Teo Siang Hian John & Anor v Southkey City Sdn Bhd [2021] MLJU 2461

Malayan Law Journal Unreported

HIGH COURT (JOHOR BAHRU)

EVROL MARIETTE PETERS JC

CIVIL APPEAL NO JA-11ANCvC-21-11 OF 2020

27 November 2021

R Vasanthan (Julie Lim & Vasanthan & Co) for the appellants/plaintiff.

Jeyanthi Shanmugam (Pretam Singh, Nor & Co) for the respondent/defendant.

Evrol Mariette Peters JC:

GROUNDS OF JUDGMENTIntroduction

[1]This was an appeal ("this Appeal") against the decision of the learned Magistrate on 26 October 2020, in dismissing the Appellants' application for summary judgment against the Respondent, pursuant to Order 14 of the Rules of Court 2012 ("Rules of Court"). For ease of reference, the Appellants and Respondent will be referred to respectively as the Plaintiffs and Defendant.

The factual background

[2]Pursuant to a sale and purchase agreement ("SPA") dated 31 August 2013, the Plaintiffs had purchased from the Defendant, the developer, a unit at A-18-3A, Mosaic SR Tower A, Southkey, Johor Bahru, Johor ("the Unit") at the price of MYR763,000.

[3]Although the SPA was a contract pursuant to Schedule H to the Housing Development (Control & Licensing) Regulations 1989 ("Housing Development Regulations"), clauses 25 and 27 of the SPA provided for 42 months (instead of 36 months as statutorily prescribed) as the completion period.

Time for delivery of vacant possession

25. (1) Vacant possession of the said parcel shall be delivered to the Purchaser in the manner stipulated in clause 26 within forty two (42) calendar months from the date of this Agreement.

(2) If the Vendor fails to deliver vacant possession of the said Parcel in the manner stipulated in clause 26 within the time stipulated in subclause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rule of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in subclause (1) until the date the Purchaser takes vacant possession of the said Parcel. Such lilquidated damages shall be paid by the Vendor to the purchaser immediately upon the date the Puchaser takes vacant possession of the said parcel.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said parcel.

...

Completion of common facilities

27. (1) The common facilities serving the said housing development shall be completed by the Vendor within forty two (42) calendar months from the date of this Agreement. The Vendor's architect shall certify the date of completion of the common facilities.

(2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Vendor completes the common facilities.

[Emphasis added.]

[4]The Defendant subsequently applied for and obtained from the Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan ("the Ministry"), a further extension of six months to deliver vacant possession, which approval was communicated *via* letter dated 1 December 2016.

[5]The Defendant had surrendered vacant possession of the Unit on 30 August 2017 and the common facilities on 31 December 2017, resulting in what the Plaintiffs claimed to be, a delay of 183 days and 306 days respectively, on the basis that delivery of vacant possession should have been on 28 February 2017.

[6]The Plaintiffs filed their claim on 21 February 2020 for liquidated ascertained damages ("LAD") in the amount of MYR38,254.52 and MYR12,793.32 for the delay in delivery of the Unit and common facilities respectively.

[7]On 30 August 2020, the Plaintiffs filed an application for summary judgment, which was dismissed by the

Magistrate. As a result thereof, the Plaintiffs appealed to this Court. This Appeal was allowed for the following reasons.

Contentions, evaluation, and findings

[8]The learned Magistrate concluded that there were triable issues, namely, whether the Plaintiffs had objected to the initial completion period of 42 months as opposed to 36 months; whether the Ministry had the power to extend the completion period for a further six months to 48 months; and whether the Plaintiffs, after being informed of the extension, had taken any action against such decision.

[9]The nub of the Plaintiffs' contention was that the learned Magistrate had erred when she decided there were triable issues, and that had she considered the Federal Court case of *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162 ("*Ang Ming Lee")*, she would have allowed the Plaintiffs' application for summary judgment.

[10]The Plaintiffs further argued that the SPA, which was a statutory contract, was governed by Schedule H to the Housing Development Regulations, and therefore, the decision of the Ministry to grant an extension of six months, was not valid.

[11]The relevant provisions for consideration were section 24 of the Housing Development (Control & Licensing) Act 1966 ("Housing Development Act"), and regulations 11 and 12 of the Housing Development Regulations, all of which read:

> **Housing Development (Control & Licensing) Act 1966**
>
> Section 24 - *Powers to make regulations.*
>
> (2) In particular and without prejudice to the generality of the foregoing power, the regulations may –
>
> …
>
> (e) regulate and prohibit the conditions and terms of any contract between a licensed housing developer, his agent or nominee and his purchaser;
>
> …
>
> ******
>
> **Housing Development (Control & Licensing) Regulations 1989**
>
> Regulation 11 – *Contract of sale.*
>
> **…**

(3) 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:

...

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Regulation 12 – *Appeal.*

Notwithstanding anything to the contrary in these Regulations, any person aggrieved by the decision of the Controller under paragraph (3) of regulation 3, paragraph (1) of regulation 4, paragraph (4) of regulation 5, paragraph

(2) of regulation 9 or paragraph (3) of regulation 11 may, within fourteen

(14) days after having been notified of the decision of the Controller, appeal against such decision to the Minister; and the decision of the Minister made thereon shall be final and shall not be questioned in any court.

[12]In my view, the Plaintiffs were correct in their submission, pursuant to the decision of the Federal Court in *Ang Ming Lee*, which held that such changes to the statutory contract made by the Ministry were *ultra vires* Schedule H to the Housing Development Regulations, and, therefore, invalid.

[13]The opinion of the Federal Court, through Tengku Maimun Tuan Mat CJ on the validity of section 24 of the Housing Development Act and regulation 11 of the Housing Development Regulations are as follows:

On the above analysis, we hold that the Controller has no power to waive or modify any provision in the Schedule H Contract of Sale because s. 24 of the Act does not confer power on the Minister to make regulations for the purpose of delegating the power to waive or modify the Schedule H Contract of Sale to the Controller. And it is not open to us to read into the section an implied power enabling the Minister to do so. We consequently hold that reg. 11(3) of the Regulations, conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is *ultra vires* the Act.

[Emphasis added.]

[14]Reference was made also to *Sri Damansara Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah* [2020] 1 LNS 146:

As decided in *Ang Ming Lee*, reg. 11(3) HDR is *ultra vires* HDA. If reg. 11(3) HDR is invalid, the Controller's Extension which is made pursuant thereunder, is also invalid.

…

As the Controller's Extension is invalid (please refer to the above paragraph 19), the 42 Months Period cannot apply in this case. By virtue of reg. 11(1) HDR, the SPA "shall be in the form prescribed in Schedule H". Consequently, all the parties in

this case are bound by the 36 Months Period as provided in Schedule H. This is clear from the use of the mandatory term "*shall*" in reg. 11(3) HDR.

[15]As was emphasised in *Sri Damansara Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah* and *Ang Ming Lee*, the Housing Development Act and Housing Development Regulations are social legislation, enacted by Parliament to protect home buyers in particular, and not housing developers.

[16]Reference was also made to the case of *Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Applications* [2020] 6 CLJ 55, although I am mindful that the Court of Appeal had delivered its decision on 29 July 2021, overruling the decision of the High Court.

[17]The Defendant's contention pivoted on the Federal Court case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865, where it submitted that the mode to challenge the extension of six months by the Ministry should have been by way of a judicial review of such decision. The Defendant had emphasised that since the Plaintiffs' claim in the present case was contractual in nature, the decision in *Ang Ming Lee* had no application, since the Federal Court in that case was addressing an application for judicial review of the Minister's decision.

[18]I was unable to agree with the Defendant, bearing in mind that the contract in question was statutory in nature, and as such, strict adherence was necessary. This principle was expounded by the Court of Appeal in *Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor* [2016] 1 CLJ 893, where it was stated:

> The SPA between the respondents and the appellant, who is a housing developer, is governed by a statutory form of contract as prescribed in sch. H of the Housing Development (Control and Licensing) Regulations 1989 [PU(A) 58/1989] ('the regulations'). As such, the provisions in the SPA are not merely contractual, but are in effect statutory provisions, as they are actually provisions of sch. H of the Regulations, which have been imposed by law upon the parties.
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> [Emphasis added.]

[19]Furthermore, the extension of time in question had already been declared *void ab initio* by the Federal Court in *Ang Ming Lee,* and as such, there was palpably nothing to challenge, as this Court was bound by the decision in *Ang Ming Lee* by virtue of the doctrine of stare decisis. In any event, the fact that the Plaintiffs had not applied for a judicial review to challenge the extension did not render such extension valid.

[20]This brings to the forefront the issue of whether the decision in *Ang Ming Lee* is retrospective in nature, bearing in mind that the extension by the Ministry was granted *via* letter dated 1 December 2016, which was prior to the decision of the Federal Court in *Ang Ming Lee*. In light of cases such as *Abillah Labo Khan v. PP* [2002] 3 CLJ 521 and *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526 , the answer to that is in the affirmative, that is, the decision in *Ang Ming Lee* applied retrospectively . The only exception to such principle would be if there was a specific direction of prospectivity expressed in the judgment itself. In my view, since the Federal Court in *Ang Ming Lee* had not specifically directed that its decision was prospective in

nature, it applied retrospectively. Reference was made also to *Kok Chay Har & Ors v BH Realty Sdn Bhd* [2021] 1 LNS 13, in which the learned Judicial Commissioner in that case had addressed similar issues as those in the present case.

[21]In the final analysis, it must be remembered that the Housing Development Act and the Housing Development Regulations are social legislation, and as such, regard must be had to the purpose of the legislation as prescribed by section 17A of the Interpretation Acts 1948 & 1967, which reads:

> Section 17A – *Regard to be had to the purpose of Act*
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[22]Furthermore, there should be no attempt to rewrite statutory contracts at the expense of purchasers. This was made clear by the Federal Court in *Ang Ming Lee* in the following passage:

> In the instant appeals, the Schedule H contract of sale prescribed by the Regulations is to carry into effect the provisions of the Act, which is to protect the interests of the purchasers. The regulations made by the Minister must thus achieve the object of protecting the interests of the purchasers and not the interests of the developers. And at the risk of repetition, the duty to protect the interests of the purchasers is entrusted to the Minister.
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> [Emphasis added.]

[23]In light of the settled law referred to above, it was my view that the learned Magistrate had erred when she concluded that there were triable issues, resulting in the dismissal of the Plaintiffs' application for summary judgment.

Conclusion

[24]In the upshot, therefore, based on the aforesaid reasons, and after careful scrutiny and consideration of all the evidence before this Court, including the written and oral submissions of both parties, and the grounds of judgment of the learned Magistrate, this Appeal was allowed with costs.

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