SANGKA CHUKA & ANOR

v.

PENTADBIR TANAH DAERAH MERSING, JOHOR & ORS

High Court Malaya, Johor Bahru
Mohd Nazlan Mohd Ghazali JC
[Judicial Review No: 25-27-02-2012]
11 January 2016

Administrative Law: *Judicial review — Certiorari — Application to quash notice requiring trespassers to vacate lands on Endau Rompin National Park — Applicants claimed customary rights over said lands — Whether any evidence of continuous occupation of said lands — Whether customary land rights were not extinguished and continued to subsist on said lands — Whether customary lands encompassed hunting and foraging areas — Whether respondents owed a fiduciary duty to applicants — Whether notice valid*

Constitutional Law: *Right to property — Aboriginal peoples' right over land — Applicants claimed customary rights over lands on Endau Rompin National Park — Whether any evidence of continuous occupation of said lands — Whether customary land rights were not extinguished and continued to subsist on said lands — Whether customary lands encompassed hunting and foraging areas — Whether respondents owed a fiduciary duty to applicants — Federal Constitution, art 13*

Native Law and Custom: *Land dispute — Customary rights over land — Test of occupation — Applicants claimed customary land rights over lands on Endau Rompin National Park — Whether any evidence of continuous occupation of said lands — Whether customary land rights were not extinguished and continued to subsist on said lands — Whether customary lands encompassed hunting and foraging areas — Whether respondents owed a fiduciary duty to applicants*

This was an application for judicial review by way of an order of *certiorari* to quash a notice issued under s 425 of the National Land Code ('NLC') by the 1st respondent, which required trespassers to vacate the Endau Rompin National Park by the day after 18 January 2012 ('the notice') and demanded the demolition of any structures built within the said park. Although not specifically identified in the notice, the applicants contended that the same was directed at the Orang Asli Jakun of Kampung Peta ('Orang Asli Jakun'). In this application, the applicants sought various remedies, including declaratory relief in relation to the customary rights of the Orang Asli Jakun in respect of their customary lands in and around the Endau Rompin National Park and the Kampung Orang Asli Peta ('Kampung Peta') which area was set out in the community map ('the customary lands'). Accordingly, the issues to be decided were, amongst others, whether there was evidence of continuous occupation of customary lands; whether customary land rights were not extinguished and continued to subsist; whether the customary lands encompassed hunting and

foraging areas; whether the respondents owed a fiduciary duty; and whether the notice was valid.

Held (allowing the application with costs):

(1) It was not necessary that there must be actual physical presence to show occupation of the customary lands, for there could also be occupation under the law *vis-a-vis* native customary land rights if there was sufficient measure of control preventing strangers from intrusion or interference. It was imperative to note that there were two crucial aspects to this test of occupation. The first was occupation by physical presence which was best evidenced by the existence of settlement areas such as villages and residential sites as well as cultivated lands. The second was occupation in respect of the areas extending beyond such physical settlements, where the focus was on the aspect on the continuous use of the land by the Orang Asli in accordance with their custom, to the exclusion of third parties encroaching into the area in question. (*Madeli Salleh v. Superintendent of Lands & Surveys Miri Division and Government of Sarawak (refd)*). (para 35)

(2) Based on the evidence adduced, the presence of the Orang Asli Jakun of Kampung Peta in the said areas throughout the customary lands could therefore be said to be fairly established and long-standing. In addition, the contention of the 4th and 6th respondents that the applicants' rights to their customary lands were confined only to their settlement areas was plainly unsustainable in the face of the established common law position and the fact of continuous occupation and maintenance of a traditional connection with those areas. (para 53)

(3) The respondents failed to establish the existence of any subsequent legislation which clearly extinguished the prior common law customary land rights of the applicants. The respondents' bare assertion that the applicants' customary title and rights had been extinguished by law, predominantly by reason of the creation of the Endau Rompin National Park or that on the almost spurious basis that the applicants were incapable of exercising "control" or ensuring "exclusivity" over the customary lands was lacking in substance and was entirely devoid of merit. (para 54)

(4) In light of the affidavit evidence, the applicants had shown not only that the activities of hunting, fishing and foraging to be integral elements to the custom and traditional activities of the Orang Asli Jakun of Kampung Peta, but that such practices were so closely intertwined with their use of and reliance on the lands they claimed to be ancestral and customary in nature, which had long been the primary source and essence of their existence and would continue to be essential to their future livelihood. Consequently, excluding foraging activities on lands beyond settlement sites when those sites, like the case of the applicants, clearly formed part of their custom and daily usage and activities, was not justified under the law. (paras 61-62)

(5) Given the compelling, and almost overwhelming, and in large parts uncontroverted affidavit evidence, there was no justifiable or rational basis to reach any conclusion other than that the Orang Asli Jakun of Kampung Peta had the common law right to their customary lands. Therefore, the pre-existing customary land rights and prior ownership of native title over the areas of land claimed by the applicants were not impaired or in any way affected by subsequent legislative interventions including the NLC, and was thus protected by art 13 of the Federal Constitution ('FC'). (para 63)

(6) The long established and continuous use of lands for hunting and foraging activities, on the facts of this instant case, fortified the implication that the applicants already had a reasonable and sufficient degree of control over the customary lands, to the exclusion of strangers. (para 66)

(7) The argument that there was no exclusivity or sufficient control to prevent interference because the 3rd respondent had built permanent structures on the claimed lands within the Endau Rompin National Park was clearly flawed by reason of the trite principle that one could not take advantage of one's own default. In the instant case, the 3rd respondent should not have built the structures on a land that rightfully belonged to the applicants or at the very least, not without acknowledging the pre-existing customary land rights of the applicants. (para 67)

(8) Based on the evidence adduced, the respondents had breached their fiduciary duty to the applicants and the Orang Asli Jakun of Kampung Peta, principally for failing to ensure that the entire customary lands were gazetted as Aboriginal Reserve or at least not included within the Endau Rompin National Park, and for their continued failure to take steps subsequently to exclude that part of the customary lands within the Endau Rompin National Park, despite having the knowledge of the fact of the continuous occupation of the said customary lands by the Orang Asli Jakun of Kampung Peta, and more crucially, notwithstanding the recommendation by the 4th respondent or its predecessor as early as 1954 that the said lands should have been first gazetted, as well as more recently in 2010 that the lands should be returned to the rightful owner, being the Orang Asli Jakun of Kampung Peta. (para 71)

(9) A proper interpretation of item two of the State List of the Ninth Schedule to the FC, art 44 FC on the legislative authority of the Parliament and the Aboriginal Peoples Act 1954 ('APA 1954'), and considering art 8(5)(c) of the FC, would define the welfare of the Orang Asli more widely and purposively to include the protection and gazettal of the Orang Asli customary lands. There was thus no cogent basis for the 4th and 6th respondents to contend that matters pertaining to gazettal of land, being land matters, were not within the purview of the Federal Government. In addition, s 7 of the Government Proceedings Act 1956 did not make the 4th and 6th respondents immune from such suits because the present application did not involve the question of the exercise of public duties. (paras 73-74)

(10) On the issue of the validity of the notice, considering the finding of the customary land rights of the Orang Asli Jakun of Kampung Peta, the contention of the respondents that the notice was lawful, reasonable and procedurally proper was therefore untenable. Given the non-applicability of the NLC to native customary rights, the purported jurisdictional basis for the reliance and subsequent issuance of the said notice was plainly misconceived under the law, thereby rendering the decision embodied in the notice *ultra vires* the NLC, the APA 1954 and the FC and was thus manifestly not valid, for being inflicted with an illegality and error of law. (para 82)

(11) The patent failure on the part of the respondents to taken into account relevant consideration, specifically the legally recognised customary land rights of the applicants and the Orang Asli Jakun of Kampung Peta at common law to the claimed customary tracts of land within the boundaries of the Endau Rompin National Park, was yet another facet of an error of law or an illegality that was amenable to the public law remedy of judicial review. (para 84)

(12) In the instant case, the notice bordered on representing a decision which was irrational or unreasonable in the sense that it was "so outrageous in its defiance of logic or of any acceptable moral standards that no sensible person who had applied his mind to the question to decide could have arrived at it." As such, the decision of the respondents, to evict the Orang Asli Jakun of Kampung Peta was clearly flawed and defective for having been afflicted by instances of error of law and *Wednesbury* unreasonableness in the various aspects of illegality and procedural impropriety. (paras 87-88)

Case(s) referred to:

Abu Bakar Pangis & Ors v. Tung Cheong Sawmill Sdn Bhd & Ors [2014] 6 MLRA 1 (refd)

Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 3 MLRH 95 (refd)

Caxton (Kelang) Sdn. Bhd. v. Susan Joan Labrooy & Anor [1986] 1 MLRH 478 (refd)

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (refd)

Datuk Syed Kechik Bin Syed Mohamed v. Government Of Malaysia & Anor [1978] 1 MLRA 504 (refd)

Delgamuukw v. British Columbia [1997] 3 SCR 1010 (refd)

Frame v. Smith [1987] 2 SCR 99 (refd)

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1990] 1 MLRA 536; [1990] 1 MELR 34 (refd)

Jilubhai Nanbhai Khachar v. State of Gujarat [1955] AIR SC 142 (refd)

Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 1 MLRA 170 (refd)

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 1 MLRA 819 (refd)

Ketua Pengarah Kastam v. Ho Kwan Seng [1975] 1 MLRA 586 (refd)

Khalip Bachik & Satu Lagi lwn. Pengarah Tanah dan Galian Johor & Yang Lain [2012] MLRHU 1709 (refd)

Khoo Cheng & Ors v. Pentadbir Tanah Muar [2006] 4 MLRH 401 (refd)

Land Executive Committee Of Federal Territory v. Syarikat Harper Gilfillan Berhad [1980] 1 MLRA 175 (refd)

Mabo v. Queensland (No. 2) [1992] 175 CLR 1 (refd)

Madeli Salleh v. Superintendent Of Lands & Surveys & Anor [2005] 1 MLRA 599 (refd)

Malaysia Airline System Berhad v. Wan Sa'adi Wan Mustafa [2015] 1 MELR 403; [2015] 1 MLRA 290 (refd)

Mohamad Nohing & Ors v. Pejabat Tanah dan Galian Negeri Pahang & Ors [2013] MLRHU 668 (refd)

Ng Hee Thoong v. Public Bank Berhad [1995] 1 MLRA 48 (refd)

Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 1 MLRH 304 (refd)

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1998] 2 MLRA 438 (refd)

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 1 MELR 21; [2003] 2 MLRA 114 (refd)

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1996] 1 MELR 71; [1996] 1 MLRA 725 (refd)

Saeng-Un Udom v. PP [2001] 3 SLR 1 (refd)

Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 1 MLRH 161 (refd)

Superintendent Of Lands & Surveys Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 1 MLRA 580 (refd)

Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh [2007] 2 MLRA 390 (refd)

Superintendent Of Lands And Surveys Department Sibu Division & Anor v. Usang Labit & Ors And Another Appeal [2013] MLRAU 433 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 1 MLRA 268 (refd)

Legislation referred to:

Aboriginal Peoples Act 1954, s 6

Evidence Act 1950, s 48

Federal Constitution, arts 8(5)(c), 13, 44, Ninth Schedule, item 2

Government Proceedings Act 1956, s 7(2)

National Land Code, s 425(1)

Rules of Court 2012, O 53 rr 1(2), 2(2), (3)

Specific Relief Act 1950, s 44(1)

Other(s):

Halsbury's Laws of Malaysia, vol 9, para 160.076

Counsel:

For the applicants: Rajkumar Mathusuthanan (Yogeswaran Subramaniam & K Mohan with him); M/s Law Raj Teh & Partners

For the 1st, 2nd, 3rd & 5th respondents: Nurul Izalina Rajaai, Johor State Legal Advisor

JUDGMENT

Mohd Nazlan Mohd Ghazali JC:

Application

[1] This is an application for judicial review by way of an order of *certiorari* to quash a notice dated 17 January 2012 issued under s 425 of the National Land Code ("NLC") by Pentadbir Tanah Daerah Mersing, the 1st respondent, which required trespassers to vacate the Endau Rompin National Park by the day after on 18 January 2012 ("the notice) and demanded the demolition of any structures built within the said park. Although not specifically identified in the notice, the applicants contended that the same was directed at the Orang Asli Jakun of Kampung Peta.

[2] The applicants are also, in the same judicial review proceedings, seeking various other remedies, including declaratory relief in relation to the customary rights of the Jakuns of Kampung Peta in respect of their customary lands in and around the Endau Rompin National Park and Kampung Orang Asli Peta ("Kampung Peta") which area is set out in the community map ("The Customary Lands") exhibited as exh "KP-1" to the affidavit in support of the 2nd applicant. In summary, their prayers as per encl 1 are mainly for the following:

> "(i) An order for *certiorari* for the notice be quashed;
>
> (ii) A declaration that the applicants hold customary land rights over the Customary Lands;
>
> (iii) A declaration that the respondents have no authority to extinguish the customary land rights of the applicants without adequate compensation;
>
> (iv) A declaration that the applicants are entitled to the protection of their customary land rights by the respondents given the fiduciary duties owed by the latter;
>
> (v) A declaration that the respondents had breached their constitutional, statutory and fiduciary duties by their failure to prevent the inclusion of parts of the Customary Lands into the Endau Rompin National Park;
>
> (vi) An order of *mandamus* to compel the respondents to de-gazette any parts of the Customary Lands under Forest Reserve;

(vii) An order of *mandamus* to compel the return of the relevant parts of the Customary Lands to the applicants and Orang Asli Jakun of Kampung Peta;

(viii) A declaration that the notice does not extinguish the customary land rights of the applicants in respect of the Customary Lands;

(ix) A declaration that the notice is void and is of no effect

(x) An injunction to prevent the respondents from evicting Orang Asli Jakun of Kampung Petafrom their Customary Lands and from demolishing their building structure thereon;

(xi) An injunction to prevent the respondents from restricting access for the applicants and Orang Asli Jakun of Kampung Peta to their Customary Lands;

(xii) An order for payment of compensation for any acquisition by the respondents of any parts of the Customary Lands; and

(xiii) Damages for losses suffered by the applicants."

Key Background Facts

[3] This judgment discusses the law on native customary rights *vis-a-vis* the ancestral lands of the Orang Asli in Peninsular Malaysia and the application of judicial review proceedings in situations where there are violations of such rights.

[4] The applicants instituted this application on behalf of themselves and in a representative capacity on behalf of other residents of Kampung Peta. They are members of the "Jakun" sub-ethnic group of the indigenous aboriginal "Orang Asli" community of the Malay Peninsula.

[5] The applicants reside in the interior of south-east Pahang and in Johor. The instant dispute concerns what is claimed to be the customary ancestral lands of the Jakuns in Ulu Endau area, Johor, which is demarcated by the green boundaries in the map in the Annexure to the notice of application and which is also exhibited as "exh NK-3" to the affidavit in support (the "Community Map") and which measures approximately 15,000 acres. The applicants contended that the Orang Jakun have continuously occupied the demarcated area since time immemorial or at least the 1940s, and carried out their customary activities in the area (such as hunting, fishing, collecting forest produce and erecting ceremonial sites for worship and burial).

[6]The Customary Lands which are said to be the customary ancestral lands of the Jakuns of Kampung Peta and demarcated in the said Community Map include, *inter alia*, the following villages:

i) Kampung Orang Asli Ulu Endau,

ii) Kampung Orang Asli Kg Temiang,

iii) Kampung Orang Asli Kg Padang Iwah,

iv) Kampung Orang Asli Kg Gaban,

v) Kampung Orang Asli Kg Chenggal Rambutan,

vi) Kampung Orang Asli Kg Kuala Jasin, and

vii) Kampung Orang Asli Kg Pantai Burung.

[7] The applicants thus argued that the Jakuns of Kampung Peta (together with their ancestors) have continuously occupied the Customary Lands from time immemorial and maintained, in accordance with Jakun laws and customs, a traditional connection with these lands in the aforementioned areas in Mersing, Johor.

[8] Further, the Jakun of Kampung Peta (including their said ancestors) have, continuously cultivated and resided on, and have exercised customary and proprietary rights, in and over the Customary Lands. In this regard, they built dwelling places, planted orchards, buried their dead, practiced their laws and customs and existed as an established community on the said Customary Lands.

[9] In 1989, 547 acres of the Kampung Peta region were gazetted as aboriginal land under s 6 of the Aboriginal Peoples Act 1954 by the 5th respondent, being the Johor State Government ("Gazetted Land").

[10] However, the Gazetted Land constitutes what the applicants considered only a part of the customary entitlement of the applicants in the Customary Lands and does not include other areas of land ("Ungazetted Land") that have also been continuously occupied, used and enjoyed by the applicants, and by their ancestors earlier in time.

[11] Thus the Gazetted Land at Kampung Peta did not include other parts of Kampung Peta as well as the remainder of the applicants' customary ancestral lands in the demarcated area (ie 15,000 acres - 547 acres = 14,453 acres). This balance (ie 14,453 acres) of Ungazetted Land, as contended by the applicants, also forms part of customary ancestral lands of the applicants which they have continuously occupied as well as used for their customary activities. As such, the Customary Lands claimed by the Jakuns of Kampung Peta in this case comprises the Gazetted Land and the Ungazetted Land.

[12] The applicants submitted that the Gazetted Land does not encompass the entire Customary Lands of the Jakun of Kampung Peta. More particularly, the Ungazetted Land include other lands around Tapak Sungai Jaler, Pantai

Burung, Kuala Jasing and others which have been continuously cultivated and occupied by the Jakuns of Kampung Peta and had always, from their perspective, formed part of the Customary Lands.

[13] In the same year of 1989, the Johor State Government (the 5th respondent), gazetted 25,295 hectares of land as state forest reserve now known as Taman Negara (Johor) Endau Rompin ("the Endau Rompin National Park") under the National Park (Johor) Corporation Enactment 1989.

[14] The applicants contended that the gazetting of the Endau Rompin National Park had also failed to take into consideration the customary entitlement of the applicants and in effect encroached into the Customary Lands of the Jakuns of Kampung Peta.

[15] It is the case of the applicants that the Endau Rompin National Park was created over part of the ungazetted (14,453 acres) customary ancestral lands of the applicants and therefore constituted an encroachment into and trespass of the applicant's Customary Lands.

[16] Some years later, in or about 1993, Perbadanan Taman Negara Johor (the 3rd respondent) acting by itself or in collaboration with either one or all other respondents, had erected structures including chalets, buildings, offices ('the Structures') on the parts of the Customary Lands situated within the Endau Rompin National Park. This was undertaken without any payment of compensation to the Jakuns of Kampung Peta.

[17] Several years later on 15 September 2011, the 3rd respondent delivered a letter dated 6 September 2011 to the 2nd applicant which contained a request that the Jakuns of Kampung Peta refrain from clearing, cultivating and carrying out activities in and around Pantai Burung, which falls within the areas of the Ungazetted Land. Upon receiving the letter from the 3rd respondent to vacate the said area, the 2nd applicant made inquiries with the 4th respondent and obtained documentation which they contended supports their claim over the Customary Lands. The applicants' solicitors then wrote to the 3rd respondent seeking clarification on the latter's letter of 6 September 2011. No response was forthcoming.

[18] The 3rd respondent instead issued a letter dated 16 January 2012 to the 1st respondent, seeking the latter's cooperation to institute enforcement action against what was alleged to have been a trespass in the said area around Pantai Burung. This, the next day resulted in the issuance of the notice by the 1st respondent. The notice in contention entitled *"Notis Perintah Supaya Keluar daripada kawasan Taman Negara Johor Endau-Rompin (PETA)"* was issued by the Pejabat Tanah Daerah Mersing (the 1st respondent) and affixed onto a tree in the Pantai Burung area. The said notice reads as follows:

PEJABAT TANAH DAERAH MERSING
86800 MERSING, JOHOR.

No. Fail: (18)dlm.PTD.(MG)05/00/01/0908/0033/2011
Tarikh: 17 Januari, 2012.

NOTIS PEMBERITAHUAN ATAS PENCEROBOHAN TANAH KERAJAAN DI DAERAH MERSING

KEPADA SESIAPA YANG BERKENAAN,

NOTIS PERINTAH SUPAYA KELUAR DARIPADA KAWASAN TAMAN NEGARA JOHOR ENDAU-ROMPIN (PETA)

Merujuk perkara di atas, adalah dengan ini dimaklumkan bahawa tuan / puan didapati telah melakukan pencerobohan atas tanah kerajaan sebagaimana di atas. Ini bermakna tuan / puan telah melakukan satu kesalahan di bawah Seksyen 425 (1) dan (1a) Kanun Tanah Negara (KTN) dan boleh diambil tindakan di bawah seksyen tersebut yang jika disabitkan kesalahan boleh dikenakan denda tidak melebihi RM10,000.00 (RM SEPULUH RIBU SAHAJA) atau tidak melebihi 1 tahun (SATU TAHUN) penjara ATAU kedua-duanya sekali.

Tuan / Puan adalah dinasihatkan supaya memberhentikan apa-apa bentuk pencerobohan serta keluar meninggalkan tanah tersebut dalam tempoh 1 HARI dari tarikh surat ini dengan membuka sendiri segala binaan / bangsal / bangunan / pondok / pancang bot / jeti atau apa-apa jua bentuk tanaman yang telah ditanam di atas tanah.

2. Jika arahan ini tidak dipatuhi, tindakan penguatkuasaan ke atas bangunan atau tanaman tuan / puan akan dilaksanakan bagaimana peruntukan di bawah Seksyen 425 (A) 1 Kanun Tanah Negara (KTN). Pentadbiran ini akan meroboh / menghapus atau memusnahkan apa-apa bangunan atau tanaman serta tuan / puan akan didakwa dan dihadapkan ke mahkamah serta dikenakan denda sebagaimana tersebut di atas.

Sekian terima kasih.

'BERKHIDMAT UNTUK NEGARA'

t.t

(JAMALUDIN BIN HAJI A.HAMID),

Pentadbir Tanah,

Mersing.

Summary Of The Submission By The Applicants

[19] The central thrust of the case for the applicants, in the main, is anchored on the primary contention that the applicants have acquired native Orang Asli customary land rights at common law in respect of the Customary Lands where they have occupied and maintained traditional connection with the lands in accordance with their custom and practices. On the authority of leading cases on the subject such as *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 MLRH 95 (affirmed by the Court of Appeal) and the Court of Appeal decision in *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 1 MLRA 819 this common law customary land rights pre-exists and is not subject to the National Land Code.

[20] It is thus the submission of the applicants that the issuance of the said notice, which is expressly stated to be pursuant to s 425(1) of the NLC to be an error of law since NLC is not applicable to the land in question.

[21] The relevant respondents had therefore failed to consider the rights and interests of the applicants and the Jakuns of Kampung Peta as holders of customary land rights, nor afford an opportunity to the applicants to be heard in respect of such rights prior to arriving at the decision to issue the notice. Furthermore, the relevant respondents had themselves already earlier consented in writing for the Jakuns of Kampung Peta to continue occupying amongst others, Pantai Burung, being the area in question. This is borne out by specifically, firstly, the affidavit in reply for the 4th and 6th respondents affirmed by Ketua Pengarah Jabatan Kemajuan Orang Asli Malaysia ("JKOAM"), confirming that the Jakuns of Kampung Peta had lived in the relevant areas, including Pantai Burung even prior to the gazetting of Kampung Peta as Aboriginal Reserved Land. The affidavit also affirmed that the Jakuns of Kampung Peta had occupied some 100 acres of land already ventured by them which although was not made part of the Gazetted Land, and in fact included in the Endau Rompin National Park, the same would remain to be protected. Indeed, the affidavit even confirmed that the area said to be worked on by the applicants was within the scope of the approval earlier granted by the 3rd respondent, all of which, the applicants submitted have the effect of at the very least, creating a legitimate expectation that the Jakuns of Kampung Peta would be consulted or at least afforded the opportunity to be heard on matters relating to their Customary Lands.

[22] The applicants further contended that the relevant respondents, namely the 1st, 2nd, 4th, 5th and 6th respondents all owe a fiduciary duty under the law as provided in the Federal Constitution and the Aboriginal Peoples Act 1954 to protect the interests of the Orang Asli, including in particular in respect of the applicants' native customary title to the Customary Lands.

[23] In addition, it was further highlighted by the applicants that the fact that the notice was issued by the 1st respondent only 24 hours after the letter of instruction from the 3rd respondent of 16 January 2012 to the 1st respondent to take enforcement action against the alleged trespass and posted on a tree at a relatively inaccessible location suggests that the notice was issued in haste. The issuance rode roughshod over the rights of the applicants who had always occupied the said Customary Lands even with the knowledge, acquiescence as well as "consent" of the relevant respondents. Equally of importance, the applicants submitted that they were rightfully entirely dependent on the respondents to safeguard their interests in the first place.

Summary Of The Contention Of The Respondents

[24] The respondents on the other hand maintained that the notice was properly issued in exercise of the general powers of the State Director, Registrar or Land

Administrator; it concerned only an area which is outside the Gazetted Land, and that the notice was only intended for those Jakuns of Kampung Peta who had cleared an area of about 20 acres in size to develop and cultivate a rubber plantation, to cease such activities. The notice was certainly not a direction for all Orang Asli Jakun Kampung Peta to leave their settlement located within the Endau Rompin National Park.

[25] The respondents significantly argued that the applicants' customary title and rights have been extinguished by law, predominantly by reason of the creation of the Endau Rompin National Park, and that the applicants had failed to prove continuous occupation over their claimed Customary Lands for there was lack of exclusivity and control, because there is insufficient measure of control to prevent strangers from interfering, partly attributed to the erection of the said Structures on the Customary Lands and the clearance of trees without any payment of compensation to the applicants.

[26] The 4th and 6th respondents, being a Federal Government agency and the Federal Government, respectively, further contended that they had discharged their public duties under the Federal Constitution and the Aboriginal Peoples Act 1954, disputing however that there exists any constitutional or statutory obligation on the part of the Federal Government to grant the applicants rights to the development land or to gazette land as Aboriginal Reserve in the absence of clear language to that effect in the Federal Constitution, more so as the granting of land rights is a State matter in accordance with item 2 of State List in the Ninth Schedule to the Federal Constitution.

[27] All of the respondents thus contended that if such fiduciary duty existed, it had been discharged in accordance with the Federal Constitution and the Aboriginal Peoples Act 1954, and further argued that even if there had been a failure, such non-feasance is not actionable by virtue of s 7 of the Government Proceedings Act 1956. The said respondents also submitted that the applicants have failed to prove the existence of a fiduciary duty on the part of the respondents in accordance with the test as propounded in *Frame v. Smith* [1987] 2 SCR 99 which stated that:

> "… Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."

[28] The respondents also submitted that the reliefs prayed for by the applicants in respect of their customary rights over a certain unspecified area of land as produced in the Community Map is unnecessary and far reaching without any definitive demarcation of the relevant areas. It is therefore giving rise to uncertainty and of doubtful utility and usefulness. The respondents referred to authorities such as *Land Executive Committee Of Federal Territory v. Syarikat Harper Gilfillan Berhad* [1980] 1 MLRA 175 and *Datuk Syed Kechik Bin Syed Mohamed v. Government Of Malaysia & Anor* [1978] 1 MLRA 504 in support of such contention. The respondents also argued that the applicants have not fulfilled the test justifying the granting of a declaratory relief as stated in *Caxton (Kelang) Sdn. Bhd. v. Susan Joan Labrooy & Anor* [1986] 1 MLRH 478.

[29] The respondents further argued that the order for *mandamus* to de-gazette areas within the Endau Rompin National Park or restore customary lands to the applicants cannot be founded on s 44(1) of the Specific Relief Act 1950 as there is no legal duty imposed on the respondents governing the claim of the applicants, thus not fulfilling the requirement of O 53 r 1 (2) which stipulates the need for adherence to Chapter VIII of Part 2 of the Specific Relief Act 1950 s 44 (1) concerning performance of public duties. The respondents' stance is that the National Parks Act 1980 does not impose any duty on the respondents to de-gazette any part of the Customary Lands or to restore that of the said Customary Lands to the applicants.

The Law On Indigenous Land Rights

[30] The position in respect of native customary land rights of the Orang Asli in Malaysia may now be considered as settled law to the extent that the principles have been established by case law authorities, particularly by the quartet of the leading cases of *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 MLRH 95 (Court of Appeal *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [1998] 1 MLRA 170), *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 1 MLRH 161 (Court of Appeal *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 1 MLRA 819), *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 1 MLRH 304 (Court of Appeal *Superintendent Of Lands & Surveys Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 1 MLRA 580) and *Madeli Salleh v. Superintendent Of Lands & Surveys & Anor* [2005] 1 MLRA 599 (Federal Court *Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 2 MLRA 390). The key principles of law that may be distilled from these cases which are of relevance to the instant application may be stated as follows:

"(i) The Orang Asli have a common law right to their ancestral land provided there is a continuous and unbroken occupation and enjoyment of rights to the land since time immemorial.

(ii) The common law rights to their customary land pre-exist and thus pre-date the Aboriginal Peoples Act 1954 and National Land Code 1965 (the NLC). Indeed, the Crown's acquisition of sovereignty did not interfere with native customary land rights. The Aboriginal Peoples Act 1954 thus complements and does not extinguish customary land rights and the NLC has no application over such customary land right (see *Sagong Tasi* and s 4(2)(a) of NLC). It is a form of a right acquired in law and not based on any document of title.

(iii) The common law customary land rights of the Orang Asli or native customary title is *sui generis* and is a right over the land inclusive of the right to live on their land as their forefathers had lived, as would their future generations, the right to move about freely without disturbance or interference and the right to the produce of the land.

(iv) The customary land right however does not involve the right to the land in the sense that the Orang Asli cannot convey, lease out or rent the land. However, the customary rights over land is a form of proprietary rights within the scope of art 13 of the Federal Constitution and therefore enjoy constitutional safeguard against deprivation of the proprietary customary land rights without compensation. The extinguishment or deprivation of such rights can only be made for public purposes by legislative provisions in terms free from any ambiguity, and after payment of compensation. Mere implication is insufficient.

(v) Native customary title represents a community title of a permanent nature and is identifiable by reference to the traditional customs and laws of the community. The Orang Asli native title and customary rights in turn is determined by showing their continuous use and occupation of land.

(vi) The test of occupation is the existence of sufficient measure of control to prevent strangers from interfering. Actual physical presence is however not a pre-requisite to establish continuous use and occupation.

(vii) The ascertainment of the specific rights associated with native customary title requires a scrutiny of the custom and practices of each individual community. As is the case for determining "occupation", the custom and practice can only be considered as a matter of proof based on the evidence adduced.

(viii) Given the established proposition that the custom and traditions of a particular Orang Asli community determine whether there is occupation and continuous use of the Customary Lands, which in turn defines the nature and extent of their customary land rights as recognised under common law, such rights may extend beyond the settlement areas of the community and may be coterminous with the lands used for roaming, hunting and foraging, if the customs and activities of the community is proven to include such foraging activities.

(ix) The Federal and State Governments owe a fiduciary duty to protect the welfare of the Orang Asli, including their land rights, and not to act in

any manner inconsistent with those rights, as well as to provide remedies where an infringement occurs (see also Federal Court case of *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2012] 1 MLRA 1). This fiduciary duty is founded among others on constitutional and statutory provisions such as firstly, art 8 (5)(c) of the Federal Constitution which sanctions an exception to the equality principle in relation to provisions for the protection, well-being or advancement of the aboriginal people of Malay Peninsular (including reservation of land); secondly, item 16 of the 9th Schedule in list 1 - Federal List empowering the Federal Government to promulgate laws for the welfare of the aborigines; and thirdly, the Aboriginal Peoples Act 1954 itself, which object as stated in its preamble is expressly to provide for the protection, well-being and advancement of the aboriginal peoples of Peninsular Malaysia.

(x) A failure to gazette Orang Asli Reserved Land may constitute a breach of such fiduciary duty."

The Extent Of The Applicants' Native Title To Their Customary Lands

(i) The Test Of Continuous Occupation

[31] Having stated the foregoing propositions of law, it is now apposite for me to consider the position of the applicants in relation to their claim to native customary rights before I touch on the validity of the notice issued under s 425 of the NLC by the 1st respondent.

[32] I do not find the fact that the Orang Asli of Kampung Peta being members of the "Jakun" indigenous community to be in dispute. Exhibit SC-2 (encl 13) of the affidavit in reply by the 2nd applicant showed a document entitled Orang2 Asli Johor prepared by Jabatan Hal Ehwal Orang Asli Johor issued in September 1961 classifying Orang Asli living in Mersing area, including specifically Kampung Peta, as Jakun. The underlying bone of contention in the instant application however, is the extent of the customary land rights of the applicants, with the respondents recognising only the Gazetted Land.

[33] Whilst it can safely be stated that the proposition of law on native customary land rights is fairly settled, in that the law recognises that the common law rights embodied in native title of indigenous peoples in Malaysia over their customary lands are to be respected, a related but crucial issue of no less importance, given its practical relevance is the determination of the extent of such native rights over the subject customary land. This is in turn significantly dependent on the issue whether the natives occupy and maintain a traditional connection with the said customary land in accordance with their custom and usages. The very foundation of the rights of natives and aborigines to their customary land is therefore the fact of continuous use and occupation of the same. Occupation of the Customary Lands claimed by the applicants in the instant case as such is the *sine qua non* and absolutely central to establishing the all-important native customary rights.

[34] The test of establishing "occupation" is most authoritatively enunciated by Arifin Zakaria FCJ (as His Lordship then was) in *Madeli Salleh* in the following fashion:

> "On the issue of what is meant by "occupation", we agree with the view of the Court of Appeal that actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exist sufficient measure of control to prevent strangers from interfering: See *Newcastle City Council v. Royal Newcastle Hospital* [1959] 1 All ER 734; which was followed by the local case of *Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor* [1991] 1 MLRH 741. Therefore, following the above authorities, the fact that the respondent ceased to live on the land prior to the fire which gutted the house on the land in 1941 that does not mean that he ceased to be in occupation of the said land. The evidence before the court clearly established that he continued to exercise control over the said land after the said period. The respondent could not, therefore, be said to have lost his right or interest over the said land by reason of abandonment or non occupation of the said land."

[35] It is therefore clear that it is not necessary that there must be actual physical presence to show occupation of the Customary Lands, for there can also be occupation under the law *vis-a-vis* native customary land rights if there is sufficient measure of control preventing strangers from intrusion or interference. It is imperative to note that there are two crucial aspects to this test of occupation. The first is occupation by physical presence which in my view is best evidenced by the existence of settlement areas such as villages and residential sites as well as cultivated lands. The second is occupation in respect of the areas extending beyond such physical settlements, where the focus is on the aspect on the continuous use of the land by the Orang Asli in accordance with their custom, to the exclusion of third parties encroaching into the area in question. In my view, this second aspect is the one which concerns the areas for hunting, roaming and foraging. In both situations however, the critical issue is one of evidence and proof.

[36] I shall deal with both situations of occupation also because the applicants' case is not only that the notice has the effect of encroaching on their land rights at especially the area of Kampung Peta in Pantai Burung, but that a declaration is sought in respect of their ancestral land rights to the entire Gazetted Land as well as the more sizeable Ungazetted Land, extending to the seven areas as specified earlier in this judgment and their surrounding areas (as demarcated per the Community Map exhibited to the affidavit of the 1st applicant).

(ii) Evidence Of Continuous Occupation Of Customary Lands

[37] The 2nd applicant averred in his affidavit that the Jakuns of Kampung Peta and their ancestors have occupied the Customary Lands located within the Ulu Endau and the Kinchin River area from time immemorial. They had occupied and cultivated Pantai Burung, Ulu Endau, Temiang, Padang Iwah, Gaban,

Chenggal Rambutan and Kuala Jasin, and continue to occupy these areas and other areas within the Customary Lands through the maintenance of their traditional activities, including harvesting and tending to their cultivation and orchards, collection of forest produce, hunting and fishing, the maintenance of gravesites and the conduct of traditional ceremonies at sacred sites (keramat).

[38] From the said affidavit, it is further affirmed that the Jakun of Kampung Peta continue to occupy the areas known as Batu Gajah and Kuala Lamakoh, both located within the Customary Lands. The maternal aunt of the 2nd applicant, Som binti Rangik, aged around 90, was born and is residing in Kuala Lamakoh. The settlement at Kuala Lamakoh was relocated in the 1950s but they continue to occupy this area through the maintenance of their traditional activities.

[39] According to the Jakuns' oral histories, Som binti Rangik's grandfather was Batin Lepar, who was the Batin of Kampung Peta (also then known as Iwah) prior to the Japanese occupation. There were five subsequent Batins whom the 2nd applicant has knowledge of after Batin Lepar, before the 2nd applicant himself was appointed as Batin of Kampung Peta in 1996; namely, Batin Perang, Batin Besar, Batin Jajah anak Janang, Batin Ali (who passed away in 1965) and Batin Tiam.

[40] The Community Map was prepared by the applicants and is said to be premised on the areas relevant to the adoption of the use of their ancestral custom with particular reference to prominent ancestral landmarks and sites at hills, mountains, rapids, rivers and confluence. The entire Customary Lands of Kampung Peta is about 7,450 hectares (18,410 acres) and with a boundary circumference of approximately 47.5km in distance.

[41] The 1st applicant exhibited pictures, amongst others, which show that the Jakuns of Kampung Peta had occupied in and around the areas identified as Tapak Sungai Jaler and Pantai Burung which are situated within the Customary Lands as depicted in the Community Map, highlighting in particular, pictures of burial and holy ancestral sites at Pantai Burung and rubber plantations. This exh KP-2 attempts to explain the history of how Kampung Peta came to be known as such, and emphasises the importance of Endau River as the key mode of transportation of the Jakuns of Kampung Peta who in the 1950s had to travel the length of the Endau River, from its headwaters to Endau town to buy basic necessities and provisions in exchange for items such as rattans, in a journey that could take four to five days either way. Their trips on wooden boats would pass villages such as Kampung Punan, Kampung Tanah Abang, Kampung Tanjung Tuan, Kampung Meletong, Kampung Denai and Kampung Labong before reaching Endau town and the Jakuns would also fish during the journey.

[42] These pictures, which illustrate the occupation and use of land in the area of Kampung Sungai Burung which is the subject area targeted by the

notice, are not challenged by the respondents in any of their submission. In fact, the affidavit in reply of the 4th and 6th respondents, affirmed by the Ketua Pengarah of JKOAM (encl 10) admitted the statement in para 22 (of the affidavit of the 2nd applicant), which contains the pictures as per exh KP-2.

[43] The affidavit in reply of the 2nd applicant, being the Tok Batin himself contains further averments on the oral history of the Jakuns of Kampung Peta, their local laws, custom and traditions which are integral to the use of the lands and waters within the Customary Lands. Ceremonies such as funeral rites, including location of gravesites (which according to their custom should not be moved) are very closely linked to the Customary Lands. So too would the spirit-appeasing ceremony of "bela hutan" be, and the same can be said in respect of the spiritual cleansing by ritual bathing, commonly performed at the sacred site of Jeram Bungsu Pacau which is also located within the Ungazetted Land (supported by pictures shown in exh SC-6 to the affidavit in reply of the 2nd applicant in encl 13).

[44] Other sacred ancestral sites are averred to be at Pantai Burung itself, specifically the grave of Nenek Panjang Berjanggut, a large rock in Batu Gajah, rapids at Kuala Lamakoh and Pengkalan Pak Baluk at Lubuk Ewah, all of which locations are within the Ungazetted Land part of the Customary Lands, and are marked in the Community Map.

[45] In respect of land tenure, it was averred by the 2nd applicant that the Customary Lands are possessed, occupied, used and enjoyed for the benefit of the Jakuns of Kampung Peta, where according to their laws and customs, entry into the Customary Lands by any outsider, including Jakuns who do not have kinship ties with the Jakuns of Kampung Peta, requires express permission. Durian trees had also been planted along both sides of the Endau River within the Customary Lands. These trees have been inherited and are owned by individual members of the community as is the case with old swiddens and rubber trees that are located within the Ungazetted Land of the Customary Lands.

[46] Further affidavit evidence on the aspect of traditional relationship with the land is that the Jakuns of Kampung Peta rely on the collection of forest produce such as rattan and bamboo for traditional, commercial and subsistence purposes. These products are thus essential to their livelihood and deemed integral to their culture. For example, bamboo is utilised for amongst other purposes, the building of traditional homes and structures and to build the Pelanta Air Panchoh in the Air Panchoh ceremony.

[47] It is useful if I further reproduce below the relevant parts of the affidavit of the 2nd applicant (in paras 29 to 32) which provides greater emphasis on what in my view appears to suggest a strong existence of an intertwining element or connection between the life of the Jakuns of Kampung Peta and their use of the land and its produce within the Customary Lands.

"Traditional and subsistence hunting is essential to our livelihood, well-being and life and is conducted within the Customary Lands using, among other things, nyumpit (blowpipes), jirat (snares) and lembing (spear). Once again, we rely on our Customary Lands to make most hunting equipment. For example, the nyumpit is carved from kayu tepinis or mesawa. The damak (dart) for the nyumpit is made from the habong tree while the poison for the damak is extracted from the rengkek tree or root of the Ipoh tree.

The Jakun of Kampung Peta also traditionally fish and trap tortoises along the Endau River and its tributaries located within the Customary Lands. Fish are angled, speared, trapped using lukah (made from woven rattan) or paralysed using nuba (juice of deris or jangiut root) and speared.

We use wood from the chengai tree to carve the hull of our traditional boats (perahu). Other types of wood including those from the penok, merbau, kepong, merawan and gerunggung trees located within the Customary Lands are used to complete the construction of the perahu.

The Customary Lands are also an invaluable source of traditional medicine for the Jakun of Kampung Peta. Parts of various plants located or grown on the Customary Lands are utilised to cure ailments or for general good health. For example, the decoction of the root of the purut keletong plant is used to cure coughs. Drinking a decoction of root of the pengesep plant alleviates internal body pains, breathing difficulties and bloody coughs. The decoction of the serapat root is a general health tonic for women. The root of the lembe hitam, if eaten raw, reduces hot fever. In the mid-1980s, I assisted the Malayan Nature Society to record more than 50 types of herbal medicine used by the Jakun of Kampung Peta."

[48] In addition to the affidavit evidence of the applicants concerning occupation and settlement of the Orang Asli Jakun Kampung Peta which are not credibly disputed by the respondents, the evidence particularly that of the 2nd applicant, being the headman or Tok Batin of the Orang Asli Jakun Kampung Peta which by his affidavit narrated the oral histories of the Orang Asli Jakun Kampung Peta, their the practices, custom and traditions, as well as their connection with the use of the Customary Lands, and that of continuous occupation, ought to be construed as relevant pursuant to s 48 of the Evidence Act 1950. Furthermore, the claim of native customary rights over Kampung Peta is, very crucially, supported by documents from and averments by the respondents themselves. In particular these include the following:

"(a) A letter dated 4 August 2010 from Pegawai Hal Ehwal Orang Asli Daerah Mersing to Pengarah Hal Ehwal Orang Asli, enclosing a report prepared by Pentadbiran Hal Ehwal Orang Asli Daerah Mersing dated 3 August 2010. This Report, which is contained in the affidavit in support of the first applicant as exh KP-8, stated in no uncertain terms the following significant observations:

(i) The Kampung Orang Asli Kampung Peta encompasses the seven villages specified earlier in this judgment;

(ii) History of their occupation is recorded in as early as the 1940s.

(iii) The permanent occupations on these lands involve cultivation of rubber trees.

(iv) The 2nd applicant, Batin Sangka Chuka succeeded Tok Batin Tiam.

(v) Kampung Pantai Burung is the burial ground of the Orang Asli Jakun Kampung Peta, which is the symbol of their customary land rights. This is also where some of their ancestors were born and now buried.

(vi) In 1960 Jabatan Hal Ehwal Orang Asli made a formal application for Kampung Orang Asli Peta and the villages surroundings it to be gazetted as Aboriginal Reserve but the process got postponed, but subsequently reviewed in the 1980s.

(vii) The Kampung Orang Asli Kampung Peta was gazetted in 1989 (547 acres in size), as was the boundary exercise for Endau Rompin National Park approved in 1989.

(viii) If however the boundary delineation exercise of the Endau Rompin National Park had been referred to either the Tok Batin or Jabatan Hal Ehwal Orang Asli, Kg. Pantai Burung and Kg. Kuala Jasin would certainly have not been included within the boundaries of the Endau Rompin National Park.

(ix) The Orang Asli did not encroach into the Endau Rompin National Park but it was the reverse. The National Park instead ignored the fundamental rights of the Orang Asli and knowingly included their native customary lands, complete with the rubber plantation and burial grounds within the boundaries of Endau Rompin National Park.

(x) The customary land at Kg. Pantai Burung should be returned to the Orang Asli Jakun of Kampung Peta."

[49] Those are the findings of the Pegawai Hal Ehwal Orang Asli Mersing representing the Department tasked with the responsibility to promote the welfare of the Orang Asli in Peninsular Malaysia no less, where the essence, import and purport of the report could not have been any more definitive in providing the requisite evidence of the existence of a prior, continuous and unbroken occupation of the Orang Asli Jakun Kampung Peta in the areas of Customary Lands as specified in the instant application, which thus indisputably validates the claim to their native customary land rights, both already gazetted (547 acres or 221.36 hectares) as the Gazetted Lands well as parts ungazetted including areas (specifically, the Ungazetted Land) now situated within the Endau Rompin National Park.

[50] There is yet another official letter which provides equally compelling evidence of the existence of customary land rights of the Orang Asli Jakun

Kampung Peta. This is the letter from the office of the Assistant Protector of Aborigines, Johore in Mersing dated way back on 22 May 1954 (also in exh KP-8 of the affidavit in support of the 1st applicant). The suggestion as contained in this letter was for the areas covered by the Endau river basin to be declared and gazetted as "Aboriginal Reserves" as the aborigines had even then expressed concerns about the future of their ancestral land, cultivation activities and jungle products at various places along Anak Endau River. It was specifically recommended by the Assistant Protector of Aborigines Johore that both sides of the Endau banks and three miles on either side be reserved to the Orang Asli. This clearly refers to areas beyond the presently 547 acres of gazetted aboriginal land of Kampung Peta region.

[51] Further, the affidavits in reply by the 3rd, 4th and 6th respondents also admitted that even before the gazetting of Kampung Peta, the Orang Asli had occupied and cultivated tracts of lands in Pantai Burung and surrounding areas and that post gazetting of the Endau Rompin National Park, the Orang Asli had been given "consent" to continue working on their existing rubber plantation, visit burial grounds and practice their customs and traditions. This further provides unchallenged evidence, emanating from the respondents themselves, of the history of prior and continuous occupation of Kampung Peta extending into the presently ungazetted Orang Asli land within the boundaries of the Endau Rompin National Park. The evidence of continuous occupation provides the foundation of the existence of native customary and proprietary land rights covering the entire extent of the areas of the land, gazetted as well as ungazetted.

[52] Yet further evidence, similarly unchallenged, (thus attracting the application of the principle established in *Saeng-Un Udom v. PP* [2001] 3 SLR 1, where in the absence of any affidavit or expert evidence to the contrary, the evidence of expert made available stands admitted) can be found in the expert witness affidavit of Dr Colin Nicholas, whose research also refers to literatures by ethnographers published as far back as 1881 and 1841 which noted that the Jakuns of Johore had lived and occupied the upper branches of the most Southern system of rivers in the Malay Peninsular including the Endau. Dr Colin Nicholas stated in his report (exh CGN-2) that the Jakuns of Kampung Peta have been in continuous occupation of their customary lands to presently. The expert report provided a credible support to the Community Map exhibited to the affidavit in reply by the 1st applicant. The Community Map has sufficiently and clearly marked out prominent sites of villages, fruit trees, ceremonial, traditional and customary locations. The relevant parts of the uncontroverted report by Dr Colin Nicholas on the point is most pertinent:

> "Early Jakun presence in Upper Endau
>
> 17. On focusing my research on the Orang Asli in the state of Johor, especially in the Endau River basin, my studies have revealed that the Orang Asli have been occupying their traditional territories from very early times. This is

attested to by published historical accounts and in the works of very early writers.

...

Continued Jakun presence in the Customary Lands

25. Renowned Japanese anthropologist Prof. Narifumi Maeda Tachimoto lived among the Jakuns along the Endau River in the 1960s. His research has been published in various journals and in his book The Orang Hulu. [Please see pp CN107 - CN124 of this report].

26. In Chapter 2 of his book, at pp 13 to 24, he discusses the settlements of the Orang Hulu, by which name the Jakuns here are also called, situated along the banks of the Endau River, Kampung Peta is one of them. At p 23 he writes specifically about Kampung Peta, as follows:

> Peta is situated the farthermost upstream among the hamlets I studied in the upper courses of the Endau near the mountain (bukit) named Peta (Figure 10). Like the core population of Punan, that of Peta seems to have formerly dwelt along the Kinchin River and the upper reaches of the Endau.

[Please see p CN117 of this report.]

27. To support this contention, he quotes, at pp 23-24, Lake and Kelsall who, in their 1894 article on A journey on the Sembrong from Kuala Indau to Batu Pahat, mentioned meeting Jakuns from settlements ranging from 25 to 60 individuals at various locations that transect the boundaries of the current Endau-Rompin National Park. These included locations such as Kuala Lemakoh, Batu Gajah, Linggor and Selai (the latter on the western boundary of the current national park). [Please see pp CN125-CN135 of this report for the article by Lake and Kelsall.].

...

Summary of Conclusions

98. Based on my study, I find that the Jakun-Orang Asli of Kampung Peta are the descendants of the earlier known peoples who settled and travelled in the greater Upper Endau River basin before the arrival of non-Jakun people.

99. The customary lands of the Kampung Peta Jakuns is within a distinct boundary that includes the customary areas of Padang Iwah, Kuala Jasin, Pantai Burung, Ulu Endau, Batu Gajah, Kuala Lemakoh, Kuala Kinchin and Bukit Janing.

100. The Jakuns who live in the customary lands are a unique and distinct community who exercise exclusivity in their social membership. They also continue to practice the culture and traditions of their ancestors to a reasonable extent.

101. Some of their customary lands are individually owned and managed, which most are held collectively. All land dealings and use are subject to community rules and traditions.

102. The Jakuns of Kampung Peta still practice their traditional customs on the land and continue to perfom the necessary rituals in their customary lands. By continuing to acknowledge and observe these customs that are distinctive to Orang Hulu culture, the Jakuns of Kampung Peta have maintained a connection with their customary lands.

103. The community still depends on the land for their economic livelihood and subsistence needs. This includes the area known as Pantai Burung which is within the current park boundaries.

104. With the exception of their forced resettlement during the Emergency, the Jakuns of Kampung Peta did not at any material time abandon their customary lands.

105. The Orang Asli Reserve gazetted in 1989 represented a small proportion of their customary lands. The large part of their customary lands remain ungazetted, and as such with insecure tenure."

[53] The presence of the Jakuns of Kampung Peta in the said areas throughout the Customary Lands can therefore be said to be fairly established and long-standing to the extent that the 4th and 6th respondents' main argument is more to the point that the applicants' rights to their Customary Lands are confined only to their settlement areas. This contention is in my view plainly unsustainable in the face of the established common law position and the fact of continuous occupation and maintenance of a traditional connection with these areas, and for the reasons that I shall elaborate further below.

(iii) Customary Land Rights Not Extinguished And Continue To Subsist

[54] The respondents have also failed to establish the existence of any subsequent legislation which clearly extinguished the prior common law customary land rights of the Orang Asli Jakun of Kampung Peta. The respondents' bare assertion that the applicants' customary title and rights have been extinguished by law, predominantly by reason of the creation of the Endau Rompin National Park or that on the almost spurious basis that the applicants are incapable of exercising "control" or ensure "exclusivity" over the Customary Lands is lacking in substance and is entirely devoid of merit, considering the weight of authorities, such as *Madeli Salleh, Bato Bagi* and *Sagong Tasi*, to name only a few, which have specifically ruled that such customary land rights under common law can only be overridden and extinguished by nothing less than plain, obvious and unambiguous legislative prescriptions. None however, has been raised by any of the respondents, for there is not any.

(iv) Customary Lands Encompass Hunting And Foraging Areas

[55] The authority relied on by the respondents to state their position that the native customary rights do not extend beyond settlement sites to the jungle at large where the Orang Asli use to roam to forage for their livelihood is principally the Court of Appeal's decision in *Nor Anak Nyawai*; in particular, to the following passage:

"From the above two cases we note that the common feature which forms the basis of claim for native customary rights is the continuous occupation of land. Further, we are inclined to agree with the view of the learned trial judge in *Sagong Tasi & Ors (supra)* that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food. We note that even Mr Baru in his submission hinged the claim of the respondents over the Disputed Area on the assertion that they 'had been in continuous occupation and by express provisions of the law at the relevant time, been lawfully occupying the Disputed Area'. It is thus a matter of evidence adduced whether his submission can be sustained."

[56] However *Nor Anak Nyawai* was decided prior to the Court of Appeal decision in *Sagong Tasi* which had authoritively held, on the issue of the determinant of the customary title, as follows:

"As respects the present appeal two important principles emerge from the Advice of the Board. First, that the fact that the radical title to land is vested in the Sovereign or the State (as is the case here) is not an *ipse dixit* answer to a claim of customary title. There can be cases where the radical title is burdened by a native or customary title. **The precise nature of such a customary title depends on the practices and usages of each individual community. And this brings me to the second important point. It is this. What the individual practices and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community. In other words it is a question of fact** to be decided (as it was decided in this case) by the primary trier of fact based on his or her belief of where, on the totality of the evidence, the truth of the claim made lies. In accordance with well established principles, it is a matter on which an appellate court will only disagree with the trial judge in the rarest of cases. Here, of course, there is complete acceptance by the respondents of the facts as found by the learned judge. I have already set out his conclusions on the proved facts. Based on those facts and on the authorities he concluded that the plaintiffs had established their claim to a customary title to the land in question."

[Emphasis Added]

[57] Nor was this ruling in *Nor Anak Nyawai*, which excludes land used for hunting and foraging from the content of customary land rights referred to by the Federal Court in *Madeli Salleh*. Indeed, the Federal Court in *Madeli Salleh* referred approvingly of the Australian High Court decision of *Mabo v. Queensland (No. 2)* [1992] 175 CLR 1 which in a majority judgment held as follows:

"Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs."

[58] Further, *Madeli Salleh* also makes it clear, as stated earlier in this judgment, that physical presence is unnecessary to prove occupation. Indeed, the ground-breaking case of *Adong Kuwau* recognised the rights to 53,273 acres of foraging lands forming part of the Orang Asli plaintiffs' customary lands as occupied as proprietary rights protected by art 13 of the Federal Constitution. The following passage is instructive:

> "In the present case adequate compensation for the loss of livelihood and hunting ground ought to be made when the land **where the plaintiffs normally went to look for food and produce** was acquired by the government. The compensation was not for the land but for what was above the land over which the plaintiffs had a right."
>
> [Emphasis Added]

[59] In addition, the important Canadian Supreme Court's decision in *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 ruled the following on the subject of occupation:

> "149. However, the aboriginal perspective must be taken into account alongside the perspective of the common law. Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land: *Common Law Aboriginal Title, supra*, at p 73; also see *Cheshire and Burn's Modern Law of Real Property, supra*, at p 28; and Megarry and Wade, *The Law of Real Property, supra*, at p 1006. **Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources:** see McNeil, *Common Law Aboriginal Title*, at pp 201-2. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at p 758."
>
> [Emphasis Added]

[60] In my view, the weight of authorities suggest that lands used for roaming, hunting and foraging cannot be automatically excluded from being deemed to constitute a part of the ancestral and customary lands of the Orang Asli. When determining the question on the contents and extent of the customary land rights under common law, in situations concerning both settlement sites and the surrounding foraging areas, the fundamental and pivotal question is decidedly one of evidence of occupation, which could but need not be physical in nature, and that of the continuous traditional connection with the lands. As stated earlier, the crucial test is one of proof as a matter of fact. Mere assertions surely cannot form the basis of common law customary land rights. If a custom or usage concerning the activities of hunting and foraging can be established to be traditionally related to the lands in question, common law customary land rights may be established, subject to the satisfaction of the test of occupation enunciated in *Madeli Salleh*. Even then, the aspect concerning

whether or not the claimants in any given case could show evidence of sufficient degree of control to prevent interference from strangers should also be applied with considerations of pragmatism when dealing with vast foraging and roaming areas.

[61] In my assessment, in light of the affidavit evidence referred to earlier, the applicants have indeed shown not only that the activities of hunting, fishing and foraging to be integral elements to the custom and traditional activities of the Jakuns of Kampung Peta, but that such practices are so very closely intertwined with their use of and very reliance on the lands they claim to be ancestral and customary in nature, which had long been the primary source and essence of their very existence and will continue to be essential to their future livelihood.

[62] In my view, any other conclusion would be untenable for, given that the custom and traditions having connection with the lands of the Orang Asli determine the extent of their customary land rights, excluding foraging activities on lands beyond settlement sites when these, like the case for the Jakuns of Kampung Peta, clearly form part of their custom and daily usage and activities, is not justified under the law. A contrary position may have the unintended effect of threatening the continuation of not only the character but also the contents of their traditions and custom, and potentially in the long run the very survival of the Orang Asli, as presently identifiable with their custom and traditions.

[63] Virtually, all of the averments of the 1st and 2nd applicants concerning the history, customs and activities of the Jakuns of Kampung Peta are not met with substantive and credible riposte but merely bare denials, if at all, bordering on requiring this court to apply the rule established by the court of Appeal in *Ng Hee Thoong v. Public Bank Berhad* [1995] 1 MLRA 48 to the effect that such averments of the applicants could thus be deemed admitted. Given the compelling, and almost overwhelming, and in large parts uncontroverted affidavit evidence as I outlined above, there is no justifiable or rational basis for me to reach any conclusion other than that the Orang Asli Jakun Kampung Peta plainly have the common law right to their customary lands, which pre-existing customary land rights and thus prior ownership of native title over the areas of land claimed by the applicants are not impaired or in any way affected by subsequent legislative interventions including the NLC, and is thus protected by art 13 of the Federal Constitution.

[64] Such customary land rights extend beyond settlement sites to the hunting and foraging areas since it has also been proven, not only from especially the evidence of the applicants, but also the expert report that such activities constitute an integral element of the Orang Asli Jakun Kampung Peta's custom, occupation and usage of their Customary Lands. I should reiterate that the threshold issue of prior and continuous use and occupation, being the pre-requisite to establishing customary land rights has been found to be satisfactorily met on account of the foregoing evidence.

[65] Therefore, the 4th and 6th respondents' argument that continuous occupation of the Orang Asli Jakun Kampung Peta in respect of the claimed area within the Endau Rompin National Park cannot be proven pursuant to the test approved by the Federal Court in *Madeli Salleh* on the existence of sufficient measure of control to prevent strangers from interfering in the sense of what the respondents construed as exclusivity over the said lands is in my view unsustainable. First, *Madeli Salleh* does not actually mention the test of exclusivity, at least not in the sense that the respondents are contending.

[66] Secondly, and more fundamentally, the test of occupation is not merely physical occupation. As mentioned earlier, *Adong Kuwau* involves a decision which ruled that the vast areas of ancestral lands on which the claimants foraged for their livelihood to be subject to customary land rights. The case of *Delgamuukw* is even more specific on its pronouncement of the point to such effect. In the instant case, the evidence of use of areas within the Customary Lands for hunting, roaming, fishing and foraging is manifest. Their continuous use of the Customary Lands for such purposes is well established, if not even documented and chronicled. I do not find evidence that such activities in the relevant areas of the Customary Lands to be affected by any unwelcomed intrusion or interference by third party strangers. Indeed, as mentioned earlier, there is also evidence, similarly unchallenged, that entry into the Customary Lands is regulated in the sense that even other Jakuns (not from Kampung Peta) would require express permission before granted access. In any event, the long established and continuous use of lands for hunting and foraging activities, on the facts of this instant case, fortify the implication that the Jakuns already having a reasonable and sufficient degree of control over the Customary Lands, to the exclusion of strangers.

[67] Thirdly, the argument that there is no exclusivity or sufficient control to prevent interference because the 3rd respondent had built permanent structures on the claimed lands within the Endau Rompin National Park is clearly flawed by reason of the trite principle that one cannot take advantage of one's own default. The application of the legal principle that a party cannot benefit from his own breach or default can be seen in the case of *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1998] 2 MLRA 438 where the Court of Appeal decided that a land owner who erected a warehouse on his land in breach of the requirement to obtain planning permission should not receive any benefit from it from any compensation to be paid in respect of the acquisition of the land. Similarly in the case of *Khoo Cheng & Ors v. Pentadbir Tanah Muar* [2006] 4 MLRH 401, the order of forfeiture in favour of a party was set aside because of prior non-compliances with a number of mandatory requirements of the NLC by the same party. Indeed, the Court of Appeal in *Sagong Tasi* too stated that it would not be correct for the State Government to argue that no compensation ought to be paid on account of the non-gazetting of the relevant customary lands, which should have been but failed to have been undertaken by them in the first place. In the instant case, the 3rd respondent should probably not have built the structures on a land that rightfully belonged to the applicants. At

least not without acknowledging the pre-existing customary land rights of the applicants.

(v) The Respondents Owe A Fiduciary Duty

[68] This finding on default emphasises the important point — that is on the breach of fiduciary duty on the part of the respondents who are bound under the law to protect the applicants and the Jakuns of Kampung Peta in the first place. I have no hesitation in finding that the test to establish the existence of a fiduciary duty as stated in *Frame v. Smith* as submitted by the respondents are clearly met. But in any event, the proposition of law that Federal and State Governments owe a fiduciary duty to ensure the safeguard of the welfare of the Orang Asli including the protection of their land rights is already settled and free from doubt. In *Sagong Tasi*, the Court of Appeal held as follows:

> "In my judgment, it was open to the judge to have made a finding that the failure or neglect of the 1st defendant to gazette the area in question also amounted to a breach of fiduciary duty. Here you have a case where the 1st defendant had knowledge or means of knowledge that some of the plaintiffs had settled on the ungazetted area. It was aware that so long as that area remained ungazetted, the plaintiffs' rights in the land were in serious jeopardy. It was aware of the 'protect and promote' policy that it and the 4th defendant had committed themselves to. The welfare of the plaintiffs, on the particular facts of this case, was therefore not only not protected, but ignored and/or acted against by the 1st defendant and/or the 4th defendant. These defendants put it out of their contemplation that they were ones there to protect these vulnerable First Peoples of this country. Whom else could these plaintiffs turn to? In that state of affairs, by leaving the plaintiffs exposed to serious losses in terms of their rights in the land, the 1st and/or 4th defendant committed a breach of fiduciary duty. While being in breach, it hardly now lies in their mouths to say that no compensation is payable because of non-gazettation which is their fault in the first place. I am yet to see a clearer case of a party taking advantage of its own wrong. For these reasons, the plaintiffs were plainly entitled to a declaration that they had customary title to the ungazetted area which is more clearly demarcated in the plan exh P1 and marked in green and yellow. The strip of land that was excised out of the whole area runs across the portions marked green and yellow as well as the gazetted portion marked in orange. It is the former area in respect of which compensation must be paid in accordance with the 1960 Act. This part of the cross appeal must therefore be allowed."

[69] The Federal Court in *Bato Bagi* made the same point no less clearly in the following manner in the judgment of Richard Malanjum CJSS:

> "As for the argument that the Government stands in a fiduciary position to protect the interests of the natives, I am of the view that such a notion has been accepted by our courts. (See: *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors (supra)*. It has also been adopted in foreign jurisdictions. (See for instance the Supreme Court of Canada in *Delgamuukw v. British Columbia* [1997] 3 SCR 1010). It is therefore not unheard of that the Government ought to protect the interests of the natives and stand in a fiduciary position *vis-a-vis* the natives."

[70] In fact, it is difficult for the 4th respondent to deny that it owes a fiduciary duty to the applicants as it has admitted to that effect in its letter of 4 August 2010 and the accompanying report of 3 August 2010 especially the statement in para 8 on p 81 which states the following:

> *"*Pada tahun 1960, Jabatan Hal Ehwal Orang Asli telah membuat permohonan secara rasmi supaya Kampung Orang Asli Peta dan kampung dalam gugusannya digezetkan sebagai Kawasan Simpanan Orang Asli, tetapi proses itu tertangguh..." ["gugusannya" is defined as the seven identified villages]

The earlier letter of 22 May 1954, as highlighted earlier, is also of similar effect.

[71] Based on the evidence referred to earlier, the respondents had, as similarly found in *Sagong Tasi*, breached their fiduciary duty to the applicants and the Orang Asli Jakun Kampung Peta, principally for failing to ensure that the entire customary lands were gazetted as Aboriginal Reserve or at least not included within the Endau Rompin National Park, and for their continued failure to take steps subsequently to exclude that part of the customary land within the Endau Rompin National Park, despite having the knowledge of the fact of the continuous occupation of the said customary lands by the Orang Asli Jakun Kampung Peta, and more crucially, notwithstanding the recommendation by the 4th respondent or its predecessor as early as 1954 that the said lands should have been first gazetted, as well as more recently in 2010 that the lands should be returned to the rightful owner, being the Orang Asli Jakun Kampung Peta. A delay of more than 10 years in gazetting customary lands of the Orang Selat of Johor was ruled by the High Court to be a breach of fiduciary duty by the State Government in *Khalip Bachik & Satu Lagi lwn. Pengarah Tanah Dan Galian Johor & Yang Lain* [2012] MLRHU 1709.

[72] Further, a proper interpretation of the item 2 of state list of the Ninth Schedule to the Federal Constitution, art 44 on the legislative authority of the Parliament and the Aboriginal Peoples Act 1954, and considering art 8(5)(c) of the Federal Constitution referred to earlier, would in my view, define the welfare of the Orang Asli more widely and purposively to include the protection and gazettal of the Orang Asli customary lands.

[73] I am in agreement with the proposition that the power of a legislative body to promulgate laws on a subject matter extends to all ancillary and subsidiary matters to achieve the intended objective of the Constitution and its means of governance (see the Indian Supreme Court's decision in *Jilubhai Nanbhai Kachar v. State of Gujarat* [1955] AIR SC 142) There is thus no cogent basis for the 4th and 6th respondents to contend with the argument (which given the context of the instant case, a simplistic one) that matters pertaining to gazettal of land, being land matters, are not within the purview of the Federal Government. After all, the role of the Director General of the 4th respondent and the extensive powers of the relevant minister under the Aboriginal Peoples Act 1954 clearly meet the characteristics of a fiduciary relationship established in accordance with the test in *Frame v. Smith* which I alluded to earlier.

[74] In addition, s 7 of the Government Proceedings Act 1956 ("GPA") does not make the 4th and 6th respondents immune from such suits because the present application does not involve the question of the exercise of public duties within the meaning ascribed to it in the GPA. The exercise of public duties in the GPA is defined in the context of a different scope as follows:

> "(2) For the purpose of subsection (1) the expression "exercise of the public duties" includes:
>
> (a) the construction, maintenance, diversion and abandonment of railways, roads, bridle-paths or bridges;
>
> (b) the construction, maintenance and abandonment of schools, hospitals or other public buildings;
>
> (c) the construction, maintenance and abandonment of drainage, flood prevention and reclamation works; and
>
> (d) the maintenance, diversion and abandonment of the channels of rivers and waterways."

Further, the above definition in s 7(2) has no relevance to the nature and character of the fiduciary duty applicable in the instant case, which is recognised by common law.

Validity Of The Notice Under Section 425 Of The NLC

(i) Grounds For Judicial Review

[75] The fundamental premise on which judicial review can provide a remedy had been enunciated by Lord Diplock in the landmark House of Lords' decision in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. In administrative law, judicial review remedies can therefore be granted in respect of the following key categories against relevant governmental and public authorities:

> (i) Illegality: where the decision maker has not understood correctly the law that regulates his decision-making power and given effect to it;
>
> (ii) Irrationality: where the decision is so outrageous in its defiance of logic or of accepted moral standards such that no sensible person who had applied his mind to the question to be decided could have arrived at it; and
>
> (iii) Procedural impropriety: where there is a failure by the decision-making body to observe procedural rules that are expressly laid down even where such failure does not involve any denial of natural justice.

[76] Not only are the categories not exhaustive (see the Federal Court's decision of *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725), but the development of administrative law

in Malaysia has also firmly established that whilst judicial review proceedings do not involve the exercise of an appellate function, the merits of the decisions of inferior tribunals can be reviewed in circumstances deemed to constitute an exception to the principle of the role being supervisory in nature (see the Federal Court's decision in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 1 MELR 21; [2003] 2 MLRA 114).

[77] It is therefore well-established that public authorities and inferior courts must disregard irrelevant considerations nor fail to take into account relevant considerations. A more recent decision of the Federal Court in the case of *Malaysia Airline System Berhad v. Wan Sa'adi Wan Mustafa* [2015] 1 MELR 403; [2015] 1 MLRA 290, cited with approval an earlier ruling of the former Supreme Court in *Harpers Trading (M) Sdn Bhd v. Nasional Union of Commercial Workers* [1990] 1 MELR 34; [1990] 1 MLRA 536 with emphasis on the following observation by Jemuri Serjan SCJ (as he then was):

> "Unreasonableness here, in our view, was used in the context of the broad sense of that term as expounded by Lord Greene MR in the case of *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] KB 223. "Reasonableness" here embraces the various heads of ultra vires - such as misdirecting oneself in law, taking into account irrelevant considerations, or failing to take into account relevant considerations - which is now known as the *Wednesbury* principles ..."

[78] The Federal Court in *Malaysia Airline System v. Wan Sa'adi @ Syed Sa'adi Wan Mustafa* further affirmed that a decision could also be considered manifestly unreasonable if no body of persons could have reached it, and that in order to come to such conclusion there must be overwhelming evidence to support it.

[79] The concept of an error of law also embodies substantially similar *ultra vires* permutations, if not of even wider application. *Halsbury's Laws of Malaysia* Vol 9 para [160.076] describes the same as follows:

> "Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof."

[80] The following passage from the judgment of Gopal Sri Ram JCA (as he then was) in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 1 MLRA 268 on the concept of "error of law" is most instructive:

> "In my judgment, the true principle may be stated as follows. 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. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLRA 57), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunised from judicial review by an ouster clause however widely drafted."

[81] It is therefore incumbent on the High Court in any judicial review application to make the evaluation whether there had been any shortcomings that would tantamount to a defect in the *Wednesbury* unreasonableness sense, comprising either an illegality, irrationality or procedural impropriety (and proportionality) or otherwise involving an error of law to justify invoking the public law remedies prayed for.

[82] On the issue of the validity of the said notice, considering my finding on the existence of the customary land rights of the Orang Asli Jakun Kampung Petain relation to both Gazetted Land and Ungazetted Land throughout the Customary Lands, the contention of respondents that the notice is lawful, reasonable and procedurally proper is therefore untenable. Given especially the non-applicability of the NLC to native customary rights, the purported jurisdictional basis for the reliance and subsequent issuance of the notice which, considering the totality of affidavit evidence must have been intended to be directed at the applicants *vis-a-vis* an area within the Endau Rompin National Park, is plainly misconceived under the law, thereby rendering the decision embodied in the notice *ultra vires* the NLC, the Aboriginal Peoples Act 1954 and the Federal Constitution and is thus manifestly not valid, for being inflicted with an illegality and error of law.

[83] In any event, going by the respondents' own line of argument that the law only recognises settlement area of the Orang Asli, given that it is beyond dispute that the Jakuns of Kampung Peta occupy and live in villages including Kampung Pantai Burung located within the Endau Rompin National Park, the 1st respondent's decision to issue the notice demanding the eviction of the Jakun of Kampung Peta out of the Endau Rompin National Park, is very crystal — clearly therefore tantamount to a manifest error which is indefensible under the law.

[84] Additionally, the patent failure on the part of the said respondents to have taken into account relevant consideration, specifically the legally recognised customary land rights of the applicants and the Orang Asli Jakun Kampung Peta at common law to the claimed customary tracts of land within the boundaries of the Endau Rompin National Park, is similarly yet another facet of an error of law or an illegality that is amenable to the public law remedy of judicial review, as is the case in relation to the denial of the right of the applicants to be heard despite the admission by the said respondents that they had even consented to the applicants entering into and occupying the land area of Kampung Pantai Burung and its surrounding parts within the Endau Rompin National Park.

[85] This is not to mention the documentary evidence in the form of letters authored by officials of the 1st and 4th respondents referred to earlier, clearly giving rise to at the very least a legitimate expectation on the part of the applicants that they would be consulted or afforded the opportunity to be heard. In *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, Lord Fraser identified two situations that could give rise to a legitimate expectation. First is where there is an express promise by the relevant authority and secondly, where there exists a regular practice that an applicant may reasonably expect would continue.

[86] Both such circumstances are present in the instant case. It is well established, as pronounced by Raja Azlan Shah FJ (as His Highness then was) in *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 MLRA 586 that the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action. Of similar effect is the Court of Appeal's decision in *Majlis Perbandaran Pulau Pinang v. Syed Ahmed MM Gouse Mohamed* [2006] 2 MLRA 548 which concerns property rights. Gopal Sri Ram JCA (as he then was) held as follows:

> "It is a settled principle of public law that a person must be heard before he or she is deprived of his or her property (See *Cooper v. The Wandsworth Board of Works*). Since the respondent was deprived of his house in breach of the rule in *Cooper*'s case, the respondent was plainly entitled to be compensated for the loss of his house. Further, there was a clear violation of art 13(1) of the Federal Constitution wherein the respondent should have been given an opportunity of being heard. It has been repeatedly held by the courts across the Commonwealth that compensation is payable to a person whose constitutionally guaranteed fundamental right, such as the right to life, personal liberty or property is violated."

It is thus beyond dispute that the total failure by the said respondents in this regard constituted a procedural impropriety, justifying yet another basis for an order of *certiorari* be issued to quash the notice.

[87] Furthermore, considering the circumstances of the issuance of the notice, where the applicants and Orang Asli Jakun of Kampung Peta and other alleged trespassers were given only 24 hours to vacate and leave the Endau Rompin

National Park and tear down any structures built thereon, when it is as clear as daylight that the applicants had been living in a settlement site within the Endau Rompin National Park itself, the notice borders on representing a decision which is irrational or unreasonable in the sense that it is "so outrageous in its defiance of logic or of any acceptable moral standards that no sensible person who had applied his mind to the question to decide could have arrived at it" (see *Bromley London Borough Council v. Greater London Council & Anor* [1983] 1 AC 768 and *Malaysia Airline System Berhad v. Wan Sa'adi Wan Mustafa* [2015] 1 MELR 403; [2015] 1 MLRA 290 referred to earlier).

[88] As such, the decision of the respondents, particularly the 1st respondent, to evict the Orang Asli Jakun of Kampung Peta (even if only a section thereof) as constituted by the issuance of the notice purportedly in pursuance of s 425 of the NLC, following a written request by the 3rd respondent was clearly flawed and defective for having been afflicted by instances of error of law and *Wednesbury* unreasonableness in the various aspects of illegality and procedural impropriety. This more than justifies the court directing that an order of *certiorari* be awarded to quash the notice, the decision encapsulated therein, as well as the full import and purport of what it sought to achieve.

Reliefs

[89] The landmark Federal Court's decision in *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725 made it clear that the court has the power in a judicial review application to mould the remedy to suit the justice of the case. This is now reinforced by O 53 r 2(3) of the Rules of Court 2012. I further take the view that most of the declaratory and consequential reliefs sought by the applicants in respect of their customary land rights and breach of fiduciary duty owed by the respondents are inherently intertwined with the principal relief of *certiorari* applied for concerning the impugned notice and in accordance with O 53 r 2(2) of the Rules of Court 2012 are clearly related to or connected with the same subject matter which arose from the question on the extent of the land rights of the applicants in the Customary Lands.

[90] I also find that given the facts and evidence in the instant case, the applicants have clearly fulfilled the test for the granting of declaratory relief as established by *Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor* [1986] 1 MLRH 478 and the objection by the respondents on this ground is thus wholly without merit. Further, the relief of the remedy of *mandamus* to compel the gazetting of the Customary Lands is not precluded by s 44 (1) (b) of the Specific Relief Act 1950 as the provisions under the Aboriginal Peoples Act 1954 must also be read together with the overriding fiduciary and constitutional duty of the respondents under the art 8(5)(c) of the Federal Constitution, in respect of which any non-feasance must surely be actionable in law. Cases such as *Keat and Partner v. East Suffolk Rivers Catchment Board* [1939] 4 All ER 174 ought rightfully to be distinguished since even though it establishes that non-feasance

on the part of the Government is not actionable, this, in my view, is only of relevance to a situation concerning a breach of a public duty in the nature which does not strictly involve and is in contradistinction to breaches of constitutional and fiduciary duties.

[91] Even though there are averments on behalf of the 1st and 4th respondents that the said notice was not targeted at the applicants and that there was no intention to evict them, in my judgment, the wordings of the notice are widely drafted to have the effect of including them as well. More directly to the point, the letters between the parties during the few months prior to the date of the notice highlighted earlier, clearly demonstrated that the applicants and the Orang Asli Jakun Kampung Peta were the intended target audience of the 1st respondent.

[92] Furthermore, the applicants' prayers for the remedy of declarations, apart from being within the contemplation of O 53 r 2(2) and (3) is also wholly unsurprising and entirely understandable. This is since their primary concern of being dispossessed of their ancestral community lands has always been the overriding imperative foremost on their minds such that the issue should in the interest of justice be comprehensively addressed. As mentioned earlier, a letter dated in 1954 from the Aboriginal Administration Office in Mersing recommending the gazetting of Aboriginal Reserve along the Endau River had even then already emphasised the apprehension of the Orang Asli about their customary land rights. As parties entrusted with the fiduciary duty to ensure the protection and well-being of the Orang Asli in Peninsular Malaysia, it is now most opportune for the long outstanding and unresolved issue of customary and ancestral lands be afforded by the respondents a meaningful and total closure as Orang Asli Jakun Kampung Peta so truly long-deserved.

[93] Accordingly, in light of the foregoing, the reliefs prayed for by the applicants in encl 1 are hereby granted in the following manner. Prayers (i) to (iv) and (vi) to (ix) on *certiorari*, certain declarations and *mandamus* are all allowed. In respect of prayer (ii), an official survey should also be undertaken by the relevant respondents immediately to draw the formal boundaries of the Customary Lands of the Orang Asli Jakun Kampung Peta by using natural boundaries of rivers and hills and procure the gazetting of the said Customary Lands to be as closely as possible corresponding to the area of the Customary Land asserted by the applicants as per the Community Map, and for the gazette exercise to be completed within 18 months, at the cost to be borne by the relevant respondents. A similar order was made by the High Court in *Mohamad Nohing & Ors v. Pejabat Tanah dan Galian Negeri Pahang & Ors* [2013] MLRHU 668.

[94] On this, I agree with the relevance of the authorities submitted by the applicants, namely the Court of Appeal's decisions in *Superintendent Of Lands And Surveys Department Sibu Division & Anor v. Usang Labit & Ors And Another Appeal* [2013] MLRAU 433 and *Abu Bakar Pangis & Ors v. Tung Cheong Sawmill*

Sdn Bhd & Ors [2014] 6 MLRA 1, to the effect that the Community Map produced by the Orang Asli such as the applicants is not meant to be an official or professional map but is more to serve as a general visual guide to the spatial extent of the ancestral lands. As the following passage from *Usang ak Labit* would readily demonstrate, the courts have accepted such community maps as sufficient in native customary right cases:

> "Objection was made that it was not a licensed surveyor and should not be used. We are of the view it is to illustrate the statement of claim, and at the end of the day, the map is not contradicted by the aerial photographs below when maps were superimposed by the appellants."

[95] Similarly, in *Abu Bakar Pangis* the court made the following observation:

> "In our view, a realistic approach must bear in mind also that:
>
> (a) NCR lands are held without requirement of survey, registration and issued document of title;
>
> (b) the natives living off their NCR lands are a subsistence culture, not sophisticated businessmen, and can hardly be expected to afford to pay quit rents, let alone survey fees; and
>
> (c) even the government makes it a condition the timber licensees and lessees of provisional leases to undertake and bear the cost of surveys."

[96] In addition, in the instant case, at the risk of being repetitive, it is still worthy of emphasis that the credibility of the Customary Map is also supported by the expert evidence of Dr Colin Nicholas. For example, he stated the following in paras 17 and 18 of exh CGN-2:

> "17. On focusing my research on the Orang Asli in the state of Johor, especially in the Endau River basin, my studies have revealed that the Orang Asli have been occupying their traditional territories from very early times. This is attested to by published historical accounts and in the works of very early writers.
>
> 18. For example, D.F.A. Hervey in his 1881 article on Endau and its Tributaries, at pp 120-121 stated that, some few years back the Jakun on the Endau, that is to say, the Endau, Sembrong, and their tributaries, were in comparatively comfortable circumstances, procuring the produce of the jungle for traders, and receiving the ordinary returns in kind, or planting tapioca, sweet potatoes, sugar-cane, and plantains..."

[97] I do not allow prayer (v) on the declaration of failure by respondents to exercise the powers as this is unnecessary; and I also do not grant (x) to (xiii) on injunction and damages because in my view the injunctions would similarly be unnecessary given the granting of the declarations on the customary land rights, and that I did not find a compelling basis to award damages to the applicants in the absence of evidence of significant tangible loss suffered by the applicants.

Overall Evaluation

[98] Although the judicial review application by the applicants originates from their reaction to the issuance of the notice now sought to be quashed, the overarching thrust of their case is to have their assertions of customary land rights over the Customary Lands validated by this court. Applying the clear precedents of legal principles established by the appellate courts to the weight of affidavit evidence placed before this court, largely uncontradicted by the respondents, including those averments which emanate from the respondents themselves, I arrived at the conclusion in support of the existence of customary land rights, and in the process also found a breach of fiduciary duty of the relevant respondents in failing to ensure the requisite protection of the welfare, including the land rights of the Orang Asli Jakun Kampung Peta. On the facts, this finding of customary land rights extends throughout the Customary Lands and include areas used by the applicants and Orang Asli Jakun Kampung Peta for hunting, roaming and foraging activities. This decision is also the key result of the analysis as I have described above, that the existence and essence of customary title and land rights is determined by continuous occupation which in turn is evidenced either by actual physical occupation or continuation of traditional connections with the land in the form of hunting, foraging and the maintenance of uncultivated jungle. Such foraging and hunting activities fall within the latter category and at the same time, fulfil the test of preventing strangers from any intrusions, based on the affidavit evidence adduced.

[99] The existence of the customary land rights established, the notice would no longer be tenable and thus ought appropriately to be quashed by *certiorari*. There are no legal impediments to the granting of other public law remedies of declarations and *mandamus*.

Conclusion

[100] In view of the foregoing reasons, in conclusion, it is my finding that the applicants have on a balance of probabilities succeeded in establishing their case for judicial review of the decision relating to the impugned notice issued by the 1st respondent. I therefore grant the reliefs according to the terms as I have stated above, and ordered costs of RM5,000.00 against the respondents.