SYED NOOR AZMAN SYED MD KAMAL & ORS

v.

PENGARAH TANAH DAN GALIAN NEGERI PERAK & ORS

High Court Malaya, Taiping
Noor Ruwena Md Nurdin J
[Originating Summons No: AB-24NCVC-10-01-2025]
25 August 2025

Land Law: *Malay reservations — Sale and transfer of Malay reserve land to non-Malay company — Plaintiffs seeking cancellation of registration of Company as proprietor and for land to be vested/registered in their names as owners or trustees by virtue of them being Malays born in State, and living in district where land situated — Whether plaintiffs had locus standi to file suit — Whether Malay reserve land could be held by non-Malays — Whether circular issued by Ketua Pengarah Tanah dan Galian had force of law*

The subject matter of the dispute was a piece of Malay Reserve Land ('MRL') in Mukim Kota Lama Kanan, Daerah Kuala Kangsar, Perak, which was purchased by Agro VB Sdn Bhd ('the Company') through a successful bid at a court-ordered auction involving Pantel Enterprise Sdn Bhd ('Pantel Enterprise'), a Malay-owned company that had been wound up. The directors of the Company were Malaysians of Chinese descent. The plaintiffs commenced the instant action, seeking, *inter alia,* a declaration that the 2nd defendant cancel the registration of the Company as the proprietor of the land, and that they be vested with and registered as owners or trustees of the said land free from any encumbrances. The plaintiffs claimed that by virtue of them being Malays born in the State of Perak, professing the Muslim faith, and living in the district of Kuala Kangsar, where the land was situated near their homes, they had the *locus standi* to bring this action against the defendants who had allegedly failed to protect the interests of the Malays. Reliance was placed by the plaintiffs on *Nik Elin Zurina Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* ('*Nik Elin*') in support of their proposition that they were interested parties who should protect the interests of the Perak Malays. The plaintiffs also relied on *Wan Ismail & Anor v. Musa Mat Jani & Anor* ('*Wan Ismail*') in support of their argument that the Company, being a non-Malay company, did not have the right to hold the said land. The plaintiffs further contended that the 'Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan Bilangan 16/2022' ('Circular') issued by the Ketua Pengarah Tanah dan Galian on 'Cadangan Pemantauan Terhadap Pemindahan Saham Sesebuah Syarikat Melayu Yang Memiliki Atau Memegang Kepentingan Ke Atas Tanah Rizab Melayu Atau Pegangan Melayu Kepada Pemilik Bukan Melayu Serta Tindakan Susulan

Oleh Pendaftar Atau Pentadbir Tanah' had the force of law. The defendants, in response, contended that the plaintiffs were neither proprietors nor neighbours of the said land and were not adversely affected by the holding of the land by the Company, and therefore did not have any right to commence the instant suit. It was argued that, at best, the plaintiffs were 'busybodies'. It was also submitted by Senior Federal Counsel that there was such a thing as 'non-Malay holding' within the MRL as provided by the Enakmen Rizab Melayu (Perak) FMS Cap 142 ('ERM').

Held (dismissing the plaintiffs' suit):

(1) *Nik Elin* was distinguishable from the instant case, which was not a 'public law suit' in the sense of a 'public-interest litigation', namely, a judicial review or constitutional challenge as that case was premised on. Based on the reliefs sought, the plaintiffs' action was not in the nature of a 'public law suit' but an attempt to gain a valuable piece of land purchased by the Company without giving it a chance to defend itself. (para 11)

(2) By virtue of art 8 of the Federal Constitution ('Constitution'), all persons were equal before the law and entitled to the equal protection of the law. In this regard, the plaintiffs had breached the rule of natural justice, ie the *audi alteram partem* rule, by not naming the Company as a defendant in the suit, and by arbitrarily dismissing any right of the Company to be heard simply by averring that it was a non-Malay company that did not have a right to hold the said land. (para 16)

(3) *Wan Ismail,* being a decision of the High Court, was not binding on the Court in this instance and was distinguishable on its facts. (para 17)

(4) Any attempt to deprive the Company of the said land must be in accordance with the provisions of art 13 of the Constitution, including allowing the Company to be a party to the suit so that it could be heard. Article 89(1A) of the Constitution, which was relied on by the plaintiffs, did not state that the Company need not be given the right to be heard. On this ground alone, the plaintiffs' application ought to be dismissed. (paras 19-20)

(5) Land was a matter within State jurisdiction, and States had absolute powers to make State laws and policies pertaining to land matters. The prior written approval of the Menteri Besar should be obtained before any transfer of the land could be effected. In this regard, without the prior written approval of the Menteri Besar, the registration of the land in the name of Syarikat Ching & Lim Estate Sdn Bhd, which the Company was previously known as, could not have been allowed by the Land Administrator. Accordingly, the provisions of the National Land Code ('NLC') and the Kaedah-Kaedah Tanah Perak 1966 had been complied with. (para 21)

(6) There existed such a concept as a 'non-Malay holding' within the MRL because on a construction of the ERM – particularly ss 2, 7, 8 and 19 – not all land within a Malay reservation was necessarily a Malay holding. In this regard, *Tan Hong Chit v. Lim Kin Wan*, which concerned the transfer of a non-Malay holding to a non-Malay after the creation of a Malay reservation, strengthened the argument that there was such a thing as a non-Malay holding. (paras 25-29)

(7) On the facts, the said land was gazetted as MRL in 1954, long after the enactment of the ERM in 1913 (and amended in 1933). Hence, the plaintiffs' contention that Pantel Enterprise, being a Malay company and having been the registered proprietor of the land, automatically rendered the land a Malay holding could only stand if the land was gazetted as MRL between 1 January 1914 and 14 December 1933. No sufficient evidence was adduced to support the plaintiffs' claim that the land was a Malay holding. (paras 36-38)

(8) In the event the finding that the land was a non-Malay holding was wrong, the Registrar of Land and the Land Administrator should refer the question to the Court under s 419 of the NLC and not by way of the instant suit, which was initiated by the plaintiffs to void the transaction and subsequent registration by the Company. Order 1A and/or O 92 r 4 of the Rules of Court 2012 could not be invoked to cure any irregularities as they went to the substantial merits of the case rather than form. (para 40)

(9) The Circular was not made under any enabling provision of the law, although references were made therein to the NLC, and therefore it was merely an administrative document to be used as guidance by the Land Administrator in such dealings. Accordingly, the Circular was not binding on the Court. (paras 42-43)

Case(s) referred to:

Bebe Sakimah Mohd Asrof v. Pendaftar Hakmilik Negeri Perak [2021] 1 MLRH 700 (refd)

David v. De Silva [1934] AC 106 (refd)

Dr H K Fong Brainbuilder Pte Ltd v. Sg-Maths Sdn Bhd & Ors [2020] 6 MLRA 588 (folld)

Edwin Thomas v. F&N Beverages Marketing Sdn Bhd & Anor [2017] 2 MLRH 629 (refd)

Humaira Ratnadewi Syarifudin v. Sapiah Hassan & Ors [2022] MLRHU 1174 (refd)

Nabors Drilling (Labuan) Corporation v. Lembaga Perkhidmatan Kewangan Labuan [2018] 2 SSLR 201 (refd)

Nik Elin Zurina Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan [2024] 3 MLRA 1 (distd)

Syarikat Macey Berhad v. Nightingale Allied Services & Ors [1994] 3 MLRH 890 (refd)

Tan Hong Chit v. Lim Kin Wan [1964] 1 MLRA 535 (refd)

Wan Ismail & Anor v. Musa Mat Jani & Anor [1989] 3 MLRH 53 (distd)

Legislation referred to:

Federal Constitution, arts 8(1), 13, 89(1), (1A), (6), Ninth Schedule

Malay Reservations Enactment (Perak) FMS Cap 142, ss 2, 6, 7, 8, 16(i), 17, 19

National Land Code, ss 4(1), (2), 89(a), (b), 214(1), (2), 340, 341(2)(c), 419

Rules of Court 2012, O 1A, O 92 r 4

Other(s) referred to:

Intisari Enakmen Rizab Melayu, https://pintu.instun.gov.my/pdf/tanah/6_-_AKTA_LAIN/9-ENAKMEN_REZAB_MELAYU/3-NOTA/INTISARI_ENAKMEN_RIZAB_MELAYU.pdf, pp 12, 14

Counsel:

For the plaintiffs: Norazura Mohamed Mokhtar; M/s Azura Mokhtar & Low

For the defendants: Ainul Wardah Shahidan; State Legal Advisor's Office

JUDGMENT

Noor Ruwena Md Nurdin J:

Introduction

[1] These grounds of judgment have been prepared in respect of this court's decision to dismiss Encl 1, which was filed by the appellants (plaintiffs at the High Court) on 17 January 2025. Hearing was conducted on 5 May 2025, and the decision was delivered on 4 June 2025. Dissatisfied with the court's decision, the plaintiffs filed the Notice of Appeal on 1 July 2025. The parties will be referred to as they were at the High Court.

[2] The plaintiffs in Encl 1 prayed for the following reliefs:

(i) deklarasi bahawa hak milik HSM 214 No. PT 953, Mukim Kota Lama Kanan, Daerah Kuala Kangsar, Negeri Perak Darul Ridzuan (selepas ini dirujuk sebagai "Tanah tersebut") adalah merupakan Tanah Rizab Melayu dikenali sebagai 'Southern Karai Malay Reservation' menurut Warta Kerajaan Negeri Perak [F.M.S. No. 355], The Malay Reservation Enactment bertarikh 25 Mac 1954;

(ii) deklarasi bahawa pemilikan dan ketuanpunyaan hak milik bagi Tanah tersebut oleh CHING & LIM ESTATE SDN BHD (No. Syarikat: 1045237-P) (kini ditukar nama kepada AGRO VB SDN BHD) (selepas ini dirujuk sebagai "Syarikat tersebut") melalui Perserahan No.: 00SC58444/2013 bertarikh 18 Disember 2013 iaitu Perakuan Jualan Oleh Mahkamah (Borang 16F) dimana Syarikat tersebut bukan merupakan entiti Melayu adalah diisytiharkan sebagai tidak sah dan batal menurut s 19 Enakmen Rizab Melayu (Perak) [F.M.S. Cap. 142];

(iii) supaya defendan kedua hendaklah membatalkan pendaftaran hak milik Tanah tersebut atas nama syarikat tersebut dalam tempoh tujuh (7) hari dari tarikh Perintah ini;

(iv) supaya plaintif pertama, plaintif kedua dan plaintif ketiga hendaklah diletak hak dan didaftarkan sebagai tuan punya berdaftar atau didaftarkan sebagai pemegang amanah di atas suratan hak milik bagi tanah tersebut bebas daripada apa-apa bebanan;

(v) Defendan kedua hendaklah menerima, mendaftar dan mengeluarkan suratan hak milik tanah tersebut di atas nama plaintif pertama, plaintif kedua dan plaintif ketiga dalam tempoh empat belas (14) hari dari tarikh Perintah ini;

(vi) deklarasi bahawa syarikat tersebut adalah merupakan pihak yang menduduki Tanah tersebut secara salah dan dikehendaki keluar serta menyerahkan milikan kosong bagi tanah tersebut kepada plaintif-plaintif dalam tempoh tiga puluh (30) hari daripada tarikh Perintah ini;

(vii) bahawa syarikat tersebut tidak dibenarkan memasuki, memungut hasil, memusnahkan tanaman dan/atau bangunan dan mengeluarkan apa-apa barang daripada tanah tersebut;

(viii) bahawa defendan pertama, defendan kedua dan/atau defendan ketiga adalah dihalang untuk dan/atau melakukan tindakan membatalkan Perisytiharan Tanah Rizab Melayu ke atas tanah tersebut;

(ix) bahawa plaintif-plaintif diberikan kebebasan untuk memfailkan permohonan untuk relif sampingan (sekiranya perlu) untuk memberi efek kepada Perintah yang diberikan dalam permohonan ini;

(x) Kos; dan

(xi) Lain-lain relif, atau apa-apa perintah yang difikirkan adil, patut dan suaimanfaat oleh mahkamah Yang Mulia ini.

Cause Papers

[3] The Cause Papers filed by the parties were as follows:

a. Saman Pemula (encl 1) dated 17 January 2025;

b. Afidavit Sokongan (encl 2) affirmed by the 1st plaintiff on 9 January 2025;

c. Afidavit Jawapan (encl 4) affirmed by Khatiahazmim binti Rusdi for the defendants dated 19 February 2025; and

d. Afidavit Balasan (encl 5) dated 7 March 2025.

Facts Of The Case

[4] The case for the plaintiffs was as summarised in the alasan for the application and in their affidavits and submissions as follows:

(1) bahawa terdapat Warta Kerajaan Negeri Perak [F.M.S. No. 355], The Malay Reservation Enactment bertarikh 25 Mac 1954 yang menetapkan bahawa Tanah tersebut adalah merupakan Tanah Rizab Melayu — 'Southern Karai Malay Reservation';

(2) bahawa oleh kerana Tanah tersebut merupakan Tanah Rizab Melayu, maka CHING & LIM ESTATE SDN BHD (No. Syarikat: 1045237-P) (kini ditukar nama kepada AGRO VB SDN BHD) (selepas ini dirujuk sebagai "Syarikat tersebut") adalah terhalang dari segi undang-undang di bawah Perkara 89(6) Perlembagaan Persekutuan 1957 dan s 19 Enakmen Rizab Melayu (Perak) [Cap. 142] untuk didaftarkan sebagai tuan punya yang memiliki Tanah tersebut dan melakukan apa-apa urusniaga ke atas Tanah tersebut;

(3) akibat tindakan-tindakan secara berasingan dan/atau secara kolektif oleh defendan pertama, kedua dan/atau ketiga yang secara salah dan/atau khilaf dan/atau cuai dan/atau lalai yang telah membenarkan pindahmilik, pelupusan, pendaftaran dan pengeluaran hak milik ke atas nama Syarikat tersebut yang bukan merupakan entiti Melayu menurut Enakmen Rizab Melayu (Perak) [F.M.S. Cap. 142]; dan

(4) akibat tindakan-tindakan secara berasingan dan/atau secara kolektif oleh defendan pertama, kedua dan/atau ketiga yang secara salah dan/atau khilaf dan/atau cuai dan/atau lalai; ia adalah terjumlah kepada suatu penyalahgunaan kuasa dan kecuaian yang disengajakan terhadap orang-orang Melayu yang diwakili oleh plaintif-plaintif dan/atau DYMM Seri Paduka Baginda Sultan Perak dan/atau Ruler of the State in Council.

[5] The subject matter of this dispute is a piece of land known as HSM 214 No. PT 953, Mukim Kota Lama Kanan, Daerah Kuala Kangsar, Negeri Perak Darul Ridzuan (hereinafter referred to as "the said Land"), which is a Malay Reserve Land (MRL) of the 'Southern Karai Malay Reservation' according to the State of Perak Government Gazette [F.M.S. No. 355], The Malay Reservation Enactment dated 25 March 1954. The size of the said Land is a massive 335 acres (135.5695 hectares). From the brief facts, the said Land has been purchased by a company now known as Agro VB Sdn Bhd (referred to as "the said company") through a successful bid during an auction. Previously, it was known as Ching & Lim Estate Sdn Bhd. By a court order for sale due to foreclosure, the said Land was sold to the said company by Pantel Enterprise Sdn Bhd, which was a Malay-owned company that has been wound up (refer to exh SNA-6 of encl 5).

[6] The plaintiffs claimed that by virtue of the fact that they are Malays, born in the state of Perak Darul Ridzuan and of Muslim faith, living in the district of Kuala Kangsar where the said land was situated nearby their homes, therefore as Malays they have *locus standi* to bring this action against the Government agencies named as defendants above whom have allegedly failed to protect interests of the Malays. The plaintiffs sought, *inter alia*, a declaration that the 2nd defendant cancel the registration of the said company as proprietor of the said Land within 7 days of the date of the court order and that the plaintiffs be vested with and registered as the registered owner or as trustee of the said land free from any encumbrances.

[7] Nevertheless, it was glaringly obvious that they had not named the said Company (owner of the said Land) as a defendant in this suit. From the SSM search conducted (exh SNA-2 of encl 2), the court gathered that the business of the company is "Growing of durians and other agricultural crops. Wholesale and trading of fruits and other agricultural related products". The directors of the said company are Malaysians of Chinese descent. As it is not brought as a party in this suit, the court has no details in regard to the sale of the said Land from the original owner, Pantel Enterprise Sdn Bhd, to the said company, other than that the court order for sale was registered via No. Perserahan 00SC58444/2013 on 18 December 2013 (exh SNA-1 of encl 2).

[8] In regard to the complaint that the said company was not named, the plaintiffs simply replied that since their holding of the said Land was illegal, therefore, they need not be made a party to the suit.

Evaluation And Findings Of The Court

[9] There were 3 issues to be considered by this court as follows:

i. whether the plaintiffs have *locus standi* to bring the action before the court;

ii. whether Malay Reserve Land may be held by a non-Malay under the Enakmen Rizab Melayu (Perak) F.M.S. Cap 142 ("ERM"); and

iii. whether the Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan Bil. 16/2022 dated 8 August 2022 (referred to as "the said Circular") issued by Ketua Pengarah Tanah dan Galian on "Cadangan Pemantauan Terhadap Pemindahan Saham Sesebuah Syarikat Melayu Yang Memiliki Atau Memegang Kepentingan Ke Atas Tanah Rizab Melayu Atau Pegangan Melayu Kepada Pemilik Bukan Melayu Serta Tindakan Susulan Oleh Pendaftar Atau Pentadbir Tanah" have force of law.

i. Whether The Plaintiffs Have *Locus Standi*

[10] The defendants contended that the plaintiffs did not have any right to commence the action as they were not proprietors nor neighbours of the said Land, nor were they adversely affected by the holding of the said Land by the said company. They were, at best, "busybodies". The plaintiffs argued the case of *Nik Elin Zurina Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* [2024] 3 MLRA 1 in support of their proposition that they were interested parties who shall protect the interests of the Perak Malays. I refer to the following paragraphs of the majority judgment in *Nik Elin*'s case *(supra)*:

> "[19] The premise of the respondent's first preliminary objection is that the petitioners have no *locus standi* to file this petition or that in any event, the present petition is academic or abstract. The respondent contends that the

petitioners are busybodies who have no basis to initiate this case in that the petitioners are not even adversely affected by any of the impugned sections. In addition, there is no real dispute or controversy between them and the respondent.

[20] In response, the petitioners suggest that they either do, or intend later on in life, to reside in Kelantan. The petitioners suggest that they have properties in Kelantan and do have some semblance of a life there. They are therefore residents of Kelantan and Enactment 2019 is a law that can be used against them. Their argument suggests, at its core, that the impugned sections exist as law, and can be enforced against them. They therefore maintain that they have a basis to challenge the impugned sections.

[21] It is our view that the petitioners do have *locus standi* to maintain the present petition which is neither academic nor abstract. Our reasons are as follows.

[22] *Locus standi* refers to the standing or right of the person to sue. The most recent decision by this court on this issue is that in *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 4 MLRA 114 ('*Taman Rimba*'). In that case, the court endorsed the minority judgment of Eusoffe Abdoolcader SCJ in *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 MLRA 178 ('*Lim Kit Siang*'). **Summarising the analysis therein, *locus standi* ought to be relaxed as much as possible to allow any public-spirited person to file a public lawsuit provided that he has some interest in the matter**.

[Emphasis Added]

[11] Nevertheless, with due respect, this court viewed that the plaintiffs' argument was flawed because this was not a "public lawsuit" in the sense of a "public-interest litigation", namely a judicial review or a constitutional challenge, such as that *Nik Elin*'s case *(supra)* was premised upon. The present case may be distinguished from the above based on the facts of the case. What the plaintiffs intended to do was to "privately" obtain the property of the said company by contending that it was not a Malay company and deprive it of the said Land by relying on s 19 of the ERM, which states:

"Section 19. Dealings contrary to Enactment void.

(i) all dealings or disposals whatsoever and all attempts to deal in or dispose of any Malay holding contrary to the provisions of this Enactment shall be null and void and no rent paid in pursuance of any such dealing disposal or attempts shall be recoverable in any court."

[12] The plaintiffs sought to be made registered owners or trustees of the said Land after gaining hold of it and also an injunction to prevent the said company from "memasuki, memungut hasil, memusnahkan tanaman dan/atau bangunan dan mengeluarkan apa-apa barang daripada Tanah tersebut". From the reliefs sought, this court opined that the action brought by the plaintiffs was not in the nature of a "public lawsuit" but was an attempt to gain a valuable (massive) piece of land bought by the said company without

giving it a chance to defend itself, under the guise of a "public lawsuit". The plaintiffs were "busybodies" who had no interest in filing the suit. All the interested parties in the case of *Nik Elin (supra)* were named or given the chance to intervene in that suit, as can be seen in the representation therein (refer to the Federal Court judgment), unlike the present case. Only the relevant authorities were named as parties here. So how can the plaintiffs claim that it was a "public lawsuit"?

ii. Whether Malay Reserve Land May Be Held By A Non-Malay Under The Enakmen Rizab Melayu (Perak) F.M.S. Cap 142 ("ERM")

[13] The court will now move on to the second issue above. Section 340 of the National Land Code (NLC) provides:

> 340.(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent:
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law.

[14] It appears that the plaintiffs had moved the court under s 341(2)(c) of the NLC (to grant the reliefs sought), but this was not stated in the intitulement of encl 1. The plaintiffs contended that the said company's registration as owner of the said land was void because the defendants could not explain why, only after 2 attempts, the registration of the said Land was allowed by the 2nd defendant. The plaintiffs submitted that:

> "8. Berkenaan isu alasan mengapa Perserahan Kali Pertama dan Kedua bagi Borang 16F yang dilakukan perserahan kepada defendan 2 ditolak pada 22 Disember 2011 dan 22 Februari 2013 telah gagal dijawab atau diberikan apa-apa alasan oleh defendan-defendan. Defendan hanya mengakui kandungan Carian Rasmi ekshibit "SNA-3" yang dikemukakan dan selanjutnya meletakkan beban pembuktian ke atas plaintif-plaintif bagi membuktikan mengenai perserahan-perserahan yang dilakukan oleh defendan.
>
> 9. Begitu juga tiada sebarang penjelasan atau alasan diberikan oleh defendan-defendan mengapa Perserahan Kali Ketiga bagi Borang 16F pada 18 Disember 2013 telah diterima/diluluskan oleh defendan kedua.
>
> 10. Memandangkan tiada penjelasan diberikan oleh defendan, maka plaintif-plaintif menyatakan bahawa defendan kedua sebenarnya mempunyai pengetahuan bahawa TRM tersebut tidak dibenarkan untuk didaftarkan di atas nama Syarikat Tersebut kerana ia bukan merupakan Syarikat berstatus "Melayu" berdasarkan kepada dua (2) penolakan perserahan dilakukan oleh defendan kedua pada 22 Disember 2011 dan 22 Februari 2013".

[15] In my view, this was too simplistic a conclusion by the plaintiffs (para 10) that the said land was an MRL to suit their purpose and without considering the evidence of the 1st defendant (on its behalf and for the defendants) in encl 4 para 12, which may be summarised as follows:

(i) that the said Land within an ERM was owned by Syarikat Ching & Lim Estate Sdn Bhd on a non-Malay holding;

(ii) the registration of Borang 16F (Perakuan Jualan oleh Mahkamah) under No. Perserahan 00SC58444/2013 in accordance with the provisions of the NLC and Kaedah-Kaedah Tanah Negeri Perak 1966;

(iii) that the plaintiffs did not have any interest and right to apply for the said Land to be vested and registered in their names as Trustees; and

(iv) the guarantee in art 13 of the Federal Constitution.

[16] Continuing from the above, the plaintiffs dismissed the defendants' averments by relying on art 89(1 A) of the Federal Constitution. Before I go on to consider the issue, it must be borne in mind that art 8(1) provides that

all persons are equal before the law and entitled to the equal protection of the law. In this regard, this court opined that the plaintiffs had breached the rule of natural justice, i.e. *audi alteram partem* rule, by not even naming the said company as a defendant in this suit. They had arbitrarily and nonchalantly dismissed any right of the said company to be heard simply by averring that it was a Non-Malay company that did not have a right to hold the said Land and relied on the case of *Wan Ismail & Anor v. Musa Mat Jani & Anor* [1989] 3 MLRH 53. This was despite the 1st defendant's averment that the said Land was a non-Malay holding and not a Malay holding within the MRL.

[17] The case of *Wan Ismail & Anor v. Musa Mat Jani & Anor (supra)* was decided by the High Court of Temerloh, and the decision did not bind this court. Additionally, the case may be distinguished on its facts (which I have reproduced from the law report) as follows:

> "The 1st Defendant had applied for a mining land from the State of Pahang and this application was approved on 28 February 1985 involving an area measuring some 35 acres ("the said area"). On 13 March 1985 the 1st defendant and the plaintiff entered into an agreement ("the agreement") whereby the plaintiff undertook to mine for gold ore in the said area, either as agent or as contractor for the defendant. Under the terms of the agreement, the 1st defendant was to grant an option to the plaintiff to take a sub-lease of the said area. A mining certificate was granted to the 1st defendant on 3 February 1986.
>
> Due to some problems between the parties, the 1st defendant gave notice to terminate the agreement. The plaintiff applied for and obtained an injunction to restrain the defendants from interfering with the plaintiff's rights under the agreement. The 1st defendant applied to set aside the injunction on the ground, *inter alia*, that the agreement was illegal and therefore *void ab initio* since it was contrary to the Malay Reservations Enactment. The application was allowed and the plaintiff now appeals."

[18] It is pertinent to note that the provisions of the Pahang State Malay Reservations Enactment ("the said Enactment") then were similar to the Perak ERM. Reliance was also placed on s 19 of the said Enactment to deny the plaintiff thereof its right to mine for gold ore on the 1st defendant's land. The learned High Court Judge stated:

> "I was satisfied that from the evidence adduced before me that the defendants had conclusively proved that the said mining area was part of a Malay Reserved Land vide Pahang Gazette Notification No. 171 dated 26 February 1987. **As my decision to allow the application to set aside the injunction against the defendants was solely persuaded by the provisions of the Malay Reservations Enactment, I did not find it necessary to dwell further on the merits of this case on other grounds**.
>
> Section 2 of the Malay Reservations Enactment makes provision for the definition of "Malay" with regard to both an individual and a corporate body. For a corporate body to be treated as a "Malay" for the purposes of the Enactment, the definition reads:

> For the purposes of the Enactment a company registered under the Companies Enactment shall if and so long as every member thereof is a Malay and the transfer of shares therein is restricted by the articles of association thereof to Malays be deemed to be a Malay...

Reading the above definitions I find that the plaintiff company cannot therefore be accepted as a "Malay". For ease of reference if I may also reproduce the other relevant provisions of the said Enactment and any other law relevant to this case. Section 2 of the Enactment also imports the definition of words and expression as contained in the Land Code and the provision reads:

> All words and expressions used in this Enactment which are defined in s 2 of the Land Code shall bear the meaning assigned to them by the said section.

(The Land Code referred to must mean the Land Code Cap 138 being one of the F.M.S. revised laws and so is the Malay Reservations Enactment [F.M.S. Cap 142].) **Section 7 of the Enactment reads:**

> **No State land included within a Malay Reservation shall be sold, leased or otherwise disposed of to any person not being a Malay:**
>
> > **Provided that the Ruler in Council may alienate State Land within a Malay Reservation to any body corporate or company specified in the Third Schedule, which the Ruler in Council may, by order published in the Gazette, add to, delete from or amend, from time to time:**
> >
> > > **Provided further that any State land thus alienated shall be deemed to be a Malay holding.**

Section 19 of the Enactment reads:

> **(i) All dealings or disposals whatsoever and all attempts to deal in or dispose of any Malay holding contrary to the provisions of this Enactment shall be null and void and no rent paid in pursuance of any such dealing disposal or attempt shall be recoverable in any Court**.
>
> **(ii) No action for breach of contract shall lie in respect of any dealing in or disposal of or any attempt to deal in or dispose of any Malay holding contrary to the provisions of this Enactment**.

The definition of the word "dealing" as found in s 2 of the Land Code Cap. 138(2) reads:

> "Dealing" with its grammatical variations and cognate expressions means any transaction of whatever nature by which land is affected under this or any previous Land Enactment or Registration of Titles Enactment, and includes a caveat.

This definition must therefore be given effect to the word "dealing" in the Malay Reservations Enactment.

> I find that the purport of the agreement of 13 March 1985 was to sub-lease to the plaintiff company the mining lease granted to the 1st Defendant. **The plaintiff company not being a "Malay", is legally prohibited to "deal" or even "attempt to deal" with a Malay holding and any such deal or attempt to deal would be null and void (s 19(i) of the Malay Reservations Enactment Cap 142)**. Also as the plaintiff company is not a body gazetted under the Third Schedule as required by s 7 of the Enactment I am also of the view that the transaction as undertaken within the terms of the agreement of 13 March 1985 cannot legally be recognised. Similarly the power of attorney dated 27 November 1986 granted by the 1st defendant in favour of one Lim Seng @ Lam Kam Seng, the Managing Director, of the plaintiff company cannot also be recognised in law.".
>
> [Emphasis Added]

[19] The plaintiffs, rather simplistically, have applied the above case to the present case without considering that the said company in the present case had purchased the said Land in an auction and the property was a Non-Malay holding (this point will be elaborated later). Hence, it was my view that any attempt to deprive the said company of the said Land must be in accordance with the provisions of art 13 of the Federal Constitution, including by allowing the said company to be a party in this suit so that it could be heard. The plaintiffs argued that art 89(1A) of the Federal Constitution was applicable in this regard. The provision states:

> "(1a) Any law made under Clause (1) providing for the forfeiture or reversal to the State Authority, or for the deprivation, of the ownership of any Malay reservation, or of any right or interest therein, on account of any person, or any corporation, company or other body (whether corporate or unincorporate) holding the same ceasing to be qualified or competent under the relevant law relating to Malay reservations to hold the same, shall not be invalid on the ground of inconsistency with art 13."

[20] The plaintiffs have misconstrued art 89(1A) of the Federal Constitution, which merely provides that the provision would not be invalid in an inconsistency challenge under art 13 of the same. It is not stated in art 89(1A) that the respondent (i.e. the said company) need not be given the right to be heard. It would be a dangerous precedent set by this court should it allow the plaintiffs the reliefs sought without giving the said company a chance to explain how it came about having ownership of the said Land. The defendants may only explain on registration of the said Land, but they would not be in a position to tell the court regarding the circumstances of the sale of the said Land via a court-held auction. This information must come from the said company itself and no one else. On this ground alone, I am entitled to dismiss the plaintiffs' application. However, if I am wrong to conclude that the said company should have been made a party to the suit, I will deal with the merits of the case, ie the issues of a Malay holding and Non-Malay holding, which was the crux of the case.

[21] It is trite that land is a State matter and States have absolute powers to make state laws and policies pertaining to land matters (Ninth Schedule, Federal Constitution). A perusal of exh SNA-1 in encl 2 showed that the prior approval of the Menteri Besar was to be obtained first before any transfer of the said Land may be effected, i.e. "Tanah ini tidak boleh dipindah milik atau dipajak tanpa kebenaran Menteri Besar". The prior written approval of the Menteri Besar was required before any transfer or lease could be made, regardless of the fact that alienation had been done. It is this court's considered view that, without the prior written approval of the Menteri Besar, the registration of the said land to Syarikat Ching & Lim Estate Sdn Bhd could not have been allowed by the Pentadbir Tanah. Accordingly, the provisions of the NLC and Kaedah-Kaedah Tanah Negeri Perak 1966 had been complied with, despite only after the third attempt.

[22] The plaintiffs contended that the said Land's status was a Malay holding because it was once held by Pantel Enterprise Sdn Bhd, which prior to being wound-up, its directors and shareholders were of the Malay race therefore, Pantel Enterprise Sdn Bhd was a "Malay" within the meaning of the ERM (without any further evidence to substantiate their claim). The defendants contended that the said Land was not a Malay holding and therefore it was the prerogative of the State Government to reject or accept the presentation (for registration in 2013). We now look at the various provisions of the laws that the parties have cited. Below are the relevant provisions of the NLC and ERM for ease of reference:

National Land Code (Revised 2020)

Savings

4.(1) Nothing in this Act shall affect the past operation of, or anything done under, any previous land law or, so far as they relate to land, the provisions of any other law passed before the commencement of this Act:

Provided that any right, liberty, privilege, obligation or liability existing at the commencement of this Act by virtue of any such law shall, except as hereinafter expressly provided, be subject to the provisions of this Act.

(2) Except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of:

(a) any law for the time being in force relating to customary tenure;

(b) any law for the time being in force relating to Malay reservations or Malay holdings;

...

Conclusiveness of register documents of title

89. Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence:

(a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and

(b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document.

What may be transferred, and restrictions on exercise of powers

214.(1) Subject to subsection (2), the following shall be capable of transfer under this Act:

(a) the whole, but not a part only, of any alienated land;

(b) the whole, but not a part only, of any undivided share in alienated land;

(c) any lease of alienated land;

(d) any charge; and

(e) any tenancy exempt from registration.

(2) The powers conferred by subsection (1) shall be exercisable in any particular case subject to:

(a) any prohibition or limitation imposed by this Act or any other written law for the time being in force;

(b) any restriction in interest to which the land in question is for the time being subject; and

...

Malay Reservations Enactment FMS [Cap 142]

Section 2. Interpretation.

In this Enactment unless the context otherwise requires:

"Malay", means a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion;

"Malay holding" includes

(a) any registered interest of a Malay as proprietor or co-proprietor in any alienated land included in a Malay Reservation duly declared and gazetted under the provisions of this Enactment:

Provided that no such interest shall be deemed to be a Malay holding until there shall have been registered against the register document of title for such land a requisition in the Form A in the First Schedule as provided in s 6.

[Am. by Ord. 25/54]

(b) any registered interest of a Malay as proprietor or co-proprietor in any alienated land included in a Malay Reservation duly declared and gazetted under the provisions of the Malay Reservations Enactment, 1913.

...

Section 7. Restriction on alienation.

No State land included within a Malay Reservation shall be sold, leased or otherwise disposed of to any person not being a Malay:

* Provided that the Ruler in Council may alienate State Land within a Malay Reservation to any body corporate or company specified in the Third Schedule, which the Ruler in Council may, by order published in the Gazette, add to, delete from, or amend, from time to time:

And provided further that any State Land thus alienated shall be deemed to be a Malay holding.

* As applicable to Perak, Pahang & Selangor.

[Perak En No. 3/62; Pahang En No 1/62 & Sel. En No. 15/61]

Section 8. Restriction as to transfer, charges and leases.

(i) Subject to the provisions of subsection (ii) and of ss 16 and 17 no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay, and not memorandum of transfer, charge or lease in contravention of this section shall be capable of registration in any Land Office or Registry of Titles.

(ii) If any land included in a Malay Reservation is sub-divided and sub-divisional titles registered therefor and one or more of the proprietors of such land are Malays and one or more of the proprietors of such land are persons who are not Malays and there are simultaneously presented to the proper registering authority cross-transfers of such sub-divisional titles, such cross-transfers may notwithstanding anything contained in subsection (i) be registered by such proper registering authority.

[Subs. by G.N. 1149 of March 3rd, 1941, which was incorporated by G.N. 1186/39]

[23] Section 7 restricts ownership of MRL to Malays and any body corporate or company specified in the Third Schedule, which the Ruler in Council may, by order published in the Gazette, add to, delete from, or amend, from time to time. It is provided further that any State Land thus alienated (in accordance

with s 7) shall be deemed to be a Malay holding. The plaintiffs submitted that since the said company had not been Gazetted in the Third Schedule, thus the company may be deprived of the said Land as it had not been exempted from the operation of s 7.

[24] However, in the interpretation part, s 2 defines what is a "Malay holding", which, in my opinion, the definition is not exhaustive. The defendants submitted that the said land was held under a "Non-Malay holding", which is allowed under the law even for MRL. The law is silent in regard to the definition of "Non-Malay holding" under s 2 of the ERM. Thus, we look at s 8 which provides for circumstances in regard to transfers, charges and leases. Subsection (1) states that "subject to the provisions of subsection (ii) and of ss 16 and 17, no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay...". In subsection (ii), it states that if any land included in a Malay Reservation is sub-divided and sub-divisional titles registered therefor and one or more of the proprietors of such land are Malays and one or more of the proprietors of such land are persons who are not Malays and there are simultaneously presented to the proper registering authority cross-transfers of such sub-divisional titles, such cross-transfers may notwithstanding anything contained in subsection (i) be registered by such proper registering authority.

[25] Based on the above provisions' construction, I have to agree with the submissions of the learned Senior Federal Counsel that there is such a thing as a "Non-Malay holding" within the MRL as provided by the ERM, but not because of the construction of subsection (ii) in the way the defendants contend. In interpreting a provision of the law, the court uses the plain meaning rule and construes the construction of the particular section in accordance with legislative intent. Section 8 is not a difficult provision of the law. Subsection (i) prohibits a Malay holding land from being transferred, charged, leased, or otherwise disposed of to any person not being a Malay. This is the general rule. Then comes the exception in subsection (ii). Although it talks about cross-transfers (for registration purposes), the said subsection (ii) makes provisions for "any land included in a Malay Reservation which is subdivided and sub-divisional titles registered therefore where one or more of the proprietors of such land are Malays and one or more of the proprietors of such land are persons who are not Malays".

[26] Article 89(1) provides that "Any land in a State which immediately before Merdeka Day was a Malay reservation in accordance with the existing law may continue as a Malay reservation in accordance with that law until otherwise provided by an Enactment of the Legislature of that State...". The ERM was enacted in 1933, prior to Merdeka Day, and the Enactment has continued to be in operation to date. In my view, circumstances in which subsection (ii) may be applicable are such as when a Malay Reserve is

declared by the State, but the land has been subdivided before the declaration is made and therefore, cross-transfers of sub-divisional titles involving Malay and Non-Malay proprietary ownership may be registered by the registering authority, despite the provision of subsection (i). The Privy Council in *David v. De Silva* [1934] AC 106 held that where there is ambiguity as to the meaning of a disabling statute, the construction which is in favour of the freedom of the individual should be given effect to. The question that needs to be addressed by the court is why, in a Malay Reserve Land, there is a provision for "Malay holding"? Does that mean by default there is a "Non-Malay holding"?

[27] The plaintiffs submitted the case of *Bebe Sakimah Mohd Asrof v. Pendaftar Hakmilik Negeri Perak* [2021] 1 MLRH 700, where the decision of the High Court in Ipoh to allow the plaintiff (a Non-Malay) the declaration she sought on the ground of non-compliance with s 6 of the ERM i.e. no endorsement, it was a Malay holding land in the title. The plaintiffs submitted that the Court of Appeal subsequently overturned the decision of the High Court, but there were no written grounds provided by the Court of Appeal to date. The High Court of Ipoh held that not all Malay Reservation land is necessarily a Malay holding, and this was followed by the High Court of Kuala Lumpur in the case of *Humaira Ratnadewi Syarifudin v. Sapiah Hassan & Ors* [2022] MLRHU 1174. The decisions of the High Courts are not binding on this court, but they are persuasive unless there is a conclusive written ground by the Court of Appeal, with due respect, to enable this court to determine what was the reason for overturning the Ipoh High Court's decision in *Bebe Sakimah*'s case *(supra)*. I agree with the submissions of the learned Senior Federal Counsel that there is such a thing as a Non-Malay holding within an MRL because on construction of the ERM, in ss 2, 7, 8 and 19, I subscribe to the views that not all Malay Reservation land is necessarily a Malay holding.

[28] I refer to the case of *Syarikat Macey Berhad v. Nightingale Allied Services & Ors* [1994] 3 MLRH 890 where the High Court stated:

> "On the issue of the Malay Reservation, the applicants' solicitors have explained that the transfer of the said land could be effected to a non-Malay even with such an endorsement. This is for reason that under s 8 of the Malay Reservation Enactment FMS Cap. 142, which is applicable to Negeri Sembilan, Pahang, Perak and the Federal Territories, (hereinafter referred to as the said Act) states that, "no Malay holding shall be transferred, charged leased or otherwise disposed of to any person not being a Malay...". The term "Malay holding" is interpreted in s 2 of the Act as, "any registered interest of a Malay as proprietor or coproprietor in any alienated land included in a Malay Reservation...". **This means that in order for s 8 to apply, the land in the Malay Reservation must have first of all, a Malay registered proprietor or co-proprietors. If there has been no such Malay registered proprietor or co-proprietors in such a Malay Reservation land before, then there should be no prohibition in the transfer of such land to a non-Malay**.

> This view seems to be similar to that adopted by the Federal Court in *Tan Hong Chit v. Lim Kin Wan* [1964] 1 MLRA 535. It was held in this case that when a piece of land in the Malay Reservation area is registered in the name of a non-Malay who had acquired the land prior to the creation of the Malay Reservation, the non-Malay can transfer the land to any non-Malay, and any subsequent transfer or charge to a non-Malay can be affected without obtaining the approval of the Ruler-in-Council. Though the decision in this case was based on the Kelantan Malay Reservation Land Enactment of 1930, while our present case involves the Malay Reservation Enactment FMS Cap. 142, it is the opinion of this court that the underlying principle is still the same.".
>
> [Emphasis Added]

[29] The case of *Tan Hong Chit v. Lim Kin Wan* concerned the transfer of a Non-Malay holding land to a Non-Malay after the creation of a Malay Reservation land in which their land was situated. That case, in my view, strengthened the argument that there is such a thing as a Non-Malay holding within MRL.

[30] Before moving on to the last issue for consideration in this case, I refer to a publication by Institut Tanah dan Ukur Negara (INSTUN) available on its website on the Internet, which is titled "*Intisari Enakmen Rizab Melayu*" (https://pintu.instun.gov.my/pdf/tanah/6_- _AKTA_LAIN/9-ENAKMEN_REZAB_MELAYU/3- NOTA/INTISARI_ENAKMEN_RIZAB_MELAYU.pdf).

[31] It is a guidebook on the ERM and contains some history of the ERM, which I found quite useful while doing research on this topic. I refer to p 12 of the said publication as follows:

> "6.0 PEGANGAN MELAYU
>
> Kecuali sekatan yang berkaitan dengan pelupusan tanah kerajaan atau di Wilayah Persekutuan Kuala Lumpur, yang terletak di dalam Kawasan Rizab Melayu kepada mana-mana orang bukan Melayu, kesemua bentuk sekatan yang dikenakan oleh ERM (NMB Bab 142), ERM Johor dan ERM Terengganu, memberi tekanan kepada hak milik Pegangan Melayu. Ertinya, mana-mana hak milik yang tidak tergolong ke dalam hak milik Pegangan Melayu masih boleh diurusniagakan dengan bukan Melayu ataupun sekatan yang dikenakan itu tidak terikat sekalipun kawasan tanah bagi hak milik-hak milik sedemikian termasuk ke dalam kawasan Rizab Melayu yang diisytiharkan dan diwartakan dengan sempurnanya di bawah peruntukan ketiga-tiga ERM yang berkenaan.
>
> Oleh yang demikian adalah penting bagi kita untuk mengetahui akan konsep Pegangan Melayu itu sendiri dan cara mana ianya dapat dilaksanakan supaya objektif mengadakan sesuatu sekatan itu tercapai sepenuhnya".

[32] The said publication then went on to discuss the interpretation of "Malay holding" in s 2 of the ERM. The conclusion is that a Malay holding land cannot be transferred, charged or leased to a Non-Malay as provided for in the various provisions in the ERM. Since the said Land was previously held by a Malay

company, the plaintiffs submitted that it was a Malay holding the land then. Subsequently, Pantel Enterprise Sdn Bhd was wound up and the said Land was auctioned, at which the said company successfully bid and purchased the property. At this point, I revert to *Bebe Sakimah*'s case *(supra)*, where the High Court analysed the ERM and stated the following important points in regard to a Malay holding land:

> "[48] Only State land included within a Malay Reservation which is alienated shall be deemed to be a Malay holding as provided by s 7 of the MRE but save for this, for land included in a Malay Reservation to be a Malay holding or to be deemed to be a Malay holding, the step of having to have it declared and gazetted by way of a requisition in Form A in the First Schedule is required.
>
> [49] Therefore, unless it is State land included within a Malay Reservation which is alienated or land which had already been duly declared and gazetted under the provisions of the Malay Reservations Enactment, 1913, s 6 MRE enjoins the Collector of the district in which any alienated lands are included in a Malay Reservation to present to the proper registering authority a requisition as prescribed in Form A in the First Schedule containing a list of all alienated lands declared to be in a Malay Reservation before it is to be treated as a Malay holding. It provides as follows:
>
> (i) Upon the publication in the Gazette of any notification comprising any declaration whereby any alienated lands are included in a Malay Reservation, the Collector of the district in which such lands are situate shall present to the proper registering authority a requisition in the Form A in the First Schedule containing a list of all alienated lands included in and affected by such declaration and requiring him to note in his registers of titles the fact of the inclusion of such lands in such Malay Reservation.
>
> (ii) Upon the registration of any fresh document of title for any land included in any Malay Reservation, whether such land became included therein before or after the commencement of this Enactment, the Collector of the district in which such land is situate shall present to the proper registering authority a requisition in the Form A in the First Schedule, requiring him to note his register of title the fact on the inclusion of such land in such Malay reservation.
>
> (iii) Upon presentation of a requisition in the Form A in the First Schedule the proper registering authority shall make a memorial thereof upon every register document of title included therein.
>
> (iv) When any memorial has been made upon any register document of title for any land under the provision of subpara (iii) the proper registering authority shall by notice in the Form B in the First Schedule require the proprietor of such land or any other person in whose possession the issue document of title for such land may be to deliver the same and upon such delivery shall make on such issue document of title a like memorial as has been made on the register document of title for such land.
>
> (v) If it shall at any time be made to appear to the proper registering authority that:

(a) any register or issue document of title for any land included in any Malay Reservation declared under the provisions of Malay Reservations Enactment, 1913, has not been described with the words "Malay Reservation" as provided by s 12 of the said Enactment, or

(b) that in regard to any land included in a Malay Reservation declared under this Enactment no memorial has been made on the register or issue document of title of the fact that such land is included in such Malay Reservation.

he may present a requisition in Form A in the First Schedule and shall make a memorial thereof on such register or issue document of title. For the purpose of making such memorial on any issue document of title he may by notice in the Form B in the First Schedule require the proprietor or any other person in whose possession it may be to deliver the same.

(vi) Notwithstanding anything hereinbefore in this section contained the proper registering authority shall not make any memorial under this section on the register or issue document of title for any land which the sole proprietor is not a Malay or of which none of the co-proprietors are Malays.

(vii) When any such land or any undivided share in such land as is mentioned in subsection (vi) is transferred to a Malay the proper registering authority shall present a requisition in the Form A in the First Schedule relating to such land and shall thereupon take such action as is prescribed in para (v).

(viii) No fee shall be charged for the making of any memorial or the service of any notice under the provisions of this section.

(ix) Any person who wilfully fails to comply with the provisions of any notice which has been personally served on him under subsection (iv) or (v) shall be liable to a fine of one hundred dollars.".

[33] His Lordship in *Bebe Sakimah*'s case *(supra)* continued that:

"[63] A close reading of ss 6(i) and 2(a) of the MRE makes it clear that there is a three step process for land declared under Malay Reservation post the commencement of the MRE to be a Malay holding. The three steps are as follows:

(a) first step — A publication is made in the gazette making notification of the alienated lands that are included in a Malay Reservation;

(b) second step — the collector of the district in which such lands are situated shall then present to the proper registering authority a requisition in Form A in the First Schedule containing a list of all alienated lands included in and affected by such declaration to note in his registers of titles the fact of the inclusion of such lands in such Malay Reservation; and

(c) third step — The proper registering authority shall then make a memorial upon every register of document of title included in the lands declared as Malay Reservation.".

[34] The Ipoh High Court agreed with the plaintiff's submissions based on available evidence that there has been incomplete endorsement in breach of the provisions of s 6 of the MRE, by reason of the incomplete endorsement, the plaintiff cannot be said to have failed to carry out due diligence in (ascertaining the status) of the said property and that a mere endorsement of 'Pengisytiharan Rezab Melayu (Malay Reservation) is insufficient for the said property to be a Malay holding. It stated in para 81 that despite studying the 1928 Gazette Notification closely, the court was not able to discern the evidential nexus that the said property was part of the lands set out in the (Second) schedule listing the lands declared to be Malay Reservation. It said just because there is a mention of Mukim Lekir with the declared lands said to have an approximate area of 26,000 acres, did not prove that the said property is within the lands so described in the 1928 Gazette Notification. Thus, the issue was that the property had not been properly identified.

[35] The above 3 steps may also be applicable to the present case before this court. It was the contention of the defendants that the said Land was not a Malay holding land, therefore the prohibitions of transfer to a Non-Malay company did not apply. The court found some similarities in the case above in the application of s 16(i) of the ERM. I refer to the following paragraphs in *Bebe Sakimah*'s case *(supra)* in support of my views in the present case:

> "[82] **The court is also mindful that the said property is one sold by an encumbrancer pursuant to an order for sale and by reason of this, the provisions contained in s 16 of the MRE would be more relevant. Section 16(ii)(b) and (iii) of the MRE provides that a Malay holding subject to a sale by an encumbrance such as a charge is one within the meaning of s 2(a) of the MRE which would require the three-step process detailed above.**
>
> [83] The plaintiff had also pointed out (encl 2 BS7) that by way of a circular issued on 1 June 1976 the Director of Lands and Mines had advised all collectors on the provisions of s 2 of the MRE and for all of them to take immediate steps to ensure that the requirements of s 6(1)*(sic* — should be 6(i)) of the MRE are given immediate attention. Indeed, the circular entitled 'Surat Pekeliling Pengarah Tanah Dan Galian, Perak, Bil 6/76 carries this exhortation:
>
> > Adalah didapati masih banyak lagi tanah-tanah yang diwartakan sebagai Rizab Melayu mengikut Malay Reservation Enactment Cap 142 tidak mempunyai catatan mengikut s 6(1) (*sic* — should be (i)) enakmen tersebut. Dengan yang demikian tanah-tanah Rizab Melayu tersebut mengikut pengertian Malay Holding di atas tidak lagi boleh dianggap sebagai Malay Holding walaupun tanah itu sudah diwartakan sebagai Rizab Melayu dan dimilik oleh orang-orang Melayu. Ini bermakna semua urusan-urusan tanah yang diserahkan untuk pendaftaran boleh didaftarkan sekiranya tanah-tanah yang berkenaan tidak jatuh di bawah pengertian Malay Holding...

> Dengan ini Pemungut Hasil Tanah sekalian adalah dinasihatkan supaya menyemak semua tanah-tanah yang telah diwartakan sebagai Rizab Melayu dalam daerah *Bebe Sakimah Mohd Asrof v. Pendaftar Hakmilik Negeri Perak* [2021] 1 MLRH 700 at 724 masing-masing. Pemungut Hasil Tanah hendaklah menentukan iaitu bagi semua tanah Rizab Melayu yang diwartakan selepas tahun 1933 di bawah Malay Reservation Enactment Cap 142 tindakan untuk pendaftaran catatan di bawah s 6 hendaklah dijalankan sekiranya belum dijalankan...
>
> ...
>
> [85] **The encumbrancer in this case is Bank Islam Malaysia Bhd and from the title (encl 2 exh BS1), the encumbrance in the form of a charge was registered on 8 March 2003. The MRE came into force on 15 December 1933. As the charge was registered after the commencement of the MRE, the declaration and gazetting of the said property as Malay Reservation must be that done after 15 December 1933. It follows that the reliance by the defendant upon a declaration and gazetting of Malay Reservation land done on 25 May 1928, which is before 15 December 1933, is wholly misplaced as such declaration and gazetting would not come within both s 16(ii)(a) or (b) as to prohibit or restrict a non-Malay from buying the said property.**
>
> [Emphasis Added]

[36] In the present case, the said Land was gazetted as MRL in 1954, many years after the enactment of the ERM in 1913 (and amended in 1933). Therefore in my view, the plaintiffs' contention that due to Pantel Enterprise Sdn Bhd being a Malay company had been a proprietor of the said Land and automatically make it a Malay holding land pursuant to s 2(b), would only have a leg to stand on if the said Land was gazetted as a MRL between 1 January 1914 to 14 December 1933. Additionally, this court found that there was no information as to when the said Land was registered to Pantel Enterprise Sdn Bhd. The enterprise was incorporated in 1986, whereas the date of registration of title was stated as 18 February 1991 (exh SNA-1), but did not state who was the proprietor. The court cannot simply assume it was registered to Pantel Enterprise Sdn Bhd. In fact, there was no information from that company to assist the court on which encumbrancer (financial institution) it was charged to and when.

[37] Under s 16(i) of the ERM, it provides:

> (i) Subject to the provisions of subsection (ii), if any land included in a Malay Reservation is encumbered, such land may be sold at the instance of the encumbrancer under the provisions of any law in force for the time being.
>
> (ii) No such land shall be sold, to any person not being a Malay if at the date of the registration of the encumbrance the sole-proprietor or of such of the co-proprietors of such land was a Malay and:

(a) such land was at such date included in a Malay Reservation duly declared and gazetted after the commencement of this Enactment, or

(b) such land was at such date included in a Malay Reservation duly declared and gazetted after the commencement of this Enactment and the interest of such sole proprietor or of each of such co-proprietorship as the case may be was a Malay holding within the meaning of s 2(a).

[38] Without the evidence as I have stated above, the court could not make a positive finding if the said Land was a Malay holding as contended by the plaintiffs. The burden of proof is on the plaintiffs to prove their claims. However, although this was a contest of affidavits, I found that the plaintiffs did not have sufficient proof to support their claim that the said Land was a Malay holding land. The plaintiffs should have made the said company a party to this suit, for it may have all the necessary evidence to assist the court, which the plaintiffs did not have. Interestingly, it is noted that the 2nd defendant in the present case was also the defendant in *Bebe Sakimah*'s case *(supra),* who in the present case, held on to the contention that the said Land was a Non-Malay holding land.

[39] I found that what the Ipoh High Court alluded to in regard to the 3-step requirement (for land declared under Malay Reservation post the commencement of the MRE to be a Malay holding) was also discussed in the *Intisari Enakmen Rezab Melayu* publication by INSTUN as follows (p 14 onwards):

"Tafsiran (ii) ini sebenarnya lebih merujuk kepada hak milik-hak milik lama di mana kawasan tanahnya terletak di dalam kawasan Rizab Melayu yang diisytiharkan di bawah ERM 1913 dan hak milik-hak milik yang didaftarkan di antara 1 Januari 1914 hingga 14 Disember 1933. Pada masa ERM 1913 ini berkuat kuasa dahulu (dari 1 Januari 1914 hingga 14 Disember 1933) kesemua hak milik yang didaftarkan bagi mana-mana Rizab Melayu yang diisytiharkan di bawah ERM 1913 itu bukan merupakan hak milik Pegangan Melayu. Ianya boleh dikatakan sebagai hak milik Rizab Melayu sahaja. Sebagai hak milik Rizab Melayu kesemua sekatan yang dikenakan oleh ERM 1913 itu tetap terikat.

Walau bagaimanapun, satu keperluan terpaksa dilakukan terlebih dahulu iaitu pada tiap-tiap hak milik yang berkenaan hendaklah:

i) ditulis dengan jelasnya

ii) secara melintang

iii) di permukaan DHD

iv) dengan menggunakan dakwat merah

v) perkataan MALAY RESERVATION

> Tanpa penulisan (inscription) perkataan "Malay Reservation" hak milik sedemikian tidak terikat dengan segala sekatan yang dikenakan oleh ERM 1913 itu dahulu. ERM 1913 telah dimansuhkan mulai daripada 15 Disember 1933. Kesemua kawasan Rizab Melayu yang diisytiharkan dahulu terus menerus wujud.
>
> Begitu juga dengan ribuan hak milik yang didaftarkan di antara 1 Januari 1914 hingga 14 Disember 1933 itu masih berkuat kuasa hingga sekarang. Persoalannya, kesemua hak milik itu tidak berstatuskan Pegangan Melayu. Mulai 15 Disember 1933 ERM 1933, kemudiannya ERM (NMB Bab 142), telah mentafsirkan kesemua hak milik Rizab Melayu yang didaftarkan di antara 1 Januari 1914 hingga 14 Disember 1933 itu sebagai Pegangan Melayu. Ini dibekalkan di bawah tafsiran (b) kepada Pegangan Melayu yang diberikan pada s 2, ERM (NMB Bab 142). Perlu diingat bahawa terdapat satu perbezaan yang ketara di antara tafsiran Pegangan Melayu di bawah s 2(a) dengan s 2(b) itu. Di bawah s 2(a) endorsan di bawah s 6 adalah wajib, manakala di bawah s 2(b) endorsan itu dikecualikan.
>
> Walaupun ERM 1913 itu telah dibatalkan mulai daripada 15 Disember 1933 namun kesemua kawasan Rizab Melayu yang telah diisytihar semasa ERM 1913 itu berkuat kuasa dahulu itu terus menerus wujud hingga ke hari ini melainkan pengisytiharannya sebagai Rizab Melayu itu telah dibatalkan dengan sempurnanya di bawah s 3(b) ERM (NMB Bab 142)."

[40] If I am wrong in my finding that the said Land is not a Non-Malay holding land, I am of the view that the Registrar of Land and the Land Administrator should refer the question to the court under the provision of s 419 of the NLC, and not by way of this Encl 1 which was initiated by the plaintiffs to void the transaction (the successful purchase of the said Land during the auction) and subsequent registration by the said company and excluding it from a suit in which it should have been entitled to be heard; regardless of whether its holding of the said Land was illegal or not. In my view, O 1A and/or O 92 r 4 of the Rules of Court 2012 cannot be invoked to cure any irregularities in the proceedings, as it went to the substantial merits of the case and not merely on form. However, to reiterate, the defendants, as the relevant state authorities on land matters, contended that everything had been done in accordance with the law and that the said Land concerned a Non-Malay holding land within the MRL, and was not caught by ss 7, 8 and 19 of the ERM.

iii. Whether The Said Circular Has The Force Of Law

[41] Lastly, the plaintiffs contended that the Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan Bilangan 16/2022 ("the said Circular") has the force of law. It is trite that an administrative circular is not a piece of legislation having the force of law. It is only a guideline as stated in the said document. Lampiran A of the Garis Panduan Pengurusan Perintah Jualan atau Pajakan Tanah atas Permintaan Pemegang Gadaian in para 7.3.2 listed down the categories of people who cannot make an offer to purchase an auction property i.e. orang atau badan bukan Melayu, jika tanah berkenaan dalam kawasan "Rezab Melayu atau pegangan Melayu".

[42] The court opined that the Circular was not made under any enabling provision of the law, although it made references to the NLC, and therefore it was merely an administrative document to be used as guidance by the Land Administrator in such dealings. In this regard, I refer to the Court of Appeal case of *Dr H K Fong Brainbuilder Pte Ltd v. SG-Maths Sdn Bhd & Ors* [2020] 6 MLRA 588. There, the Court of Appeal referred to *Edwin Thomas v. F&N Beverages Marketing Sdn Bhd & Anor* [2017] 2 MLRH 629 at paras [79]-[80] and *Nabors Drilling (Labuan) Corporation v. Lembaga Perkhidmatan Kewangan Labuan* [2018] 2 SSLR 201 at p 212 para [34] and p 213 paras [35]-[37] cited by the plaintiffs in support of their argument that guidelines have the force of law. The Court of Appeal stated:

> "[27] We observe that there is a common denominator in both cases highlighted to us by the plaintiff ie there is an enabling provision allowing the issuance of the 'guidelines' in question. In *Edwin Thomas*, the High Court held Practice Note No 1 of 1987, a set of guidelines has the force of law because it was issued under s 28 of the Industrial Relations Act 1967. On the other hand, in *Nabors Drilling*, the Guidelines for Carrying on Offshore Leasing Business in Labuan 2003 was held by the High Court to be made by the Lembaga Perkhidmatan Kewangan Labuan (respondent) pursuant to the power conferred on it under s 4A of the Labuan Financial Services Authority Act 1996.
>
> [28] Based on our research, the Franchise (Forms And Fees) Regulations (PU(A) 422 of 1999) is the only regulations made by the Minister pursuant to s 60 of the FA 1998. The other two regulations are:
>
> (a) Franchise (Qualifications of a Franchise Broker) Regulations 1999 (PU(A) 423 of 1999) made by the Minister pursuant to s 14(2) of the FA 1998; and
>
> (b) Franchise (Compounding of Offences) Regulations 1999 (PU(A) 424 of 1999) made by the Minister pursuant to s 41 of the FA 1998.
>
> In light of the above, with respect we make this observation that the submission on behalf of the plaintiff that the Buku Panduan was issued by the Minister of Domestic Trade and Consumer Affairs pursuant to s 60 of the FA 1998 is misconceived.
>
> [29] The question of taking any judicial notice does not arise because in light of the existence of the three aforementioned regulations, it is clear that the Buku Panduan has not been issued pursuant to any enabling provision under the FA 1998 for it to have the force of law. We therefore find it unnecessary to refer to the Buku Panduan."

[43] Applying the above principles to the present case, the court found that the Circular does not have the force of law and is not binding on this court. On the whole, the plaintiffs have failed to prove their case on a balance of probabilities.

Conclusion

[44] Premised upon the above considerations, in the interest of justice, the court dismissed Encl 1 with costs.