

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN
GUAMAN SIVIL NO: BA-22NCvC-453-11/2021
ANTARA**

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- 2. NASRUL FAHMI BIN NASARUDDIN
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- 5. MD AZLAN BIN MOHD NOOR
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19. **NORHAFIZ BIN HASHIM**
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20. **FADHLULLAH JAMIEL BIN JAMANI**
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22. **MARINA BINTI OMAR**
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23. **MOHAMAD NORA'AINA BIN NOORUDIN**
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25. **MUHAMMAD HELMI BIN NGAH**
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34. **MOHAMMAD AZLAN BIN MOHAMMAD**
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35. **NURFAZIRAH BINTI ABD FAJIL**
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36. **AIREEN FARHANA BINTI MUHAMMAD AMIN
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37. **NOOR SHUHADA BINTI SHAIDUN**
(No. K/P: 860622-38-5356)
38. **BADRIL HISHAM BIN ABU BAKAR**
(No. K/P: 781206-14-5665)
39. **MOHD FAIZAL BIN GHAZALI**
(No. K/P: 780822-01-5931)
40. **ZURAIFAH BINTI ZAINI**
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41. **AHMAD MAULUDDIN BIN KASTAN**
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42. **CHE WAN SHAZLEEN BINTI ROSLI**
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43. **MOHD FIRDAUS BIN MOHD AKHIR**
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44. **NURRUL ASSYIKEEN BINTI MD. JAFFARY**
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48. NUR SYAKIRAH BINTI MADZLAN
(No. K/P: 910801-87-5046) ... PLAINTIF-
PLAINTIF

DAN

SYMPHONY HILLS SDN. BHD.
(No. SYARIKAT: 347800-M) ... DEFENDAN

GROUPS OF JUDGMENT

Introduction

[1] In this action, the Plaintiffs are 48 purchasers of units in a housing development project known as Serene Heights, Bangi. The Defendant is the developer of the project.

[2] The sale and purchase agreements between the Plaintiffs and the Defendant were signed between 19-09-2017 and 31-03-2019. Each sale and purchase agreement (“SPA”) stipulated that vacant possession would be delivered within 36 months from the date of the SPA.



[3] On 18-11-2021, the Plaintiffs sued the Defendant for liquidated agreed damages (“LAD”) for delayed delivery of vacant possession, claiming delays ranging from 177 to 668 days.

[4] The LAD amounts claimed by the Plaintiffs were calculated from the end of 24 months from the date of their respective SPA.

[5] Trial dates had been set down for 25-3-2024 to 27-3-2024 when the Plaintiffs applied under Order 14A of the Rules of Court 2012 for leave to have certain questions determined without a trial.

Analysis of Questions Framed

[6] The questions framed by the Plaintiffs are as follows (“Questions”):

- (i) Whether the period for delivery of vacant possession based on the extension of time of 12 months approved by the Housing Controller on 13-6-2017 is lawful
- (ii) Whether the variation to Clause 24(1) of the SPA was made according to procedures set by the Ministry of Housing and Local Government at the material time
- (iii) Whether the Minister of Housing and Local Government and/or the Housing Controller had reason to approve the amendments to Clause 24(1) of the SPA that three (3) years is necessary to complete the installation of new pipes and to obtain water supply
- (iv) Whether the Plaintiffs had knowledge that vacant possession will be delivered within 36 months from the date of the SPA and elected to deem the SPA as valid and binding



- (v) Whether the Plaintiffs are estopped by law from disputing that vacant possession shall be delivered within 36 months from the date of the SPA
- (vi) Whether the decision of the Federal Court in **Ang Ming Lee** is applicable to this action
- (vii) Whether the Plaintiffs, not satisfied with the decision of the Minister of Housing and Local Development and/or Housing Controller, ought to have challenged that decision by way of judicial review or challenge the decision of the Minister of Housing and Local Development and/or Housing Controller through a writ action against the Defendant and name the Housing Controller and Minister of Housing and Local Development
- (viii) Whether the Plaintiffs who did not challenge the decision of the Minister of Housing and Local Government and/or the Housing Controller, are estopped by law from disputing the decision.

- [7]** The Questions can be grouped into four (4) categories for analysis:
- (a) Questions (i) and (vi): Validity of extension of time
 - (b) Questions (ii) and (iii): Justification for extension of time
 - (c) Questions (iv), (v), (viii): Estoppel
 - (d) Question (vii): Mode of challenge

Validity of extension of time

- [8]** I agree with the Plaintiffs that Questions (i) and (vi) on the validity of the extension of time granted by the Housing Controller are suitable



threshold issues to be determined under Order 14A of the Rules of Court 2012. Based on the undisputed facts of the case, this Court is in a position to determine the question of law raised without a full trial.

[9] According to Regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (“**HDR**”), made under section 24 of the Housing Development (Control and Licensing) Act 1966 (“**HDA**”):

“Every contract of sale for the sale and purchase of a housing accommodation together with the sub-divisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.”

[10] The Schedule G Contract of Sale applicable in the Plaintiffs’ case provides for time for delivery of vacant possession as follows:

“Vacant possession of the said Property shall be delivered to the Purchaser in the manner stipulated in clause 26 within twenty-four (24) months from the date of this Agreement.”

[11] In this case, the Defendant had applied for and was granted a 12-month extension of time to deliver vacant possession of the units to purchasers (“**EOT**”).

[12] According to the approval letter dated 13-6-2017 (“**Approval Letter**”), the EOT was approved by the Deputy Housing Controller at a meeting on 23-5-2017 and signed off on behalf of the Housing Controller. It was granted under Regulation 11(3) of the HDR which reads:



“Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:

Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller.”

[13] A further observation is that Section 4(3) of the HDA provides:

“(3) The Controller may, in writing, delegate all or any of his powers or functions under this Act, except his power of delegation, to any Deputy Controller, Inspector, officer or servant appointed under subsection (1)”

[14] In addition to the 12-month extension of time, the Defendant obtained a further 167-day extension of time from the Ministry of Housing and Local Government on 25-11-2020 under the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020. This does not appear to be a matter in issue between the parties.

[15] The Defendant delivered vacant possession of the units purchased by the Plaintiffs on 28-12-2020 and 24-9-2021, within the contractual period of 36 months from the dates of their respective SPAs as further extended due to COVID-19.



[16] The only issue in contention is the validity of the EOT granted under Regulation 11(3) of the HDR as evidenced by the Approval Letter.

[17] In ***Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals*** [2020] 1 CLJ 162 (“***Ang Ming Lee***”), the Federal Court declared that Regulation 11(3) of the HDR was *ultra vires* the HDA. Its effect was to render null and void, any extension of time granted by the Housing Controller under Regulation 11(3) of the HDR.

[18] The issues addressed by ***Ang Ming Lee*** had been percolating in the Courts for a while. After ***Ang Ming Lee*** was decided by the Federal Court on 26-11-2019, many purchasers filed actions for the recovery of LAD with the benefit of that decision. The Plaintiffs were one such group of purchasers.

[19] In ***Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals*** [2024] 8 CLJ 519 (“***Obata-Ambak***”), the Federal Court has now clarified that ***Ang Ming Lee*** does not have a retrospective effect on extensions granted by the Housing Controller before ***Ang Ming Lee***. The Federal Court held as follows:

“[167] We have given our utmost consideration on the facts and the law and we are of the view that if Ang Ming Lee is to have retrospective effect there would be serious ramifications and repercussions to the housing developers that had placed reliance on the existing law and diligently complied with the laws which were at that time valid.

[168] Therefore, based on the reasons we have stated above and the exceptional circumstances involved, the decision of Ang Ming



Lee is prospective. To say otherwise that Ang Ming Lee applies retrospectively will result in great injustice and devastating consequences to the housing industry that had diligently complied with the laws before Ang Ming Lee. Thus, the principles enunciated in Ang Ming Lee will not apply to extensions granted by the Controller before Ang Ming Lee.”

[20] It cannot be stated any more clearly in **Obata-Ambak** that extensions granted by the Housing Controller before **Ang Ming Lee** are not *ultra vires* the HDA. The EOT in this case was granted before **Ang Ming Lee** in accordance with the prevailing law at the time. Based on the clarification in **Obata-Ambak**, the answer to Questions (i) and (vi) are as follows:

- (i) Whether the period for delivery of vacant possession based on the extension of time of 12 months approved by the Housing Controller on 13-6-2017 is lawful: **YES**
- (vi) Whether the decision of the Federal Court in **Ang Ming Lee** is applicable to this action: **NO**

Justification for extension of time

[21] The Questions under this category relate to the actions of the Housing Controller in granting the EOT. **Obata-Ambak** also decided that the purchasers in a housing development project are not eligible to collaterally attack the Housing Controller’s decision to grant extensions of time based on the second actor theory. The Federal Court held as follows:

“[131] In this case before us, the proper parties are the Controller who performed the administrative action and Sri Damansara who relied on the administrative decision. The second and third respondents as the purchasers do not fall within the two categories



of parties entitled to initiate collateral proceedings to invalidate the Controller's extension. Moreover, the collateral proceeding can only be used as a defence rather than an attack. In Pan Wai Mei, the Court of Appeal ruled that:

[10] The foregoing general rule is subject to the doctrine of collateral attack. In proceedings brought in reliance of an invalid act or decision, a defendant or an accused may plead the invalidity by way of defence in civil or criminal proceedings.

[132] Hence, the second and third respondents in this case cannot initiate this collateral proceeding, as they are using it as an attack against Sri Damansara (who is the developer and the second actor) as opposed to a defence. There was no direct challenge against the Controller's decision to grant the extension by way of judicial review. Thus, it shall not render the second act invalid as there is a reliance on validity of the first act when the second act was performed."

[22] Based on the above analysis, Questions (ii) and (iii) are answered as follows, in the absence of any Order of Court in direct proceedings against the relevant parties on the invalidity of the Approval Letter in any other respect:

- (ii) Whether the variation to Clause 24(1) of the SPA were made according to procedures set by the Ministry of Housing and Local Government at the material time: **YES**
- (iii) Whether the Minister of Housing and Local Government and/or the Housing Controller had reason to approve the amendments to Clause 24(1) of the SPA that 3 years is



necessary to complete the installation of new pipes and to obtain water supply: **YES**

Estoppel and Mode of Challenge

[23] As these are alternative defences pleaded by the Defendant, there is no need for me to answer the remaining Questions. They have no effect on the determination based on Questions (i), (ii), (iii) and (vi) that the Plaintiffs' action will necessarily fail in the light of ***Obata-Ambak***.

Conclusion

[24] The Plaintiff's O.14A application was filed before the decision in ***Obata-Ambak*** was published. The Defendant opposed it on grounds that the questions framed are questions of mixed fact and law, are disputed as to the facts, have been ventilated when a prior summary judgment application by the Plaintiffs was dismissed and that the application is made too late in the day.

[25] The Plaintiffs declined to withdraw the O.14A application or the suit in spite of the clear ramifications of ***Obata-Ambak*** on the sustainability of this action. It was therefore urged upon me by the Defendant to hear the O.14A application and dismiss the suit.

[26] According to O.14A of the Rules of Court 2012:

“(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-

(a) such question is suitable for determination without the full trial of the action; and



(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.”

[27] Even if the Plaintiffs’ O.14A application were not still pending, this Court is empowered to determine on its own motion, any question of law where it appears that such question is suitable for determination without full trial and that such determination will finally determine the entire cause. As set out above, the answers to the Plaintiffs’ Questions (i), (ii), (iii) and (vi) have afforded the Defendant a full defence to the Plaintiffs’ suit for LAD.

[28] Accordingly, I allow the Plaintiffs’ O14A application in part with no order as to costs. Consequent to the determination of Questions (i), (ii), (iii) and (vi), I dismiss the Plaintiffs’ claim with costs.

[29] Costs fixed at RM42,000.00 (arrived at on the basis of RM1,200 per contested SPA), jointly and severally against the Plaintiffs.

Bertarikh : 24 Oktober 2024

SGD

ELAINE YAP CHIN GAIK
PESURUHJAYA KEHAKIMAN
MAHKAMAH TINGGI MALAYA
SHAH ALAM



Peguan

Untuk Plaintiff-Plaintif : Nashitoh Kassim (with Aishah Mat Nor), Messrs Nashitoh Kassim & Associates (Jitra)

Untuk Defendan : Leonard Yeoh (with Caleb Sio and Chen Moi Yan), Messrs Tay & Partners (Kuala Lumpur)

