

Southville City Sdn Bhd

v

Chua Teck Kee & Anor

High Court, Kuala Lumpur – Application for Judicial Review

No. WA-25-7-1-2019

Mariana Yahya J

July 10, 2019

Administrative law – Remedies – Judicial review – Award of liquidated damages by second respondent for late delivery of vacant possession – Whether second respondent erred in awarding damages calculated from date of payment by first respondent of stakeholder sum to firm representing first respondent – Whether damages for late delivery ought to have been calculated from date of sale and purchase agreement instead – Housing Development (Control and Licensing) Regulations 1989, reg 11(2), Schedule H

On September 28, 2013, the first respondent appointed Messrs Khairin Nisa & Co as a stakeholder to represent him to make an irrevocable offer ("IO") to the applicant to purchase a unit in a housing project ("the project") to be developed by the applicant. The first respondent then placed a sum of RM3,000 ("the stakeholder sum") with the stakeholder with instruction to release the same to the applicant once there is acceptance by the applicant of the first respondent's offer to purchase.

The first respondent subsequently entered into a sale and purchase agreement ("the SPA") with the applicant on March 27, 2014 and vacant possession was delivered by the applicant on March 29, 2018. The first respondent thereafter filed a claim against the applicant for liquidated damages for late delivery of vacant possession. In support of his claim, the first respondent contended that the 48 months' time frame within which vacant possession was to be delivered commenced from the date when the stakeholder sum was paid to the stakeholder and not from the date of the SPA and that in the circumstances there had been a delay of 253 days. The second respondent found in favour of the first respondent and awarded the sum of RM23,369.20 as damages.

The applicant denied having received the IO until the SPA was entered into between it and the first respondent and applied for judicial review to quash the award made by the second respondent. The applicant contended inter alia that the second respondent had erred in calculating the damages from the date the monies were paid to the stakeholder instead of from the date of the SPA. It was further contended that the second respondent had failed to take into consideration the fact that the applicant was not in the position to enter into any agreements with the first respondent since it had no Housing Developers License

1 and Sale & Advertising Permit at the material time in 2013 and that the said license was only obtained by it on March 26, 2014.

Issue

5 Whether the second respondent had committed an error of law and/or erred in principle in allowing the first respondent's claim for liquidated damages, calculated from the date the stakeholder sum was paid to the stakeholder.

10 **Held**, allowing the applicant's judicial review application

- 15 1. Based on clause 1.2 of the IO, the first respondent was aware that the applicant was under no obligation to collect any payment before the property was opened for sale and pursuant to clause 3 of the IO the stakeholder was instructed to release the monies to the applicant upon the applicant's confirmation that project was open for sale and acceptance of the first respondent's offer to purchase and towards settlement of the first 10% of the purchase price. On the facts the stakeholder sum was only released to the applicant on March 27, 2014 after the SPA was signed by both parties. Thus, the stakeholder sum cannot be constituted as "booking fee" and/or "deposit" towards the sale and purchase of the project. Even if the court were to accept that the stakeholder sum is a booking fee or a deposit, the sum was received by the applicant on March 27, 2014 and not September 28, 2013. [*see p 392 paras 14-15*]
- 25 2. There was no agreement or SPA between the applicant and the first respondent on September 28, 2013. For the applicant to accept payment before the contract of sale would contradict reg 11(2) of the Housing Development (Control and Licensing) Regulations 1989 which prohibits any parties from collecting any payment as stakeholder. There is no evidence to show that Messrs Khairin Nisa & Co had acted as the agent or panel lawyer for the applicant to collect the stakeholder sum. [*see p 392 para 16 - p 393 para 16*]
- 30 3. At no time did the applicant represent to the first respondent that the RM3,000 is a booking fee and/or deposit. If it was, then the payment ought to have been paid to the applicant and not to the stakeholder. The stakeholder sum thus is neither a deposit nor a booking fee. There was therefore no basis for the second respondent to award damages based on the date the stakeholder sum was deposited with the stakeholder as there was no concluded contract between the applicant and the first respondent prior to the signing of the SPA. [*see p 393 para 17*]
- 35 4. Clause 25 and 27 of the SPA specifically mentions that delivery of vacant possession shall be within 48 calendar months from the date of the SPA, whereas clause 27 states that the completion of common facilities shall be

completed within 48 calendar months from the date of the SPA. The SPA does not provide that the delivery of vacant possession and completion of common facilities must be completed from any other date. On the facts, the SPA is in accordance with Schedule H of the Regulation 1989 and the terms thereof are to be strictly followed and cannot be contracted out of. [see p 393 para 19]

5. The second respondent had committed a jurisdictional error by taking into account the wrong facts and in failing to consider that the applicant is not the stakeholder to the first respondent. [see p 393 para 21 - p 394 para 21]
6. No binding contract was formed on September 28, 2013 as there was no consideration, no acceptance and no intention to create legal relations between the applicant and the first respondent. The second respondent thus had erred in holding that the date of ascertaining the delivery of vacant possession should be September 28, 2013. [see p 394 para 22]
7. The second respondent had committed jurisdictional errors and/or Anisminic errors and acted on incorrect basis in fact. The award therefore ought to be quashed for being tainted with illegality and unreasonableness. In the premises curial intervention is warranted. [see p 394 para 23]
8. The liquidated damages payable for late delivery of the vacant possession of the property and late completion of the common facilities should have been calculated from date of the SPA and not from the date of the stakeholder sum was deposited with the stakeholder. [see p 394 para 24]

Cases referred to by the court

Malaysia Land Properties Sdn Bhd v Chan Cecilia & Anor [2011] AMEJ 0034; [2011] 1 LNS 55, HC (ref)

Menteri Dalam Negeri & 8 Ors v Titular Roman Catholic Archbishop of Kuala Lumpur [2013] 6 AMR 356; [2013] 8 CLJ 890, CA (ref)

Metramac Corp Sdn Bhd (Formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 3 AMR 725; [2006] 3 CLJ 177, FC (ref)

R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 AMR 433; [1996] 1 MELR 71, FC (ref)

YB Menteri Sumber Manusia v Association of Bank Officers, Pennisular Malaysia (and Another Appeal) [1999] 2 AMR 1837; [1999] 2 CLJ 471, FC (ref)

Legislation referred to by the court

Malaysia

Housing Development (Control and Licensing) Regulation 1989, reg 11(2), Schedule H

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1 *Justin Voon* (Justin Voon Chooi & Wing) for applicant
Tay Shieh Chin (Ismail Sabri Wee & Wong) for first respondent

Judgment received: July 25, 2019

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Mariana Yahya J

Background of the case

10 [1] The applicant filed the judicial review to quash the decision of the second respondent dated December 6, 2018 in the House Purchaser's Claims Tribunal Award No. TTPR/B/0981/18.

15 [2] The impugned decision is being challenged on the grounds are as follows;

(i) The tribunal has erred in granting the award of as damages for late delivery of vacant possession.

20 (ii) The calculation of damages must be counted from date of the sale and purchase agreement ("SPA") and not from date deposit sum paid to the stakeholder.

25 (iii) The award is ultra vires because the tribunal had failed to consider that the applicant was not in the position to enter into any agreements with the first respondent since it had no housing developers license and sale and advertising permit as at December 8, 2013. The approval for the said license was only granted on March 26, 2014.

Brief facts

35 [3] The applicant is a housing developer. On September 28, 2013, before the project was launched, the first respondent decided to secure the opportunity to purchase vide irrevocable offer ("IO") to purchase/option/confirmation by the stakeholder dated September 28, 2013.

40 [4] The first respondent had pursuant to letter dated September 28, 2013 (exh SC3 affidavit in support of the applicant, encl 3) appointed Messrs Khairin Nisa & Co as their stakeholder ("stakeholder") and had placed RM3,000.00 ("stakeholder sum") with the instruction to release the stakeholder sum to the applicant once the project is open for sale.

[5] The first respondent entered into a sale and purchase agreement with the applicant on March 27, 2014. On March 29, 2018, the applicant then delivered vacant possession to the first respondent. Thus, the first respondent filed a claim at the house purchaser's claims tribunal for late delivery of vacant possession.

[6] The first respondent argued that the time period of 48 calendar months for delivery of vacant possession of the property and the completion of the common

property to the first respondent allegedly started to run from the date of the stakeholder sum was paid to the stakeholder i.e. on September 28, 2013 and not from the date of the SPA.

[7] Thus, the applicant was allegedly delayed by 253 days in delivering the vacant possession of the property and the completion of the common property to the first respondent and liable to pay liquidated damages in total sum of RM29,611.39.

[8] The tribunal had awarded the first respondent RM23,369.20 as liquidated damages for late delivery of vacant possession and late completion of common property. Hence, the main issue before this court is whether the first respondent has rightly awarded the LAD of the property which is 48 months from the date of placement of stakeholder sum i.e from September 28, 2013 expiring on September 27, 2017 OR 48 months from the date of the SPA i.e. March 27, 2014 expiring on March 26, 2018.

Findings

The law

[9] It is trite that the court will consider three grounds i.e. illegality, irrationality and procedural impropriety and the court will review the substance of the case as well as process in a judicial review application as illustrated by the Federal Court in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 AMR 433; [1996] 1 MELR 71.

[10] In *YB Menteri Sumber Manusia v Association of Bank Officers, Pennisular Malaysia (and Another Appeal)* [1999] 2 AMR 1837; [1999] 2 CLJ 471, the Federal Court held that:

In *Anisminic v Foreign Compensation Commission* [1969] 1 AC 147 (perhaps the most important case in modern judicial review) the House of Lords widened the already wide doctrine of ultra vires to minimise the effect of an ouster clause of the "shall not be questioned" variety. In doing so, the House gave the following formulation of what errors are jurisdictional:

- (a) The tribunal was not entitled to enter into the inquiry in question;
- (b) The tribunal failed to comply with the conditions precedent to its jurisdiction
- (c) *The tribunal made a decision it had no power to make;*
- (d) The tribunal made a decision in bad faith;
- (e) The tribunal failed to comply with the rules of natural justice;
- (f) The tribunal "asked itself a question";

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- 1 (g) The tribunal "applied the wrong test";
- 5 (h) *The tribunal "failed to deal with the question remitted to it" and decided some question which was not remitted to it;*
- 10 (i) *The tribunal failed to take into account something it was required to take into account; and*
- 15 (j) *The tribunal based itself on something it was not entitled to take into account.*

(Emphasis added.)

[11] The court also refers to the case of *Menteri Dalam Negeri & 8 Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 AMR 356; [2013] 8 CLJ 890 wherein the Court of Appeal held that (which has been affirmed by the Federal Court):

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20 [69] ... the decision maker must consider matters required to be considered and disregard irrelevant collateral matters and the decision must be within the perimeters of the statutory powers given to the decision maker on the matter. It goes without saying therefore if the decision is made in compliance with these principles and requirements such decision cannot be said to be unreasonable and is unassailable. *But if the exercise of the discretion is made in contravention of any law or that the decision maker has taken into consideration irrelevant matters or that the decision maker has acted in excess of powers conferred upon him in respect of the matter which he decided or that the decision militates against the object of the statute, then the court can intervene and strike down the decision as unreasonable and unlawful.* (Emphasis added.)

Issues – Whether the second respondent has committed an error of law and/or erred in principle and its decision making process in allowing the first respondent's claim for liquidated damages for the late delivery of vacant possession and common facilities (LAD) which is calculated started from the date of the stakeholder sum was paid to the stakeholder i.e on September 28, 2013

[12] On September 28, 2013, the first respondent appointed Messrs Khairin Nisa & Co as a stakeholder to represent the first respondent to make an irrevocable offer to the applicant to purchase a unit of the project when the applicant is ready to sell the units in the project. The first respondent then had placed RM3,000.00 ("stakeholder sum") to the stakeholder with instruction to release the stakeholder sum to the applicant once there is acceptance by the applicant of the first respondent offer to purchase.

[13] The applicant denied that they had received the irrevocable offer to purchase made by the first respondent until the SPA was entered between first respondent and the applicant. The first respondent failed to prove that he or his stakeholder had ever sent the IO to the applicant.

[14] This court refers to clause 1.2 of the IO where the first respondent was aware that the applicant is under no obligation to collect any payment before the property was opened for sale.

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Clause 1.2

1) Kindly be informed of the following:

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1.2 The Developer has informed me/us that the said Development wherein the property is part of, is not yet open for sale and therefore the Developer is not prepared to collect any payment towards my/our intended purchase of the property.

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[15] Clause 3 of the IO provides that;

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3) To facilitate the purchase of the Property, I/We, enclose herein my/our payment of the above mentioned Stakeholder Sum (hereinafter referred to as "the Stakeholder Sum" via the above mentioned Method of Payment, with my/our irrevocable instructions to you to release the Stakeholder Sum to the Developer upon the Developer's confirmation that the Project is open for sale for the Developer's consideration and acceptance of my/our offer to purchase the Property and towards settlement of the first 10% of the Purchase Price in accordance with . the term contained here in.

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Whereas clause 20 reads as follows;

I/We understand and agree that nothing in this letter shall be construed to imply an obligation on the Developer to develop the Project and to launch the Project for sale.

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The stakeholder sum was only released to the applicant by the stakeholder for the first respondent on March 27, 2014 after the SPA was signed by both parties.

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By reading the above said provisions, this court is of the view that the stakeholder sum cannot be constituted as "booking fee" and/or "deposit" towards the sale and purchase of the project. Even if this court were to accept that the stakeholder sum is a booking fee or a deposit, the sum was received by the applicant on March 27, 2014 and not September 28, 2013.

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[16] There was no agreement or the SPA between the applicant and the first respondent on September 28, 2013. For the applicant to accept payment before the contract of sale would contradict reg 11(2) of the Housing Development (Control and Licensing) Regulation 1989 which prohibits any parties to collect any payment as stakeholder.

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1 *Regulation 11(2):*

No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.

5 There is no evidence to show that Messrs Khairin Nisa & Co is the agent or panel lawyer to the applicant to collect the stakeholder sum.

10 [17] This court is with the applicant's submission that at no time did the applicant represent to the first respondent that the RM3,000.00 is a booking fee and/or deposit. If it is, then the payment ought to be paid to the applicant and not to the stakeholder. Therefore, the stakeholder sum is neither a deposit nor a booking fee.

15 [18] From the facts above, this court concludes that there is no basis for the second respondent to award based on the date of the stakeholder sum deposited on the stakeholder as there was no concluded contract between the applicant and the first respondent prior to the signing of the SPA.

20 [19] This court refers to clauses 25 and 27 of the SPA where it specifically said that delivery of vacant possession shall be within 48 calendar month from the date of the SPA. Whereas clause 27 said that the completion of common facilities shall be completed within 48 calendar month from the date of the SPA. Nowhere in the SPA provides that the delivery of vacant possession and completion of common facilities must be completed from any other date. The court refers to the Federal Court case of *Metramac Corporation Sdn Bhd (Formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 3 AMR 725; [2006] 3 CLJ 177 and found that the language used in a statute must be interpreted in accordance to the Parliament's intention and to give a clear effect on it. The court held as follows:

35 The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention.

40 This court is of the view that the SPA on the facts is in accordance with Schedule H of the Regulation 1989 whereby it is the Parliament's intention that it shall be strictly followed and cannot be contracted out.

[20] The second respondent is not at liberty to ignore the express provision of the Act. Where the words of the Act are clear and unambiguous, the second respondent is obliged to apply the law and to observe the limits on its jurisdiction as specified under the Act (see *Malaysia Land Properties Sdn Bhd v Chan Cecilia & Anor* [2011] AMEJ 0034; [2011] 1 LNS 55). Therefore the date of the agreement in this case must mean on March 27, 2014 and the time for the applicant to deliver vacant possession is 48 months from the date of SPA.

[21] This court finds that when the second respondent grants the award based on the purported date of the stakeholder sum in the stakeholder, the second respondent has committed a jurisdictional error by taking into account the

wrong facts that the stakeholder sum is a booking fee or a deposit whereas the applicant is prohibited to collect any payment as stakeholder because there was no contract of sale on September 28, 2013. The second respondent failed to consider that the applicant is not the stakeholder to the first respondent.

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[22] After considering the applicant's application and submissions of the parties, this court finds that no binding contract was formed on September 28, 2013 as there is no consideration, no acceptance and no intention to create legal relation between the applicant and the first respondent. The second respondent has erred in holding that the date of ascertaining the delivery of vacant possession should be started on September 28, 2013.

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[23] Premised on the aforesaid, the court finds that the second respondent has committed jurisdictional errors and/or anisminic errors as mentioned above especially the second respondent has acted on incorrect basis in fact. The award made by the second respondent ought to be quashed as it is tainted with illegality and unreasonableness which warrants the curial intervention of this court as the tribunal has exceeded its jurisdiction.

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[24] To conclude, the liquidated damages payable for late delivery of the vacant possession of the property and late completion of the common facilities should have been calculated from date of the SPA and not the date of the stakeholder sum being deposited on the first respondent stakeholder. The court allowed the applicant's judicial review application with costs RM5,000.00 subject of payment of allocator.

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