

**Badan Pengurusan Bersama Kristal Heights 2 & Anor v
Syarikat Sri Malawati Sdn Bhd & Anor**

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-459-08 OF
2015
VAZEER ALAM J
16 APRIL 2019

*Civil Procedure — Pleadings — Failure to plead — Claim for breach of
statutory duty — Whether plaintiff failed to plead specific statute and relevant
breaches of statute by fifth defendant*

*Land Law — Land administrator’s right of way — Creation — Statutory duties
owed to registered proprietors before creating ROW over land belonging to registered
proprietor — Whether defendants breached statutory duties — Whether
defendants owed duty of care to plaintiff — Whether defendants breached duty of
care — Whether defendants negligent — National Land Code ss 388, 390 &
391*

This suit involved a main suit which was subsequently struck out by the Court of Appeal and the counterclaim. The plaintiff had also obtained summary judgment against the first and second defendants. The matter for determination at this point was the counterclaim against the third to fifth defendants. Parties herein will be referred to as they were in the named in the counterclaim. The plaintiff was seeking declaratory and injunctive relives in regard to the lawfulness and validity of the right of way (‘ROW’) as well as damages for trespass and/or negligence and/or breach of statutory duty. The plaintiff’s case against the third and fourth defendant was that the grant of ROW on the plaintiff’s land without the plaintiff’s knowledge or consent as the registered proprietor of the land was wrong in law and contrary to statutory provisions in the National Land Code. Whilst the case against the fifth defendant was that it ought not to have approved the planning permission and issued the CF for Kristal Heights 2 when it knew that the access road to Kristal Heights 2, passed through the plaintiff’s private property.

Held, allowing the counterclaim against the third and fourth defendant but dismissing the counterclaim against the fifth defendant:

- (1) The fourth defendant was mandated by law to carry out an enquiry and conduct a survey to identify the affected land and when the decision was made to grant the right of way, he was to memorialise that grant by

- A endorsement on the register document of title and the issue document of title. The National land Code provided for compensation to be paid to the land owner on whose land the right of way was created. These statutorily mandated procedures were not complied with when the fourth defendant created the ROW over the plaintiff's land therefore the
- B ROW was invalid, unenforceable and was contrary to the law and was a breach of its statutory duty owed to the plaintiff (see paras 14–15).
- (2) The fourth defendant owed a duty of care in common law to the plaintiff as the registered proprietor to ensure its rights of enjoyment to the said land was not deprived or encroached by the fourth defendant's unlawful
- C act. Based on the above, the plaintiff was therefore entitled to judgment against the fourth defendant for breach of statutory duty and negligence (see para 16).
- (3) The plaintiff had failed to plead the specific statute and relevant breaches of the statute by the fifth defendant. In an action for breach of statutory duty it was an essential requirement that the law was to be pleaded (see
- D para 30).
- (4) There was no statutory duty owed by the fifth defendant to the plaintiff as the duties owed by the fifth defendant under by-law 25 of the Uniform
- E Building By-Laws were only to qualified persons defined therein (see para 33).
- (5) By virtue of the close proximity of the plaintiff's land, it was foreseeable that any planning permission that allowed for the encroachment by the
- F applicant for that planning permission onto the plaintiff's land would cause damage to the plaintiff, and when the added requirement of justice fairness and reasonableness of the case under the *Caparo* test was considered, there was a clear duty of care owed by the fifth defendant to the plaintiff. Nevertheless, the court found that D5 had acted reasonably
- G to ensure that there was no unlawful encroachment onto the said land. Thus, D5 had properly discharged its duty of care and there was no breach of that duty (see paras 36, 39 & 41).

[Bahasa Malaysia summary

- H Guaman ini melibatkan satu guaman utama yang kemudiannya telah dibatalkan oleh mahkamah rayuan dan tuntutan balasnya. Plaintiff juga telah mendapatkan satu penghakiman terus terhadap defendan pertama dan kedua. Pekara untuk ditentukan diperingkat ini adalah tuntutan balas terhadap
- I defendan ketiga hingga kelima. Pihak-pihak di dalam ini akan dirujuk sepertimana mereka dinamakan dalam tuntutan balas. Plaintiff telah memohon untuk mendapatkan relif injuktif dan deklarasi berkaitan dengan kesahan disisi undang-undang hak lalu-lalang persendirian pentadbir tanah ('HLL') dan juga kerugian untuk pencerobohan dan/atau kecuaiian dan/atau pelanggaran tanggungjawab statutori. Kes plaintiff terhadap defendan ketiga dan keempat

adalah pemberian HLL atas tanah plaintif tanpa pengetahuan atau keizinan plaintif sebagai pemilik berdaftar tanah tersebut adalah salah disisi undang-undang dan bertentangan dengan peruntukan statutori dalam Kanun Tanah Negara. Manakala kes terhadap defendan kelima adalah ianya sepatutnya tidak meluluskan kebenaran merancang dan mengeluarkan CF untuk Kristal Heights 2 apabila ianya mengetahui bahawa jalan akses kepada Kristal Heights 2, melalui tanah peribadi plaintif.

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Diputuskan, membenarkan tuntutan balas terhadap defendan ketiga dan keempat tetapi mengetepikan tuntutan balas terhadap defendan kelima:

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- (1) Defendan keempat diberi mandat melalui undang-undang untuk menjalankan satu inkuiri dan mengadakan satu pemeriksaan untuk mengenal pasti tanah yang terjejas dan apabila keputusan dibuat untuk memberikan hak lalu-lalang, dia hendaklah menyatakan kebenaran tersebut dengan penandaan pada daftar dokumen hak milik dan dokumen hak milik keluaran. Kanun Tanah Negara memperuntukkan bahawa ganti rugi hendaklah dibayar kepada pemilik tanah yang mana hak lalu lalang tersebut dibuat. Prosedur yang diberi mandat secara statutori ini tidak dipatuhi apabila defendan keempat membuat HLL atas tanah plaintif oleh yang demikian HLL tersebut adalah tidak sah dan tidak boleh dikuatkuasakan dan bertentangan dengan undang-undang dan merupakan pelanggaran tanggungjawab statutorinya terhadap plaintif (lihat perenggan 14–15).
- (2) Defendan keempat mempunyai kewajiban berjaga-jaga dalam undang-undang common terhadap plaintif sebagai pemilik berdaftar untuk memastikan hak untuk menikmati tanah tersebut tidak terhalang atau diganggu oleh tindakan defendan keempat yang menyalahi undang-undang. Berdasarkan perkara diatas, plaintif oleh itu berhak ke atas keputusan terhadap defendan keempat untuk pelanggaran tanggungjawab statutori dan kecuaiian (lihat perenggan 16).
- (3) Plaintif gagal untuk memplidkan statut spesifik atau pelanggaran relevan statut oleh defendan kelima. Dalam satu tindakan untuk pelanggaran tanggungjawab statutori ianya merupakan satu keperluan asas bahawa undang-undang tersebut hendaklah diplidkan (lihat perenggan 33).
- (4) Tiada tanggungjawab statutori oleh defendan kelima terhadap olaintif kerana tanggungjawab defendan kelima dibawah by-law 25 Uniform Building By-Laws hanyalah kepada individu yang layak sepertimana ditafsirkan didalamnya (lihat perenggan 33).
- (5) Berdasarkan dekatnya tanah plaintif, adalah dijangka bahawa apa-apa kebenaran merancang yang membenarkan kemasukkan oleh pemohon untuk kebenaran merancang tersebut keatas tanah plaintif akan menyebabkan kerugian kepada plaintif dan dengan keperluan tambahan

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- A untuk keadilan, kesaksamaan dan munasabah untuk kes dibawah ujian *Caparo* dipertimbangkan, jelas wujud kewajipan berjaga-jaga yang perlu diberi defendan kelima terhadap plaintif. Namun begitu, mahkamah memutuskan bahawa defendan kelima telah bertindak secara munasabah untuk memastikan tiada pencerobohan salah disisi undang-undang atas tanah tersebut. Oleh itu, D5 telah menjalankan kewajipan berjaga-berjaganya dan tiada pelanggaran kewajipan itu (lihat perenggan 36, 39 & 41).]
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Notes

- C For cases on creation of land administrator's right of way, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3916–3919.
For cases on failure to plead, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7482–7490.

D Cases referred to

- Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur* [2006] 2 MLJ 137, HC (refd)
Caparo Industries plc v Dickman [1990] 1 All ER 568; [1990] 2 AC 605, HC (refd)
- E *David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Ors* [2009] 4 MLJ 253, HC (refd)
Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors [1997] 3 MLJ 546, HC (refd)
- F *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440, HC (refd)
Kelab Renang Pulau Pinang v Pentadbir Tanah, Daerah Timur Laut, Pulau Pinang & Anor [2014] 6 MLJ 134; [2014] 5 CLJ 341, CA (refd)
Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734, FC (refd)
MIDF Amanah Investment Bank Bhd (formerly known as Amanah Short Deposit Bhd) v Pesaka Astana (M) Sdn Bhd & Ors [2016] 9 MLJ 483, HC (refd)
- G *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389, HC (refd)
X and others (minors) v Bedfordshire County Council [1995] 3 All ER 353, HL (refd)

H Legislation referred to

- National Land Code ss 388, 389, 390, 391, 392, 393
Town and Country Planning Act 1976 ss 21(7), 22
Uniform Building By-Laws 1984 by-law 25

- I *Justin Voon (JL Wong with him) (Justin Chooi & Wing) for the plaintiff.*
Mohd Aizan bin Mohd Salleh (Selangor State Legal Advisor) for the third and fourth defendants.
Nur Amalina bt Haris (Edlin Ghazaly & Assoc) for the fifth defendant.

Vazeer Alam J:

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INTRODUCTION

[1] The first plaintiff in the main suit (ie the second defendant in the counterclaim) ('02') is the joint management body ('JMB') of a condominium complex known as Kristal Heights 2 ('Kristal heights 2'), and the second plaintiff in the original action (ie the first defendant in the counterclaim) ('D1') is the developer of Kristal Heights 2.

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[2] Adjacent to Kristal Heights 2 is a piece of land known as Lot No 72077, Bandar Selayang, Negeri Selangor held under No Hakmilik 108438 ('the said land'), of which the current registered owner is the first defendant in the main action (ie the plaintiff in the counterclaim) ('the plaintiff').

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[3] The second defendant in the main action, ie the Pentadbir Tanah Daerah Gombak (ie the fourth defendant in the counterclaim) ('D4'), had upon the application of D1, approved a right of way ('ROW') to Kristal Heights 2, which passed through the plaintiff's said land. The said ROW was granted by D4 without the consent or knowledge of the plaintiff.

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[4] D5, ie the Majlis Perbandaran Selayang, the local authority having jurisdiction over the said land and its vicinity, had approved the planning permission for D1 to develop Kristal Heights 2, wherein the access road to the development by virtue of the ROW passed through the plaintiff's said land. D5 subsequently approved and issued the certificate of fitness for occupation ('CF') for the development.

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[5] When the plaintiff came to know of the existence of the ROW, the plaintiff objected to the same on grounds of illegality, trespass and encroachment of its rights in and to the said land.

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[6] As a pre-emptive strike, vide the main action, D1 and D2 sought declarative relief to the effect that the ROW was valid and lawful, and that the residents of Kristal Heights 2 were entitled to use the ROW for ingress and egress to their condominium complex. In this regard, D1 and D2 sought an order of court to compel the plaintiff and D4 to register a memorial in the plaintiff's issue document of title as well as the register document of title to the land recognising the ROW.

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A MAIN CLAIM STRUCK OUT

[7] Upon the plaintiff's application, the main claim was struck out by the Court of Appeal on 14 July 2016. Hence, only the counterclaim remained for adjudication.

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THE PLAINTIFFS SUMMARY JUDGMENT AGAINST D1 AND D2

C [8] The plaintiff in the counterclaim had obtained summary judgment on 9 June 2017 against the first and second defendants in the counterclaim, ie the developer, Vat Seng Development Sdn Bhd, and the JMB.

COUNTERCLAIM AGAINST D3, D4 AND D5

D [9] Thus, only the plaintiff's counterclaim against the third defendant ('D3'), the fourth defendant ('D4') and fifth defendant ('D5') proceeded to trial. D3 was at the material time the Pentadbir Tanah Daerah Gombak, and was not acting his personal capacity when he made the decision to grant the ROW. Thus, D3 and D4 are one and the same legal persona, and in this
E judgment I will deal with both D3 and D4 as one.

TRIAL BIFURCATED

F [10] By order of this court dated 21 February 2018, the trial was bifurcated, and I proceeded to first determine the issue of liability, with damages to be assessed in subsequent proceedings, if the need should arise.

THE PLAINTIFF'S COUNTERCLAIM AGAINST D3, D4 AND D5

G [11] The plaintiff in its counterclaim against the D3, D4 and D5 is essentially seeking declaratory and injunctive relief in regard to the lawfulness and validity of the ROW, as well as damages for trespass and/or negligence and/or breach of statutory duty. The plaintiff's case is that the grant of ROW on the plaintiff's said land by D3 and/or D4 without the plaintiff's knowledge
H or consent as the registered proprietor of the land is wrong in law and is contrary to statutory provisions in the National Land Code ('the NLC') particularly ss 389–393 of the NLC. As against D5, the plaintiff contends that D5 ought not to have approved the planning permission and issued the CF for Kristal Heights 2 when it knew that the access road to Kristal Heights 2, as
I approved by the D5 in the planning permission, passed through the plaintiff's private property.

MY DECISION

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[12] Having considered the counterclaim and the respective defence to counterclaim filed by D3, D4 and D5, and further having read and considered the written submissions of counsel, I find that the plaintiff in the counterclaim has successfully established its case against D3 and D4 for negligence and breach of statutory duty, but has failed to prove its case against D5. Hence judgment in respect of liability was entered for the plaintiff in the counterclaim against D3 and D4 and the following orders were made:

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- (a) a declaration that the ROW passing through the plaintiff's land in Lot No 72077, Bandar Selayang, Daerah Gombak, Negeri Selangor, purported to have been granted by the D3 and/or D4 to the D1 and D2 is contrary to the law and is thus invalid and unenforceable;
- (b) a declaration that the letter dated 18 September 2009 bearing reference Bil () dlm PTG No 9/1/1/2009 issued to the D1 bearing the caption 'Permohonan Lalu Lalang (ROW) Pentadbir Tanah mengikut Seksyen 391 Kanun Tanah Negara Di Kristal Heights HS(D) 30652, PT 35652, PT35265, Mukim Batu, Daerah Gombak' granting the ROW is invalid, unenforceable and is contrary to the law;
- (c) an order that damages be assessed against D3 and/or D4 jointly and severally;
- (d) interest on any general damages so assessed and ordered to be paid shall be at the rate of 5%pa calculated from 18 September 2009; and
- (e) the D3 and D4 shall bear the cost of the action against them and the quantum shall be assessed together with the assessment of damages.

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[13] I further ordered that the counterclaim against D5 be dismissed with cost of RM10,000.

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REASONS FOR MY DECLSION

Against D3 and D4

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[14] As against D3 and D4, the case is very clear. As the land administrator, D4 may create rights of way over land, which is in legal parlance known as land administrator's right of way. This power is provided in s 388 of the NLC. The creation of the right of way and the procedure for such creation is governed by ss 390 and 391 of the NLC, wherein D4 is mandated by law to carry out an enquiry and conduct a survey to identify the affected land and when the decision is made to grant the right of way, he is to memorialise that grant by endorsement on the register document of title and the issue document of title. Further, s 393 of the NLC provides for compensation to be paid to the

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A landowner on whose land the right of way is created. See *Kelab Renang Pulau Pinang v Pentadbir Tanah, Daerah Timur Laut, Pulau Pinang & Anor* [2014] 6 MLJ 134; [2014] 5 CLJ 341 (CA).

B [15] Suffice to say that none of these statutorily mandated procedures were complied with when D4 created the ROW over the plaintiffs land. The evidence shows that D4 did not give any notice to the plaintiff to hold an enquiry as required under ss 390 and 391 of the NLC nor did the plaintiff consent to the ROW in favour of D1 and/or for the plaintiff's land to be used as an access road for Kristal Heights 2. There is clear deprivation of the plaintiff's rights over its land. Hence, I find that the ROW is invalid, unenforceable and is contrary to the law and is a breach of its statutory duty owed to the plaintiff. The decision of D4 has led to trespass of the plaintiff's land and the plaintiff losing peaceful enjoyment of its rights to possession and utilisation of the said land.

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E [16] Further, D4 owes a duty of care in common law to the plaintiff as the registered proprietor to ensure that its rights of enjoyment to the said land is not deprived or encroached by D4's unlawful acts. The plaintiff is thus entitled to judgment against D4 for breach of statutory duty and negligence.

Against D5

F [17] As for the plaintiff's case against D5, there is evidence showing that on 16 February 2001 D5 had approved D1's application for planning permission (*kebenaran merancang*) ('original *KM*') to develop the Kristal Heights 1 on Lot 3345, Mukim Setapak, Daerah Gombak, Selangor ('Lot 3345'). Subsequent to that, there was an application by D1 to amend the said original *KM*, ie to insert an adjacent Lot 2305, with the intention to build Kristal Heights 2. D5 approved the amendment application via its letter dated 5 August 2003 ('letter dated 5 August 2003') based on the Layout Plan No 1206601002-0204 ('second layout plan') ('the amended *KM*'). Subsequently, D5 approved D1's application for Perakuan Pelan Bangunan No 314/1.0, ie the CF, which was in line with the second layout plan.

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H [18] Initially there were no issues between the plaintiff and D1 in respect of the access road to Kristal Heights 2. The access road to Kristal Heights 2 initially approved by D5, as per the amended *KM*, was connected to the plaintiff's reserve road based on the plaintiff's *KM* approved on 23 March 2004 ('the plaintiff's *KM*') to develop the plaintiff's adjoining land.

I [19] However, on 28 December 2005, the plaintiff had amended the plaintiff's *KM* and changed the reserve road, which now ran north in between Lot 646 and cemetery reserve ('the plaintiff's amended *KM*') ('the said reserve

road'). However, via letter dated 11 April 2007, D1 through its consultant engineer, Perunding Baram Sdn Bhd ('PBSB'), informed D5 that the said reserve road as in the plaintiff's amended *KM* was not suitable for its purpose, for the following reasons:

- (i) jalan tersebut berbeza aras antara dua jalan yang bersambungan dan bercerun; dan
- (ii) jalan tersebut berada di bawah aras terendah rizab kubur yang mempunyai cerun bukit yang agak curam.

[20] Hence, the terrain and contour of the road reserve as in the plaintiffs amended *KM* made it unsuitable for D1 to connect its road access to Kristal Heights 2 to that road reserve. Thus, D1 suggested an alternative access road to D5 which would pass through the plaintiffs said land. Vide letter dated 17 September 2007, D5 had informed D1 that it had no objection to the proposed alternative access road provided that they first obtain approval from the land owner through which the road passes and also obtain approval from the Jabatan Perancang Bandar.

[21] Subsequently, on 8 January 2008, based on internal checking conducted by D5, D5 issued a letter to D1 informing among others:

- (i) melalui semakan, jalan keluar masuk di dalam Pelan Susun Atur Kedua terse but adalah melalui kawasan pembangunan Sri Malawati;
- (ii) Yat Seng hendaklah berbincang dengan Sri Malawati berhubung isu laluan jalan keluar masuk tersebut memandangkan terdapat satu lagi permohonan KM oleh Sri Malawati yang telah diluluskan bersama dengan laluan jalan keluar masuk ke kawasan pembangunan Yat Seng;
- (iii) berkenaan laluan alternatif tersebut, sekiranya ia melibatkan tanah individu atau pemaju, Yat Seng hendaklah mendapat persetujuan tuan tanah yang berkaitan terlebih dahulu; dan
- (iv) bahawa MPS hanya boleh mencadangkan namun kebenaran hak lalu lalang perlulah diperoleh oleh Yat Seng daripada pemilik tanah berkaitan.

[22] Hence, it is clear that D5 had vide letter dated 8 January 2008 informed D1 that since the proposed road access to Kristal Heights 2 passed through the plaintiff's land, D1 must obtain approval of the private land owner through whose land the proposed access road passes, which would be the plaintiff. Thereafter, upon D1's request via its letter dated 18 April 2008, a meeting was held on 8 July 2008 attended by the plaintiff, D1 and D5, to discuss the issue of the proposed access road. During the said meeting, the plaintiff refused to agree to the alternative road suggested by D1 which passed through the plaintiff's land.

- A [23] However, on 8 August 2008, D1 wrote a letter to D5, confirming that the proposed access road was still on government land based on their searches conducted at the appropriate land office ('letter dated 8 August 2008') and thus suggested that D5 could consider approving this access road. The relevant contents of the letter dated 8 August 2008 reads as follows:
- B ... Hasil daripada kajian teliti, kami rasa masalah jalan keluar/masuk boleh diatasi melalui cara berikut:
- C 1. Mengadakan sebahagian daripada (kira-kira 44m x 7.6m) tanah di selatan tapak projek ini sebagai rezab jalan yang mana kami akan bertanggungjawab ke atas pembinaan dan menyelenggaranya. *Ini disebabkan oleh hasil pencarian dengan pejabat tanah menunjukkan bahawa tanah ini masih merupakan tanah kerajaan.* (Emphasis added.)
- D [24] Together with the letter dated 8 August 2008, D1 submitted a plan and suggested another alternative access road which connected Lot 2305 to an existing road for Kristal Heights 2. D1 then submitted an application to re-amend the *KM* vide letter dated 10 March 2009 to change the access road to Kristal Heights 2. In the said application, D1 had endorsed the access road in the Layout Plan No 010254-09-SSP-0201 ('third layout plan') as 'Tanah Kerajaan yang Dipohon', meaning that access was being sought over state land that had not been alienated.
- E [25] In response to the letter dated 8 August 2008, D5 wrote a letter dated 20 March 2009 to D1 advising D1 to, inter alia, liaise with the appropriate land office to obtain their approval in respect of the proposed access road.
- F [26] Subsequently, by way of letter dated 24 June 2009, D5 approved the application to re-amend the *KM* (to change the access road). However that re-amended *KM* was still subject to the following condition:
- G (i) Pihak tuan juga perlu mendapatkan kebenaran hak lalu-lalang daripada pemilik tanah sekiranya laluan keluar masuk melibatkan tanah hak milik individu dan sekiranya melalui tanah kerajaan perlu mendapat kebenaran daripada pihak Pentadbir Tanah dan Daerah Gombak.
- H Hence, D5 had given a conditional approval to re-amend the planning permission and had in respect of the proposed access road required D1 to obtain the consent of the proprietor of the land, if it passed through private land, or obtain the permission of D4 if it was state land.
- I [27] On 18 September 2009, D4 had granted the ROW to D1. Thus, D5 took it that the condition imposed in its letter dated 24 June 2009 had been fulfilled. Thereafter, on 4 November 2009, there was a committee meeting held to obtain approval for the *pelan kerja tanah dan pelan jalan dan perparitan* submitted by D1.

[28] The said committee meeting was attended by representatives of among others, D4. The *pelan kerja tanah* dan *pelan jalan dan perparitan* were then approved by the Engineering Department of D5. The CF for Kristal Heights 2 as issued approximately one year and five months after D4 had issued the said letter confirming the ROW.

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CLAIM FOR BREACH OF STATUTORY DUTY

[29] As against these background facts, let me now consider the plaintiffs pleaded case against D5. The plaintiff's first cause of action against D5 is for breach of statutory duty, and to succeed, the plaintiff must prove that there is a duty owed to the plaintiff by D5 conferred under the relevant statute and/or provision in approving the *KM* and/or issuing the CF. In addition to that, it must also be shown that the plaintiff is the person intended to be protected under such statute and/or provision. See *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440. Further, the relevant statute must be specifically pleaded for that is the basis of the claim, and the breach must be stated in order to prove the liability. See *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors* [1997] 3 MLJ 546; *Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur* [2006] 2 MLJ 137; *MIDF Amanah Investment Bank Bhd (formerly known as Amanah Short Deposit Bhd) v Pesaka Astana (M) Sdn Bhd & Ors* [2016] 9 MLJ 483.

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[30] However, I find that though the plaintiff has pleaded the specific statute and relevant breaches of the statute by D4, the plaintiff has failed to plead the relevant statute or provision where the specific duty is owed by D5 to the plaintiff and the breach or breaches thereof that form the basis of the claim. Unlike the general principle of pleadings that does not require laws to be pleaded, in an action for breach of statutory duty it is an essential requirement. Such pleadings incorporating the particulars of breach are important for the court to determine whether the plaintiff is included in the category of persons protected by the relevant statute and/or provision of the law. The failure to do so is fatal to the plaintiff's claim as the pleadings would then not disclose any such cause of action.

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[31] Even if I were to disregard this lack of pleadings and consider the plaintiffs claim on its merits, I find that upon scrutiny of the counterclaim and the agreed issues to be tried, the alleged statutory duty of D5 which is at play here is possibly derived from the power and/or discretion conferred on D5 as a local authority by two separate statutory provisions, namely:

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- (a) the power to grant the *KM* and/or amended *KM*; under s 22 of the Town and Country Planning Act 1976 (Act 172) ('the TCPA'); and

- A (b) to issue the CF; under by-law 25 of Uniform Building By-Laws 1984 (the UBBL).

B [32] However, when s 22 of the TCPA is perused the statutory duties of D5 in granting a planning permission are merely towards the applicant, ie D1 in this case, and or any person objecting under s 21(7) thereof. Hence, the plaintiff is not a person protected under these provisions and no statutory duty can arise to cover the plaintiff on the pleaded facts.

C [33] As for the issuance of the CF, I find that there is no statutory duty owed by D5 to the plaintiff, for under by-law 25 of the UBBL, the duties are owed by D5 only to qualified persons defined therein, such as architects, registered building draughtsman, engineers and the owner of the building. The plaintiff does not come under the category of qualified persons covered under
D by-law 25.

E [34] I further find that the plaintiff has failed to prove the existence of any statutory duty owed by D5, and thus, the issue of any breach of such duty does not arise, and the plaintiff's claim for breach of statutory duty against D5 must necessarily fall (see *David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Ors* [2009] 4 MLJ 253).

CLAIM FOR NEGLIGENCE

F [35] The plaintiff also claims in the alternative for negligence, ie breach of duty of care under the common law by D5 to the plaintiff in exercising its duty and/or powers and/or functions. In *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353, the English court held that 'a common law duty of care may arise in the performance of statutory functions'. Further, in
G determining whether D5, as a local authority, owed a duty of care under common law, the test of proximity and foreseeability as espoused in *Caparo Industries plc v Dickman* [1990] 1 All ER 568; [1990] 2 AC 605, and adopted by the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389, is applicable.

H [36] I find that by virtue of the close proximity of the plaintiff's land, it is foreseeable that any planning permission that allows for the encroachment by the applicant for that planning permission, in this case D1, onto the plaintiff's land would cause damage to the plaintiff. And when the added requirement of
I justice, fairness and reasonableness of the case under the *Caparo* test is considered, there is a clear duty of care owed by D5 to the plaintiff.

[37] Now, as to the question of whether there was a breach of that duty of care, I find that there is none. The evidence shows that D5 had knowledge that

the said land was alienated to the plaintiff by the state, and that is the reason why D5 had called for a meeting with the plaintiff and D1 to discuss the issue of access road to Kristal Heights.

A

[38] However, the qualified title to the said land had not been issued at the material time. D1 had then represented to D5 that the land in question was still government/state land, and this was confirmed by a certified surveyor, Tetuan Saujana Ukur. The amended plans prepared by D1's consultant engineer also alluded to the fact that the said land was termed as 'Tanah Kerajaan yang Dipohon'. Nevertheless, even in the face of such representation, D5 only gave conditional approval for the amended *KM*, and imposed an express condition requiring D1 to obtain the landowner's approval if the land was private land or obtain the approval of the state authority if the land was state land. In this regard, it must be noted that in approving or granting a planning permission, there are always conditions attached thereto, the standard ones being in Borang C(1) and there is nothing untoward in D5 giving the conditional approval to D1 to reamend the planning permission.

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D

[39] Thus, I find that D5 had acted reasonably to ensure that there is no unlawful encroachment onto the said land. Thus, when D4 approved and granted the ROW vide letter dated 18 September 2009 and further when representatives of D4 attended the meeting on 4 November 2009 that approved the *pelan kerja tanah dan pelan jalan dan perparitan* and did not object to the proposed access road, D5 had acted bona fide under the believe that the condition imposed in its approval for the amended *KM* as regards the access road had been fulfilled.

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[40] The plaintiff argues that D5 ought to have done its own searches at the appropriate land office to ascertain if the representations of D1 as regard the status of the said land were true and accurate and that the approval of the ROW by D4 was in accordance to law. I find that is an unreasonable argument and that the imposition of such a duty on D5 would be onerous. The reliance placed by D5 on the letter dated 18 September 2009 issued by D4 confirming the grant of ROW over the said land is to my mind proper and reasonable. D5 cannot be required to carry out its own independent searches on the ownership of the said land or to ascertain the lawfulness or validity of the ROW. In all fairness, that cannot be the standard of care that is required of D5, as a local authority. See *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734.

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[41] Thus, I find that D5 had properly discharge its duty of care and there is no breach of that duty.

I

[42] Wherefore, I entered judgment for the plaintiff as regards its

- A** counterclaim against D3 and D4, and dismissed the plaintiff's counterclaim against D5, and made the following orders:
- (a) a declaration that the right of way passing through the plaintiff's land in Lot No 72077, Bandar Selayang, Daerah Gombak, Negeri Selangor, purported to have been granted by D3 and/or D4 to D1 and D2 is
- B** invalid, unenforceable and contrary to the law;
- (b) a declaration that the letter dated 18 September 2009 bearing reference Bil () dlm PTG No 9/1/1/2009 issued to D1 bearing the caption 'Permohonan Lalu Lalang (ROW) Pentadbir Tanah mengikut Seksyen
- C** 391 Kanun Tanah Negara Di Kristal Heights HS(D) 30652, PT 35652, PT35265, Mukim Batu, Daerah Gombak' is invalid, unenforceable and contrary to the law;
- (c) an order that damages be assessed against D3 and/or D4 jointly and
- D** severally;
- (d) interest on any general damages assessed and ordered to be paid shall be at the rate of 5%pa calculated from 18 September 2009;
- (e) the D3 and D4 shall bear the cost of the action against them and the
- E** quantum of which shall be assessed together with the assessment of damages; and
- (f) the counterclaim against D5 is dismissed with cost RM10,000.

Order accordingly.

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Reported by Izzat Fauzan

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