IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
Case No. 01(f)-29-10/2019(W)

Between

PJD Regency Sdn Bhd … Appellant

And

1. Tribunal Tuntutan Pembeli Rumah
2. Ng Chee Kuan … Respondents

(HEARD TOGETHER WITH)

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
Case No. 01(f)-30-10/2019(W)

Between

PJD Regency Sdn Bhd … Appellant

And

1. Tribunal Tuntutan Pembeli Rumah
2. Wong Kien Choon … Respondents

(HEARD TOGETHER WITH)

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
Case No. 01(i)-40-12/2019(M)

Between

Ong See Chen **… Appellant**

And

GJH Avenue Sdn Bhd **… Respondent**

(HEARD TOGETHER WITH)

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
Case No. 01(f)-41-12/2019(M)

Between

Ong See Siew **… Appellant**

And

GJH Avenue Sdn Bhd **… Respondent**

(HEARD TOGETHER WITH)

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
Case No. 01(f)-42-12/2019(M)

Between

Ong See Ping **… Appellant**

And

GJH Avenue Sdn Bhd **… Respondent**

(HEARD TOGETHER WITH)

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
Case No. 01(f)-4-02/2020(W)

Sri Damansara Sdn Bhd … Appellant

And

1. Tribunal Tuntutan Pembeli Rumah
2. Thong Chee Wei
3. Teoh Sheh Wee … Respondents

(HEARD TOGETHER WITH)

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
Case No. 01(f)-31-10/2020(W)

Between

Sri Damansara Sdn Bhd … Appellant

And

1. Voon Kuan Chien
2. Tribunal Tuntutan Pembeli Rumah … Respondents

Coram

Tengku Maimun binti Tuan Mat, CJ
Nallini Pathmanathan, FCJ
Abdul Rahman bin Sebli, FCJ
Zabariah binti Mohd. Yusof, FCJ
Mary Lim Thiam Suan, FCJ

JUDGMENT OF THE COURT

Introduction

[1] The phrase 'social legislation' attached to the Housing Development (Control and Licensing) Act 1966 ('HDA 1966') and its ensuing subsidiary legislation i.e. the Housing Development (Control and Licensing) Regulations 1989 ('HDR 1989') is not merely a fanciful label. In disputes between home buyers and housing developers, its significance lies in the approach taken by the Courts to tip the scales of justice in favour of the home buyers given the disparity in bargaining power between them and the housing developers.

[2] The question then arises: what happens when the developers devise ingenious schemes to circumvent the law and when they are called out for it, turn around to say that it is the home buyers who seek to make a windfall under the guise of 'protection'? To our minds, this is the crux of these appeals.

Background Facts

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

[4] Two appeals (Appeals No. 29 and No. 30) were filed by PJD Regency Sdn Bhd, the developer of a project known as 'You Vista' in Cheras. The 1st respondent in both appeals is the statutory housing tribunal ('Housing Tribunal') constituted under section 16B of the HDA

1966. The 2nd respondent in both appeals are the purchasers of certain units in that development project. We will refer to this set of appeals as 'PJD Regency Cases'.

[5] Three appeals (Appeals No. 40, 41 and 42) were filed by the purchasers of a project known as 'Taman Paya Rumput Perdana Fasa 2'. The common respondent is the developer of the project, GJH Avenue Sdn Bhd. This set of appeals will be referred to collectively as 'GHJ Avenue Cases'.

[6] The remaining two appeals (Appeals No. 4 and 31) were filed by the developer Sri Damansara Sdn Bhd in relation to a project known as 'Foresta Damansara'. The respondents in both the appeals are the purchasers. The appellant is represented by different counsel in both appeals as they stemmed from two separate judicial review applications. This set of appeals will be referred to as 'Sri Damansara Cases'.

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

[8] We heard the appeals together as they essentially raised the same point of law. The common question of law falling for consideration as summed up from the similarly worded leave questions in all the appeals is as follows:

> "Where there is a delay in the delivery of vacant possession by a developer to the purchaser in respect of Schedule G and/or H type contracts under Regulation 11(1) of the Housing Development (Control and Licensing)

Regulations 1989 (Regulation 1989) enacted pursuant to Section 24 of the Housing Development (Control and Licensing) Act 1966, whether the date for calculation of liquidated agreed damages ('LAD') begins from:

(a) the date of payment of deposit/booking fee/initial fee/expression by purchase of his written intention to purchase; or

(b) from the date of the sale and purchase agreement,

having regard to the decisions of the Supreme Court in *Hoo See Sen & Anor v Public Bank Berhad* [1988] 2 MLJ 170 and *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597.".

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

[10] For clarity, we reproduce the material portions of those clauses respectively as follows:

"Schedule G

24. Time for delivery of vacant possession

(1) Vacant possession of the said Property shall be delivered to the Purchaser in the manner stipulated in clause 26 within twenty-four (24) months **from the date of this Agreement**.

…

(4) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Property.

Schedule H

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 27 within thirty-six (36) months **from the date of this Agreement**.

…

(4) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.". [Emphasis added]

[11] In the instant appeals, the courts below premised most of their reasoning by either following or distinguishing the Supreme Court decisions in *Hoo See Sen & Anor v Public Bank Berhad & Anor* [1988] 2 MLJ 170 ('*Hoo See Sen*') and *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597 ('*Faber Union*'). Given that the common question of law turns on that reasoning, we will proceed to address that issue directly before turning to the factual matrix of each set of appeals. Certain individual appeals herein also posed specific leave questions premised on the facts unique to them. We shall deal with those specific leave questions where necessary.

Our Analysis/Decision

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

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

[13] In light of these submissions, it is appropriate that we first examine those cases beginning with the seminal decision in *Hoo See Sen*.

[14] The material facts in *Hoo See Sen* were these. The appellants/purchasers had purchased a house from the second respondent/developer and for that purpose, obtained financing from the first respondent/bank. As security for the loan, the purchasers assigned the benefits under the sale and purchase agreements with the developer to the bank. It was an accepted fact that the purchasers had paid a booking fee for the house on 18 August 1982 but that the sale and purchase agreement was signed only seven months later on 18 March 1983. The purchasers sued the bank in the High Court seeking an injunction against the bank to prohibit it from releasing the balance of the

purchase price to the developer on the ground that the developer actually owed the purchasers a greater sum in LAD. The High Court refused the injunction and hence the appeal to the Supreme Court.

[15] At both levels, the purchasers asserted that the developer had failed to deliver vacant possession of the house to the purchasers within the previously agreed 24-month period. In terms of the calculation of the LAD, the Supreme Court proceeded on the basis that the calculation began from the date of the booking fee and not from the date of the agreement. The bank opposed the injunction for the reason that there was an undertaking between it and the developer to pay the balance of the purchase price. The Supreme Court essentially held that the undertaking was immaterial and that given the calculation, the LAD owed to the purchasers by the developer exceeded the balance of the purchase price. Accordingly, it followed that the developer owed the purchasers the difference in the amount. The Supreme Court thus allowed the appeal and granted the injunction as prayed for.

[16] Without getting into a lengthy exposition of the concept, we find it necessary to state that '*ratio decidendi*' is a legal term of very elementary status. *Ratio decidendi* is different from the decision of the Court in that it comprises the legal reasoning which forms the basis of the decision and it is this legal reasoning which ultimately finds its place in the doctrine of *stare decisis* and binding precedent.

[17] From our reading, the *ratio decidendi* of *Hoo See Sen* is that the date of calculation of the LAD runs from the date the booking fee was paid and not from the date of signing of the agreement. The purchasers in that case would not have been entitled to the difference of the two sums

(balance of the purchase price and the LAD) if the calculation of the LAD begun from the date of the agreement, as the developers in these appeals contended that it should. The developers' argument that *Hoo See Sen* was simply a case about injunctions was, with respect, an attempt to confuse the decision of the Supreme Court with the *ratio decidendi* of the case.

[18] This leaves us with the decision of the Supreme Court in *Faber Union*. The facts of the case are quite straightforward. They can be summed up in the words of Eusoff Chin CJ at page 598:

> "When this appeal came before us on 6 January 1995, only one issue was argued and that is, for the purpose of ascertaining the date of delivery of the vacant possession in a claim of liquidated damages for late delivery of a building to be constructed, does time start running from the date of payment of the booking fee, or the date of the signing of the sale and purchase agreement, which was executed after the payment of the booking fee.".

[19] After relying solely on *Hoo See Sen*, the Supreme Court concluded as follows, at pages 598-599:

> "The learned counsel for the respondent has sent us the case which is *Hoo See Sen & Anor v Public Bank Bhd* [1988] 2 MLJ 170. The facts there are similar to the ones before us. …
>
> At p 171, it was held that for the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time starts to run is the date on which the purchaser paid the booking fee, and not the date of the signing of the sale and purchase agreement.
>
> We find no good reason to disagree with the earlier decision of the Supreme Court.".

[20] Given our earlier exposition on *Hoo See Sen*, it is our view that *Faber Union* was correctly decided. As stated earlier, the *ratio decidendi* of *Hoo See Sen* is that the date of calculation of the LAD begins from the date of payment of the booking fee and not from the date of the Scheduled Contracts. That is why the Supreme Court allowed the appeal and granted the injunction in favour of the purchasers to restrain the bank from releasing the funds to the developer given that the calculation of the LAD far exceeded the balance of the purchase price. It follows that *Faber Union*, having been decided in the same fashion, is good law.

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

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

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

[24] Judgments ought to be read and appreciated in context. It follows, reading the two cases in context, that even if the Supreme Court in *Faber Union* referred to the wrong report or the wrong page of *Hoo See Sen*, this single error is not a sufficient reason for us to take the drastic leap of declaring that this Court's predecessor decided the case *per incuriam*.

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

[26] In any event, we are of the view that the above point of law is further clarified and cemented by the nature of the HDA 1966 and HDR 1989 being social legislation. Thus, leaving aside the quarrel over the correctness of the two said Supreme Court decisions, we find that

subsequent judicial decisions and legislative changes do not support the developers.

The Concept of Social Legislation

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

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

[29] The social significance of the statute is further borne out by the words of Suffian LP in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 ('*SEA Housing*'), at page 34:

> "It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, **Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act**. That was why rule 12 was enacted and in particular paragraphs (o) and (r) thereof. With respect we do not agree with Mr. Chelliah that it was open

to a developer to get round these paragraphs by the inclusion of such a clause as clause 32 in this agreement.". [Emphasis added]

[30] It appears that even since 1982, housing developers have continued to devise ingenious, and if we may say so, devious schemes to overcome the protections afforded to purchasers by the scheme of the HDA 1966. We would say here that booking fees are one such invention. How is the concept of social legislation relevant to the weeding out of such practices?

[31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legislation is 'social legislation'. A social legislation is a legal term for a specific set of laws passed by the legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. Given that one side always has the upper hand against the other due to the inequality of bargaining power, the State is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class. A clear and analogous example is how this Court interpreted the Industrial Relations Act 1967 in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 ('*Hoh Kiang Ngan*').

[32] Mr Lambert Rasaratnam, learned counsel for the developers contended that the Scheduled Contracts must be read literally and in accordance with the intention of parties and that this is a feature of the principles of contractual interpretation. Ms Sheena Sinnappah, also counsel for the developers, submitted that the principles of statutory interpretation should apply and that we ought to prioritise the literal rule. Essentially, the developers submitted that it was the intention of the parties or the intention of Parliament that the date of the agreement should

follow the printed date in the first page of the agreement. When queried about how this could be reconciled with the concept of social legislation, Mr Lambert Rasaratnam stated that the Courts cannot purport to rewrite the written agreement between the parties.

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

[34] We find considerable support for this assertion in the judgment of this Court in *Hoh Kiang Ngan* (supra), at page 387:

> "Now, it is well settled that the Act is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen. **In accordance with well settled canons of construction, such legislation must receive a liberal and not a restricted or rigid interpretation.**". [Emphasis added]

[35] At page 388, this Court cited with approval the following dictum of Bhagwati J in *Workmen of Indian Standards Institution v Management of Indian Standards Institution* (1976) 1 LLJ 36 at p 43, with which we agree and adopt, as follows:

> "[I]t is necessary to remember that the Industrial Disputes Act 1947 is a legislation intended to bring about peace and harmony between management and labour in an 'industry' so that production does not suffer and at the same time, labour is not exploited and discontented and, therefore, the tests must be so applied as to give the widest possible connotation to the term 'industry'.

> Whenever a question arises whether a particular concern is an 'industry', the approach must be broad and liberal and not rigid or doctrinaire. **We cannot forget that it is a social welfare legislation we are interpreting and we must place such an interpretation as would advance the object and purpose of legislation and give full meaning and effect to it in the achievement to (sic) its avowed social objective.**". [Emphasis added]

[36] From the above, we would summarise the principles on the interpretation of social legislation as follows:

(i) Statutory interpretation usually begins with the literal rule. However, and without being too prescriptive, where the provision under construction is ambiguous, the Courts will determine the meaning of the provision by resorting to other methods of construction foremost of which is the purposive rule (see the judgment of this Court in *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97).

(ii) The literal rule is automatically displaced by the purposive rule when it concerns the interpretation of the protective language of social legislation.

(iii) For the avoidance of doubt, it is important to emphasise that even where a term or provision of a social legislation or a statutory contract enacted thereunder is literally clear or unambiguous, the Court no less shoulders the obligation to ensure that the said term or provision is interpreted in a way which ensures maximum protection of the class in whose favour the social legislation was enacted.

[37] Having regard to the above principles, we cannot apply the literal rule to arrive at the simplistic conclusion that the date of calculation of the LAD runs from the date printed in the Scheduled Contract. Our reluctance to do so does not mean that we are 'rewriting' the bargain between the parties, instead we are construing the Scheduled Contract in accordance with the statutory protections afforded by Parliament. At this juncture, it is perhaps appropriate that we analyse the legal developments in respect of booking fees to appreciate the intention of Parliament with respect to such a practice.

Legislative History and Statutory Interpretation

[38] Learned counsel for the purchaser, Mr KL Wong took us through the legislative history of the HDR 1989. We agree with his submission and will now set it out coupled with our own observations.

[39] In the Hansard of the 3rd Reading of the Housing Development (Control and Licensing) Bill on 25 March 1966, the then Minister of Local Government and Housing, the Honourable Mr Khaw Kai-Boh, said at pages 7250-7251, as follows:

> "Mr Speaker, Sir, as you are well aware, there have been repeated instances, where innocent members of the public have fallen victims of rapacious and unscrupulous persons, who pose as housing developers and obtain substantial deposits as booking fees for houses, which they not only do not intend to build but also are in no position to do so. I also have personally received a continuous stream of letters from several persons concerned that they have paid deposits for houses in housing scheme and found to their dismay that no houses were being built and that they could not recover their deposits. A good parallel to this are the mushroom insurance companies which,

only a few years ago prior to the introduction of the Insurance Act, 1963, swindled ignorant people of millions of dollars. I would like to quote, with your permission, Sir, a few cases to illustrate my point.

…

Case “B” –

In June, 1965, a resident of Kuala Lumpur addressed the Minister for Local Government and Housing stating that in September, 1964, Company "B" called for booking deposits for their housing project in Gombak Road. They collected $2,000 each from about 100 prospective purchasers. In about April, 1965, seven months later, they obtained a second deposit of between $3,000 to $3,500 for the houses. Up till June, 1965 nine months later, no work was commenced much to the consternation of the purchasers although completion of the houses was promised by August, 1965. The writer requested the Ministry to introduce suitable legislation to control housing developers.

…

I, therefore, consider that legislative measures should be taken to protect the people from bogus and or unscrupulous housing developers. Hence this Bill.”.

[40] The Bill was passed and it now exists as the HDA 1966. Speaking specifically in the context of booking fees, deposits or any other labels that may be used, it is quite clear that this very issue was one of the main reasons why the HDA 1966 was passed. The Honourable Minister’s words – “legislative measures should be taken to protect the people from bogus and or unscrupulous housing developers. Hence this Bill.” – speak for themselves.

[41] Section 24 of the HDA 1966 empowers the Minister to issue regulations for the purpose of carrying into effect the provisions of that Act. In particular, subsections 2(c), 2(e), 2(g) and 2(ia) enable the Minister to prescribe the form of contracts, regulate and prohibit conditions of the terms of such contracts, prescribe penalties for the contravention of the regulations and to provide for exemptions from the operation of the Act, its forms and restrictions – as the case may be.

[42] At first, the Minister prescribed the Housing Development (Control and Licensing) Rules 1970 ('1970 Rules'). Rule 10 of the 1970 Rules permitted developers to collect booking fees, as follows:

> "(1) A purchaser of housing accommodation including the land shall not be required to pay a booking fee of a sum exceeding 2.5 per centum of the purchase price of such housing accommodation including the land.
>
> …
>
> (3) For the purposes of this Rule the term "booking fee" shall include any payment by whatever name called which payment gives the purchaser an option or right to purchase the housing accommodation including the land.".

[43] Although it is expressed in prohibitive terms, it is clear that the Minister at one point saw it fit to allow developers the right to collect booking fees provided that the amount of such fees did not exceed a statutory range. Eventually, the 1970 Rules, in particular Rule 10 thereof, was repealed on account of the then Government deciding that they needed to enforce stricter regulations against developers. This is borne out by an oral answer given on 17 November 1981 by the then Minister of Local Government and Housing, the Honourable Dato' Haji Abdul Jalal

bin Haji Abu Bakar as recorded in the Dewan Rakyat Hansard, at page 6018:

> "Kementerian saya sedar atas masalah-masalah yang timbul daripada kutipan wang tempahan perumahan seperti yang berlaku dalam kes-kes ini dan cadangan-cadangan sedang ditimbangkan oleh Kementerian saya untuk memperketatkan lagi undang-undang yang ada sekarang bagi mengurangkan masalah-masalah yang timbul. Di antara lain, Kementerian saya akan mempertimbangkan kemungkinan di mana **pihak pemaju perumahan hanya akan dibenarkan mengutip wang deposit 10% dan menandatangani perjanjian jual-beli apabila mereka menjalankan projek perumahan dan tidak dibenarkan mengutip wang tempahan.**" [Emphasis added]

[44] The above extract manifests the then Minister's unequivocal intention to completely eradicate the practice of collecting booking fees. What then followed was the complete repeal of the 1970 Rules and the subsequent enactment of the Housing Developers (Control and Licensing) Regulations 1982 ('HDR 1982'). A perusal of the HDR 1982 reveals that a provision like Rule 10 of the 1970 Rules was deleted with no comparable substitute. Accordingly, the Minister seemed to have impliedly ruled out the practice of accepting booking fees, as seen from regulation 12 of the HDR 1982:

> "(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 E.
>
> (2) No amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with the prior approval in writing of the Controller.".

[45] Any doubt there may have been as regards this practice is now put to rest with the coming into force of the HDR 1989. Regulation 11 thereof which appears to have replaced regulation 12 of the HDR 1982, provides as follows (prior to the 2015 amendment):

> "(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.
>
> **(2) No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.**
>
> (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.". [Emphasis added]

[46] Regulation 11(2), as emphasised, very clearly stipulates and expressly provides for an absolute prohibition against the collection of booking fees howsoever they are called or described. Instead, the Scheduled Contracts now require that 10 percent of the purchase price be paid upon the signing of the sale and purchase agreement. Thus, speaking in ideal terms, if the law is strictly complied with, there is no question as to whether the date of calculation of the LAD runs from the date of payment of the booking fee or from the formal date of the

agreement. This is because, the 10 percent deposit and the signing of the sale and purchase agreement would have been done simultaneously. Indeed, the statutory contracts for sale prescribe a specific payment schedule that must be complied with.

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

> "(2) No person including parties acting as stakeholders shall collect any payment by whatever name called except as prescribed by the contract of sale.".

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

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

date printed in the Scheduled Contracts. Otherwise, this Court would be condoning the developers' attempt in this case to bypass the statutory protections afforded to the purchaser by the legislative scheme put in place.

[50] We will now proceed to examine the legal effect of the booking fee and why the date of the contract ought to run from the date of its payment and not from the date printed in the contract. In this regard, our discussion will be on illegality and the formation of contract.

The Legal Effect of Booking Fees

Illegality

[51] It is abundantly clear at this stage that the developers who collect booking fees do so in express contravention of regulation 11(2) of the HDR 1989. Without prejudging the matter, it is possible for any reasonable person to conclude that the developers have committed an offence under regulation 13(1) of the HDR 1989. Further, solicitors or anyone else who have collected the fees as stakeholders or who have advised or encouraged the developers to do so have similarly committed an offence under regulation 13(3). For completeness, we set out these provisions as follows:

> "13. (1) Any person who contravenes any of the provisions of these Regulations shall be guilty of an offence and shall be liable on conviction to a fine not exceeding fifty thousand ringgit or to a term of imprisonment not exceeding five years or to both.
>
> …

(3) Any person who knowingly and wilfully aids, abets, counsels, procures or commands the commission of an offence against any provision of these Regulations shall be liable to be punished with punishment provided for the offence.".

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

[53] For the sake of the industry in this country and given the rampancy of this practice of collecting booking fees as openly conceded by counsel for the developers, this point requires analysis. And, as is apparent from the judgment of this Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 at pg 113, this Court may deal with any matter which it considers relevant for the purpose of doing complete justice according to the substantial merits of a particular case.

[54] The law on illegality and contracts is generally provided for in the Contracts Act 1950. Section 10(1) stipulates that all agreements are contracts if they are, *inter alia*, made with lawful consideration. Section 24 in turn provides, among other grounds, that the consideration or object of an agreement is unlawful if (a) it is forbidden by law or (b) it is of such a nature that, if permitted, it would defeat any law. Apart from the Contracts Act 1950, the law on illegality in contracts is further supplemented by common law (both Malaysian and English).

[55] Looking at the transactions herein holistically, we do not consider the agreements to be *ex facie* illegal as they are based on statutory contracts. There is no question of the Scheduled Contracts in this case being forbidden by law or that they are of such a nature that, if permitted, would defeat any law because they are themselves prescribed by law. What we have here is an instance whereby one party to the contracts namely the developers, have committed an illegal act in securing the contracts. Thus, it is not the contracts *per se* that are illegal rather it is their performance which has violated the strict terms of regulation 11(2) of the HDR 1989 and the Schedules to the Scheduled Contracts.

[56] In dealing with this issue, we glean significant guidance from existing case law, namely, the decision of the Supreme Court in *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369 ('*Coramas*') and the decision of this Court in *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 ('*Lori*').

[57] *Coramas* concerned the interpretation of the now repealed Banking and Financial Institutions Act 1989 ('BAFIA 1989'). The primary issue in that case was regarding the sale and purchase of shares in a certain company which transaction required the prior written approval of both Bank Negara Malaysia and the Minister of Finance. It was contended that the agreement was void on the grounds that those prior written approvals were not obtained. The Supreme Court referred to section 125 of BAFIA 1989 which stipulated, essentially, that an agreement shall not be void for contravention of its provisions unless clearly expressly or impliedly declared by the law to be so.

[58] Leaving aside section 125, the Supreme Court observed that provisions similar to section 125 are rare and that they generally endorse the principle that a contract is not void for illegality unless on a proper construction of the statute, it was the intention of Parliament that such an agreement should be void for that purpose. At pages 377-378, the Supreme Court cited with approval the decision of the High Court of Australia in *Yango Pastoral Pty Ltd v First Chicago Australia Ltd* (1978) 21 ALR 585 at 588, as follows:

> "This general principle could have no application to the present case where the statute provides to the opposite effect, namely, that while it prohibits and penalizes certain agreements or arrangements, it nevertheless reveals an intention that generally they shall be valid and enforceable; the exception being where it is otherwise provided in the statute or in pursuance of any provision therein. Provisions of this sort are rare and so we are reminded of the following passage in the judgment of Gibbs ACJ in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*:
>
> > It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, **because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable**. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed."

[59] In other words, the fact that a particular course of conduct may attract penal sanctions is not in itself a sufficient ground to suggest that an agreement made in contravention of that very act is void for illegality. As this Court observed in *Lori* (supra) at page 104, it is a trend of the common law that courts are slow to strike down contracts on grounds of illegality especially if they are commercial contracts. The Supreme Court, in the same page, endorsed the views of Raja Azlan Shah CJ (Malaya) in *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244, who at page 247, said:

> "We bear in mind the much quoted and common sense warning by Devlin J in *St John Shipping Corp v Joseph Rank Ltd* [1956] 3 All ER 683 at pp 690, 691) against a too ready assumption of illegality or invalidity of contracts when dealing with statutes regulating commercial transactions.".

[60] The above principles were also accepted and applied by the Court of Appeal in *Tekun Nasional v Plenitude Drive (M) Sdn Bhd and other appeals* [2018] 4 MLJ 567 ('*Tekun Nasional*') where it noted as follows at page 585:

> "[69] Pursuant to s 270 which is a saving provision, the mere fact that the agreement was entered in contravention of the FSA, is not by itself sufficient to render the agreement void. There must be some other provisions in the FSA which has the effect of rendering the agreement void. Except for various provisions on penalty and sanction for breach, we do not find any other invalidating provisions in the FSA which has that effect.".

[61] While the facts in that case revolved around allegations of illegality in light of section 270 of the Financial Services Act 2013, a savings provision, the Court of Appeal nonetheless accepted the general

statement of law adumbrated in *Coramas* (supra), that is, the mere breach of a penal provision does not by itself render an agreement void for illegality unless Parliament clearly intended, whether expressly or impliedly, that such agreements be rendered void as such. The judgment of the Court of Appeal is presently under appeal in *Tekun Nasional v Plenitude Drive (M) Sdn Bhd and another appeal* [Civil Appeals No. 02(f)-90-10/2018(W) and 02(f)-92-10/2018(W)]. However, this Court was not minded to grant leave on the questions of law on illegality and thus, so much of the decision of the Court of Appeal remains undisturbed.

[62] Given the aforementioned principles on illegality, how should we deal with the developers' blatant breach of regulation 11(2) of the HDR 1989 in the present appeals? Could it be the intent of the written law in this case that a breach of that provision should render the Scheduled Contracts void? Construing the law in that way would be detrimental to the innocent home buyers who paid booking fees under the erroneous assumption that it was necessary to secure their purchase. This is particularly in the context of the rather perplexing submission of the developers that there must be strict and literal compliance with the Scheduled Contracts so much so that we must interpret the date of commencement from the date printed on the said contracts. According to the developers, the purchasers seek to abuse the booking fee as the commencement period to acquire a windfall in the LAD under the guise of protection. Yet, at the same time, the developers have no answer to their own practice of flouting the law by collecting booking fees in express contravention of regulation 11(2) of the HDR 1989.

[63] In the circumstances, there ought to be a workable formula (using the phrase loosely) on how Courts are to deal with a contractual setting

borne out of statute meant to protect a certain class of persons who have been made to be complicit in a transaction which contravenes the law as a result of an abuse by the stronger side. During the course of our research, we found at least one case, the judgment of the Privy Council in *Kiriri Cotton Co Ltd v Dewani* [1960] 1 All ER 177 (‘*Kiriri Cotton*’), to be analogously on point.

[64] The facts and resultant *ratio decidendi* of the case are as follows. The appeal concerned a claim by the plaintiff/tenant against the landlord/defendant for the recovery of a sum of money that he had paid as premium for the sub-lease of a flat. Though having paid it, the tenant later claimed that the payment of the premium was in contravention of the Ugandan Rent Restriction Ordinance 1951. Section 3(2) of that statute absolutely prohibited the collection of such premiums and provided for a penalty against landlords who did so but it did not provide an express remedy of restitution to purchasers who had nonetheless paid it. The High Court of Uganda decided in favour of the tenant and ordered the return of the premium. The judgment was upheld on appeal to the Court of Appeal for Eastern Africa. Hence the appeal to the Privy Council.

[65] The only issue before the Privy Council was whether the tenant/plaintiff, having engaged in an illegal transaction was entitled to recover back the premium. The Board observed that neither one of the parties thought that what they were doing was illegal. Lord Denning, who delivered the unanimous judgment of the Board, endorsed the general principle of law that where an illegal transaction has been completed and where parties are *in pari delicto*, the Courts will not entertain a suit for recovery. His Lordship however added that where the party seeking recovery can show that he is not *in pari delicto*, the Courts may be minded

to order restitution. Thus, the corollary question was whether the tenant was *in pari delicto*.

[66] *Kiriri Cotton* is generally regarded as authority for restitution of money had and received. Nevertheless, there is one dimension of the case which we find completely on point with this case as regards Lord Denning's analysis on social legislation (though the term was not used) and its effect on whether the innocent party was *in pari delicto*. The Privy Council most crucially was aware that the Rent Restriction Ordinance was passed with the view to protect tenants. Accordingly, the Board held that there was a greater onus on landlords to comply with the terms of the Act and that the tenant's willingness to comply with the demand for premium did not render him *in pari delicto*. It is pertinent to reproduce the words of Lord Denning which is relevant to the present appeals. At page 181, his Lordship said:

> "The issue thus becomes — Was the plaintiff in pari delicto with the defendant company? Counsel for the defendant company said they were both in pari delicto. The payment was, he said, made voluntarily, under no mistake of fact, and without any extortion, oppression or imposition, and could not be recovered back. True, it was paid under a mistake of law, but that was a mistake common to them both... Their Lordships cannot accept this argument...
>
> … if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other — it being imposed on him specially for the protection of the other — then they are not in pari delicto and the money can be recovered back: see *Browning v Morris* ((1778), 2 Cowp at p 792) by Lord Mansfield. Likewise, if the responsibility for the mistake lies more on the one than the other —because he has misled the other when he ought to know better — then again they are not in pari delicto and the money can be recovered back…".

[67] The most important observation by Lord Denning is on the nature of the legislation having been passed to protect tenants at page 182:

> "In applying these principles to the present case, the most important thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage. One of the obvious ways in which a landlord can exploit the housing shortage is by demanding from the tenant "key-money". Section 3(2) of the Rent Restriction Ordinance was enacted so as to protect tenants from exploitation of that kind. This is apparent from the fact that the penalty is imposed only on the landlord or his agent and not on the tenant. It is imposed on the "person who asks for, solicits or receives any sum of money", but not on the person who submits to the demand and pays the money. It may be that the tenant who pays money is an accomplice or an aider and abettor… but he can hardly be said to be in pari delicto with the landlord. The duty of observing the law is firmly placed by the ordinance on the shoulders of the landlord for the protection of the tenant; and if the law is broken, the landlord must take the primary responsibility. Whether it be a rich tenant who pays a premium as a bribe in order to "jump the queue", or a poor tenant who is at his wit's end to find accommodation, neither is so much to blame as the landlord who is using his property rights so as to exploit those in need of a roof over their heads.".

[68] We fully agree with and endorse the above passage. The legislature in that case acknowledged that tenants are a weaker class as against landlords. The purpose of the legislation was thus to protect tenants from abuse. A tenant who is thus forced by the landlord to pay a premium so that he may secure a roof over his head cannot be assumed to be, in law, *in pari delicto* given his protected status.

[69] The same principle extends to the present appeals. In *Kiriri Cotton*, the Courts provided a remedy in restitution beyond what the statute clearly

expressed (apart from spelling out penal sanctions against landlords). In other words, the existence of a penalty did not prevent the tenant/plaintiff from obtaining his remedy.

[70] The present case is made even stronger for the purchasers by the fact that the scheme of the HDA 1966, the HDR 1989 and the Scheduled Contracts expressly affords the purchasers a statutorily calculated remedy in the LAD.

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

[72] To close on this sub-issue, we are aware that the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council & other appeals* [1998] 4 All ER 513 at page 560 appeared to have departed from the reasoning of the Privy Council in *Kiriri Cotton* in respect of monies paid under a 'mistake of law'. From our reading of the case, the House of Lords was not particularly required to deal with the specific issue of payment of money predicated on an illegal transaction and the resulting effect that it might have had on the innocent parties' claim to the money so had and received. Regardless, insofar as the principle of restitution is concerned as regards the concept of monies had and received, the Lordships were not convinced that there were any exceptions to merit the application of the mistake of law principle. Indeed, their Lordships were not dealing with a case of illegality

in contract and how a statutorily protected class of persons will not be deemed *in pari delicto* even if they were party to the transaction.

[73] Be that as it may, the House of Lords and Privy Council constitute distinct judicial tribunals and the decisions of both judicial institutions are of equal persuasive weight in Malaysia – post the cut-off date in section 3 of the Civil Law Act 1950 (and notwithstanding the principle established in *Khalid Panjang & Ors v Public Prosecutor* (No. 2) [1964] 1 MLJ 108 on the otherwise binding effect of certain Privy Council decisions in Malaysia). Here we prefer and adopt the approach of Lord Denning in *Kiriri Cotton* as his Lordship's view and the principle the Board expounded apply squarely to the larger context of these appeals.

[74] *Kiriri Cotton* has been followed and applied in at least one judgment of the High Court of Singapore in *Tan Chor Thing v Tokyo Investment Pte Ltd & Anor* [1991] 3 MLJ 87. The facts, as simplified were these. There was a dispute between the plaintiff and the two defendants as to who between them is entitled to the 290,000 shares. There was proof that the plaintiff owned them but the defendants claimed equitable ownership on account of a transaction between them and the plaintiff's brother. The shares were in the possession of the authorities who were investigating the defendants for trading in futures in contravention of the Singapore Futures Trading Act (Cap 116, 1985). The defendants had pleaded guilty to the offence but nonetheless maintained their claim to the shares.

[75] At first instance, the assistant registrar held that the plaintiff was entitled to the shares. The defendants, dissatisfied, appealed to the High Court. The plaintiff argued that whatever pledge that may have been made between his brother and the defendants which purported to given them

equitable ownership was illegal. The defendants maintained that the transaction, having been done in Hong Kong was legal. The question was whether the plaintiff was entitled to the recovery of the shares in light of the illegality. The High Court found that the transaction was illegal. Among other grounds, Chan Sek Keong J (later Chief Justice) held that the Singapore Futures Trading Act was passed to protect the public and that accordingly, the plaintiff, not having been *in pari delicto* was entitled to recover them. His Lordship arrived at the decision by relying on *Kiriri Cotton*. For completeness, Chan Sek Keong J said at page 91:

> "Secondly, one of the objects of the Act is to protect that class of the public who trade in futures. As there was no allegation that the plaintiff was in pari delicto, he was also entitled to recover the shares on this ground: *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192; [1960] 1 All ER 177.".

[76] Thus, it can be said that the general principle of law flowing from this discussion is as follows. When it concerns social legislation and the stronger side to the transaction has committed an illegal act, the existence of a penal provision does not automatically render the contract void. If that were so, then the legislation would, if it were taken to destroy the contract or to erase the weaker side's right to a remedy, be to defeat the very protective purpose for which it was enacted. Accordingly, in such cases, the weaker party to the transaction will not be deemed to be *in pari delicto* and shall accordingly be entitled to the appropriate remedy. The natural result of this is that the stronger party will have that illegality construed against them. The result of that exercise depends very much on the facts of a particular case.

[77] In these appeals, the prime idea behind the legislative framework is that the developers should be confined to a set timeline. Booking fees are

prohibited yet the developers have continued to brazenly flout the law by calling it standard practice. At the same time, they very boldly demand that the statute be construed in their favour by strictly limiting the commencement period to the dates printed in those contracts.

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

Formation of Contract

[79] The next point advanced by the purchasers is that a valid contract came into being when they paid the booking fee to the developers. Counsel for the purchaser Mr KL Wong in particular submitted that the purchasers had to sign certain *pro forma* documents upon their payment of the booking fees. The developers rejected this argument on the basis that regulation 11(2) ought to be construed literally to mean that a contract is only a contract once the Scheduled Contracts are formally signed.

[80] The purchasers referred us to several authorities to support their submission that a booking fee is sufficient to show the existence of a contract. Suffice that we refer to only two of them namely, the judgment of the Privy Council in *Daiman Development Sdn Bhd v Mathew Lui Chin Teck and another appeal* [1981] 1 MLJ 56 (‘*Daiman*’); and that of the High

Court in *Lim Eh Fah & Ors v Seri Maju Padu* [2002] 4 CLJ 37 ('*Lim Eh Fah*').

[81] In *Daiman*, the respondent/purchaser had paid a booking fee and signed a booking *pro forma* to purchase a house. All the material terms namely the price and the subject-matter of the sale such as the lot and the description of the property had been agreed upon. Eventually, the appellant/developer informed the purchaser that the purchase price was increased on account of a change in the layout plan and an increase of material and construction costs. The purchaser did not agree to this and sought specific performance of the *pro forma* document. The issue was rather straightforward i.e. whether the purchasers, having signed a *pro forma* and having paid a booking fee to the developer can be said to have entered into a valid sale and purchase agreement or whether the transaction nonetheless remained subject to contract.

[82] The developer in *Daiman* took the same position as did the developers in the instant appeals which did not find favour with the Privy Council. Sir Garfield Barwick noted as follows at page 61:

> "To treat the *pro forma* as a source of legal obligation and at the same time to deny the contractual force of the express agreement to purchase and its concomitant agreement to sell, treating its terms as doing no more than giving the respondent the right of refusal, leaving with the appellant the option whether or not to offer the property for sale at all, does more than violence to the language of the *pro forma*. If the appellant did not wish to become bound to the respondent from the outset, a document radically different from the *pro forma* would be necessary. **Having regard to the terms of the rules it might indeed be difficult, if not impossible, to devise a document which provided for payment of a booking fee and at the same time left the**

developer with an option to offer or not offer the property for purchase to the person who had paid the booking fee. The definition of a "booking fee" in the rules cannot in this respect be overlooked.". [Emphasis added]

[83] On a proper construction of the *pro forma* document and grounded on trite principles of contract law, the Privy Council was satisfied that a valid contract was already formed. The subsequent signing of a sale and purchase agreement was found to be merely a formality. The Privy Council thus considered the appellant/developer bound by the *pro forma* and ordered specific performance of it.

[84] We are mindful that *Daiman* was decided at a time when the 1970 Rules were in force. Rule 12 of the 1970 Rules was quite different in that it stipulated a list of minimum terms which a sale and purchase agreement must include. Further, as elaborated earlier in this judgment, the then 1970 Rules permitted the collection of booking fees. That in our view does not alter the principles of the formation of a valid contract in any way.

[85] Had the developers in the present appeals complied strictly with the terms of the Scheduled Contracts as statutorily prescribed, then the payment of the initial 10 percent deposit and the signing of the statutory sale and purchase agreement would have been done simultaneously. The fact that they have nonetheless bypassed the statutory prohibition against the collection of booking fees, and the *pro forma* agreements being amply clear as to the fundamentals of the agreement, means that a bargain was indeed made at the time of the payment of the booking fee. In our judgment, the legislative intent was that the initial payment of monies, in the form of a deposit, is sufficient to constitute an intention to

enter into a contract given that the agreement would have to be signed at the same time.

[86] The other reason that attracts the application of these foundational principles of contract law is to ensure maximal protection of the purchasers having regard to the social purpose of the HDA 1966 and its subsidiary legislation. At the risk of repetition, if the 10 percent deposit is paid at the same time of the signing of the agreement, there would be no issue of there being separate dates for calculating the LAD. Having bound themselves to a bargain by collecting the booking fee and procuring a signed *pro forma* and top of it being responsible for drafting the final formal agreement, the developers have thereby put the purchasers in a disadvantageous position. The problem this poses is that the developers may abuse the opportunity to put whichever date they wish with a view to extend the date to deliver vacant possession. We can see, for example, that this was the case in *Hoo See Sen* (supra) where the formal agreement was only signed seven months after the booking fee was paid.

[87] In *Lim Eh Fah* (supra), the issue was simply whether the LAD period should begin to run from the date of payment of the deposit or from the signing of the agreement. The fact that what was paid in that case was a 'deposit' makes no difference to the present case as the effect of a booking fee is to operate as part of the deposit. After referring to *Hoo See Sen* (supra) and *Faber Union* (supra), Suriyadi J (as he then was) observed at page 41, as follows:

> "One must bear in mind that the date of 17 July 1992 ie, the deposit payment date, was the date when the contract was struck, and the very date the respondent assumed responsibility to fulfil its part of the bargain. If the date of the signing of the S&P agreement were to be taken as the relevant date,

when time started to run for the delivery of the vacant possession, the respondent could willy-nilly pick any dates it favoured to execute the S&P agreement, which would certainly prejudice the interest of the purchaser.".

[88] After referring to regulation 11 of the HDR 1989, at the same page, his Lordship then observed that:

> "In relation to this case, the above provision explicitly means that the respondent was permitted to accept deposits so long as it was provided for under the S&P agreement. A reading of the receipt, found at p. 39 of the Record of Appeal, highlighted that the payment was a 'deposit on apartment No. 6, Floor 2, Kampong Cina, Kota Bharu, Kelantan.' **What is the purpose of a deposit if not to indicate offer and acceptance, each with its respective responsibilities that must be fulfilled in accordance with the provisions of the S&P agreement**. The main obligation of the appellant was to pay in full the purchase price of the impugned property (cl. 4), failing which interest may be imposed on any late payments. At the other end of the agreement, it was the duty of the respondent to build, deliver and to hand over vacant possession within the agreed period to the appellant, failing which liquidated damages at the rate of 10% per annum of the costs of the property must be paid to the appellant.. [Emphasis added]

[89] We agree fully with the views expressed above and as such we answer all related leave questions on the common issue to the effect as follows:

> Where there is a delay in the delivery of vacant possession by a developer to the purchaser in respect of Scheduled Contracts under Regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (Regulation 1989) enacted pursuant to Section 24 of the Housing Development (Control and Licensing) Act 1966, the date for calculation of liquidated agreed damages ('LAD')

begins from the date of payment of deposit/booking fee/initial fee/expression by the purchaser of his written intention to purchase and not from the date of the sale and purchase agreement literally.

[90] Having addressed the primary issue of law we now propose to deal with each of the set of appeals.

The PJD Regency Cases

[91] The PJD Regency Cases concern two different judicial review applications filed in the Kuala Lumpur High Court by the developer respectively against purchasers Wong Kien Choong and Ng Chee Kuan. Another respondent, common to both judicial review applications, is the Housing Tribunal. The application against Wong Kien Choon was heard before Azizah binti Nawawi J (as she then was) while the other against Ng Chee Kuan was before Kamaludin bin Said J (now JCA).

[92] The facts in both cases are undisputed, hence it is not necessary for us to delve into the minutiae. Suffice to say, that in both cases, the Housing Tribunal awarded the purchaser LAD in respect of late delivery of both vacant possession and completion of common facilities. We shall deal with the vacant possession point first.

[93] Clause 25 of the sale and purchase agreements which is modelled after the relevant Scheduled Contracts requires that vacant possession be delivered within 42 months from the date of the sale and purchase agreement. We note that in 2015, the HDR 1989 was amended to abridge the time to just 36 months. In essence, the purchasers signed a *pro forma* sale and paid booking or commitment fees to purchase their respective

properties. They signed their sale and purchase agreements at a later date.

[94] The developer delivered vacant possession to the purchasers who eventually filed a claim for LAD for late delivery. The Housing Tribunal calculated the sum of the LAD from when the booking fee was paid and not from when the sale and purchase agreements were signed.

[95] In its two applications for judicial review, the developer contended that the LAD ought to have been calculated from the later date and not the booking fee date. The learned High Court Judges in both cases, on the authority of *Hoo See Sen* and *Faber Union* held that the Housing Tribunal was correct to calculate the LAD from the booking fee. The Court of Appeal affirmed the High Court. Given our exposition of the law earlier, the concurrent decisions of the High Court and the Court of Appeal are correct and we are therefore minded to uphold the decisions.

[96] With that we are only left with the leave question unique to this set of appeals. It reads as follows:

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

[97] In this regard, we find it necessary to set out clauses 26 and 27 of the sale and purchase agreements, as follows:

"26. Manner of delivery of vacant possession

(1) The Vendor shall let the Purchaser into possession of the said Parcel upon the following:

(a) the issuance of **a certificate of completion and compliance** certifying that the said Building has been duly constructed and completed in conformity with the approved plans and the requirements of the Street, Drainage and Building Act 1974 and any by-laws made thereunder;

...

(2) The delivery of vacant possession by the Vendor shall be supported by **a certificate of completion and compliance** certifying that the said Building is safe and fit for occupation and includes handing over the keys of the Parcel to the Purchaser.

…

27. Completion of common facilities

(1) The common facilities serving the said housing development shall be completed by the Vendor within forty two (42) calendar months from the date of this agreement. **The Vendor's architect shall certify the date of completion of the common facilities.**". [Emphasis added]

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

[99] The developer's argument was essentially that clauses 26 and 27(1) of the sale and purchase agreements are distinct in nature. Clause 27(1) only relates to vacant possession. There is no requirement in that Clause for a CCC. It was submitted that clause 26 merely requires a CCC to ensure that the building is safe for the delivery of vacant possession and nothing more. It was further submitted that the newly inserted clause 29 post the 2015 amendment to Schedule H does not expressly refer to the CCC and hence, it is sufficient to conclude that the sale and purchase agreements were not intended to refer to the CCC in terms of the time to complete the common facilities. For ease of reference, we reproduce the recently inserted clause 29 of Schedule H as follows:

> "**Completion of common facilities**
>
> 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**.
>
> (2) If the Developer fails to complete the common facilities in time, the Developer shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price.
>
> (3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Developer completes the common facilities together **with the architect's certification**.". [Emphasis added]

[100] It is true that clause 27(1) of the sale and purchase agreements makes no reference to the CCC though it requires an architect's

certification. The clause and the provisions of Schedule H do however require that developers obtain the CCC. Further, clause 29 of the post-2015 amendment to Schedule H also reflects that an architect's certification is required. The only bone of contention here is whether such certification should be in the form of a CCC or a CPC.

[101] Reverting to the principles of interpretation of social legislation, the Court is required to construe the statutory contract in a manner most favourable to the purchasers. It is clear that the sale and purchase agreements only refer to one type of certification namely, the CCC. Further, if we were to apply logical reasoning, a developer is only entitled, pursuant to clause 27(1)(a) of the sale and purchase agreement, to deliver vacant possession to the purchasers upon the issuance of the CCC. We cannot fathom why the drafters of the legislation would have intended to apply one standard in respect of vacant possession and another standard in respect of the completion of common facilities. Thus, absent clear legislation or written words to the effect that the certification of an architect means anything other than the CCC, we are not prepared to accept the submissions of the developer.

[102] Additionally, the CCC is a legal requirement imposed by law which in turn is only issued upon the developer complying with all regulatory laws such as the Street, Drainage and Building Act 1974. This in our view, affords protection to purchasers who would be assured that the relevant authorities have approved the construction. The same cannot be said in respect of the CPC or any other such document not amounting to a CCC. The CPC, in any case arises under the building or construction contract and not the Scheduled Contracts.

[103] For completeness, we reproduce the observations of Azizah Nawawi J held in the Court below in respect of this issue, as follows:

> "[40] Added to that, the certifications are for different purposes. The Certificate of Practical Completion was issued by the Developer's architect to the Developer's main contractor to show proof that work undertaken by the main contractor in the building contract entered between the main contractor and the Developer, has been completed to the satisfaction of the Developer's architect. On the other hand, the CCC was issued to certify that the Property, together with the common facilities, has been constructed and completed in conformity with the approved plans and requirements of the Street, Drainage and Building Act 1974 and its by-laws.
>
> [41] Therefore, the certification under Clause 27 of the SPA can only refer to the CCC. This is because the completion of the common facilities must be in tandem with the completion of the Property itself, as the purposes of the common facilities are for the use and comforts of the purchasers.".

[104] For the reasons aforementioned, we agree with her Ladyship's observations on the distinction between CCCs and CPCs and how the LAD period commences from the issuance of the CCC. The Court of Appeal, upon citing numerous authorities for the proposition that the Scheduled Contracts, the HDA 1966 and the HDR 1989 ought to be construed in favour of the purchasers, also agreed with the High Court.

[105] Before parting with this issue, we find it necessary to state the following. The law and the sale and purchase agreements very clearly require a prescribed architect's certification. The leave question to that extent is superfluous and redundant because it asks the obvious. We answer the leave question in the affirmative with the additional observation that such certification shall be in the form of a CCC.

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

The GJH Avenue Cases

[107] The GJH Avenue Cases stemmed from two judicial review applications which were heard separately before Siti Khadijah Hassan Badjenid J and Vazeer Alam Mydin Meera J (now JCA).

[108] Without going too much into the facts, the sole issue upon which leave was granted in these appeals is whether the purchasers are entitled to LAD as calculated from the date of the booking fee. The Housing Tribunal awarded the purchasers LAD from the date they paid the booking fee. Following *Hoo See Sen* and *Faber Union*, the learned High Court Judges held that the date of commencement of the LAD is from the booking fee. The decision of the Housing Tribunal High Court was thus upheld. Aggrieved, the developer appealed to the Court of Appeal which only heard one of the appeals as all parties agreed that the decision in that appeal would bind all other appeals.

[109] The most crucial portions of the judgment of the Court of Appeal are reproduced as follows:

> "[28] Thus, the Tribunal, in our view, is to apply the law as clearly stipulated in schedule G, particularly in Clause 22 pursuant to section 24 HDA 1966 and regulation 11(1) HDR 1989. The amendment to the law was made and the creation of the Tribunal was to simplify the claims of home buyers. Hence, it is

not for the Tribunal, in this case the 1st respondent, to sieve through the authorities to justify its finding of the meaning of the "date of this agreement", but to apply the law; in this case Clause 22; which is so clearly worded, to decide on the claim

…

[33] With due respect to the Learned High Court Judge, we found that he erred when His Lordship failed to see the error of law committed by the 1st respondent. We had no issue with the doctrine of *stare decisis* but the two Supreme Court decisions of **Hoo See Sen**, *supra*, and **Chew Yet Shong**, *supra*, as well as the two Court of Appeal cases of **Foong Seong Equipment**, *supra* **and Nippon Express (M) Sdn Bhd**, *supra*, which were relied heavily by the Learned High Court Judge could easily be distinguished. We perused the two latter cases and found that the sale and purchase agreements involved therein were not Form G type of agreements

…

[35] In the appeal before us, the contract of sale is the SPA. We combed through the SPA and could not find any clause which allowed the collection of deposit. Even the 10% of purchase price, according to its Third Schedule, can only be collected upon the signing of the SPA; and not before. Learned Counsel for the 2nd and 3rd respondents in her written submissions had submitted that the appellant, by collecting deposit, had breached the law and thus precluded from defending the 2nd and 3rd respondents' claim for LAD to be calculated from the date of deposit paid.

[36] With due respect, we were of the contrary view. It was our considered view that the fact that the law prohibits the collection of deposit when it is not provided for by the SPA clearly indicates that "the date of this agreement" as provided for in the SPA is the actual date of the SPA was entered into. The Form G contract is a statutory contract, prescribed by law. The law as prescribed does not allow the parties to a contract in Form G to contract out of the scheduled form.".

[110] With respect, and in light of the principles we have adumbrated above, we are unable to agree with the Court of Appeal generally and for the specific reasons that follow.

[111] Firstly, the Housing Tribunal is established by law. 'Law' under Article 160 of the Federal Constitution includes 'common law' insofar as it is in operation in the Federation or any part thereof. As numerous judgments have pointed out, common law includes Malaysian common law. It is on this basis that the doctrine of *stare decisis* exists in Malaysia. Having acknowledged that *Hoo See Sen* and *Faber Union* are authorities for the proposition that calculation of LAD begins from the booking fee date, the Court of Appeal was bound to follow the decision in those cases. In our view, the Court of Appeal's attempt to distinguish those cases is, as is the attempt by the developers in these appeals, artificial.

[112] In any event, we have held that quite apart from those cases, the date nonetheless begins from the payment of the booking fee on account of the principles of statutory interpretation on social legislation. The Court of Appeal, with respect, appears to have misapplied the test in relation to illegality within the context of social legislation. It is our view that to limit the date of calculation to the date in the contract is to impliedly condone the collection of such fees. In other words, the result of such a construction by the Court of Appeal would mean that the developers are allowed to benefit from the booking fees collected in contravention of the law while at the same time being allowed to manipulate the date of the contract for purposes of the LAD. Additionally, the Court of Appeal appears to not

have directed itself to the principles of contract law and the decision of *Daiman* which it was bound to follow.

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

Sri Damansara Cases

[114] The Sri Damansara Cases arose from three separate judicial review applications filed in the Kuala Lumpur High Court.

[115] The first appeal (Appeal No. 4) arose from two consolidated judicial review applications filed by the developer against the decision of the Housing Tribunal. The application was heard before Nordin bin Hassan J (now JCA) who dismissed it. The developer appealed to the Court of Appeal. The Court of Appeal agreed with the High Court and dismissed the appeal. Before us, learned counsel Mr Dhiren Rene Norendra acts for the developer.

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

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

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

[119] The learned High Court Judge cited with approval the following passage in *Chew Ewe Hin & Anor v Sanjana Triangle Sdn Bhd & Anor case* [2017] 1 LNS 355, where Abdul Majid Tun Abdul Hamzah JC (as he then was) held, as follows:

> "[36] Returning to the four clauses pertaining to the LAD found in the SPA I agree with the views expressed by the learned author and hold that the doctrine of unjust enrichment has no application to the present case. The Defendant cannot turn around and say that since discount was given the LAD ought to be calculated based on the discounted purchase price. After all the terms of the SPA are statutorily provided for.".

[120] As we understand it, the High Court essentially held that the sale and purchase agreement having been derived from a statutory contract was not subject to amendment by the parties and that accordingly the developer was bound by the terms of the statutory contract of sale that the LAD shall be calculated from the purchase price.

[121] The Court of Appeal dealt with the issue quite simply as follows, per Harmindar Singh Dhaliwal JCA (as he then was):

> "[24] In this context, the provisions of the contract of sale admit to no ambiguity as liquidated damages are to be calculated from the agreed purchase price. There was no mention of any rebate in the sale and purchase agreement. It must be borne in mind that the contract of sale was prescribed and regulated by statute and the parties could not import additional clauses into it and especially to remove the protection of home buyers.
>
> [25] For the above reasons, we did not think there was any justification for the plea of unjust enrichment. There was, therefore, no error on the part of the Tribunal in the calculation of the liquidated damages.".

[122] We agree with the views of the High Court and the Court of Appeal. It is trite principle of law that where a statute prescribes a form under the umbrella of social protection, such provisions may be contracted out of provided that the terms of the agreement are favourable to the purchasers (see *Sea Housing* (supra), at page 34).

[123] The express provision of rebates, in our view, is favourable to the purchasers which the developer could have inserted into the sale and purchase agreement. There is an express finding by the Court of Appeal that there were no such terms. Now, even if such terms were included into

the contract, for the following reason, we doubt that it would have altered the conclusion on the calculation of the LAD.

[124] A rebate is essentially an *ex post facto* discount. It amounts to refund of monies already paid by the purchaser. The concept behind LAD is to compensate a purchaser for the developer's failure to comply with the statutorily prescribed timeline. It would defeat the purpose of the protection guaranteed by the law if a developer is allowed to cut his losses incurred by the LAD by offsetting it using the purchaser's own money. In our view, such an act amounts to nothing more than an act to manipulate the purchase price for the collateral purpose of having to pay LAD.

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

[126] We therefore answer the question of whether the award of the Housing Tribunal results in the purchasers being unjustly enriched in the negative. We find no appealable error and we agree with the concurrent decisions of the High Court and the Court of Appeal to uphold the award of the Housing Tribunal. Appeal No. 4 is accordingly dismissed with costs and the orders of the Courts below are affirmed.

[127] In respect of the other appeal (Appeal No. 31), it arose from the judicial review application filed by the same developer Sri Damansara against the decision of the Housing Tribunal. The outcome was the same.

The judicial review was before Azizah binti Nawawi J (now JCA) who also dismissed it. The developer lodged an appeal to the Court of Appeal. In this case, the developer is represented by learned counsel Mr Andrew Davis.

[128] This case also concerns the calculation of LAD. The High Court upheld the decision of Housing Tribunal to award LAD from the date of the booking fee upon relying on *Hoo See Sen* and *Faber Union*. The Court of Appeal affirmed and further, correctly applied the principles of statutory interpretation in relation to social legislation apart from following the said Supreme Court decisions.

[129] In our judgment, the Courts below took into account all the correct principles of law in declining to disturb the award of the Housing Tribunal. We find no reason to intervene and we therefore dismiss Appeal No. 31 with costs. The orders of the High Court and the Court of Appeal are affirmed.

Conclusion

[130] The Courts will not countenance the bypassing of statutory safeguards meant to protect the purchasers. To that extent, where the developers act in contravention of the law, they have to accept the resulting consequences.

[131] While the developers might think that it is a standard commercial practice to accept booking fees, the development of the law clearly

suggests to the contrary. The Courts will not condone such a practice until and unless the law says otherwise.

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

Dated: 19 January 2021

signed

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

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