IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
(APPELLATE JURISDICTION)
[CIVIL APPEAL NO: 02(f)-50-09/2021(J)]

BETWEEN

REMEGGIOUS KRISHNAN ... APPELLANT

AND

SKS SOUTHERN SDN BHD
(DAHULU DIKENALI SEBAGAI MB BUILDERS SDN BHD)

... RESPONDENT

(IN THE COURT OF APPEAL MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: J-01(A)-580-10/2019

BETWEEN

SKS SOUTHERN SDN BHD
(DAHULU DIKENALI SEBAGAI MB BUILDERS SDN BHD)
... APPELLANT

AND

1. TRIBUNAL TUNTUTAN PEMBELI RUMAH MALAYSIA

2. REMEGGIOUS KRISHNAN ... RESPONDENTS

In the High Court of Malaya at Johor Bahru In the State of Johor Darul Tazim, Malaysia
Judicial Review Application No: JA-25-21-03/2019

Between

SKS Southern Sdn Bhd
(Dahulu dikenali sebagai MB Builders Sdn Bhd)

… Applicant

And

1. Tribunal Tuntutan Pembeli Rumah Malaysia

2. Remeggious Krishnan ... Respondents

CORAM: VERNON ONG LAM KIAT, FCJ
ZALEHA YUSOF, FCJ
HARMINDAR SINGH DHALIWAL, FCJ

JUDGMENT OF THE COURT

Introduction

[1] The appeal concerns the jurisdiction of the Tribunal for Home Buyers Claims ("Tribunal") in respect of sections 16Q and 16M of the Housing Development (Control and Licensing) Act, 1966 ("HDA 1966"). Specifically, the appeal concerns important questions as to jurisdiction of the Tribunal in respect of split claims as well as issues pertaining to the delivery of vacant possession.

[2] The present appeal emanates from a judicial review application filed by the respondent to review the award of the Tribunal dated 16 January 2019 ("the Award"). The Tribunal had allowed the claim of the appellant. The High Court dismissed the respondent's judicial review application on 22 September 2019. The Court of Appeal, however, allowed the respondent's appeal, set aside the said High Court order and quashed the Award of the Tribunal on 2 November 2020.

[3] Undeterred, the appellant successfully obtained leave of this Court to file an appeal on the following questions of law:

Question 1:

In view of section 16Q and section 16M of the Housing

Development (Control and Licensing) Act, 1966, whether there is a jurisdiction for the Tribunal for Home Buyers Claims to hear two (2) separate claims in respect of the same subject property where the total amount of dispute of these two (2) claims exceeds the monetary jurisdiction of RM50,000.00.

Question 2:

Whether the developer can be exempted to pay damages to the purchaser when the developer was in breach of the manner of delivery of vacant possession of the property as prescribed in Schedule H so long as the developer is still within the timeline to deliver vacant possession of the property.

Question 3:

By virtue of section 6 of Limitation Act, 1953, whether a purchaser's right to claim for breach of the manner of delivery of a property under Schedule H arise after the actual delivery of vacant possession of a property or after the deadline to deliver the vacant possession of a property; and

Question 4:

In view of the definition of "ready for connection" as stated in Clause 1(k) of the Sale and Purchase Agreement and Clause 22 of the Sale and Purchase Agreement as well as admission of liability by the respondent, whether Clause 27 of the Sale and Purchase Agreement is breached.

[4] We heard the appeal on 25 January 2022. After considering the submissions put forward by the parties, we came to the unanimous view that the appeal should be allowed. The order of the Court of Appeal was accordingly set aside and the order of the High Court restored with costs. We now provide our full grounds for our decision.

The Salient Facts

[5] The respondent is the developer of a residential project identified as "Sky Habitat @ Meldrum Hill, Johor Bahru" ("the Project"). The appellant is the purchaser of a unit of apartment identified as Parcel No: L-15-08 in the Project ("the Property"). By a Sale and Purchase Agreement dated 6 February 2017 ("the SPA"), the appellant agreed to purchase the Property from the respondent at the discounted price of RM569,080.00.

[6] By Clause 25(1) of the SPA, the time for delivery of vacant possession of the Property shall be 36 months from the date of the SPA, namely on or before 6 February 2020. The manner of delivery of vacant possession was set out in Clause 27 of the SPA, the relevant part of which appears as follows:

> "Clause 27 - Manner of delivery of vacant possession
>
> (1)The Developer shall let the Purchaser into possession of the said parcel upon the following:
>
> (a)...
>
> (b)...
>
> (c) water and electricity supply are ready for connection to the said Parcel;"

[7] *Vide* a Notice dated 24 April 2018, the respondent informed the appellant of its readiness to deliver vacant possession of the Property. The vacant possession was delivered with no electricity connection to the Property. The application to Tenaga Nasional Berhad ("TNB") was sent on 19 June 2018 and the deposit paid by the respondent on 26 June 2018.

[8] On 21 December 2018, the appellant filed two separate claims with the Tribunal against the respondent. They were registered under Claim No: TTPR/J/1094/18 and Claim No: TTPR/J/1095(T)/18 respectively.

Claim No: TTPR/J/1094/18 was expressed to be for "Non-Technical Claim for RM49,832.00" (“Non-Technical claim”) whilst Claim No: TTPR/J/1095(T)/18 is for "Technical Claim for RM40,000.00" (“Technical claim”).

[9] On 16 January 2019, the Tribunal heard the Non-Technical claim and awarded a sum of RM16,452.05 and costs of RM400.00 in favour of the appellant ("the Award") for the delay in the connection of the electricity. This award formed the subject matter of the respondent’s judicial review application. The Tribunal adjourned the hearing of Technical claim to a date to be fixed and subsequently made another award thereunder.

Proceedings in the courts below

[10] The respondent, being aggrieved with the Award, applied for leave to issue Judicial Review against the Tribunal and the appellant. On 23 April 2019, the High Court granted leave to the respondent to commence the judicial review. In the application for judicial review, the respondent sought to declare the Impugned Decision as invalid, null and void and of no effect and that an Order of Certiorari be issued to quash the Award based on the following reasons:

(a) that the appellant filed two separate claims with the Tribunal, contrary to sections 16M(1) and 16Q of the HDA; and

(b) that the Tribunal had erred in awarding damages to the appellant for the non-connection of electricity to the Property.

[11] The High Court, after hearing the application for judicial review, refused to quash the Award. In summary, the High Court held as below:

(a) since the respondent had failed to file any response to the appellant's Affidavit-In-Reply dated 4 July 2019, the assertions by appellant were neither denied nor disputed, it is

deemed an admission by the respondent, following the case of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609. On this ground alone, the High Court was of the view that the judicial review application should be dismissed.

(b) In any event, the High Court also considered the submissions on the merits and dismissed the judicial review application on the following grounds:

[i] that clauses 25 and 27 of the SPA stipulate that vacant possession of the Property shall be delivered to the 2nd Respondent within 36 months from the date of the SPA and that the manner of delivery of vacant possession is upon *inter alia* water and electricity supply are ready for connection to the said Property.;

[ii] that although vacant possession was delivered, there was no electricity connection to the Subject Property as required by Clause 27(1) of the SPA as the application to TNB was sent only on 19 June 2018 and the deposit paid by the appellant (respondent here) on 26 June 2018.;

[iii] that Section 16Q of the Housing Development (Control and Licensing) Act, 1966, ("HDA 1966") permits the filing of split claims if the 1st respondent chose to deal with the split claims and that the discretion should not be interfered with. In any event, although the claims were split, they were for two different claims, one was for technical claim and the other, for a non- technical claim;

[iv] that the 1st respondent did not err in awarding damages to the 2nd respondent for the non-connection of electricity to the Property as it was undisputed that

vacant possession was delivered without any electricity connection to the Property in breach of Clause 27 of the SPA, which states that water and electricity supply are ready for connection to the Property; and

[v] that the 1st respondent did not err in the computation of damages, and that the figure was not 'plucked out of the air' as the calculation was based on the analogy of the ten percent rule and that it was a reasonable method of computation as compensation for the 2nd respondent who had been deprived of the opportunity to utilise and enjoy the Property.

[12] The respondent appealed against the High Court decision. After hearing the appeal, the Court of Appeal found that there were merits in the appeal and unanimously allowed the appeal with costs. In summary, the Court of Appeal held as below:

(i) In respect of the High Court's finding that the respondent's failure to file any response to the appellant's Affidavit-In-Reply dated 4 July 2019, the Court of Appeal ruled that in a judicial review, further affidavit by the applicant after leave had been obtained is only permitted by the court if new matters not already disclosed in the leave stage are raised by the other party as specifically provided in Order 53 Rule 7(1) Rules of Court 2012. Since the High Court did not indicate what new matters arose out of the affidavits of the appellant which requires a further affidavit from the respondent to rebut or answer, there are no merits in the High Court's finding on this issue.

(ii) The High Court also erred in the construction of Clause 27(1)(c) of the SPA. It is pertinent to note that the HDA 1966 and its Schedules thereto had since been amended after the case of **Hoya Holding** (*supra*) and the court therein was in

fact construing a provision of the Sale and Purchase Agreement which wordings is different from the relevant clause in the SPA in the present case. In **Hoya Holding** (*supra*), the court therein was construing the words "with the connection of" as opposed to the present case where the words used in Clause 27(1)(c) of the SPA were "ready for connection". Clause 27(1)(c) of the SPA states "ready for connection" and it does not mean that the Property must be installed with an actual supply of electricity.

(iii) The date of the SPA was 6 February 2017 and the respondent was required to deliver vacant possession of the Property to the appellant on or before 6 February 2020. Both the Tribunal and the High Court concluded that there was a late delivery of the Property of 63 days calculated from 24 April 2018 to 26 June 2018 based on their erroneous construction of Clause 27(1)(c) of the SPA as the electricity supply was in fact connected to the Property on 11 July 2018, well before the time due for delivery of vacant possession which was on 6 February 2020. In the circumstances, the Tribunal's Award was without any basis and was made arbitrarily.

(iv) The prohibition against the raising of fresh issue although not ventilated earlier in the courts below did not apply when the fresh issue was related to the matter of jurisdiction (*Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 and *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153; [2020] MLJU 54).

(v) It is imperative that section 16M(1) of the HDA 1966 be read together with section 16Q of the same Act. Section 16Q of the HDA 1966 clearly provided that the subject matter of the claim cannot be split nor more than one action can be filed in respect thereof if the combined amount claimed

exceeds the jurisdiction conferred by section 16M(1) of the HDA 1966. The effect of section 16Q of the HDA 1966 when read as a whole could only mean that there is no prohibition against the filing of "split claims" provided the total amount of the "split claims" remains within the jurisdiction of the Tribunal but not otherwise. The High Court's reliance on the word "may" alone without construing the provision in its full and proper context is flawed.

(vi) Further, the following sentence in section 16Q HDA 1966 namely “in respect of the same matter against the same party for the purpose of bringing it within the jurisdiction of the Tribunal”, it clearly meant that claims filed by the appellant must refer to the same matter that is the Property against the same party, the respondent.

(vii) Even though the appellant’s claims were for different claims, namely the technical claim and non-technical claim and even though the respondent had never raised any objection to the claims before the Tribunal, such matters were immaterial and the Tribunal had no jurisdiction to hear the two split claims, as it was clearly beyond the jurisdiction of the Tribunal and contrary to sections 16M(1) and 16Q of the HDA 1966. The court has inherent powers to set aside such orders exercisable on its own motion, even if parties did not raise objections on the issue of jurisdiction or implicitly acquiesce in the matter or brought by the party which the order purports to affect for that purpose.

Our Analysis and Decision

[13] Arising from the four questions of law for which leave was granted and the submissions raised by the parties in the instant appeal, we considered that it was necessary for this Court to consider and determine the issues as follows. The first issue is whether the filing of

two separate claims involving different matters in respect of the same property was contrary to sections 16M and 16Q of the HDA 1966 ("The Jurisdiction Issue"). The second issue is whether it was appropriate to award damages for the non-connection of electricity to the said Property ("The Damages Issue").

The Jurisdiction Issue

[14] In any discussion on the HDA 1966, it is necessary to allude to the purpose and objective of the legislation. It is beyond doubt that the HDA 1966 was enacted as a piece of social legislation to protect house buyers. With that in mind, any term or provision in the statute must be interpreted in a way which ensures maximum protection for the house buyers against the developer. (see *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other Appeals* [2020] 1 CLJ 162 and *PJD Regency Sdn Bhd v. Tribunal Pembeli Rumah & Anor and other Appeals* [2021] 2 MLJ 60).

[15] It is therefore imperative that sections 16M and 16Q of HDA 1966 be interpreted in such a way as to provide protection of house buyers in keeping with the intention of Parliament. Now, section 16M of the HDA 1966 provides that the Tribunal shall have the jurisdiction to determine a claim where the total amount in respect of which an award of the Tribunal is sought does not exceed RM50,000.00. We noted that the words "a claim" and not "all the claims" are used in this section. However, section 16Q of the HDA 1966 provides that the claims may not be split, nor more than one claim brought, in respect of the same matter against the same party for the purpose of bringing it within the jurisdiction of the Tribunal. We also noted that the word "matter", instead of "property" or "housing accommodation", has been used in this section, the significance of which will become apparent in the discussion that follows.

[16] In the present case, and as alluded to at the outset, the appellant had filed two separate claims in respect of the Property. The two claims

are the Technical Claim, grounded on the failure of the respondent to provide adequate ceiling height and protruding beams and pillars with the claim amounting to RM40,000.00; and the second being the Non-Technical Claim, grounded on the breach of manner of delivery of the Property with the claim amounting to RM49,832.00. Both of the claims, viewed separately, did not exceed the monetary jurisdiction of RM50,000.00 under section 16M of the HDA 1966.

[17] As mentioned earlier, the Court of Appeal took the position that the words "same matter" in section 16Q of the HDA meant that the claims filed by the appellant must refer to the same matter, that is, the Property. With respect, we think this interpretation is incorrect. As submitted by the appellant's counsel, with which we agreed, if it was Parliament's intention for "the same matter" to be interpreted as "the same Property" as suggested by the Court of Appeal, the drafters of the legislation would have used the term "Property" or "housing accommodation". In fact, the term "housing accommodation" has been specifically defined in the section 3 of the HDA 1966, as follows:

> *"housing accommodation" includes any building, tenement or messuage which is wholly or principally constructed, adapted or intended for human habitation or partly for human habitation and partly for business premises and such other type of accommodation as may be prescribed by the Minister from time to time to be a housing accommodation pursuant to section 3A"*

[18] For the aforesaid reasons, we were unable to agree with the Court of Appeal that the words "same matter" in section 16Q of the HDA must mean the "same Property". We took the view that the "same matter" can only mean the same issue or type of claim and not the same property. We, therefore, agreed with the position of High Court that there were two different matters in the present case, i.e. one was for technical matter and the other was for non-technical matter. As such, section 16Q of the HDA 1966 was inoperative in the present case.

[19] Having determined that the appellant may file split claims in respect of different and distinct matters, it becomes necessary to consider also whether the total amount of the combined claims may not exceed the monetary jurisdiction of the Tribunal. In this regard, we considered it significant that the monetary jurisdiction of the Tribunal of RM50,000.00 in section 16M of the HDA 1966 only applies to "a claim" and not "all the claims". Thus, we agreed with the appellant's submission that section 16M does not limit the appellant's two separate and distinct claims to a combined amount lesser than RM50,000.00. As long as each of the appellant's claims in respect of different and distinct matters does not exceed the monetary jurisdiction of the Tribunal, the appellant was not in violation of section 16M of the HDA 1966.

[20] Although we agreed with the Court of Appeal that section 16M and section 16Q of the Act should be read as a whole, nonetheless, we considered that the two separate and distinct claims filed by the appellant did not contravene any of the abovementioned sections. Since both of the appellant's claims were grounded on different and distinct matters and each of the appellant's claims was well within the jurisdiction of the Tribunal, we were in agreement with the reasoning of the High Court. Accordingly, there was no reason for the High Court to intervene with the decision of the Tribunal.

[21] For clarity, we would also add that there may arise a situation where a purchaser files two separate claims for the same matter in which the combined amount of the split claims exceeds the monetary jurisdiction of the Tribunal. For example, as pointed out by the appellant's counsel, a claim of Liquidated Ascertained Damages ("LAD") in the total sum of RM80,000.00 may be split by the purchaser into two claims of RM40,000.00 each. In such a case, the Tribunal may exercise its discretion to disallow such claims to be split in order to prevent the purchaser circumventing the monetary jurisdiction of the Tribunal.

The Damages Claim

[22] Now, the Court of Appeal held that since Clause 27(1)(c) of the SPA states "ready for connection", it does not mean that the subject property must be installed with actual supply of electricity. With respect, this cannot be the correct interpretation as it overlooks Clause 1(k) of the SPA (which when read together with Clause 27(1)(c) of the SPA) provides that "ready for connection" means electrical points fully functional and supply is available for tapping into the Property.

[23] It must follow that there was an obligation on the developer to provide actual supply of water and electricity to the Property. Any other interpretation would be unfair to the purchasers save for the payment of any deposits for the supply of water and electricity if the SPA provided for it. In the circumstances, we agreed that the respondent was in breach of Clause 27 of the SPA as the delivery of vacant possession was invalid since there was no electricity supply connected at the time. The High Court was right to observe that the appellant suffered losses as he was deprived of the opportunity to utilize and enjoy the Property as it lacked electricity supply.

[24] Now, the Court of Appeal took the position that no losses could have been suffered by the appellant here as the respondent was still within the time frame for delivery of vacant possession. With respect, we were unable to accept this proposition. In our view, the time frame for delivery of vacant possession is quite separate from the manner of delivery of vacant possession. The appellant was entitled to claim compensatory damages for breach of Clause 27 of the SPA. This was separate from any claim for liquidated damages for late delivery of possession under Clause 25 of the SPA. In the event, damages was justifiably ordered by the Tribunal for the delay of 63 days for breach of Clause 27.

Conclusion

[25] In the circumstances, and for the reasons mentioned, we found merit in the issues raised by the appellant. We answered Question 1 in the affirmative. We agreed with the reasoning of the High Court. The objective was to protect the aggrieved purchasers of their rights to resort to the Tribunal, which provides for an easier, cheaper and quicker avenue for aggrieved purchasers to claim damages or compensation from the housing developers. We declined to answer the rest of the questions as they pertained to a given state of facts. In any case, we had sufficiently stated our views as to the law in respect of the issues raised in the preceding discussion.

[26] The appeal was, accordingly, allowed with costs of RM50,000.00 to the appellant subject to allocator. The order of the Court of Appeal was set aside and the order of the High Court restored. Since the delivery of our decision, our learned sister Zaleha Yusof FCJ has since retired. This grounds of judgment is therefore prepared in accordance with section 78 of the Courts of Judicature Act 1964.

Dated: 6 MARCH 2023

(HARMINDAR SINGH DHALIWAL)
Judge
Federal Court of Malaysia

Counsel:

For the appellant - Lum Kok Kiong & Tan Ming Chu; M/s Lum Kok Kiong & Co.

For the respondent - Chen Wai Jiun; M/s WJ Chen & Co.