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Hedgeford Sdn Bhd v Jennifer Fu Woan Lin & Ors

B HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO WA-25–172–09 OF 2016
FAIZAH JAMALUDIN J
24 MAY 2019

C *Civil Procedure — Judicial review — Application for — Decision of homebuyers tribunal — Right of audience before the tribunal — Whether tribunal may allow third party to appear on behalf of homebuyer — Whether tribunal must dismiss claims made if homebuyer failed to appear during hearing date — Calculation of liquidated damages for late delivery of vacant possession and completion of common facilities — Whether to be calculated from date of SPA or date of payment of deposit*

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This was an application for judicial review by the applicant pursuant to O 53 of the Rules of Court 2012 ('the ROC') in relation to the awards given by the ninth respondent ('the tribunal'). The applicant was the developer of an apartment building, whilst the first to eighth respondents were purchasers of apartment units in the said building. The applicant had delivered vacant possession and completed the common facilities of the apartment late. Pursuant to the terms and conditions of the SPAs, the purchasers were entitled to liquidated damages for the delay. The crux of the contention between the parties were that the applicant only offered the purchasers liquidated damages for the late delivery of vacant possession, to which the purchasers accepted, but when they were unaware that they were also entitled to liquidated damages for the late completion of the common facilities under the SPA. The purchasers subsequently lodged claims with the tribunal for the full amount of liquidated damages payable by the applicant under the SPA. The tribunal allowed all the claims. The applicant's complaint against the tribunal's decision were namely: (a) the tribunal should have dismissed the claims as they did not attend the hearing before the tribunal and did not provide good reason for their absence — the applicant alleged that they did not personally attend the hearing before the tribunal but were represented by a person known as Sri; (b) the tribunal committed an error of law in failing to consider that the purchasers' claims for liquidated damages were in breach of the full and final settlements between the applicant and purchasers; and (c) the tribunal had committed an error of law by allowing the claims for liquidated damages based on the date of the payment of deposit and not from the date of the SPAs as stipulated in the SPA.

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Held, allowing the judicial review in part with no order as to costs:

(1) Pursuant to s 16AE of the Housing Developers (Control and Licensing) Act 1966 ('the HDA'), 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 regulations in making and adopting any procedure. A template 'Surat Wakil Kuasa Bagi Menghadiri Pendengaran' which allowed a homebuyer to authorise a third party to represent him/her was contrary and ignored the provisions of the Part VI of the HDA. Therefore, the tribunal's decision in allowing the third parties to represent homebuyers at hearings before it went against the purpose and intent of setting up the tribunal, which was to provide a quick, simple and inexpensive forum for homebuyers to pursue their claim against housing developers. This ability to appoint a third party which was not extended to the housing developer went against the natural justice principle of rule against bias. Therefore, the decision to allow a third party to represent the purchasers at a hearing was procedurally improper and the tribunal had breached the principles of natural justice and failed to observe the procedural rules laid down in the HDA by which the tribunal's jurisdiction was conferred (see paras 34–35 & 40–42).

(2) On the plain reading of the Housing Development (Tribunal for Homebuyer Claims) Regulations 2002, it was agreed that the provisions were not permissive but mandatory. It was clear that the legislative intent of parliament was that if a claimant did not appear at the hearing, the tribunal must either dismiss the claimant's claim or award the respondent's counterclaim, if the respondent had a counterclaim. The president of the tribunal should have dismissed the claims when the purchasers did not attend the hearing. Therefore the president of the tribunal in allowing Sri to represent he purchasers at the hearing before the tribunal was ultra vires of the HDA and therefore the purported making of the awards were ultra vires of the HDA (see paras 48–52).

(3) If the date of the SPA was the date of the payment of the booking fee, it meant that there existed a binding contract for the sale and purchase of the property between the purchaser and the developer at the date of the payment of the booking fee. The purchaser would accordingly be bound to complete the purchase of the property. If the purchaser exchanged his mind and decided not to purchase the property and would not execute the formal contract in the form of contract in Schedule H, the purchaser would be in breach of the SPA 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, 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. Therefore, the tribunal had erred in law by

calculating liquidated damages from the date of the booking fee. The liquidated damages payable for late delivery of vacant possession of the apartment and late completion of the common facilities should have been calculated from the date of the SPA (see paras 70–71).

[Bahasa Malaysia summary

Ini merupakan satu permohonan untuk semakan kehakiman oleh pemohon selaras dengan A 53 Kaedah-Kaedah Mahkamah 2012 ('KKM') berkaitan dengan awad yang diberikan oleh responden kesembilan ('tribunal'). Pemohon merupakan pemaju satu building pangsapuri, manakala responden pertama hingga kelapan merupakan pembeli unit pangsapuri dalam bangunan tersebut. Pemohon telah menyerahkan milikan kosong dan menyelesaikan fasiliti umum pangsapuri tersebut lewat. Selaras dengan terma dan syarat SPA, pembeli berhak untuk ganti rugi tertentu untuk penangguhan tersebut. Asas ketegangan antara pihak-pihak adalah bahawa pemohon hanya menawarkan pembeli ganti rugi tertentu untuk kelewatan serahan milikan kosong, yang mana pembeli telah menerimanya, tetapi mereka tidak mengetahui bahawa mereka juga layak untuk menerima ganti rugi tertentu untuk kelewatan penyelesaian fasiliti umum di bawah SPA. Pembeli kemudiannya membuat aduan dengan tribunal untuk jumlah penuh ganti rugi tertentu yang perlu dibayar kepada pemohon dibawah SPA. Tribunal membenarkan semua tuntutan. Aduan pemohon terhadap keputusan tribunal adalah: (a) tribunal sepatutnya mengenetepikan tuntutan kerana mereka tidak hadir dihadapan tribunal dan tidak memberikan alasan baik untuk ketidakhadiran mereka — pemohon mengatakan bahawa mereka tidak hadir secara kendiri pada pendengaran akan tetapi mereka diwakili oleh seorang individu yang dikenali sebagai Sri; (b) tribunal terkhilaf disisi undang-undang apabila gagal untuk menimbangkan bahawa tuntutan pembeli untuk ganti rugi tertentu bertentangan dengan penyelesaian penuh dan akhir antara pemohon dan pembeli; dan (c) tribunal terkhilaf disisi undang-undang apabila membenarkan tuntutan untuk ganti rugi tertentu berdasarkan tarikh pembayaran deposit dan bukannya tarikh SPA sepertimana dinyatakan dalam SPA.

Diputuskan, membenarkan sebahagian semakan kehakiman dan tiada perintah berkaitan dengan kos:

(1) Selaras dengan s 16AE Akta Pembangun Perumahan (Kawalan dan Perlesenan) 1966 ('APP'), tribunal hanya boleh mengunakan prosedur yang ianya fikir wajar dan patut tertakluk kepada peruntukan APP dan apa-apa peraturan yang dibuat di bawah APP. Tribunal tidak boleh mengendahkan peruntukan APP dan peraturannya dalam membuat atau menggunapakai apa-apa prosedur. Satu pencontoh 'Surat Wakil Kuasa Bagi Menghadiri Pendengaran' yang membenarkan pembeli rumah memberikuasa kepada pihak ketiga untuk mewakilinya adalah

bertentangan dan tidak mengendahkan peruntukan Bahagian VI APP. Oleh itu, keputusan tribunal dalam membenarkan pihak ketiga untuk mewakili pembeli rumah di pendengaran bertentangan dengan tujuan pembentukan tribunal, yang mana untuk memberikan forum yang pantas, mudah dan murah untuk pembeli rumah membuat tuntutan terhadap pemaju perumahan. Kebolehan untuk melantik pihak ketiga yang tidak melibatkan kepada pemaju perumahan bertentangan dengan prinsip keadilan asasi iaitu rukun mencegah kecenderungan. Oleh itu, keputusan untuk membenarkan pihak ketiga mewakili pembeli di satu pendengaran adalah salah di segi prosedur dan tribunal telah melanggar prinsip keadilan asasi dan gagal untuk mematuhi peraturan prosedur yang ditentukan dalam APP yang mana memberikan kuasa kepada tribunal (lihat perenggan 34–35 & 40–42).

(2) Dalam bacaan mudah Peraturan Pembangunan Perumahan (Tribunal Tuntutan Pembeli Rumah) 2002, ianya dipersetujui bahawa peruntukan yang membenarkan tetapi wajib. Adalah jelas bahawa tujuan perundangan Parlimen adalah sekiranya penuntut tidak hadir di pendengaran, tribunal perlu sama ada mengetepikan tuntutan penuntut atau membenarkan tuntutan balas responden, sekiranya responden mempunyai tuntutan balas. Presiden tribunal sepatutnya mengetepikan tuntutan apabila pembeli tidak menghadiri pendengaran. Oleh itu, presiden tribunal adalah ultra vires APP dan oleh itu pemberian awad tersebut adalah ultra vires APP (lihat perenggan 48–52).

(3) Sekiranya tarikh SPA adalah tarikh pembayaran yuran tempahan, ianya bermaksud bahawa wujud satu kontrak yang mengikat untuk penjualan dan pembelian antara pada tarikh pembayaran yuran tempahan. Pembeli oleh itu akan terikat untuk menyelesaikan pembayaran hartanah tersebut. Sekiranya pembeli menukar fikiran dan membuat keputusan untuk tidak membeli hartanah tersebut dan tidak melaksanakan kontrak formal dalam bentuk kontrak di Jadual H, pembeli akan melanggar SPA memandangkan perjanjian telahpun wujud apabila dia membayar yuran tempahan. Dalam keadaan sedemikian, pembeli akan bertanggungan kepada pemaju rumah untuk apa-apa kerugian, kerosakan dan kos yang dialami untuk pelanggaran kontrak, dan bukannya hanya kehilangan yuran tempahan yang dibayar. Adalah jelas bahawa keadaan sedemikian bukan tujuan perundangan APP. Oleh itu, tribunal telah terkhilaf disisi undang-undang dengan mengiri ganti rugi ditentukan dari tarikh pembayaran yuran tempahan. Kerugian ditentukan yang perlu dibayar untuk lewat serahan milikan kosang dan penyelesaian lewat fasiliti umum hendaklah dikira daripada tarikh SPA (lihat perenggan 70–71).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

Cases referred to

ABT Construction Sdn Bhd & Anor v Tribunal Tuntutan Pembeli Rumah & Ors [2013] 9 MLJ 193; [2013] 8 CLJ 1020, HC (refd)

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, HC (refd)

Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155, HL (refd)

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

Hoo See Sen & Anor v Public Bank Bhd & Anor [1988] 2 MLJ 170; [1988] 1 CLJ Rep 125; [1988]1 CLJ 768, SC (distd)

Kekatong Sdn Bhd v Bank Bumiputera (M) Sdn Bhd [1998] 2 MLJ 440 ; [1998] 2 CLJ 266, CA (refd)

Lembaman Development Sdn Bhd v Ooi Lai Yin & Anor and other cases [2016] 7 MLJ 261; [2015] 1 LNS 301, HC (not folld)

Lim Eh Fah & Ors v Seri Maju Padu [2002] 7 MLJ 262; [2002] 4 CLJ 37, HC (not folld)

Marathaei d/o Sangupullai & Anor v Syarikat JG Containers (M) Sdn Bhd & Anor [1998] MLJU 220; [1999] 8 CLJ 356 ; [1999] 1 AMR 53, HC (refd)

Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177, FC (refd)

Perantara Properties Sdn Bhd v JMC-Kelana Square and another appeal [2016] MLJU 1598; [2016] 5 CLJ 367, CA (refd)

Tay Choon & Ors v Jeet Kaur [1972] 1 MLJ 216; [1972] 1 LNS 151 (refd)

Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor [2007] 1 MLJ 626; [2007] 1 CLJ 300; [2007] 2 AMR 148, HC (refd)

Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah [2006] 1 MLJ 339; [2004] 4 CLJ 203; [2004] 6 AMR 381, FC (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966 ss 3, 16A, 16B, 16C, 16D, 16E, 16F, 16G, 16H, 16I, 16J, 16K, 16L, 16M, 16N, 16N(2), (3), 16O, 16O(1), 16P, 16Q, 16R, 16S, 16T, 16U, 16U(2), (3), 16V, 16W, 16X, 16Y, 16Z, 16AA, 16AB, 16AC, 16AD, 16AE, 16AF, 16AG, 16AH, 16AI, 24, Part VI

Housing Development (Control and Licensing) Regulations 1989 reg 11(1), Schedule H, cll 25, 29

Housing Development (Tribunal for Homebuyer Claims) Regulations 2002 reg 22, 22(1), (3)

Interpretation Act 1948 and 1967 s 17A

National Land Code s 431(1)

Rules of Court 2012 O 53

Subordinate Court Rules 1950 (repealed by the Rules of Court 2012)

Justin TY Voon (Chiam Jin Yann with him) (Justin Voon Chooi & Wing) for the applicant.
Aarthi a/p S Jeyarajah (Shearn Delamore & Co) for the respondent.
K Roshan (Senior Federal Counsel, Attorney General's Chambers) as amicus curiae.

Faizah Jamaludin J:

A. INTRODUCTION

[1] This is an application for judicial review brought by the applicant under O 53 of the Rules of Court 2012 ('the ROC') for:

(a) an order of certiorari to quash all and/or whole awards given by the ninth respondent, the Tribunal for Homebuyers Claim ('the tribunal') against the applicant on 6 September 2016, which allowed the claims of the first to the eighth respondents for liquidated damages for late delivery of vacant possession and common facilities in Claim Nos TTPR/W/0687/16, TTPRIW/0688/16, TTPR/W/0691/16, TTPRIW/0695/16, TTPR/W/0697/16, TTPR/W/0698/16, TTPR/W/0699/16, TTPR/W/0700/16 and TTPR/W/0701/16 ('awards'); and

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

[2] After full consideration, I allowed the applicant's claim in prayer 1 and granted an order of certiorari to quash all the awards granted by the tribunal on 6 September 2016 to the first to the eighth respondents. Prayer 2 was dismissed. I did not grant an injunction to restrain the purchasers from bringing any claim against the applicant in respect of liquidated damages due to the late delivery of vacant possession and common facilities.

[3] The first to the eighth respondents are referred to in this judgment individually as 'R1' 'R2' 'R3' 'R4' 'R5' 'R6' 'R7' and 'R8' or collectively as either 'R1 to R8' or 'the purchasers'.

[4] The full grounds of my decision are set out in this judgment.

B. BACKGROUND FACTS

[5] The applicant is the developer of the apartment building known as 'The Hedgeford Residences' in Wangsa Maju, Setapak, Kuala Lumpur ('the building'). R1 to R8 are purchasers of apartment units in the building.

[6] The applicant and the purchasers entered into sale and purchase agreements for the purchase of apartment units in the building ('SPAs'). The SPAs are in the form of contract in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('the 1989 Regulations').

[7] The applicant had delivered vacant possession of the apartment units late to the purchasers. The applicant had also completed the common facilities in the apartment building late.

[8] Under the terms and conditions of the SPAs, the purchasers are entitled to liquidated damages for the delay in delivery of vacant possession of their individual apartment units and for the delay in the completion of the common facilities in the apartment building:

(a) cl 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%pa of the purchase price from the expiry date of the delivery of vacant possession until the date the purchaser takes vacant possession of his/her apartment unit; and

(b) the applicant is required to complete the common facilities in the building within 36 calendar months from the date of the SPA entered between the applicant and each purchaser. Pursuant to cl 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%pa of the last 20% of the purchase price.

[9] The crux of the dispute between the applicant and the purchasers is that the applicant had only offered the purchasers liquidated damages for the late delivery of vacant possession, which the purchasers had accepted in full and final settlement of his/her claim. When the purchasers entered into their respective settlement agreements with the applicant and accepted the liquidated damages payment for the late delivery of vacant possession, they were not aware that they were also entitled to liquidated damages for the late completion of the common facilities under the SPAs.

[10] The purchasers subsequently lodged claims with the tribunal for the full amount of liquidated damages payable by the applicant under the SPA. All their claims were allowed by the tribunal, with the necessary deductions for the payments of the liquidated damages already received by each of the purchasers from the applicant pursuant to their respective settlement agreements.

[11] The amounts awarded by the tribunal to each purchaser are detailed

next to their individual names in the third column of Table 1 below.

TABLE 1

Claim No	Respondent	Award sum
TTPR/W/0687/16	Jennifer Fu Woan Lin	RM27,086.76
TTPR/W/0688/16	Ang Swee Hoon	RM22,382.95
TTPR/W/0691/16	Ho Chuang Choong	RM24,420.68
TTPR/W/0695/16	Jennifer Fu Woan Lin	RM25,040.35
TTPR/W/0697	Ong Pei Ching	RM30,231.27
TTPR/W/0698/16	Khoo Chee Hoang	RM7,589.95
TTPR/W/0699/16	Tey Lee Chook	RM24,821.26
TTPR/W/0700/16	Ho Swen Yung	RM21,509.67
TTPR/W/0701 /16	Carol Lee Hwei	RM11,865.76

C. LAW ON JUDICIAL REVIEW

[12] 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].

[13] 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'.

[14] The governing principles on the judicial review of the decisions of statutory tribunals are set out in *Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor* [2007] 1 MLJ 626; [2007] 1 CLJ 300; [2007] 2 AMR 148, 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 eg:
>
> (a) asks himself the wrong question;
>
> (b) takes into account irrelevant considerations;
>
> (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.

(per Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 at p 343);

(3) In process or substance, an impugned decision is flawed on ground of:

(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;

(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:

(4) possibly, proportionality.

(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

(per Edgar Joseph Jr FCJ in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at pp 186–187; referring to the judgment of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374).

[15] 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 & 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 MLJ 145; [1997] 1 CLJ 147; *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748 (CA); *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629; *Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor* [2009] 4 MLJ 285; [2009] 8 CLJ 200 — Mohamed Arif JC; and *Telekom Malaysia Bhd v Tribunal*

Tuntutan Pengguna & Anor [2007] 1 MLJ 626; [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

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

(a) the tribunal should have dismissed the purchasers' claims as they did not attend the hearing before the tribunal on 6 September 2016 and did not provide any good reason for their absence;

(b) the tribunal committed an error of law in failing to consider that the purchasers' claims for liquidated damages were in breach of the full and final settlements between the applicant and the purchasers; and

(c) the tribunal had committed an error of law by allowing the purchasers' claims for liquidated damages based on the date of the payment of deposit and not from the date of the SPAs as stipulated in cl 25 of the SPA.

E. ANALYSIS

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

[17] The tribunal was established by the introduction of the new Part VI (Tribunal for Homebuyer Claim) by the Housing Developers (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 ss 16A–16AI, with effect from 1 December 2002.

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

[18] Section 16U of the HDA governs the right to appear at hearings before the tribunal.

[19] 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.

[20] 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.

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

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

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

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

[22] The applicant's complaint against the purchasers is that they all did not personally attend the hearing before the tribunal on 6 September 2016 but were instead represented by a person known as Sri Gananathan a/l Sivanthan ('Sri') at the hearings.

[23] At the hearing on 6 September 2016, Sri had produced letters of authorisation to the tribunal issued by each of the purchasers.

[24] The applicant contends that the letters of authorisation were not effective and/or invalid and cannot overcome the statutory provisions in s 16U of the HDA and reg 22 of the 2002 Regulations.

[25] 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.

[26] Save for the exceptions in ss 16N and 16O of the HDA, 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 Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah* [2006] 1 MLJ 339; [2004] 4 CLJ 203; [2004] 6 AMR 381, that the provisions in ss 16N(2), (3) and 16O(1) clearly showed that Parliament's intention was to form a simple forum for homebuyers to lodge a claim.

[27] 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.

[28] 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.

[29] Therefore, claimants 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 and advocate and solicitor.

[30] 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 & Ors v Dato Ting Check Sii* [2009]4 MLJ 165; [2009]4 CLJ 449; [2009] 5 AMR 281 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.

[31] 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 ss 16U(2) and 16U(3).

[32] 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.

[33] 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.)

[34] 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 regulations in making and 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.

[35] 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.

[36] 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'. In *Marathaei d/o Sangupullai & Anor v Syarikat JG Containers (M) Sdn Bhd & Anor* [1998] MLJU 220; [1999] 8 CLJ 356 ; [1999] 1 AMR 53, the court held that:

> [1a] A workman may be involved in other proceedings not related to s 20(3) of the [Industrial Relations Act 1967] but when he is involved in proceedings relating to s 20(3), by s 27(1)(c) of the Act, he may appear personally or where he is a member of a trade union of workmen, he may be represented by an officer or employee of the trade union of which he is a member. By s 27(1)(d) of the Act, in such proceedings, he may be represented by an advocate only with the permission of the president or the chairman.
>
> [1b] The issue before the Industrial Court in the instant case concerned the workman's appearance in a proceeding under s 6 of the Act and thus s 27(1)(c) and (d) is not applicable. Therefore, a counsel has no locus standi to represent a workman in a non-compliance case under s 56(1) of the Act.

[37] 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 ss 16U and 16AE yields plain meaning and it is the duty of tribunal to interpret the words to give such plain meaning.

[38] The Interpretation Act 1948 and 1967 (Act 388) ('the Interpretation Act') prefers a purposive interpretation of statutes. Section 17A of the Interpretation Act 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.

[39] 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 and*

another appeal [2016] MLJU 1598; [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 ...
>
> 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:
>
> > 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 intended 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 s 17A but what Lord Griffiths said above describes what we understand as the purposive approach to interpreting statute.

[40] 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. 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.

[41] 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' ie 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).

[42] Accordingly, I find that the tribunal's decision in allowing Sri to represent the purchasers at the hearing on 6 September 2016 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. A

(b) Should the tribunal have dismissed the claimants' claims for non-appearance at the hearing? B

[43] Regulation 22 of the Housing Development (Tribunal for Homebuyer Claims) Regulations 2002 ('the 2002 Regulations') regulates the non-appearance of parties at hearings before the tribunal. Regulation 22 of the 2002 Regulation provides as follows: C

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- D

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

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

(2) An award made under subregulation (1) shall be in Form 7. E

(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 F

(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. G

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

[44] Regulation 22(1) of the 2002 Regulations 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. H

[45] The applicant argues that although the word 'may' is used in reg 22(3), the regulation is mandatory because the only available option under the 2002 Regulation to the tribunal when the purchasers did not attend the hearing was to dismiss their claims. I

[46] The applicant cites as authority the case of *Kekatong Sdn Bhd v Bank*

Bumiputera (M) Sdn Bhd [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 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 p 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 p 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.)

[47] Regulation 22 expressly provides that:

(a) 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. A

(b) 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. B

[48] 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 a 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. C

[49] Accordingly, the President of the tribunal should have dismissed the purchasers' claims when they did not attend the hearing on 6 September 2016. D

[50] 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 proceed with the hearing on 6 September 2016 and make the awards for the purchasers since they were absent from the hearing. E

[51] For the above reasons, I find that the President of the tribunal in allowing Sri to represent the purchasers at the hearing before the tribunal on 6 September 2016, had 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. F

[52] I also find that the tribunal in making the awards for the purchasers at the hearing on 6 September 2016 even though they were all absent from the hearing goes against the express provision of reg 22(1) of the 2002 Regulations. For this reason, I find that the purported making of the awards were ultra vires the HDA. G

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

[53] It is the applicant's case that the tribunal had committed an error of law by allowing the purchasers' claims for liquidated damages based on the date of the payment of booking fee and not from the date of the SPA as stipulated in cl 25 of the SPA. The applicant argues that the SPA is a statutory contract prescribed in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('the 1989 Regulations'). I

[54] The 1989 Regulations was enacted pursuant to s 24 of the HDA and

came into force on 1 April 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.)

[55] Regulation 11(1) of the 1989 Regulations provide that:

> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional 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.)

[56] 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.

[57] Clauses 25 and 29 of Schedule H states 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.)

[58] The SPAs between the applicant and the purchasers complied with the requirements of the HDA and the 1989 Regulations. As reproduced below, the provisions in cll 25 and 29 of the form of contract in Schedule H are contained in cll 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.

[59] The Federal Court in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [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* (1920) 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* (1920) 28 CLR 129 at pp 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.

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

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

[62] Counsel for the tribunal relies on the Kota Bharu High Court case of *Lim Eh Fah & Ors v Seri Maju Padu* [2002] 7 MLJ 262; [2002] 4 CLJ 37 and the Pulau Pinang High Court case of *Lembaman Development Sdn Bhd v Ooi Lai Yin & Anor and other cases* [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.

[63] 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 the Supreme Court decision in *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170; [1988] 1 CLJ Rep 125; [1988]1 CLJ 768. 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.

[64] 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.

[65] 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, ie 24 months from the date of payment of the booking fee'.

[66] In *Hoo See Sen,* the appellants/plaintiffs sued Public Bank Bhd, 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 from paying 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 authorized to do so, and this must be for the benefit of the appellants.

[67] Therefore, the remark 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 said 'by the way' and is accordingly obiter dicta. It is not the ratio decidendi of the case.

[68] For these reasons, with respect, in my view, 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.

[69] 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 17 March 1988 ie 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 1 April 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.

[70] In my view, if as held by the tribunal, the date 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.)

[71] 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.

F. FINDINGS OF THIS COURT

[72] For the above reasons, I find that the tribunal had exercised purported powers which are ultra vires the HDA in allowing a third party to represent the purchasers at the hearing on 6 September 2016 and making the Awards for the purchasers at the same hearing even though they were all absent from the hearing. I also find that the tribunal had committed errors of law by calculating the liquidated damages from the date of the booking fee instead of the date of the respective SPAs.

[73] I have not made any findings in relation to the applicant's claim that the tribunal had failed to consider that the purchasers' claims were in breach of the full and final settlement agreements reached between the applicant and the purchasers. The applicant had filed a separate civil suit in the Kuala Lumpur High Court (Civil Suit No WA-22NCVC-644–10 of 2016) and in that suit, the learned judge held that the settlement agreements between the applicant and the purchasers were 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

[74] For the above reasons, I hereby grant an order of certiorari quashing the whole awards granted by the tribunal to the purchasers against the applicant on 6 September 2016.

[75] Prayer 2 is dismissed. No order is made to restrain or injunct the purchasers 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.

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

Judicial review allowed in part with no order as to costs.

Reported by Izzat Fauzan