

## Analysis of Ang Ming Lee and Bludream City Development

Factors of the Case	Case Law	
<b>Questions/Issues to be answered by the Court (Highlighting the issue on Regulation 11(3))</b>	<p><b><i>Ang Ming Lee &amp; ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan &amp; Anor and other appeals [2020] 1 MLJ 281 (“Ang Ming Lee”)</i></b></p> <p>In this case, the Federal Court (“FC”) was faced with five questions of law but for this summary the main three are considered:</p> <ol style="list-style-type: none"> <li>1. Whether the Housing Controller has the power to waive / modify any provision in the Schedule H Contract of Sale as prescribed by the Minister under the Housing Development (Control and Licensing) Act 1966 (“HDA”);</li> <li>2. Whether s 24 of the HDA confers power on the Minister to make regulations for the purpose to delegate the power to waive or modify the Schedule H Contract of Sale to the Housing Controller; and</li> <li>3. Whether reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 (“HDR”) is <i>ultra vires</i> the HDA.</li> </ol>	<p><b><i>Bludream City Development Sdn Bhd v Alvin Leong Wai Kuan &amp; 14 ors (Civil Appeal No. B-01(A)-55-01/2020)</i></b></p> <p>In this case the Court of Appeal (“COA”) had to consider the following issues:</p> <ol style="list-style-type: none"> <li>1. Whether the purchasers are parties adversely affected by the Controller’s Decision in the 1<sup>st</sup> and 2<sup>nd</sup> extension (subject to conditions) or by the Minister’s Decision in the Second Extension;</li> <li>2. Whether the Minister’s decision to extend time for the developer to complete the units is illegal in the light of the FC’s decision on the case of Ang Ming Lee;</li> <li>3. Whether the Minister’s Decision to extend time for the Developer to complete the Units should be set aside for procedurally impropriety in that there was a breach of natural justice when the purchasers were not heard;</li> <li>4. Whether the Minister’s decision to extend time to complete the units should be set aside on the ground of irrationality; and</li> <li>5. Whether the court should interfere with the Minister’s decision to grant an extension of time.</li> </ol>
<b>Decision (Highlighting the issue on Regulation 11(3))</b>	<p>The FC answered Questions 1 &amp; 2 in the negative and the Question 3 in the affirmative.</p>	<p>The COA answered the 1<sup>st</sup> issue in the affirmative while the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> issue in the negative.</p>

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The court held that after having regards to the object and purpose of the HDA, the words '**to regulate and to prohibit**' in sub-s 24(2)(e) should be given a strict construction, in the sense that the Minister is expected to apply his own mind to the matter and not to delegate that responsibility to the Controller.

The court referred to ***De Smith's Judicial Review 7<sup>th</sup> Ed*** which stated the rule against delegation:

A discretionary power must, in general, be exercised only by the public authority to which it has been committed. It is a well known principle that of law that when a power has been conferred to a person in circumstances indicating that trust is being placed in is individual judgement and discretion he must exercise that power personally unless he has been empowered to delegate it to another.... It is a rule of construction which makes the presumption that a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statutes has conferred it and by no other authority, but this presumption may be rebutted by any contrary indication found in the language, scope or object of the statute.

The court also referred to multiple cases to highlight the object of the HDA. In ***Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd [2011] 2 MLJ 141; [2009] 6 CLJ 232***, the Federal Court reiterated the object of HDA by making the following observation:

Now, cl 23 is part of a statute based contract. In this country, the relationship between a house-buyer and a licensed developer is governed by the Housing Developers legislation. Its object is to protect house buyers against developers. A developer must execute

### 1<sup>st</sup> issue

The COA held that it is the second extension of the Minister that the purchasers could be said to be aggrieved by or adversely affected and therefore could apply to quash or set it aside. The reason being that the first extension was not prayed for nor was it stated in the statement required by O 53 r 3(2) of the Rules of Court 2012 ("**ROC**"). Also, the application would be time barred as O 53 r 3(6) states that an application for judicial review must be made within three months from the date when the grounds of application first arose.

The court referred to the case of ***Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161*** and held that the time frame in applying for judicial review prescribed by the ROC was fundamental and it goes to the jurisdiction. Even if the application has merits or not, it would be irrelevant.

### 2<sup>nd</sup> issue

The court highlighted the decision in the case of Ang Ming Lee so as to say that FC did not say that the Minister has no power to 'vary and modify' the terms of the statutory SPA but rather addressed the issue of whether the Controller could grant an extension of time to a developer to complete the units under the statutory SPA. It was held that the Controller could not and the Minister cannot delegate the duty to the Controller.

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	<p>the agreement set out in the schedule to the relevant subsidiary legislation. He cannot add other clauses in it.</p> <p>In para 40, the court held that there was no contrary indication in the language, scope or object of the Act that the duty of safeguard the interests of purchasers may be delegated to some other authority as the Parliament has entrusted the Minister to be the one to safeguard the interest of the purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H.</p> <p>In para 41, the court opined that the legislative intent that the duties shall remain with the Minister.</p> <p>Even though, the Controller is given the power to investigate on the reason why a licensed housing developer is unable to meet his obligation to the purchasers, or is about to suspend his building operations or is carrying on his business detrimental to the interests of the purchaser under s 11, the court held that it is the Minister who is empowered to give directions and to take such other measures for purposes of safeguarding the interests of the purchasers and for carrying into effect the provisions of the HDA.</p> <p>The court then went on to say that under s 12, the Minister is provided with powers to give general directions as he considers fit, to the licensed housing developer for purposes of ensuring compliance with the HDA. Such directions, which shall be given in writing, are binding on the developer.</p>	<p>The COA distinguished the fact that the Minister was the one that granted the second extension in this case and not the Controller. The COA further opined that the material facts of this case and Ang Ming Lee were poles apart and the proposition of law made in one case cannot be transported and transposed into a different factual matrix when the decision maker in this case was the Minister while in the case of Ang Ming Lee, is the Controller.</p> <p>The court went on to further mention at para 37 and 43 that the case of Ang Ming Lee declared that reg 11(3) was ultra vires. However, the COA here went on further to say that s 24(2)(e) of the HDA, grants the Minister the power to regulate and prohibit the terms and conditions of the contract of sale, thus the Minister could grant an extension of time on the ground of special circumstances.</p> <p>The COA held that although the controller has no power under reg 11(3), it does not take away the power of the Minister to make a decision under reg 11(3) or reg 12 in an appeal from an invalid decision under reg 11(3).</p> <p>The court also considered the powers conferred to the Minister under ss 11 and 12 of the HDA, where the Minister could give directions for the purposes of safeguarding the interests of purchasers where the Minister deems fit and proper.</p> <p><u>3<sup>rd</sup> issue</u> The court held that the right to be heard would depend on the circumstances and nature of the case. In the</p>
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The court held that there was a two tier structure when it came to the regulation regarding extension of time:

- First tier (reg 11(3)) - the Controller is empowered to decide on an application for extension of time.
- Second tier - once the decision is made by the Controller, an aggrieved party may appeal to the Minister under reg 12.

In para 44 and 45, the court further stated that based on s 5 of the Delegation of Powers Act 1956, the Minister is allowed to delegate his powers or duties to any person described by name or office. However, such delegation must be made by notification in the gazette. This was not done. Thus, there is no delegation of powers by the Minister to any person of his duties under the Act pursuant to the Delegation of Powers Act.

Moving on, the court in para 51, held that the power to regulate under s 24(2)(e) does not include the power to delegate.

Further, the HDA has specifically enumerated the respective duties and powers of the Minister, the Controller and an inspector. There was no such provision in the HDA that enabled the Controller to exercise the power of the Minister while there were expressed provisions that provided for the Controller to exercise the powers of the inspector by s 4(2).

Therefore, the court was of the view that it was not the Parliament's intention that the Minister's powers to regulate the terms and conditions of a contract of sale to be delegated to the Controller.

present case, the paramount consideration would be that the Minister needed to safeguard the interests of the purchasers.

The court opined that the Minister did act in a reasonable, fair and just manner in granting the second extension equivalent to the 17 months delay arising out of the stop work order for which the developer had been held not to be responsible for the cracks and subsidence in the nearby school. The court held that the developer in this case had completed the project after the second extension was granted.

The court concluded on this issue that there was no breach of natural justice (in terms of the purchasers not being heard). This is because the purchaser had the liberty to adduce evidence at the hearing of the judicial application or to put in their own expert evidence report to convince the High Court that stop work order was because of the developer's fault or neglect but there was nothing from the purchasers. Also, the requirement of the purchasers to be heard would have been a mere formality as the delay by the developer was not a fault of their own.

### 4<sup>th</sup> issue

The court considered the circumstances that were faced by the developer. The court took into account the stop work order that prevented the project from going on which an expert report said was caused by the land structure beneath the school building itself, particularly water entrapment and not attributable to the developer.

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	<p>In para 60, the court concluded that reg 11(3) of the HDR, conferring the power on the Controller to waive and modify the terms and conditions of the contract of sale is <i>ultra vires</i> the HDA.</p> <p>The case was decided in favour of the appellants</p>	<p>The counsel for the developer had raised the fact that in respect of another civil suit as stated in para 106, the purchasers had sought an order that the stop work order was invalid but the HC judge did not grant the relief. No further action was taken by the purchasers and it was deemed as the purchasers have accepted the validity of the stop work order.</p> <p>The court agreed with the counsel for the developer that the purchaser could not now take an inconsistent position that it is for the developer to challenge it in separate proceedings.</p> <p>The court decided that considering the circumstances faced by the developer in the present case and the reasons of the Minister in granting the extension that this was not a case where the developer was trying to take advantage of the purchasers as the extension was for 17 months which was the duration of the stop work order.</p> <p><u>5<sup>th</sup> issue</u></p> <p>The COA held that this not a case where the developer is trying to take advantage of their own delay and to shortchange the purchasers as it were but rather a genuine need for extension of time corresponding to the period of delay caused by the stop work order which was not through the fault of the developer.</p> <p>The case was decided in favour of the appellants.</p>
<p><b>Analysis</b></p>	<p>Reg 11(3) was made in a way that undermined the purpose of Parliament. When the HDA was enacted it was to safeguard the interest of the purchasers, not</p>	<p>To note here, the first extension wasn't a problem because there was no statement produced as per O 53</p>

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	<p>developers. While the HDA has vested powers to the Minister, there was no express provision that allows the delegation of the duty under reg 11(3) to the Controller.</p> <p>As reg 11(3) provided that the controller would be the one calling the shots to waive or modify the provision in the contract of sale and not the Minister so the existence of reg 11(3) was beyond the scope that was provided under Section 24(2)(e) of the HDA.</p>	<p>r 3(2) and the application was time barred as per O 53 r 3(6).</p> <p>The key takeaway for the 2<sup>nd</sup> issue is that Minister must exercise on his own and not to delegate as per the case of Ang Ming Lee, delegation of powers to the Controller in reg 11(3) is ultra vires as this was not the intention of Parliament.</p> <p>Also, COA here went on further to say that s 24(2)(e) of the HDA, grants the Minister the power to regulate and prohibit the terms and conditions of the contract of sale, thus the Minister could grant an extension of time on the ground of special circumstances.</p>
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