

Apex court finds controller of housing's powers to waive or modify provisions of statutory contract invalid

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Litigation, Malaysia

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Introduction

In Malaysia, the contract for the sale of buildings or residential units by developers is (subject to the nature of the development project) provided in the schedules to the Housing Development (Control and Licensing) Regulations 1989 (1989 regulations), a subsidiary legislation enacted under the Housing Development (Control and Licensing) Act 1966 (1966 act). In *Ang Ming Lee v Menteri Kesejahteraan Bandar*, Malaysia's apex court – the Federal Court – delivered a landmark decision on a pertinent issue concerning the interests of house buyers. **(1)**

Facts

The developer of a condominium project entered into sale and purchase agreements (SPAs) with purchasers pursuant to Schedule H of the 1989 regulations. Schedule H prescribes that developers must deliver vacant possession of condominium units to purchasers within 36 months from the date of signing an SPA. If a developer fails to comply, it will be liable to pay liquidated ascertained damages to the purchasers.

The dispute in question arose when the developer applied to the controller of housing for a time extension to deliver vacant possession of the condominium units pursuant to Regulation 11(3) of the 1989 regulations, which reads as follows:

(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.

The grounds cited for the time extension were:

- continuous complaints by neighbouring residents due to extended working hours at the development site;
- the issuance of stop-work orders by local authorities; and
- an investigation into the contractor's piling.

The controller of housing rejected the developer's application. Consequently, the developer appealed to the minister of urban wellbeing, housing and local government in accordance with Regulation 12 of the 1989 regulations and purportedly obtained a 12-month extension to complete the condominium project. The minister's approval of the time extension was conveyed to the developer via a letter signed by an individual on behalf of the controller instead of the minister. It must be noted that the letter informing the developer of the decision to grant a time extension was made in accordance with Regulation 11 of the 1989 regulations instead of the authorising provision, Regulation 12.

As a result, the developer was given 48 months to deliver vacant possession of the condominium units to the purchasers, and the purchasers were unable to claim liquidated ascertained damages from the developer as provided in Schedule H. Aggrieved by the minister's decision, the purchasers filed a judicial review application with the high court.

High court decision

The purchasers sought the following from the high court:

- an order quashing the controller's decision granting the 12-month extension; and
- a declaration, either jointly or in the alternative, that:
 - the letter allowing the time extension signed on behalf of the controller was invalid and beyond the jurisdiction provided in the 1966 act; and
 - Regulation 11(3) of the 1989 regulations was *ultra vires* of the 1966 act.

The high court decided for the purchasers and granted their requested orders accordingly. Dissatisfied, the developer appealed to the Court of Appeal.

Court of Appeal decision

There were three issues before the Court of Appeal – namely, whether:

- Regulation 11(3) is *ultra vires* of the 1966 act;
- the 12-month extension to complete the project had been made without jurisdiction and was therefore invalid; and
- a right of hearing ought to have been given to the purchasers before the decision was made by the controller and the minister granting a time extension to the developer to complete the project.

In essence, the Court of Appeal held that the controller could exercise discretion under Regulation 11(3) to waive or modify the terms and conditions of a contract of sale. On the subsequent issue, it was held that the 12-month extension had been made without jurisdiction and was invalid since there was no affidavit by the minister providing clarity on the signatory of the letter given the circumstances of the present case. On the last issue, the Court of Appeal ruled that purchasers must be given an opportunity to be heard prior to any decision regarding a time extension as their rights to claim for damages in the event of delay will be affected.

Aggrieved by the Court of Appeal's rulings, both parties appealed to the Federal Court.

Federal Court decision

The Federal Court granted leave to appeal to the purchasers for three questions of law:

- Can the housing controller waive or modify any provision in Schedule H, as prescribed by the minister under the 1966 act?
- Does Section 24 of the 1966 act empower the minister to make regulations to delegate the power to waive or modify Schedule H to the controller?
- Is Regulation 11(3) of the Housing Development (Control and Licensing) Regulations 1989 *ultra vires* of the Housing Development (Control and Licensing) Act 1966?

The developer obtained leave to appeal for the following questions of law:

- Must a letter granting a time extension after an appeal pursuant to Regulation 12 be personally signed by the minister or can the minister delegate the duty to sign such a letter to an officer of the Ministry of Urban,

Wellbeing, Housing and Local Government?

- Must the minister, after considering the interests of purchasers, afford them a hearing before they grant a time extension, despite no such requirement being included in the 1966 act or 1989 regulations?

The Federal Court answered the purchasers' first and second questions in the negative and their third question in the affirmative. The court found that there was no need to answer the developer's first question, as there had been no decision by the minister since the letter had been signed on behalf of the controller, in the absence of any clarification by the minister as to the discrepancy. As there had been no decision by the minister to grant the time extension, it was also unnecessary to answer the developer's second question.

Central issue

The core of the purchasers' questions of law concerned the validity of Regulation 11(3) of the 1989 regulations. In arriving at its decision on each question, the Federal Court considered Parliament's intention when enacting the 1966 act and held that the minister has sole discretion to regulate and prohibit the terms and conditions of a contract of sale under the 1966 act – a social legislation protecting and advancing the interests of house buyers. Further, notwithstanding the 36 months prescribed in the schedule, the 1989 regulations set out a two-tiered approach for requesting a time extension (ie, an application to the controller followed by an appeal to the minister). If the minister could delegate this power to the controller, there would not be an appeal process, as this would be akin to appealing a decision of the minister to said minister. Further, no notification for a delegation of power has been made by the minister pursuant to the Delegation of Powers Act 1956. Thus, there is no delegation of powers.

Since the minister is empowered by the 1966 act to regulate the terms and conditions of a contract of sale under the 1966 act, such powers to regulate do not include the power to delegate the power to modify terms of a contract of sale to the controller. Hence, the delegation via Regulation 11(3) exceeded what was intended by the law makers. By allowing the controller to grant the time extension under the powers delegated pursuant to Regulation 11(3), the purchasers' right to claim liquidated ascertained damages had been denied. The granting of the time extension, which did not safeguard the interests of the purchasers, did not uphold the spirit of the act.

For further information on this topic please contact Gan Khong Aik at Gan Partnership by telephone (+603 7931 7060) or email (khongaik@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1)[2020] 1 CLJ 162.

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