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BLUDREAM CITY DEVELOPMENT SDN BHD v. KONG THYE & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
LEE SWEE SENG JCA
B AHMAD NASFY YASIN JCA
[CIVIL APPEAL NOS: B-01(A)-55-01-2020,
B-01(A)-56-01-2020, B-01(A)-57-01-2020,
B-01(A)-62-01-2020, B-01(A)-63-01-2020
& B-01(A)-64-01-2020]
C 24 JANUARY 2022

Abstract – *The fact that the Controller of Housing has no power to make a decision under reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('Regulations') does not take away the*
D *power of the Minister to make a decision under regs. 11(3) or 12 in an appeal from an invalid decision under reg. 11(3) of the Regulations. With or without regs. 11(3) or 12 of the Regulations, the Minister is empowered, under s. 24(2)(e) of the Housing Development (Control and Licensing) Act 1966 to 'regulate and prohibit the conditions and terms*
E *of any contract' between a licensed housing developer and a purchaser. The expression 'regulate and prohibit' is wide enough to include 'waive and modify' any provisions under reg. 11(3) of the Regulations.*

F ***ADMINISTRATIVE LAW:*** *Judicial review – Judicial review challenging decision of Minister of Urban Wellbeing, Housing and Local Government ('Minister') – Appeal against – Minister granted extension of time of 17 months, from 42 months to 59 months, for developer to complete housing development – Whether purchasers were parties adversely affected – Whether Minister's decision valid in light of Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan*
G *dan Kerajaan Tempatan & Anor And Other Appeals – Whether Minister's decision tainted with procedural impropriety and irrationality – Whether there was breach of natural justice when purchasers were not heard – Whether court ought to interfere with Minister's decision – Whether Minister's decision ought to be set aside – Housing Development (Control and Licensing) Act 1966, s. 24(2) – Housing*
H *Development (Control and Licensing) Regulations 1989, reg. 11(3) & 12*

The respondents ('purchasers') were purchasers of units of service apartments developed by Bluedream City Sdn Bhd ('developer'). The Controller of Housing ('Controller') had granted the developer a six-month extension, from a contractual period of 36 months from the date of signing of the sale
I and purchase agreement ('SPA') to 42 months, for the developer to complete the housing development ('first extension'). The developer then made a

second application to the Controller to extend the 42-month time period flowing from the first extension for completing the units to 59 months as, throughout the period of 17-months stop work order ('SWO'), no work could be done. At that time, the developer had completed 46.24% of the project and had sold 80% of the units in the project. The Controller allowed the developer's second application in part and allowed an extension from 42 months to 54 months but only for the unsold units. As for the sold units, the developer would have to enter into a supplementary agreement with the purchasers ('Controller's second extension'). The developer then appealed to the Minister of Urban Wellbeing, Housing and Local Government ('Minister'). The Minister agreed to amend Schedule H to the Regulations to extend the time period to complete the units. The Minister then granted an extension of time of 17 months, from 42 months to 59 months ('second extension') ('Minister's decision'). Aggrieved, the purchasers commenced judicial review applications at the High Court, challenging the Minister's decision *ie* the second extension. The High Court (i) allowed the applications on the grounds that reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('Regulations') was *ultra vires* the Housing Development (Control and Licensing) Act 1966 ('Act'), as held in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* ('*Ang Ming Lee*'); (ii) invalidated the first extension even though there was no challenge against the same; and (iii) granted a declaration that the purchasers were entitled to their liquidated ascertained damages ('LAD') claims based on the 36-month time period under Schedule H of the Regulations. Hence, the present appeals against the purchasers, which consisted of three commenced by the developer and another three commenced by the Minister and the Controller. The issues that arose for adjudication were: (i) whether the purchasers were parties adversely affected by the Controller's decision in the first extension and second extension or by the Minister's decision; (ii) whether the Minister's decision was valid in light of *Ang Ming Lee*; (iii) whether the Minister's decision ought to be set aside for procedural impropriety in that there was a breach of natural justice when the purchasers were not heard; (iv) whether the Minister's decision ought to be set aside on grounds of irrationality; and (v) whether the court ought to interfere with the Minister's decision.

Held (allowing appeals; setting aside decision of High Court)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) The challenge to the first extension was a non-starter as (i) no extension of time was applied for leave application for the judicial review to be filed out of time; (ii) there was no statement, pursuant to O. 53 r. 3(2) of the Rules of Court 2012 with respect to the first extension; and (iii) the first extension had been subsumed into the Minister's decision. Furthermore, the High Court Judge ('HCJ') erred in bringing the first extension into play on his own accord as the purchasers themselves did not take issue with the first extension. (paras 23 & 26)

(2) In *Ang Ming Lee*, the decision to extend time to complete the units was made by the Controller, not the Minister. Here, it was the Minister that made the decision to extend time. The material facts were poles apart; the proposition of law made in one case could not be transported into a different factual matrix especially when the decision maker was different. The fact that the Controller had no power to make a decision under reg. 11(3) of the Regulations did not take away the power of the Minister to make a decision under regs. 11(3) or 12 in an appeal from an invalid decision under reg. 11(3) of the Regulations. The power of the Minister must necessarily include the power to modify the Schedule H contract. The Minister could not lose the power he validly had just because the delegation of this power to the Controller was held to be illegal. What the Minister could not delegate he would need to exercise on his own. There was thus no basis for reading *Ang Ming Lee* as having decided that the Minister had no power to decide on matters relating to extension of time for a developer to complete the units in a housing development under reg. 11(3) or on appeal under reg. 12 of the Regulations. *Ang Ming Lee* could not be read as striking down reg. 11(3) of the Regulations in its entirety. A holistic reading of *Ang Ming Lee* must mean that reg. 11(3) is *ultra vires* to the extent that it provided the Controller with the power to waive and modify the SPA in the Schedules to the Regulations. (paras 36, 42, 45, 51, 53 & 54)

(3) There was no express requirement of a right to be heard that must be given to the purchasers. What was important was that the Minister must act fairly, taking into consideration that the purchasers were not obliged to consent to any extension of time implored by the developer. The Minister was entitled to proceed on the assumption that the purchasers would not agree to any extension of time. The Minister, in discharging his duty under the Act, would have to take the interest of the purchasers into consideration as he was entrusted under the Act to safeguard their rights. There was no need to hear the purchasers individually or independently unless the Minister had some doubts as to how the purchasers' interest may best be safeguarded as in various options and permutations open to the purchasers. (paras 66-68)

(4) This was not a case where the developer was trying to take advantage of the purchasers but, in reality, where for the extension of time and the resourcefulness of the developer, this project might well not have been completed to the detriment of all. This was a case of a genuine need for the extension of time corresponding to the period of delay caused by the SWO which was not through any fault of the developer. All the developer was asking for was the extension of 17 months when they were prevented by the SWO from doing any work. The Minister's decision could not be said to be so outrageous in its defiance of logic or of accepted moral standards. It was a difficult and delicate decision that

the Minister was entitled to arrive at in taking into account the interest of the purchasers who had faced the real likelihood of the project being abandoned because of the 17 months arising from the SWO. (paras 112, 114 & 125)

(5) There were times when the court would not interfere with the exercise of discretion which Parliament had vested in a Minister. This was one such incident. The Minister had a team of advisers to advise him. They have dealt with countless projects that had been abandoned and for one reason or another and also the experience that came from reviving abandoned projects. The Minister and his team of experts were best positioned to know when a 'sick' may not be revived if the resources of the developer have dried up with continuing costs to bear even during the period of SWO and, in this case, for a period of 17 long months and coupled with the certainty that the purchasers would not forgo their right to recover LAD for every single day of delay. (paras 116 & 117)

(6) The decision of the Minister could not be said to have suffered from any of the infirmities such that it was illegal, in breach of natural justice, irrational or that it was out of proportion to the justice of the case that would make it susceptible to being quashed. (para 127)

Obiter:

(1) This decision was not a victory for anyone, not even the developer, but a reminder once again that the law and, with that, the court too that interpreted the law, would have the unenviable task of balancing the conflicting interest of the parties and to make all parties see that there could be a convergence somewhere of the apparent conflict. (para 126)

Case(s) referred to:

AmBank (M) Bhd v. Tan Yu Hock [2012] 8 CLJ 457 HC ***(refd)***

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(dist)***

Council Of Civil Service Unions v. Minister For The Civil Service [1985] AC 374 ***(refd)***

Government Of Malaysia v. Mahan Singh [1975] 1 LNS 48 FC ***(refd)***

Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 8 CLJ 149 FC ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***

Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor v. Ang Ming Lee & Ors And Other Appeals [2018] 9 CLJ 640 CA ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***

Punjab National Bank v. Manjeet Singh (Case No 4330 of 2006) (Unreported) ***(refd)***

A *R v. Chief Constable Of The Thames Valley Police, ex p Cotton [1990] IRLR 344* ***(refd)***
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

Legislation referred to:

B Federal Constitution, arts. 39, 74(1), 80(1), Ninth Schedule
Housing Development (Control and Licensing) Act 1966, ss. 4, 11, 12, 24(1), (2)(c), (e)
Housing Development (Control and Licensing) Regulations 1989, regs. 11(1), (3), 12, Schedule H
Interpretation Acts 1948 and 1967, s. 40(1)
C Rules of Court 2012, O. 53 rr. 2(3), (4), 3(2), (6)

Constitution of India [Ind], art. 73(1)

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E *Wei Sang & Huang Yee Ching; M/s WS Yong & Co*
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[Editor's note: For the High Court judgment, please see Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other
F *Application [2020] 6 CLJ 55 (overruled).]*

Reported by Najib Tamby

JUDGMENT

Lee Swee Seng JCA:

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[1] The nub of the complaint of the purchasers by way of a challenge by judicial review ("JR") is directed against the decision of the Minister to grant a second extension of time of 17 months (from 42 months to 59 months) for the developer to complete the units in the service apartments of a housing
H development ("the units").

[2] There was a first extension not by the Minister but by the Controller of Housing ("Controller") for six months from contractual period of 36 months from the date of signing of the sale and purchase agreement ("SPA") to 42 months. However, this was not the subject of the challenge by the JR
I application.

[3] There are altogether two sets of appeals being heard together and they are set out below in the ascending order of their appeal number. The first set consisting of three appeals are by the developer against three clusters of cases represented by the name of the first purchaser in civil appeals:

(i) B-01(A)-55-01-2020 *Bludream City Development Sdn Bhd v. Kong Thye & 184 Ors*;

(ii) B-01(A)-56-01-2020 *Bludream City Development Sdn Bhd v. Chan Chew Mun & 25 Ors;* and

(iii) B-01(A)-57-01-2020 *Bludream City Development Sdn Bhd v. Alvin Leong Wai Kuan & 14 Ors.*

[4] The second set of appeals consisting of another three appeals are by the Minister and the Controller against the same three clusters of purchasers represented by the name of the first purchaser in the following civil appeals:

(i) B-01(A)-62-01-2020 *Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor v. Kong Thye & 184 Ors & Anor*;

(ii) B-01(A)-63-01-2020 *Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor v. Alvin Leong Wai Kuan & 14 Ors & Anor*; and

(iii) B-01(A)-64-01-2020 *Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor v. Chan Chew Mun & 25 Ors & Anor.*

[5] The developer, Bludream City Development Sdn Bhd ("developer") was the third respondent below in the High Court. The Minister was the first respondent and the Controller, appointed under s. 4 of the Housing Development (Control and Licensing) Act 1966 ("HDA"), as the second respondent in the High Court below. The three clusters of purchasers who sued for the late delivery ("LAD") claims were the applicants in the High Court below.

[6] The housing project consists of three blocks of service apartments (pangsapuri servis) from 19th to the 26th floors (376 units) with eight storeys of car parks and a kindergarten, swimming pool, gymnasium and a place for recreation besides a guardhouse and a TNB substation in the Mines Resort City, Seri Kembangan, Mukim Petaling, Daerah Petaling, Selangor Darul Ehsan (the "project").

In The High Court

[7] The High Court had allowed the JR applications of the three clusters of purchasers with respect to the second extension of time decided by the Minister based on its understanding of the binding effect of the Federal Court's case of *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281 that reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ("HDR") is *ultra vires* the HDA.

[8] The High Court also proceeded to invalidate the first extension of time decision by the Controller even though there was no challenge in the said decision by way of the JR application with no reference to it whatsoever in the O. 53 r. 3(2) of the Rules of the Court 2012 ("ROC") statement.

[9] In the upshot, the High Court granted a declaration that the purchasers are entitled to their LAD claims based on the 36-month time period under Schedule H of the HDR.

In The Court Of Appeal

[10] In the Court of Appeal, the lead counsel for the developer was Mr Lim Chee Wee and the Senior Federal Counsel ("SFC") Mr Liew Horng Bin appeared for the Minister and the Controller. Mr G T Fernandez led the submissions of the purchasers with the other counsel for the purchasers adopting his submissions.

[11] It was argued, chiefly by the SFC for the Minister and the Controller, that the purchasers were not the aggrieved party or a party adversely affected within the meaning of O. 53 r. 2(4) ROC in that the Controller only allowed the second extension from 42 months to 54 months with respect to the SPAs already signed by the purchasers provided the purchasers agreed. As for that part of the Controller's decision that the second extension would apply without consent of the purchasers to new SPAs to be entered into, it would appear that none of the purchasers sued fall into that category and in that sense, they would have no right to complain as they are not affected by that part of the Controller's decision.

[12] With respect to the first extension which decision was made by the Controller, there was no JR application on that decision and the application filed was in any event out of time under O. 53 r. 3(6) of the ROC coupled with the fact that there was no statement necessary for a JR application under O. 53 r. 3(2) ROC.

[13] It was also argued by all the appellants that there had been a misreading by the High Court of the scope, ambit and application of the Federal Court's decision in *Ang Ming Lee*'s case (*supra*) in that the Federal Court only struck down reg. 11(3) of the HDR on the ground of being *ultra vires* the HDA because the decision there was that of the Controller and that the Federal Court had in doing so specifically stated that the decision with respect to extension of time has to be made by the Minister and not to be delegated to the Controller.

[14] The appellants marshalled the argument that there was nothing unlawful or illegal in the Minister's decision as it was within his power under s. 24(2)(e) of the HDA to "regulate and prohibit the terms of any contract" entered into between the developer and the purchasers here and under

reg. 11(3) of the HDR to "waive or modify the terms of any contract of sale" of the units, which even though the Controller could not do but nevertheless the Minister could under the HDA.

[15] All the appellants also argued that the High Court had erred in holding that there was a breach of natural justice as the purchasers were not given a right to be heard. The appellants further contended that the Minister had nevertheless taken all relevant factors into consideration including the issuance of the stop work order ("SWO") for 17 months which was later uplifted after a thorough investigation by the Jabatan Kerja Raya ("JKR") confirmed that the subsidence and cracks in a nearby school were because of an underground stream under the school and that it has no relation to any negligence on the part of the developer.

[16] All the appellants argued that the decision of the Minister under the circumstances of the case was rational, reasonable and not illegal and certainly not infected with the *Wednesbury's* irrationality such as to impugn it.

Whether The Purchasers Are Parties Adversely Affected By The Controller's Decision In The First Extension And Second Extension (Subject To Conditions) Or By The Minister's Decision In The Second Extension

[17] On 10 April 2013 the Controller granted the first extension to the developer and the purchasers executed their respective SPAs, all after the first extension. The purchasers were entitled to apply for leave for commencing a JR application as soon as they are aware of this first extension but they did not do so.

[18] Then on 7 September 2016, the developer made a second application to the Controller pursuant to reg. 11(3) of the HDR to extend the 42-month time period flowing from the first decision for completing the units to 59 months for throughout the period of the 17-month SWO, no work could be done. At that time the developer had completed 46.24% of the project and had sold 80% of the units in the project.

[19] The Controller on 17 October 2016 allowed partially the developer's second application and allowed an extension from 42 months to 54 months but only for the unsold units and as for the sold units, the developer would have to enter into a supplementary agreement with the purchasers. It goes without saying that this could only be done if the purchasers agree. The purchasers did not agree and indeed they were not obliged to agree.

[20] As none of the purchasers agreed, the purchasers could not be said to be aggrieved or adversely affected by the Controller's second extension.

[21] The developer then further appealed to the Minister on 21 October 2016 and the Minister on 19 October 2017 allowed the developer's appeal. The Minister agreed to amend Schedule H to the HDR to extend the time

A period to complete the units under cl. 25(1) to 59 months for the units. The letter communicating the decision on this second extension was signed by the Minister himself, Tan Sri Noh bin Haji Omar, personally.

[22] Thus the decision of Controller in the first extension of six months making it 42 months to complete had been subsumed into the second
B extension decision of the Minister of 17 months making it 59 months to complete.

[23] The challenge to the first decision is thus a non-starter for three reasons:

C (i) no extension of time was applied for a leave application for JR to be filed out of time;

(ii) there was no statement pursuant to O. 53 r. 3(2) ROC with respect to the first decision of the Controller; and

D (iii) the first decision of the Controller had been subsumed into the second decision of the Minister.

[24] The purchasers argued that they were unaware of the first extension of time by the Controller but that is not a valid basis as they must then apply for an extension of time to file their JR application and indeed the learned
E High Court Judge had asked learned counsel for the purchasers if they had wanted to make any amendments to their JR application but none was forthcoming.

[25] Learned counsel for the purchasers argued that the court is duty-bound to take notice of an illegality at all stages and reliance was placed on the
F Federal Court case of *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619. However, that case involved the enforcement of an illegal contract and the defence of illegality was pleaded there. Here the issue is not the illegality of the contract but the decision of the Controller that was sought to be challenged by a JR
G application which is circumscribed by its own strict procedure of statement to be filed and time to file under O. 53 r. 3(2) and r. 3(6) ROC respectively.

[26] We find merits in the argument of learned counsel for the developer that the learned High Court Judge had erred in bringing the first extension into play on his own accord. With the greatest of respect to the learned High
H Court Judge, the purchasers themselves did not take issue with the first extension. It is not for the court to decide on what parties should challenge and we hearken to the *dicta* of Zaki Tun Azmi CJ in *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430; [2009] 6 MLJ 293 as follows:

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[15] The facts pleaded will inadvertently be related to the legal principles that the party will be relying upon. **It is not for the court to decide on what principle a party should plead. It should be left to the parties to identify it themselves** (see *Tan Kong Min v. Malaysia National Insurance Sdn Bhd* [2006] 1 MLJ 601 (FC) at p 614 para [51]; *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 MLJ 213 (CA) at p 213 para D and *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 (HC) at p 196 para G).
(emphasis added)

[27] This is particularly so when granting the relief with respect to the first extension which was not prayed for nor stated in the statement as required under O. 53 r. 2(3) ROC and, in the process, the learned High Court Judge had unwittingly ignored the three-month period under O. 53 r. 3(6) ROC within which the challenge must be made or an extension of time applied for.

[28] Order 53 r. 3(2) ROC and O. 53 r. 3(6) ROC read as follows:

(2) An application for leave must be made *ex parte* to a Judge in Chambers and **must be supported by a statement setting out** the name and description of the applicant, **the relief sought and the grounds on which it is sought,** and by affidavits verifying the facts relied on.

…

(6) An application for judicial review shall be made promptly and in any event **within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.** (emphasis added)

[29] We agree with the submission of learned counsel for the developer that the first extension was granted on 10 April 2013 and would have been made known to the purchasers when they executed the SPAs for the SPAs were executed after the grant of the first extension. Indeed, the learned High Court Judge had observed as follows in his grounds of judgment:

Clause 25(1) of the SPA … provides that the 3rd Respondent shall deliver vacant completion of the Parcel to the Applicants within 42 calendar months from the date of the SPA …

[30] The timeframe under the said rule is fundamental and goes to the jurisdiction of the court. In *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 4 MLJ 161, it was held as follows:

[30] In conclusion, we are of the view that **the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction** and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. **Whether the application has merits or not, is irrelevant.**
(emphasis added)

[31] Thus, for all intents and purposes, it is the second extension of the Minister that the purchasers could be said to be aggrieved by or adversely affected and thus could apply to quash or set it aside.

Whether The Minister's Decision To Extend Time For The Developer To Complete The Units Is Illegal In The Light Of The Federal Court's Decision In *Ang Ming Lee*'s Case

[32] What exactly did the Federal Court decide in *Ang Ming Lee*'s case (*supra*) with respect to the power of the Minister to "vary and modify" the terms of the statutory SPA in Schedule H to the HDR?

[33] The Federal Court did not say that the Minister has no power to "vary and modify" the terms of the statutory SPA. The Federal Court did not venture there because that was not the issue before the Federal Court.

[34] The issue before the Federal Court was whether the Controller could grant an extension of time to a developer to complete the units under the statutory SPA. The Federal Court held that the Controller could not because the Minister cannot delegate to the Controller what it could regulate under the HDA.

[35] The Federal Court could not be clearer when it said:

> [59] The powers and duties of the Minister, the controller and an inspector, respectively had thus been clearly defined. It is also pertinent to highlight, that by s. 4(2), express provisions were made for the exercise of an inspector's powers by the controller. By sub-ss. (3) and (4) of s. 4, Parliament had expressly allowed for the delegation of the controller's powers to named persons. But there is no such provision enabling the controller to exercise the Minister's powers. This supports our view that **Parliament did not intend for the Minister's powers to regulate the terms and conditions of a contract of sale to be delegated to the controller.** (emphasis added)

[36] We must say, with all the emphasis we can command, that in *Ang Ming Lee*'s case (*supra*), the decision to extend time to complete the units was made by the Controller and not the Minister. Here, it is the Minister that made the decision to extend time for the second extension of 17 months and that decision was in a letter signed by the Minister to the developer dated 19 October 2017 (exh. JKN3 at encl. 102 AR Vol. 2.(2)). The material facts are poles apart and hence the proposition of law made in one case cannot be transported and transposed into a different factual matrix especially when the decision-maker is different in that he is a Controller there but a Minister here.

[37] The Federal Court in *Ang Ming Lee*'s case (*supra*) held that reg. 11(3) of the HDR was *ultra vires* the parent HDA. The Federal Court did not hold that the Minister, pursuant to s. 24(2)(e) of the HDA in regulating and prohibiting the terms and conditions of the contract of sale, cannot grant an extension of time on the ground of special circumstances or hardship.

[38] What the Federal Court did say in *Ang Ming Lee*'s case (*supra*) was the Minister ought to apply his own mind to the matter of an extension of time for the developer there to complete the units and not to have delegated that responsibility to the Controller as follows:

> [36] By s. 24(2)(e) of the Act, the Minister is empowered or given the discretion by Parliament to regulate and prohibit the terms and conditions of the contract of sale. As opined by the learned authors in *De Smith's Judicial Review*, a discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but the presumption may be rebutted, by any contrary indication found in the language, scope or object of the Act. In our view, having regard to the object and purpose of the Act, *the words 'to regulate and to prohibit' in sub-s. 24(2)(e) should be given a strict construction, in the sense that the Minister is expected to apply his own mind to the matter and not to delegate that responsibility to the controller.* (emphasis added)

[39] Any doubt that it was the decision of the Controller that was up for challenge and not that of the Minister is clarified by the Federal Court as follows:

> The fact that the letter was signed on behalf of the controller to convey a decision by the Ministry (as opposed to the Minister) under reg. 11, *in our view made it crystal clear that the decision to grant the extension of time to the developer was that of the controller and not the Minister. Our view is fortified by the absence of any material before the Court in the form of an affidavit by the Minister to explain the discrepancy and to state that he had indeed decided to allow the developer's appeal under reg. 12 for the extension of time.*
>
> (emphasis added)

[40] Section 24(1) and (2)(c) and (e) of the HDA empowers the Minister to do the follows:

> **24. Powers to make regulations**
>
> (i) Subject to this section, the Minister may make regulations for the purpose of carrying into effect the provisions of this Act.
>
> (ii) In particular and without prejudice to the generality if the foregoing power, 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;
>
> …
>
> (e) **regulate and prohibit the conditions and terms of any contract** between a licensed housing developer, his agent or nominee and his purchaser; (emphasis added)

[41] The relevant regulations in reg. 11(1), (3) and reg. 12 of the HDR read as followed:

> 11. Contract of sale
>
> (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, it shall be in the form prescribed in Schedule H.
>
> …
>
> (3) Where the Controller is satisfied that owing to *special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions*:
>
> Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller.
>
> …
>
> 12. Appeal
>
> Notwithstanding anything to the contrary in these Regulations, any person aggrieved by the decision of the Controller under paragraph (3) of regulation 3, paragraph (1) of regulation 4, paragraph (4) of regulation 5, paragraph (2) of regulation 9 or *paragraph (3) of regulation 11* may, within fourteen (14) days after having been notified of the decision of the Controller, *appeal against such decision to the Minister; and the decision of the Minister made thereon shall be final and shall not be questioned in any court.*
>
> (emphasis added)

[42] It is no doubt true that the Minister's decision of the second extension was made pursuant to reg. 12 flowing from a reg. 11(3) of the HDR decision of the Controller which the Federal Court in *Ang Ming Lee*'s case (*supra*) held to be an *ultra vires* decision of the Controller. The fact that the Controller has no power to make a decision under reg. 11(3) of the HDR does not take away the power of the Minister to make a decision under reg. 11(3) or under reg. 12 in an appeal from an invalid decision under reg. 11(3) of the HDR.

[43] In any event, with or without the reg. 11(3) or reg. 12 of the HDR, Parliament had empowered the Minister under s. 24(2)(e) of the HDA to "regulate and prohibit the conditions and terms of any contract" between a licensed housing developer and a purchaser. The expression "regulate and prohibit" is wide enough to include "waive and modify" any provisions

under reg. 11(3) of the HDR with respect here to the time period to complete the units and with that the application of the LAD claim only to completion outside the second extension period of 59 months.

[44] The vast power of the Minister as conferred on him by Parliament also extends to powers to give directions under ss. 11 and 12 of the HDA for the purpose of safeguarding the interests of the purchasers where the developer is unable to meet its obligations to its purchasers or is about to suspend its building operations. The sections read as follows:

> **11. Powers of the Minister to give directions for the purpose of safeguarding the interests of purchasers**
>
> (1) Where on his own volition a licensed housing developer informs the Controller or where as a result of an investigation made under section 10 or for any other reason the Controller is of the opinion that the licensed housing developer becomes unable to meet his obligations to his purchasers or is about to suspend his building operations or is carrying on his business in a manner detrimental to the interests of his purchasers, *the Minister may without prejudice to the generality of the powers of the Minister to give directions under section 12 for the purpose of safeguarding the interests of the purchasers of the licensed housing developer:*
>
> …
>
> **12. Powers of the Minister to give general directions**
>
> *The Minister may give to a licensed housing developer such directions as he considers fit and proper for the purpose, of ensuring compliance with this Act,* and any such direction shall be made in writing and shall be binding on the licensed housing developer to whom the direction is made. (emphasis added)

[45] We agree with the submission of learned counsel for the developer that the power of the Minister must necessarily include the power to modify the Schedule H contract. Whilst an unfettered discretion to do so would dilute the mandatory effect of reg. 11(3) but where such discretion can only be exercised for the interests of the purchasers, this would be in accordance with the purpose of the HDA.

[46] We further agree that s. 11 and s. 12 must also be read together with s. 40(1) of the Interpretation Acts 1948 and 1967 which provides:

> (1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

[47] The fact that the Minister has the power to "regulate" the terms and conditions of the SPA is not disputed by the Federal Court that only took umbrage against the Minister's delegation of this power to the Controller as can be seen below:

A [51] Similarly here. It is **the Minister who is entrusted or empowered by Parliament to regulate the terms and conditions of the contract of sale.** The Minister, however has delegated the power to regulate to the controller by reg. 11(3) of the Regulations. As power to regulate does not include power to delegate, the Minister's action in delegating the power to modify the conditions and terms of the contract of sale may be B construed as having exceeded what was intended by Parliament.

…

[60] On the above analysis, we hold that the controller has no power to waive or modify any provision in the Schedule H contract of sale because C **s. 24 of the Act does not confer power on the Minister to make regulations for the purpose of delegating the power to waive or modify the Schedule H contract of sale to the controller.** And it is not open to us to read into the section an implied power enabling the Minister to do so. We consequently hold that reg. 11(3) of the Regulations, conferring power on the controller to waive and modify the terms and conditions of D the contract of sale is *ultra vires* the Act. (emphasis added)

[48] Whilst the Minister may not delegate the power to "waive or modify" the Schedule H contract of sale to the Controller, the Minister may nevertheless exercise this power himself consistent with the power conferred on him by Parliament under s. 24(2)(e) of the HDA to "regulate and prohibit E the conditions and terms of any contract" between a developer and its purchaser.

[49] The elephant in the room before the Federal Court was whether the Minister may delegate his powers to regulate the terms of a contract of sale to the Controller and the answer is that the Minister cannot do so. In one's F quest for the right answer, one must not forget for a moment what was the question asked. Here the question was not whether the Minister has the power to "waive or modify" the terms of the statutory SPA but whether the Controller has such a power. The fact that the Federal Court held that the Controller does not have such a power cannot be taken to mean that the G Minister also does not have such a power. The thrust and tenor of the Federal Court's grounds of judgment were not on the Minister's power to "regulate" the terms of the statutory SPA or for that matter to "waive and modify" the terms but rather whether the Minister may delegate this power to the Controller.

H **[50]** The answer to that question posed for the Federal Court to answer was that he may not. By no stretch of one's imagination and innovativeness can the Federal Court's decision in *Ang Ming Lee*'s case (*supra*) be read to mean that since reg. 11(3) of the HDR as worded, with powers conferred on the Controller, is *ultra vires* the HDA, then even the Minister himself cannot I exercise that power for which the Federal Court said he could not delegate to the Controller.

[51] The Minister cannot lose the power he validly has just because his delegation of this power to the Controller was held to be illegal. What the Minister cannot delegate he would need to exercise on his own. The Minister's power to "waive or modify" the terms of the SPAs remains intact save that he cannot delegate it to the Controller but must exercise it himself.

[52] To put beyond a pale of peradventure that the Minister retains the power to grant an extension of time for the developer there to complete the units but that he cannot delegate this power to the Controller, the Federal Court's observation below in *Ang Ming Lee*'s case (*supra*) could not be clearer:

> [65] … The fact that the letter was signed on behalf of the controller to convey a decision by the Ministry (as opposed to the Minister) under reg. 11, **in our view made it crystal clear that the decision to grant the extension of time to the developer was that of the controller and not the Minister.** Our view is fortified by the absence of any material before the Court in the form of an affidavit by the Minister to explain the discrepancy and **to state that he had indeed decided to allow the developer's appeal under reg. 12 for the extension of time.**
>
> (emphasis added)

[53] There is thus no basis for reading the Federal Court's decision in *Ang Ming Lee*'s case (*supra*) as having decided that the Minister has no power to decide on matters relating to extension of time for a developer to complete the units in a housing development whether under reg. 11(3) or on appeal under reg. 12 of the HDR.

[54] We agree with learned counsel for the appellants that the decision of the Federal Court cannot be read as striking down reg. 11(3) of the HDR in its entirety. A holistic reading of the judgment must mean that reg. 11(3) is *ultra vires* to the extent that it provides the Controller with the power to waive and modify the SPA in the schedules to the HDR.

[55] This is even more imperative, when under art. 80(1) of the Federal Constitution, it is provided that the Executive authority of the Federation shall extend over matters concerning "housing accommodation", being a matter under the Concurrent List in the Ninth Schedule to the Federal Constitution with respect to which Parliament may make laws under art. 74(1).

[56] Article 80(1) of the Federal Constitution provides:

> (1) Subject to the following provisions of this Article **the executive authority of the Federation extends to all matters with respect to which Parliament may make laws,** and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws.
>
> (emphasis added)

[57] Article 74(1) of the Federal Constitution states:

> (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

[58] That Executive authority is vested in the Yang di-Pertuan Agong and exercisable by him or by the Cabinet or any Minister authorised by the Cabinet under art. 39 of the Federal Constitution as follows:

> The Executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorised by the Cabinet, but Parliament may by law confer executive functions on other persons.

[59] We were also referred to a passage from the learned authors of *"MP Jain: Indian Constitutional Law"* (8th edn) on art. 73(1) of the Constitution of India which our art. 80(1) of our Federal Constitution is identical with and at p. 183 where it was observed as follows:

> Nor can it be said that before the Executive can act, there ought to be a law to back it and that it cannot do anything except administering the law. So long as the Executive enjoys the majority support in the Legislature, it can go on discharging its policies and no objection can be taken on the ground that a particular policy has not been sanctioned by legislation.

[60] We do not think we need to go so far as in our HDA there are specific powers given to the Minister under s. 24(2)(e) of the HDA to "regulate and prohibit the conditions and terms of any contract" and there are already standard form SPAs prescribed under Schedule H of the HDR where under reg. 11(3) the Minister (as interpreted by the Federal Court in *Ang Ming Lee*'s case) is empowered, where because of special circumstances or hardship or necessity, compliance with any of the provisions in the contract of sale is impracticable or unnecessary, to waive or modify such provisions.

Whether The Minister's Decision To Extend Time For The Developer To Complete The Units Should Be Set Aside For Procedural Impropriety In That There Was A Breach Of Natural Justice When The Purchasers Were Not Heard

[61] Where the right to be heard is not expressly stated in the statute or regulation, then whether the Minister had taken the interest of the purchasers into account must depend on the particular and peculiar circumstances of each case. Here we are dealing with some 270 purchasers and one can imagine the colossal task involved in hearing every one of them when a quick decision has to be made.

[62] The majority in the Federal Court in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579 held that the real meaning of the right to be heard depends on the circumstances and nature of each case. Mary Lim FCJ observed astutely that:

> [348] Ultimately what is the real meaning and what amounts to an opportunity to be heard depends on the circumstances and nature of each case – see also *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 MLJ 149 FC; [2012] 3 CLJ 577.

[63] The learned High Court Judge in quashing the decision of the Minister on ground of breach of natural justice had relied on the Court of Appeal's decision in *Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor v. Ang Ming Lee & Ors And Other Appeals* [2018] 9 CLJ 640; [2018] 4 MLJ 545 where was remarked as follows:

> [24] The final issue raised before us in arguments was whether the purchasers ought to have been given a right of hearing prior to the decision made by the Controller and/or Minister. In this respect, we note that the purpose of the Act was to protect the interest of the purchasers. *As the rights of the purchasers to claim damages in the event of delay would be adversely affected or even extinguished, we agree that the purchasers must be given an opportunity to be heard prior to any decision made.*
>
> [25] As the purchasers comprise a group which can easily be ascertained, *they should at least be notified of the developer's application for any extension of time to complete the project and be given a reasonable period of time to state their views before any such decision is taken. As no such right to be heard was afforded to the purchasers, it is our judgment that the decision made in this case, whether by the Controller or Minister, was null and void and of no effect and should accordingly be set aside.* (emphasis added)

[64] The strictures set out by the Court of Appeal must now be read in the light of the majority's observation in the Federal Court's case of *Maria Chin* (*supra*).

[65] Even as long ago as the Federal Court case of *Government Of Malaysia v. Mahan Singh* [1975] 1 LNS 48; [1975] 2 MLJ 155 at p. 162 it was held by Lee Hun Hoe CJ (Borneo) that:

> ... So long as the Government acted in good faith in considering the report it must be presumed that the Government was satisfied that it was indeed in the public interest to terminate respondent's services. The court cannot go behind the report. *The procedure, being administrative, rather than judicial the approach has to be on broad lines and cannot be compared with judicial methods and procedure.* See *Local Government Board v. Arlidge* [1915] AC 120; *Ridge v Baldwin & Ors* [1964] AC 40; and *Maxwell v. Department of Trade and Industry* [1974] QB 523. Where there is an allegation of breach of natural justice the court must be concerned with the substance and reality of the situation.

A

> 'I always find the expression 'natural justice' very difficult' said Lord Parker, C.J. in *R v. Registrar of Building Societies* [1960] 1 WLR @ 676. 'There is no one code of natural justice which is automatically imported into any procedure of judicial nature. *What is imported by way of natural justice depends entirely on the tribunal or official in question, the nature of his functions, and, perhaps most important*
B
> *of all, the exact words of the statute,* because Parliament may by suitable words, provide for a procedure which conflicts in many respects with the concepts of natural justice which one would find adopted by the courts. *Each case must depend upon the nature of the function and the exact words of the statute'.*

C

> *There is nothing in the pleading to suggest that the Government has acted mala fide.* So, respondent cannot now be heard to say that Government has acted *mala fide*. Since the Government has acted in good faith that would be the end of the matter. (emphasis added)

[66] Whereas here, there is no express requirement of a right to be heard
D that must be given to the purchasers, what is important is that the Minister must act fairly, taking into consideration that the purchasers here, being purchasers, are not obliged to consent to any extension of time implored by the developer. The Minister is thus entitled to proceed on the assumption that the purchases would not agree to any extension of time.

E **[67]** The Minister, in discharging his duty under the Act, would have to take the interest of the purchasers into consideration as he is entrusted under the HDA to safeguard the rights of the purchasers under s. 11 thereof. Even the preamble in the long title to the HDA states that it is "An Act for the control and licensing of the business of housing development in Peninsular
F Malaysia, **the protection of the interest of purchasers** and for matters connected therewith." (emphasis added)

[68] There is thus no need to hear the purchasers individually or independently unless he has some doubts as to how the purchasers' interest may best be safeguarded as in various options and permutations open to the
G purchasers. The Minister is duty-bound to consider the delicate situation that had arisen through no fault of both the purchasers and the developer and to find the best solution for both innocent parties.

[69] What is required of the Minister here is to act honestly and by honest means; to act justly and to reach just ends by just means in relation to natural
H justice in an administrative law context. As a Minister entrusted to have oversight over the performance of a housing developer that must be duly licensed under the HDA, he has the duty to ensure that a decision is reached where the developer here would be able to bring the project to a completion in spite of the 17 months of delay during the period of the SWO during which
I time no construction work could be done.

[70] Whilst the purchasers may only be able to see parochially through the tainted glass of "we cannot be deprived of our right to claim for LAD for late delivery", the Minister would have to take the broader view as to whether the developer would be in a position to complete the project if they are at the same time being saddled with a claim for LAD which worked out to be about 12% of the purchase price of each unit delayed if there had been no second extension.

[71] It is not unlike selling each unit at a 12% discount in 8% for 12 months of delay and about another 4% for 5 months making 17 months of delay being the rough calculation for the LAD claim. This delay factor is a serious disruption to costing not to mention to continuing costs of bridging loans by the developer, labour costs, overheads including rental of plant and equipment, and increased costs of materials and not forgetting the costs of the interest on the purchasers' loans released under the Developer's Interest-Free Bearing Scheme ("DIBS").

[72] It is the Minister with the resources available under the Housing Department of the said Ministry to have the relevant information on costing, risk assessment and exposure to claims that would be in the best position to gauge and assess the viability of completion of the housing project that had been exposed to 17 months of delay by reference to the percentage of completion then at 46.24% completed when it should have been about 90.47% completed.

[73] The purchasers who complained that they had not been heard, could in the JR proceedings brought by them, state or give their view, supported even by their own expert reports, to support their argument that there was no good reason for the extension of time given by the Minister.

[74] There was nothing stated in the affidavits of the purchasers other than the fact that they had not contributed to the delay and, as such, should not be held responsible for it. The Minister had already known for a fact that the purchasers could not have contributed to the delay.

[75] It is an argument that the purchasers are entitled to make and the Minister, in deciding whether or not to grant the extension, is entitled to proceed on the premise that the purchasers had an accrued right under the Schedule H SPA not to accede to the developer's request for an extension of time to complete.

[76] Here the purchasers have taken the position that they should not be denied their right to claim for LAD and it is the developer that should be the one shouldering all the risks.

A **[77]** We have little doubt here that even if the purchasers had all been given that physical hearing which they claimed would have made all the difference, we are not persuaded that the purchasers would have taken a different stand or that the Minister would have been dissuaded from granting the second extension.

B **[78]** In fact, it would not be unfair to say that the Minister, being entrusted by Parliament to take care of the interest of the purchasers, would have considered the purchasers' default position of not budging at all as they are not to be blamed for the SWO. The question is whether by refusing the extension of time to correspond to the period of the SWO, would the C developer still be able to complete the project. The purchasers must also look at the hard reality on the ground where the project had been delayed for 17 months and to continue to completion with a massive LAD claim based on interest at the rate of 8% per annum on the amount of purchase price for the number of days of delay would well result in the developer not being able D to complete the project. That would not be in the interest of the purchasers and the project, had at that time, been classified as a sick project with a real likelihood of it being abandoned.

[79] We are fairly confident that hearing the purchasers would make no difference as even if a small number of purchasers were to agree to waive the E LAD claim that would have made no difference as being a highrise the developer would still need to construct every floor of the apartments.

[80] This is also a case where the purchasers are at liberty to adduce evidence at the hearing of the JR application or to put in their own expert report to convince the High Court that the SWO was because of the F developer's fault or neglect but no such evidence was forthcoming.

[81] The expert report prepared by Geo Technology Resources stated that the subsidence and crack in the nearby school, Sekolah Kebangsaan Taman Sungei Besi Indah, was not because of the work done by the developer but rather was caused by water entrapment beneath the school. It recommended G that the supporting pillars underneath the building be strengthened.

[82] The developer was asked to assist the school to strengthen the supporting pillars and it did so. The SWO was eventually lifted on 29 June 2016 once the relevant authorities in the Ministry of Works and the Ministry of Education as well as the local authority were satisfied that the problem H had been solved.

[83] Whilst it is true that it took some 17 months to determine the source of the problem and to solve it to the satisfaction of the relevant Ministries, it is also not the fault or neglect of the developer either.

I

[84] Where giving a physical right to be heard would yield no difference in the result of the decision, then those denied that right cannot be heard to complain. It is no different from asking the purchasers what is it that they would have said to the Minister other than vigorously objecting to any extension of time to be given to the developer as the fault could never ever be attributable to them as innocent purchasers.

[85] It was thus observed in *R v. Chief Constable Of The Thames Valley Police, ex p Cotton* [1990] IRLR 344, by Slade LJ at para. 59 that:

> Judges of high authority have held that the subject of a decision who has been denied a right to be heard **cannot complain of a breach of natural justice (or unfairness) unless he can show that the decision might have been different if he had been heard.** (emphasis added)

[86] Where the facts are not in dispute but only the reasonableness of the positions taken by the opposing parties, then the court is in no less an advantageous position to consider the positions taken and pitted against each other and to assess and evaluate if the decision of the Minister is nevertheless reasonable in the circumstances of the case.

[87] In *Punjab National Bank v. Manjeet Singh* (Case No. 4330 of 2006) (unreported decision of the Indian Supreme Court), Sinha J said:

> *The principles of natural justice were also not required to be complied with as the same would have been an empty formality. The court will not insist on compliance of the principles of natural justice in view of the binding nature of the award.* Their application would be limited to a situation where the factual position or legal implication arising thereunder is disputed and not where it is not in dispute or cannot be disputed. (emphasis added)

[88] In this context, insistence on requiring that the purchasers be heard prior to the Minister's decision would have been a mere formality. Looking back, we see the convergence of interest in the developer completing the project and delivering vacant possession to the purchasers in spite of being prevented through no fault of theirs from doing the work and the purchasers not having to bear the interest on their loans during the extended period of completion and indeed during the whole period of completion but foregoing the interest on late delivery.

[89] Granted, the decision of the Minister had to be decided by the light of reason and logic, as well as the exceptional exigencies that existed when the decision was made. We cannot say that the Minister had taken into account irrelevant factors or that he had failed to take relevant factors into account in granting the extension of time. Neither can we say that the Minister had not acted honestly by honest means or that he had acted *mala fide* in granting an extension of time to a developer who had itself been irresponsible in causing the delay.

[90] To grant a second extension equivalent to the 17 months delay arising out of the SWO for which the developer had been held not to be responsible for the cracks and subsidence in the nearby school, appears to us to be reasonable, fair and just in the circumstances of the case. Whilst we accept that the granting of the second extension of time may not ensure that the project would be completed, as submitted by learned counsel for the purchasers and as observed by the Federal Court in *Ang Ming Lee*'s case (*supra*), nevertheless it cannot be brushed aside as completely unrelated and at any rate, in the instant case the developer did complete the project with the second extension of time given to the developer to complete.

[91] To insist on claiming LAD for the period of extension granted by the Minister and to ask the court to quash the decision of the Minister would cause undue and aggravating hardship to the developer.

Whether The Minister's Decision To Extend Time To Complete The Units Should Be Set Aside On Ground Of Irrationality

[92] The peculiarity of the construction industry is that there may be problems that may not be anticipated, such as inclement weather, shortage of raw materials, a stop-work order because of cracks or subsidence in another building nearby the construction or even as we now only realised too late, a pandemic such as that caused by Covid-19.

[93] By and large, most risks have to be borne and shouldered by a developer and if they do not have the gumption for it, they should not venture into a business such as that of housing development, fraught with risks. Developers understand this as when it comes to their construction contracts with their main contractors either using industry-standard form construction contracts like that of Persatuan Akitek Malaysia (PAM) or that of the Public Works Department (PWD) with relevant modifications, there are provisions for extension of time that the architect or engineer or whoever is the Superintending Officer may certify for the main contractor.

[94] This extension of time would have nothing to do with the purchasers as they are not the ones who should be put to taking risks. After all, they are mere purchasers who for an agreed purchase price, have a contractual right to completion within the agreed period of completion.

[95] However, life is not so simple and straightforward and there would be instances from time to time where there is a genuine need to ask for an extension of time to complete, especially if the reason and risk are beyond that which the developer could have anticipated.

[96] Parliament, in its wisdom, had granted this flexibility to the Minister in charge so that in valid and worthy cases, a balancing act may be done to extend the time of completion, taking into consideration the delay caused, which was beyond the developer's control and the extent of completion of

the project as a whole and the interest of the purchasers who would be saying that they do not care what is the cause of delay but that they must be compensated under the agreed formula provided in the statutory SPA.

[97] This built-in flexibility is there to ameliorate the hardship suffered by a developer, faced with a double whammy, as in this case. On the one hand, no work could be done during the SWO and with that, no progress certificate of completion could be issued and hence no cash flow. However, there are the continuing costs of having to service bank loans for the construction and pay the costs of workers' wages, lease rental of machinery and supervision and maintenance costs and office overheads which would continue to run and on the other hand, an exposure to LAD claims by purchasers for every day of delay. Such is the stress that is enough to cause sleepless nights to any developer.

[98] The reality on the ground is that the developer is bleeding every day during the SWO. They made an application for an extension of time to the Controller and then the Minister, and rightly so because that is provided for under the HDA and the HDR as they understood it. In fact, by that time of application for an extension of time, the project had been classified as a "sick" project. It was only 46.24% completed when it should have been about 90.47% completed.

[99] The Minister has to weigh and consider the possible ramifications if no extension of time is granted. The developer who is already "sick" may "die" as sick people sometimes do. The developer may have to stop work altogether if it should run dry in terms of funds to continue. The end result would be a case where the project may be abandoned for quite a while before a white knight comes along and no rescue developer would want to continue on a project if the purchasers are insisting on their LAD claims.

[100] The developer might suffer liquidation and the liquidator would have to deal with the subcontractors, suppliers and purchasers and bankers under the insolvency regime. In some cases, because of the sharp rise in the costs of raw materials, the purchasers may have to pay an increase in the purchase price for a rescue contractor to complete the project in a scheme to be approved by a majority of the creditors and purchasers.

[101] There is often a cloud of uncertainty hanging over the heads of the purchasers on the question which they have every right to ask: when can I get my unit completed? It is a grim picture, but that is the reality on the ground.

[102] The saving grace here for the purchasers is that there was the Developer's Interest-Free Bearing Scheme in the DIBS and that does buffer the unintended damage caused to the purchasers as at least during the period of delay and until completion, the purchasers who had taken a loan from the banks need not have to pay interests to service the loan.

[103] Of course, nothing is free and banks are in the business of lending on interests and the developer here would have to foot the bill for a period of completion delayed by the SWO that they themselves had not anticipated.

[104] The developer has no one to pass this loss to as decided cases as they stand, do not allow a person like the developer to sue the local authority for pure economic loss. See the Federal Court case of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1. We are not suggesting that the Majlis Perbandaran Subang Jaya ("MPSJ") that issued the SWO had been negligent in issuing it. Like most things in life that we cannot be sure of, we take the high road of precaution and more so when it is a school nearby that had seen some cracks appearing in its structure on 6 February 2015.

[105] When all is safe and the experts have said so, the SWO was lifted on 29 June 2016 and it was then, after a period of about 17 months, that construction work could resume for the developer. There is nothing to say that the developer was responsible for the cracks that had appeared and in fact, the expert report said that it was caused by the land structure beneath the school building itself, particularly the water entrapment. The purchasers had not produced any contrary expert report.

[106] Learned counsel for the developer also submitted that with respect to the purchasers in Civil Appeal No: B-01(A)-57-01-2020 led by Alvin Leong with 14 others, they had in fact sought for an order that the SWO was not valid. The learned High Court Judge did not grant this relief. No cross-appeal was filed. The purchasers are therefore taken as accepting the validity of the SWO. The relevant principle of law is as enunciated in *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 8 CLJ 149; [2016] 5 MLJ 557, where it was held:

> [18] It is our considered view that since the High Court found that a valid and binding agreement was concluded between the plaintiff and the first defendant and such a finding being adverse against the first defendant, the first defendant should have filed a separate notice of appeal ie, if the first defendant wanted the aforesaid decision to be reversed or set aside.

[107] We agree with learned counsel for the developer that having taken the position that the underlying proceeding is the correct forum to challenge the SWO, the purchasers cannot now take an inconsistent position that it is for the developer to challenge it in separate proceedings. In *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565, it was held at p. 325 (CLJ); p. 583 (MLJ) as follows:

> In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. *If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course.* Decisions upon the application of the

> doctrine to litigation are but mere illustrations of the broader proposition. Indeed, this is true of all cases where the doctrine has been applied to other spheres of human activity. (emphasis added)

[108] We hear the purchasers saying that all these are not their fault, for they are as white and clean as a clear white cloth, as a *tabula rasa*, unstained by anything that had gone wrong in the world and certainly not in the case of this unhappy episode in having their units completed late.

[109] No one is seeking to punish the purchasers. In fact, like all pieces of social legislations, the law would lean to protect the weaker segment of society consistent with the paternalistic function that the law serves – to protect and promote their interests.

[110] However, one must not end up punishing a developer so as to protect purchasers. The Minister would have to take into consideration all these factors so as to come to a decision that is fair, reasonable and just. His decision is subject to judicial review.

[111] We have carefully applied the searchlight of the test for judicial review and scrutinised the reasons given by the developer in applying for the extension of time in the circumstances of this case and the reasons given by the Minister in approving it.

[112] We are more than satisfied that this is not a case where the developer is trying to take advantage of the purchasers but in reality, where but for the extension of time and the resourcefulness of the developer, this project might well not have been completed, to the detriment of all. All the developer was asking for is the extension of 17 months when they were prevented by the SWO from doing any work.

[113] Lord Diplock explained in *Council Of Civil Service Unions v. Minister For The Civil Service* [1985] AC 374 the meaning of irrationality as follows:

> By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223). It applies to **a decision which is so outrageous in its defiance of logic or of accepted moral standards** that no sensible person who had applied his mind to the question to be decided could have arrived at it. (emphasis added)

[114] Even if we were to disagree with the Minister's decision, which in this case we do not, we cannot say that the Minister's decision is so outrageous in its defiance of logic or of accepted moral standards. It was a difficult and delicate decision that the Minister was entitled to arrive at in taking into account the interest of the purchasers who had faced the real likelihood of the project being abandoned because of the 17 months arising from the SWO.

[115] At this juncture, we must say that the judicial review application is with respect to the decision of the Minister for the second extension of time. The first extension by the Controller is not the subject of this judicial review application and this court would resist the temptation to venture to that which is not the subject of the complaint. The purchasers, if they are aggrieved by the first extension and emboldened by the Federal Court's decision of *Ang Ming Lee*'s case (*supra*), would have to explore their remedy elsewhere.

Whether The Court Should Interfere With The Minister's Decision To Grant An Extension Of Time

[116] There are times when the court would not interfere with the exercise of discretion which Parliament, in all its wisdom, has vested it in a Minister. This is one such incident. This court is always positioned to review that decision by way of a judicial review and it would know when to strike it down when it does not comport with the principles of fairness, reasonableness, proportionality and basically human decency.

[117] The Minister has a team of advisers to advise him from the Housing Department of the Ministry of Urban Wellbeing, Housing and Local Government to advise him. They have dealt with countless projects that had been abandoned for one reason or another and also the experience that comes from reviving abandoned projects. The Ministry and his team of experts are best positioned to know when a "sick" may not be revived if the resources of the developer have dried up with the continuing costs to bear even during the period of SWO and in this case for a period of 17 long months and coupled with the certainty that the purchasers would not forgo their right to recover LAD for every single day of delay.

[118] Whilst some contracts between an employer and a contractor do limit the LAD claim and cap it at 10% of the contract sum, here there is none. The longer the delay the greater the risk of non-completion and the likelihood of abandonment.

[119] Should the Minister refuse to grant any extension of time to complete and if the developer is not able to complete the project, the purchasers who see themselves as the completely innocent party, may well blame the Minister for not ensuring that the developer would complete the project. It is a case of head I win and tail you lose!

[120] As stated the Minister had to weigh and consider a multitude of factors against the real likelihood of the project being abandoned and if it is abandoned, there would be greater hardship suffered by the purchasers, some of whom might be purchasing their units for a personal dwelling home for the first time. It goes without saying that once a project is abandoned and the developer has gone into liquidation, any sale of the project would invariably

involve the purchasers agreeing to forgo their LAD claim and even have to top up the purchase price for the longer the time-lapse before a rescue developer takes over, the higher would be the costs of raw materials and labour.

[121] Even if a white knight should come along it is at the very least with the purchasers having to forgo claims on LAD claims for late delivery and a very likely need for the purchasers to pay extra for the purchase price for no rescue developer would come in without counting the costs and all these after a period of uncertainty with the purchasers having to service interest on their loans in the event that the developer defaults in so doing.

[122] There is also a real likelihood that the developer might not be able to continue to service the interests on the housing loans released in which case the banks may have to look to their contracting parties in the purchasers/ borrowers to foot the interests. See the case of *Ambank (M) Bhd v. Tan Yu Hock* [2012] 8 CLJ 457; [2012] MLJU 639.

[123] What is important is that the Minister in arriving at his decision must not be actuated by bad faith or motivated by irrelevant considerations. It must be arrived at fairly taking into consideration the hardship suffered by the developer because of the 17 months of inability to work on the project that would cause any developer to bleed because costs of bank loans in the bridging loans and other overheads will continue to run and assuming the project is completed after the lifting of the SWO, another round of claims by the purchasers that would be enough to cause any developer to go down under.

[124] The developer is not asking for more than 17 months corresponding to the period of the SWO. To expect them to complete and catch up with a delay of 17 months would require the kind of acceleration of works which would require the unforeseen additional costs of labour, manpower and machine and not to mention that with the school nearby the working hours were again restricted.

[125] This is not a case of the developer trying to take advantage of their own delay and to shortchange the purchasers as it were. This is a case of a genuine need for the extension of time corresponding to the period of delay caused by the SWO which was not through any fault of the developer.

[126] This decision is not a victory for anyone, not even the developer, but a reminder once again that the law and with that, the court too that interpret the law, would often have the unenviable task of balancing the conflicting interest of the parties and to make all parties see that there could be a convergence somewhere of the apparent conflict.

A

Pronouncement

[127] Here we cannot say that the decision of the Minister suffers from any of the infirmities such as that it is illegal, in breach of natural justice, irrational or that it is out of proportion to the justice of the case that would make it susceptible to being quashed. See the test for JR of an administrative decision of the Minister or that of an inferior tribunal in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145.

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[128] The appeals were allowed and the decision of the High Court was set aside. Being a matter of public interest, we exercised our discretion and made no order as to costs.

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