DALAM MAHKAMAH SESYEN DI PETALING JAYA

DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA

GUAMAN SIVIL NO.: BB-A52NCvC-33-07/2021

ANTARA

SOH JIEN MIN & 16 LAGI ...PLAINTIF-PLAINTIF

[Plaintif-Plaintif memulakan dan membawa tindakan perwakilan ini menyaman dalam kapasiti peribadi dan sebagai seorang wakil kepada kesemua tujuh belas (17) Plaintif-Plaintif / Pembeli-Pembeli hartanah dalam projek pemajuan perumahan yang dikenali sebagai "You One" menurut peruntukan undang-undang yang ditetapkan iaitu Aturan 15 Kaedah 12 Kaedah-Kaedah Mahkamah 2012]

DAN

PJD LANDMARKS SDN BHD
[NO. SYARIKAT: 14378-A] ...DEFENDAN

ALASAN PENGHAKIMAN

Pendahuluan

Mahkamah ini pada 5/1/2022 telah menolak permohonan Defendan di Lampiran 14 untuk membatalkan writ saman terpinda dan pernyataan tuntutan terpinda Plaintif bertarikh 23/9/2021 di bawah Aturan 18 Kaedah 19(1)(a) dan /atau (b) dan/atau (d) Kaedah-Kaedah Mahkamah 2012 dengan kos RM2,000.00.

Fakta kes

Plaintif-Plaintif telah memasuki satu Perjanjian Jual Beli (selepas ini dirujuk sebagai "PJB") menurut Jadual H Peraturan-Peraturan Pemajuan

Perumahan (Kawalan dan Pelesenan) 1989 dan Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 (sebagai Pembeli-Pembeli) dengan Defendan (sebagai Pemaju, Penjual dan Pemilik tanah berdaftar) bagi pembelian petak-petak dalam suatu projek pemajuan perumahan yang dikenali sebagai "You One" ("projek perumahan tersebut").

Sebelum pelaksanaan PJB masing-masing, Plaintif-Plaintif telah dikehendaki membuat satu bayaran tempahan ("booking fee") / simpanan ("deposit") kepada Defendan dan / atau mana-mana entiti yang diberi kuasa oleh Defendan ("entiti tersebut") bagi pembelian petak-petak masing-masing.

Klausa-Klausa 25(1) dan 27(1) PJB-PJB tersebut telah diubahsuai oleh Defendan, dimana tempoh masa untuk penyerahan milikan kosong petak dan penyiapan kemudahan bersama bagi projek perumahan tersebut diubahsuai kepada empat puluh dua (42) bulan daripada tarikh PJB tersebut .

Defendan, kononnya, telah memperolehi satu lanjutan masa daripada Jabatan Perumahan Negara melalui suatu surat bertarikh 27.07.2012 untuk melanjutkan tempoh bagi penyerahan milikan kosong dari tiga puluh enam (36) bulan kepada empat puluh dua (42) bulan ("surat lanjutan tersebut").

Plaintif-Plaintif telah menerima jumlah pampasan Ganti Rugi Tertentu ("Liquidated Ascertained Damages") ("LAD") daripada Defendan bagi kelewatan dalam penyerahan milikan kosong petak dan penyiapan kemudahan bersama projek perumahan tersebut.

Namun, jumlah LAD yang diterima oleh Plaintif-Plaintif tersebut adalah tidak mengikut formula pengiraan berkanun menerusi Jadual H dan Peraturan 11(1) Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 ("Housing Development (Control and Licensing) Regulations 1989") ("HDR 1989") dan Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ("Housing Development (Control and Licensing) Act 1966") ("HDA 1966").

Tuntutan Plaintif-Plaintif adalah seperti berikut:

a. Deklarasi bahawa:

i. Pengubahsuaian tempoh masa 42 bulan kepada klausa 25(1) dan 27(1) dalam PJB adalah terbatal dan tidak sah

ii. Plaintif-Plaintif berhak menuntut LAD bermula dari tarikh bayaran tempahan/simpanan dan berdasarkan tempoh penyerahan pemilikan kosong dan penyiapan kemudahan bersama mengikut tempoh kontrak berkanun iaitu 36 bulan

iii. Plaintif-Plaintif berhak mendapat bayaran LAD mengikut Jadual A,Lajur 12 dilampirakan bersama pernyataan tuntutan

iv. Defendan membayar jumlah LAD sebanyak RM444,958.44 mengikut Jadual A, Lajur 12 dilampirkan bersama pernyataan tuntutan dalam masa 14 hari tarikh penghakiman

v. Surat pengubahsuaiandan/atau surat LAD yang dilaksanakan oleh Plaintif-Plaintif adalah terbatal dan tidak sah

b. Faedah

c. Kos

Alasan Defendan

1. Klausa 25(1) dan 27 (1) Perjanjian memperuntukkan secara jelas penyerahan milikan kosong akan diserahkan dalam masa 42 bulan dari tarikh Perjanjian pada 30/7/2012
2. Lanjutan masa diperolehi dari 36 bulan kepada 42 bulan. Ia sah dan berkekalan dan defendan bertindak dengan niat baik
3.Plaintif-plaintif menerima terma dan syarat dalam Perjanjian. Plaintif-plaintif diestop untuk mengatakan sebaliknya dengan kesahihan lanjutan masa yang diberikan
4.Perjanjian ditandatangani pada tahun 2012 dan dihalang oleh had masa
5. Bukan forum dan/atau mod yang betul bagi plaintif-plaintif menuntut relif. Plaintif gagal memasukkan pihak-pihak yang perlu dalam tindakan ini.
6. Persetujuan plaintif-plaintif menerima jumlah LAD daripada Defendan adalah diestop daripada meminta relif dalam tindakan ini
7. Seksyen 64 Akta Kontrak terpakai
8. Plaintif-plaintif telah melaksanakan dan menandatangani surat penyelesaian dan diestop daripada membuat tuntutan lanjut.

Dapatan dan Keputusan Mahkamah

<u>Prinsip undang-undang permohonan pembatalan</u>

Undang-undang mengenai kuasa budi bicara Mahkamah dalam pembatalan tindakan di bawah Aturan 18 Kaedah 19 (A.18 k.19) KKM 2012 adalah jitu dan mantap. Memadai sekiranya Mahkamah ini merujuk kepada kes tersohor sebagai panduan dan rujukan.

Mohamed Dzaiddin HMR (YAA pada ketika itu) dalam kes **Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 4 CLJ 7** yang menjadi mercu tanda (landmark case) bagi prinsip undang-undang mengenai kuasa budi bicara mahkamah di bawah A.18 k.19 ini telah memutuskan sebagaimana yang berikut:

"It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd), and this summary procedure can only be adopted when it clearly seen that a claim or answer is on the face of it "obviously unsustainable" (see AG of Duchy of Lancaster v L & NWRly & Co). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see Wenlock v Moloney & Ors). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under Order 33 r 3 (which is in pari material with our Order 33 r 2 of the RHC) (see Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable"

<u>Kutipan bayaran tempahan (booking fee)/simpanan(deposit)</u>

Sebelum pelaksanaan PJB masing-masing, Plaintif-Plaintif telah dikehendaki membuat satu bayaran tempahan ("booking fee") / simpanan ("deposit") kepada Defendan dan / atau entiti tersebut untuk menjamin pembelian petak dalam projek perumahan tersebut.

Peraturan 11(2) HDR 1989 yang secara jelas sekali melarang kutipan bayaran yang dinamakan sebagai apa sahaja kecuali ia telah ditetapkan di bawah kontrak jualan. Pembayaran tempahan ("booking fee") / simpanan ("deposit") tidak dinyatakan dalam PJB yang dilaksanakan di antara Plaintif-Plaintif dan Defendan.

Rujukan dibuat kepada keputusan Mahkamah Persekutuan dalam kes **PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 MLJ 60 ("PJD Regency")** mukasurat 33, 34, 42, hingga 44 dan 52] – perenggan-perenggan 46 hingga 49, 51, 85 hingga 86, 89 dan 131. 16. Mahkamah Persekutuan memutuskan bahawa:

"[85] Had the developers in the present appeals complied strictly with the terms of the scheduled contracts as statutorily prescribed, then the payment of the initial 10% deposit and the signing of the statutory sale and purchase agreement would have been done simultaneously. The fact that they have nonetheless bypassed the statutory prohibition against the collection of booking fees, and the *pro forma* agreements being amply clear as to the fundamentals of the agreement, means that a bargain was indeed made at the time of the payment of the booking fee. In our judgment, the legislative intent was that the initial payment of monies, in the form of a deposit, is sufficient to constitute an intention to enter into a contract given that the agreement would have to be signed at the same time.

[89] We agree fully with the views expressed above and as such we answer all related leave questions on the common issue to the effect as follows:

Where there is a delay in the delivery of vacant possession by a developer to the purchaser in respect of Scheduled Contracts under Regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (Regulation 1989) enacted pursuant to Section 24 of the Housing Development (Control and Licensing) Act 1966 , **the date for calculation of liquidated agreed damages ('LAD') begins from the date of payment of deposit/booking fee/initial fee/expression by the purchaser of his written intention to purchase and not from the date of the sale and purchase agreement literally**."

(Penekanan ditambah)

Tindakan Defendan mengutip bayaran tempahan ("booking fee") / simpanan ("deposit") daripada Plaintif-Plaintif sebelum perlaksanaan PJB-PJB masingmasing adalah jelas salah di sisi undang-undang yang sedia ada iaitu HDR 1989 dan HDA 1966. Oleh sedemikian, kenyataan Defendan bahawa bayaran tempahan ("booking fee") / simpanan ("deposit") adalah amalan perdagangan biasa dan bayaran tempahan ("booking fee") / simpanan ("deposit") boleh dikembalikan adalah langsung tidak relevan. Defendan telah melanggar HDR 1989 dan HDA 1966 dengan kutipan pembayaran bayaran tempahan ("booking fee") / simpanan ("deposit") sebelum pelaksanaan PJB Plaintif-Plaintif. Oleh itu, Plaintif-Plaintif berhak mengira tuntutan LAD bermula dari tarikh pembayaran bayaran tempahan ("booking") / simpanan ("deposit").

<u>Tempoh masa penyerahan pemilikan kosong petak dan penyiapan kemudahan bersama tidak boleh diubah suai</u>

Berdasarkan peruntukan-peruntukan undang-undang sedia ada iaitu HDR 1989 dan HDA 1966, ia adalah jelas bahawa penyerahan pemilikan kosong petak dan penyiapan kemudahan bersama bagi projek perumahan untuk perjanjian jual beli yang diperuntukkan di bawah Jadual H HDR 1989 hendaklah diserahkan dan disiapkan secara tegas dalam masa yang ditetapkan iaitu tiga puluh enam (36) bulan kalendar.

Walau bagaimanapun, Defendan telah mengubahsuai Klausa-Klausa 25(1) dan 27(1) PJB-PJB untuk penyerahan pemilikan kosong petak dan penyiapan kemudahan bersama bagi pemajuan perumahan tersebut kepada empat puluh dua (42) bulan kalendar.

Defendan telah menerima satu lanjutan masa melalui satu surat bertarikh 27.7.2012 yang dikeluarkan oleh Pengawal Perumahan berdasarkan Peraturan 11 HDR 1989 daripada Jabatan Perumahan Negara (Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan) untuk penyerahan milikan kosong dari tiga puluh enam (36) bulan kepada empat puluh dua (42) bulan . Walau bagaimanapun, peruntukan Peraturan 11(3) HDR 1989 tersebut telahpun diisytiharkan ultra vires.

Rujukan dibuat kepada kes-kes undang-undang berikut :-

(a) Mahkamah Persekutuan **Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar,Perumahan Dan Kerajaan Tempatan & Anor Dan Other Appeals (2020) 1 MLJ 281**

(b) Mahkamah Tinggi **Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan Dan Other Applications (2020) 10 MLJ 689**

(c) Mahkamah Tinggi **Sri Damansara Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors (2020) MLJU 170**

(d) Mahkamah Sesyen **Low Yip Meng lwn Ekovest Capital Sdn Bhd (2020) MLJU 1041**

(e) Mahkamah Tinggi **Leong Keng Chiang v Prema Bonanza Sdn Bhd (2021) MLJU 714**

(f) Mahkamah Tinggi **Lam Su See v Prema Bonanza Sdn Bhd (2021) MLJU 713**

(g) Mahkamah Tinggi **Chin YongQin v Prosper Plus Industry Sdn Bhd (2021) MLJU 1104**

(h) Mahkamah Tinggi **Kok Chay Har & Ors v BH Realty Sdn Bhd (2021) 1 LNS 13**

(i) Mahkamah Tinggi **Murugan a/l Superammunian v Southkey City Sdn Bhd [2021] MLJU 1950**

Ianya penting dan perlu untuk menyatakan bahawa keputusan Mahkamah Tinggi **Lam Su See v. Prema Bonanza Sdn Bhd [2021] MLJU 713** telah disahkan ("affirmed") oleh Mahkamah Rayuan dalam

Prema Bonanza Sdn Bhd v Lam Su See [Civil Appeals No.: W-02(IM)(NCvC)-624-03/2021 & W-02(IM)(NCvC)-625- 03/2021].

Walaupun alasan penghakiman masih tidak dikeluarkan tetapi menerusi https://ecourtservices.kehakiman.gov.my/CauseList, Mahkamah Rayuan menyatakan;

"We thank parties for the submission, both oral as well as written submission. This is our unanimous decision. We find no appealable error by the learned high court judge in dismissing the striking out application and also in allowing the summary judgment. Therefore we dismiss both appeals in R8 (W-02(IM)(NCvC)-624-03/2021) and R9 (W-02(IM)(NCvC)-625-03/2021). Decision of high court judge is affirmed. With regard to the cross-appeal (in R9: W-02(IM)(NCvC)-625-03/2021), we also find there is no merit in this cross-appeal. Therefore the cross-appeal is also dismissed. This is the costs that we award: For R8 (W-02(IM)(NCvC)-624-03/2021) and R9 (W02(IM)(NCvC)-625-03/2021), we award costs of RM10,000.00 for each appeal to the respondent. And for the cross appeal (in R9: W-02(IM)(NCvC)- 625-03/2021), we award costs of RM3,000.00 as agreed by both parties."

Oleh demikian, tempoh lanjutan masa yang kononnya diberikan oleh Jabatan Perumahan Negara tiada maksud undang-undang ("of no legal purport") memandangkan segala peruntukan undang-undang sedia ada termasuk HDR 1989 dan HDA 1966 untuk mengubahsuai klausa-klausa PJB tersebut telah diisytiharkan sebagai ultra vires HDA 1966.

Pengubahsuaian tersebut telah dilakukan sebelum PJB dimasuki antara Plaintif-Plaintif masing-masing dengan Defendan. Perkara ini turut

membuktikan bahawa Defendan mempunyai niat untuk "contract out" HDR 1989 dan HDA 1966.

Tambahan lagi, pernyataan Defendan bahawa Plaintif-Plaintif telah sedia maklum mengenai lanjutan tersebut sebelum melaksanakan perjanjanjian jual beli adalah tidak berasas dan tidak boleh dimulakan ('non-starter') kerana intipati perjanjian jual beli (di sini, sebagai pengubahsuaian kepada klausa-klausa 25(1) dan 27(1)) adalah berdasarkan klausa-klausa yang tidak sah dan melanggar undang-undang berkanun.

Peraturan 11(3) Housing Development (Control and Licensing) Regulations 1989 dan surat lanjutan masa bertarikh 27/7/2012 oleh Jabatan Perumahan Negara adalah ultra-vires dan terbatal dari segi undang-undang.Jabatan Perumahan Negara dan/atau Pengawal Perumahan tidak mempunyai kuasa untukmelanjutkan masa serahan milikan kosong.

Di dalam kes **Ang Ming Lee & Ors Vs Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and Other Appeals[2019] 6 MLRA 494** Mahkamah Persekutuanmemutuskan, inter-alia persoalan undang-undang seperti berikut:

"whether reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 is ultra vires the Housing Development (Control and Licensing) Act 1966"

"[60] 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." (Penekanan ditambah)

Apa-apa pengetahuan pihak Plaintif tentang tempoh 42 bulan bagi penyerahan milikan kosong dan/atau estoppel tidak boleh menghidupkan semula Peraturan 11(3) Housing Development (Control & Licensing) Regulations 1989 yang telah diputuskan oleh Mahkamah Persekutuan sebagai ultra-vires dan tidak sah lagi untuk perlanjutan tempoh penyiapan.

Terma-terma perjanjian Jual-Beli di bawah Jadual H Housing Development (Control &Licensing) Regulations 1989 adalah peruntukan statutori yang tidak boleh ditukar (altered) oleh Defendan sebagai pemaju perumahan.

Di dalam kes **Tai Kim Yew & Ors v. Sentul Raya Sdn Bhd [2004] 1 MLRH 236 .**

Yang Arif Mohd Hishamudin Mohd Yunus J memutuskan di perenggan:

"[15] Since the sale and purchase agreements are not ordinary contracts but are substantially governed by reg 11 and Schedule H of the Housing Developers Regulations, it follows therefore that cls 7, 22 and 24 of the sale and purchase agreement are not mere terms of a contract: they are also statutory provisions since they are actually provisions of Schedule H of the Housing Developers Regulations that had been imposed by law upon the parties."

Apa-apa kesedaran/pengetahuan pihak Plaintif tentang tempoh 42 bulan bagi penyerahan milikan kosong dan/atau estoppel juga tidak boleh terpakai untuk "contracting out" terma-terma Perjanjian Jual-Beli (Jadual H) dan tidak sesuai dalam konteks Housing Development (Control & Licensing) Act 1966 yang merupakan suatu "social legislation".

Di dalam kes **SEA Housing Corporation Sdn Bhd V Lee Poh Choo[1982] 1 MLRA 148,** Mahkamah Persekutuan memutuskan di MS 152-153:

"Thus it is clear that only terms and conditions designed to comply with the requirements of the rules that may be inserted in a contract of sale of land that is governed by the Act and rules, and that **on the contrary terms and conditions which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted**.

With respect, the provisions in question here are similar to those in Johnson v Moreton [1978] 3 All ER 37, a House of Lords decision, where at page 49 Lord Hailsham said:

"The policy of the law has been repeatedly used to protect the weaker of two parties who do not contract from bargaining positions of equal strength. (line a).

The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament — as was attempted here — where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest."

Di dalam kes **Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 1 MLRA 473** Mahkamah Rayuan memutuskan di perenggan:

[8] ..... The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract."

Dalam kes **Sri Damansara Sdn Bhd V Voon Kuan Chien & Anor [2020] 3 MLRA 614,** Mahkamah Rayuan memutuskan di perenggan:

"[57] In the context of the HDA and the Regulations being a social piece of legislation designed to protect the purchasers who are more vulnerable against developers, it has not escaped the notice of this Court the practice of developers like in this case, who being in a better bargaining position with their additional standard form documents or letters, to even extending to their recommendations of the use of solicitors nominated by them to represent the purchasers not only in the SPA but also in the loan documentation.

[60] Being a social piece of legislation the Court should interpret the standard form Schedule H SPA in a manner in which the purchaser would not be taken advantage of or exploited in any way or made to bear an unconscionable term.

Dalam kes **Ang Ming Lee & Ors**(supra) , Mahkamah Persekutuan menyatakan di Para [40]:

"[40] The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. ....."

Dalam kes **PJD Regency Sdn Bhd**(supra) , Mahkamah Persekutuan menyatakan :

"[1] The phrase 'social legislation' attached to the Housing Development (Control and Licensing) Act 1966 ('HDA 1966') and its ensuing subsidiary legislation, ie the Housing Development (Control and Licensing) Regulations 1989 ('HDR 1989') is not merely a fanciful label. In disputes between home buyers and housing developers, its significance lies in the approach taken by the courts to tip the scales of justice in favour of the home buyers given the disparity in bargaining power between them and the housing developers."

Tambahan lagi, perlanjutan masa melalui surat JPN bertarikh 27/7/2012 tersebut adalah dibuat sebelum kewujudan Perjanjian Jual-Beli bertarikh 30/7/2012 .

Pihak Plaintif adalah pembeli rumah yang berperanan pasif manakala Defendan sendiri yang aktif membuat permohonan untuk menukar terma perjanjian dalam bentuk Jadual-H daripada 36 bulan kepada 42 bulan.

Sebelum wujudnya apa-apa perjanjian/kontrak di antara pihak-pihak, tiada apa-apa keadaan istimewa, kesukaran atau keperluan pematuhan dalam perjanjian boleh dikatakan wujud untuk diambil-kira bagi tujuan lanjutan masa serahan milikan kosong.

Dalam kes **Ang Ming Lee**(supra) ,Mahkamah Persekutuan tidak mengumumkan bahawa kes **Ang Ming Lee**(supra) hanyalah beroperasi secara prospektif.

Dalam kes **Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and Anor [2017] 3 MLJ 561,** Mahkamah Persekutuan memutuskan:

"[127]**As a matter of principle, a court judgment is'retrospective in effect unless a specific direction of prospectivity is expressed'**. This principle has been decided by the Federal Court in Public Prosecutor V Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393."

Mahkamah Rayuan dalam kes **Leong Kum Loon V Glomac Kristal Sdn Bhd & Other Appeals (Civil Appeals No: W-02(NCVC)(A)-367-02/2017)** juga merujuk dan mengikuti kes keputusan Mahkamah Persekutuan dalam kes **Ang Ming Lee**(supra) walaupun surat lanjutan masa oleh Jabatan Perumahan Negara dalam kes tersebut adalah bertarikh 14/3/2014 sebelum keputusan Mahkamah Persekutuan dalam kes **AngMing Lee** (supra) pada 26/11/2019.

Mahkamah Rayuan (Hamid Sultan Bin Abu Backer, Abang Iskandar Bin Abang Hashim, Mary Lim Thiam Suan JJCA) menyatakan :
"[95] We are of the unanimous view that these appeals must be allowed for the reasons already adumbrated above. **The decision of the Federal Court Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor Vs Ang Ming Lee & 34 Ors [supra] on the validity of regulation 11(3) which is relevant and binding in these appeals**

provides added reason for our decision to allow all ten appeals...."

Di dalam kes **Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Application (2020) 6 CLJ 55**, Mahkamah Tinggi telah memutuskan,

"**The Federal Court in Ang Ming Lee had not expressly ruled that its decision could only have prospective effect. Hence, in accordance with the general rule, the judgment in Ang Ming Lee had retrospective effect and applied to these three applications. There were no exceptional circumstances for the doctrine of prospective overruling to apply to the decision in Ang Ming Lee. On the contrary, 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 was in the interest of homebuyers for the judgment in Ang Ming Lee to be given retrospective effect. (para 29)**

(Penekanan ditambah)

Estoppel dan Seksyen 64 Akta Kontrak 1950

LAD yang dituntut oleh Plaintif-Plaintif merupakan remedi berkanun yang berdasarkan Jadual H dan Peraturan 11(1) HDR 1989 dan HDA 1966 dan oleh kerana sifat HDR 1989 dan HDA 1966 merupakan perundangan sosial, Plaintif-Plaintif tidak diestop daripada menuntut jumlah LAD selepas pemotongan jumlah LAD yang diterima oleh Plaintif-Plaintif . Surat pengabaian / surat LAD / surat penyelesaian tidak boleh berfungsi terhadap peruntukan undang-undang terutamanya LAD yang dituntut oleh Plaintif-Plaintif adalah remedi berkanun.

Tambahan pula, jumlah LAD yang diterima oleh Plaintif-Plaintif adalah tidak menurut kiraan formula berkanun Jadual H dan Peraturan 11(1) HDR 1989 dan HDA 1966, oleh kerana pengiraan LAD oleh Defendan telah didasarkan atas :-

i. tempoh empat puluh dua (42) bulan untuk penyerahan pemilikan kosong dan penyiapan kemudahan bersama bagi pembangunan perumahan; dan

ii. tarikh PJB Plaintif-Plaintif.

Sebaliknya, Defendan telah mengabaikan secara jelas obligasinya di bawah undang-undang yang sedia ada iaitu HDR 1989 dan HDA 1966 dengan pengutipan bayaran tempahan ("booking fee") / simpanan ("deposit") daripada Plaintif-Plaintif masing-masing dan mengabaikan formula pengiraan berkanun menerusi Jadual H dan Peraturan 11(1) HDR 1989 dan HDA 1966.

Tambahan lagi, terdapat kelewatan penyerahan milikan kosong dan penyiapan kemudahan bersama bagi kesemua Plaintif-Plaintif . Defendan tidak mendasarkan kelayakan hak-hak Plaintif-Plaintif menurut kiraan formula berkanun Jadual H dan Peraturan 11 HDR 1989 dan HDA 1966.

Di dalam kes Mahkamah Tinggi **Lam Su See V. Prema Bonanza Sdn Bhd(supra)** yang bersandarkan kepada beberapa keputusan kes telah menyebut bahawa:

" [41] In Encony Development Sdn Bhd v Robert Geoffrey Gooch & Anor [2016] 1 CLJ 893, the Court of Appeal explained that the provisions in the Schedule H contract of sale are statutory provisions which have been imposed by law upon the parties. The Court said at page 906:

"[41] 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**

[42] In Oxbridge Height Sdn Bhd v Abdul Razak Mohd Yusof and Anor [2015] 2 CLJ 252, the Court of Appeal agreed that the LAD provision in the SPA cannot be contracted out of. The Court said at page 264:

"[25] ...In this appeal, the respondents took a firm view on the effect of the Housing Development (Control and Licensing) Act 1966 and reg. 11(1) of the Housing Development (Control and Licensing) Regulations 1989, in effect arguing that the **LAD provision in the Schedule G standard form SPA could not be contracted out ,.,**

[26] As a general statement of the position of the law in the context of housing development legislation which exists to **protect the interests of purchasers of housing accommodation and the public at large, the proposition could be agreed."**

[43] In the present case, the 54 months completion period (as stipulated in the SPA) was in contravention of the 36 months' timeline (as provided in Schedule H). P is statutorily entitled to claim the full LAD amount based on the completion period of 36 months as provided in Schedule H. It is evident from the attachment to the Settlement Letter that the settlement sum paid by D to P was for a period of delay (of 29 days) calculated based on the 54 months EOT Period. This is in violation of Schedule H which provides a formula for calculation based on the prescribed timeline of 36

months. That D has not paid P any LAD for the period of delay from the 36th month to the 54th month of the SPA has never been denied by D.

[44] In Hedgeford Sdn Bhd v Sri Gananatha a/l Sivanathan [2018] 1 LNS 1497, the High Court made the following observation with regard to a settlement sum offered by a developer which is less than what the purchasers were entitled to under the law:

"[134] This case demonstrates why the **position is strict and rigid when it comes to the rights of purchasers under a statutory contract Here is a case where there was delay in delivery of vacant possession of the units (clause 25 of the SPA) and in the delivery of common facilities (clause 27 of the SPA) and the plaintiff took it upon themselves, apparently for the sake of convenience, to prepare the LAD settlement letters, which states the amount that the purchaser is supposed to be entitled to under the SPA (which has been proven and acknowledged to be incorrect as it did not factor in the LAD under clause 27 SPA) without stating how the figure was derived and purporting to state that the amount represents the "amount relates to monies due to me/us pursuant to the terms of the sale and purchase agreement..." when in fact the amount due to the purchasers are very much more than what is stated in the LAD settlement letters, which PW1 and PW4 were ignorant of at the material time.**

[135] In those circumstances, even though there was no duress of any sort, and even though the purchasers (D2 to D4) had ample time and could have, but did not check with anyone about their entitlement under clause 27 of the SPAs, it **cannot be inferred or assumed, merely because they signed on the relevant LAD settlement letters or banked in the cashier's orders, that they had intentionally agreed to forgo their entitlement to LAD under clause 27 of the SPAs."**

(Penekanan ditambah)

Mahkamah berpendapat sebarang penyelesaian yang dikatakan, yang mempunyai kesan mengurangkan atau mengambil hak berkanun pembeli rumah, tidak mempunyai kesan undang-undang. Pemaju perumahan tidak boleh bergantung pada pengetepian atau estoppel sedemikian untuk menghalang pembeli rumah daripada menegaskan sepenuhnya haknya seperti yang diperuntukkan di bawah HDA. Tiada estoppel terhadap statut. Sekaligus seksyen 64 Akta Kontrak tidak berkaitan dan berbangkit.

Sama ada tindakan dihalang had masa

Defendan telah membangkitkan isu bahawa tuntutan Plaintif-Plaintif disini adalah dihalang oleh had masa berkanun. Tuntutan Plaintif-Plaintif di sini adalah bagi menuntut LAD. Kausa tindakan bagi menuntut ganti rugi tertentu hanya terakru dari tarikh pembeli mengambil pemilikan kosong petak dan tarikh penyiapan kemudahan bersama oleh Penjual menurut Klausa-Klausa 25(3) dan 27(3) (dalam bahasa asalnya) :-

"Clause 25(3) (3) For the avoidance of doubtany 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."

"Clause 27(3) (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."

Oleh itu, berkenaan dengan tuntutan LAD untuk petak-petak, menurut Klausa 25(3) PJB, sebarang kausa tindakan untuk menuntut LAD adalah terakru pada tarikh di mana pembeli-pembeli mengambil pemilikan

kosong petak, iaitu 19.07.2016 yang merupakan tarikh dianggap pemilikan kosong menurut Notis Penyerahan Pemilikan Kosong bertarikh 05.07.2016;

Berkenaan tuntutan LAD bagi kemudahan bersama, menurut Klausa 27(3) PJB, sebarang kausa tindakan untuk menuntut LAD adalah terakru pada tarikh Penjual menyiapkan kemudahan bersama, iaitu 04.07.2016 yang merupakan tarikh Perakuan Siap dan Pematuhan (Borang F).

Di dalam kes Mahkamah Tinggi **Lam Su See V. Prema Bonanza Sdn Bhd(supra)** memutuskan bahawa:

[58] D contends that P's cause of action, which is founded on a contract, arises from the SPA that is entered into between the parties. Since the SPA is dated 9.7.2012, the 6 years limitation has set in on 9.7.2018. As the SOC was filed on 28.7.2020, there was a delay of about 2 years in pursuing the action. D submits that P provided no explanation regarding the delay in the filing of the suit and no extension of time is sought by P.

[59] D's contention is devoid of merit. In my opinion, P's right to claim for LAD pursuant to Schedule H arises on the date P takes delivery of vacant possession. Because that is the time when D must pay the LAD, if any. This is stipulated in clause 25(2) of the SPA which reads:

"Such **liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Parcel."**

[60] Moreover, this is made clear in clause 25(3) of the SPA which reads:

"For the avoidance of doubt, any **cause of action to claim for liquidated**

damages by the Purchaser under this clause shall **accrue on the date the Purchaser take vacant possession of the said Parcel."**
(Penekanan ditambah)

Plaintif-Plaintif telah memfailkan dan memulakan guaman ini pada 12.07.2021. Maka, Plaintif-Plaintif masih berada dalam tempoh had masa dan tidak terhalang dengan had masa berkanun untuk memulakan tindakan ini terhadap Defendan.

Sama ada forum dan/atau mod guaman yang salah serta pihak-pihak yang perlu tidak dimasukkan

Tindakan ini adalah berdasarkan PJB yang merupakan kontrak berkanun di bawah Jadual H HDR 1989.

Mahkamah merujuk kes **Aminuddin Rezal Jaafar & Ors v Prema Bonanza Sdn Bhd (2021) 1 LNS 2283,** Mahkamah Tinggi memutuskan bahawa:

" Non-joinder of parties
[33] D argues that the Plaintiffs have failed to join the Minister of Housing and Local Government and the Housing Controller (collectively **"Ministry")** as parties to the suit, which is improper and an abuse of process. According to D, the Plaintiffs vide the present action seeks a declaration that the EOT granted by the Ministry is null and void. The Plaintiffs must therefore join them as a party herein. Their non-inclusion is fatal as the court is not empowered to make decision affecting the Ministry without affording them an opportunity to be heard.

[34] I disagree. The instant suit challenges the validity of clauses 25 and 27 of the SPA, rather than the decision of the Ministry in granting the EOT. It is already settled that the EOT is null and void in light of Ang Ming Lee. It is the contractual breach of clauses 25 and 27 of the SPA which gives rise to D's obligation to pay LAD for failing to deliver the vacant possession as prescribed under the law, as opposed to the administrative decision of the Ministry. In my view, it is not necessary for the Plaintiffs to join the Ministry as a party to this suit.

Not wrong mode of proceeding

[35] D avers that the Plaintiffs' action was filed using the wrong mode. The argument being that the Plaintiffs are challenging the validity of the EOT, which is a decision granted by the Ministry and therefore within the sphere of public law. Thus, the Plaintiffs' action must be by way of judicial review as prescribed underOrder 53 of the ROC , and not a writ action.

[36] I disagree. By reason of Ang Ming Lee, the EOT is illegal and void ab initio. As such, there is no decision to challenge. The fact that the Plaintiffs did not quash the EOT by way of a judicial review does not make the EOT legal and valid. The effect of the EOT being void is that there is no decision in the first place. Thus, there is nothing to challenge."

Dalam nada yang sama Mahkamah Tinggi dalam kes **Cheang Chee Kong & Anor v Mayfair Ventures Sdn Bhd (2021) 1 LNS 1944** menyatakan bahawa:

"**[37]** It is immaterial that the extension of time was given prior to the execution of the SPA. The extension cannot be waived or consented to as the extension was an illegality, having been made under the Regulation now declared to be ultra vires. The attempt by the Defendant to distinguish

Ang Ming Lee on this ground is without merit. The contention of the Defendant that the Plaintiffs made no protest after the SPA was signed nor did they appeal against the decision of the Controller is therefore immaterial.

[38] The Plaintiffs' claim is also opposed on the ground that judicial review proceedings ought to have been taken. I see no merit in this contention as the Plaintiffs are not taking an action premised on public law. The Plaintiffs' claim is merely a private law action for LAD against the Defendant. There is no need for the Plaintiff to proceed by way of judicial review as the question of challenging the decision of the Controller doesn't arise in view of Ang Ming Lee's decision. Nor is there any necessity to appeal to the Minister."

Berdasarkan alasan di atas, hujahan Defendan bahawa mod guaman oleh Plaintif-Plaintif adalah salah dan tidak memasukkan pihak-pihak yang perlu adalah tidak berasas dan tidak bermerit.

Kesimpulan

Berdasarkan dapatan Mahkamah sebagaimana di atas, tuntutan Plaintif-Plaintif bukan satu tindakan jelas yang tidak boleh dipertahankan. Oleh itu permohonan Defendan seperti di Lampiran 14 untuk membatalkan tuntutan Plaintif-Plaintif ditolak dengan kos RM2,000.00.

Bertarikh : 28hb.Februari 2022

Faiz bin Hj. Dziyauddin

Hakim

Mahkamah Sesyen Sivil 3

Petaling Jaya

Pihak-Pihak

Chandni Anantha Krishnan (Tetuan Lui & Bhullar) bagi pihak Plaintif-Plaintif

Kuhan Manokaran (Tetuan Rosli Dahlan Saravana Partnership) bagi pihak Defendan