Judicial Review: The Case Chong Chung Moi @ Christine Chong V The Government Of The State Of Sabah & Ors

1.0 Facts of the Case

The case Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007] 5 MLJ 441 is a judicial review case on the compulsory acquisition of land owned by the applicant. The parties to the case are applicant Chong Chung Moi @ Christine Chong, the owner of a land in the town of Telipok, Kota Kinabalu, the respondents are the Government of the State of Sabah as first respondent, Sabah Electricity Sdn. Bhd. (SESB) which is Sabah's electrical company as the second respondent, and the third respondent is the responsible concessionaire for the power plant project. The judicial review was heard in the presence of the Court of Appeal judge, then Judicial Commissioner, Yang Arif Datuk Dr. Haji Hamid Sultan bin Abu Backer, at the High Court of Kota Kinabalu on June 5, 2007. There are 64 cases referred to, and 8 statutes used for the argument.

The dispute is about a piece of land owned by the applicant that has been compulsorily acquired by the Government of Sabah for the purpose of building a power plant. The applicant find herself dissatisfied with the compulsory acquisition, and raised her right to property, and that the Government of Sabah, through SESB (which is owned by the Tenaga Nasional Berhad and the State of Sabah) had abused their powers by acquiring her land. The action of acquiring the land by the Government of Sabah was believed done for the benefit of the concessionaire, and not SESB, which, the applicant believes to be done not for the benefit of the people. The applicant also believed that the Government of Sabah should never had acquired the land for the benefit of SESB and the concessionaire.

The situation between the respondents goes as follows: The Government of Sabah acquired the said land for SESB, which is a hybrid corporation, owned by Tenaga Nasional Berhad which is under Khazanah Nasional Berhad (Malaysia's sovereign wealth fund), and the Government of the State of Sabah. SESB with the concessionaire entered into a private purchase agreement where the power plant was to be constructed by the concessionaire under the 'build, operate, and transfer' scheme which will be sold to SESB after 21 years at the price of RM10.

2.0 Issue of the Case

The issue raised by the applicant, in this case, was whether the Government of Sabah had abused their powers by acquitting the applicant's land, which is said to be not in line with Section 3 of the Land Acquisition Ordinance.

This had been epitomized by the first respondent, that the issues were that the land was acquired by the government and was enjoyed and benefitted by the third respondent which is a commercial corporation and that the land acquisition was made mala fide.

3.0 Applicant's Argument

The applicant sought for an order of certiorari to revoke the acquisition of the land, and an order of prohibition against the second respondent and any party related to the second respondent from entering and performing any type of work on the said land. This is because the applicant finds that the acquired land was used in mala fide, and not for the benefit of the public, rather for the benefit of the third respondent.

The applicant submitted to the Court that the land is protected under Article 13 of the Federal Constitution, where it is her right to own property. The applicant made it clear that she believes that the Government of Sabah should never acquire her land, and that the acquisition of her land at Telipok was made in mala fide, as they abused their powers for the third respondent to enjoy its benefit to build a power plant. The applicant raised that it is the responsibility of the concessionaire to acquire the land, not the Government of Sabah nor SESB. She raised that the Government of Sabah had misused the provisions of the Land Acquisition Ordinance specifically Section 3.

4.0 Respondents' Arguments

The first respondent, the Government of the State of Sabah, argued that what they had done was as according to the law. There was no procedural mistakes nor allegations against the first respondent, other than the validity of Section 2 of Land Acquisition Ordinance, where it defined the term public purpose. There was not much argument put forth by the first respondent, other than to have reiterated their stand that the acquisition was done for the public and for the betterment of the public. The first respondent referred the case Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd , where it emphasizes the existence of SESB in the discussion.

The second respondent, Sabah Electricity Sdn Bhd (SESB), argued that they, as a hybrid corporation, is indeed a company that was incorporated by the country, and its sole purpose is to provide electricity to Sabah and the Federal Territory of Labuan. They reaffirmed that they are a valid party to the agreement, and they are needed in order for the power plant erected by the third respondent to be functioning. They also reaffirmed that the acquisition of the land should never be a matter of conflict in this situation, as all three respondents are important and part of the agreement, and that the end goal of the acquisition of the land is for the public, and not personal gains. This was referred to the decided case of Lau Koh Sing @ Lau Kok Sing v The Sabah State Government & Ors , where it strongly affirmed that what happens on the land acquired should not be a disturbing matter, instead it is the outcome from the acquisition that matters, which in this case, is providing electricity.

The third respondent holds that though they are a concessionaire and is a limited share company who is not incorporated by the government and have no connections or so ever, it does not mean they have no rights to work on the acquired land. This is because, there is no expressed mention of any independent contractors to do any work on the acquired land. They also argued on the emphasis of them constructing a project in the light of public purpose by referring to several cases. The test in the case of S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors defines what makes a project for public purpose and public interest. The counselor to the third respondent made a remark towards the applicant, where there is no facts and materials to apply for a leave to the court.

The third respondent also contended that the applicant did not fulfill three grounds to a judicial

review, namely illegality, irrationality, and procedural impropriety as laid down in R Rama Chandran v The Industrial Court of Malaysia & Anor . The third respondent submitted to the Court to examine the applicant's application for this judicial review based on the principle from the case of Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association which the applicant must prove its application to be fulfilled, rationale, and substantial to form a prima facie.

The applicant was believed to had made negotiations to sell the said piece of land to the third respondent. It was also proven from her affidavits that the negotiation happened during the acquisition. Section 6 of the Land Acquisition Ordinance provides that the applicant is entitled to fair and adequate compensation, and if she is dissatisfied may bring the matter to the Judge of the High Court. There were no complaints for inadequate compensation, thus making it believable that her compensation was just and inadequate, and that her order of certiorari and prohibition had no substantial evidences.

5.0 The Ratio Decidendi and Obiter Dicta

Hamid Sultan JCA (then JC) finds that there are two important matters to be put into the spotlight: judicial review as a means of check and balance under separation of powers and the need and importance of acquiring land.

Hamid Sultan JCA delivered a 13 pages explanation on judicial review. He elaborately explained the importance of upholding fairness and justice, and that the needed added emphasis on public purpose and land acquisition as a way to better the public's living condition.

Hamid Sultan JCA mentioned that what the applicant did was a waste of resources, and in figurative sense is an insult to the remedies given to the public on the importance of having a judicial review. Yang Arif also reasoned that the applicant did not fulfil any substantial matters and has no locus standig to put forth an order of certiorari and prohibition. He strongly believed that what the applicant wanted was to receive monetary gains and not for the public's purpose. It was clear to him of the intentions of the applicant. The arguments put forth by the applicant should at least have a bona fide grievance, and that it will at least illustrate her interest in keeping the public's purpose in check. The applicant's application had halted an important project which will have benefited the public. Such actions are thoughtless and had shown the true colours of the applicant.

Hamid Sultan JCA in his reasonings explained that in order to bring a judicial review against the acquisition of land, a person must prove the lines, the least, that the acquisition was false and is used for personal interests. Many cases were referred by him in explaining the importance of acquiring land for the purpose of the public. He believed that as long as the definition of Section 3 of the Land Acquisition Ordinance is satisfied, public purpose is fulfilled and no questions of bad intentions should be made, unless proven.

Hamid Sultan JCA held that the applicant's application for certiorari and prohibition is dismissed, but with costs. He agrees with the arguments put forth by the respondents, that the applicant had no requirements to apply for such remedies. He mentioned that most applications for judicial reviews or public interest litigations when dismissed should never award the respondents' costs. However, in this case, due to displeasing, infuriating and as a way to

demean a remedy for the public to keep check and balance, a cost of RM20,000 had to be paid to each of the three respondents. This he believes will be a lesson for everyone to take responsibility and some thought for every action done, especially in applying for judicial review.

6.0 Opinion & Analysis

In my opinion, Hamid Sultan JCA delivered a clear and detailed judgement on the importance of acquiring land for the betterment of the public, and the emphasis on the operation of judicial review as to provide check and balance in the country. This judgement has been the reference for many cases, as it goes elaborate on the functions of a judicial review and the valid reasons and legality of acquiring land from a person for official purposes.

A recap on what the applicant contended was that the third respondent, the responsible concessioner, was disconcerted with how the concessioner, believed to be a private building company, is able to build on a land acquired by the government, in the notion of mala fide, where she believed that the government had abused its powers. This in a layman's understanding is enough to prove that the applicant wants the money, and not doing this for the public.

The respondents were sharp-witted and uphold their rights to the land. They made it clear that they had done no procedural mistakes, no mala fide in acquiring the land and no such ridiculous personal interest in building a power plant for the people of Kota Kinabalu. The agreement was made clear, that there is no personal gains in building it, and that SESB is the rightful owner of the power plant after 21 years, and is so as long as they operate and deliver electricity from the plant.

The 33 pages judgment focuses on the importance of having judicial review as a remedy for the public, and the importance on emphasizing public purpose. This case has been referred to academicians and other cases as well and proves that the 13 pages explanation of judicial review was elaborate and clear. Hamid Sultan JCA in his writing' Constitutional Oath, Rule of Law and Judicial Review: An Alternative Approach to Basic Structure Jurisprudence' mentioned this case as an important and radical reminder on the importance of judicial review. An article 'The Role of Judicial Review in Malaysia as a Tool of Check and Balance Under the Doctrine of Separation of Powers' explained how this case was important to the legal landscape. Not much scholarly articles and cases had referred this case for public purpose and land acquisition, but that does not deny the fact that Hamid Sultan JCA had delivered a splendid judgment.