# Eco Green City Sdn Bhd v Hou Zhou Yee & Ors [2022] MLJU 2435

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

WAN AHMAD FARID WAN SALLEH J

PERMOHONAN SEMAKAN KEHAKIMAN NO WA-25-157-05/2020

3 October 2022

*Kalvinder Singh Bath for the applicant.*
*Vinod Ramasamy for the respondent.*

## Wan Ahmad Farid Wan Salleh J:

JUDGMENT

**[1]**The applicant is a licensed housing developer for a residential development known as Cyber Casa @ Cybersouth Phase 1B, Mukim Dengkil, Sepang, Selangor ("the said Project"). The 1st and 2nd respondents entered into a sale and purchase agreement ("SPA") with the applicant dated 1.7.2015 to purchase a double-storey link house known as Unit No. RT3- 183 ("the said property") for a consideration of RM664,800.

**[2]**Cl 22(1) of the SPA provides as follows:

> Vacant possession of the said Building shall be delivered to the Purchaser in the manner stipulated in clause 23 within thirtysix (36) calendar months from the date of this Agreement.

**[3]**On 23.10.2018, the applicant issued a Notice pursuant to cl 23(3) notifying the 1st and 2nd respondents ("the Notice") that the said property was ready for the delivery of vacant possession. Copies of the Architect's Certificate certifying that the said property had been duly completed and the Certificate of Completion and Compliance ("CCC") were enclosed in the said Notice. It further states as follows:

> We hereby give you vacant possession of the said Parcel subject to you settling all monies due under the Sale and Purchase Agreement, including late payment interest (if any) and/or all other miscellaneous charges as specified in the enclosed Statement of Accounts.

**[4]**The 1st and 2nd respondents were of the view that the delivery of vacant possession of the said property should have been on 1.7.2017, which is 24 months after the execution of the SPA. It is not in dispute that cl 22(1) of the SPA specifies that the delivery of vacant possession was within 36 months from the SPA date. However, the 1st and 2nd respondents contended that reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (the "1989 Regulations") enacted pursuant to s 24 of the Housing Development (Control and Licensing) Act 1966 ("HDA") stipulates that the delivery of vacant possession should have been within 24 months from the date of the SPA.

**[5]**Based on the aforesaid premise, the 1st and 2nd respondents filed a claim at the Tribunal for Home Buyers Claims, the 3rd respondent herein ("the Tribunal"), for a total sum of RM66,480 for the late delivery of vacant possession.

**[6]**At the Tribunal, the applicant asserted that the applicant had obtained a certificate in writing from the Housing Controller to modify cl 11 of the SPA. Under the modified clause, the delivery of vacant possession of the said property was extended from 24 months to 36 months. The extension of time, according to the applicant, was obtained before the execution of the SPA.

**[7]**The letter, which was dated 22.4.2015 ("the Controller's letter"), states *inter alia* as follows:

> Adalah dimaklumkan bahawa setelah meneliti permohonan tuan untuk meminda Jadual G (Perjanjian Jual Beli) di bawah Peraturan 11, Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan) 1989, Jabatan ini meluluskan

lanjutan serahan milikan kosong dan penyiapan kemudahan bersama selama 12 bulan iaitu daripada 24 bulan kepada 36 bulan sahaja.

**[8]**On 18.2.2020, the Tribunal allowed the 1st and 2nd respondents claim for RM50,000.00, being the maximum compensation allowed under the HDA.

**[9]**Aggrieved, the applicant commenced an application for judicial review seeking *inter alia* an order of certiorari to quash the impugned decision.

At the Tribunal

**[10]**In his grounds of judgment, the learned President of the Tribunal made the following findings:

(a) The Tribunal took cognisance of the conflicting version on the delivery of vacant possession of the said property. The 2nd and 3rd respondents asserted that irrespective of cl 22(1) of the SPA, the vacant possession should be delivered within 24 months. On the other hand, the applicant maintained that the delivery of vacant possession was duly extended by the Controller as reflected in the SPA.

(b) However, even if the Tribunal agreed with the applicant's averment that delivery of vacant possession was within 36 months from the SPA date, the 1st applicant was still at fault. This is so because the delivery of the vacant possession should have been made on 1.7.2018. According to the Notice, the delivery of vacant possession was only affected on 23.10.2018.

(c) The only issue to be decided according to the Tribunal is: Whether the extension of time granted in the Controller's letter is valid in law.

(d) The Tribunal referred to the judgment of the Federal Court in *Ang Ming Lee & Ors v Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor & Or Appeals* [2019] 1 CLJ 162 **FC**. The case carries the proposition that reg 11(3) of the 1989 Regulations, conferring power on the Housing Controller to waive or modify any provision in Schedule H the contract of sale, was *ultra vires* the HDA.

(e) In the circumstances of the case, the Tribunal was of the view that it is no longer relevant whether the extension of time purportedly approved by the Housing Controller was before or after the SPA.

(f) In the circumstances of the case, the Tribunal was of the view that it is no longer relevant whether the extension of time purportedly approved by the Housing Controller was before or after the SPA.

**[11]**Based on the aforesaid reasons, the Tribunal made the following order:

Bahawa, Pihak Penentang hendaklah membayar Pihak Yang Menuntut jumlah sebanyak RM50,000 (Ringgit Malaysia: Lima Puluh Ribu Sahaja) sebagai ganti rugi kelewatan penyerahan milikan kosong bagi tuntutan Pihak Yang Menuntut.

At the High Court

**[12]**Learned counsel for the applicant submitted that the ratio stated by the Federal of *Ang Ming Lee* is *per incuriam*. In any event, according to learned counsel, *Ang Ming Mee* is distinguishable from the instant case.

**[13]**Learned counsel reiterated that the extension of time in the instant case was obtained before the execution of the SPA. In the circumstances, learned counsel submitted that there was no possible detriment to the 1st and 2nd respondents.

**[14]**Secondly, learned counsel for the applicant further contended that having executed the SPA, the 1st and 2nd respondents could not now come to Court and argue that cl 22(1) does not apply to them. In short, it is contended that the 1st and 2nd respondents are estopped from claiming the liquidated and ascertained damages for 12 months after having agreed to the extension as reflected in the SPA.

**[15]**During the oral submission, learned counsel for the applicant attracted my attention to the recent judgment of the High Court in *Alpine Return Sdn Bhd v Matthew Ng Hock Sing & Ors* [2022] 1 CLJ 120. It was held that although reg 11(3) of the 1989 Regulations was *ultra vires*, on the very specific facts of that case, the defendants were estopped from reneging on the SPAs and claiming LAD since all parties were under the same belief that the extension was valid at the time of the execution of the SPAs and the entire extension process was validly performed *sans* any infringement at the material time.

**[16]**Further, learned counsel also contended that the *Ang Ming Lee* should not be applied retrospectively since the judgment was delivered by the Federal Court on 26.11.2019, whereas the SPA was dated 1.7.2015.

**[17]**There is another aspect of the applicant's case in respect of the extension of time purportedly granted by the Housing Controller. It is this. Relying on the judgment of the Court of Appeal in *Bludream City Development Sdn Bhd v Kong Thye & Ors and other appeals* [2022] 2 MLJ 241 **CA**, learned counsel submitted that the extension of time purportedly granted by the Housing Controller should have been set aside by the 1st and 2nd respondents by way of a judicial review application under O 53 of the Rules of Court 2012 ("ROC") if indeed they were aggrieved by the provision.

**[18]**Further, learned counsel for the applicant contended that by granting the award, the Tribunal had allowed the 1st and 2nd respondents to unjustly enrich themselves at the expense of the applicant. According to learned counsel, the 1st and 2nd respondents would enrich themselves by claiming additional 12 months of LAD when the intention and time frame agreed by the parties, as reflected in cl 22 of the SPA, was 36 months.

**[19]**In supporting his argument, learned counsel cited *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 **FC**.

**[20]**Finally, learned counsel for the applicant submitted that the award was tainted with procedural impropriety since the Tribunal had disregarded the extension of time granted by the Controller of Housing. By not calling the Controller of Housing, the Tribunal had denied the Controller an opportunity to be heard at the proceedings.

**[21]**To summarise, learned counsel urged this Court to quash the award of the Tribunal on the following grounds:

The award is tainted with a jurisdictional error or otherwise irrationality since the Tribunal failed to consider the doctrine of estoppel.

The award is tainted with illegality since the Tribunal had exceeded its jurisdiction and failed to act with the powers conferred upon it.

The award is equally tainted with procedural impropriety since the Tribunal had failed to give the right to be heard to the Housing Controller on the issuance of the extension of time.

Analysis

**[22]**First and foremost, it is to be emphasised that the HDA is a social legislation.

**[23]**This application for judicial review is supported by the affidavit in support in Encl 3 affirmed by Nur Ayuni binti Ab Rahim on behalf of the applicant. Nur Ayuni is the Legal Manager of MCT Berhad. The applicant is a subsidiary of MCT Berhad.

**[24]**Let me begin with the issue of unjust enrichment. I have gone through the Defence of the applicant at the Tribunal. In its Defence, the applicant asserted that it had obtained the approval for the extension of time from the National Housing Department to extend the delivery of vacant possession to 36 months.

**[25]**While the applicant asserted in the Defence that it disagreed with the liquidated and ascertained damages ("LAD") claimed by the 1st and 2nd respondents, there was no mention of unjust enrichment. In short, it was not pleaded. In *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd & Or Appeals* [2018] 3 MLJ 141 **FC**, the Federal Court observed as follows:

> Pleadings enable both parties to know in advance the averments being made against them so that they will not be taken by surprise during the trial. Tellingly, in the present appeals TNB did not plead that its cause of action was founded on the law of unjust enrichment. Unjust benefit was not a pleaded issue. With respect, the submission on the benefit/unjust enrichment question by learned counsel for TNB is, therefore, misconceived.

**[26]**On the issue of estoppel, learned counsel for the applicant heavily relied on *Alpine Return* and urged this Court to conclude that the 1st and 2nd respondents should be *estopped* from not honouring the terms of the SPA, even though the timeline in the SPAs emanated from the extension. I believe the conclusion of the learned Judge in *Alpine Return* was anchored on the argument that the developer "did not commit any illegality, irregularity or depart from the provisions of the [1989] Regulations in force *at the material time*". In short, according to the learned Judge, the developer adhered to the requirements of the 1989 Regulations and applied for the extension under reg. 11(3) which was allowed by the Housing Controller *before* the amendments were made and *prior* to the execution of the SPAs with the house buyers.

**[27]**The question that arises is, does the ruling made by the Federal Court in *Ang Ming Lee* have a retrospective

effect or otherwise? If the ratio of *Ang Ming Lee* only applies to future SPAs, then it can be said that the parties, were unaware that at the time the SPA was executed on 1.7.2015, the Housing Controller has no powers to grant extensions under reg 11 which is thus *ultra vires* the HDA. However, on the other hand, if the proposition expressed by the Federal Court in *Ang Ming Lee* has a retrospective effect, then the Housing Controller's purported extension of time could not be legally effective.

**[28]**Once the purported extension of time is not effective, it does not matter whether the SPA was executed before or after the extension. The question of giving the opportunity to the Housing Controller does not arise since the action was illegal anyway.

**[29]**The answer I believe can be found in the judgment of the Court of Appeal in *UE E&C Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor & Anor appeal* [2021] 6 MLJ 864 **CA**. In delivering the judgment of the Court, Hashim Hamzah JCA held as follows:

> Next, there is nothing expressly mentioned in *Ang Ming Lee* regarding the prospectivity of the said decision. Therefore, the decision of the Federal Court in *Ang Ming Lee* operates retrospectively (see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 and *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526).

**[30]**In short, the decision in *Ang Ming Lee*, is applicable retrospectively to the facts in the present case. It is therefore clear that the Federal Court in *Ang Ming Lee* did not specify that the decision on reg 11 of the 1989 Regulations being ultra vires the HDA was to apply prospectively. It therefore means that it applies retrospectively.

**[31]**The same proposition can be seen in *Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications* [2020] 10 MLJ 689 where Wong Kian Kheong J remarked as follows:

> I am not able to accept the third respondent's submission that the judgment in *Ang Ming Lee* can only have prospective effect. My reasons are as follows:
>
> (a) the Federal Court in *Ang Ming Lee* has not expressly ruled that its decision can only have prospective effect. Hence, in accordance with the general rule, the judgment in *Ang Ming Lee* has retrospective effect and applies to these three applications; and
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> (b) there are no exceptional circumstances for the doctrine of prospective overruling to apply to the decision in *Ang Ming Lee*. On the contrary, as held in many cases (including *Ang Ming Lee*), the object of HDA and HDR is to protect a 'homebuyer' (as defined in s 16A of the HDA). Accordingly, in line with the purpose of HDA and HDR, it is in the interest of homebuyers for the judgment in *Ang Ming Lee* to be given retrospective effect.

**[32]**In view of the clear pronouncement by the Court of Appeal in *Lee Jeng Yuh* and an equally forceful *ratio* in *Alvin Leong,* the question of estoppel does not arise. With due respect to the proposition in *Alpine Return*, one cannot be expected to honour a term in the SPA which is held to be illegal.

**[33]**As I indicated earlier, since the Housing Controller has no power to extend the time for the delivery of vacant possession, the question of whether the SPA was executed after the extension does no longer arise. The Court of Appeal in *Lee Jeng Yuh* said this:

> We disagree with the defendant on this issue. The decision of the Federal Court in *Ang Ming Lee* is clear that the Housing Controller has no power whatsoever to waive and modify the terms and conditions of the scheduled agreement in the first place. Therefore, the issue of whether the approval is obtained before or after the SPAs has been executed is not relevant.

**[34]**As to *Bludream City* relied on by learned counsel for the applicant, since the Housing Controller has no power to extend the time, it is open for the 1st and 2nd respondents to launch a collateral attack on that decision by filing a claim before the Tribunal. In *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 **FC**, the Federal Court held that:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack.

**[35]**Therefore, there is no need for the 1st and 2nd respondents to apply for judicial review against the decision of the Housing Controller. A challenge at the Tribunal is sufficient.
Finding

**[36]**For the reasons aforesaid, the award of the Tribunal is not tainted with procedural impropriety, *Anisminic* error or *Wednesbury* unreasonableness to make it amenable to judicial review.

**[37]**The application for judicial review is therefore dismissed with costs of RM1,000 to the 1st and 2nd respondents.

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