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## CONSTRUCTION LAW

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# ANG MING LEE REFINED AND CONTEXTUALISED – DUST SETTLED AT LAST

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### INTRODUCTION

In the recent case of [Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd & other appeals](#) (“**Obata & other appeals**”), the Federal Court delivered its much awaited decision as regards its earlier decision of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 (“**Ang Ming Lee**”), which had, since its pronouncement in 2019, caused much legal uncertainties plaguing the housing industry. **Obata & other appeals** put to rest the primary issue concerning the applicability of **Ang Ming Lee**.

### LEGISLATIVE & REGULATORY FRAMEWORK

To understand the significance of **Obata & other appeals**, it is apt to first examine the relevant legislative and regulatory framework governing the housing industry.

The control and licensing of housing development in Malaysia is primarily governed by the Housing Development (Control and Licensing) Act 1966 (the “**HDA**”) and the Housing Development (Control and Licensing) Regulations 1989 (the “**HDR**”). The relevant provisions are:

- (1) Section 24 of the HDA – which empowers the Minister in charge of housing to, inter alia, “make regulations” and to “regulate and prohibit the conditions and terms of any contract between a licensed housing developer ... and his purchaser”. Pursuant to section 24 of the HDA, the Minister made the HDR;
- (2) Regulation 11(1) of the HDR – which provides that every contract of sale “of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels” (typically, a service apartment or a condominium) shall be in the form prescribed in Schedule H of the HDR;
- (3) Schedule H of the HDR – which is the standard form contract of sale, amongst others, prescribes the time for delivery of vacant possession i.e. 36 months from the date of the contract of sale; and
- (4) Regulation 11(3) of the HDR – which empowers the Controller (a person appointed by the Minister to carry out certain powers and functions under the HDA) to waive or modify any provision in Schedule H of the HDR.

## PRE-ANG MING LEE

Prior to **Ang Ming Lee**, for various reasons, developers would apply for an extension to the completion period of their housing developments. Upon the Controller's approval, the extended completion period would be incorporated and reflected in the sale and purchase agreements ("SPAs"). This was often done before the SPAs were executed. Hence, purchasers would often have knowledge of the extended completion period before or when executing the SPAs.

## ANG MING LEE AND THE AFTERMATH

In the landmark ruling of **Ang Ming Lee**, the Federal Court unanimously held that the Controller had no power to waive or modify the provisions in Schedule H of the HDR, and that Regulation 11(3) of the HDR is ultra vires (*which means beyond the power of*) the HDA. The reason was briefly that section 24 of the HDA (which provides for the Minister's powers to regulate) does not include the power to delegate. In other words, the Minister could not have, by Regulation 11(3) of the HDR, delegated the power to waive or modify Schedule H of the HDR to the Controller. Therefore, the Controller could not have such non-delegable power.

The effect of **Ang Ming Lee** is that an extension of completion period granted and approved by the Controller under Regulation 11(3) of the HDR is invalid. However, the Federal Court in **Ang Ming Lee** did not expressly pronounce whether its ruling applies retrospectively or prospectively. Thus, uncertainties ensued as to whether the extended completion period granted and approved prior to **Ang Ming Lee** would be affected.

Following **Ang Ming Lee**, the Malaysian courts have on several occasions held that **Ang Ming Lee** is to have retrospective effect<sup>1</sup> – meaning it is applicable to all modifications (including all extensions of completion period) made by the Controller before **Ang Ming Lee**.

Since **Ang Ming Lee** was handed down, plenty of developers suddenly found themselves embroiled in legal suits by the purchasers for liquidated ascertained damages ("LAD"). Some of these suits were commenced years after vacant possession was delivered and LAD payments were ordered as, by retrospective operation of **Ang Ming Lee**, LAD would effectively be computed from the expiry of 36 months from the date of the SPA.

## OBATA & OTHER APPEALS

**Obata & other appeals** comprised a total five appeals, namely:

- (1) Appeal No.: 02(i)-70-08/2022 (W) *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd*;
  - (2) Appeal No.: 02(i)-71-08/2022 (W) *Prema Bonanza Sdn Bhd v Obata-Ambak Holdings Sdn Bhd*;
- (collectively, "**Obata**")
- (3) Appeal No.: 02(i)-72-08/2022 (W) *Prema Bonanza Sdn Bhd v Vignesh Naidu a/l Kuppusamy Naidu*;

<sup>1</sup> See e.g. *UE E&C Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor and another appeal* [2021] 6 MLJ 864 para 38, CA; *Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications* [2020] 10 MLJ 689 para 29, HC; and *Yvonne Chow Shih Sze v MRCB Seputeh Land Sdn Bhd (dahulunya dikenali sebagai 'Gapurna Land Sdn Bhd') & Ors* [2022] MLJU 987 para 39-42, HC

(4) Appeal No.: 02(i)-74-08/2022 (W) *Vignesh Naidu a/l Kuppusamy Naidu v Prema Bonanza Sdn Bhd*; and

(collectively, "**Vignesh**")

(5) Appeal No.: 01(f)-1-01/2023 (B) *Sri Damansara Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors* ("**Sri Damansara**").

These appeals were heard together by the Federal Court and concerned the central issue of LAD consequent upon **Ang Ming Lee**. Under this central issue lied the issues of limitation, second actor theory, prospective overruling and unjust enrichment, which will be elaborated in turn below.

### Limitation

In the appeals of **Obata** and **Vignesh**, the purchasers executed the SPAs in and around 2012. About 8 years later and after the decision of **Ang Ming Lee**, the purchasers commenced the actions on 18.6.2020 and 21.8.2020 respectively, challenging, inter alia, the validity of the SPAs clauses governing vacant possession and completion, to which they had agreed when signing the SPAs in 2012.

The developer contended that the purchasers' claims clearly fall outside the limitation period since the SPAs were executed 8 years before the suits were filed and therefore, their claims would be barred by limitation.

On whether the purchasers' claims were barred by limitation, the Federal Court's decision was briefly as follows:<sup>2</sup>

- (1) It is trite that a cause of action founded on a contract accrues on the date of its breach. Such action shall not be brought after 6 years from when the cause of action accrues;
- (2) The purchasers' cause of action accrued on the date the SPAs were executed. This is because at the time the SPAs were executed, the purchasers had knowledge that the completion period of the housing project was 54 months. However, they failed to raise the issue of the validity of the relevant clauses in the SPAs at two material instances, as the Federal Court noted, namely before or when executing the SPAs in 2012 and subsequently before signing the full and final settlement of LAD with the developer in 2017; and
- (3) Both actions in **Obata** and **Vignesh** were filed in 2020, which was outside the period of limitation. Therefore, the purchasers' claims were barred by limitation, as the 6-year period had expired. Therefore, the purchasers' claims must necessarily fail.

### Second Actor Theory

In the appeal of **Sri Damansara**, among the issues dealt with was whether the "Second Actor Theory" applies. The theory contemplates a situation where an innocent third party acts in reliance upon an earlier administrative act or decision which is subsequently held to be unlawful or ultra vires.

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<sup>2</sup> Grounds of Judgment para 86-102

After hearing competing arguments and considering a series of precedents, the Federal Court held that the theory applies and should be the “*perfect and preferred antidote*” to “*eradicate any negative side effects of Ang Ming Lee*”<sup>3</sup>. The Federal Court’s reasoning was briefly as follows:

- (1) A legally defective act does not necessarily result in the act having no legal effect at all. The courts have power to afford legal effect to ultra vires decision for public interest or orderly administration;<sup>4</sup>
- (2) Therefore, despite the first act by the Controller (the approval of extension of time) having been declared unlawful and invalid by **Ang Ming Lee**, it should not adversely affect the parties who had relied on that decision or regulation prior to the declaration of invalidity, particularly the developer who had relied upon the first act by the Controller;<sup>5</sup> and
- (3) There would be substantial injustice if the act of the developer is found to be void because of the invalidity of the first act by the Controller.<sup>6</sup>

#### Prospective Overruling

Prospective overruling is a doctrine where the courts declare the law but restrict its operation to the future.<sup>7</sup> It is used to avoid reopening of settled issues, to prevent multiplicity of proceedings and to avoid uncertainty and avoidable litigation.<sup>8</sup>

In respect of a governmental or administrative act, the Federal Court recognised that a “[r]etrospective invalidation of governmental acts may have far reaching consequences especially when many parties have relied on the act and there are financial considerations and consequences involved.”<sup>9</sup>

Having considered the facts and the justice of the case, the Federal Court held that the decision of **Ang Ming Lee** is prospective – meaning the principles enunciated in **Ang Ming Lee** will not apply to extensions granted by the Controller before **Ang Ming Lee**.<sup>10</sup> The reasons for such prospective overruling were simply that:

- a. At the time the Controller granted the extension of time, the law i.e. Regulation 11(3) of the HDR was valid. Great reliance was placed and SPAs were based on the extension as required by the law;<sup>11</sup> and
- b. In the same vein, if **Ang Ming Lee** were to have retrospective effect, there would be serious ramifications and repercussions to the housing industry in Malaysia in particular, the developers that had placed reliance on the existing law and diligently complied with the law which was at that time valid.<sup>12</sup>

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<sup>3</sup> Grounds of Judgment para 134

<sup>4</sup> Grounds of Judgment para 121

<sup>5</sup> Grounds of Judgment para 134

<sup>6</sup> Grounds of Judgment para 135

<sup>7</sup> Grounds of Judgment para 141

<sup>8</sup> Grounds of Judgment para 144

<sup>9</sup> Grounds of Judgment para 146

<sup>10</sup> Grounds of Judgment para 168

<sup>11</sup> Grounds of Judgment para 160

<sup>12</sup> Grounds of Judgment para 167

## Unjust Enrichment

Based on the findings vis-à-vis the issues above and having considered the factual matrix of the appeals, the Federal Court held that there would be injustice if the purchasers' claims for LAD were allowed to be calculated retrospectively. The purchasers would be unjustly enriched if their claims are allowed.<sup>13</sup> The rationale was simply that:

*"[175] ... house buyers were fully aware of the terms of SPAs with the extended period with no objection, and had benefited as vacant possession delivered and, LAD payment was accepted. The developers complied with the provisions of the law at that time and had not acted in any way unconscionably to the detriment of the interest of the purchasers. It was only after Ang Ming Lee that the claims were filed years after delivery of vacant possession and payment of LAD. Ang Ming Lee is not a carte blanche for purchasers to claim LAD retrospectively and to enjoy financial windfall."*

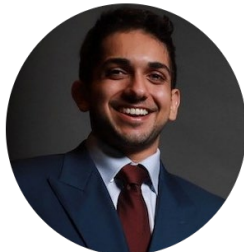
## CONCLUSION

In a nutshell, the decision of **Obata Ambak & other appeals** presents the much awaited answer and clarity to the legal uncertainties surrounding the extension of time granted by the Controller which had been plaguing the housing industry in this country. The decision is by no means, as the Federal Court stresses, meant to revisit **Ang Ming Lee**, but to refine it and put it in proper context.<sup>14</sup>

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*Disclaimer: The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.*

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<sup>13</sup> Grounds of Judgment para 177

<sup>14</sup> Grounds of Judgment para 133