IN THE HIGH COURT OF MALAYA IN SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA
[CIVIL APPEAL NO.: BA-12A-88-11/2022]

BETWEEN

TROPICANA METROPARK SDN BHD
[COMPANY NO. : 412231-X] **... APPELLANT**

AND

1. **CHANG JAU REN**
   [IDENTITY CARD NO. : 731208-10-5653]

2. **CHEW HUI HOON**
   [IDENTITY CARD NO. : 710616-01-5304]

3. **WONG DONG MAY**
   [IDENTITY CARD NO. : 810126-01-5916]

4. **TAN l-LIN**
   [IDENTITY CARD NO. : 810314-14-5582]

5. **CHERYL TEH SIEW WEI**
   [IDENTITY CARD NO. : 880325-56-5578]

6. **KEK PEI CHIN**
   [IDENTITY CARD NO. : 740310-01-5122]

7. **MURNI DAUD**
   [IDENTITY CARD NO. : 850321-01-5272]

8. **CHONG TSE TSONG**
   [IDENTITY CARD NO. : 840304-04-5083]

9. **MOHD ZAKI MOHD NOR**
   [IDENTITY CARD NO. : 700722-01-5827]

10. MONALIZA ZAINOL
[IDENTITY CARD NO. : 760611-09-5072]

11. KOH BOON GUAN
[IDENTITY CARD NO. : 800916-08-6891]

12. JASON SIA SZE WAN
[IDENTITY CARD NO. : 760713-10-5243]

13. MICHELLE YONG VOON SZE
[IDENTITY CARD NO. : 780629-14-6008] **... RESPONDENTS**

[Responden-Responden memulakan dan membawa tindakan perwakilan ini menyaman dalam kapasiti peribadi dan sebagai seorang wakil kepada kesemua tiga belas (13) Pembeli-Pembeli hartanah dalam projek pembangunan perumahan yang dikenali sebagai "Tropicana Metropark Phase 1C" menurut peruntukan undang-undang yang ditetapkan iaitu Aturan 15 Kaedah 12 Kaedah- Kaedah Mahkamah 2012]

(In the Matter of the Sessions Court of Petaling Jaya
In the State of Selangor Darul Ehsan, Malaysia
[Civil Suit No. BB-B52-5-01/2022])

Between

1. Chang Jau Ren
[Identity Card No. : 731208-10-5653]

2. Chew Hui Hoon
[Identity Card No. : 710616-01-5304]

3. Wong Dong May
[Identity Card No. : 810126-01-5916]

4. Tan I-Lin
[Identity Card No. : 810314-14-5582]

5. Cheryl Teh Siew Wei
[Identity Card No. : 880325-56-5578]

6. Kek Pei Chin
[Identity Card No. : 740310-01-5122]

7. Murni Daud
[Identity Card No. : 850321-01-5272]

8. Chong Tse Tsong
[Identity Card No. : 840304-04-5083]

9. Mohd Zaki Mohd Nor
[Identity Card No. : 700722-01-5827]

10. Monaliza Zainol
[Identity Card No. : 760611-09-5072]

11. Koh Boon Guan
[Identity Card No. : 800916-08-6891]

12. Jason Sia Sze Wan
[Identity Card No. : 760713-10-5243]

13. Michelle Yong Voon Sze
[Identity Card No. : 780629-14-6008] … Plaintiffs

[Plaintif-Plaintif memulakan dan membawa tindakan perwakilan ini menyaman dalam kapasiti peribadi dan sebagai seorang wakil kepada kesemua tiga belas (13) Pembeli-Pembeli hartanah dalam projek pembangunan perumahan yang dikenali sebagai “Tropicana Metropark Phase 1C” menurut peruntukan undang-undang yang

ditetapkan iaitu Aturan 15 Kaedah 12 Kaedah-Kaedah Mahkamah 2012]

And

Tropicana Metropark Sdn Bhd
[Company No. : 412231-X] … Defendant

GROUNDS OF JUDGMENT
(O.14A Disposal)

Introduction

[1] The appeal which came before this Court was filed by the Appellant-Developer against the decision of the Sessions Court which had allowed the Respondents-Purchasers' claims pursuant to Order 14A / Order 33 Rule 4 of the Rules of Court 2012 on 21.10.2022.

[2] On 1 March 2023 this Court upheld the Sessions Court's decision and dismissed the appeal with costs.

[3] Arising therefrom, the Appellant-Developer has filed an appeal to the Court of Appeal.

Background facts of the case

[4] The Respondents had entered into their respective Sale and Purchase Agreements ("SPAs") pursuant to Schedule H of the Housing Development (Control and Licensing) Regulations 1989") ("HDR 1989") and Housing Development (Control and Licensing) Act 1966") ("HDA 1966") as Purchasers, with the Appellant (as the Developer, Vendor and Owner) for the purchase of parcels in a housing development project known as "Tropicana Metropark Phase 1C" ("the said housing project / housing development"), [see the SPAs at pages 212 - 509 of the

Records of Appeal Parts B & C Volume 2(1) and Volume 2(2) - Enclosures 4 and 5].

[5] Prior to the execution of the SPAs, the Respondents were required to make a booking fee / deposit payment to the Appellant / the Appellant's Stakeholder Solicitors, i.e. Messrs Mah Kamariyah & Philip Koh and Messrs Leonie, Chong & Co. ("the said entities") for the purchase of their respective parcels, [see the Respondents' booking fee / deposit payments at pages 191 - 210 of the of the Records of Appeal Parts B & C Volume 2(1) - Enclosure 4],

[6] Clauses 25(1) and 27(1) of the SPAs for the delivery of vacant possession of parcels and completion of the common facilities had been modified from the statutorily mandated 36 months to 45 months by the Appellant.

[7] The Appellant obtained letters of extensions of time dated 31.10.2013 and 12.08.2014 from the National Housing Department / Kementerian Perumahan dan Kerajaan Tempatan ("KPKT") which contained terms granting an extension of time for the delivery of vacant possession of parcels and completion of the common facilities from 36 months to 45 months ("the said EOTs"). [see the letters on the said EOTs dated 31.10.2013 and 12.08.2014 on pages 511 - 512 of the of the Records of Appeal Parts B & C Volume 2(2) - Enclosure 5] The Appellant contends that these EOT are valid and binding upon the parties, while the Respondents contend that the EOTs are null and void and of no legal effect.

[8] The Appellant obtained the Certificate of Completion and Compliance (Form F) dated 12.12.2017 which was issued by the Principal Submitting Person, Ar Hud Abu Bakar (LAM Registration No.: A/H 67) and issued the Notices of Delivery of Vacant Possession dated 28.12.2017 to the Respondents and

informed the Respondents to take vacant possession of their respective parcels, [see the Certificate of Completion and Compliance dated 12.12.2017 on page 514 of the of the Records of Appeal Parts B & C Volume 2(2) - Enclosure 5] [see the Notices of Delivery Vacant Possession dated 28.12.2017 at pages 516 - 534 of the of the Records of Appeal Parts B & C Volume 2(2) - Enclosure 5],

[9] On 19.01.2022 the Respondents initiated and brought an action in the Sessions Court against the Appellant for the recovery of their respective LAD entitlement pursuant to their rights stemming from the HDR 1989 and HDA 1966. [see the Respondents' Amended Writ of Summons and Amended Statement of Claim both dated 28.03.2022 at pages 25 - 30 and 31 - 48 of the Records of Appeal Part A Volume 1 - Enclosure 3].

[10] On 14.06.2022, the Respondents had filed an application for the determination by the Court of the questions or issues of law or fact filed pursuant to Order 14A / Order 33 Rule 2 of the Rules of Court 2012, containing eleven (11) questions or issues of law or fact, to obtain the reliefs and prayers sought following the Respondents' Amended Writ of Summons and Statement of Claim [Enclosure 16], [seethe sealed Notice of Application dated 14.06.2022 at pages 15 - 24 of the Records of Appeal Part A Volume 1 - Enclosure 3],

[11] After a series of affidavits and the Written Submissions and Submissions In Reply filed by both the Appellant and Respondents, on 21.10.2022 the learned Sessions Court Judge had allowed the Respondents' Order 14A / Order 33 application and awarded cost of RM2,000.00 to the Respondents. [Reference is made to the sealed Order dated 21.10.2022 at pages 97- 100 of the Records of Appeal Part A Volume 1 - Enclosure 3] 14. Thus, the Appellant proceeded to file this appeal in this Honourable

Court on 01.11.2022 against the decision of the Sessions Court in allowing the Respondents' Order 14A / Order 33 application. [Reference is made to the sealed Notice of Appeal dated 01.11.2022 on pages 101 -104 of the Records of Appeal Part A Volume 1 - Enclosure 3],

LAW ON DISPOSAL OF ACTION BY QUESTIONS OF LAW AND / OR PRELIMINARY QUESTIONS

[12] In *Ong Slang Pheng v. Millenium Mall Sdn Bhd and Ors* [2021] 1 LNS 868 the High Court has summarised the law on disposal of action by questions of law under O.14A and/or by preliminary questions under O.33 r.2 in paragraphs [16] to [28] of the judgment reproduced below:

"[16] *The relevant provisions relating to disposal of action by questions of law and / or preliminary question are found in the following parts of the Rules of Court 2012 ("ROC 2012"):*

"O. 14A DISPOSAL OF CASE ON POINT OF LAW

Determination of questions of law or construction (O. 14A r. 1)

1(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."

O.33 rule 2: Time of trial of question or issues

2. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

O.33 rule 5: Dismissal of action after decision of preliminary question

5. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

O.14A Determination of Questions of Law or Construction:

[17] *The ambit of O. 14A has been explained by the appellate courts in various decided cases included those referred to below:*

(1) The Federal Court in Thein Hong Teck & Ors v. Mohd Afrizan bin Husain and another appeal [2012] 1 CLJ 49; [2012] 2 MLJ 299 held as follows:

> *"[47] It is trite law that O. 14A of the Rules of the High Court 1980 may only be resorted to if there is no dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings concludes that the material facts are not in dispute (see Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2008] 2 MLJ 812). Where the issues of fact are interwoven with legal* issues *raised,*

it will be undesirable for the court to split the legal and factual determination for to do so would in effect be to give rulings in vacuo or on a hypothetical ruling, which the court will not do (see State of Bank of India v. Mariani Marketing 1 March [1991], CA Transcript No. 91/0304).

(2) Federal Court in Director of Forests, Sarawak & Anor v. Racha Urud & Ors and other appeals [2017] 5 CLJ 389 quoted with approval the following passage of Malaysian Court Practice:

[35] *On the applicability and the approach to be taken by the court in exercising its powers and discretion under O. 14A, we refer to the commentary on O. 14A appearing in the Malaysian Court Practice (Practitioner Edition), a publication of The Malayan Law Journal at pp. 125-127 which reads as follows:*

[14A.1.3.] Suitable question of law or construction. The question of law or construction must be suitable to be determined without the full trial of the action. The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action. For example see Manganmal Jhamatmal Lalwani v. NE Vickerama [2001] 1 SLR 90 (where the plaintiff made an application for a ruling on the preliminary issue as to whether there was an issue estoppel).

In cases where all the relevant evidence is before the court, and where the point of law depends entirely on the construction of relevant documents in their context and it is not suggested that any further evidence could be available, it would be appropriate for the question to be dealt with under Order 14A rather than to allow it to go for trial. See European Asian Bank AG v. Punjab and Sind Bank [1983] 2 All ER 508 at p 521, GA (construction of letter of credit). For the law as to construction, see Prenn v. Simmonds [1971] 3 All ER 237.

The question of law or construction to be determined by the court under this order should be stated or formulated in clear, careful and precise terms, so that there should be no difficulty or obscurity, still less any ambiguity or fictitious facts, about what is the question that has to be determined: Allen v. Gulf Oil Refining Ltd [1979] 3 All ER 353. There must be no hypothetical or future facts: Summer v. William Henderson & Sons Ltd [1963] 2 All ER 712, CA (no facts were agreed and what the outcome of the evidence was most uncertain). Where the issues of fact are interwoven with the legal issues raised, it will be undesirable for the court to split the legal and factual determination, for to do so would in effect be to give legal rulings in vacuo or on a hypothetical ruling, which the court will not do (see State Bank of India v. Mariani Marketing, 1 March 1991, CA Transcript No. 9/0304).

The issue of law, if it is discernible at all, has to be discernible from the statement of claim and defence. *If there could still be a debate as to whether on slightly different facts a cause of action might or might not exist, an application under O. 14Ais inappropriate. The court should not be required to interpret the statement of claim*

to decide what point of law arises. An application under O. 14A is to decide clear points of law or construction apparent on the pleadings (see Watson & Anor v. Dutton Forshaw Motor Group Ltd & Ors [1998] EWCA 3245, 22 July 1998, CA). (emphasis added)

(3) The Court of Appeal in Dato' Sivanathan a/l Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062; [2016] 3 MLJ 122 explained the scope of O. 14A in the following words:

"[10] It is obvious that the power of the court under this order is discretionary, as clearly evident by the use of the word 'may' therein. The power, in our opinion, is only exercisable where the determination of any such question of law or construction of any document, as the case may be, appears to the court to be suitable without the full trial of the action and will finally determine the entire cause or matter or any claim or issue in such action. This is a required prior condition or a prerequisite which must be fulfilled before this order can be invoked. The court should not, as a matter of course, proceed to determine any such question without first considering the legal prerequisite in this order. In a nutshell, the conditions prescribed in r. 1 are not that can be conveniently avoided or sidestepped....."

[12] ***The Malaysian Court Practice - High Court*** *(Lexis Nexis 2004) at para 14A.1.3 clearly states that the test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court*

proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action (see also BP Malaysia Sdn Bhd v. Zabedah bte Mohamed & Ors [2007] 1 LNS 44; [2007] 8 MLJ 384; [2007] 8 CLJ 245).

[18] *From the provisions of O. 14A and the decided authorities of the appellate courts, the following principles can be gleaned:*

(1) O. 14A is only applicable to determination of questions of law: O. 14A r. 1;

(2) the question of law must be suitable for determination ***without the full trial*** *of the action:* O. *14A r. 1(a);*

(3) such determination of question of law will ***finally*** *determine the* ***entire*** *cause or matter or* ***any*** *claim or issue therein: O. 14 Ar. 1(b);*

(4) the prerequisites in items (1) to (3) above are cumulative prior conditions to be fulfilled before this O. 14A procedure can be invoked: Dato' Sivanathan a/l Shanmugam case (Court of Appeal) (supra);

(5) the word "may" at the beginning of O. *14A r. 1 gives the Court the discretion whether or not to invoke the* O. *14A procedure even if the three prerequisites are fulfilled;*

(6) Where there is a dispute by the parties as to the relevant facts, O. 14A is not applicable: Thein Hong Teckcase (Federal Court)(supra), Director of Forests, Sarawak & Anor v. Racha Urud & Ors and other appeals (Federal Court)(supra); and

(7) O. 14A should not be used to determine questions which are based on hypothetical, ambiguous or fictitious facts: Thein Hong Teck case (Federal Court)(supra), Director of Forests, Sarawak & Anor v. Racha Urud & Ors and other appeals (Federal Court)(supra);

(8) The question of law or construction to be determined by the court under O. 14A should be stated or formulated in clear, careful and precise terms, so that there should be no difficulty or obscurity: Director of Forests, Sarawak & Anor v. Racha Urud & Ors and other appeals (Federal Court)(supra); and

*(9) Where the issues of disputed fact are interwoven with legal issues raised, it will be undesirable for the court to split the legal and factual determination: **Thein Hong Teck** case (Federal Court), Director of Forests, Sarawak & Anor v. Racha Urud & Ors and other appeals (Federal Court).*

[19] *As the wording in O. 14A. r. 1 (a) and r. 1(b) suggests, the primary objective of O. 14Ais to confer upon the Court a discretionary power to finally dispose of the action without a full trial by way of determination on the suitable question(s) of law. Read with O. 34 r. 1(1) of Rules of Court 2012, which also lays down the policy and/or fundamental feature of managing civil cases towards **just, expeditious** and **economical** disposal, the Court in the first stage of an* O. *14A application which has fulfilled the three prerequisites will also have to consider the degree of likelihood that the determination of the question(s) of law would avoid the necessity of a lengthy and protracted full trial. The phrase "or any claim or issue" in subrule 1(b) ofO. 14A cannot be interpreted in isolation and out of context. In*

other words, the determination of a question of law is to be resorted only where it would or is likely to result in substantial saving in time and costs of full trial.

[20] *If the determination of a question of law will finally determine a selected "claim or issue" in the action, the Court still has to consider the effect of the final determination on the selected claim or issue on the remaining claims and issues pleaded in the same action. Where the final determination of the selected claim or issued would render unnecessary the full trial of* ***all or overwhelming majority*** *of the other pleaded claims and issues, the Court should order an O. 14A disposal of the action in line with the primary objective of their expeditious and economical disposal of civil proceedings. However, where the full trial of* ***all or the overwhelming majority of*** *the pleaded claims and issues in the action would still be necessary irrespective of the outcome of the final determination on the selected claim or issue, then it is inappropriate or undesirable to proceed with* O. *14A procedure. In most cases, it is highly probable that a party will appeal against the Court's decision on a question of law determined under* O. *14A procedure. Where the selected claim or issue represents only one of the many or several pleaded claims and issues, an appeal against* O. *14A determination of the selected claim or issue is likely to result in a stay of execution of the court decision and/or stay of trial of the action pending the outcome of the appeal pursuant to the principle decided by the Federal Court in Kosma Palm Oil Mills Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2004] 1 CLJ 239; [2004] 1 MLJ 257. As such, the final determination of the selected claim or issue would in effect delay or stall the disposal of the entire action instead of accomplishing the O. 14A intended objective of expeditious and economical disposal without the necessity of a full trial. In a nutshell, the Court's discretion in ordering O. 14A disposal has to be exercised in the*

factual context of each particular case even if the three prerequisites are fulfilled.

Order 33 Trial of Preliminary Question

[21] *A perusal of the following in O. 33 r. 2 and O. 33 r. 5 does not show the prohibition of trial of preliminary question which involves a factual dispute. O. 33 r. 2 expressly provides that ''The Court may order any question or issue , whether* ***of fact*** *or law or* ***partly of fact and partly of law.....****to be tried before..... the trial of the cause or matter." O. 33 r. 5, which flows from and is related to O. 33 r. 2, provides thus, "If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter* ***substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary,*** *it may dismiss the cause or matter or make such other order or give such judgment therein as may be just."*

[22] *O. 33 rr. 2 and 5 and O. 34 r. 1(1) of the Rules of Court 2012 are complementary to each other in that both are intended to serve the primary objective of facilitating just, expeditious and economical disposal of civil actions. When O. 33 r. 2 and O. 33 r. 5 are read together in light of their primary objective it appears that the following points can be gleaned therefrom:*

(1) Preliminary or separate trial of question under O. 33 r. 2 may be for any one or more the following categories of questions -

(a) question of fact;

(b) question of law; or

(c) question partly of fact and partly of law, i.e. mixed question of fact and law.

[see the express wording in O. 33 r. 2(1)].

(2) Preliminary or separate trial of question under O. 33 r. 2 should be ordered where it appears to the Court that it would facilitate the just, expeditious and economical disposal of the action [O. 33 r. 2 read with O. 34 r. 1(1)];

(3) where it appears to the Court that a decision of a question would substantially dispose of the cause or matter or renders the trial of the cause or matter unnecessary, the Court should order a preliminary or separate trial of the question under O. 33 r. 2 [O. 33 r. 2 read with O. 33 r. 5].

(4) the question or issue for preliminary or separate trial under O. 33 r. 2 is not limited to pleaded issues, as it can be "raised by pleadings or otherwise"; and

(5) the question or issue for separate trial, can be tried before, at or after the trial of the cause or matter (O. 33 r. 2).

[23] *In relation to O. 33 trial of preliminary question, the Plaintiff cited the appellate court's reported judgments, including the following passages:*

(1) Hiap Soon Hong Sdn Bhd v. Leopad Assets Sdn Bhd [2018] 1 LNS 664 (Court of Appeal)

[26] In this respect, we are obliged to note that O. 33 r. 2 and also O. 33 *r. 5 ROC 2012 are intended to save time and unnecessary costs by avoiding the substantial expense of a trial. However, in order for Order 33 to have any efficacy, it is necessary for the judge to ensure, at the outset, that the relevant facts are not disputed...*

[27] Additionally, such agreed facts must deal completely with the issues or questions that are

intended to be raised for disposal under Order 33. In other words, all the material facts necessary for the consideration of the matter must have been proved or admitted for the court to have the jurisdiction to hear the matter under Order 33 ROC 2012.

[28] In the event that the parties are unable to agree to the facts that are necessary for the disposal of the issues or questions, the judge must decline to proceed further and set the matter down for trial. It is now common knowledge that, unlike some years ago, civil suits filed nowadays are disposed of in a trial within a matter of months. This has been achieved largely through the use of efficient case management and the proactive approach of judges to ascertain the issues between the litigants at an early stage. Litigants are also encouraged to conform to reasonable timelines thus ensuring early disposal of disputes.

[29] In this way, the utility of "short cuts" by resort to Order 33 and Order 14A ROC 2012 is now diminished. In any case, such "short cuts" are only useful if they have the effect of disposing of the cause or matter as envisaged by O. 33 r. 5. It will be a waste of time if after hearing the preliminary issues the litigation is not resolved (see Chan Kum Loong v. Hii Sui Eng [1979] 1 LNS 10; [1980] 1 MLJ 313. In the end, it may be more useful and advantageous for parties to frame the same issues for trial. The disputed facts can then be taken at the trial through the examination of the relevant witnesses and the matter resolved fairly quickly. So the argument that

such "short cuts" lead to substantial saving of time has become less persuasive.

(2) Majlis Peguam v. Raja Segaran A/L Krishnan [2004] 4 CLJ 239; [2005] 1 MLJ 15 (Court of Appeal):-

137 First the law. For O. 33 of the Rules to apply the issues in a case should be clear and not riddled with complexities and the facts should not be in dispute. 'Where the issues on point of law to be decided involve the consideration of facts, resort to O. 33 r. 2 is appropriate. It is undesirable to resolve such issues on a purely hypothetical state of facts' - (see Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 1 CLJ Rep 321; [1991] 3 MLJ 474); Arab Malaysian Finance Bhd v. Meridien International Credit Corporation Ltd London [1993] 4 CLJ 307; [1993] 3 MLJ 193).

The Court of Appeal's judgments cited in this paragraph 23 seemed to suggest that O. 33 r. 2 and O. 33 r. 5 procedure should not be resorted to where the question or issue for preliminary or separate trial involved any factual dispute.

[24] *On the surface, there appears to be a contradiction between the abovementioned points in paragraph 22 and the passages of the Court of Appeal's Judgment quoted in paragraph 23 above. However, all judgments are to be read in the context of the factual matrix of the case, as explained by the following decisions of the House of Lords and Privy Council:*

(a) "Every judgment of the Court must be read as governed by the facts of the case": Quinn v. Leatham [1901] A.C. at page 506;

(b) Every case is decided on its own facts and must be read accordingly: per Viscount Simon in Harris v. D.P.P [1952] 1 All ER at page 1050D; and

(c) "All judgment under the common law system must be understood secundum subjectectum materiam" i.e. judges, in pronouncing principles, have in mind the characteristics present in the case, which characteristics may be absent in other cases": per Lord Diplock in Mutual Life & Citizens' Assurance Company Ltd & Another v. Clive Raleigh Evatt [1971] AC 793, at page 802D-F.

Bearing such approach in mind, the ratio decidendi of a judgment is to be extracted from the factual context of the case.

[25] *In Hiap Song Hong case, the Court of Appeal basically followed the dicta of the previous Court of Appeal decision in Majlis Peguam Negara v. Raja Segaran a/l Krishnan [2002] 3 CLJ 370; [2003] 1 MLJ 15 where after citing in support the cases of Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781, [1991] 3 MLJ 474 and Arab Malaysian Finance Bhd v. Meridian International Credit Corporation Ltd London [1993] 4 CLJ 307 [1993] 3 MLJ 193 the Court of Appeal held that for* O. *33 r. 2 RHC 1980 to apply, the issues in a case should be clear and not riddled with complexities and the facts should not be in disputed: see paragraph [22].*

[26] *In Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 1 CLJ Rep 321; [1991] 3 MLJ 474 the facts were rather peculiar. In that case, the High Court at the opening of the trial allowed a party's counsel to argue on two preliminary questions (said to be questions of law) without any O. 33 r. 2 application. The Court of Appeal held as follows:*

"The ambit of O. 33 r. 2 RHC 1980 was discussed by the Court of Appeal in the case of Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337. Delivering the judgment of the Court of Appeal, Mohd Noor Ahmad JCA (as His Lordship then was) held at p. 352:

> ***Order 33 r. 2 of the RHC states that the Court may order any question or issue arising in the cause or matter, whether of fact or law or partly of fact and partly of law,*** *and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. The Federal Court in Palaniappa Chettiar v. Sithambaram Chettiar & Ors [1981] 1 LNS 156; [1982] 1 MLJ 186 agreed with the learned Judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents were upheld, that concludes the whole proceedings and it would be unnecessary to try the other issues. In SI Rajah & Anor v. Dato' Mak Hon Kam & Ors (No. 1) [1994] 1 CLJ 207, Lim Beng Choon J, after considering a large number of authorities on the ambit of* O. *33 r. 2 and its equivalent, stated that before deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations "*

[27] *In the considered view of this Court, the Court of Appeal's judgments in those cases may probably need re-consideration by the appellate court.*

[28] *The points stated in paragraph 22 above regarding the ambit of O. 33 r. 2 and r. 5 found support from and / or are consistent with the following decided authorities which also include the Court of Appeal's decisions:-*

(a) *Lim Beng Choon J's Judgment in S.l. Rajah & Anor v. Dato' Mak Hon Kam & Ors (No. 1) [1994] 1 CLJ 207 which, after reviewing the various decided authorities, summarised the principles on* O. *33 r. 2 as follows:*

> *From the decisions made in all the aforementioned cases cited earlier one thing is clear and that is that unlike the former O. 34 r. 2 of the English Rules of Supreme Court 1965 which is in pari materia with our former rule which had the same numbering as provided in our Rules of the Supreme Court 1957 and which only empowered the Court to try questions of law by way of a special case stated,* ***the present O. 33 r. 2 is wider in terms for it is also applicable to questions of fact or questions partly of fact and partly of law*** *raised by a party to the suit "before, at and after the trial" of the suit. However that may be, in deciding whether to allow the preliminary questions to be raised at the trial the Court must bear in mind the following observations enunciated in the aforementioned cases:*
>
> *(1) As a general rule, the Court will exercise its power under* O. *33 r. 2 to order a preliminary question to be tried if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go on trial as a whole.*
>
> *(2) Notwithstanding the general rule, an order under the said rule should not be made in*

respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit.

(3) Preliminary points of law have been described as too often treacherous short cuts but where it is a trial of so- called preliminary issues of fact, the justification to allow the trial of such issues is even harder to discern.

(4) In any event a preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue - see Allen v. Gulf Oil Refining Ltd. [1980] QB 156.

(b) Court of Appeal In Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu [2003] 4 CLJ 337 at p. 352 held:

"Order 33 r. 2 of the RHC states that the Court may order any question or issue arising in the cause or matter, ***whether of fact or law or partly of fact and partly of law,*** *and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. The Federal Court in Palaniappa Chettiar v. Sithambaram Chettiar & Ors [1981] 1 LNS 156; [1982] 1 MLJ 186 agreed with the learned judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents were upheld, that concludes the whole*

proceedings and it would be unnecessary to try the other issues."

At the same page of the reported judgment, the Court of Appeal also quoted with approval the four observations made by Lim Beng Choon J. in S.I. Rajah & Anor v. Dato' Mak Hon Kam & Ors (No. 1) [1994] 1 CLJ 207, as quoted in subparagraph (aO above. After having quoted with approval the four observations of Lim Beng Choon J., the Court of Appeal added:

"Those are the applicable principles to an O. 14A application and to the alternative application made pursuant to O. 33 r. 2. However, the outcome of their applications will depend very much on the facts of each case."

(c) In Daud Arshad & Ors v. FELCRA BHD [2019] 9 CLJ 443 the Court of Appeal, in a judgment delivered by Tengku Maimun JCA (now CJ), quoted and approved the statement of principle in Karen Isabel Wilfed v. Dyana Shila Vasanthan [2014] AME J0185; [2014] 4 CLJ 737 that notwithstanding a delaying application the pertinent and crucial factor to consider is whether the preliminary issue will result in a substantial saving of time and expenditure: see paragraphs [4] and [23].

(d) In Lim Thiam Huat & Anor v. MBF Holdings Bhd & Anor and other appeals [2018] 1 LNS 678 the Court of Appeal, in a judgment delivered by Abdul Rahman Sebli JCA (now FCJ), specifically recognised that O. 33 r. 2 can apply to ***preliminary question of fact*** *if the four observations of Lim Beng Choon J. in S.I. Rajah v. Dato'*

Mak Hon Kam case are followed: see paragraph [17] to [20].

A closer examination of the provisions in O. 33 r. 2 supports the proposition that the Court of Appeal's decisions quoted in this paragraph 28 regarding the applicability of O. 33 *r. 2 to preliminary question of fact are more in line with the express wording of* O. 33 *r. 2."*

Nature of the questions posed in our present case

[13] In pour present case the proposed questions of law posed at the Sessions Court were expressed in the national language. As neither party has done a translation into the English language, this Court will use the same wording of the proposed questions of law in the national language as was used in the Sessions Court.

[14] The questions posed in the Sessions Court and the nature of the questions, as held by this Court are as stated below.

(a) Sama ada pengutipan bayaran tempahan ("booking") / simpanan ("deposit") oleh Defendan daripada Plaintif-Plaintif sebelum pelaksanaan Perjanjian Jual Beli ("PJB") merupakan amalan dagangan dan praktis industri yang sah disisi undang- undang sedia ada iaitu PeraturanPeraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 ("Housing Development (Control and Licensing) Regulations 1989") ("HDR 1989") dan Akta Pemajuan Perumahan (Kawalan dan Perlesenan) 1966 ("Housing Development (Control and Licensing) Act 1966") ("HDA 1966").

Decision of this Court: This is a question of law.

(b) Sama ada keputusan Mahkamah Persekutuan dalam *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor and Other Appeals* [2021] 2 MLJ 60 ("PJD Regency") adalah retrospektif memandangkan prinsip dan keputusan undang-undang relevan kes tersebut boleh diguna pakai dalam guaman ini.

Decision of this Court: This is a question of law.

(c) Sama ada keputusan Mahkamah Persekutuan dalam Ang *Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and Other Appeals* [2020] 1 MLJ 281 ("Ang Ming Lee") adalah retrospektif yang Peraturan 11(3) HDR 1989 adalah ultra vires HDA 1966 memandangkan terdapat beberapa otoriti / kes seterusnya yang telah memutuskan bahawa kes tersebut adalah bersifat retrospektif dan keputusan undang-undang relevan kes tersebut boleh diguna pakai dalam guaman ini.

Decision of this Court: This is a question of law.

(d) Sama ada, tempoh penyiapan dalam klausa-klausa 25(1) dan 27(1) PJB Plaintif-Plaintif boleh diubah dengan suatu lanjutan masa ("lanjutan masa tersebut") bertarikh 31.10.2013 dan 12.08.2014 yang diberikan menurut Peraturan 11(3) HDR 1989 (di mana lanjutan masa tersebut ditandatangani oleh Kugan Gopalan (bagi surat lanjutan masa bertarikh 31.10.2013) dan Mohd Zulkifli Bin Hassan (bagi surat lanjutan masa bertarikh 12.08.2014) kedua-dua sebagai pegawai bagi pihak Pengawal Perumahan) memandangkan peraturan tersebut kini telah diisytiharkan ultra vires?

Decision of this Court: This is a question of law.

(e) Sama ada tempoh penyiapan dalam klausa-klausa 25(1) dan 27(1) PJB-PJB Plaintif-Plaintif yang telah diubah suai mesti dibaca dalam versi asal menurut Jadual H HDR 1989.

Decision of this Court: This is a question of law.

(f) Sama ada pengetahuan dan persetujuan Plaintif-Plaintif adalah relevan dan materia! dalam guaman ini, memandangkan transaksi jual beli termasuk PJB Plaintif-Plaintif tersebut dikawal dan adalah menurut perundangan sosial iaitu HDR 1989 dan HDA 1966 (yang tidak dipatuhi oleh Defendan).

Decision of this Court: This is a question of law.

(g) Sama ada surat penyelesaian di antara Plaintif Ke-7 dan Defendan boleh berfungsi sebagai satu pengabaian dan / atau estopel terhadap peruntukkan undang-undang, iaitu HDA 1966 dan HDR 1989.

Decision of this Court: This is a question of law.

(h) Sama ada tindakan yang dibawa oleh Plaintif-Plaintif ini melebihi tempoh had masa untuk suatu tuntutan LAD yang terakru pada penyerahan milikan kosong dan penyiapan kemudahan bersama.

Decision of this Court: This is a question of law.

(i) Sama ada tuntutan Plaintif-Plaintif dihadkan oleh doktrin laches kerana terdapat kelewatan yang tidak munasabah oleh Plaintif-Plaintif dalam mengambil tindakan guaman ini.

Decision of this Court: This question involves 2 parts, namely (1) sama ada doktrin laches terpakai kepada tuntutan pembeli di

bawah Akta HAD 1966 [or, in English, whether the doctrine of laches applies to purchasers' claims under the Housing Development (Control and Licensing Act) 1966]; dan (2) jika ya, sama ada tuntutan Plaintif-Plaintif dihadkan oleh doktrin laches kerana terdapat kelewatan yang tidak munasabah oleh Plaintif-Plaintif dalam mengambil tindakan guaman ini or, in English, if the answer is in the affirmative, whether the Plaintiffs' claims here are barred by laches due to unreasonable delay on the part of the Plaintiffs in commencing the present suit]. Part (1) is a question of law, and Part (2) is a question of mixed law and facts.

(j) Sama ada terdapat pengayaan yang tidak adil oleh Plaintif-Plaintif dan sama ada pengayaan yang tidak adil boleh beroperasi terhadap perundangan sosial, iaitu HDA 1966 dan HDR 1989. '

Decision of this Court: This question involves 2 parts, namely (1) sama ada prinsip terhadap pengayaan yang tidak adil boleh beroperasi terhadap tuntutan pembeli di bawah Akta HAD 1966 dan HDR 1989; [or, in English, whether the principle against unjust enrichment can operate against a social legislation] dan (2) jika ya, sama ada terdapat pengayaan yang tidak adil oleh Plaintif-Plaintif [or, in English, if the answer is in the affirmative, whether the was any unjust enrichment enjoyed by the Plaintiffs here]. Part (1) is a question of law, and Part (2) is a question of mixed law and facts.

(k) Sama ada Plaintif-Plaintif mempunyai *locus standi* untuk memulakan, mengekalkan dan memulakan tindakan ini sebagai tindakan wakil, dalam kapasiti peribadi mereka dan sebagai wakil kepada kesemua tiga belas (13) Plaintif-Plaintif.

Decision of this Court: This is a question of law.

[15] The next broad question is:

> **Whether the questions posed are suitable for disposal under O.14A and/or O.33 r.2 of Rules of Court 2012**
>
> Sessions Court's decision: Yes.
>
> Decision of this Court: This Court affirms the Sessions Court's decision on this question of law and procedure.

[16] This is clearly allowed for by the express provisions of the ROC 2012:

> ***"Determination of questions of law or construction (O. 14A, r. 1)***
> *1.(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.*
>
> ***Time of trial of questions or issues (O. 33, r. 2)***
>
> *2. The Court may order* ***any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law,*** *and whether raised by the pleadings or otherwise,* ***to be tried before,*** *at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.*
>
> ***Dismissal of action after decision of preliminary issue (O. 33, r.5)***

5. If it appears to the Court that the decision of ***any question or issue*** *arising in a cause or matter and tried separately from the cause or matter* ***substantially disposes of*** *the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just. "*

[17] See also the judgment of the High Court in *Ong Siang Pheng v. Millenium Mall Sdn Bhd* [2021] 1 LNS 868, reproduced in paragraph 12 above, which has discussed the law and referred to various appellate court's decisions on O.14A and O.33 r.2.

[18] The questions posed in this case fulfils the criteria for O.14A disposal because:

(a) Of the eleven (11) proposed questions, nine (9) of them are questions of law and the remaining two (2) questions have sub-questions of law;

(b) The only two (2) sub-questions of fact are depending on the outcome of their corresponding sub-questions of law, and these sub-questions may not be necessary for full trial if they are rendered irrelevant by the outcomes of the decisions on their corresponding sub-questions of law;

(c) the final determination of the questions of law would render unnecessary the full trial of **all or overwhelming majority** of the other pleaded claims and issues;

(d) an O. 14A disposal of the action here is in line with the primary objective of expeditious and economical disposal of civil proceedings;

(e) There is a very high degree of likelihood that the determination of the questions of law would avoid the

necessity of a lengthy and protracted full trial in our present case involving 13 plaintiffs; and

(f) the determination of the questions of law would or is likely to result in substantial saving in time and costs of full trial.

[19] Further or alternatively, the questions posed in this case fulfils the criteria for O.33 r. 2 disposal because:

(g) Of the eleven (11) proposed questions, nine (9) of them are questions of law and the remaining two (2) questions have sub-questions of law;

(h) The only two (2) sub-questions of fact are depending on the outcome of their corresponding sub-questions of law, and these sub-questions may not be necessary for full trial if they are rendered irrelevant by the outcomes of the decisions on their corresponding sub-questions of law;

(i) the final determination of the questions of law would render unnecessary the full trial of **all or overwhelming majority** of the other pleaded claims and issues;

(j) Even if it were necessary for trial of the two (2) sub-questions of fact after the determination of the questions of law, the trial of the two (2) sub-questions of fact would be relatively very much shorter that the wholesale full trial of all the questions and issues pleaded in the present case;

(k) an O. 33 r.2 disposal of the action here is in line with the primary objective of expeditious and economical disposal of civil proceedings;

(l) There is a very high degree of likelihood that the determination of the questions of law would avoid the

necessity of a lengthy and protracted full trial in our present case involving 13 plaintiffs; and

(m) the determination of the preliminary questions of law would or is likely to result in substantial saving in time and costs of full trial.

Answers to the questions of law posed

[20] The questions posed in the Sessions Court and the nature of the questions, as held by this Court are as stated below:

(a) Sama ada penqutipan bayaran tempahan ("booking") / simpanan ("deposit") oleh Defendan daripada Plaintif-Plaintif sebelum pelaksanaan Perjanjian Jual Beli ("PJB") merupakan amalan daqanqan dan praktis industri yang sah disisi undanq- undanq sedia ada iaitu PeraturanPeraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 ("Housing Development (Control and Licensing) Regulations 1989") ("HDR 1989") dan Akta Pemajuan Perumahan (Kawalan dan Perlesenan) 1966 ("Housing Development (Control and Licensing) Act 1966") ("HDA 1966").

Decision of the Sessions Court: Collection of deposit or booking fee before the date of the Sale and Purchase Agreement is contrary to the statutory provisions on HDA 1966 and HDR 1989.

Decision of this Court: This Court affirms the Sessions Court's decision on this question of law. The legal consequence of the developer's collection of deposit or booking fee from purchasers is that the period for completion of common facilities and for delivery of vacant possessions shall be computed from the date of payment of deposit or booking fee: see the Federal Court's decision in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli*

Rumah & Anor and other appeal [2021] 2 CLJ 441; [2021] 2 MLJ 60, wherein the apex court has held that the date of delivery of vacant possession should commence from the date of the payment of the booking fee or deposit, as opposed to the date of the SPA.

(b) Sama ada keputusan Mahkamah Persekutuan dalam *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor and Other Appeals* [2021] 2 MLJ 60 ("PJD Regency") adalah retrospektif memandangkan prinsip dan keputusan undanq-undang relevan kes tersebut boleh diguna pakai dalam quaman ini.

Decision of the Sessions Court: The Federal Court's decision in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor and Other Appeals* [2021] 2 MLJ 60 operates retrospectively and is applicable to our present case.

Decision of this Court: This Court affirms the Sessions Court's decision on this question of law. This retrospective effect of the Federal Court's decision on point of law has been affirmed by the Court of Appeal in *Vinesh Naidu v. Prema Bonanza Sdn Bhd* [2023] 1 LNS 162.

(c) Sama ada keputusan Mahkamah Persekutuan dalam *Anq Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and Other Appeals* [2020] 1 MLJ 281 ("Anq Ming Lee") adalah retrospektif yang Peraturan 11(3) HDR 1989 adalah ultra vires HDA 1966 memandangkan terdapat beberapa otoriti / kes seterusnya yang telah memutuskan bahawa kes tersebut adalah bersifat retrospektif dan keputusan undang-undang relevan kes tersebut boleh diguna pakai dalam guaman ini.

Decision of the Sessions Court: The Federal Court's decision in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and Other Appeals* [2020] 1 MLJ 281 operates retrospectively and Regulation 11(3) of HDR 1989 is *ultra vires* the HAD 1966.

Decision of this Court: This Court affirms the Sessions Court's decision on this question of law. This nullification of the Regulation 11 (3) also applies retrospectively to the present case. See the Court of Appeal's decision in *Vinesh Naidu v. Prema Bonanza Sdn Bhd* [2023] 1 LNS 162 and in *UE E&C Sanjia (M) Sdn Bhd v. Lee Jeng Yuh & Anor* [2021] 10 CLJ 271; [2021] 6 MLJ 864.

(d) Sama ada, tempoh penyiapan dalam klausa-klausa 25(1) dan 27(1) PJB Plaintif-Plaintif boleh diubah dengan suatu lanjutan masa ("lanjutan masa tersebut") bertarikh 31.10.2013 dan 12.08.2014 yang diberikan menurut Peraturan 11(3) HDR 1989 (di mana lanjutan masa tersebut ditandatanqani oleh Kugan Gopalan (bagi surat lanjutan masa bertarikh 31.10.2013) dan Mohd Zulkifli Bin Hassan (bagi surat lanjutan masa bertarikh 12.08.2014) kedua-dua sebaqai pegawai bagi pihak Pengawal Perumahan) memandangkan peraturan tersebut kini telah diisytiharkan ultra vires?

Decision of the Sessions Court: The answer is in the negative. Clauses 25(1) and 27(1) of the Sale and Purchase Agreement, which incorporated the Controller of Buildings' purported extension of time, are invalid. The period for completion dan delivery of vacant possession is 36 months as provided in the statutory form of sale and purchase agreement, and not 48 months which is purportedly stated in clauses 25(1) and 27(1) of the Sale and Purchase Agreements signed here.

Decision of this Court: This Court affirms the Sessions Court's decision on this question of law. The Federal Court decision in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor dan other appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281 is to the effect that the modification or alteration of any provision in the Schedule H (the statutory sale and purchase agreement) approved by the Controller of Housing who exercised his purported power under Regulation 11(3) of the Regulation is *ultra vires* the Housing Development (Control and Licensing) Act 1966. See the Federal Court's decision in PJD Regency case *(supra)* and the Court of Appeal's decisions in *Vinesh Naidu v. Prema Bonanza Sdn Bhd* [2023] 1 LNS 162 and in *UE E&C Sanjia (M) Sdn Bhd v. Lee Jeng Yuh & Anor* [2021] 10 CLJ 271; [2021] 6 MLJ 864.

(e) Sama ada tempoh penyiapan dalam klausa-klausa 25(1) dan 27(1) PJB-PJB Plaintif-Plaintif yang telah diubah suai mesti dibaca dalam versi asal menurut Jadual H HDR 1989.

Decision of the Sessions Court: Yes.

Decision of this Court: This Court affirms the Sessions Court's decision on this question of law. Clauses 25(1) and 27(1) of the signed Sale and Purchase Agreements, insofar as they contravene the statutory provisions, are void to that extent, with the result that the lawful and effective period for completion and delivery of vacant possession is 36 months from the date of payment of deposit. See the Federal Court's decision in **Ang Min Lee** case; the Court of Appeal's decison in *Vinesh Naidu v. Prema Bonanza Sdn Bhd* [2023] 1 LNS 162.

(f) Sama ada penqetahuan dan persetujuan Plaintif-Plaintif adalah relevan dan material dalam quaman ini, memandangkan transaksi jual beli termasuk PJB Plaintif-

Plaintif tersebut dikawal dan adalah menurut perundangan sosial iaitu HDR 1989 dan HDA 1966 (yang tidak dipatuhi oleh Defendan).

Decision of the Sessions Court: Negative.

Decision of this Court: This Court affirms the Sessions Court's decision on this question of law. It has decided by the courts that there can be no estoppel against the statute in the context of HDD 1966 and HDR 1989 provisions. The purchasers' knowledge and agreement to sign terms which contravene statutory provisions does not estop or bar them from suing the developer based on the statutory schedule H agreement terms. In *UE E&C Sanjia (M) Sdn Bhd v. Lee Jeng Yuh & Anor* [2021] 10 CLJ 271; [2021] 6 MLJ 864, the Court of Appeal court disagreed with the appellant's argument that the extension as 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. According to the Court of Appeal, the decision in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281 which was delivered on 26 November 2019, was applicable retrospectively to the facts in the case before the Court of Appeal. The issue of whether the approval was obtained before or after the SPAs was executed was not relevant. In a subsequent Court of Appeal's decision in *Vinesh Naidu v. Prema Bonanza Sdn Bhd* [2023] 1 LNS 162 the Court of Appeal also held to the same effect.

(g) Sama ada surat penyelesaian di antara Plaintif Ke-7 dan Defendan boleh berfunqsi sebaqai satu penqabaian dan / atau estopel terhadap peruntukkan undanq-undanq, iaitu HDA 1966 dan HDR 1989.

Decision of the Sessions Court: No.

Decision of this Court: The Court of Appel in *Oxbridge Height Sd Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 251, [2014] MLJU 1932 upheld the validity of a settlement agreement of LAD between the developer and purchaser, while the Court of Appeal in *Prema Bonanza v. Lam Su See* (Civil Appeals No.: W02(IM)(NCvC)-624-03/2021 & W-02(IM)(NCvC)-625-03/2021) invalidated a settlement agreement on LAD between the developer and purchaser. Faced with the conflicting decisions of the Court of Appeal, this Court cannot fault the Sessions Court for choosing to follow either one of these Court of Appeal decisions until and unless the Federal Court has made a final decision on this question of law. As at today, the Federal Court has not decided on this question of law of public importance, and therefore there is no sufficient justification for this Court to interfere with the Sessions Court's decision on this question of law,

(h) Sama ada tindakan yang dibawa oleh Plaintif-Plaintif ini melebihi tempoh had masa untuk suatu tuntutan LAD yang terakru pada penyerahan milikan kosong dan penyiapan kemudahan bersama.

Decision of the Sessions Court: No.

Decision of this Court: This Court affirms the Sessions Court's decision on this question of law except for the declaratory relief in sub-paragraph 48(a) of the Amended Statement of Claim. The declaration of invalidity of clauses 25(1) and 27(1) was filed more than 6 years after the date of the signing of the Sale and Purchase Agreement which incorporated the said clauses, and is therefore outside the limitation period, However, cause of action for the declaration of the purchasers' entitlement to LAD [subparagraph 48(b)] and the claim for RM612,082.52 as LAD [subparagraph 48(d)] accrued from the date of delivery or deemed delivery of vacant possession (on or after 28.12.2017):

see clause 26(3) of the Schedule H of sale and purchase agreement (HDR 1989) ["*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.*"]- clause 26 of the singed Sale and Purchase Agreements here; Notice of Delivery of Vacant Possession at pages 516 - 536 of Appeal Records.

In the premises the Plaintiffs' causes of action to claim for recovery of LADs here accrued on or after 28.12.2017, and the action herein is not barred by Limitation Act. Nevertheless, the deletion of prayer (a) from paragraph 48 of the Amended Statement of Claim does not affect the grant of other prayers in sub-paragraphs 48(b) to (g) of the Amended Statement of Claim.

In the Court of Appeal's decison in *Vinesh Naidu v. Prema Bonanza Sdn Bhd* [2023] 1 LNS 162 it was held that the purchasers do not have to challenge the validity of the Controller's extension of time by commencing a judicial review application. The Court of Appeal held that an ordinary suit such as writ of summons is a proper mode for the purchasers to sue for recovery of liquidated damages under Schedule H agreements and in the writ action the purchasers can raise question as to the validity or otherwise of the Controller's extension of time.

(i) <u>sama ada doktrin laches terpakai kepada tuntutan pembeli di bawah Akta HAD 1966.</u>

<u>Decision of the Sessions Court in</u>: No.

<u>Decision of this Court</u>: This Court affirms the Sessions Court's decision on this question of law. Laches should only be applied to equitable reliefs in certain appropriate situations, and it should not be applied to contractual claims which are not based on equity.

More so, where the purchasers' claims for liquidated damages under the statutory sale and purchase agreement are based on a social legislation, there is no room for the application of doctrine of laches to defeat or deny the purchasers' claims for liquidated damages.

(j) Sama prinsip terhadap penqayaan yang tidak adil boleh beroperasi terhadap perundangan sosial, iaitu HDA 1966 dan HDR 1989.

Decision of the Sessions Court: No.

Decision of this Court: This Court affirms the Sessions Court's decision on this question of law. The equitable principle against unjust enrichment cannot operate to defeat or diminish an express statutory remedy. To allow the application of equitable principle against unjust enrichment to defeat or diminish an express statutory remedy is tantamount to re-writing the statute itself.

(k) Sama ada Plaintif-Plaintif mempunyai *locus standi* untuk memulakan, mengekalkan dan memulakan tindakan ini sebagai tindakan wakil, dalam kapasiti peribadi mereka dan sebagai wakil kepada kesemua tiga belas (13) Plaintif-Plaintif.

Decision of the Sessions Court: Yes.

Decision of this Court: This Court affirms the Sessions Court's decision on this question of law. See also O.15 r. 12. Representative actions in the form of the purchasers' claims for liquidated damages against developers or in the form of property owners against developer or property manager have been well-established and judicially recognised in various decided cases of the courts. Examples of such representative actions include *Maju Puncakbumi Sdn Bhd v. Chan Han Keong* (on behalf of

himself and 137 owners) [2019] 1 LNS 1703 (Court of Appeal); *Cheong Kok Khuen and Ors v. Kolektra Recreation Sdn Bhd* [2010] MLJU 1236 (High Court); *Voon Keng & Ors v. Sykt. Mazwina Development Sdn Bhd* [1990] 3 CLJ (Rep.) 329 (High Court); *Toh Shu Hua & 122 Ors v. Wawasan Rajawali Sdn Bhd & Anor* [2023] 2 CLJ 310 (High Court); etc.

Whether any balance question of fact to be tried

[21] The answers to the questions of law have rendered it academic and/or unnecessary for trial of the two sub-questions of mixed law and facts under Part 2 of Issue (i) and Part 2 of Issue (j).

[22] As such, the Sessions Court was correct in giving judgment based on the disposal of the questions of law without ordering for trial of any balance question of mixed fact and law.

Conclusion

[23] In conclusion, this Court has dismissed the Appellant / Defendant's appeal, subject to alteration of the Sessions Court's Order dated 21.10.2022 by deletion of the declaratory order in item (a) thereof and a minor amendment to item 2(f) thereof.

[24] Item (a) of the Sessions Court's Order dated 21.10.2022 was deleted because it is unnecessary for the court to make a declaratory order when dealing with the purchasers' claims in writ action for liquidated damages under the Schedule H statutory agreements and also because the relief of declaration to impugn an administrative decision may probably be time-barred, whereas the purchasers' monetary claims for liquidated damages accrued from the delivery or deemed delivery of vacant possession is not time- barred.

[25] Item 2(f) of the Order dated 21.10.2022 was amended by inserting the words *"(iaitu 11.01.2018)"* after the phrase *"tarikh*

kausa tindakan terakru" so that there would be no ambiguity or complication in enforcing or computing the amount of interest based on the Order dated 21.10.2022.

[26] In dismissing the appeal with costs, this Court also held that items 1, 2(b) to 3 of the Sessions Court's Order dated 21.10.2022 are affirmed, with the slight amendment to item 2(f) as stated above.

[27] This Court has also ordered that the costs of this appeal, assessed at an amount of RM4,000 and subject to allocator, shall be paid by the Appellant/Defendant to the Respondents/Plaintiffs.

Dated: 31 MARCH 2023

(TEE GEOK HOCK)
JUDGE
HIGH COURT OF MALAYA AT SHAH ALAM
(NCvC 10)

Counsel:

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