

Malayan Law Journal Unreported/2012/Volume /Pengaruh Tanah Dan Galian Pulau Pinang & Ors v Tang Hak Ju - [2012] MLJU 73 - 11 January 2012

[2012] MLJU 73

## **Pengaruh Tanah Dan Galian Pulau Pinang & Ors v Tang Hak Ju**

**COURT OF APPEAL (PUTRAJAYA)**  
**SYED AHMAD HELMY, ALIZATUL KHAIR AND AZIAH ALI JJCA**  
**CIVIL APPEAL NO P-01-372 OF 2009**  
**11 January 2012**

*(Legal Advisor of the state of Pulau Pinang) for the appellant.*

*(Malik Imtiaz Sarwar) for the appellant.*

*(YC Wong) for the respondent.*

**Syed Ahmad Helmy JCA:**

### **BROAD GROUNDS OF JUDGMENT**

1. The appeal herein is against the decision of the learned Judge dated 24 November 2009 dismissing the Appellant/Defendants' appeal against the assessment of damages by the Deputy Registrar on the 21 September 2007.

2. The learned Judge at pages 39 to 41 of the Appeal Record specifically adverted in his grounds of judgment (the assessment judgment) to the fact that the Plaintiffs claim is confined to prayers 3,6,7 and 8 after having abandoned prayers 1 & 2 of the Originating Summons. It is also significant to note that the learned Judge only granted prayers 6(a)(b)(c) and (d) and dismissed prayers 3,7 and 8 - see pages 610 and 810 of the Appeal Record - hence the assessment was proceeded upon the four heads of claim as per prayers 6(a)(b)(c) and (d) (described as prayers 6(i) (ii) (iii) and (iv) in the assessment judgment.

3. In essence the foundation of the Respondent/Plaintiffs claim for damages is based on negligence and hence the applicable principles regulating assessment are tortious principles.

4. Our conclusion aforesaid is derived from the following factual matrix:-

The thrust of the Respondent/Plaintiffs case was that section 380 of the National Land Code did not apply and had been wrongly invoked, resulting in unlawful deprivation of land within the meaning of Article 13 of the Federal Constitution. The Respondent in advancing their claim had contended that there had been mala fides and malice on the part of the Appellants and in that regard asserted that the Appellant's are liable for misfeasance in public office. The learned Judge in his judgment dated 23.12.2005 (the "**Liability Judgment**") (**Record of Appeal ("RA") Jilid 9 pages 797-824**) -

- a did not find for the Respondent on the '*misfeasance in public office*' cause of action;
- b did not declare that the title had been wrongfully cancelled.
- c did not conclude that there had been an Article 13 of the Federal Constitution contravention;  
and
- d found that the Appellants had acted in an unfair, unjust and arbitrary manner in invoking section 380 of the National Land Code and had thereby acted contrary to the legitimate expectations of the Respondent to quiet possession of the Land -

See: *Tang Hak Ju v Pengarah Tanah dan Galian Pulau Pinang & 2 Ors MT1-24-151- 2005* (unreported judgment) annexed to the Appellants' Bundle of Authorities.

From the foregoing, it follows that the learned Judge had in effect found that the Appellants had been negligent in alienating the Land to the Respondent. On that footing, the learned Judge made the Order dated 4.10.2005 appearing at pages 794 to 797 of the Appeal Record for assessment of damages under the following heads of claim:-

- a Loss of profits (Prayer 6(i);
- b Wasted expenditure (Prayer 6(ii);
- c Loss of goodwill (Prayer 6(iii); and
- d Liability for sub-contractor's expenses (Prayer 6(iv).

The Registrar assessed damages as follows:

- a Loss of profits at RM28,248,000.00 (**See Record of Appeal Jilid 1, pages 44 to 51, paragraphs 26 to 38**);
- b Wasted expenditure assessed at RM658,271.00 (**See Record of Appeal, Jilid 1, page 52, paragraphs 40**);
- c Loss of goodwill assessed at RM450,000.00 (**See Record of Appeal, Jilid 1, pages 52 to 53, paragraphs 41 to 42**); and
- d Interest at 8% from the date of the accrual of the cause of action (**See Record of Appeal, Jilid 1, page 53, paragraph 43**).

5. In our view the learned Judge misdirected himself on the basis of assessment when there was undue and wholly inappropriate reliance on the principles of law derived from authorities in respect of damages for breach of contract as opposed to tort. The misdirection relates to the error in not approaching the assessment by reference to the core principles of compensation in tort, namely causation and foreseeability and the heads of damage in tort. This is discernable from the failure of the learned Judge to address his mind to the foreseeability and causation arguments and duty to mitigate advanced by the Appellant - see page 81 Appeal Record Jilid 2.

6. In the circumstances in the light of the erroneous approach adopted by the Deputy Registrar and affirmed by the learned Judge the misdirection is self evident which warrants appellate interference. Hence in relation to the assessment for loss of profits, the amount as assessed by the Deputy Registrar is hereby set aside and the matter remitted back to the Deputy Registrar for assessment to be based on tortious principles of foreseeability, causation and heads of damage.

7. On the assessment of damages under the head of wasted expenditure we agree with learned appellants' Counsel that pre-alienation expenses is not recoverable. Hence the pre-alienation expense of RM 176,486.00 is to be deducted from the sum of RM658,271.00 awarded and the amount assessed is accordingly reduced to RM481,785.00.

8. On the head of damage for loss of goodwill there appears to be insufficient evidence for an award to be made. From the factual matrix the learned Judge failed to take into consideration the Valuation of Goodwill Report prepared by the Director of The Valuation Department Mr. Lau Wai Seang. The learned Judge adopted a simplistic approach by dismissing the valuation on the grounds that he is not an accountant and merely relied on the evidence of Tan Yen Wooi the Chartered Accountant called by the Respondent and there is absence of any explanation as to why he accepted the evidence of one over the other. Hence on the facts and circumstances of the case we find that the Respondent have failed to establish loss of goodwill and hence the award under this head is hereby set aside.

Interest at the rate of 8% per annum from date of accrual of the cause of action until full settlement as ordered by the Deputy Registrar is hereby affirmed.

Costs in the cause.