IN THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION) Appeal No. 01(f)-29-10/2019(W) Between PJD Regency Sdn Bhd and Tribunal Tuntutan Pembeli Rumah & Anor and other appeals

SUMMARY OF THE GROUNDS OF JUDGMENT

Introduction

[1] There are seven appeals before us comprising three sets of different cases. All cases stemmed from applications for judicial review filed in the High Court at Kuala Lumpur and Malacca.

[2] Two appeals were filed by PJD Regency Sdn Bhd, the developer of a project known as 'You Vista' in Cheras. The 1st respondent in both appeals is the statutory housing tribunal ('Housing Tribunal') constituted under section 16B of the HDA 1966. The 2nd respondent in both appeals are the purchasers of certain units in that development project. We will refer to this set of appeals as 'PJD Regency Cases'.

[3] Three appeals were filed by the purchasers of a project known as 'Taman Paya Rumput Perdana Fasa 2'. The common respondent is the developer of the project, GJH Avenue Sdn Bhd. This set of appeals will be referred to collectively as 'GJH Avenue Cases'.

[4] The remaining two appeals were filed by the developer Sri Damansara Sdn Bhd in relation to a project known as 'Foresta Damansara'. The respondents in both the appeals are the purchasers. This set of appeals will be referred to as 'Sri Damansara Cases'.

[5] For ease of comprehension, throughout this judgment, we will refer to parties by their general designations namely as 'the developers', 'the purchasers' and 'the Housing Tribunal'.

[6] The common question of law falling for consideration as summed up from the similarly worded leave questions in all the appeals is as follows:

> "Where there is a delay in the delivery of vacant possession by a developer to the purchaser in respect of Schedule G and/or H type contracts under Regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (Regulation 1989) enacted pursuant to Section 24 of the Housing Development (Control and Licensing) Act 1966, whether the date for calculation of liquidated agreed damages ('LAD') begins from:
>
> (a) the date of payment of deposit/booking fee/initial fee/expression by purchaser of his written intention to purchase; or
>
> (b) from the date of the sale and purchase agreement,
>
> having regard to the decisions of the Supreme Court in *Hoo See Sen & Anor v Public Bank Berhad* [1988] 2 MLJ 170 and *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597.".

[7] The above question arose as a result of the difference in interpretation between the developers and the purchasers as to the meaning of the words "from the date of this agreement" contained respectively in clause 24(1) of Schedule G of the HDR 1989 and clause 25 of Schedule H of the HDR 1989 (both are statutory contracts and shall be referred to collectively as 'Scheduled Contracts').

[8] In the instant appeals, the courts below premised most of their reasoning by either following or distinguishing the Supreme Court decisions in *Hoo See Sen & Anor v Public Bank Berhad & Anor* [1988] 2 MLJ 170 ('*Hoo See Sen*') and *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597 ('*Faber Union*').

Our Analysis/Decision

The Decisions of the Supreme Court in *Hoo See Sen* and *Faber Union*

[9] The purchasers submitted that *Hoo See Sen* and *Faber Union* are both authorities for the proposition that the date of calculation of LAD begins from the date when they paid the booking fee. The developers argued that *Hoo See Sen*, when understood properly, established no such proposition and that *Faber Union* having followed it, was decided *per incuriam*. According to the developers, the Scheduled Contracts ought to be read literally. If their submissions are correct, then the LAD period begins quite literally from the date printed on the Scheduled Contracts even if that date was printed long after the booking fee was paid.

[10] From our reading, the *ratio decidendi* of *Hoo See Sen* is that the date of calculation of the LAD runs from the date the booking fee was paid and not from the date of signing of the agreement.

[11] Given our exposition on *Hoo See Sen* in the grounds of judgment, it is our view that *Faber Union*, having been decided in the same fashion as *Hoo See Sen*, is good law.

[12] Mr Lambert Rasaratnam, learned counsel for the developers argued that *Faber Union* was decided *per incuriam* for the reason that the

Supreme Court referred to *Hoo See Sen* erroneously. Learned counsel contended that the Supreme Court purported to refer to a passage in *Hoo See Sen* to determine that the Court had formerly held that the date of the contract runs from the booking fee. He referred us to page 171 of the Malayan Law Journal report to state that the Supreme Court said no such thing in *Hoo See Sen*. Instead, he said that in his research, the only statement which comes close to that is found in the *semble* at page 171 of the now defunct Supreme Court Reports. Thus, according to learned counsel, the reference to page 171 of *Hoo See Sen* in *Faber Union* was not a reference to the decision of the Court but to that of the *semble* of the Supreme Court Reports.

[13] In our view, and with respect, Mr Lambert's submission with which other counsel for the developers adopted, is flawed for the following reasons.

[14] Firstly, the principles of *stare decisis* are rudimentary. *Faber Union* cannot be read *in vacuo*. It must be read in light of its facts. At page 598 of the Malayan Law Journal report, the Supreme Court in *Faber Union* set out the salient facts in *Hoo See Sen* and then concluded, at page 599, that the *ratio decidendi* of *Hoo See Sen* is that the date of calculation of LAD runs from the booking fee. And having set out the facts and the principle of law applied to them, *Faber Union* quite unequivocally decided that when it concerns the calculation of LAD, the date runs from the date of the payment of the booking fee.

[15] Judgments ought to be read and appreciated in context. It follows, reading the two cases in context, that even if the Supreme Court in *Faber Union* referred to the wrong report or the wrong page of *Hoo See Sen*, this

single error is not a sufficient reason for us to declare that this Court's predecessor decided the case *per incuriam*.

[16] Accordingly, upon a wholesome and coherent reading of the two judgments of the Supreme Court in *Hoo See Sen* and *Faber Union*, the point of law at issue in these appeals remains very much decided. Where a developer fails to deliver vacant possession according to the time stipulated in the statutory sale and purchase agreement, the calculation of the LAD begins from the date of payment of the booking fee and not from the date of that statutory agreement.

[17] In any event, we are of the view that the above point of law is further clarified and cemented by the nature of the HDA 1966 and HDR 1989 being social legislation.

The Concept of Social Legislation

[18] That the HDA 1966 and its subsidiary legislation are social legislation is settled beyond dispute (see the decisions of the Federal Court in: *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141 and *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281).

[19] The long title of a statute is relevant to its interpretation (see section 15 of the Interpretation Acts 1948 and 1967). The long title of the HDA 1966 provides in no uncertain terms that it exists, in Peninsular Malaysia, for the protection of the interest of purchasers and for matters connected therewith.

[20] It was contended for the developers that the Scheduled Contracts must be read literally and in accordance with the intention of parties and that this is a feature of the principles of contractual interpretation. And applying the principles of statutory interpretation, we ought to prioritise the literal rule, which means the date of the agreement should follow the printed date in the first page of the agreement.

[21] With the greatest of respect, it is our view that the submission is untenable. When it comes to interpreting social legislation, the State having statutorily intervened, the Courts must give effect to the intention of Parliament and not the intention of parties. Otherwise, the attempt by the legislature to level the playing field by mitigating the inequality of bargaining power would be rendered nugatory and illusory.

Legislative History and Statutory Interpretation

[22] Learned counsel for the purchaser, Mr KL Wong took us through the legislative history of the HDR 1989. We agree with his submission and we have set it out in the grounds of judgment coupled with our own observations.

[23] In the Hansard of the 3rd Reading of the Housing Development (Control and Licensing) Bill on 25 March 1966, the then Minister of Local Government and Housing, the Honourable Mr Khaw Kai-Boh, said "legislative measures should be taken to protect the people from bogus and or unscrupulous housing developers. Hence this Bill."

[24] The Bill was passed and it now exists as the HDA 1966. Speaking specifically in the context of booking fees, deposits or any other labels that

may be used, it is quite clear that this very issue was one of the main reasons why the HDA 1966 was passed.

[25] Section 24 of the HDA 1966 empowers the Minister to issue regulations for the purpose of carrying into effect the provisions of that Act. The Minister may prescribe the form of contracts, regulate and prohibit conditions of the terms of such contracts, prescribe penalties for the contravention of the regulations and provide for exemptions from the operation of the Act, its forms and restrictions – as the case may be.

[26] At first, the Minister prescribed the Housing Development (Control and Licensing) Rules 1970 ('1970 Rules'). Rule 10 of the 1970 Rules permitted developers to collect booking fees provided that the amount of such fees did not exceed a statutory range.

[27] Eventually, the 1970 Rules, in particular Rule 10 thereof, was repealed on account of the then Government deciding that they needed to enforce stricter regulations against developers.

[28] What then followed was the complete repeal of the 1970 Rules and the subsequent enactment of the Housing Developers (Control and Licensing) Regulations 1982 ('HDR 1982'). A perusal of the HDR 1982 reveals that a provision like Rule 10 of the 1970 Rules was deleted with no comparable substitute.

[29] Any doubt there may have been as regards the practice of collecting booking fees is now put to rest with the coming into force of the HDR 1989.

[30] Regulation 11(2) of the HDR 1982 very clearly stipulates and expressly provides for an absolute prohibition against the collection of

booking fees howsoever they are called or described. Instead, the Scheduled Contracts now require that 10 percent of the purchase price be paid upon the signing of the sale and purchase agreement. Thus, speaking in ideal terms, if the law is strictly complied with, there is no question as to whether the date of calculation of the LAD runs from the date of payment of the booking fee or from the formal date of the agreement. This is because, the 10 percent deposit and the signing of the sale and purchase agreement would have been done simultaneously.

[31] The recent amendment to the HDR 1989 vide P.U.(A) 106/2015, to our minds, further cements the notion that the legislative framework has been further tightened to abrogate this practice of booking fees. Regulation 11(2) was amended to even stricter terms: everyone, not just developers, is prohibited from collecting booking fees.

[32] In our view, the intention of Parliament is unequivocal. From the Hansard in 1966, to the change in the subsidiary legislation up to the amendment to the HDR 1989 in 2015, the written law in force has made it crystal clear that the collection of booking fees is to be absolutely prohibited.

[33] Given the clear legislative intent, it follows that we are unable to read the Scheduled Contracts in these appeals literally. The legislative aim here is that any payment collected must be in accordance with the terms of the schedule of the statutory contract of sale. Accordingly, to give effect to this legislative intent and in light of the collective status of the HDA 1966 and HDR 1989 as social legislation, it follows that where this illegal practice of booking fee is afoot, the date of the contract cannot be taken to mean the date printed in the Scheduled Contracts. Otherwise, this Court would be condoning the developers' attempt in this case to bypass

the statutory protections afforded to the purchaser by the legislative scheme put in place.

[34] In our grounds of judgment, we have proceeded to examine the legal effect of the booking fee and why the date of the contract ought to run from the date of its payment and not from the date printed in the contract. In this regard, our discussion is on illegality and the formation of contract.

[35] During the hearing of these appeals, we posed a question to counsel for the developers on the effect of the transaction between parties in these cases vis-à-vis the issue of illegality. Counsel's reply was that while the breach of regulation 11(2) might attract penal sanctions, it does not affect the substantive validity of the Scheduled Contracts in these appeals.

[36] For the sake of the industry and given the rampancy of this practice of collecting booking fees as openly conceded by counsel for the developers, this point requires analysis.

[37] In dealing with this point, we glean significant guidance from existing case law, namely, the decision of the Supreme Court in *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369 ('*Coramas*') and the decision of this Court in *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 ('*Lori*') and the judgment of Privy Council in *Kiriri Cotton Co Ltd v Dewani* [1960] 1 All ER 177 ('*Kiriri Cotton'*).

[38] The present case is made even stronger for the purchasers by the fact that the scheme of the HDA 1966, the HDR 1989 and the Scheduled

Contracts expressly affords the purchasers a statutorily calculated remedy in the LAD.

[39] It does not therefore lie in the mouths of the developers to demand that the purchasers be restricted to the plain words of the law when the developers themselves, by demanding and collecting booking fees, have acted contrary to the express prohibition of regulation 11(2). We wholly echo the sentiment in *Kiriri Cotton* that the onus of compliance with the regulatory scheme of the housing legislation, being social legislation, is on the developers.

[40] In these appeals, the prime idea behind the legislative framework is that the developers should be confined to a set timeline. Booking fees are prohibited yet the developers have continued to brazenly flout the law by calling it standard practice. At the same time, they very boldly demand that the statute be construed in their favour by strictly limiting the commencement period to the dates printed in those contracts.

[41] In construing the illegality against the developers, if it is their attempt to have secured an early bargain through the illegal collection of booking fees, then the protective veil cast by the legislature over the purchasers should operate in a way so as to bind the developers to the booking fees. In this way, the developers will have to bear the full extent of the LAD payable by them to the purchasers consistent with the overall intent of the written law in respect of late delivery of vacant possession.

Formation of Contract

[42] The next point canvassed by the purchasers is that a valid contract came into being when they paid the booking fee to the developers.

[43] The purchasers referred us to several authorities to support their submission that a booking fee is sufficient to show the existence of a contract. Suffice that we refer to only two of them namely, the judgment of the Privy Council in *Daiman Development Sdn Bhd v Mathew Lui Chin Teck and another appeal* [1981] 1 MLJ 56 ('*Daiman*'); and that of the High Court in *Lim Eh Fah & Ors v Seri Maju Padu* [2002] 4 CLJ 37 ('*Lim Eh Fah'*), which we accept and endorse.

[44] As such we answer all related leave questions on the common issue to the effect as follows:

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

[45] Having addressed the primary issue of law we will now deal with each of the set of appeals.

<u>The PJD Regency Cases</u>

[46] In the PJD Regency Cases, the Housing Tribunal awarded the purchaser LAD in respect of late delivery of both vacant possession and completion of common facilities.

[47] In its two applications for judicial review, the developer contended that the LAD ought to have been calculated from the later date and not the booking fee date. Given our exposition of the law earlier, the concurrent decisions of the High Court and the Court of Appeal are correct and we are therefore minded to uphold the decisions.

[48] There is a leave question unique to this set of PJD Regency cases. It reads as follows:

> "For the purpose of ascertaining the date of completion of common facilities under a statutory agreement prescribed in Schedule H and J of the Housing Development (Control and Licensing) Regulations 1989 made pursuant to the Housing Development (Control and Licensing) Act 1966, whether the relevant date is when the prescribed architect certifies they were completed."

[49] The purchaser contended that the calculation of LAD in respect of the common facilities should run from the date the certificate of completion and compliance ('CCC') was issued. The developers contended that it should be calculated from the date the certificate of practical completion ('CPC') was issued. The Housing Tribunal decided in favour of the purchaser.

[50] Reverting to the principles of interpretation of social legislation, the Court is required to construe the statutory contract in a manner most favourable to the purchasers. It is clear that the sale and purchase agreements only refer to one type of certification namely, the CCC.

[51] Additionally, the CCC is a legal requirement imposed by law which in turn is only issued upon the developer complying with all regulatory laws such as the Street, Drainage and Building Act 1974. This in our view,

affords protection to purchasers who would be assured that the relevant authorities have approved the construction. The same cannot be said in respect of the CPC or any other such document not amounting to a CCC. The CPC, in any case arises under the building or construction contract and not the Scheduled Contracts.

[52] We answer the leave question in the affirmative and that such certification shall be in the form of a CCC.

[53] In the circumstances, we find the judgments of the High Court in the PJD Regency Cases to be correct and accordingly, the Court of Appeal did not err in affirming them. We dismiss the PJD Regency Appeals with costs.

The GJH Avenue Cases

[54] The Housing Tribunal awarded the purchasers LAD from the date they paid the booking fee. Following *Hoo See Sen* and *Faber Union*, the learned High Court Judges held that the date of commencement of the LAD is from the booking fee. The decision of the Housing Tribunal was thus upheld by the High Court.

[55] The Court of Appeal allowed the developer's appeals. It found that the two Supreme Court decisions are distinguishable and concluded that "the date of this agreement" as provided for in the SPA is the actual date of the SPA entered into between the developers and the purchasers.

[56] With respect, we are of the view that the Court of Appeal's attempt to distinguish those cases is artificial. The Court of Appeal was bound to follow the decisions in *Hoo See Sen* and *Faber Union*.

[57] As such, we are minded to allow the purchaser' appeals in the GJH Avenue Cases with costs. The decision of the Court of Appeal is hereby set aside and the orders of the High Court are restored.

Sri Damansara Cases

[58] Six leave questions have been summarised by learned counsel into what he called 'the 3 actual questions'. The first two of those summarised questions ask whether the calculation of LAD commences from the booking fee or from the date of the sale and purchase agreement and as such, whether *Faber Union* (supra) was correctly decided. The third question is whether the purchasers were unjustly enriched by the award of the Housing Tribunal.

[59] The Housing Tribunal awarded the purchasers LAD as calculated from the date of the deposit prior to a formal sale and purchase agreement. The High Court followed *Hoo See Sen* and *Faber Union* and upheld the Housing Tribunal's award. The Court of Appeal affirmed. In addition to following the two Supreme Court decisions, the Court of Appeal also followed the Privy Council's decision in *Daiman* (supra) on the principles of formation of contract. We have elaborated our views on this issue *in extenso* and we accordingly agree with and affirm them.

[60] The only issue that remains is unjust enrichment. The developer had provided a 10 percent rebate on the purchase price of the property to the purchasers. As such, the developer contended that the LAD should have been calculated on the rebated purchase price and not on the actual purchase price stipulated in the sale and purchase agreement as that would otherwise tantamount to unjust enrichment.

[61] The LAD prescribed by law is a statutory remedy afforded to the purchasers. There can therefore be no question of unjust enrichment upon an innocent party's right to enforce his statutory remedy against the party in breach. This is especially so considering the developer's own contravention of the law by collecting an initial fee from the purchaser in express contravention of regulation 11(2) of the HDR 1989.

[62] We therefore answer the question of whether the award of the Housing Tribunal results in the purchasers being unjustly enriched in the negative. The appeals by Sri Damansara are accordingly dismissed with costs and the orders of the Courts below are affirmed.

Conclusion

[63] The Courts will not countenance the bypassing of statutory safeguards meant to protect the purchasers. While the developers might think that it is a standard commercial practice to accept booking fees, the development of the law clearly suggests to the contrary. The Courts will not condone such a practice until and unless the law says otherwise.

[64] In summary, we find that the appeals by the developers are devoid of merit and we accordingly dismissed the appeals with costs. We find merits in the purchasers' appeals and the appeals are therefore allowed with costs.

Dated: 19 January, 2021.

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice
Federal Court of Malaysia.

Note: This summary is merely to assist in the understanding of the grounds of judgment. The authoritative text is the grounds of judgment.