



Rosli Dahlan
Dispute Resolution
T: +603 6208 5804
E: rd@lh-ag.com



Ho Ai Ting
Dispute Resolution
T: +603 6208 5907
E: hat@lh-ag.com

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The End: No More Extension of Time to Housing Developer

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Pengawal Perumahan, Kementerian

Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan ^[1]

In a landmark decision on Tuesday, the Federal Court, in allowing appeals filed by the homebuyers of a condominium project, held that Regulation 11(3) of the Housing Development (Control & Licensing) Regulations 1989 (**Regulations**), which confers power on the Controller to waive and modify the terms and conditions of the statutory contract of sale, is *ultra vires* the Housing Development (Control & Licensing) Act 1966 (**HDA**) and therefore invalid.

Facts

Under the statutory Schedule H sale and purchase agreements, the developer is required to deliver vacant possession of the condominium units to the homebuyers within 36 months from the date of the agreements.

Prior to the expiry of the 36-month period, the developer filed an application for an extension of time for delivery of vacant possession to the Controller of Housing (**Controller**) pursuant to Regulation 11(3) of the Regulations. The Controller rejected the developer's application, which led the developer to lodge an appeal to the Minister of Urban Wellbeing, Housing and Local Government (**Minister**) pursuant to Regulation 12. By a letter purportedly signed by a person on behalf of the Controller, the developer was granted an extension of time of 12 months (**EOT Letter**). As a result, the homebuyers were unable to claim for the liquidated ascertained damages as provided for in the sale and purchase agreements.

Dissatisfied with the EOT Letter, the homebuyers filed an application for judicial review against the Minister, the Controller and the developer. The validity/irregularity of the EOT Letter was specifically challenged, among others, that the said letter was signed by someone on behalf of the Controller, instead of the Minister or someone on behalf of the Minister.

Federal Court Decision

In holding that Regulation 11(3) is *ultra vires* the HDA, the Federal

Court found, among others:

- (a) The legislative intent of s 24(2)(e) of the HDA which empowers the Minister to “*regulate and prohibit the conditions and terms of any contract between... developer... and his purchaser*” is that such duties shall remain with the Minister, and it is not for the Minister to delegate that responsibility to the Controller;
- (b) There was no express power to delegate under the HDA;
- (c) As the “power to regulate” in s 24(2)(e) of the HDA does not include the power to delegate, the Minister’s action in delegating the power to modify the conditions and terms of the contract of sale may be construed as having exceeded what was intended by Parliament;
- (d) In allowing the Controller to waive or modify the terms and conditions of the contract of sale and, in the process, denying the purchasers’ right to claim for liquidated ascertained damages in case of late delivery, Regulation 11(3) does not comply with the description of the Regulations, which is designed to protect the interests of the purchasers.

A look ahead

Notably, this landmark decision has changed the landscape of the housing industry and brings about wide ramifications affecting the housing developers. The Federal Court reaffirmed that the HDA is a piece of social legislation designed to protect the homebuyers and that the interests of the homebuyers shall be the paramount consideration against the housing developer.

In our respectful view, the Federal Court judgment brought about two issues:

- (a) As a matter of principle, a court judgment is “*retrospective in effect unless a specific direction of prospectivity is expressed*”.

[\[2\]](#)

In the grounds of judgment, the Federal Court did not deal with the doctrine of prospective overruling, i.e. whether the declaration of invalidity of Regulation 11(3) was made prospectively. Therefore, it is foreseeable that there may be argument on the interpretation of this Federal Court judgment and its effect.

- (b) Now that Regulation 11(3) has been declared invalid, Regulation 12, which provides for an appeal to the Minister against the Controller’s decision, is arguably rendered redundant. It remains open, following this Federal Court judgment, whether the Minister would still have the power to grant an extension of time to developers to complete their projects. However, the HDA and the Regulations, as they stand, do not have any provision enabling the Minister to grant an extension of time.

It is hoped that a circular or practice direction will soon be issued so as to serve as a guide to judicial officers in relation to their conduct of pending cases on similar issues. This would ensure conformity in

understanding what the Federal Court decided, especially as to the correct application of the decision to all pending cases.

The grounds of judgment may be viewed [here](#).

Ho Ai Ting and **Christopher Ik Chu Jek** (icj@lh-ag.com)

If you have any queries concerning housing disputes, please contact our specialised team of partners [Rosli Dahlan](mailto:rd@lh-ag.com) (rd@lh-ag.com), [Bahari Yeow Tien Hong](mailto:yth@lh-ag.com) (yth@lh-ag.com) or [Ho Ai Ting](mailto:hat@lh-ag.com) (hat@lh-ag.com).

Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia

T +603 6208 5888
F +603 6201 0122/0136
E enquiry@lh-ag.com
W www.lh-ag.com

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[1]

Federal Court Civil Appeal No 01(f)-38-10/2018(W), heard together with Federal Court Civil Appeals No 01(f)-41-10/2018(W); 02(f)-95-10/2018(W); 02(f)-96-10/2018(W); 02(f)-97-10/2018(W) and 02(f)-98-10/2018(W)

[2]

Semenyih Jaya Sdn Bhd v PTD Hulu Langat & Another case [2017] 5 CLJ 526 (FC)