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I Own the Land, Do I Own the airspace as well?



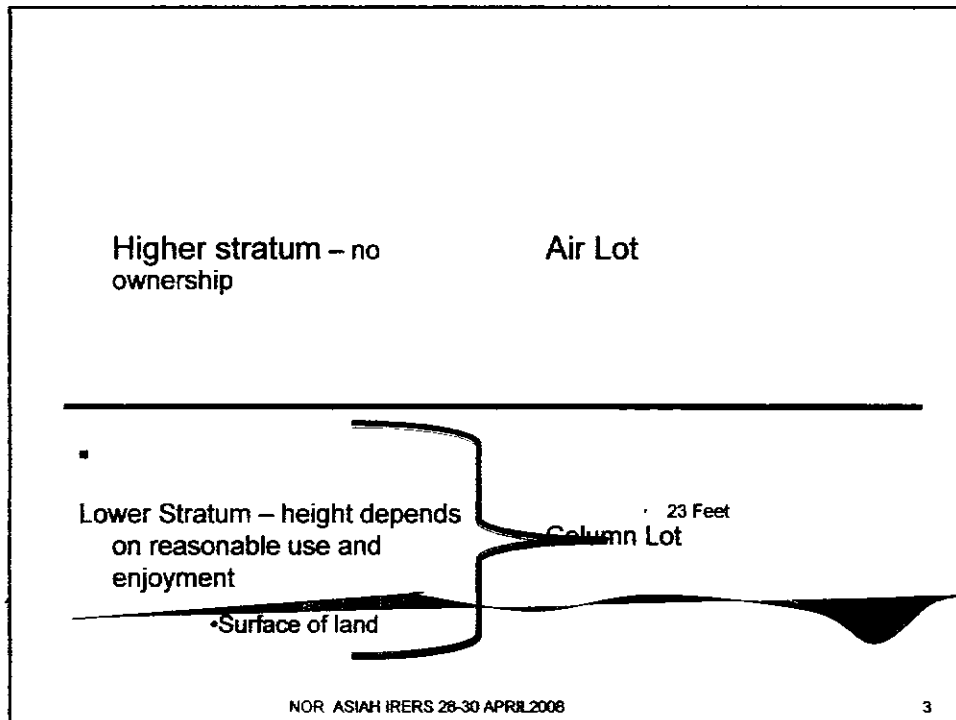
NOR ASIAH IRERS 28-30 APRIL 2008

Objectives of the paper

- to examine the law and principles pertaining to the right to enjoy the airspace above one's land;
- to determine the extent of right of enjoyment OF the AIRSPACE;
- To consider the possible ways to deal with land and airspace above the land especially in development and construction cases

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What is airspace under the Malayan law?

- S 5 (NLC) excluding the airspace when defining land. It provides that land includes the surface of the earth and anything that forms that surface, such as the earth below that surface, all vegetation and other natural products, and all that is attached to the earth or permanently fastened to it

S 42 NLC –suggests for the separation of airspace and land. It says that the SA has the power to issue permit for the use of airspace on and above state land or reserved land

S 44 - provides that owners of alienated land, TOL or lease may enjoy the exclusive use and enjoyment so much of the column of the airspace above the surface of the land as is reasonably necessary to the lawful use and enjoyment of the land.

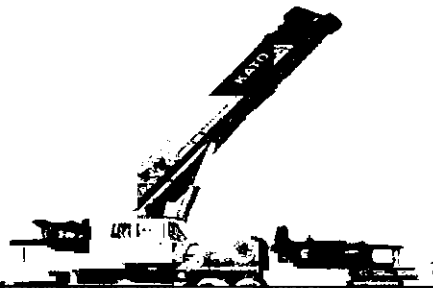
But, subject to other provisions of the NLC and/or any other laws for the time being in force.

So is the airspace part of the land?

13th century:

- **Maxims:** a person who owns land owns everything above the land up to the heavens and down to the innermost depths of the earth
Land maxim :“Whatever is attached to the ground becomes a part of it”.
QN: Do these principles remain relevant and to what extent?

- Issue: Has the land owner sufficient proprietary right and interest of the airspace above his land which would entitle him to defend his rights against any person who encroaches his/her rights and interests?
- Cf ;S 42 and s 44



Common law as well as the statutes in England - overruled these principles from latin maxims.

Examples: *Berstein v Skyviews & General Ltd [1978]*– aircraft flying for aerial photograph, the phrase “to the heavens” – were given a restrictive meaning in order to balance the right of individuals with public rights

Ct Hd: no one can rightfully claim the higher strata of airspace

England- there are various laws that provide for a limitation of the landowners' right to airspace.

E.g, s 76(1) of the Civil Aviation Act 1982 provides that no action against trespass or nuisance can be maintained by reason of a passing aircraft at a reasonable height above the ground.

The Air Regulations of 1996 determined that such a height cannot be lower than 200 meters above roof level. Exceptions - taking off , landing areas and in emergency situations.

Ownership of Air

The NLC, The Civil Aviation Act and the English common law provide guidelines

- i. s 44 The landowner can enjoy his airspace but his enjoyment is limited to what is allowed by the NLC or other laws. His ownership right is limited to what he can reasonably use and enjoy.

Means: a landowner cannot simply sell the airspace per se without attaching to it any specific right of enjoyment. He/she can either develop or utilize the land in some ways in order to prove the enjoyment or use of the land.

High Stratum - Malaysia

- It is provided under the Civil Aviation Act 1969 and Civil Aviation Regulation 1996 no trespass or nuisance can be pursued agst the aviation authority. Both laws are also subject to International Civil Aviation Organisation (ICAO) Standards and Recommended Practices (SARP). In this respect, the use of the airspace for the purpose of aviation must take into consideration these two laws.

Case law

- *Chen Yue Kiew (F) v Angkasamas Sdn Bhd*, [2003] a land owner is said to be entitled to exclusive use and enjoyment of his/her land and the air space above it.



Intrusion of airspace: Trespass or nuisance?

- In general, every unlawful entry by one person into land in the possession of another is regarded as trespass for which an action lies, even though no actual damage occurs.
- In the case of trespass of airspace in which the D can show that the aircraft has flown within the reasonable height and for lawful use, it is not actionable *per se* unless it can be proven that the flight has caused actual damage to the land or property thereon or therein, or use of the land.

Kelsen v Imperial Tobacco (1957): advertising signboard encroaching to P's airspace, was held as trespass

Wollerton's case (1970): crane overlooking of P's property constituted trespass altho' no damage

Berstein v Skyviews (1977) Griffith J, taking of aerial photograph by flight is a not trespass

- Reason: To balance the √ of owner agst the √ of public
- Australia : *LJP Investment* [1987] – trespass only occurs if the entry into airspace is at a height intervenes with the occupier actual use of land

Right of airspace and land development

Karuppannan v Balakrishnen (Chong Lee Chin & Ors, third parties)- The FC observed that the case of a trespass to land and airspace committed by the owner of an adjacent lot was a serious case. Thus, the aggrieved owner of the lot upon which trespass is committed was entitled to an interlocutory mandatory injunction

The question is how high ownership extent so that vertical and horizontal development could be done without having any possible action for trespass?

- In the US, the height is defined by statute and case law.

Eg. Intrusion of neighbour's airspace at a level between tree height is a trespass

Flying aircraft at 83 feet low entitled the owner for compensation and no flight can fly lower than 200 feet

What about Malaysia?

Reasonable and necessary use

Con't .Land Development and airspace

- Developers utilizes the airspace to meet the demand of housing in growing population and trend. Thus, in strata property, the purchaser acquires title of the airspace, as stated in the NLC as well as the STA 1985. The owner enjoys and takes title for something that is permanently attached to the land thus form part of the land.
- In this regard, the use and enjoyment *via* things that are permanently affixed to land is not a contentious issue.

USE OF AIRSPACE ABOVE RESERVE LAND / STATE LAND



Big cities like K Lumpur, New York or Hong Kong, demands effective and practical use of airspace and cost effective, *HOW, it is*
For example, railroad, Restoran Jejantas or Bridges s in such as in KLCC Tower
How it can be done? Lease and / permit to use airspace s 75A

Case of use of airspace for public purposes

TNB's cases: use of land and airspace of private land for the installation of transmission posts or installation of electric cables over various types of land including private land.

S 11, 13 and 16 of the Electric Supply Act 1990 (ESA)

QN: Is it fair for the landowner?

Didow v Alberta Power Limited (1988)

Electrical company (D) constructed power line on municipal road along east side of App's land. P claimed an action in trespass.

- Hd: the activities constitute a low level permanent intrusion which interferes with the App's potential to use and enjoy the land thus amount to TRESPASS.

(1)

How to be fair –

- S 11(8) of ESA gives power for SA to order for acquisition of part or the whole lot of the land and the decision is final
Tekali Prospecting [2001]- judge observed that since the Board is a private company thus the Board is expected to acquire the land and pay appropriate compensation
- HJ Salleh Buang – any act by TNB that affects private citizen property without appropriate compensation is unconstitutional

Remedies-discretionary

- A. Injunction – mandatory injunction
- may be granted even there is no damage
 - if damages is not appropriate
 - if the damages is too minimal
- The D must show why injunction shd not be granted
- Even if granted, the injunction may be suspended till the project is completed
- B. Damages – how to assess the damages
- Scott J in Anchor Brewhouse's case: it is open to court to assess on the basis of reasonable license fee for the use of airspace

Suggestions

- Developer shd get consent to intrude to neighbouring owner's airspace;
- Prepare to pay compensation;
- Prepare a proper agreement;
- Increase insurance coverage;
- Proper Acquisition under LAA
- SA must exercise power given under s 11(8) ESA 1990

Conclusion

- Owner of land has right to use, to enjoy but has no proprietary right to airspace above his land;
- Court always incline to give certainty to rights of land owners;
- Nevertheless, the land owner only has exclusive right but not absolute;
- Developer must get consent and prepare agreement for license to use airspace