Hedgeford Sdn Bhd
v
Lynda Quah May Lu & Anor

High Court, Kuala Lumpur – Application for Judicial Review No. WA-25-8-01/2017
Faizah Jamaludin J

April 30, 2019

Administrative law *– Remedies – Certiorari – Application to quash decision of second respondent allowing first respondent's claim for liquidated damages for late delivery of vacant possession and common facilities – Whether first respondent's claim ought to have been dismissed for failure by first respondent to attend hearings without providing good reason for absence – Whether first respondent may be represented by third party at hearings before second respondent – Whether liquidated damages ought to be calculated from date of sale and purchase agreement instead of date of payment of booking fee – Whether lack of procedural fairness and/or breach of natural justice in second respondent's decision making process – Housing Development (Control and Licensing) Act 1966, s 16U – Housing Development (Control and Licensing) Regulations 1989, Schedule H – Housing Development (Tribunal for Homebuyer Claims) Regulations 2002, regs 22(1), (2), 27*

The applicant is the developer of the Hedgeford Residences ("the building"). On July 19, 2012 the first respondent entered into a sale and purchase agreement ("the SPA") with the applicant for the purchase of an apartment unit in the said building. The SPA which was a form of contract in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 specifically provided inter alia that vacant possession of the property was to be delivered within 36 months from the date of the SPA; that the common facilities in the said building are to be completed with the same period; and that in the event of delay in delivery of vacant possession, the applicant is liable to pay liquidated damages ("LAD") at 10% of the purchase price from the expiry date of delivery of vacant possession until vacant possession is handed over. As regards late completion of the common facilities, it was specifically provided that LAD is payable at 10% per annum of the last 20% of the purchase price.

The applicant failed to deliver vacant possession within the stipulated time. It then paid LAD for the late delivery to the first applicant who accepted the same in full settlement of her claim and a settlement agreement to that effect was entered into between the parties. LAD was however not paid for the late completion of the common facilities. The first applicant subsequently filed a claim with the second respondent ("the tribunal") for the full amount of LAD.

The claim was allowed in part after setting off the amount already paid to the first applicant.

The applicant sought a review of the tribunal's award on the grounds inter alia that the applicant had not attended the proceedings before the tribunal in person but was instead represented by a third party. In this regard, the applicant submitted that under the Housing Development (Control and Licensing) Act 1966 ("the HDA") and except for the situations as provided for under s 16U of the HDA, the parties to the claim before the tribunal, have to appear in person. It was further also submitted that the tribunal had erred in allowing the claim for LAD based on the date of payment of deposit instead of the date of the SPA; that the tribunal had erred in failing to take into account that the claim was in breach of the settlement agreement that had been entered into between the parties; and that there had been a breach of natural justice in that it was never given the opportunity to present its case and/or to reply to the first applicant's claim.

Issues

1. Can a claimant be represented by a third party at hearings before the tribunal.

2. Whether the tribunal ought to have dismissed the first applicant's claim for non-appearance at the hearings.

3. Whether the tribunal had erred in law in allowing the claim for LAD from the date of payment of the booking fee instead of the date of the SPA.

4. Whether the applicant had been denied the right to be heard.

Held, granting order of certiorari to quash the whole of the award with no order as to costs; prayer for injunction to restrain first applicant from claiming LAD for late delivery of vacant possession and common facilities, dismissed

1. (a) The parties to a claim before a tribunal are the homebuyer as defined under s 16A of the HDA i.e. the claimant and the housing developer who is the respondent. It is only in cases where complex issues of law are involved and where a party "will suffer severe financial hardship", that a party may be represented by an advocate and solicitor pursuant to s 16U of the HDA. As was laid down in *Datuk Haji Mohammad Tufail bin Mahmud & 4 Ors v Dato Ting Check Sii (and Another Appeal)* [2009] 5 AMR 281 the right to be represented by a counsel of one's choice is conditional upon the laws regulating it. *[see p 534 para 22 - p 536 para 28]*

   (b) The tribunal cannot on its own motion allow a homebuyer to be represented by a third party who is not an advocate and solicitor. In this regard, s 16E of the HDA specifically provides that the tribunal can only

adopt procedures it thinks fit and proper subject to the provisions of the HDA and any regulations made thereunder. In the circumstances, the tribunal's decision to allow the third party to represent the first applicant at the hearings before it is procedurally improper and goes against the purpose and intent of the setting up of the tribunal and the natural justice principle of *nemo judex in sua causa*. *[see p 536 para 32; p 538 paras 38-40]*

2. It is clear from reg 22 of the Housing Development (Tribunal for Homebuyer Claims) Regulations 2002 ("the 2002 Regulations") that the legislative intent of Parliament is that in the event of a claimant not appearing at the hearing, the tribunal must either dismiss the claimant's claim or allow the respondent's claim if any. In the premises and pursuant to reg 22(1) and (2) of the 2002 Regulations, the tribunal did not have the option to keep on adjourning the hearing as it had done, until the first respondent decided to attend the same. Regulation 22(1) and (2) of the 2002 Regulations must be interpreted strictly and take precedence over the general provision in reg 27. The tribunal's purported exercise of its powers to allow the first respondent to be represented by a third party and to adjourn the hearings due to the first claimant's absence, is ultra vires the HDA. *[see p 540 para 46 - p 542 para 54]*

3. The tribunal's finding that the date of payment of the booking fee is the date of the sale would mean that there exists a binding contract for the sale and purchase of the property between the parties at the date of payment of the booking fee. If that is the case, then in the event of a purchaser deciding to not execute a formal contract in the form of contract in Schedule H, the purchaser would then be in breach of the sale and purchase agreement since the agreement would already have come into being upon payment of the booking fee thus rendering the purchaser liable to the developer for any loss or damage suffered by the developer instead of merely forfeiting the booking fee. Such an outcome could not have been the legislative intent of the HDA. Accordingly, the tribunal had erred in law in calculating the LAD from the date of the booking fee instead of from the date of the SPA. *[see p 546 paras 71-72]*

4. The applicant had a legitimate expectation to be allowed to address the tribunal during the hearing. By disallowing the applicant to do so, the tribunal had thereby acted unfairly and had committed a breach of natural justice. Additionally, it was procedurally improper and irrational for the tribunal to have made its decision in this instance, based on its earlier decision in a third party's claim in another case. *[see p 547 para 78 - p 548 para 81]*

Cases referred to by the court

ABT Construction Sdn Bhd & Anor v Tribunal Tuntutan Pembeli Rumah Sdn Bhd & Ors [2013] 9 MLJ 193; [2013] 8 CLJ 1020 *(ref)*
Amalgamated Society of Engineers v Adelaide Steamship Co Ltd 28 CLR 129 *(ref)*
Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 *(ref)*
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL *(ref)*
Datuk Haji Mohammad Tufail bin Mahmud & 4 Ors v Dato Ting Check Sii (and Another Appeal) [2009] 5 AMR 281; [2009] 4 MLJ 165; [2009] 4 CLJ 449, FC *(ref)*
Hoo See Sen & Anor v Public Bank Bhd [1988] 2 MLJ 170, SC *(dist)*
Kekatong Sdn Bhd v Bank Bumiputera (M) Sdn Bhd [1998] 2 AMR 1769; [1998] 2 MLJ 440; [1998] 2 CLJ 266, CA *(ref)*
Lembaman Development Sdn Bhd v Ooi Lai Yin & Anor (and 2 Other Suits) [2015] AMEJ 593; [2016] 7 MLJ 261; [2015] 1 LNS 301, HC *(ref)*
Lim Eh Fah & 4 Ors v Seri Maju Padu (dituntut sebagai sebuah firma) [2002] 4 AMR 4491; [2002] MLJU 300; [2002] 4 CLJ 37, HC *(ref)*
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 3 AMR 725; [2006] 4 MLJ 113; [2006] 3 CLJ 177, FC *(ref)*
Ng Hee Thoong & Anor v Public Bank Berhad [1995] 1 AMR 622; [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA *(ref)*
Pakas Rao a/l Applanaidoo & 3 Ors v Pendaftar Pertubuhan Malaysia & 3 Ors [2015] AMEJ 1150; [2015] 5 MLJ 500; [2015] 8 CLJ 521, CA *(ref)*
Perantara Properties Sdn Bhd v JMC – Kelana Square & Anor [2016] 5 CLJ 367, CA *(ref)*
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487; [1988] 2 CLJ (Rep) 390 *(ref)*
Tay Choon & Ors v Jeet Kaur [1972] 1 MLJ 216; [1972] 1 LNS 151, HC *(ref)*
Telekom Malaysia Bhd v Tribunal Pengguna & Anor [2007] 2 AMR 148; [2007] 1 MLJ 626; [2007] 1 CLJ 300 *(ref)*
Westcourt Corporation Sdn Bhd v Tribunal Tuntutan Pembeli Rumah [2004] 6 AMR 381; [2006] 1 MLJ 339; [2004] 4 CLJ 203, FC *(ref)*

Legislation referred to by the court

Malaysia
Housing Development (Control and Licensing) Act 1966, ss 3, 16A, 16AE, 16AI, 16L, 16N, 16N(2), (3), 16U, U(2), U(3), 24, 160, 160(1), Part VI
Housing Development (Control and Licensing) (Amendment) Act 2002, ss 16A to 16AI, 25, Part VI
Housing Development (Control and Licensing) Regulations 1989, s 11(1), Schedule H, clauses 25, 29
Housing Development (Tribunal for Homebuyer Claims) Regulations 2002, regs 8, 22, 22(1), (2), (3), 27
Interpretation Acts 1948 and 1967, s 17A

Legal Profession Act 1976
National Land Code 1965, s 431(1)
Rules of Court 2012, Order 53
Subordinate Court Rules 1950

Justin TY Voon and *Chiam Jin Yann* (Justin Voon Chooi & Wing) for applicants
Aarthi S Jeyarajah (Shearn Delamore & Co) for respondents
K Roshan, SFC (AG's Chambers) as amicus curiae

Judgment received: May 14, 2019

Faizah Jamaludin J

A. Introduction

[1] This is an application for judicial review brought by the applicant under Order 53 of the Rules of Court 2012 for:

(i) an order of certiorari to quash all and/or the whole award given by the President of the Tribunal for Homebuyer Claims ("tribunal") on December 20, 2016 allowing the claims of the first respondent ("purchaser") for liquidated damages for late delivery of vacant possession and common facilities in claim No. TTPR/W/0711/16 filed at the tribunal ("award"); and

(ii) the purchaser to be injuncted and/or prevented from bringing any claim in the tribunal in respect of liquidated damages against the applicant due to the late delivery of vacant possession and common facilities.

[2] For the reasons stated herein, I allowed the applicant's claim in Prayer 1 and granted an order of certiorari to quash the whole award granted by the tribunal to the purchaser. Prayer 2 was dismissed. I did not grant an injunction to restrain the purchaser from bringing any claim against the applicant in respect of liquidated damages due to the late delivery of vacant possession and common facilities.

B. Background facts

[3] The applicant is the developer of the apartment building known as *"The Hedgeford Residences"* in Wangsa Maju, Setapak, Kuala Lumpur ("the building"). The purchaser is a purchaser of an apartment unit in the building.

[4] The applicant and the purchaser entered into a sale and purchase agreement dated July 19, 2012 for the purchase of an apartment unit in the building ("SPA"). The apartment unit is described as a parcel in the SPA. The SPA is in the form of contract in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ("the 1989 Regulations").

[5] The applicant had delivered vacant possession of the apartment unit late to the purchaser. The applicant had also completed the common facilities in the apartment building late.

[6] Under the terms and conditions of the SPA, the purchaser is entitled to liquidated damages for the delay in delivery of vacant possession of her individual apartment units and for the delay in the completion of the common facilities in the apartment building.

(i) Clause 25(1) of the SPA stipulates that the applicant is to deliver vacant possession to the purchaser within 36 calendar months from the date of the SPA. For any delay in delivery of vacant possession, the applicant would be liable to pay the purchaser liquidated damages calculated from day to day at the rate of 10% per annum of the purchase price from the expiry date of the delivery of vacant possession until the date the purchaser takes vacant possession of her apartment unit.

(ii) The applicant is required to complete the common facilities in the building within 36 calendar months from the date of the SPA. Pursuant to clause 27 of the SPA, the applicant is liable to pay the purchaser liquidated damages to be calculated from day to day at the rate of 10% per annum of the last 20% of the purchase price.

[7] The crux of the dispute between the parties is that the applicant had only offered the purchaser liquidated damages for the late delivery of vacant possession, which the purchaser had accepted in full and final settlement of her claim. When the purchaser entered into the settlement agreement with the applicant and accepted the liquidated damages payment for the late delivery of vacant possession, she was not aware that she was also entitled to liquidated damages for the late completion of the common facilities under the SPA.

[8] The purchaser subsequently lodged a claim with the tribunal for the full amount of liquidated damages payable by the applicant under the SPA. Her claim was allowed by the tribunal, with the necessary deductions for the payment of the liquidated damages received from the applicant pursuant to the settlement agreement.

[9] The tribunal awarded the purchaser the sum of RM25,466.35 as liquidated damages, after setting-off the sums already paid to the purchaser by the applicant, for late delivery of vacant possession and common facilities.

C. Law on judicial review

[10] Order 53 of the Rules of Court 2012 states that:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application [for judicial review].

[11] Judicial review, as Lord Brightman stated in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155,

> is not an appeal from a decision, but a review of the manner in which the decision was made.

[12] The governing principles on the judicial review of the decisions of statutory tribunals are set-out in *Telekom Malaysia Bhd v Tribunal Pengguna & Anor* [2007] 2 AMR 148; [2007] 1 MLJ 626; [2007] 1 CLJ 300, where Low Hop Bing J (as his Lordship then was) held as follows:

> [12] At this juncture, it is appropriate for me to set out the principles governing the grounds for sustaining a substantive notice of motion to challenge a decision-making process by way of certiorari, as follows:
>
> (1) It is neither an appeal nor a review of the decision itself, but a review of the decision-making process of the tribunal to see if there are errors of law on the face of the record;
>
> (2) It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed; and an error may be disclosed if the decision-maker e.g.
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> (a) asks himself the wrong question;
>
> (b) takes into account irrelevant considerations;
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> (c) omits to take into account certain relevant considerations (an anisminic error);
>
> (d) misconstrues the terms of the relevant statute; or
>
> (e) misapplies or misstates a principle of general law.
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> (per Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 AMR 1601 at 1628 lines 5-12; [1995] 2 CLJ 748 at 765 f-g, CA);
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> (3) In process or substance, an impugned decision is flawed on ground of:
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> (a) illegality, meaning that the decision must be based on law and the decision-maker must understand directly the law that regulates his decision-making power and must give effect to it, and whether he has or not is par excellence a justiciable question;
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> (b) irrationality meaning "Wednesbury unreasonableness", so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it, as enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223;

(c) procedural impropriety covering failure:

(i) to observe basic rules of natural justice;

(ii) to act with procedural fairness;

(iii) to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice; and

(4) Possibly, proportionality.

(per Edgar Joseph Jr FCJ in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 AMR 433 at 469 line 45 - 471 line 12; [1997] 1 CLJ 147 at 172b-173b; referring to the judgment of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374).

[13] With regards to judicial review of the decision of the Homebuyers Tribunal, Varghese George J (as his Lordship then was) in *ABT Construction Sdn Bhd & Anor v Tribunal Tuntutan Pembeli Rumah Sdn Bhd & Ors* [2013] 9 MLJ 193; [2013] 8 CLJ 1020 held that:

[37] The court in dealing with a judicial review application was not sitting in appeal against the impugned decision or award but only exercising the court's supervisory powers over subordinate tribunals. To merit curial intervention the applicant concerned had to establish that "errors" in the nature of "illegality", "irrationality" or "procedural impropriety" (and maybe "proportionality") had been committed during the decision-making process. (R *Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 AMR 433; [1997] 1 CLJ 147; *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 AMR 1601; [1995] 2 CLJ 748 (CA); *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2011] 3 AMR 38; [2010] 8 CLJ 629; *Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor* [2009] AMEJ 0174; [2009] 8 CLJ 200 – Mohamed Arif JC; and *Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor (and Another Application)* [2007] 2 AMR 148; [2007] 1 CLJ 300).

[38] The judicial review court's intervention on the grounds of "illegality" would be available if it was shown that the decision maker had misconstrued any provision of a statute or misapplied a principle of general law. A decision could be quashed on the basis of 'irrationality' if it was shown that there was no basis to support the finding of fact, or the conclusion reached was diametrically contrary to evidence on record or where the decision maker had asked the wrong questions or taken into consideration irrelevant matters and omitted relevant matters.

D. The applicant's complaint

[14] The applicant's complaint against the tribunal's decision is four-pronged, namely:

(i) The tribunal should have dismissed the purchaser's claim as she did not attend the hearings before the tribunal on September 21, 2016,

October 25, 2016 and November 15, 2016 without providing any good reason for her absence;

(ii) The tribunal committed an error of law in failing to consider that the purchaser's claim for liquidated damages was in breach of the full and final settlement between the applicant and the purchaser;

(iii) The tribunal had committed an error of law by allowing the purchaser's claim for liquidated damages based on the date of the payment of deposit and not from the date of the SPA as stipulated in clause 25 of the SPA; and

(iv) There was no procedural fairness and/or there was a breach of natural justice in the tribunal's decision-making process. The tribunal did not give the applicant the opportunity to present its case and/or to reply the purchaser's claim.

E. Analysis

(i) Non-attendance of hearings by the claimant before the tribunal

[15] The tribunal was established by the introduction of the new Part VI (Tribunal for Homebuyer Claim) by the Housing Development (Control and Licensing) (Amendment) Act 2002 ("Act A1142") to the Housing Development (Control and Licensing) Act 1966 ("the HDA"). Section 25 of Act A1142 amended the HDA by introducing Part VI, which comprises of s 16A to s 16AI, with effect from December 1, 2002.

(a) Can a claimant be represented by a third-party at hearings before the tribunal?

[16] Section 16U of the HDA governs the right to appear at hearings before the tribunal. The applicant's complaint against the purchaser is that she did not personally attend the hearings but was instead represented by a person named Sri Gananathan a/l Sivanthan ("Sri") at the hearings.

[17] Section 16U stipulates as follows:

16U. Right to appear at hearings

(1) At the hearing of a claim every party shall be entitled to attend and be heard.

(2) No party shall be represented by an advocate and solicitor at a hearing unless in the opinion of the Tribunal the matter in question involves complex issues of law and one party will suffer severe financial hardship if he is not represented by an advocate and solicitor; but if one party is subsequently allowed to be represented by an advocate and solicitor then the other party shall also be so entitled.

(3) Subject to subsection (2) but notwithstanding section 37 of the Legal Profession Act 1976 [Act 166] –

(a) a corporation or an unincorporated body of persons may be represented by a full-time paid employee of the corporation or body;

(b) a minor or any other person under a disability may be represented by his next friend or guardian ad item.

(4) Where a party is represented as permitted under subsection (3), the Tribunal may impose such conditions as it considers necessary to ensure that the other party to the proceedings is not substantially disadvantaged.

[18] It is the applicant's case that under the HDA, only the claimant and the respondent have a right of hearing before the tribunal save for situations expressly stated in s 16U of the HDA. The parties have to appear in person.

[19] Under s 16U, there are only three exception to the rules, namely:

(i) where in the tribunal's opinion the matter involves complex issues of law and the party will suffer severe financial hardship if he is not represented by an advocate and solicitor, the tribunal would allow both parties to be represented by advocates and solicitors; or

(ii) a full-time employee may represent a corporation or an unincorporated body of persons; or

(iii) a minor or a person with disability may be represented by his next friend or guardian ad litem.

[20] The purchaser says that she attended the hearing on September 21, 2016. This is denied by the applicant. The applicant argues that if the purchaser had attended the hearing on September 21, 2016, why was it adjourned to October 25, 2016 by the tribunal. Also, the purchaser was represented by Sri at the hearing on September 21, 2016. Sri had produced a letter of authorisation to the tribunal issued by the purchaser. The applicant contends that the letter of authorisation was not effective and/or invalid and cannot overcome the statutory provisions in s 16U of the HDA and reg 22 of the Housing Development (Tribunal for Homebuyer Claims) Regulations 2002 ("the 2002 Regulations").

[21] The purchaser admits that she did not attend the hearings on October 25, 2016 and November 15, 2016. At those hearings, she was represented by her cousin and Sri respectively. She attended the hearing on December 20, 2016 in person, at the conclusion of which the tribunal gave the award.

[22] Who are the parties to a claim before a tribunal? The parties are the homebuyer who is the claimant and the housing developer who is the respondent. Section 16L of the HDA stipulates that a homebuyer may lodge with

the tribunal a claim for any loss suffered or any matter concerning his interest as a homebuyer under the HDA.

[23] Save for the exceptions in s 16N and s 160, the tribunal's jurisdiction is expressly limited to a claim for a sum not exceeding fifty thousand ringgit based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the housing developer. The Federal Court observed in *Westcourt Corporation Sdn Bhd v Tribunal Tuntutan Pembeli Rumah* [2004] 6 AMR 381; [2006] 1 MLJ 339; [2004] 4 CLJ 203, that the provisions in s 16N(2), (3) and s 160(1) clearly showed that Parliament's intention was to form a simple forum for homebuyers to lodge a claim.

[24] Who is a homebuyer under Part VI of the HDA? "*Homebuyer*" is defined in s 16A of the HDA as:

> a purchaser and includes a person who has subsequently purchased a *"housing accommodation"* from the first purchaser of the housing accommodation.

Section 3 of the HDA defines *"housing accommodation"* to include:

> any building, tenement or messuage which is wholly or principally constructed, adapted or intended for human habitation or partly for human habitation and partly for business premises and such other type of accommodation as may be prescribed by the Minister from time to time to be a housing accommodation pursuant to section 3A.

[25] The right to be heard is expressly given by the HDA to the parties to the claim, namely the homebuyer and the housing developer. Only in cases involving complex issues of law and where the party will "suffer severe financial hardship", is a party allowed to be represented by an advocate and solicitor pursuant to s 16U. Where one party is allowed to be represented by an advocate and solicitor, s 16U(2) entitles the other party to also be represented by a solicitor. Subject to the exception in s 16U(2), s 16U(3) allows parties who are corporations or unincorporated body of persons to be represented by a full-time employee and a minor or a person under a disability to be represented by his next friend or guardian ad litem.

[26] Therefore, claimants (whether they are individuals, corporations, unincorporated body of persons, minors and persons under disability) can only be represented by an advocate and solicitor if (i) the case involves complex issues of law and they will "suffer severe financial hardship" or (ii) where the other party to the claim is allowed by the tribunal to be represented by an advocate and solicitor.

[27] The statutory right to be heard expressly provided in s 16U is in line with the common law right to be heard under the "audi alteram partem" principle of natural justice. Zaki Azmi CJ in delivering the judgment of the Federal Court in

Datuk Haji Mohammad Tufail bin Mahmud & 4 Ors v Dato Ting Check Sii (and Another Appeal) [2009] 5 AMR 281; [2009] 4 MLJ 165; [2009] 4 CLJ 449, FC held that:

> The right to be heard is an integral part of the rules of natural justice. The right to be represented by counsel of one's choice is however conditional upon the laws regulating it.

[28] The right to be heard is a personal right. However, as stated by the Federal Court in *Datuk Haji Mohammad Tufail*, the right to be represented by a counsel of one's choice is conditional upon the laws regulating it. Similarly, in hearings before the tribunal, the right to be represented at a hearing is conditional upon the provisions of the HDA. There is no mention in s 16U or in any other section of the HDA that a party to a claim can be represented by a third party, who does not fall within the exceptions in s 16U(2) and s 16U(3).

[29] As observed by the Federal Court in *Westcourt Corporation Sdn Bhd*, the intention of Parliament in legislating for the tribunal in Part VI of the HDA is to provide a simple forum for homebuyers to pursue their claim against housing developers.

[30] The legal advisor to the tribunal attended the hearing of this judicial review, as amicus curiae, not on the invitation on this court but on his own volition. He filed a written submission stating, inter alia, that the tribunal can make its own procedure to allow a homebuyer to be represented by a third party who is not an advocate and solicitor.

[31] Respectfully, I have to disagree with his submission. Section 16AE of the HDA states as follows:

> *Subject to this Act and to any regulations*, the Tribunal shall adopt such procedure as it thinks fit and proper. (Emphasis added)

[32] Therefore, pursuant to s 16AE, the tribunal can only adopt procedures it thinks fit and proper ***subject to*** provisions of the HDA and any regulations made under the HDA. The tribunal cannot ignore the express provisions in the HDA and the regulations under it, in adopting any procedure. Counsel for the tribunal exhibited a template *"Surat Wakil Kuasa Bagi Menghadiri Pendengaran"*, which he submits a homebuyer can use to authorise a third party to represent the homebuyer at any hearing before the tribunal.

[33] In my view, this procedure adopted by the tribunal, whereby a homebuyer can authorise a third party to represent him/her or it (for homebuyers which are corporations or any other non-natural persons) by filing in the *"Surat Wakil Kuasa Bagi Menghadiri Pendengaran"*, is contrary to and ignores the express provisions of the Part VI of the HDA.

[34] In the case of *Tay Choon & Ors v Jeet Kaur* [1972] 1 MLJ 216; [1972] 1 LNS 151, the High Court in interpreting the Subordinate Court Rules 1950 held that "*there is nothing in these rules which allows an agent to appear on behalf of the principal*".

[35] It is a trite principal of statutory interpretation that plain words must be given their plain and ordinary meaning. There is no principle of interpretation that authorises a court or in this case the tribunal, to rewrite the statutory provisions in Part VI of the HDA. The words in s 16U and s 16AE yields plain meaning and it is the duty of tribunal to interpret the words to give such plain meaning.

[36] The Interpretation Acts 1948 and 1967 (Act 388) ("the Interpretation Acts") prefers a purposive interpretation of statutes. Section 17A of the Interpretation Acts states that:

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

[37] On the use of the purposive approach for the interpretation of statutes, David Wong Dak Wah JCA (as his Lordship then was) in delivering the Court of Appeal's decision in *Perantara Properties Sdn Bhd v JMC – Kelana Square & Anor* [2016] 5 CLJ 367 held as follows:

> As stated in our opening remark, the task before us is one of interpretation of statute and the starting point must be s 17A of the Interpretation Acts 1948 and 1967 ...
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> Section 17A embodies the concept of purposive approach which was explained by the House of Lords in *Pepper v Hart* [1993] AC 593 (by majority) through Lord Griffiths as this:
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> > "The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intented to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

We are fully aware that England does not have a s 17A but what Lord Griffiths said above describes what we understand as the purposive approach to interpreting statute.

[38] The tribunal's decision in allowing third parties to represent homebuyers at hearings before it goes against the purpose and intent of the setting up of the tribunal, which is to provide a quick, simple and inexpensive forum for the homebuyers to pursue their claim against housing developers. By adopting a procedure whereby third parties can represent homebuyers at hearings before the tribunal, in my view, would give rise to a category of people who make it their business to represent homebuyers at the tribunal hearings for a fee. There are no rules and regulations to regulate the conduct and fee structure of these "third-party representatives", unlike an advocate and solicitor who are regulated by Bar Council and the Disciplinary Board pursuant to the Legal Profession Act 1976. Unsuspecting homebuyers can fall prey to these unregulated "third-party representatives".

[39] Furthermore, the tribunal's decision in allowing the homebuyer only, and not the housing developer, to appoint a third-party representative, goes against the natural justice principle of *"nemo judex in sua causa"* i.e. rule against bias. By giving one party, and not the other, the right to be represented by a third-party at a hearing can amount to bias. As can be seen in s 16U of the HDA, the Act avoids such bias by allowing the other party to a claim to appoint an advocate and solicitor to represent it if the tribunal allows one party to that claim to be represented by an advocate and solicitor based on the criteria set-out in s 16U(2).

[40] Accordingly, I find that the tribunal's decision in allowing Sri and the purchaser's cousin to represent the purchaser at the hearings before the tribunal to be procedurally improper. In doing so, the tribunal had breached the principles of natural justice and had failed to observe the procedural rules laid down in the HDA by which the tribunal's jurisdiction was conferred.

(b) Must the tribunal dismiss a claimant's claim for non-appearance at hearing?

[41] Regulation 22 of the 2002 Regulations regulates the non--appearance of parties at hearings before the Tribunal. Regulation 22 of the 2002 Regulation provides as follows:

22. *Non-appearance of parties*

(1) If the claimant does not appear on the date, at the time and place fixed for the hearing but the respondent appears, the President may, if he is satisfied that the notice of hearing has been duly served –

(a) dismiss the claim, if the respondent has no counter-claim;

(b) make an award for the counter-claim, if the respondent has a counter-claim.

(2) An award made under sub regulation (1) shall be in Form 7.

(3) If the respondent does not appear on the date, at the time and place fixed for the hearing but the claimant appears, the President may, if he is satisfied that the notice of hearing has been duly served –

(a) proceed with the hearing in the absence of the respondent; or

(b) adjourn the hearing to a later date.

(4) Before disposing of the claim in the absence of the respondent, the President shall consider any representation submitted by the claimant.

(5) An award made where the respondent is absent shall be in Form 8.

(6) If neither party appears on the date, at the time and place fixed for the hearing, the action shall be struck out.

[42] Regulation 22(1) of the 2002 Regulation states that if the claimant does not appear on the date, time and place fixed for the hearing but the respondent appears, the President may dismiss the claim or if the respondent has a counterclaim, make an award for the respondent's counterclaim.

[43] The applicant argues that although the word "may" is used in reg 22(3), the regulation is mandatory because the only available option to the tribunal when the purchaser did not attend the hearings was to dismiss her claim.

[44] The applicant cites as authority the case of *Kekatong Sdn Bhd v Bank Bumiputera (M) Sdn Bhd* [1998] 2 AMR 1769; [1998] 2 MLJ 440; [1998] 2 CLJ 266, where the Court of Appeal held that the word "may" appearing in the opening paragraph of s 431(1) of the National Land Code 1965 is not permissive but mandatory so that service of documents under the Code must be in compliance with the terms. So, the respondent's failure to comply with s 431(1) vitiated the order for sale. Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal held that:

> First, *it has been recognised by high authority that when a provision in a statute uses permissive language such as "may" it is a question of legislative intent, dependent upon a number of factors, whether the intended result is mandatory or directory*. As Lord Campbell CJ said in *Liverpool Borough Bank v Turner* (1860) 30 LJ Ch 379 at 380:
>
> > "No universal rule can be laid down ... It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."
>
> Again, in *Howard v Bodington* (1877) 2 PD 203 at 211, Lord Penzance said:
>
> > "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended

> to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory ...
>
> I have been very carefully through all the principal cases but upon reading them all, conclusion at which I am constrained to arrive is this, that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of *Liverpool Borough Bank v Turner* (1860) 30 LJ Ch 379."
>
> We do not apprehend the approach to statutory interpretation formulated in the cases cited above to have altered or modified through passage of time. And no authority was cited to us during argument to suggest anything to the contrary.
>
> *It is therefore wrong to assume as a matter of course that whenever Parliament uses the word "may" in a statute it never means "must".*
>
> In any event, there is at least one case which has interpreted "may" as "must" in relation to service of process. In *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261, the Privy Council construed the words "such service may be effected" appearing in r 15 of the Rules contained in the Second Schedule to the Election Offences Ordinance 1954 as a mandatory requirement.
>
> (Emphasis added.)

[45] Regulation 22 expressly provides that:

> (1) if the Claimant does not appear at a hearing,
>
> "the President may, if he is satisfied that the notice of hearing has been duly served, (a) dismiss the claim, if the respondent has no counter-claim; (b) make an award for the counter-claim, if the respondent has a counter-claim."
>
> (2) if the Respondent does not appear at a hearing,
>
> "the President may, if he is satisfied that the notice of hearing has been duly served, (a) proceed with the hearing in the absence of the respondent; or (b) adjourn the hearing to a later date."

[46] On the plain reading of the 2002 Regulations, I agree with the applicant that the provisions in reg 22(1) and (2) are not permissive but mandatory. It is clear from reading reg 22 that the legislative intent of Parliament is that if the claimant does not appear at the hearing, the tribunal must either dismiss the claimant's claim or award the respondent's counterclaim, if the respondent has a counterclaim.

[47] In my view, if the Parliament wanted to give the president the option to adjourn the hearing in situations where the claimant is not present, reg 22 would have been drafted to read "where the parties" do not appear at the hearing

instead of drafting two separate subsections catering for situations (i) where the claimant is not present and (ii) where the respondent is not present. The option for the president to adjourn the hearing is only provided where the respondent is not present. Alternatively, Parliament could have expressly given the tribunal the option to adjourn the hearing if the claimant does not attend the hearing by drafting words to that effect in reg 22(i). However, Parliament does not provide the tribunal with such option.

[48] Accordingly, the president of the tribunal should have dismissed the purchaser's claim when she did not attend the first hearing on September 21, 2016 instead of adjourning the hearing to October 25, 2016, and adjourning it again to November 15, 2016, when she did not attend the second hearing on October 25, 2016, and further adjourning it to December 20, 2016, when she again did not appear at the third hearing on November 15, 2016.

[49] In my opinion, it is clear from the plain reading of reg 22(1) and (2), that the president did not have the option to keep on adjourning the hearing as he did in this case until the purchaser decided to attend the hearing. In this instant case, when the purchaser did not turn up for the hearings, the tribunal's only option under the 2002 Regulations was to either dismiss the purchaser's claim or if the applicant had a counterclaim, to allow the said counterclaim.

[50] There is a provision in reg 27, which states that *"the Tribunal may from time to time adjourn a hearing on such conditions* as *it thinks just"* . However, the provision in reg 27 is a general provision, whereas the provision in reg 22 is a special provision stipulating the powers of the president in situations where the claimant or the respondent does not attend the hearing after the notice of hearing had been served.

[51] Pursuant to the principle of statutory interpretation of *"generalibus specialia derogant'* , the specific provisions in reg 22(1) and (2) must be interpreted strictly and takes precedence over the general provision in reg 27. In the case of *Pakas Rao a/l Applanaidoo & 3 Ors v Pendaftar Pertubuhan Malaysia & 3 Ors* [2015] AMEJ 1150; [2015] 5 MLJ 500; [2015] 8 CLJ 521, the Court of Appeal held:

> [21] The maxim *generalibus specialia derogant is* a legal principle which implies that the special provision is one that derogates from the general provision and the special provision must be interpreted strictly in the case; and that a general provision cannot *remove* a special provision. It is a basic principle of statutory interpretation. It was referred to in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ (Rep) 285, FC, wherein Raja Azlan Shah CJ (Malaya) (as HRH then was) said:
>
> > "... *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law."

[52] Accordingly, the general provision in reg 27 cannot remove the special provision in reg 22.

[53] For these reasons, I find that the president of the tribunal had made an error of law in adjourning the hearings several times until the Purchaser attended the hearing in person. As said by Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL ("the *CCSU* case")

> the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess.

[54] For the above reasons, I find that in allowing Sri and the purchaser's cousin to represent her at the hearings and in adjourning the hearings several times due to her absence, the president of the tribunal purported to exercise powers under the HDA and the 2002 Regulations which he did not possess. Accordingly, such purported exercise of power by the tribunal is ultra vires the HDA

(ii) Attempt to contract out from Schedule "H" of the HDA

[55] It is the applicant's case that the tribunal had committed an error of law by allowing the purchaser's claim for liquidated damages based on the date of the payment of booking fee and not from the date of the SPA as stipulated in clause 25 of the SPA. The applicant argues that the SPA is a statutory contract prescribed in Schedule H of the 1989 Regulations.

[56] The 1989 Regulations was enacted pursuant to s 24 of the HDA and came into force on April 1, 1989. Section 24 of the HDA stipulates that the minister may make regulations for the purpose of carrying into effect the provisions of the HDA and that the regulations may

> (c) prescribe the form or forms of contracts *which shall be used* by a licensed housing developer, his agent, nominee or purchaser both as a condition of the grant of a licence under this Act or otherwise.
>
> (Emphasis added.)

[57] Regulation 11(1) of the 1989 Regulations provides that:

> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the sub divisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and *where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H*.
>
> (Emphasis added.)

[58] Therefore, pursuant to s 24 of the HDA and reg 11(1) of the 1989 Regulations, licensed housing developers must use the form of contract in Schedule H of the

1989 Regulations as the sale and purchase agreement for the apartments in subdivided buildings. In this present case, the SPA was in the form of contract provided in Schedule H.

[59] Clauses 25 and 29 of Schedule H state as follows:

> 25. (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in clause 27 within thirty-six (36) months *from the date of this Agreement*.
>
> ...
>
> 29. (1) The common facilities serving the said housing development, which shall form part of the common property, shall be completed by the Developer within thirty-six (36) months *from the date of this Agreement*. The Developer's architect shall certify the date of completion of the common facilities and a copy of the certification shall be provided to the Purchaser.
>
> (Emphasis added.)

[60] The SPA between the applicant and the purchaser complies with the requirements of the HDA and the 1989 Regulations. As reproduced below, the provisions in clauses 25 and 29 of the form of contract in Schedule H are contained in clauses 25 and 27 of the SPA respectively.

> 25. **Time for delivery of vacant possession**
>
> (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in clause 26 within thirty-six (36) calendar months from the date of this Agreement.
>
> 27. **Completion of common facilities**
>
> (1) The common facilities serving the said housing development shall be completed by the Vendor within thirty-six (36) calendar months from the date of this Agreement. The Vendor's architect shall certify the date of completion of the common facilities.

[61] The Federal Court in *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 3 AMR 725; [2006] 4 MLJ 113; [2006] 3 CLJ 177 approved the principle of statutory interpretation propounded by Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* 28 CLR 129, where Augustin Paul FCJ held

> [17] ... Thus when the language used in a statute is clear effect must be given to it. As Higgins J said in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* 28 CLR 129 at 161-162:

> "The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to *be* expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable."

[62] From the plain reading of clauses 25 and 29 of Schedule H of the 1989 Regulations as contained in clauses 25 and 27 of the SPA, the applicant is required to deliver vacant possession of the apartment to the purchaser and complete the common facilities within 36 calendar months from the date of the SPA.

[63] However, the tribunal, contrary to express provision of Schedule H and the SPA, awarded liquidated damages to the purchaser from the date of the payment of the booking fee instead of from the date of the SPA.

[64] Counsel for the tribunal relies on the Kota Bharu High Court case of *Lim Eh Fah & 4 Ors v Seri Maju Padu (dituntut sebagai sebuah firma)* [2002] 4 AMR 4491; [2002] MLJU 300; [2002] 4 CLJ 37 and the Pulau Pinang High Court case of *Lembaman Development Sdn Bhd v Ooi Lai Yin & Anor (and 2 Other Suits)* [2015] AMEJ 593; [2016] 7 MLJ 261; [2015] 1 LNS 301 where it was held that the relevant date for calculating the liquidated damages is the date of the payment of the booking deposit.

[65] The High Court in *Lembaman Development* relying on the decision in *Lim Eh Fah* held that liquidated damages should be calculated from the date of the payment of the booking fee. In *Lim Eh Fah*, the learned judge held that payment of the booking deposit was the relevant date for calculating liquidated damages citing as authority the Supreme Court decision in *Hoo See Sen & Anor v Public Bank Bhd* [1988] 2 MLJ 170; [1988] 1 CLJ (Rep) 125. The learned High Court judge said:

> Following an earlier case of *Hoo See Sen & Anor v Public Bank Bhd* [1988] 2 MLJ 170, the Supreme Court had decided that the relevant date for ascertaining when time started to run, to be when the booking fee was paid. Under held it is clearly authored:
>
> > "For the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time started to run was the date on which the purchaser paid the booking fee, and not the date of signing of the sale and purchase agreement."

[66] However, when one looks at the headnotes of the case of *Hoo See Sen* as reported at [1988] 2 MLJ 170, there is no such provision in the headnotes of the case as cited by the learned judge in *Lim Eh Fah*. The headnotes of *Hoo See Sen* as reported at [1988] 2 MLJ 170 states as follows:

Held, allowing the appeal:

(1) it is clear that the appellants assigned to the first respondent only the rights regarding the property and the appellants' rights under the sale and purchase agreement. The appellants are therefore still bound and continued to be bound to observe and perform all the duties and liabilities under the sale and purchase agreement, including the payment of the purchase price;

(2) the payment of the purchase price, which is purportedly due from the appellants, is the liability of the appellants and is not the liability of the first respondent. Under no circumstances was the first respondent bound or even authorised to make such payment and indeed the position of the first respondent in the matter of disbursing the loan is in the capacity of an agent to the appellants. The first respondent is holding the loan sum on behalf of the appellants and is bound to release the money only when authorised to do so and this must be for the benefit of the appellants;

(3) the appeal should therefore be allowed and the interim injunction prayed for by the appellants should be issued.

[67] Nowhere in the headnotes does it state *"For the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time started to run was the date on which the purchaser paid the booking fee, and not the date of signing of the sale and purchase agreement"* as quoted by the judge in *Lim Eh Fah*. It is only in the body of the Supreme Court's judgment in *Hoo See Sen* did Salleh Abbas LP say *"the building was to be so constructed that the second respondent had to give vacant possession within 24 months of the date of the agreement, i.e. 24 months from the date of payment of the booking fee"*.

[68] In *Hoo See Sen*, the appellants/plaintiffs sued Public Bank Berhad, the first respondent, for an injunction to restrain it from paying the developer, the second respondent, a certain sum of money due from the appellant to the second respondent on the grounds that a greater sum was due from the second respondent to the appellant. Both sums arose out of a sale and purchase agreement of a house between the second respondent and the appellant: the first sum being the balance of the purchase price and the second sum was an amount of liquidated damages for late delivery of vacant possession. The Supreme Court allowed the appellants' application for an injunction to restrain Public Bank to pay the developer the monies due from the appellants to the developer on the grounds that Public Bank *"is holding the loan sum on behalf of the appellants and is bound to release the money only when authorised to do* so, *and this must be for the benefit of the appellants."* Accordingly, the statement made by Salleh Abbas LP in *Hoo See Sen* that the date of the payment of the booking fee was the date of the agreement was obiter dicta. It was not the ratio decidendi of the case.

[69] For these reasons, with respect, I find that the decision of the Kota Bharu High Court in *Lim Eh Fah* and later followed by the Pulau Pinang High Court in *Lembaman Development* that the relevant date for the calculation of liquidated

damages for late delivery of vacant possession in the date of payment of the booking fee was made per incuriam.

[70] Furthermore, the facts in the case of *Hoo See Sen* can be distinguished from the facts in this instant case. *Hoo See See* was decided on March 17, 1988 i.e. before the 1989 Regulations came into force. The 1989 Regulations stipulating the form of contract to be used by the licensed housing developers in Schedule H only came into force on April 1, 1989. Accordingly, when the Supreme Court made the decision in *Hoo See Sen*, the form of sale and purchase agreement used by the developer and purchaser was not a statutorily mandatory form of contract.

[71] In my view, if as held by the tribunal, the date of the of the sale and purchase agreement is the date of the payment of the booking fee, it means that there exists a binding contract for the sale and purchase of the property between the purchaser and the developer at the date of payment of the booking fee. The purchaser would accordingly be bound to complete the purchase of the property. If the purchaser changes his mind and decides not to purchase the property and not to execute the formal contract in the form of contract in Schedule H, the purchaser would be in breach of the sale and the purchase agreement since the agreement had already come into being when he paid the booking fee. In such a situation, the purchaser would be liable to the housing developer for any loss, damage or costs suffered for breach of contract, instead of just forfeiting the booking fee paid, for not proceeding with the purchase of the property for which he had paid the booking fee. Clearly such an outcome cannot be the legislative intent of the HDA, which long title (as amended by PU(A) 441/2010) states that it is:

> An Act to provide for the control and licensing of the business of housing development in Peninsular Malaysia and the Federal Territory of Labuan, the *protection of the interest of purchasers* and for matters connected therewith.
>
> (Emphasis added.)

[72] For these reasons, I find that the tribunal had erred in law by calculating the liquidated damages from the date of the booking fee. The liquidated damages payable for late delivery of the vacant possession of the apartment and late completion of the common facilities should have been calculated from the date of the SPA.

(iii) Denial of right to be heard

[73] During the hearing of the purchaser's claim on December 20, 2016, the president of the tribunal only asked the purchaser whether her claim was the same as a claim No. TTPR/W/0705/16 by a third party, Ong Si Hui, which was previously decided by the tribunal ("the third-party's claim") and did not give the applicant the opportunity to present its case. The applicant told the tribunal that there were similarities between the claims but it wished to address the tribunal

on the differences between the purchaser's claim and the other claim and other important points. However, the applicant was stopped by the president of the tribunal. Without allowing the applicant to submit its case, the president of the tribunal informed the parties that its decision as regards the purchaser's claim will follow its earlier decision in the third-party's claim.

[74] This fact is not rebutted by the purchaser is her affidavit in reply. Neither was it addressed by the purchaser's counsel in her submissions.

[75] As held in the Court of Appeal in *Ng Hee Thoong & Anor v Public Bank Berhad* [1995] 1 AMR 622; [1995] 1 MLJ 281; [1995] 1 CLJ 609, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of the other party to contradict the assertion is usually treated as an admission by that party of the fact asserted.

[76] For this reason, I find that the tribunal made its decision in respect of the purchaser's claim based on its earlier decision in the third-party's claim and without giving the applicant the right to be heard.

[77] As stated by the Federal Court in *Datuk Haji Mohammad Tufail bin Mahmud & Ors v Dato Ting Check Sii* (supra), the right to be heard is an integral part of the rules of natural justice. In *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487; [1988] 2 CLJ (Rep) 390, Edgar Joseph Jr J (as his Lordship then was) held that the applicants were entitled to succeed in their judicial review application based on the respondent's denial of the applicants their right to make written representations. His Lordship held:

> It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; for example, a defendant is generally entitled to notice of evidence that might assist his case. It is, therefore, a breach of natural justice for the prosecution to conceal such evidence: *R v Leyland Justices; Ex p Hawthorn* [1979] QB 283.

[78] The applicant had a legitimate expectation to be allowed to address the tribunal during the hearing. I find that the tribunal in disallowing the applicant to put forward its case had failed to act fairly and had failed to observe the basic rules of natural justice. In denying the applicant its right to be heard at the hearing before the tribunal, the president of the tribunal had committed a breach of natural justice.

[79] Further, I find that the tribunal in making its decision as regards the purchaser's claim against the applicant based on its earlier decision in the third-party's claim to be procedurally improper and irrational. It its trite law that the tribunal must decide a case before it based on the facts of that said case and the applicable law. As held in *ABT Construction Sdn Bhd & Anor v Tribunal*

Tuntutan Pembeli Rumah Sdn Bhd & Ors (supra), a tribunal's decision can be quashed on the grounds of irrationality

> if it was shown that there was no basis to support the finding of fact, or the conclusion reached was diametrically contrary to evidence on record or where the decision maker had asked the wrong questions or taken into consideration irrelevant matters and omitted relevant matters

[80] Lord Diplock in the *CCSU* case held that:

> *By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.* Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system ... "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> (Emphasis added.)

[81] In this present case, the tribunal made its decision in respect of the purchaser's claim not based. On the facts of the said case before it but on earlier decision it had made in a separate case, namely the third-party's claim. To decide a case based on the facts of another case is highly improper and irrational and to paraphrase Lord Diplock, "a *decision which* is so *outrageous in its defiance of logic."*

F. Findings of this court

[82] Accordingly, in addition to my findings in Sections I and II of Part E above that the tribunal had exercised purported powers which are ultra vires the HDA and had committed errors of law, I further find based on the reasons discussed in Section III of Part E, that the tribunal's decision can also be quashed on the grounds of breach of natural justice, procedural impropriety and irrationality.

[83] I have not made any findings in relation to the applicant's claim that the tribunal had failed to consider that the purchaser's claim was in breach of the full and final settlement reached between the applicant and the purchaser. The applicant had filed a separate civil suit in the Kuala Lumpur High Court (Civil Suit No. WA-22NCvC-644-10/2016) and in that suit, the learned judge held that the settlement agreement between the applicant and the purchaser was invalid and not binding on the parties. The applicant had filed a notice of appeal at the Court of Appeal against the decision of the High Court and the appeal at the time of the hearing of this case before me was pending hearing at the Court of Appeal.

G. Decision

[84] For the above reasons, I hereby grant an order of certiorari quashing the whole of the award granted by the tribunal to the purchaser on December 20, 2016.

[85] Prayer 2 is dismissed. No order is made to restrain or injunct the purchaser from making a claim at the tribunal and/or the courts for the delay in the delivery of vacant possession and for the delay in completion of the common property.

[86] No order is made as to costs. Each party is to bear its own costs.