

**DALAM MAHKAMAH TINGGI DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
[GUAMAN SIVIL NO: BA-22NCVC-179-04/2021]**

BETWEEN

**NG SOOK FOON
(and 91 others)**

... PLAINTIFFS

AND

MARIMO LAND SDN BHD

... DEFENDANT

[the original suit]

.....

BETWEEN

MARIMO LAND SDN BHD

... PLAINTIFF

AND

**NG SOOK FOON
(and 91 others)**

**93. KEMENTERIAN PERUMAHAN DAN
KERAJAAN TEMPATAN**

94. PENGAWAL PERUMAHAN

... DEFENDANTS

[Counterclaim filed by the defendant (in the original suit)]

JUDGMENT**Introduction**

[1] The plaintiffs brought a representative action and sued in their respective personal capacity and as representatives of all 92 plaintiffs pursuant to Order 15 rule 12 of the Rules of Court 2012 (hereafter ‘RoC’), against the defendant, a developer.

[2] The defendant took out a counterclaim against the plaintiffs as well as added the 93rd and 94th defendants (in the counterclaim).

[3] The disputes between the plaintiffs and the defendant and in the defendant’s counterclaim revolve around the interpretation of the provisions expressed in the Sale and Purchase Agreement and the position of the law in relation to claim for liquidated ascertain damages (“LAD”) against the defendant. All parties are in consensus that the disputes between the parties, including the defendant’s counterclaim, could finally determine the entire cause or the matter based on the determination of 6 questions of law pursuant to Order 14A rule 1(1)(a) and (b) of the RoC.

[4] The 6 questions of law were framed for determination before this Court, and they are as follows:

1. Whether the delivery of vacant possession should commence from the date of the payment of the booking fee as opposed to the date of the Sale and Purchase Agreement?
2. Whether the Purchasers and the Defendant are bound by the Sale and Purchase Agreement wherein the completion period in Clauses 25(1) and Clauses 29(1) has been modified from thirty-six (36) months to forty-eight (48) months via Regulation 11(3) of the Housing Development (Control and Licensing) Regulations 1989 (“HDR”)?

3. Whether the Purchasers can rely on the original Schedule H of the HDR's thirty-six (36) months completion period to claim for liquidated damages ("LAD") as against the Defendant?
4. Do the Federal Court decisions in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor Dan Other Appeals* [2020] 1 MLJ 281 and *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor and Other Appeals* [2021] 2 MLJ 60 apply retrospectively?
5. Whether the Defendant is entitled to seek indemnity against the 93rd and 94th Defendants in the Counterclaim for losses, if any?
6. Whether the Defendant is entitled to an order for specific performance against the 93rd and 94th Defendants in the Counterclaim to ratify the validity of the extension of time sought?

[5] This Court will address and answer the above questions of law as set out below *in seriatim*.

Brief Background Facts

[6] The defendant is a licensed housing developer of a housing project known as "RESIDENSI O'HAKO" (hereafter 'the housing project'). The defendant offered to sell its units in the housing project via the statutory sale and purchase agreement pursuant to Schedule H (hereafter 'the SPA') of the **Housing Development (Control and Licensing) Regulation 1989** (hereafter 'the Regulations') under the **Housing Development (Control and Licensing Act) 1966** (hereafter 'the HDA').

[7] Two important events happened prior to the execution of the sale and purchase agreement between the defendant and the respective plaintiffs.

[8] First, on 12.05.2015, the defendant obtained the approval from the Ministry of Housing and Local Government (the 93rd defendant in the counterclaim) for an extension of time from 36 months (3 years) to 48 months (4 years) in the standard clause for the delivery of vacant possession and completion of the common facilities, and for the calculation of 48 months to commence from the date of the execution of the sale and purchase agreement to date of delivery of vacant possession.

[9] The approved extension of time for the delivery of the vacant possession of the property, i.e., 48 months, was incorporated into the SPA. On 26.8.2019, the defendant obtained the Certificate of Completion and Compliance for the property. On 1.10.2019, the defendant issued the notice of delivery of vacant possession to the plaintiffs. Clause 27(3) of the SPA stipulates that upon expiry of 30 days from the date of service of the said notice, whether or not the plaintiffs take possession of their respective units, it shall be deemed that the plaintiffs have taken delivery of possession. Hence, on 31.10.2019, it was deemed that the plaintiffs had taken possession of their respective units.

[10] The second important events is the defendant through two firms of solicitors Messrs Michael Chen & Co. and Messrs Iqbal Hakim, Sia & Voo received and/or collected from the respective plaintiffs a booking fee and/or deposits for the unit which the respective plaintiffs intended to purchase prior to the execution of the formal SPAs.

[11] The plaintiffs' action is mainly premised on the Federal Court decision in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor dan other appeals* [2020] 1 MLJ 281 which stated that the modification of any provision in the

Schedule H (the statutory sale and purchase agreement) approved by the controller who exercised his power under Regulation 11(3) of the Regulation is *ultra vires* the HDA.

[12] In view of the above Federal Court decision, the plaintiffs aver that (i) the date of delivery of vacant possession ought to be 36 months, instead of 48 months from the date of SPA; and (ii) that the calculation of the liquidated ascertain damages (hereafter ‘the LAD’) ought to commence from the date of receipt of the booking fees/deposit until the date of delivery of vacant possession, i.e., on 31.10.2019.

[13] The defendant avers that the plaintiffs entered into the respective SPAs knowing that the date of delivery of vacant possession stated therein was 48 months, and therefore, the plaintiffs should not be enriched from seeking LADs based on the calculation commencing after 36 months from the date of SPA. The defendant also avers that in the event the defendant is liable to compensate the plaintiffs, the defendant seeks an indemnity from the 93rd and 94th defendants (in the counterclaim) because they were the ones who approved the extension of time for the date of delivery of vacant possession from 36 months to 48 months pursuant to the power granted to the controller under the Regulations.

[14] Based on the above undisputed facts, the parties agreed to dispose the matters (the main action and the counterclaim) by way of Order 14A of the RoC – full and final disposal by way of determination of questions of law.

The Findings of this Court

First Question: Whether the delivery of vacant possession should commence from the date of the payment of the booking fee as opposed to the date of the Sale and Purchase Agreement?

[15] The first question of law has been determined in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor and other appeal* [2021] 2 MLJ 60, FC, wherein the apex court has ruled that the date of delivery of vacant possession should commence from the date of the payment of the booking fee as opposed to the date of the SPA.

[16] This Court does not intend to regurgitate the legal propositions enunciated in the Federal Court decision. It is not disputed that the respective plaintiffs had paid a booking fee/deposit for the purchase of their respective units in the housing project prior to entering into the respective SPAs. The payments, by whatever term they are called, was for the purpose of securing the interest of the respective plaintiffs to purchase the particular units selected by the plaintiffs. The recipient(s) of the booking fee/deposit was (were) acting for the developer in accepting the payment as part of the purchase price.

[17] The legal propositions enunciated in the Federal Court decision in *PJD Regency Sdn Bhd (supra)* have been followed by many High Court decisions (see *Tan Ching Ching v. Ekovest Capital Sdn Bhd* [2021] MLJU 2844; *Aminnudin Rezal Bin Jaafar & ors v. Prema Bonanza Sdn Bhd* [2021] MLJU 2783; *Chin Yongqin v. Propers Plus Industry Sdn Bhd* [2021] MLJU 1104; *Shanggari Maniarsu & ors v. Zubican Sdn Bhd* [2021] 1 LNS 2001). This Court is bound by the decision of the Federal Court. Hence, the answer to the first question is the date of commencement for the purpose of the calculation of the date for delivery of vacant possession should be from the date of receipt of the booking fee/deposit.

Second Question: Whether the Purchasers and the Defendant are bound by the Sale and Purchase Agreement wherein the completion period in Clauses 25(1) and Clauses 29(1) has been modified from thirty-six (36) months to forty-eight (48) months via Regulation 11(3) of the Housing Development (Control and Licensing) Regulations 1989 (“HDR”)?

[18] This Court is of the considered view that premised on the Federal Court decision in *Ang Ming Lee & Ors (supra)*, the modification of the time frame for the delivery of vacant possession from 36 months to 48 months is *ultra vires*. As such, the standard 36 months period ought to be taken as the time frame for the delivery of vacant possession of the property.

[19] In *UE E&C Sanjia (M) Sdn Bhd v. Lee Jeng Yuh & Anor* [2021] 6 MLJ 864, the Court of Appeal held that (from the headnotes):

“The court disagreed with the appellant’s argument that the extension was approved by the Housing Controller before the SPAs were executed and the parties were deemed to have consented to the extended period stipulated in the SPAs. The decision in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 which was delivered on 26 November 2019, was applicable retrospectively to the facts in the present case. The issue of whether the approval was obtained before or after the SPAs was executed was not relevant. Since it was held by the Federal Court that the housing controller had no power to waive or modify any provision in the Schedule H agreement, the SPAs entered into between the appellant and the respondents were clearly in contravention of the statutorily prescribed form in Schedule H. The court agreed with the learned trial judge that s. 24(a), (b) and (e) of the Contracts Act 1950 were applicable to the facts in the case. The court agreed with the learned trial judge in his findings that the respondents were not aware of the illegality, based on the witness statements. It was only fair and just to the parties in the present appeals to be put in their original position as if the SPAs had never been executed. The SPAs were void for illegality from their inception because the Housing Controller had no power under the law to grant any extension of time on the delivery of vacant possession and completion of the

common facilities beyond the 36 months period prescribed in Schedule H to the 1989 Regulations (see paras 35–36 & 40–42, 44 & 48).”

[20] The above legal proposition clearly answers the second question of law before this Court. The defendant (with the approval of 93rd and 94th defendants in the counterclaim) could not modify the statutory SPA Schedule H. Although the final decision of the Court of Appeal was that the SPAs were invalid and void, that is not the parties’ positions in the present case. This Court is bound by the legal propositions in the decisions of the Federal Court and Court of Appeal. Hence, the answer to the second question is in the negative.

Third Question: Whether the Purchasers can rely on the original Schedule H of the HDR’s thirty-six (36) months completion period to claim for liquidated damages (“LAD”) as against the Defendant?

[21] Based on the legal propositions in the decision of the Federal Court in **Ang Ming Lee**, the answer to the third question is in the affirmative.

Fourth Question: Do the Federal Court decisions in Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor Dan Other Appeals [2020] 1 MLJ 281 and PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor and Other Appeals [2021] 2 MLJ 60 apply retrospectively?

[22] This Court is bound by the decision of the Court of Appeal in *UE E&C Sanjia (M) Sdn Bhd (supra)* which stated that the decision of the apex court in Ang Ming Lee applies retrospectively. Likewise, the decision in **PJD Regency Sdn Bhd** has a retrospective effect. Therefore, this Court answers the fourth question in the affirmative.

Fifth Question: Whether the Defendant is entitled to seek indemnity against the 93rd and 94th Defendants in the Counterclaim for losses, if any?

Sixth Question: Whether the Defendant is entitled to an order for specific performance against the 93rd and 94th Defendants in the Counterclaim to ratify the validity of the extension of time sought?

[23] With regard to the fifth and sixth questions of law, this Court intends to deal with them together.

[24] Pursuant to s. 17 of the HDA, it states as follows:

17. Indemnity and protection against suit and proceedings.

No action shall lie against the Government, the Minister, the Controller, Inspector or against any officer of the Government or any person acting under the direction of the Minister, the Controller or Inspector for damages in any civil court for anything *bona fide* done, ordered or omitted to be done pursuant to this Act; and all actions which may lawfully be brought in respect of anything done, ordered or omitted to be done pursuant to this Act shall be instituted within six months from the date of the act or omission complained of, and not afterwards.

[25] At the time the 93rd and 94th defendants (in the counterclaim) exercised their power to approve the extension of time of the date of delivery of vacant possession of the property they genuinely believed they were acting within the power of the law. Hence, this Court finds that the 93rd and 94th defendants' action was *bona fide*, and therefore, they are protected under s. 17 of the HDA from being liable for their "unlawful" action.

[26] The defendant's counterclaim against the 93rd and 94th defendants (in the counterclaim) could not sustain because (i) it is out of time; and (ii) the 93rd and 94th defendants (in the counterclaim) could not be faulted for their action at that material time. Further, the defendant could not put the blame on the 93rd and 94th defendants because their action was in response to the defendant's application for the extension of time. The defendant could not now accuse the 93rd and 94th

defendants (in the counterclaim) of having “unlawfully” approved the application because of the ruling of the apex court in **Ang Ming Lee**.

[27] Further, the 93rd and 94th defendants are also protected under s. 29 of the Government Proceeding Act 1956 from any court order by way of an injunction or specific performance against them.

[28] Based on the above propositions of law, the Court finds that the defendant’s counterclaim against the 93rd and 94th defendants is unsustainable. Hence, this Court answers to the fifth and sixth questions in the negative.

[29] This Court has also considered the many issues and questions raised by the defendant’s counsel in his submissions. However, this Court is unable to make a ruling in favour of the defendant because the nub of the questions of law raised before this Court have been determined by the higher courts. Therefore, the principle of *stare decisis* applies and the legal propositions of the higher courts are binding on this Court.

Conclusion

[30] For the reasons stated above, this Court allows the plaintiffs’ claim (in the main suit) and dismisses the defendant’s counterclaim. This Court also orders the defendant to pay costs of RM3,000.00 to the plaintiffs and RM1,000.00 to the 93rd and 94th defendants (all costs are subject to allocator fees).

(CHOO KAH SING)
Judge
High Court Shah Alam

Dated: 4 SEPTEMBER 2022

COUNSEL:

For the plaintiffs - Harneshpal Singh; M/s Lui & Bhullar

For the defendant - Idris Seydalavi; M/s Halim Hong & Quek

*For the 93rd & 94th defendants (in the counterclaim) - Noerazlim Saidil;
Peguan Kanan Persekutuan*

Case(s) referred to:

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor Dan Other Appeals [2020] 1 MLJ 281

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor and Other Appeals [2021] 2 MLJ 60

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor dan other appeals [2020] 1 MLJ 281

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor and other appeal [2021] 2 MLJ 60, FC

Tan Ching Ching v. Ekovest Capital Sdn Bhd [2021] MLJU 2844

Aminnudin Rezal Bin Jaafar & ors v. Prema Bonanza Sdn Bhd [2021] MLJU 2783

Chin Yongqin v. Propers Plus Industry Sdn Bhd [2021] MLJU 1104

Shanggari Maniarsu & ors v. Zubican Sdn Bhd [2021] 1 LNS 2001

UE E&C Sanjia (M) Sdn Bhd v. Lee Jeng Yuh & Anor [2021] 6 MLJ 864

Fourth Question: Do the Federal Court decisions in Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor Dan Other Appeals [2020] 1 MLJ 281

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor and Other Appeals [2021] 2 MLJ 60

Legislation referred to:

Housing Development (Control and Licensing Act) 1966, s. 17

Government Proceeding Act 1956, s. 29

Rules of Court 2012, O. 14A r. 1(1)(a), (b), O. 15 r. 12

Housing Development (Control and Licensing) Regulations 1989, reg. 11(3)