PERBADANAN PENGURUSAN TAMAN BUKIT JAMBUL v. KERAJAAN MALAYSIA
HIGH COURT MALAYA,
ABDUL HAMID MOHAMAD J
CIVIL SUIT NO: 21-1-96
16 NOVEMBER 1999
[2000] 5 CLJ 98

***TORT**: Nuisance - Renovation of flats - Setting-up of government clinic - Whether a mere inconvenience - Whether an actionable nuisance*

***LOCAL GOVERNMENT**: Buildings - Renovation of flats - Setting-up of government clinic - Whether approved by management corporation - Whether contrary to use of land meant for residential and commercial purposes only*

The plaintiff was the management corporation of a building of flats. The plaintiff alleged that the defendant had done renovation to units owned by the defendant to set up a government clinic without the approval of the plaintiff. In so doing, the plaintiff claimed that the defendant had pulled down walls, encroached on the five-foot path way thus trespassing on the property of the plaintiff and causing nuisance. The plaintiff alleged that the defendant required the approval of the town council ('the MPP') for the renovation works done and that MPP was wrong in law to hold the view that its approval was not required. Also, that the establishment of a government clinic was contrary to the condition of use of the land meant for residential and commercial purposes only.

The defendant claimed that it had bought the said units for the purpose of setting up the government clinic and that it had obtained the approval from the predecessor of the plaintiff, *ie*, Asas Dunia, before convening renovation work.

Held:

[1] There was no dispute that the five-foot way was a common property. From the facts, the defendant was granted "exclusive use and enjoyment" or at the very least "special privileges" over the common property. This was not exclusive to the defendant only but also to every member of the public, every resident and every member of his family. The principle of equitable estoppel was applicable.

[2] The defendant need not obtain fresh approval from the plaintiff as the defendant had obtained the approval from Asas Dunia before the plaintiff was established. The question of trespass did not arise at all as the renovation was done with the permission of Asas Dunia.

[3] If the law were to treat every inconvenience as actionable nuisance, then nobody could build or renovate his house in a town or residential area. Question of nuisance must be considered with reference to local circumstances. Whether an act amounts to nuisance or not depends on the magnitude of the act or its effects, seen in the light of the circumstances of the relevant surroundings. People living close to a wholesale market will have to put up with the

noises coming from the market in the wee hours of the morning. People living near an airport cannot complain that the sounds of the aeroplanes is a nuisance.

[3a] The taking away of the five-foot way by the defendant which was compensated with a new five-foot way covered with awning not only at the area taken but right up to the main entrance was not actionable nuisance. There was also no basis for the allegation that the renovation done by the defendant had caused nuisance.

[4] It was for the MPP to state whether it required the plans to be approved or not. The defendant could not be blamed if the MPP did not require the defendant to get its approval. In fact, the plans were submitted to the MPP for approval, believing that they had to be approved. This showed good faith on the part of the defendant. If the plaintiff wanted to challenge the decision of the MPP, it should either apply for judicial review or name the MPP in this suit.

[5] As to the plaintiff's allegations that the plaintiff had made changes which were not in conformity with the other parts of the building, these were too trivial to amount to nuisance. Extensive changes are usually made by residents within weeks after the keys are handed over by the developers. The public or the "reasonable man" do not consider those changes as nuisance. There should not be a different standard for a government project for the public.

[6] The plaintiff's submission that the defendant had breached the condition in the grant to use the building as a government clinic when it should be used for residential and commercial purposes only, contradicted the stand taken by the plaintiff all along, *ie*, that the plaintiff did not object to the defendant putting up the government clinic for the public provided the plaintiff approved of it. Secondly, that was a matter for the land office and not for the plaintiff. Thirdly, the plaintiff did not complain about the existence of the private clinic in the same premises. As such, there was no rational for objecting to the setting-up of a government clinic.

[6a] On the plaintiff's claim that it did not want to open a flood-gate for other residents to make similar alterations to their units, the plaintiff had every right to allow or not to allow any alterations to be made but only subsequent to its establishment. It was beyond the plaintiff's powers to prevent what had been allowed to be done prior to its establishment.

[Plaintiff's claim dismissed with costs.]

Case(s) referred to:

Mok Deng Chee v. Yap See Hoi & Ors [1981] CLJ 62 (Rep);

[1981] 2 MLJ 32 ***(refd)***

Legislation referred to:

Strata Titles Act 1985, ss. 4, 42

Counsel:

For the plaintiff - Stella Lau; M/s Lim Kean Siew & Co

For the defendant - Syed Marzidi, FCReported by Kavitha Gunasegaran

JUDGMENT

Abdul Hamid Mohamad J:

When this case first started three defendants were named:

(1) Perbadanan Pembangunan Bandar (2) Kerajaan Malaysia, and (3) Kerajaan Negeri Pulau Pinang.

The writ and statement of claim against the first defendant was struck out by this court. Appeal against that decision to the Court of Appeal was dismissed, leaving only the second and the third defendants. During the trial, the action against the third defendant was withdrawn leaving only the second defendant.

For convenience I shall refer to the original first defendant as "UDA", the original second defendant as "the defendant" and the original third defendant as "the State Government". The Ministry of Health a Ministry of the Government of Malaysia will be referred to as "the Ministry". The medical and health department, a department of the Ministry in Penang will be referred to as "the health department" and its director as "the director of health". Taman Bukit Jambul will be referred to as "the taman". Asas Dunia Sdn. Bhd. will be referred to as "Asas Dunia". The Jabatan Kerja Raya will be referred to as "JKR" and the Majlis Perbandaran Pulau Pinang as "MPPP".

The statement of claim is lengthy. I shall only give a very brief summary in this judgment. However, for easy understanding of the case, I shall also provide a chronology of events.

The plaintiff is a management corporation established under the Strata Titles Act 1985 in respect of the Taman. As such it is the owner of the common property of the taman. The plaintiff alleges that the defendant, through the Ministry and the JKR had done renovation to units owned by the defendant for the purpose of making a government health and dental clinic without the approval or consent of the plaintiff. In so doing the defendant had pulled down walls, encroached on the five-foot path and encroached on the common property, thus trespassing on the property of the plaintiff and causing nuisance to the residence. The plaintiff prays for various declarations, including causing voluntary waste, trespass, nuisance and that the second defendant is not entitled to use the said Blocks D and H (where the units bought by the second defendant are situated) for public purpose, i.e. government health and dental clinic. The plaintiff also prays for an order that the second defendant pull down the renovation and re-instate the structure of the said blocks. The plaintiff also prays for damages, interest and costs.

In brief the defence of the second defendant is that the second defendant had bought those units for the purpose of making government health and dental clinic for the public. The second defendant had obtained the approval and consent of the plaintiff before convening the renovation work. The defendant denies to causing structural changes, nuisance or guilty of trespass. The defendant also counterclaims for a declaration that the defendant be permitted to enter, move in the equipments and commence the services of the clinic. In the alternative, the defendant prays for the refund on the management fees of RM400 per month paid by the defendant to the plaintiff since July 1990. The defendant also prays for damages, interest and cost.

I shall now reproduce the chronology of events that are either undisputed or as found by me based on oral and documentary evidence, avoiding the more salient issues that need to be and will be discussed in greater detail later.

On 5 October 1985, UDA entered into joint-venture agreement with Asas Dunia to develop the land in question and build 1231 units of flats. According to the agreement, UDA is the owner of the land and Asas Dunia is the developer. Asas Dunia is to carry out the development at its own expense.

Asas Dunia is to have absolute control and discretion in respect of planning, execution and completion of the development. Asas Dunia is solely responsible for the marketing promotion and sale of the flats and shoplots to the public. Asas Dunia is responsible and at its own expense to set up a management corporation for the said flats upon their completion. Subject to payment of RM10 million to UDA by Asas Dunia, the proceeds from the sale of the flats entirely belong to Asas Dunia. In short it is what is commonly known as a "turn-key" project.

Even prior to that, the ministry of health was planning to put up a polyclinic in the area. A polyclinic project was approved under the 5th Malaysia Plan (1986-1990).

On 21 February 1989 the director of Health (DW1) wrote to Asas Dunia, referring to a discussion over the telephone on the same day and informing Asas Dunia that the Ministry would have to renovate the units intended to be purchased by the Ministry for the purpose of making the government clinic to suit the Ministry's requirements. The letter also says that a portion of the wall will have to be pulled down and partitions put up. Awning will have to be put up as a shelter against rain and sunshine. The director of health also asked for Asas Dunia's consideration and approval.

On 11 March 1989, Asas Dunia replied. This letter was signed by DW2, the executive chairman of Asas Dunia. The reply, *inter alia*, says that Asas Dunia will give all the necessary co-operation and assistance required by the Ministry for the establishment of the government clinic which is badly required in the area.

On 28 March 1989, Asas Dunia (DW2) wrote to MPPP and enclosed an amended plan to the said units incorporating the purposed renovation and seeking MPPP's approval.

By a sale and purchase agreement dated 18 July 1990, the Federal Land Commissioner bought 10 flat units from Asas Dunia for the Ministry.

In May 1991 DW1 went on leave prior to retirement. She was succeeded by DW3.

On 14 September 1991 DW3 (the second director of health) forwarded the renovation plans of the nine units to MPPP.

On 23 March 1992 MPPP requested the health department to submit a complete building plan to MPPP.

On 16 April 1992, DW3 forwarded MPPP's letter dated 23 March 1992 to JKR to prepare and submit the required plan.

While all these were happening the plaintiff had not come into existence. Then on 6 November 1992 the plaintiff was established pursuant to an amendment to the Strata Titles Act 1985.

Contract to do the renovation work was awarded in early 1993, and possession was handed over to the contractor, Erat Jaya Sdn Bhd, on 22 April 1993. Work was to be completed in three months.

DW3 made a visit to the site on 24 April 1993. He found that there was a partition on the passage way against the wall of one of the units. That partition was used by the watchman. The contractor could not do the renovation work because it was in the way. According to him, during the visit someone came and talked to him. That person said that the partition was put up by Asas Dunia and asked him to talk to Asas Dunia. Consequently, on the same day he wrote a letter to Asas Dunia (Bundle B p. 59 and 59A).

From this letter, it is clear that:

(a) the health director says that during his site visit he found the guard house occupying part of the five-foot way;

(b) Asas Dunia had said that it had no objection to the renovations subject to the condition that MPPP is informed about it;

(c) the health director, by this letter, informs Asas Dunia that MPPP has no objection;

(d) Asas Dunia had earlier instructed the health department to contact the plaintiff to seek the plaintiffs co-operation to vacate the area (occupied by security office);

(e) the health department had contacted the plaintiff but the plaintiff refused to vacate the area and asked the health department to get in touch with Asas Dunia regarding the matter.

(f) the director of health pleads with Asas Dunia to request the plaintiff to vacate the area and find another area for the security office. (This makeshift guard house was never vacated nor dismantled).

On 3 May 1993 Encik Ridza Abdoh, The deputy director of JKR (DW8), himself an engineer, visited the site with his engineers and technicians. In his evidence he said:

> I was very satisfied by the action taken by my officers. I did not feel that there was much problem to carry out the work, apart from minor complaints like existing material in the area. I instructed my officers to take away the debris as soon as

possible.

On the following day (4 May 1993) a meeting was held. It was attended by Mr. Soo, representing the JKR, representatives of the district office, the health department and PW3.

It is not very clear as to what transpired at that meeting. Both DW3 and DW8 themselves did not attend that meeting. The representatives of the health department and the JKR who attended that meeting were not called. DW8 relates what Mr. Soo, DW8's subordinate officer, told him after the meeting. Of course that is hearsay. Anyway, what DW8 says of what Mr. Soo told him is not really important. It only explains what he did subsequently, *ie*, to call another meeting on 7 May 1993. In the meantime, around that time, most probably before 4 May 1993, according to DW3, he received a phone call from PW3 who said he was chairman of the plaintiff and responsible for the management of the Taman. According to DW3, PW3 said that the defendant had to get his approval for whatever the health department wanted to do outside the clinic. DW3 said he did not know about PW3 nor the plaintiff. According to him after that they sat-down together to resolve the issues. I believe he was referring to the meeting on 7 May 1993.

On 5 May 1993 the plaintiff, through its solicitors, wrote to JKR (bundle C p. 1):

> YJK/NG/TBJ/Gen 5hb Mei 1993
> **Per: Kerja-kerja Pembinaan Untuk Kementerian Kesihatan di Block D dan H, di Taman Bukit Jambul, Pulau Pinang**
> Kami mewakili Perbadanan Pengurusan Taman Bukit Jambul, untuk Blok D ke Blok H.

Anak guaman kami menyatakan bahawa pihak tuan telah mendirikan kerja-kerja pembinaan di kaki lima tingkat bawah Blok D dan H. Sila harap maklum bahawa kawasan kaki lima blok-blok tersebut adalah harta bersama ke semua penghuni-penghuni blok-blok tersebut dan kerja-kerja pembinaan tidaklah dibenarkan mengikut Akta Hakmilik Strata 1985.

> Kami difahamkan bahawa pihak tuan telah bersetuju untuk menghentikan kerja-kerja pembinaan di kawasan kaki lima dan selanjutnya untuk meruntuhkan tembok-tembok yang didirikan di Blok-blok tersebut atas permintaan Encik Bonny CK Loo, Pengerusi Perbadanan.
> Kami difahamkan bahawa setakat ini pihak tuan belum lagi mengambil apaapa tindakan untuk meruntuhkan pembinaan tersebut dan kami diarahkan oleh anak guaman kami untuk memberi notis kepada pihak tuan untuk berbuat demikian dengan secepat mungkin.

Kerjasama tuan dalam perkara ini dialu-alukan.

> Sekian, harap maklum.
> Signed

Two days later (on 7 May 1993) another meeting was held at the site. It was attended by DW8 (the deputy director of JKR), DW3 (the director of health), other government officers, PW3 and other members of the plaintiff.

DW3, the director of health, described what happened at the meeting thus:

> ... we tried to persuade him (PW3, the Chairman of the Plaintiff - added) to give us his permission. We said it was a Government project for the people.
> He wanted the plans to be approved by MPPP and as well as a letter requesting for permission from him.

DW8 described what happened at the meeting thus:

> Meeting arranged on 7 May 1993. I went to the site. Meeting was held at the site. The Chairman of the Corporation was present. The main complaint told to me was that work was done without approval of MPPP. I said I could submit all the plans to MPPP and get the approval. I did not promise him I would definitely get it as that is outside my jurisdiction main complain at that meeting was no MPP's approval. I agreed to try to get the approval because I thought that would help solve the problem. The Chairman of the Management Corporation agreed. No other conditions were imposed by the Chairman.

Towards the later part of his evidence, DW8 again said:

> I attended the meeting on 7 May 1993. The main complaint was that there was no approval by MPPP. It was agreed that we should get approval of MPPP. I was satisfied with the way the project was completed. I took it that the complaints were not that serious. There was no other complaint after the meeting, before I left the service. Plan was submitted to MPPP after the meeting.

PW3 did not give specific evidence about this meeting.

I accept the evidence of DW3 and DW8 as to what transpired at the meeting on 7 May 1993.

DW8's evidence as to what he did after the meeting is as follows:

> I went back to my office. I instructed my officers to submit plans to MPPP. I also wrote to the Chairman out of courtesy that the approval would take some time and to get his agreement to continue with the work.

That letter, dated 14 May 1993 (bundle C p. 3) reads:

> PKR.PP B/12/68(37) 14hb Mei 1993
> **Mengubahsuai 9 Buah Lot Kedai Di Blok 'D' - 'H' Untuk dijadikan Klinik Anika Bukit Jambul, Pulau Pinang**

Merujuk kepada perkara yang tersebut di atas adalah dimaklumkan kepada tuan oleh kerana terhadap beberapa masalah yang tidak dapat dielakkan, pihak JKR

> Pulau Pinang akan mengemukakan Pelan Bangunan berkaitan kepada Yunit Pendaftaran Pelan MPPP untuk dipertimbangkan oleh Majlis dalam sedikit masa lagi.
> Memandangkan prosedur untuk pertimbangan Majlis mungkin akan mengambil masa maka pejabat ini memohon persetujuan tuan untuk meneruskan pelaksanaan kerja-kerja pengubahsuaian di atas mengikut Pelan Ubahsuaian yang telah ditetapkan.

Signed

DW8 went on to say:

Para 2 - I hope to soften Chairman's stand.
I was surprised I received a lawyer's letter - page 4 Bundle C
- Ex. P2.

That letter, dated 19 Mei 1993 reads:

YJK/NG/TBJ/GEN/ad 19hb Mei 1993
Mengubahsuai 9 buah lot kedai di Block D-H untuk dijadikan Klinik Anika Bukit Jambul
Kami telah diserahkan surat tuan bertarikh 14hb Mei 1993 yang dialamatkan kepada Perbadanan Pengurusan Taman Bukit Jambul dengan arahan untuk membalas surat tersebut.
Walaupun Perbadanan Pengurusan Taman Bukit Jambul (PPTBJ) bersimpati dengan masalah yang dihadapi oleh pihak tuan, dukacita dimaklumkan bahawa PPTBJ tidak dapat memberikan kebenaran mereka untuk membolehkan pihak tuan meneruskan pelaksanaan kerja-kerja pengubahsuaian kerana ini akan mewujudkan satu contoh yang buruk (bad precedence) kepada pemilik-pemilik lain, terutama sekali, memandangkan kerja-kerja pengubahsuaian adalah di bawah pengendalian pihak kerajaan.
Oleh yang demikian, selaras dengan cogan kata "Kepimpinan Melalui Tauladan", pihak tuan adalah dikehendaki oleh PPTBJ untuk memperolehi kelulusan pelan-pelan pihak berkuasa sebelum kerja-kerja pengubahsuaian diteruskan.

Signed

DW8 went on the say:

I was surprised because there was no indication at the meeting by the Chairman that he would take legal action. When I received this letter, I felt I had been played out. I replied.

This letter is dated 27 May 1993. It reads:

PKR.PP (41)B/12/68 27 Mei 1993
Mengubahsuai 9 Buah Lot Kedai Di Blok 'D' - 'H' Untuk Dijadikan Klinik Anika Bukit Jambul, Pulau Pinang
Adalah dengan hormatnya merujuk kepada perkara di atas serta surat dari guaman tuan Lim Kean Siew & Co. bil. YJK/NG/TBJ/GEN/ad bertarikh 19 Mei 1993. Sukacita dimaklumkan bahawa proses untuk mengemukakan pelan dan seterusnya mendapatkan kelulusan dan pihak Majlis Perbandaran Pulau Pinang (MPPP) dijangka akan mengambil masa yang panjang dan pihak kami tidak dapat memberi jaminan bila pelan tersebut akan diluluskan oleh pihak MPPP memandangkan ianya adalah di luar bidang kuasa pejabat ini.
2. Oleh kerana surat dan peguam tuan dengan jelas meminta supaya pihak kami memberhentikan kerja-kerja tersebut, maka pejabat ini mungkin tidak ada pilihan lain kecuali memberhentikan kerja tersebut seperti yang diminta.

3. Sukacita diingatkan bahawa tindakan untuk memberhentikan kerja ini mempunyai implikasi yang banyak seperti sosial, kontrak dengan pemborong yang menjalankan kerja dan lain-lain. Jika kerja ini diberhentikan, kemungkinan untuk menyambung projek ini kembali akan mengambil masa yang panjang dan masalah projek ini akan menjadi lebih rumit.
4. Sukacita diingatkan bahawa pihak tuan selaku pihak yang menganggap bertanggungjawab dan berkuasa di kawasan tersebut, hendaklah juga sanggup menerika semua implikasi yang akan timbul dengan penuh tanggungjawab hasil dari keputusan yang dibuat oleh pihak tuan. Diingatkan juga semua tuntutan yang akan dibuat oleh pemborong kami hasil dari pemberhentian kerja ini akan dimajukan kepada tuan untuk dibayar oleh pihak tuan.
Signed

DW8 went on to say:

It was only to caution the Chairman whether he was aware of the implication. After that I did not hear any objection and proceeded with the work.

On 8 July 1993, the plaintiff wrote to JKR again. This letter says:

TBJMC/7/4 8th July, 1993
Re: Mengubahsuai 9 Buah Lot Kedai Di Blok D Dan H Untuk Dijadikan Klinik Anika Bukit Jambul, Pulau Pinang
We refer to our recent discussion on 7th May 1993 between your goodself, Dr. Lee Cheow Peng, JKR's representatives and our committee members pertaining to the above mentioned matter.

We have to date note that works occupying the common corridor/passageway have been erected and walls built right up to the roof beam. We regret very much to inform that we have yet to receive the approved plan from Majlis Perbandaran Pulau Pinang by your department. Though we welcome the clinics in our area but at the same time we have legal obligations to fulfil and we do not want to venture out of the law.

While we have no objections in the construction of the clinic but on the other hand we do not wish to set a precedent whereby other shop units will act on such similar incidence.
For your information, we underline herewith the legal aspects associating to the Strata Title Act 1985 for your attention
(a) as far as flats, condominiums and apartments are concerned, they involve the transfer of rights and not of land;

(b) under the Act, the word "Title" involves the rights and privileges of the owners.

For example, right to the use of common passageway, right to the use of common corridor, right to support, right of service and etc;
(c) Section 42 Sub-section 2 of the Act prohibit the Management Corporation to have the power to transfer any portion of the common property which forms part of the building or the land on which the building stands;

Having spelt above, we hope that you could understand our position.

> The Management Corporation apart from running the daily maintenance in the area, we are also managing the rights and privileges of the owners in the Blocks concerned as enacted under the Strata Titles Act 1985.
> In order for us to resolve this outstanding matter, we sincerely hope that you could furnish us with a letter stating the approval letter from the MPPP will be presented to us for our records. By the way, we are not particular on the time frame to obtain the approval letter say, indicate in your letter a duration of six months or a year.
> Our action will depend on the outcome of this letter.

Signed

It should be noted that the letter was copied to Dr. Ibrahim Saad, then the Deputy Chief Minister of Penang and Madam Kee Phaik Cheen, an Ex-Co. Member.

Pursuant to that letter another meeting was held on 20 July 1993. The minutes of the meeting, signed by the secretary of the plaintiff is now reproduced:

> **Minutes Of The Meeting Held At 26th Floor, Komtar Conference Room On 20th July, 1993 At 10.00 a.m.**
> Present: YB. Madam Kee Phaik Cheen Mr. Bonny Loo Chee Kong Perbadanan Pengurusan Taman Bukit Jambul (PPTBJ) Mr. Yong Hin Seng - Perbadanan Pengurusan Taman Bukit Jambul (PPTBJ) Mr. Goh Cheng Chye - Perbadanan Pengurusan Taman Bukit Jambul (PPTBJ) Mr. Teoh Tong Hai - Jabatan Kerja Raya (JKR) Dr. Hussain - Kementerian Kesihatan (KS) Mr. Yusof - Kementerian Kesihatan
> Subject: "Mengubahsuai 9 Buah Lot Kedai Di Blok D Dan H Untuk Dijadikan Klinik Anika Bukit Jambul, Pulau Pinang"
> 1.0 The meeting was chaired by YB. Madam Kee Phaik Cheen at 10.12 a.m.
> 2.0 The following points were discussed in view of the abovementioned subject:
> - Mr. Teoh Hong Hai (JKR) brief the floor on the nature of the JKR and commented that any construction works carried out by them need not seek approval from the Majlis Perbandaran Pulau Pinang;
> - Madam Kee highlighted to the PPTBJ that the "Klinik Anika" is for the common good to the to the residents in Taman Bukit Jambul and also the public in the surrounding area. Since the construction works of the clinics did occupy the common corridors, she reiterated that JKR must compensate the common corridors inorder not to deprive the residents' right to the passageway. The plan of the clinic was shown to the floor by Mr. Teoh that the deprived common corridors have been compensated;

- Mr. Goh brief the floor that the Management Corporation of Taman Bukit Jambul is of no opinion to object to both the establishment and the construction design of the clinics. As far as the law is concerned (as enacted under the Strata Title Act 1985) the Management Corporation hands are tight in view of the fact that we are answerable to the residents at all times. Moreover the Management Corporation

> also do not wish to venture out of the law. Bonny Loo, told the floor that the Management Corporation is ever willing to compromise provided a letter on the approved plan is given by the authorities concerned to cushion the Management

> Corporation in the event of being sued under the law in the future;
> - Bonny Loo commented that holding an Emergency General Meeting to discuss this issue will be disadvantage towards this particular project. He felt strongly that although the residents will surely welcome the clinics in the area but will object to the construction protruding the common corridors;
> - As a matter of reciprocity, Mr. Yong suggested that Kementerian Kesihatan to forward PPTBJ a letter stating additional space will be required whereby the common corridors in the blocks concerned have to be utilised. Madam Kee also commented that the said letter by Kementerian Kesihatan must also indicate the used common corridors will be surrendered to the residents if required in the future. Dr. Hussain told the floor that the said letter will have to be referred to the authorities and will revert as soon as possible;
> - Mr. Yusof commented that in the past, projects undertaken by Kementerian Kesihatan do not experience such problems except for Taman Bukit Jambul. Madam Kee replied that most of the projects carried out by Kementerian Kesihatan were erected on Government land and for this particular project, the clinics were erected on private land;
> - In view of the common corridors have been utilised on Blocks D and H, Bonny Loo requested JKR to construct extension shelter right up to the main entrance for continuous shelter and safety of the residents. Mr. Teoh will consider and study the proposal.
> There being no further business, the meeting was adjourned at 11.15 am with vote of thanks to the chairlady, Madam Kee Phaik Cheen.
> Signed

The minutes says what it says. However, it should be noted that one new thing has surfaced. Madam Kee Phaik Cheen says that since the construction works of the clinics occupies the common corridors, JKR must compensate the common corridors in order not to deprive the residents' right of way. The plaintiff wants the Ministry to give a letter stating that additional space is required. PW3 wants the JKR to construct the extension shelter (awning) right up to the main entrance for continuous shelter and safety of the residents.

The renovation project was completed in January 1994 but without water and power supply.

Reading the first paragraph of the plaintiff's letter dated 16 May 1994, it appears that on 26 April 1994, Tenaga Nasional Berhad had written to the plaintiff "informing" the plaintiff that excavation work had to be done to lay new electric cables for the clinic.

On 12 May 1994, MPPP wrote to JKR:

> M.10/2/3/2/1-20 12 Mei 1994
> Pelan Bangunan No. BP33452(LB) - Pengubahsuaian Klinik Anika Di Bukit Jambul

Saya diarah merujuk kepada pelan tersebut di atas dan dengan ini Majlis ingin mengesahkan bahawa pelan bagi projek-projek Kerajaan Persekutuan dan Kerajaan Negeri yang dilaksanakan oleh Jabatan Kerja Raya tidak perlu dikemukakan kepada Majlis Perbandaran Pulau Pinang untuk kelulusan.

> Ini termasuk juga pelan-pelan untuk mengubahsuaian Klinik Anika di Bukit Jambul, Pulau Pinang.

> Sekian, dimaklumkan.
> Signed

This letter confirms what was said by Mr. Teoh Hong Hai, a representative of the JKR at the meeting with YB Madam Kee Phaik Cheen on 20 July 1993, about ten months earlier.

DW8, in his evidence, also said:

> From my experience, we don't need MPPP approval. We submit the plan to comply with requirement of the Management Corporation to enable us to proceed with the work.

On 16 May 1994, PW3 replied to Tenaga Nasional Berhad's letter dated 26 April 1994 as follows:

> PPTBJ/5/18 16th May, 1994
> Re: Permohonan Untuk Mendapatkan Kebenaran Untuk Mengali Di Block H Taman Bukit Jambul Pulau Pinang Untuk Elektrik Ke Klinik Anika
> We refer to your letter dated 26th April, 1994 informing us that excavation work is needed to lay the new electric cables for the clinic.

However, before we are in the position to act same, we have yet to receive the intended letter from the Kementerian Kesihatan for using the common corridors.

> Upon receiving the said letter from the Kementerian Kesihatan, we shall no doubt revert to you along this line.
> Please be informed.
> Signed

It should be noted that even though PW3 used the word "informing", from the heading of the letter which must have been lifted from the Tenaga Nasional Berhad's letter it is very clear that Tenaga Nasional Berhad had in fact written to the plaintiff to ask for permission to do excavation work to lay electric cables for the clinic.

This is made clearer by the letter from JKR to the plaintiff two days later, (18 May 1994):

> (68) dlm.PKR.PP.B/12/68 18hb. Mei 1994
> Construction of 9 Clinic At Blk. D & H Taman Bukit Jambul, Penang
> Merujuk kepada perkara di atas, bersama-sama ini dikemukakan salinan surat dari Majlis Perbandaran Pulau Pinang yang jelas maksudnya.
> 2. Dengan itu adalah diharapkan jabatan ini dapat meneruskan kerja-kerja pengorekan jalan untuk kabel yang telah terbengkalai akibat keengganan pihak tuan memberi kebenaran untuk mengorek.

3. Pejabat ini amat kesal di atas sikap pengurusan tuan yang tidak begitu memberi kerjasama di dalam melaksanakan projek tersebut walaupun projek berkenaan merupakan projek untuk kemudahan awam.

> Atas tindakan tersebut telah menyebabkan kelewatan untuk penyerahan, projek yang mana sekaligus mengakibatkan kesusahan kepada pihak orang awam.

Sekian, terima kasih.
Signed

After that there appears to have been a meeting at the office of the assistant district officer (land). What transpired there is not known.

On 30 July 1994, PW3 wrote to the chief assistant district officer (Land) informing him that the plaintiff had not received "the said letter from the Kementerian Kesihatan regarding the issue of common area usage by Klinik Anika."

The letter must be the one required by the plaintiff at the meeting on 20 July 1993 attended by Madam Kee Phaik Cheen.

In response the director of health wrote to the chief assistant district officer (land) on 4 August 1994:

(13) dlm. PPK/PEM 275/2 4 Ogos 1994
"Letter From Kementerian Kesihatan As Per Meeting On June 23 1994"
Dengan hormatnya merujuk perkara di atas dan surat daripada Perbandaran Pengurusan Taman Bukit Jambul kepada tuan pada 30 Julai 1994.
2. Adalah dimaklumkan bahawa Kementerian ini tetap tidak bersetuju untuk mengeluarkan surat berkenaan. Surat daripada Jabatan ini kepada Y.B. Madam Phaik Kee Cheen, bil. (98) dlm. PPK/PEM 275/1 bertarikh 5 Ogos 1993 dilampirkan untuk rujukan tuan. Untuk makluman tuan satu perbincangan awal telah diadakan pada 7 Mei 1993 di mana satu keputusan telah dibuat iaitu pihak Pengurusan hanya memerlukan surat kebenaran daripada pihak Majlis Perbandaran Pulau Pinang untuk rekod. Bersama ini dilampirkan surat berkaitan perbincangan daripada pihak Pengurusan bil. TBJMC/7/4 bertarikh 8 Julai 1994.
3. Pada 20 Julai 1993 satu perbincangan bersama Y.B. Madam Kee Phaik Cheen telah diadakan bagi menyelesaikan masalah ini namun gagal. Oleh itu untuk memenuhi permintaan awal daripada pihak pengurusan yang memerlukan penjelasan daripada pihak Majlis Perbandaran Pulau Pinang. Bersama-sama ini salinkan surat berkenaan bil. M.l0/2/3/2/l-20 bertarikh 12 Mei 1994 beserta surat JKR bertarikh 18 Mei 1994 yang begitu jelas menerangkan maksudnya.
Sekian, terima kasih.
Signed

The building was handed over by the JKR to the health department 23 August 1994.

On 7 October 1994, the director of health wrote to the chief secretary of the Ministry stating that the plaintiff still wanted a letter from the Ministry applying for approval by the plaintiff for the use of the five-foot way. The letter further says that if the Ministry does not agree to give such a letter and if it is suggested that the clinic be closed (may be by the Ministry - added) then the Ministry is required (I believe by the plaintiff - added) to reinstate the building to its original condition.

On 22 November 1994, director of health wrote to the plaintiff pleading for "relaxation" (kelonggaran) for the use of the five-foot way. He also enclosed the letter from MPPP dated 12 May 1994 which says that MPPP's approval for the renovation was not required.

On 30 November 1994 the plaintiff, through its solicitors, replied. The letter, *inter alia*, says:

> Dukacita dimaklum bahawa pihak pengurusan tidak mempunyai kuasa untuk memberi sebarang kelonggaran kepada pihak tuan seperti yang dipohon. Tapak kaki lima di hadapan Poliklinik merupakan harta bersama ke semua penghuni blok berkenaan dan ianya tidak boleh dikhaskan untuk kegunaan mana-mana pihak tidak kira maksud dan tujuannya. Selain daripada itu surat Majlis Perbandaran Pulau Pinang bertarikh 12hb Mei 1994 yang menyatakan bahawa mereka tidak ada halangan mengenai pengubahsuaian bangunan-bangunan Poliklinik adalah pada hemat kami salah di sisi undang-undang dan bercanggah dengan peruntukan-peruntukan Akta Jalan, Pant dan Bangunan 1974 dan Akta Hakmilik Strata 1985.
>
> Tidak kira apa jua amalan pihak Majlis Perbandaran Pulau Pinang dan Jabatan Kerja Raya dalam perkara ini, setahu kami tidak ada sebarang peruntukan undang-undang yang menyatakan bahawa pihak kerajaan tidak perlukan pelanpelan untuk kerja dan pengubahsuaian lebih-lebih lagi di bangunan-bangunan kepunyaan pihak swasta. Kami ulangi di sini bahawa bangunan-bangunan berkenaan adalah tertakluk kepada bidang kuasa Perbadanan Pengurusan Taman Bukit Jambul yang tertakluk pula kepada peruntukan-peruntukan Akta Hakmilik Strata 1985.
>
> Jika pihak tuan dapat mengatasi peruntukan-peruntukan undang-undang tersebut di atas. Sila beritahu kami kerana sehingga hari ini pihak JKR dan Majlis Perbandaran Pulau Pinang telah berdiam diri bila masalah-masalah perundangan ini diutarakan kepada mereka.

It appears that another meeting was held on 7 February 1995, involving the state legal advisor. On 27 March 1995, the state legal advisor gave his opinion:

> **Poliklinik Kerajaan Bukit Jambul**
>
> Dengan segala hormatnya saya merujuk kepada perkara yang tersebut di atas dan mesyuarat yang diadakan pada 7 Februari 1995.
>
> 2. Pada pandangan saya adalah jelas bahawa kakilima bagi petak yang dimiliki oleh jabatan tuan yang digunakan sebagai poliklinik kerajaan adalah merupakan harta bersama. Mengikut seksyen 42 Akta Hakmilik Strata, harta bersama adalah menjadi milik Perbadanan Pengurusan. Oleh itu pembinaan apa-apa bangunan di atas harta bersama tersebut oleh jabatan tuan tanpa kebenaran Perbadanan Pengurusan adalah menyalahi peruntukan Akta berkenaan.
>
> 3. Walau bagaimanapun, Undang-Undang Kecil 3 Jadual Ketiga Akta memperuntukkan bahawa Perbadanan boleh melalui persetujuan dengan jabatan tuan memberi jabatan tuan penggunaan dan penikmatan ekslusif terhadap kakilima bagi petak-petak kakilima jabatan tuan tersebut. Terserahlah kepada kebenaran pengurusan berkenaan sama ada bersetuju ataupun tidak memberi kelulusan. Jika pihak perbadanan tidak dapat
>
> memberi kelulusannya tuan adalah dinasihatkan supaya merobohkan apaapa pembinaan di atas kakilima tersebut dan menghadkan pembinaan poliklinik berkenaan hanya di dalam lingkungan petak yang dimiliki oleh jabatan tuan.
>
> 4. Walau apapun yang tersebut di atas, pihak tuan adalah dinasihatkan supaya merujukkan kes ini kepada Penasihat Undang-Undang Kementerian tuan untuk mendapatkan pandangan beliau.
>
> Signed

I think I should stop and the narration here first.

Section 4 of the Strata Titles Act 1985 defines "common property" as follows:

> "Common property" means so much of the lot as is not comprised in any parcel (including any accessory parcel), or any provisional block as shown in an approved strata plan.

Section 42 provides (I shall first, quote the provision prior to the amendment by Act A753 which came into effect on 23 February 1990):

> 42.(1) The management corporation shall, on coming into existence, become the proprietor of the common property and be the custodian of the issue document of title of the lot.
> (2) The management corporation shall have in relation to the common property the powers conferred by the National Land Codeon a proprietor in relation to his land:
> Provided that:
> (i) except where it is specifically provided otherwise in this Act, those powers may be exercised only on the authority of a unanimous resolution; and
> (ii) the power to transfer any portion of the common property on the authority of a unanimous resolution shall be subject to the approval of the Director.

Proviso (ii) was amended by Act A753 which came into effect on 23 February 1990. The amended provision reads:

> (ii) the corporation shall not have power to transfer any portion of the common property which forms part of the building or Defendant the land on which the building stands.

Paragraph 3 of the third schedule provides:

> 3. The corporation shall control, manage and administer the common property or the benefit of all the proprietors:
> Provided that the corporation may, by agreement with a particular proprietor, grant him exclusive use and enjoyment of part of the common property or special privileges in respect of the common property or part of it.

From the above provisions it is clear that the management corporation, **on coming into existence**, becomes the proprietor of the common property. The management corporation, as such proprietor has powers similar to those conferred on other proprietors in respect of their land, conferred by the National Land Code. However, such powers may be exercised only on the authority of a unanimous resolution. Prior to the amendment, this includes power to transfer any portion of the common property but subject to the approval of the director of lands and mines. But, with effect from 23 February 1990, the power to transfer any portion of the common property is removed. Now, it cannot be transferred at all.

In this case, these is no dispute that the five-foot way is a common property. It is also not disputed that the plaintiff came into existence on 6 November 1992. Thus, the plaintiff only

became the proprietor of the common property from that date *ie*, 6 November 1992.

But, three years and nine months before that, on 21 February 1989, the then director of health had written to Asas Dunia, the company then managing the property, of the renovations that would have to be done to the units to be purchased by the defendant. Three weeks later, on 11 March 1989, Asas Dunia gave its consent. Asas Dunia went to the extent of writing to MPPP enclosing the amended plan incorporating the proposed renovation and seeking for approval (clearly Asas Dunia must have been of the opinion that the approval of MPPP was required. But, as it turned out to be, MPPP later confirmed that its approval was not required). Only after that, on 18 July 1990, that the sale and purchase agreement was signed. In other words, the defendant wanted to be sure that it could renovate the units to its requirement to be used as a polyclinic before it purchased the units. And, the plaintiff only came into existence more than two years later, on 6 November 1992.

It is clear from the chronology that at the time when the plaintiff came into existence and became the proprietor of the common property the amendment to proviso (ii) of s. 42 of the Act had not come into force.

However, I do not think that the amendment is material to the facts of this case because, first, the defendant never claimed that that portion was transferred to the defendant by Asas Dunia and the plaintiff never and has no power to transfer it to the defendant.

What is relevant is the provision of para. 3 of the Third Schedule to the Act, especially the proviso thereto, which has been reproduced earlier.

The question then is whether Asas Dunia had granted the plaintiff exclusive use and enjoyment or special privileges of the common property in question.

From the correspondence between the director of health and Asas Dunia, from the evidence of the director of health (DW1) and the chairman of Asas Dunia (DW2) it is clear to me that Asas Dunia had granted "exclusive use and enjoyment" or at the very least "special privileges" to the defendant over the five-foot path. Even then, the "exclusive use and enjoyment" is not actually exclusive to the defendant only. The defendant is not an individual resident. Every member of the public, every resident and every member of his family, including PW3, still has access to the area. Of course if they prefer and can afford treatment at the private clinic in the same Taman that is their own choice.

I am of the view that the principle of equitable estoppel is applicable here. The principle is so well entrenched in our law and has been applied so often that I do not think it is necessary for me to refer to any authority.

The next of question is whether the permission given by Asas Dunia binds the plaintiff. The position is similar to the situation common in this country, especially Penang, where a landlord has permitted the ground tenant to put up a building on his land, the tenant puts up the building and subsequently the landlord sells the land. The new proprietor cannot be heard to say that the tenant had not obtained his permission to put up the building and the tenant must therefore pull down the building and vacate the land. *Mok Deng Chee v. Yap See Hoi & Ors[1981] CLJ 69 (Rep)* is the leading authority for this proposition. That rule which is applicable to individual defendants should also apply to the Government of Malaysia, the defendant. In the circumstances, I do not think that the defendant has to obtain fresh approval

from the plaintiff.

The plaintiff's submission and the learned State Legal Advisor's opinion would have been right if the plaintiff had been established prior to the approval given by Asas Dunia.

It is also to be noted that the plaintiff had been changing its stand and adding new grounds of objection along the way. At first the plaintiff only wanted the MPPP to be informed about the renovation. Then at the meeting on 7 May 1993, MPPP's approval was still the main complaint. Besides the plaintiff wanted the defendant to write to the plaintiff requesting for permission. Twelve days later the plaintiff, through its solicitors, said it could not give permission as it would be a bad precedent to the residents. By July 1993, the plaintiff's solicitors letter was still asking for the letter of approval letter from the MPPP.

At a meeting held twelve days later, it appears that Madam Kee Phaik Cheen introduced another requirement that the common corridor be compensated, which is quite fair. This was done but the plaintiff objected to the construction of the new five-foot way on other grounds. At that meeting PW3 said that the plaintiff required "a letter on the approved plan from the authorities concerned (it must mean MPPP - added) to cushion the management corporation in the event of being sued under the law in future." A new reason is given. However, another representative of the plaintiff, suggested that the Ministry give a letter to the plaintiff "stating additional space will be required whereby the corridors in the blocks concerned have to be utilised." PW3 then requested that extension shelter (awning) be constructed right up to the main entrance, again a new demand. (That was also done later).

Then came the letter from MPPP confirming that MPPP's approval is not necessary, as it is a government project. But the plaintiff did not allow TNB to do excavation work in order to lay electric cables, the reason being it had not received the letter from the Ministry.

In his evidence PW3 said that that "does not mean that we would agree to them taking the five-foot way if they can produce a letter of approval from the MPPP. Our stand was it cannot be taken away. If any authority were to give that kind of letter, we would take action against it."

This is a clear shift from the earlier stand of the plaintiff. Of course PW3 was giving evidence long after MPPP had given the letter that MPPP's approval was not required. The point is earlier on DW3 wanted MPPP's approval. But when the MPPP said that its approval was not required, PW3 categorically said they would not allow the five-foot way to be taken away and would sue the authority that gave letter of authority to take it away.

When Madam Kee said that the five-foot way must be compensated, the PW3 asked that the extension shelter (awning) be extended right up to the main entrance, which was also done by the defendant later. If he did not agree to the taking away of the five-foot way and the construction of the new fivefoot way why did he ask for the awning to cover the new five-foot way to be extended?

By November 1994, from the letter written by the solicitors for the plaintiff, the plaintiff said that it had no power to allow the relaxation ("kelonggaran") to the plaintiff to use the five-foot way. The plaintiff now challenges the correctness of the position taken by MPPP that its approval is not required. In other words, the plaintiff has changed its stand from wanting the defendant to "inform" MPPP to requiring MPPP's approval. But when MPPP says that its

approval is not required, the plaintiff says the MPPP is wrong in law to hold that view.

Yet, a further ground was added in the statement of claim, that is, that establishment of the government clinic is contrary to the condition of use of the land which is for residential and commercial purpose only, the government clinic being for public purpose. In other words a private doctor can have a clinic there but the government cannot have a clinic for the people who cannot afford to go to the private clinic, there. One wonders whose interests the plaintiff is serving.

The learned Senior Federal Counsel has aptly likened the attitude of the plaintiff to the "Puteri Gunung Ledang" episode.

On the issue of trespass, in view of my earlier finding that the renovation was done with the permission of Asas Dunia which is binding on the plaintiff, the question of trespass does not arise at all.

It is also alleged that the renovation has caused nuisance.

In his evidence PW3 says because of the renovation, if the original pipe is blocked, the plaintiff is not able to have access to remove the blockage. He says that an extension was made to the main power supply without going through the proper electrical safety requirements. It would cause black out to the whole block. Other damage may also arise. He complains about power fuse and trunking (wires) put in the common area without the plaintiff's consent. He complains that he was not shown any electrical diagram of what the defendant wanted to do. He complains that the five-foot way of Block H has been sealed, the floor raised. He says that the "small pipe put by them has caused blockage." And because the pipe is blocked, water flows through the air-condition. He also talks about "the dirt in the clinic."

Under cross-examination, regarding the five-foot way, PW3 said: "They have taken a new common area to build a new five-foot way. The present unit owners can pass through the five-foot way."

Regarding awning, he said:

> We did not request that the awning be built. The awning was put up by the Kementerian Kesihatan, when they did it, we said to them if you want to do it, do it to the whole building. They did not put up the awning to the whole building.

On behalf of the defendant witnesses on the above complaints, DWS, a JKR electrical technician, who was directly involved in the electrical works of the renovation gave detailed evidence of how the work was carried out. He said:

> TNB akan membuat penyambungan di bilik switch Block D dan akan memasang meter serentak. TNB akan sambung di bilik switch Block D dan akan memasang isolator dalam bilik switch Block D dan terus ke meter.
> Isolator itu untuk mengawal on-off bekalan ke Klinik. Di peringkat akhir semasa TNB sedang memasang meter bersama kontraktor pertengkaran berlaku antara pengurusan Bukit Jambul dengan pekerja. Isolator tak sempat dipasang, sebab pertengkaran itu. Pengurusan tak benarkan pemasangan isolator.

Kerja-kerja telah dibuat yang tak boleh buat ialah penyambungan dalam bilik switch dan memasang isolator letrik belum disambung.

> Ini tidak menyebabkan kerosakan apa-apa peralatan penghuni di unit-unit lain.

Peranan Switch Board - ia sistem pembahagian kepada unit-unit yang lain.

> Switch Board di Block D, H dalam keadaan "off'. Bagi Block H, bekalan ada tetapi dalam keadaan "off". Bagi Block D, bekalan ke Switch Board pun belum ada.

Under cross examination he said:

> Saya sendiri dan penghuni menghendaki isolator dipasang. Semua pihak mahu ada isolator untuk keselamatan. Untuk projek biasa tak perlu isolator. Dalam keadaan ini semua pihak setuju isolator perlu dipasang. Ia tidak dipasang sebab ada pertengkaran, saya rasa bukan kerana isolator.

Under re-examination, the witness said:

> Saya menghantar dua pucuk surat kepada Pengurusan meminta kebenaran. Pengurusan tidak memberi apa-apa jawapan.
> Dalam surat saya itu saya ada membekalkan pelan-pelan berkaitan.
> Tenaga Nasional Berhad cadang isolator dipasang untuk keselamatan, JKR akan mematuhinya.

DW6, a JKR technical assistant (mechanical) also gave evidence for the defendant. He was handling the installation of the air-conditioning units. He explained the type of units used and how it was installed. On the issue that water was flowing through the air-conditioning pipe, he said:

> Air-cond was not in operation. There would be no water flowing from the aircond. I checked the joint between the PVC pipe to drain pipe. It was properly done, it was good and sealed. As water was not running inside the pipe there could not be a hole causing leakage.

Under cross-examination, the witness said:

> I did not test it when it was completed because there was no electric supply. The installation was good, but I did not test whether it works.

When he was referred to photograph B at p. 118 of Bundle B, he said:

> I am not aware whether there was rust at the air-cond. I did not see any water.

Shown photograph B on p. 117 of Bundle B, he said:

> The drain pipe is from the main building. There is stain. I checked the joints of water flows through the pipe whether there would be leakage or not, I won't know.

Under re-examination and referring to photograph no. 17 on p. 117 of Bundle B, he said:

> Down pipe is the bigger one. The PVC pipe (smaller one). Drain pipe was connected to down pipe. It was good and sealed.

DW7, an engineer, who was the "Penolong Pengarah Bangunan" with the JKR, Penang also gave evidence. He monitored and co-ordinated the project. He said:

> The project was not carried out smoothly. The main problem was the Management Corporation... Management demanded that the awnings be extended right to the main entrance which we did (Block D).
> We compensated the five-foot way - eight feet - which is covered by awning. We also raised the new five-foot way to the same level as the existing floor. This was done to both Block D and H.
> They complained that because of the renovation they could not get to the gully eye to do the maintenance. There is no problem for us to get access to gully eye to do maintenance.

Regarding the clogging of the trap hole, he said: "it may be due to lack of maintenance. The clog could have come from the wash basin."

Under cross examination he said that after the renovation some of the gully pipes were outside the clinic, some inside. Shown photograph at p. 119 Bundle B, he said that the trap hole was outside the clinic.

He went on to say:

> ... The existing gully is still there. We added a new gully. In Block D, we made a new additional gully.

The plaintiff complains that the renovation work has produced, raised, caused congestion and dirt throughout the duration of the work.

To me this only shows the unreasonable attitude of the plaintiff, especially the chairman. Which construction work, be it the construction of a new building or renovation work in a town or residential area that does not cause some such disturbance to the neighbours? Even the construction of the Taman must have caused some disturbance or inconvenience to other people.

If the law were to treat every inconvenience as actionable nuisance, then nobody can build or renovate his house in a town or residential area. And we cannot have one standard for the private sector and one, a more stringent one, for the government. After all the government does it for the public, not for profit.

About the five-foot way, it is true that the original five-foot way has been taken away, but a new one was constructed, covered by awning, to protect users, especially from rain. The plaintiff's demand that the awning be provided right up to the main entrance, purely to make it look better, was also complied. Anybody familiar with Penang will not fail to notice that almost every fivefoot way is blocked by stalls and merchandise even occupying part of the

road. Nobody seems to take any objection to it. May be because it is done by members of the public in the course of their business. And none of them provide an alternative five-foot path with awning to shelter the users from rain.

I know that what I have just said is not supported by evidence in this case. But it is as much a fact as Penang Hill is on Penang Island. Question of nuisance must be considered with reference to local circumstances. Whether an act amounts to nuisance or not depends on the magnitude of the act or its effects, seen in the light of the circumstances of the relevant surroundings: people living close to a wholesale market will have to put up with the noises coming from the market in the wee hours; people living near an airport cannot complain that the sounds of the aeroplanes is a nuisance.

I do not say that every blockage of five-foot way is not a nuisance, neither do I condone it. It depends on the circumstance of each case. All I say is that in the circumstances of this case, the taking away of the five-foot way by the defendant which is compensated with a new five-foot way covered with awning, not only at the area taken, but right up to the main entrance, is not actionable nuisance.

I now come to the electrical extension. True that PW3 has a diploma in engineering but he admits that he has "no qualification/experience on building." At he same time we cannot say that the engineers and technicians of the TNB (and the JKR) know nothing about electrical extensions, or do not care about its safety.

Indeed, I believe that they know more and care more. It is their job and their responsibility. But looking at the complaints by PW3 it appears as if the TNB (and the JKR) are no more or no better than fly-by-night contractors, making illegal extensions. Everything that they do is wrong, sub-standard and dangerous. I can't accept that. From the totality of the evidence I am confident that the TNB engineers and technicians (and the JKR) are responsible people who are concerned about the safety of the extension. TNB is the authority responsible for the supply of electricity and matters connected thereto. The officers are salaried officers and not contractors out to make quick money.

I accept the evidence of the witnesses of the defendant that the extension carried out is proper and safe. The complaints have no merits.

We now come to the blockage. The air-condition units were never switched on as there was no electricity supply. There could not be any water from the air-condition units that caused the blockage. Indeed, even if they have been switched on, the water from the units cannot cause blockage to the pipes, as the amount would be too little anyway.

The blockage to the pipes must have been caused by waste water from the flats, in particular from the sinks. Every household faces such problem at times.

I am also of the view that the piping done by the defendant is not the cause of blockage. The JKR would not be so irresponsible as to use improper-sized pipes or to do improper extension. I accept the evidence of the JKR engineer, DW7, on this point.

The plaintiff also complains that due to the renovation works, they have no access to the gully eye inside the clinic to do maintenance work.

The plaintiff should blame themselves for such problem. They have prevented the operation of the clinic. So it was locked. If they had not, the clinic would be in operation, it will be opened daily. It is unimaginable that the health department would allow waste water from the units to flood the clinic. The department would be the first the rectify it and not just to allow access to the plaintiff to do maintenance work.

In the circumstances, I am of the view that there is no basis for the allegation of nuisance.

Along the way, the plaintiff have also raised other issue. One, the latest is that the MPPP is wrong in law in not requiring the plans for the renovation to be approved by it.

The approving authority is the MPPP. It is for MPPP to say whether it requires plans to be approved or not. The defendant cannot be blamed if the MPPP does not require the defendant to get the approval. Indeed, from the beginning, the health department and the JKR submitted plans to MPPP for approval, believing that they have to be approved. It shows their good faith.

MPPP is not a party in this suit. In my view if the plaintiff wants to challenge the decision of MPPP it should either apply for judicial review or name the MPPP in this suit.

In its statement of claim the plaintiff also alleges that the defendant has made changes which are not in conformity with the other parts of the building e.g. by making roller shutter doors and louvers. I think these are too trivial to amount to nuisance. One need only take a slow drive in any housing scheme to see the extensive changes made by residents, usually within weeks after the keys are handed over by the developers. Yet, the public or "the reasonable man" does not seem to consider those changes as nuisance. There should not be a different standard for a government project for the public.

One of the late grounds of objection is that the defendant has contravened the condition in the grant, which stipulates that the buildings allowed to be built are only for residential and commercial only. Therefore to use the building as a government clinic for public purpose is in breach of the condition.

This ground is contradictory to the stand taken by the plaintiff all along and confirmed by PW3 in his evidence that the plaintiff does not object to the defendant putting up a government clinic for the public but it must be with the plaintiff's approval. Secondly, that is a matter for the land office, not for the plaintiff. Thirdly, whereas the plaintiff does not complain about the existence of the private clinic in the same premises, I fail to see the rational for objecting to the setting-up of a government clinic.

It is also said, and this too is one of the late grounds put up, that the plaintiff does not want to open a flood-gate for other residents to make similar alterations to their units.

The answer is that, since its establishment, the plaintiff has every right to allow or not to allow any to be made subsequently. It is up to the plaintiff whether to allow them to make to such changes or not. What has been allowed to be done prior to the plaintiffs establishment is beyond its powers to prevent.

In the circumstance I dismiss the plaintiff's claim with costs. I am of the view that the plaintiff should pay costs. True the plaintiff is a body establishment by law. But the

government too is not putting up the clinic for a profit. It is to serve the public who cannot afford to go to private clinics. The government is using tax-payer's money, for the benefit of the public. As a result of the plaintiff's objections and unreasonable demands which multiply from time to time and the threat of legal action agent the plaintiff work was stopped, electricity supply could not be connected, the clinic could not be opened, the public have been deprived of the use of the clinic for more than five years already, the plaintiff in my view should pay the full costs of this action the plaintiff, including the costs of bringing witness from Kuala Lumpur and other places.

Coming now to the defendant's counterclaim. I do not think it is necessary for me to make a declaration as prayed in prayer (a) of the counterclaim, *ie*, that the plaintiff allows the defendant to enter the said units and commence the services of the clinic. In my view, no approval of the plaintiff is required.

Regarding prayer (b), I declare that the plaintiff has no right to prevent the defendant from entering the said units, be it to move in the equipments, to provide water and electricity supply or whatever, for the purpose of the operation of the clinic.

Regarding damages prayed in prayers (c) and (d) of the counter-claim, no evidence was led regarding damages. The learned Federal Counsel in his submissions too did not ask for damages but only urged this court "to dismiss this case with costs, so that the clinic can be fully operational and the Rakyat benefit from it soonest." In the circumstance I make no order as to damages. The plaintiff should be grateful for the defendant's magnanimity in spite of the fact that senior civil servants, doctors and engineers included, have been made to plead and beg to the plaintiff, especially PW3, for his (PW3 and the plaintiff's) permission to do what they have to do to complete the clinic so that it will be operational when they were only doing their duties to provide medical facilities to the public.