Date and Time: Friday, 7 February 2025 9:16:00 AM MYT

Job Number: 244722428

Document (1)

1. *First Lotus (M) Sdn Bhd v Datuk Bandar Kuala Lumpur & Anor [2024] MLJU 443*

Client/Matter: -None-

Search Terms: FIRST LOTUS (M) SDN BHD v. DATUK BANDAR KUALA LUMPUR & ANOR [2024] MLJU 443

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
MY Cases	-None-

First Lotus (M) Sdn Bhd v Datuk Bandar Kuala Lumpur & Anor [2024] MLJU 443

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

AHMAD KAMAL MD SHAHID H

JUDICIAL REVIEW APPLICATION NO WA-25-572-11 OF 2022

20 February 2024

Yip Huen Weng (with Ngo Jun Yan) (Josephine, LK Chow & Co) for the applicant.
EMohd Fikri bin Abd Rahman (Radzlan Low & Partners) for the respondent.

Ahmad Kamal Md Shahid H:

Judgment

Introduction

[1] The Applicant filed an application for judicial review **(Enclosure 8)** under Order 53 of the Rules of Court 2012 (ROC).

[2] Leave was granted to the Applicant for application for judicial review against the Respondents to seek the following reliefs: -

2.1 suatu Perintah Certiorari untuk membatalkan Perintah Responden Kedua bertarikh 16.8.2022 dalam Kes Rayuan No: R67/2020;

2.2 suatu Perintah Certiorari untuk membatalkan Notis Penolakan Permohonan Kebenaran Merancang Responden Pertama bertarikh 18.11.2020;

2.3 suatu deklarasi bahawa Pemohon dibenarkan untuk memakai premis yang beralamat di No. 21, Jalan Aminuddin Baki, Taman Tun Dr. Ismail, 60000 Kuala Lumpur sebagai firma guaman;

2.4 suatu Perintah Mandamus diarahkan kepada Responden Pertama untuk mengisukan satu Kebenaran Merancang untuk menukar jenis kegunaan kediaman sediada kepada pejabat sementara bagi Premis tersebut;

2.5 suatu Perintah Mandamus diarahkan kepada Responden Pertama untuk memperbaharui Kebenaran Merancang tersebut, setiap kali Pemohon perlu memperbaharu Kebenaran Merancang tersebut;

2.6 sekiranya Pemohon diberikan kebenaran menurut perenggan-perenggan 2.1-2.5 di atas, satu perintah untuk perintah-perintah yang dipohon;

2.7 satu perintah interim supaya sebarang prosiding, tindakan dan/atau keputusan berbangkit daripada keputusan-keputusan Responden Pertama dan Responden Kedua berkenaan Premis tersebut digantung sehingga pelupusan permohonan untuk Semakan Kehakiman ini secara interparte;

[3] In this judicial review, the Applicant seeks to quash the 2nd Respondent's **(Appeals Board)** decision dated 16.8.2022 **(the Decision),** in respect of Appeal No: R67/2020 **(the Appeal).**

[4] In essence, the 1st Respondent **(DBKL)** has refused the Applicant's planning permission application for a temporary conversion of usage of a residential premise to an office **(the Application).** Upon the Applicant's appeal to the Appeals Board, the Appeals Board dismissed the Applicant's appeal against the DBKL's refusal/rejection of the Application.

[5] After the hearing, I allowed the Applicant's judicial review application (Enclosure 8). I will now set out the grounds for my decision.

Background Facts

[6] The narration of the background facts herein is adopted with and/or without modification from the written submissions of the parties and can be summarized as follows: -

6.1 The Applicant is the registered owner of No. 21, Jalan Aminuddin Baki, Taman Tun Dr Ismail, 60000 Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur **(the Premise).** The Premise has been rented to Messrs. Josephine, L K Chow & Co **(JLKC)** to operate as a legal firm since 1.10.2016.

6.2 Prior to that, the Premise was rented for the operation of another law firm under the name of Messrs. Richard Wee & Yip for 6 years, between January 2010 to September 2016.

6.3 On 26.6.2020, DBKL issued an enforcement notice to JLKC, purporting that the Applicant/JLKC had contravened Section 26 of the Federal Territory (Planning) Act 1982 **(FTA 1982),** specifically on changing the usage of the Premise from residential to office without a planning permission from DBKL. (See: **Page 3, "Exhibit YHW-2", Affidavit in Support (AIS) (1))-**

6.4 After several correspondence and meetings, DBKL's representatives advised the Applicant/JLKC to apply to DBKL's Planning Department, for a temporary change of usage of the Premises. (See: **Pages 4-18, "Exhibit YHW-3", AIS (1)).**

6.5 On 2.10.2020, the Applicant, vide its architect, DCDA Architect Sdn. Bhd. submitted the Application to DBKL. (See: **Pages 21-27, "Exhibit YHW-4", AIS (1)).**

6.6 Upon receiving the Applicant's Application and to complete the assessment of the Applicant's Application, the DBKL had on 21.10.2020 made a site visit to the Applicant's Premises and the following were discovered:

(a) investigation found that the legal firm activities have been operating for the past 10 years;

(b) the surrounding area is an existing housing area of semi-detached houses; and

(c) enforcement notice dated 26.6.2020 has been issued against the activities for operating without a planning permission.

6.7 Based on the application for planning permission received and the site visit, the DBKL had amongst others made the following assessment:

(a) The application does not comply with the KL City Plan 2020 as the locality where the Applicant's Premise is iocated is zoned as Established Housing; and

(b) The Application also is prohibited by way of Rule 2 of the Federal Territory (Planning) (Classes of Use of Land and Buildings) (Federal Territory of Kuala Lumpur) Rules 2018 **(FTR 2018)** read together with the Schedule there at being office activities prohibited in Established Housing Zones.

6.8 Therefore, it was recommended that the application to change the usage from residential to office cannot be considered by reason that office activities (B3) are prohibited in residential premises (EH).

6.9 It was also recommended that a compound be offered to the Applicant for operating as a legal firm for the past 10 years.

6.10 In light of the recommendation set out above, it was decided at the One Stop Centre Committee Meeting dated 3.11.2020 to reject the Applicant's Application for planning permission by reason that the same is not in compliance with the KL City Plan 2020 and FTR 2018 that prohibits office activities in Residential Zones.

6.11 On 8.12.2020, the Applicant received a Notice of Rejection **(Notice of Rejection)** from the DBKL. The Application was rejected on the premise that it was inconsistent with the KL City Plan 2020 and FTR 2018, which disallows office activities (B3) in Residential Zone (EH). (See: **Page 105, "Exhibit YHW-4", AIS (1)).**

6.12 The zoning of the Premise as set out in the KL City Plan 2020 is not disputed. (See: **Page 13, "Exhibit YHW-7", Applicant's Affidavit in Reply (AAIR)).**

6.13 On 17.12.2020, the Applicant filed the Appeal with the Appeals Board. (See: **Pages 107-116, "Exhibit YHW-4", AIS (1)).**

6.14 On 16.8.2022, the Appeals Board dismissed the Appeal. (See: **The Appeals Board Order is on pages 1-2, "Exhibit YHW-1", AIS (1)).** (See: **The Grounds of Decision is on pages 105-110, AAIR).**

6.15 Hence, the present judicial review application by the Applicant.

The Applicant's submission

[7] In gist, the Applicant submits that the Appeals Board has committed an error in law and/or facts and/or acted irrationality in coming to the Decision, this included: -

7.1 a fundamental failure or misapplication of Section 22(4) of the FTA 1982 in finding the DBKL had rightfully exercised its powers in dismissing the Application;

7.2 failure to consider the applicable laws which allow the Firm to operate from a residential premise; and

7.3 failure to consider material considerations submitted by the Applicant.

The Respondents' submission

[8] In essence, the Respondents submit that: -

8.1 the DBKL had duly rejected the Applicant's planning permission application, as it does not comply with KL City Plan 2020 and FTR 2018, which prohibit office activities within a residential zone; and

8.2 that Section 45 (12) of the FTA 1982 bars the Appeals Board's decision from being questioned by this Honorable Court.

The Law

[9] Judicial review is generally concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety.

[10] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the Courts to scrutinize the decision not only for the process, but also for substance.

[11] It is settled law that the High Court will not interfere with a decision of the Respondents unless it can be established that the decision is infected with errors of law.

[12] In the Federal Court case of *Akira Sales & Service (M) Sdn Bhd v. Nadiah Zee bt. Abdullah and another appeal* [2018] 3 MLRA 589; ; [2018] 2 CLJ 513; ; [2018] 2 MELR 337; ; [2018] 2 MLJ 537, the liberal approach on judicial review in *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; ; [1997] 1 CLJ 147 has been re-emphasized as follows:

"[45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:

'It is often said that judicial review is concerned not with the decision but the decision-making process. (See e.g. *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that **such a decision is also open a challenge on grounds of illegality' and 'Irrationality' and in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.**

in this context, it is useful to note how Lord Diplock (at pp 410-411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:

> **By 'illegality'** as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> **By irrationality',** I mean what can by now be succinctly referred to as 'Wednesday unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this roie, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I have described the third head as **procedural impropriety'**
>
> rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
>
> Lord Diplock also mentioned **proportionality'** as a possible fourth ground of review which called for development"

(emphasis added)

[13] Further, the Court of Appeal in *Dato' Seri Dr. Ahmad Zahid bin Hamidi, Menteri Dalam Negeri, Kementerian Dalam Negeri & Ors v. Soo Lina & Ors* [2018] 1 MLRA 683; ; [2018] 6 CLJ 285; ; [2018] 1 AMR 436; ; [2018] 2 MLJ 738 explained the test of reasonableness in a judicial review as follows:

> "[39] The test of reasonableness has been the subject of many cases over the decades in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on ground of unreasonableness or irrationality, Henchy J of the Irish Court in *The State (at the Prosecution of John Keegan and Eoin J Lysaght) v. The Stardust Victims' Compensation Tribunal* [1986] IR 642 set a number of such circumstances in different terms. They are;
>
> 1. It is fundamentally at variance with reason and common sense;
> 2. It is indefensible for hearing in the teeth of plain reason and common sense; and
> 3. Because the court is satisfied that the decision-maker has breached his obligation whereby the 'must not flagrantly reject or disregard fundamental reason common sense in reaching his decision.
>
> [41] In *Meadows v. Minister for Justice Equlity and Law Reform and others* [2010] IESC 3 Denham J in her dicta (ratio) set out the following test:
>
> This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. Inter alia, the decisionmaker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises inter alia from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, or reviewing the reasonableness of the

decision; (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on or rational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective'."

[14] In addition, a decision that involves an error of law is subject to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 1 MLRA 336; ; [1999] 3 CLJ 65; ; [1999] 3 AMR 3529; ; *[1999] 3 MLJ 1*, where it states:

"In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the not to be challenged, etc' kind, **judicial review will lie to impeach all errors of law made by an administrative body or tribunal and,** we would add, inferior courts. In the words of Lord Denning in Pearlman v. Harrow School (ibid) at p 70, "... **no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it."**

(emphasis added)

[15] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the Applicant must show that the Respondents had, among others: -

a. Asked itself the wrong questions;
b. Considered irrelevant matters;
c. Failed to take relevant matters into consideration;
d. Failed to apply the proper principle(s) of law; and/or
e. Reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

The decision of the Court

Whether the decision made by the DBKL was contravened and ultra vires the FTA 1982, KL City Plan 2020 read together with FTR 2018

[16] The DBKL submits that it has given due and proper consideration when assessing the Applicant's Applications for planning permission after having considered and relied upon the KL City Plan 2020 and FTR 2018.

[17] The DBKL submits that it has ensured that all applications for planning permission are in compliance with the necessary requirements in place at the time the application was made.

[18] Based on the application for planning permission received and the site visit, the DBKL had amongst others made the following assessment: -

18.1 the Application does not comply with the KL City Plan 2020 as the locality where the Applicant's Premise is located is zoned as Established Housing;

18.2 the Application also is prohibited by way of Rule 2 of the FTR 2018 read together with the Schedule there at being office activities prohibited in Established Housing Zones; and

18.3 it was recommended that the Application to change the usage from residential to office as cannot be considered by reason that office activities (B3) are prohibited in residential premises (EH).

[19] Therefore, having made the necessary considerations it is submitted that the Respondent is correct in declining the Applicant's Application for planning permission.

[20] It is to be noted that Section 22 of the FTA 1982 gives DBKL the power and discretion to grant planning permission, notwithstanding the existence of a development plan, subject to restrictions under Section 22(4) and Section 23 of the FTA 1982.

[21] Section 22 of the FTA 1982 reads as follows: -

22 Development order

(1) The Commissioner shall have power exercisable at his discretion to grant planning permission or to refuse to grant planning permission in respect of any development irrespective of whether or not such development is in conformity with the development plan; provided however the exercise of the discretion by the Commissioner under this subsection shall be subject to the provisions of subsection (4) and section 23.

(2) Where the Commissioner decides to grant planning permission in respect of a development he may issue a development order-

(a) granting planning permission without any condition in respect of the development;

(b) granting planning permission subject to such condition or conditions as the CommIssioner may think fit in respect of the development:

Provided that the Commissioner shall not issue a development order under this subsection unless he is satisfied that the provision of section 41 relating to the assessment of development charges has been complied with.

(3) Without prejudice to the generally of paragraph (b) of subsection (2), the Commissioner may impose any or all of the following conditions-

(a) To the effect that the development order granting planning permission in respect of any change of use of land or building is only for a limited period and after the expiry of that period the use of the land or building as authorised under such development order shall cease to have any effect and the land or building shall be reverted to its original use; and

(b) To regulate-

(i) The development and use of any other land which is under the control of the applicant and which is adjoining the land for which planning permission is to be granted for the development thereof; and

(ii) The works that may be carried out on such other land in the manner and to the extent as may appear to the Commissioner to be expedient with regard to the development for which planning permission is to be granted.

(4) The Commissioner in dealing with an application for planning permission shall take into consideration such matters as are in his discretion expedient or necessary for purposes of proper planning and in this connection but without prejudice to the discretion of the Commissioner to deal with such application, the Commissioner shall as far as practicable have regard to-

(a) the provisions of the development plan and where the local plan has not been adopted, the Comprehensive Development Plan; and

(b) any other material consideration:

Provided that, in the event of there being no local plan for an area and the Commissioner is satisfied that any application for planning permission should not be considered in the interest of proper planning until the local plans for the area have been prepared and adopted under this Act then the Commissioner may either reject or suspend the application.

(5) Upon the receipt of an application for planning permission the Commissioner shall within such time as may be prescribed either grant or refuse the application and when the application is granted subject to condition or refused, the Commissioner shall give his reasons in writing for his decision.

(6) Where a development order is granted, whether with or without conditions, it shall be conveyed to the applicant in the prescribed form.

(emphasis added)

[22] The recent Federal Court case of *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors and Other Appeals* [2023) 4 MLRA 114; ; [2023] 4 AMR 221; ; *[2023] 3 MLJ 829*; ; [2023] 5 CLJ 167 had stated: -

> [55] Section 22(4} is multifaceted and contains several limbs. The first limb which reads "the Commissioner in dealing with an application for planning permission shall take into consideration such matters as are in his discretion expedient or necessary for purposes of proper planning ..." makes it clear that the **Datuk Bandar is required to take into consideration matters that are in his discretion expedient or necessary for proper planning.**
>
> [56] This means that the Datuk Bandar is obligated by law to consider matters which are expedient, ie. beneficiai or necessary for proper planning. We comprehend from the FT Act that proper planning refers to the system of planning and regulation underlying the Act, namely the structure plan system as opposed to the CDP system. So, the need to consider the statutory development plans is an essential task, even if there is to be a subsequent departure from the same. **What underscores the consideration of 'matters' for the exercise of the Datuk Bandar's discretion in this section, is the need to adhere to proper planning as envisaged under the Act.**
>
> [57] The Datuk Bandar's discretion as to what is expedient or necessary for purpose of proper planning appears to be worded widely. However, this does not detract from a statutory construction that such discretion should be exercised objectively and not subjectively or selectively. If the latter approach is adopted, this will necessarily lead to arbitrariness. Arbitrariness is precisely what a holistic reading of the Act seeks to prohibit. **Therefore, in exercising its discretion, the Datuk Bandar is expected to act reasonably, logically and in conformity with the purpose and object of the Act "**
>
> (emphasis added)

[23] Based on the Federal Court in **Trellises** (supra), the DBKL must set out these matters which are deemed expedient or necessary for proper planning objectively, before making the decision to dismiss the Application.

> [58] In order for a court to assess whether the Datuk Bandar's discretion has in fact been exercised within the ambit of the Act, **it is necessary that the Datuk Bandar explains or sets out the 'matters' that are in his objective opinion, expedient or necessary for purposes of proper planning, and which therefore caused him to exercise his discretion to either grant or refuse planning permission.** Otherwise, it would not be possible for any party, the court or the public to know or comprehend on what basis a decision was made to either allow or refuse planning permission. The issue of when such reasons ought to be given also arises for consideration in this series of appeals and will be considered later.
>
> (emphasis added)

[24] Upon perusal of the Notice of Rejection, I find that the DBKL had rejected the Application, after merely considering the KL City Plan 2020 and the FTR 2018. From the contents of the Notice of Rejection, it is apparent that the DBKL did not give any consideration to any other matters. (See: **Page 105, "Exhibit YHW-5', AIS (1)).**

[25] The Notice of Rejection reads as follows: -

> ADALAH DIBERITAHU bahawa permohonan
>
> **untuk cadangan menukar jenis kegunaan kediaman sedia ada kepada Pejabat sementara** di atas Lot No. 21, Jalan Aminuddin Baki, Taman Tun Dr. Ismail, Kuala Lumpur dalam Bandaraya Kuala Lumpur.
>
> **untuk: Tetuan First Lotus (Malaysia) Sdn Bhd.**
>
> **tidak diberi kebenaran perancangan dengan alasan** berikut: -
>
> **Tidak selaras dengan Pelan Bandaraya Kuala Lumpur 2020 dan Kaedah-Kaedah (Perancangan) (Kelas-Kelas Kegunaan Tanah dan Bangunan) WPKL 2018 yang tidak membenarkan aktiviti Pejabat**
>
> Obligation to set out the considerations in reaching the decision, whenever challenged.

> In the first place, there is no doubt that s. 22 by its terms confers a discretion upon the appellant in matters of planning approval. **But it is not an unfettered discretion because ParÜament has directed that the appellant should take into account certain considerations before making his decision whether to grant or to refuse approvai.**
>
> Secondly, we are in agreement with Dato' Zaki's submission that the question whether planning approval should be granted or refused is a matter for the appellant to decide, He has access to material and information which is, for good reason, denied this Court. We therefore agree that it is not the function of the Court to determine how the planning of Kuala Lumpur should take place.
>
> Thirdly, **since it is for the appellant to make the determination on issues of planning approval, it is for him, when challenged, to set out the matters he took into account when arriving at his decision so as to satisfy the Court that he acted in accordance with law.** This he must do, in the ordinary way, by filing an affidavit explaining the circumstances that affected his decision. On the authorities, he cannot be compelled to provide an affidavit. But if he does not do so, the usual consequences, to which we have earlier adverted, must follow and the Court must be left to decide the case on such admissible evidence as is made available to it.
>
> (emphasis added)

[32] In the Application, I find the Applicant has provided extensive justifications concerning the material considerations for the DBKL's assessment However, both the DBKL and the Appeals Board have disregarded the material considerations which would have affected the decision making process, which are as follows: -

(a) the statutory implication of the Legal Profession Act 1976 **(LPA)** and Bar Council Rulings which allow the operation of a law firm from a residence premise;

(b) the need for there to be a harmonious interpretation of the FTA 1982 and the LPA, read together with the Bar Council Rulings;

(c) the operation of law firms from the Premises before the KL City Plan 2020 and the FTR 2018 were enacted;

(d) the distinct nature of operations of the Firm;

(e) the express public support towards the Firm at its current location;

(f) the temporary nature of the Application; and

(g) the undesirous consequence of automatically rendering all legal firms which are currently operating from premises within a residential zone in Kuala Lumpur to be illegal.

[33] Furthermore, this Court is of the view that in the event the DBKL has any concerns over the implication of permitting the Firm to operate from the Premise, this can be remedied by imposing reasonable conditions on the Applicant in granting the temporary conversion.

[34] Furthermore, the DBKL is empowered to withdraw the temporary conversion orto refuse an extension, in the event the Applicant/the Firm fails to comply with such conditions.

[35] Therefore, based on the above, I am of the view that the DBKL's and Appeals Board's conduct in failing to set out, consider and decide on these considerations is a contravention of its statutory duty under Section 22(4) of the FTA 1982.

Ouster Clause

[36] The Respondents contend that Section 45(12) of the FTA 1982 provides that an order made by the Appeals Board in this case is finai and shall not be called into question in any court of law.

[37] Section 45(12) of the FTA 1982 states as follows: -

> "45(12) **An order made by the Appeal Board on an appeal** before it **shall be final, shall not be called into question in any court,** and shall be binding on ail parties to the appeal or involved in the matter."
>
> (emphasis added)

[38] The Respondents is trying to convince this Court that the Appeals Board's decision is immune to challenge by virtue of Section 45(12) ofthe FTA 1982.

[39] In the Federal Court case of *Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363; ; [1984] 1 CLJ (Rep) 155; a similar provision to Section 45(12) of the FTA 1982 was referred to, namely Section 33B (1) of the *Industrial Relations Act 1967* which states as follows:

> "Subject to this Act and the provisions of section 33A, an award, decision or order of the Industrial Court under this Act (including the decision whether to grant or not to grant an application under section 33A (1)) shall be **final and conclusive, and shall not be challenged, appealed against, received, quashed or called in question in any court."**
>
> (emphasis added)

[40] With reference to the above Section 33B (1), the Federal Court in **Hotel Equatorial** (supra) referred to the decision of the House of Lords in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 and found that: -

> **". .. When words in a statute oust the power of the High Court to review decisions** of any inferior tribunal by certiorari, **they will not have the effect of ousting that power** if the inferior tribunal has **acted without jurisdiction** or if
>
> it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a **nullity.** A decision on any question would be a nullity if the tribunal in making the decision **failed to consider any matter which the law requires it to take into consideration** in determining the question..."
>
> (emphasis added)

[41] Likewise, in another Federal Court case of *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 AMR 433; ; [1996] 1 MLRA 725; ; [1996] 1 MELR 71; ; [1997] 1 CLJ 147; ; [1997] 1 MLJ 145 ***at 182 & 183,*** it was reiterated that despite the wordings of Section 33B (1) of the *IRA*.

> **"...Yet, our High Courts and Federal Court Intervene** to quash the Awards of the Industrial Court in appropriate cases, **all for the cause of justice.** Therefore, **even when the statute declares an Award is final, the courts can still intervene..."**
>
> (emphasis added)

[42] The Federa! Court went on to say on page 183:

> "... it is clear that the **High Courts** and the Federal Court have adopted a **liberal and progressive approach in certiorari proceedings,** and I find that where the particular facts of the case warrant it the High Court should endeavour **to remedy an injustice** when it is brought to its notice rather than deny relief to an aggrieved party on purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice..."
>
> (emphasis added)

[43] The same issue concerning such a similar ouster clause arose in the Court of Appeal case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union* [1995] 2 CLJ 748;; [1995] 1 MLRA 268; ; [1995] 2 AMR 1601; ; [1995] 2 MLJ 317. In that case, it concerned the applicability of the ouster provision in Section 33B (1) of the *Industrial Relations Act 1967*.

[44] In the case, the Gopal Sri Ram JCA (as he then was) held that an inferior tribunal has no jurisdiction to make errors of law and thus, its decision cannot be immune from judicial review by way of an ouster clause.

> [6] **An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law and it is no longer of concern whether the error is jurisdictional or not. Such distinction ought no longer to be maintained. If there is an error of law upon which the award of the tribunal is founded, such error whether of interpretation of otherwise must necessarily be**

without jurisdiction or in excess of jurisdiction. It follows that the decision of the *Board in South East Asia Fire Bricks v. Non-Metalic Mineral Products Manufacturers Employees Union & Ors* *[1981] A.C 363*, and all those cases approved by it, are no longer good law.

By the same token, the cases of *Kannan v. Menteri Buruh dan Tenaga Rakyat* *[1974] 1 MLJ 90* and *Lian Yit Engineering Works Sdn Bhd v. Loh Ah Fon & Ors* *[1974] 2 MLJ 41* though disapproved or overruled by the Board, must now be taken to have always correctly stated the law.

[7] **Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause, however widely drafted. The ouster clause in** *s. 33B (1)* **of the Act, therefore, does not disable the High Court from exercising its judicial review of awards of the Industrial Court."**

(emphasis added)

[45] Based on the above, I am of the view that the Respondents' submission that Section 45(12) of the FTA 1982 excludes this Court's supervisory jurisdiction to quash an administrative decision i.e. DBKL and Appeals Board for an error of law has no basis in law.

Conclusion

[46] Given the reasons aforesaid, the DBKL incorrectiy dismissed the Application by not considering material considerations as required under Section 22(4) (b) of the FTA 1982. This was followed by the Appeals Board's errors in law and/or in facts and/or unreasonable acts in arriving at the Decision.

[47] This Court is of the view that the Respondents' decision was tainted with irrational and/or errors of law and/or unreasonableness that warrants the intervention of this Court.

[48] As such, the Applicant's application for judicial review (Enclosure 8) is allowed with costs of RM2,000.00 subject to the allocator fee.

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