build on the land alienated to it or buy or rent one of

the properties to be built by the State Economic Development Corporation”, the Federal Court nevertheless held that “the fact that other properties were available is not enough to prove that the State Government had acted mala fide when it acquired this property.”

On further appeal to the Privy Council, Lord Griffiths held (rejecting the appeal) that “bad faith is an exceedingly serious allegation to make and she who makes it has a heavy burden to discharge the onus of proving it”. Mere suspicion is not enough.

f. Unconscionable and unmeritorious conduct

In *Stamford Holdings Sdn Bhd vs. Kerajaan Negeri Johor & 4 Ors* [1998] 2 AMR 997, the appellant company owned some 8,500 acres of agricultural land in Johor. In 1984, the appellant applied to the first respondent for approval to develop part of the land (1,788 acres) but failed to obtain the necessary approval, even after waiting for 4 years. The appellant then approached the third and fourth respondents for their assistance, as the latter had indicated to the appellant that they could procure the necessary approvals from the first respondent. They also alleged that they had direct links with the second respondent, who was in control of the first respondent. After a series of meetings and negotiations between the appellant and the third and fourth respondents, the necessary approvals were granted by the first respondent to the appellant.

The third and fourth respondents thereafter approached the appellant to jointly develop the remaining 6,600 acres. A series of meetings and negotiations took place, but the parties failed to reach agreement on crucial issues such as shareholding and the sale price of the 6,600 acres. According to

the appellant, if the parties cannot agree on the terms put forward by the third and fourth respondents, the appellant's land would be compulsorily acquired. In December 1992, a notification of intended acquisition under section 4 was issued. However, it lapsed on December 31, 1993.

The parties thereafter resumed negotiations, but when these talks failed, compulsory acquisition commenced for the second time. The appellant then filed proceedings in court, contending in their statement of claim that the whole acquisition proceedings were an act of bad faith, namely, that they were an act of vengeance against the appellant for not submitting to the second, third and fourth respondents, and that therefore the acquisition was void and inoperative.

The respondents countered by filing their application to strike out the appellant's writ and statement of claim on the ground that there was a failure to disclose a reasonable cause of action. In the meanwhile, none of the respondents had filed their defence to the appellant's claim.

On April 14, 1995, the Johor Bahru High Court struck out the appellant's claim against all the respondents on the ground that it did not disclose any reasonable cause of action. The appellant then appealed to the Court of Appeal. On January 6, 1998 the Court of Appeal allowed the appellant's appeal and ordered the case to go to full trial.

In its judgment, the Court of Appeal said that “acquisition proceedings may be challenged on the ground of mala fide or bad faith.” The court added that “So long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out.”

The court also noted that the facts “as stated in the statement of claim ... clearly

show the unconscionable or unmeritorious conduct of the respondents. At least these facts are, in the absence of any defence filed, assumed true, stand un rebutted and would constitute a good cause of action against the respondents.”

Administrative Law Issues

All administrative actions and quasi-judicial decisions can be challenged by means of judicial review on anyone or more of the following grounds

- a. Denial or breach of natural justice;
- b. Ultra vires.

There are two separate elements of natural justice - one, the right to be heard (which means the right to be informed and to make representations before any decision is made as affecting one's interest) and two, the rule against bias. The decision of L.C. Vohrah J in *Goh Seng Peow & Sons Realty Sdn Bhd vs. Collector of Land Revenue Wilayah Persekutuan* [1986] 2 MLJ 395 (mentioned above) is an example of land acquisition being successfully challenged on the ground of breach of natural justice.

With regard to ultra vires, recent development in the realm of administrative law has expanded this doctrine to include the following aspects -

- a. ultra vires includes both substantive as well as procedural ultra vires;
- b. abuse of discretionary powers, such as actions done in bad faith (*mala fide*), taking into consideration extraneous factors or failing to take into consideration relevant factors, improper motive, unreasonable or irrational (referred to as “Wednesbury unreasonableness”), procedural unfairness, inordinate or unreasonable delay.

In *Kulasingam* (above), the Federal Court held that failure to comply with section 9(1) of the Act does not result in vitiating the land acquisition proceeding because the court considered that provision to be merely directory and not mandatory. With respect, it is submitted if administrative law principles have been fully considered by the court (procedural ultra vires), such failure to comply with an important provision of the Act should make the acquisition proceeding null and void.

With regard to *Syed Omar* (above), it is submitted that if principles of administrative law have been fully considered, the court might reach a different conclusion. In *Sydney Municipal Council v. Campbell* [1925] AC 338 PC, the council had statutory power to acquire land compulsorily for purposes of road widening, road improvements and carrying out any “improvements” or “remodelling” of any part of the city. The council decided to acquire a piece of land for purposes of road widening and another (larger) area for purposes of carrying out improvements to the city. It was later discovered that the primary objective of the council was to acquire as much land as possible for future capital appreciation, with a view to bringing more income to the city rather than for the statutory purposes of carrying out improvements or remodelling. In the circumstances, the Privy Council held that its action was in breach of its discretionary powers and should be restrained by the courts from carrying it out.

In *Syed Omar*, it is conceivable that the 3,700 acres (not immediately identifiable as part of the Johor Port project and marked vaguely for some “special purposes”) was acquired by the State Authority for future capital appreciation. If the decision in *Sydney* had been fully considered, it is possible that the court might have allowed the challenge by the landowner.