

JUDGMENT Express

[2026] 5 MLRA

Kaisar Maxim Sdn Bhd
v. Ong Hock Tek

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KAISAR MAXIM SDN BHD

v.

ONG HOCK TEK

Court of Appeal, Putrajaya
Supang Lian, Wong Kian Kheong, Alwi Abdul Wahab JJCA
[Civil Appeal No: W-02(IM)-1170-06-2025]
19 June 2026

Administrative Law: *Judicial review — Stay of development order (DO) — Whether High Court in application for judicial review (JRA) of DO issued by Datuk Bandar Kuala Lumpur had power under O 53 r 3(5) Rules of Court 2012 (ROC 2012) to grant stay of DO pending disposal of JRA — Meaning of ‘proceedings in question’ in O 53 r 3(5) ROC 2012 — Whether resort might be had to definitions of ‘proceeding’ in O 1 r 4(1) ROC 2012 and s 3 Courts of Judicature Act 1964 to construe phrase ‘proceedings in question’ in O 53 r 3(5) ROC 2012 — Whether applicant in JRA not entitled to interim injunction prohibiting developer’s execution of DO or planning permission pending outcome of JRA — Whether United Kingdom (UK) cases regarding r 54.10 Civil Procedure Rules 1998 (UK) not applicable in interpretation of O 53 r 3(5) ROC 2012*

The appellant had obtained a development order (DO) from the Datuk Bandar Kuala Lumpur (DBKL) to develop a piece of land owned by it. The respondent was the owner and occupant of the adjoining land and had filed a judicial review application (JRA) seeking, *inter alia*, an order of *certiorari* to quash the DO. The appellant, which had filed a separate action in Kuala Lumpur High Court Civil Suit No. WA-22NCvC-257-04-2024 (Suit 257) and later obtained summary judgment against the respondent for trespassing onto its land and had commenced proceedings for assessment of damages, was not joined as a party to the JRA. The High Court Judge (HCJ) (1st Judge) granted *ex parte* leave for the JRA and an *ex parte* stay of the DO pending disposal of the JRA (*ex parte* stay order). An ad interim order for stay of the DO (ad interim stay order) was subsequently granted upon the respondent’s *inter partes* application for stay, and the appellant was allowed to intervene in the JRA. Following the 1st Judge’s elevation to the Court of Appeal, the second High Court Judge (2nd Judge) granted an order for stay of the DO pending disposal of the JRA (*inter partes* stay order). The appellant appealed against the *inter partes* stay order and applied (encl 3) for a stay of the said order pending disposal of its appeal. At the hearing of encl 3, the Court of Appeal raised a question of law as to whether the High Court in an application for judicial review of a DO issued by the DBKL had the power under O 53 r 3(5) of the Rules of Court 2012 (ROC) to grant a stay of the DO pending disposal of the judicial review application in favour of the applicant in the said application. The appellant argued that the High Court did not have the power to order a stay of the DO under O 53



r 3(5) of the ROC 2012. The respondent argued to the contrary in that the High Court was empowered to do so pending the outcome of the JRA.

Held (allowing the application):

(1) The phrase ‘proceedings in question’ in O 53 r 3(5) of the ROC 2012 must necessarily refer to a decision of a public authority and the execution of the said decision by the public authority itself and not by any other party. In the context of a DO or planning permission (PP), once the same was granted to a developer by the DBKL or by the local planning authority (LPA), the execution of that DO/PP was not by the DBKL/LPA but by the developer. Accordingly, upon issuance of the DO/PP by the DBKL/LPA, there was no execution of the said DO/PP to constitute ‘proceedings in question’ within the meaning of O 53 r 3(5) of the ROC 2012. Hence, the High Court had no power pursuant to O 53 r 3(5) of the ROC 2012 to stay a DO/PP pending the outcome of the JRA. The object of the Housing Development (Control and Licensing) Act 1966 (HDA), policy consideration and practical and commercial reasons supported the aforesaid construction of the phrase ‘proceedings in question’. (paras 18, 20, 21 & 24)

(2) Based on *Bursa Malaysia Securities Bhd v. Gan Boon Aun (Bursa Malaysia Securities)* and *Re Ex Parte Application For Leave To Apply For Judicial Review By Shell People Services Asia Sdn Bhd*, resort could not be had to the definitions of ‘proceeding’ in O 1 r 4(1) of the ROC 2012 and s 3 of the Courts of Judicature Act 1964 to construe the phrase ‘proceedings in question’ in O 53 r 3(5) of the ROC 2012. As was clear from *Tan Bun Teet & Ors v. Menteri Sains, Teknologi Dan Inovasi Malaysia & Ors (Tan Bun Teet)*, a developer was entitled in law to implement the DO/PP. (paras 17-18)

(3) In view of O 53 r 2(3) of the ROC 2012 as interpreted by the Court of Appeal in *Bursa Malaysia Securities* and *Tan Bun Teet*, the applicant in a JRA was not entitled to an interim injunction to prohibit a developer’s execution of the DO/PP pending the outcome of the JRA. (para 18)

(4) The JRA would not be rendered academic if the DO/PP could not be stayed pursuant to O 53 r 3(5) of the ROC 2012 pending the outcome of the JRA, nor would irreparable prejudice be caused to the applicant. (para 18)

(5) Cases decided in the United Kingdom regarding r 54.10 of the United Kingdom Civil Procedure Rules 1998 (UK CPR) were not applicable in the interpretation of O 53 r 3(5) of the ROC 2012 in view of the stark difference between O 53 r 3(5) of the ROC 2012 and r 54.10 of the UK CPR. There was no legislation in the UK which was equivalent to the Housing Development (Control and Licensing) Act 1966 and the Housing Development (Control and Licensing) Regulations 1989 (HDR). In this regard, the High Court’s decision in *Tunku Dato’ Seri Nadzaruddin Ibni Tuanku Ja’afar v. Datuk Bandar Kuala Lumpur & Anor*, which concerned JRA regarding a DO issued by the DBKL, wherein reliance was placed on a UK authority and a finding was



made that a stay order was permissible under O 53 r 3(5) of the RHC, was overruled. (paras 20, 22, 23 & 24)

(6) Accordingly, the HCJ had no power under O 53 r 3(5) of the ROC 2012 to grant the *ex parte* stay order, *ad interim* stay order and *inter partes* stay order. Consequently, the said orders were nullities *ab initio* and liable to be set aside on that ground alone. (paras 24 & 26)

(7) The respondent's non-joinder of the appellant as a party lacked *bona fides* as the respondent had actual knowledge of the appellant and the development, and appeared to be a retaliation against the earlier proceedings taken out against the respondent by the appellant. (para 25)

(8) Where an *ex parte* application was made for leave to file a JRA and for an order to stay the 'proceedings in question', the High Court should firstly deal with the leave prayer only on an *ex parte* basis. If leave was granted, and if the party who might be adversely affected by the proposed stay was not cited as a co-respondent in the Form 109, the High Court should not hear the stay prayer until the applicant had applied for leave to join that party as a co-respondent in the JRA. Where the party was cited as a co-respondent in the Form 109, the High Court should only hear the stay prayer on an *inter partes* basis by giving that party the right to object to the stay prayer. (paras 27-28)

Case(s) referred to:

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2019] 6 MLRA 494 (refd)

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 2 MLRA 313 (folld)

Eu Finance Berhad v. Lim Yoke Foo [1982] 1 MLRA 507 (folld)

Lim Yoke Foo v. Eu Finance Berhad [1984] 1 MLRA 750 (folld)

R v. Secretary Of State For Education And Science, Ex Parte Avon County Council [1991] 1 All ER 282 (not folld)

Re Ex Parte Application For Leave To Apply For Judicial Review By Shell People Services Asia Sdn Bhd [2019] MLRHU 1612 (folld)

Tan Bun Teet & Ors v. Menteri Sains, Teknologi Dan Inovasi Malaysia & Ors [2013] 3 MLRA 73 (folld)

YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor [2002] 3 MLRH 313 (overd)

Legislation referred to:

Civil Procedure Rules 1998 [UK], r 54.10

Courts of Judicature Act 1964, s 3

Federal Territory (Planning) Act 1982, ss 2(1), 22(2)

Government Proceedings Act 1956, s 29

Housing Development (Control and Licensing) Act 1966, s 3



Housing Development (Control and Licensing) Regulations 1989, reg 11(1), (1A), Schedules G, H, I, J

Rules of Court 2012, O 1 r 4(1), O 15 r 6(2)(b)(i), (ii), O 32 r 6, O 53 rr 2(1), (3), (4), 3(1), (2), (3), (5), 5(1)(a), (b), (2)

Rules of the Court of Appeal 1994, rr 54, 96, 105

Rules of the Supreme Court 1965 [UK], O 53 r 3(10)

Specific Relief Act 1950, s 54

Town and Country Planning Act 1976, ss 2(1), 22(3)

Counsel:

For the appellant: Abdul Shukor Ahmad (Selvarajah Sivalingam, Selwyn Vijayarajan Das & Daniel Bock Jr Wei with him); M/s Shukor Baljit & Partners

For the respondent: Alliff Benjamin Suhaimi; (See Hau Tsien with him); M/s Thomas Philip

[For the High Court judgment, please refer to *Ong Hock Tek v. Datuk Bandar Kuala Lumpur & Anor* [2025] MLRHU 1657]

JUDGMENT

Wong Kian Kheong JCA:

A. Introduction

[1] This judgment discusses the question of whether the High Court in an application for a Judicial Review (JRA) of a “development order” (DO) issued by the Datuk Bandar Kuala Lumpur (DBKL) for the development on a piece of land pursuant to s 22(2) of the Federal Territory (Planning) Act 1982 (FTPA) has the power under O 53 r 3(5) of the Rules of Court 2012 (RC) to grant a stay of the DO pending the disposal of the JRA, in favour of the applicant in the JRA (an owner and occupier of the neighbouring land).

B. Background

[2] The above-named appellant company (Appellant) owns a piece of land, Lot PT 9419, Mukim Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur (Appellant’s Land).

[3] On 25 October 2017, the Appellant had obtained a DO from the DBKL to develop the Appellant’s Land (Development). Consequently, the Development had commenced on the Appellant’s Land and at the time of the hearing of this notice of motion in court enclosure no 3 (Enc. 3), the Development had yet to be completed.

[4] The respondent (Respondent) is the owner and occupant of the land adjoining the Appellant’s Land (Respondent’s Land).



[5] On 15 October 2021, the Appellant's building surveyors, P-Con Building Surveyor Sdn Bhd (PBS), had written to the Respondent and sought the Respondent's permission to inspect the Respondent's Land before the commencement of the Development [PBS's Letter (15 October 2021)]. By way of a letter dated 29 October 2021, the Respondent replied to PBS's Letter (15 October 2021) [Respondent's Letter (29 October 2021)]. According to the Respondent's Letter (29 October 2021), among others, the Development was "humongous" which would "certainly adversely affect" the Respondent's Land. It was clear from the Respondent's Letter (29 October 2021) that the Respondent had actual knowledge of the Development.

[6] The Appellant's solicitors sent a letter dated 4 November 2022 to the Respondent [Appellant's Demand (4 November 2022)] which-

- (1) alleged that the Respondent had trespassed on the Appellant's Land by way of a structure erected on the Appellant's Land by the Respondent; and
- (2) demanded the Respondent's removal of the alleged structure within 14 days from the date of the Appellant's Demand (4 November 2022).

[7] The Respondent's then solicitors denied the Appellant's Demand (4 November 2022) in a letter dated 30 November 2022.

[8] On 19 April 2024, the Appellant filed Kuala Lumpur High Court Civil Suit no: WA-22NCvC-257-04/2024 against the Respondent (Suit 257). In Suit 257-

- (1) the Appellant averred that the Respondent had trespassed on the Appellant's Land;
- (2) on 22 January 2025, the High Court granted a summary judgment that the Respondent had trespassed on the Appellant's Land [Summary Judgment (Suit 257)]; and
- (3) based on the Summary Judgment (Suit 257), the Appellant had commenced proceedings in the High Court to assess the damages to be paid by the Respondent to the Appellant for the Respondent's trespass on the Appellant's Land [Assessment of Damages (Suit 257)].

[9] On 17 May 2024, the Respondent filed a JRA against DBKL only (This JRA). In This JRA-

- (1) the Respondent applied for, among others, an order of *certiorari* to quash the DO;
- (2) on 15 July 2024, upon the Respondent's *ex parte* application, the first learned High Court Judge (as he then was) (1st Judge)-



- (a) granted-
 - (i) *ex parte* leave for This JRA; and
 - (ii) an *ex parte* stay of the DO pending the disposal of This JRA (*Ex Parte* Stay Order); and
- (b) directed the Respondent's application for a stay order of the DO pending the disposal of This JRA, to be heard on an *inter partes* basis [Inter Partes Application (Stay Order)];
- (3) after the *Ex Parte* Stay Order was served by the Respondent's solicitors on the Appellant, the Appellant applied to intervene in This JRA;
- (4) on 30 July 2024, when the *Inter Partes* Application (Stay Order) was first heard, the 1st Judge granted an ad interim order to stay the DO pending the disposal of This JRA (Ad Interim Stay Order);
- (5) on 4 September 2024, after hearing oral submissions from learned counsel for the Appellant and Respondent, the 1st Judge-
 - (a) allowed the Appellant to intervene in This JRA; and
 - (b) refused to extend the Ad Interim Stay Order; and
- (6) upon the elevation of the 1st Judge to the Court of Appeal, on 17 June 2025, after hearing submissions from learned counsel for the Appellant and Respondent, the second learned High Court Judge (as she then was) granted a stay order of the DO pending the disposal of This JRA [*Inter Partes* Stay Order (DO)].

C. Proceedings in the Court of Appeal

[10] The Appellant appealed to the Court of Appeal against the *Inter Partes* Stay Order (DO) (This Appeal).

[11] In This Appeal, the Appellant filed Enc. 3, which applied for, among others, a stay of the *Inter Partes* Stay Order (DO) pending the disposal of This Appeal.

[12] When Enc. 3 was heard in the Court of Appeal, we posed the question of law as stated in the above para 1, to learned counsel for both parties (Court's Question). The Court's Question was not raised in the High Court and in the written submissions of both parties filed in the Court of Appeal for Enc. 3.

[13] The Court's Question was asked in accordance with the second rule of natural justice so as to give a right to learned counsel for both parties to submit on the Court's Question (before we decide on Enc. 3).



Our Decision**D. Does The Court Have Power to Stay a DO Under Order 53 Rule 3(5) RC?**

[14] We reproduce below-

- (1) the definition of “proceeding” in O 1 r 4(1), O 53 rr 2(3), (4), 3(1), (2) and (5) RC; and
- (2) the definition of “proceeding” in s 3 of the Courts of Judicature Act 1964 (CJA)

“RC

Order 1 r 4(1) **In these Rules, unless the context otherwise requires -**

...

“proceeding” means any proceeding whether in open Court or in Chambers and includes an application at any stage of a proceeding which is deemed to have started when an action is filed;

Order 53 rule 2(3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:

Provided that the power to grant an injunction shall be exercised in accordance with the provisions of s 29 of the Government Proceedings Act 1956 [Act 359] and s 54 of the Specific Relief Act 1950.

...

Order 53 r 2(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Order 53 r 3 Leave

- (1) **An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule.**
- (2) **An application for leave must be made *ex parte* to a Judge in Chambers** and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

...

- (5) **The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.**



CJA

section 3. In this Act, unless the context otherwise requires-

...

“proceeding” means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding;”

[Emphasis Added]

[15] The response by learned counsel to the Court’s Question was as follows:

- (1) the learned counsel for the Appellant replied that pending the disposal of This JRA, the High Court has no power to grant a stay of the DO pursuant to O 53 r 3(5) RC; and
- (2) the Respondent’s learned counsel contended that the High Court is empowered to issue a stay of the DO under O 53 r 3(5) RC (pending the outcome of This JRA).

[16] This judgment concerns a DO issued by DBKL pursuant to the FTPA. According to s 2(1) FTPA, a DO means the granting of a “planning permission” (PP) with or without conditions for any development specified in the DO. Consequently, this judgment also discusses whether the High Court has the power under O 53 r 3(5) RC to stay a PP (pending the hearing of a JRA) granted by a “local planning authority” [defined in s 2(1) of the Town and Country Planning Act 1976 (TCPA)] under s 22(3) TCPA. At the risk of repetition, we do not decide on the High Court’s power pursuant to O 53 r 3(5) RC to stay “proceedings in question” (pending the disposal of a JRA) which do not involve a DO and PP (DO/PP).

[17] We shall first consider whether the definitions of “proceeding” in O 1 r 4(1) RC and s 3 CJA apply to O 53 r 3(5) RC. In this regard, we refer to the following two cases which did not concern a DO/PP:

- (1) in *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 2 MLRA 313, at [62], Heliliah JCA (as she then was) decided as follows in the Court of Appeal-

“[62] The second question relates to the word ‘proceeding’. The word is not defined in the [Rules of the High Court 1980]. The definition is to be found in [CJA] which provides, *inter alia*, ‘proceeding means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding’. It is debatable whether the words ‘any proceeding whatsoever of a civil nature’ are wide enough to envisage a body such as the Listing Committee [part of Bursa Malaysia] to put a stop to the further conduct of its deliberations. The term ‘proceeding’ is not further defined in the Interpretation Acts 1948



and 1967 and hence it must be given the ordinary construction in the context in which it appears.”

[Emphasis Added]; and

- (2) the High Court decided as follows in *Re Ex Parte Application For Leave To Apply For Judicial Review By Shell People Services Asia Sdn Bhd* [2019] MLRHU 1612 (*Shell People Services Asia*), at [43] and [44]-

“[43] Premised on the definition of “proceeding” in O 1 r 4(1) RC, the learned SRC [Senior Revenue Counsel] has contended that the court can only stay proceedings in open court and chambers (Court Proceedings) pursuant to O 53 r 3(5) RC (but the court cannot stay DGIR’s [Director General of Inland Revenue’s] Decision itself)....

[44] I am not able to accept the above submission by the learned SRC. This is due to the following reasons:

- (1) Order 53 r 3(5) RC concerns a stay of the “proceedings in question”, namely the decision which has a sufficient element of public law that is amenable to judicial review — please see the 1st Condition in the above sub-paragraph 16(1). In other words, applications for judicial review generally do not concern Court Proceedings. The definition of “proceeding” in O 1 r 4(1) RC however concerns Court Proceedings only. Accordingly, the definition of “proceeding” in O 1 r 4(1) RC cannot be resorted to in the interpretation of O 53 r 3(5) RC;
- (2) all the definitions in O 1 r 4(1) RC apply to RC “unless the context otherwise requires”. As explained in the above sub-paragraph (1), the context of O 53 r 3(5) RC (which does not apply to Court Proceedings) does not require the application of the definition of “proceeding” in O 1 r 4(1) RC;
- (3) *if I have accepted the above contention by the learned SRC-*
 - (a) this will cause an injustice wherein the Substantive Application will be rendered academic if the court does not stay the decision in question; and
 - (b) this will render O 53 r 3(5) RC redundant; and
- (4) as explained in the above paras 40(2) and 41, the court has the power to grant an *Ad Interim* Stay. It will be incongruous if the court can give an *Ad Interim* Stay pending the disposal of the Leave Application but the court is incapable of granting a stay of DGIR’s decision pending the disposal of the Substantive Application.”

[Emphasis Added]



Based on *Bursa Malaysia Securities* and *Shell People Services Asia*, we cannot resort to the definitions of “proceeding” in O 1 r 4(1) RC and s 3 CJA to construe the phrase “proceedings in question” in O 53 r 3(5) RC.

[18] Secondly, we are of the following view regarding the meaning of the phrase “proceedings in question” in O 53 r 3(5) RC:

- (1) a person can only file a JRA [Applicant (JRA)] regarding a decision of a public authority in O 53 r 2(4) RC. In accordance with the rule of harmonious construction, O 53 r 2(4) RC should be interpreted in harmony with O 53 r 3(5) RC. Hence, the phrase “proceedings in question” in O 53 r 3(5) RC must necessarily refer to a decision of a public authority (Public Authority’s Decision) and the execution of the Public Authority’s Decision by the public authority itself (not by any other party) [Public Authority’s Execution (Public Authority’s Decision)]. Accordingly, if a Public Authority’s Execution (Public Authority’s Decision) has not been completed-
 - (a) an Applicant (JRA) may apply to the High Court to stay the Public Authority’s Execution (Public Authority’s Decision) pursuant to O 53 r 3(5) RC pending the disposal of the JRA; and
 - (b) if the High Court does not stay the Public Authority’s Execution (Public Authority’s Decision) pending the outcome of the JRA, the JRA may be rendered redundant due to the completion of the Public Authority’s Execution (Public Authority’s Decision);
- (2) in the context of a DO/PP, once a DO/PP is granted to a developer (Developer) by DBKL or the local planning authority (DBKL/Local Planning Authority), the execution of the DO/PP is not by DBKL/Local Planning Authority but by the Developer [Developer’s Execution (DO/PP)]. Accordingly, upon the issuance of a DO/PP by DBKL/Local Planning Authority, there is no execution of the DO/PP by DBKL/Local Planning Authority to constitute “proceedings in question” within the meaning of O 53 r 3(5) RC — please refer to the above sub-paragraph (1). Hence, the High Court has no power pursuant to O 53 r 3(5) to stay a DO/PP pending the outcome of the JRA;
- (3) even if a Developer’s Execution (DO/PP) has adversely affected an Applicant (JRA), the Developer’s Execution (DO/PP) cannot constitute “proceedings in question” as understood in O 53 r 3(5) RC due to the following reasons-



- (a) a Developer is entitled in law to implement the DO/PP. This is clear from the following judgment of Azahar Mohamed JCA (as he then was) in the Court of Appeal case of *Tan Bun Teet & Ors v. Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLRA 73, at [1], [4], [5], [7] and [10]-

“[1] This was an appeal by the appellants (the applicants in the High Court) against the decision of the learned judge of the Kuantan High Court given on 8 November 2012 dismissing the appellants’ application (encl 13) dated 14 September 2012 for an interim stay until the final disposal of the pending judicial review proceedings. We heard the appeal on 19 December 2012, wherein at its conclusion we unanimously dismissed it with costs....

...

[4] On 30 January 2012, a temporary operating license (‘TOL’) was approved by the 2nd respondent to the 4th respondent. After that, on 7 February 2012, the applicants together with three other individuals had filed a notice of appeal to the 1st respondent pursuant to s 32 of the AELA [Atomic Energy Licensing Act 1984] against the decision of the 2nd respondent made on 30 January 2012. However, in a letter dated 27 March 2012, the applicants withdrew from proceeding with the appeal leaving the remaining individuals to proceed with the said appeal. On 13 June 2012, the 1st respondent had dismissed the appeal. Then, the applicants had on 14 July 2012 filed the judicial review proceedings (thereafter leave to commence judicial proceedings was granted on 28 August 2012) seeking the following reliefs:

...

- (c) that the said TOL be stayed, pursuant to O 53 r 3(5) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of this court, pending the determination of these proceedings;

...

[5] On 3 September 2012, the 2nd respondent issued the TOL to the 4th respondent. Not long after that, on 14 September 2012, the applicants filed an application (encl 13), which is the subject matter of the appeal herein, against the 1st and 2nd respondents seeking for an order that:

- (a) the decisions of the second and 1st respondents made on 30 January 2012 and 13 June 2012 respectively in relation to the approval of the TOL for the LAMP in Gebeng be forthwith stayed until the final disposal of these judicial review proceedings;
- (b) that the exercise of the rights under the TOL issued on or about 3 September 2012 pursuant to the decisions of the



second and 1st respondents made on the 30 January 2012 and 13 June 2012 respectively, be forthwith stayed till final disposal of these judicial review proceedings; and

- (c) alternatively, an interlocutory injunction be granted restraining the 2nd respondent from issuing any further licenses, permits, or approvals in relation to, and following upon its decision made on 30 January 2012 to approve a TOL to the 4th respondent in respect of its LAMP at Gebeng till final disposal of these judicial review proceedings, upon the undertaking of the applicants to abide by any order of damages that may be made by the court in case the court should hereafter be of opinion that the 2nd respondent shall have sustained by reason of this order, which the applicants ought to pay.

...

[7] In considering this appeal, we have closely scrutinised the judgment of the learned High Court Judge. In her judgment, the learned judge, among others, held that since the TOL has been issued to the 4th respondent, the 1st and 2nd respondents are no longer involved and hence it was impossible to stay the decisions of the 1st and 2nd respondents and even then s 29 of the Government Proceedings Act 1956 ("GPA") and s 54 of the Specific Relief Act 1950 ("SRA") need to be considered so as to preclude any injunctive order or otherwise being granted....

...

[10] That being the principles to be applied, we now turn to consider the specific issues which arise for determination in this appeal. In the injunction/stay application, the first relief sought by the applicants is to stay the decisions of the 1st and 2nd respondents. It was argued by learned counsel for the appellants that there were special circumstances to grant an interim stay as prayed on the basis that the *status quo* ought to be maintained, and not altered, till the appeal is disposed of. It was further argued that the judicial proceedings seek, *inter alia*, to quash the respective decisions of the 1st and 2nd respondents, which if successful, would result in there being no decisions at all. We do not agree with these arguments. In our judgment, the application to stay the decisions of the two respondents approving the TOL is unsustainable as the TOL had since been issued to the 4th respondent for the LAMP project. Whatever rights, duties and responsibilities accruing under the TOL are now the responsibilities of the 4th respondent. The position would have been different if the TOL had not been issued. The undisputed fact is that the 4th respondent is now the legal and valid holder of the TOL. Viewed in this way, it is not possible or practical for the decision to be stayed."

[Emphasis Added]; and



- (b) an Applicant (JRA) cannot apply to the High Court for any interlocutory injunction to restrain the completion of a Developer's Execution (DO/PP) pending the disposal of the JRA. This is clear from the following two judgments of the Court of Appeal (2 Court of Appeal Judgments)-

- (i) according to *Bursa Malaysia Securities*, at [58]-

"[58] Order 53 r 3(5) of the RHC provides that the grant of leave under that rule shall not operate as a stay of the proceeding in question. In the circumstances of this appeal GBA in moving an oral application for stay should have provided grounds in order to enable the judge to exercise his discretion to grant stay. The order for stay in the circumstances of this appeal is tantamount to a prohibitory relief akin to an injunction. Order 53 rule 2(3) expressly provides that an order of injunction may be granted but it has to be in the context of the substantive application for judicial review."

[Emphasis Added]; and

- (ii) it was decided in *Tan Bun Teet*, at [13], as follows-

"[13] In the first place, we are of the view that in judicial review proceedings an application for an injunction can only be made pursuant to O 53 r 2(3) [RC], which provides as follows:

...

Hence, we are of the view that an application for an injunction could only be made at the substantive judicial review hearing and not before it."

[Emphasis Added];

In view of O 53 r 2(3) RC as interpreted in the 2 Court of Appeal Judgments, an Applicant (JRA) is not entitled to an interim injunction to prohibit a Developer's Execution (DO/PP) pending the outcome of a JRA. This is because a Developer has every right to implement the DO/PP.

If the High Court stays a DO/PP pending the disposal of the JRA [Stay Order (DO/PP)], the Stay Order (DO/PP) is in effect an interlocutory injunction to restrain a Developer's Execution (DO/PP) pending the outcome of the JRA which amounts to a circumvention of O 53 r 2(3) and the 2 Court of Appeal Judgments; and

- (4) if a Developer's Execution (DO/PP) cannot be stayed by the High Court pursuant to O 53 r 3(5) RC pending the outcome of a JRA, the substantive JRA is not rendered academic. Nor is there irreparable prejudice to an Applicant (JRA). This is because-



- (a) the Applicant (JRA) may still proceed in the substantive JRA to persuade the High Court to issue an order of *certiorari* to quash the DO/PP; and
- (b) as provided in O 53 r 2(3) RC, if the Applicant (JRA) is successful in the substantive JRA, the Applicant (JRA) may seek-
 - (i) an order of damages against the Developer [Substantive JRA Relief (Damages)]. In this respect, the Applicant (JRA) has to comply with O 53 r 5(1)(a), (b) and (2) RC; and
 - (ii) a perpetual mandatory injunction for the Developer to dismantle and/or take down the Development [Substantive JRA Relief (Perpetual Mandatory Injunction)].

[19] Our interpretation of the phrase “proceedings in question” in O 53 r 3(5) RC in the above para 18 is supported by-

- (1) policy consideration (Policy Consideration); and
- (2) practical and commercial reasons (Practical/Commercial Reasons).

[20] A Policy Consideration is involved when a Development concerns a “housing development” within the meaning of s 3 of the Housing Development (Control and Licensing) Act 1966 (HDA). According to the Federal Court’s judgment delivered by Tengku Maimun CJ in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2019] 6 MLRA 494, at [40], the HDA is a “social legislation designed to protect the house buyers” [Object (HDA)]. Where HDA applies, the contents of Sale and Purchase Agreements between a Developer and purchasers of “housing accommodation” (as defined in s 3 HDA) (Purchasers) are required to be in the form of “statutory contracts” (Statutory SPAs) as prescribed in Schedules G, H, I or J to the Housing Development (Control and Licensing) Regulations 1989 (HDR) [please refer to reg 11(1) and (1A) HDR]. The Statutory SPAs provide certain time periods for Developers to hand over vacant possession of units of housing accommodation to the Purchasers and, upon such failure to do so, the Developers “shall” pay liquidated damages to the Purchasers [Developers’ Liability (Liquidated Damages)].

If a Stay Order (DO/PP) is granted by the High Court-

- (1) this will delay the completion of the Development and the Purchasers will therefore be prejudiced in the sense that the Purchasers cannot get vacant possession of their housing accommodation within the time periods stipulated in the Statutory SPAs; and



- (2) the Development may be abandoned to the detriment of the Purchasers.

Conversely, if the High Court has no power to issue a Stay Order (DO/PP), the Object (HDA) may be attained because there should not be a delay in the Development and the Purchasers should get vacant possession of their housing accommodation within the time periods as provided in the Statutory SPAs. In this manner, both the Object (HDA) and Policy Consideration support our construction of the phrase “proceedings in question” in O 53 r 3(5) RC (please refer to the above para 18).

[21] In *Tan Bun Teet*, at [10], the Court of Appeal had considered, among others, a practical reason in dismissing an appeal against the High Court’s refusal to grant, among others, an interim stay pending the disposal of a JRA. In the same vein, we consider the following Practical/Commercial Reasons in interpreting the phrase “proceedings in question” in O 53 r 3(5) RC in the manner explained in the above para 18:

- (1) Developers would inevitably have incurred expense in conceptualising, planning and applying for DO/PPs; and
- (2) if a Stay Order (DO/PP) is granted, Developers would be financially exposed as follows-
 - (a) the Developers have to demobilise immediately and stop the Development;
 - (b) the Developers have to bear interest on bank facilities and cost of financing the Development while the Stay Order (DO/PP) is in force;
 - (c) even though the Development has stopped, the overhead expenses of the Developers have to be borne;
 - (d) the Developers have to pay for-
 - (i) construction work which has been performed by the Developers’ main contractors and sub-contractors (Main Contractors/Sub-Contractors); and
 - (ii) supplies provided to the Developers by their suppliers (Suppliers).

The Stay Order (DO/PP) may trigger a “chain of litigation” in the form of arbitration, court action and/or proceedings under the Construction Industry Payment and Adjudication Act 2012 among the Developers, Main Contractors/Sub-Contractors and/or Suppliers;



- (e) the Developers' Liability (Liquidated Damages) may arise due to the delay in the completion of the Development;
- (f) if a Developer succeeds to set aside the Stay Order (DO/PP) or if the substantive JRA is subsequently dismissed-
 - (i) the Developer has to remobilise and recommence Development (Remobilisation). In view of inflation, Remobilisation may entail a higher cost; and
 - (ii) in obtaining a Stay Order (DO/PP), an Applicant (JRA) has no obligation to furnish an undertaking to pay damages to the Developer. A developer may only have an option to sue the Applicant (JRA) for damages with regard to a tort of abuse of process in the form of the wrongful filing of the JRA and the obtaining of the Stay Order (DO/PP); and
- (g) in the worst-case scenario, the Developer may be forced into insolvency.

[22] We have not overlooked the High Court's decision in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor* [2002] 3 MLRH 313 which concerned a JRA regarding a DO issued by DBKL. It was decided in *Tunku Dato' Seri Nadzaruddin*, at pp 322 to 323, as follows:

"In the event this court grants leave to apply for *certiorari* the applicant also prays for a stay order as per para 2 of the application.

Such a stay order is permissible under O 53 r 3(5) of the RHC, which provides:

...

The phrase 'a stay of the proceedings' must have a wider application. It is not confined to proceedings in a court only. Today, many applications for judicial review are for orders of *certiorari* to quash decisions of decision-making bodies other than courts, including Government ministers, local authorities and other bodies whose decisions are susceptible to judicial review. Thus the phrase 'a stay of the proceedings' in relation to such bodies must mean 'a stay of the process by which the decision challenged has been reached, including the decision itself' (see *R v. Secretary Of State For Education And Science, Ex P Avon County Council* [1991] 1 All ER 282). Judicial review, by way of an application for *certiorari* is a challenge to the way in which decision has been arrived at.

The decision maker may appear to argue that his or its decision was reached by an appropriate procedure. Thus, as had been decided in *ex p Avon County Council*, a decision made by an officer or minister of the crown as well as other relevant decision-making bodies can, in principle, be stayed by an order of the court. That the court should have the power to order a stay of a decision of a decision-making body pending the conclusion of a challenge to the decision-making process by way of judicial review. In the present



application, if the court does not direct a stay of proceedings as prayed by the applicant (as in para 2 of encl 1), it means that the 2nd respondent can proceed to develop the said land as approved by the 1st respondent. This would mean that the applicant's substantive motion for *certiorari* would be rendered nugatory in the event he succeeded in his application.

Conclusion

At this stage of the proceedings, the court is satisfied that the matter to be decided is not frivolous or vexatious; and that the applicant has produced sufficient evidence or some substance in his grounds supporting the application. Therefore the court grants the applicant's application for leave as well as for stay of proceedings as prayed in encl 1."

[Emphasis Added]

[23] We are of the view that cases decided in the United Kingdom (UK) are not applicable in the construction of our O 53 r 3(5) RC. Our reasons are as follows:

- (1) *Tunku Dato' Seri Nadzaruddin* relied on the judgment of Glidewell LJ in the Court of Appeal of the UK in *R v. Secretary Of State For Education And Science, Ex Parte Avon County Council* [1991] 1 All ER 282 (*Avon County Council*). It is to be noted that at the time of the decision in *Avon County Council*, the then applicable O 53 r 3(10) of UK's Rules of the Supreme Court 1965 [RSC 1965 (UK)] (reproduced in *Avon County Council*, at p 284) provided as follows-

"Where leave to apply for judicial review is granted, then-

- (a) if the relief sought is an order of prohibition or *certiorari* and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;
- (b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ."

[Emphasis Added]

We note the following two material differences between O 53 r 3(10) RSC 1965 (UK) and our O 53 r 3(5) RC-

- (a) when a UK court grants leave for a JRA pursuant to O 53 r 3(10)
 - (a) RSC 1965 (UK), "the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders". It is clear that by virtue of O 53 r 3(10)(a) RSC 1965 (UK), once leave for a JRA is obtained, a stay order is the norm and not the exception.



However, our O 53 r 3(5) RC has expressly stated that the High Court's "grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question". As decided in *Shell People Services Asia*, at [45(1)], upon the High Court's grant of leave for a JRA, a stay of the "proceedings in question" pursuant to O 53 r 3(5) RC is not the general rule but an exception; and

- (b) Order 53 r 3(10)(b) RSC 1965 (UK) had expressly empowered a UK court "at any time" to "grant in the proceedings such interim relief as could be granted in an action begun by writ". This is different from our O 53 r 2(3) RC and 2 Court of Appeal Judgments which do not empower the High Court to grant any "interim relief" pending the disposal of a JRA — please refer to the above sub-paragraph 18(3)(b).

The present r 54.10 of UK's Civil Procedure Rules 1998 [CPR (UK)] states as follows-

- "(1) **Where permission to proceed is given the court may also give directions.**
- (2) Directions under paragraph (1) may include-
- (a) **a stay of proceedings to which the claim relates;**
- (b) directions requiring the proceedings to be heard by a Divisional Court."

[Emphasis Added]

In view of the stark difference between our O 53 r 3(5) RC and r 54.10 CPR (UK), cases decided in the UK regarding r 54.10 CPR (UK), cannot apply in the interpretation of our O 53 r 3(5) RC; and

- (2) The UK has no legislation which is equivalent to our HDA and HDR which supports the Policy Consideration (please see the above para 20).

[24] Premised on the reasons stated in the above paras 18 to 21 and 23-

- (1) we are constrained to overrule the High Court's judgment in *Tunku Dato' Seri Nadzaruddin*;
- (2) the learned High Court Judge had no power under O 53 r 3(5) RC to grant the *Ex Parte* Stay Order, Ad Interim Stay Order and *Inter Partes* Stay Order (3 Stay Orders). Consequently, all the 3 Stay Orders are nullities *ab initio* and can be set aside on this ground alone. In this regard, we rely on the Federal Court's judgment delivered by Eusoffe Abdoolcader J (as he then was) in *Eu Finance*



Berhad v. Lim Yoke Foo [1982] 1 MLRA 507, at pp 510 to 511, as follows:

“The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell’s Asbestos And Engineering Ltd* [1967] 2 QB 729, 736, Lord Diplock LJ (now a Law Lord) said (at p 736) that ‘it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside’.

Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal ‘but he is not bound to (do so), because he is at liberty to treat the act as void’ [*Birmingham (Churchwardens And Overseers) v. Shaw* (1849) 10 QB 868, 880, 116 ER 329 at p 880 (per Denman CJ)]. In *Barnard v. National Dock Labour Board* [1953] 2 QB, 34 it was said that, as a notice of suspension made by the local board was a nullity, ‘the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension’ (at p 34 per Singleton LJ). *Ridge v. Baldwin* [1964] AC 40 is to the same effect.

Lord Denning said in *Director of Public Prosecutions v. Head* [1959] AC 83 (at p 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in *Regina v. Paddington Valuation Officer & Anor, Ex Parte Peachey Property Corporation Ltd (No 2)* [1966] 1 QB 380 (at p 402). The judgment of this court in *Pow Hing & Anor v. Registrar of Titles, Malacca* [1980] 1 MLRA 57, at p 60, 157 refers to the decision of the House of Lords in *London & Clydeside Estates Ltd v. Aberdeen District Council & Anor* [1980] 1 WLR 182, 189 and a passage in the judgment of the Lord Chancellor, Lord Hailsham of St. Marylebone (at p 189) where he refers to a spectrum of possibilities as the legal consequence of non-compliance with statutory requirements and speaks of one extreme where there has been such an outrageous and flagrant violation of a fundamental obligation that what has been done may be safely ignored and treated as having no legal consequence and in the event of any reliance sought thereon the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own.”

[Emphasis Added]



The above judgment of the Federal Court has been affirmed by Lord Brightman on appeal to the Privy Council (our then apex court) in *Lim Yoke Foo v. Eu Finance Berhad* [1984] 1 MLRA 750, at p 753; and

- (3) Enclosure 3 is solely concerned with the *Inter Partes* Stay Order. This is because the *Ex Parte* Stay Order and Ad Interim Stay Order had already lapsed. Rule 105 of the Rules of the Court of Appeal 1994 (RCA) provides as follows-

“rule 105 **Inherent powers of the [Court of Appeal]**

for the avoidance of doubt, it is declared that nothing in [RCA] shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.”

[Emphasis Added]

As the *Inter Partes* Stay Order was *void ab initio*, we have no hesitation to set aside the *Inter Partes* Stay Order in encl 3 pursuant to r 105 RCA on the following two grounds-

- (a) to prevent an injustice to the Appellant; and/or
- (b) to prevent an abuse of the Judicial Review procedure by the Respondent.

As explained in the above sub-paragraph 18(4), the setting aside of the *Inter Partes* Stay Order does not render the substantive JRA nugatory because the Respondent is still entitled to persuade the High Court to grant the following remedies in the substantive JRA-

- (i) a *certiorari* order to quash the DO granted by DBKL to the Appellant;
- (ii) Substantive JRA Relief (Damages); and/or
- (iii) Substantive JRA Relief (Perpetual Mandatory Injunction).

E. The Respondent’s Non-Joinder of the Appellant in This JRA [Respondent’s Non-Joinder (Appellant)]

[25] We have to express our deep disquiet regarding the Respondent’s Non-Joinder (Appellant). The Respondent’s Non-Joinder (Appellant), in our view, lacked *bona fides* due to the following evidence and reasons:

- (1) it was clear from the Respondent’s Letter (29 October 2021) that the Respondent had actual knowledge of the Appellant and Development; and



- (2) the Respondent's Non-Joinder (Appellant) was a "retaliation" against Suit 257.

We rely on the following judgment of the Court of Appeal in *Tan Bun Teet*, at [7], [11] and [17]-

"[7]... The learned judge also considered what is the correct test for a stay application premised on the factual matrix of the present case and having considered the decision in *R v. Inspectorate Of Pollution, Ex P Greenpeace Ltd* [1994] 1 WLR 579, decided that it would only be proper if the 3rd and 4th respondents were made parties at the very outset before an injunction was sought. The learned judge then decided that the third and 4th respondents should have been made a party to the judicial review proceedings at the outset.

...

[11]... At this point, we should highlight an important fact. It is this. At all material times the third and 4th respondents were not named or made parties to the judicial review proceedings and more than that were not parties to the stay application in the High Court. For this, it is all the more striking that the third and 4th respondents had to file an application to intervene to be added as parties. In this respect, the case of *R v. Inspectorate Of Pollution, Ex P Greenpeace Ltd*, which was alluded to by the learned High Court Judge in her judgment, discussed the issue of stay and injunctions where similarly, an affected party, was not made a party to the proceedings. In much the same way, in the present case, as the outcome of granting the stay will be to affect detrimentally the operations of the 4th respondent, we take the view that the failure on the part of the applicants at the material time to include the third and 4th respondents from the very outset in the injunction/stay application is fatal to their applications....

...

[17] For all the reasons stated, we are of the view that the learned judge had exercised her discretion correctly in dismissing the applicants' injunction/stay application...."

[Emphasis Added]

F. Could the High Court Grant a Stay Order Pursuant to Order 53 Rule 3(5) RC on an *Ex Parte* Basis?

[26] In this case, the 1st Judge granted the *Ex Parte* Stay Order. It would be remiss of us if we did not express our view that O 53 r 3(5) RC does not empower the High Court to grant a stay of the "proceedings in question" (pending the outcome of the JRA) on an *ex parte* basis. In this regard, our decision on this matter is not confined to a DO/PP. This decision is premised on the following reasons:

- (1) unlike O 53 r 3(2) RC which expressly allows an Applicant (JRA) to make an *ex parte* application for leave of the High Court to file



a JRA, the Rules Committee had deliberately omitted the words “*ex parte*” in O 53 r 3(5) RC; and

- (2) a stay of the “proceedings in question” pending the disposal of the JRA, may have far-reaching effect on a party who is bound by the stay order (X). In accordance with the second rule of natural justice, X should be accorded a right to oppose a stay application. It is to be noted that by virtue of O 32 r 6 RC, an *ex parte* order (including an *ex parte* stay order) can be set aside by the court in a subsequent application by X.

G. How Should the High Court Deal with an *Ex Parte* JRA Which Applied for Leave to File a JRA and an Order to Stay the “Proceedings In Question”?

[27] We will now discuss the following scenario:

- (1) an Applicant (JRA) has filed an *ex parte* “Form 109” (as stated in Appendix A to RC) pursuant to O 53 rr 2(1), 3(2) and (5) RC (Form 109); and
- (2) the Form 109 contains, among others, the following two prayers-
 - (a) a prayer for leave of the High Court to file a JRA (Leave Prayer); and
 - (b) a prayer for a stay of the “proceedings in question” pending the outcome of the JRA (Stay Prayer).

[28] We propose the following course of action for the above scenario:

- (1) the High Court should first deal with the Leave Prayer only on an *ex parte* basis. For this purpose, as provided in O 53 r 3(3) RC, the Attorney General’s legal officer has a right-
 - (a) to be served by an Applicant (JRA) with all the cause papers regarding Form 109;
 - (b) to attend the *ex parte* hearing of the Leave Prayer; and
 - (c) to object to the Leave Prayer;
- (2) if the Leave Prayer is refused by the High Court, that is the end of the JRA; and
- (3) if the High Court allows the Leave Prayer, with regard to the Stay Prayer-
 - (a) if the party who may be adversely affected by the proposed stay order (X), is not cited as a co-respondent in the Form 109, the High Court should not hear the Stay Prayer until the Applicant (JRA) has applied for leave to join X as a co-



respondent in the JRA pursuant to O 15 r 6(2)(b)(i) and/or (ii) RC; and

- (b) if X has been cited as a co-respondent in the Form 109, the High Court should only hear the Stay Prayer on an *inter partes* basis by giving X the right to object to the Stay Prayer, by way of *affidavit* and submission (both written and oral). As explained in the above para 26, O 53 r 3(5) RC does not allow the High Court to grant a stay of the “proceedings in question” (pending the outcome of the JRA) on an *ex parte* basis.

H. Costs for encl 3

[29] As we have set aside the *Inter Partes* Stay Order based solely on the Court’s Question, in accordance with rr 54 and 96 RCA, we exercise our discretion not to award any costs for encl 3.

I. Conclusion

[30] The upshot is encl 3 is allowed without costs on the sole basis that the High Court had no power under O 53 r 3(5) RC to grant the *Inter Partes* Stay Order.

[31] I had previously forwarded a draft copy of this judgment (Draft) to Supang Lian and Dr Alwi bin Abdul Wahab JJCA. Both my learned sister and brother had agreed with the Draft.

