Housing Developers Breathe a Sigh of Relief – The *Alvin Leong* Saga (Part II)

Authors

Bahari Yeow
Partner

Alex Choo
Senior Associate

This is a sequel to our article titled "Housing Developers Breathe a Sigh of Relief – The Alvin Leong Saga". In the previous article, we discussed the case of Alvin Leong in the High Court[1] and briefly set out the findings of the Court of Appeal in reversing the decision of the High Court.

Following the release of the Court of Appeal's judgment[2], this article aims to analyse the findings and implications of this landmark decision on the housing industry in Malaysia.

Brief Facts

The brief facts are as follows:

1. Alvin Leong and other purchasers entered into statutory sale and purchase agreements ("**SPAs**") for several service apartments ("**Parcels**").
2. Prior to entering into the SPAs, the Developer obtained an extension to deliver vacant possession ("**VP**") of the Parcels for 6 months from the Controller of Housing ("**Controller**").
3. Thus, the SPAs provided that VP would be delivered within 42 months (instead of 36 months as provided under Schedule H) from the date of the SPAs ("**1st Extension**").
4. Subsequently, the Developer sought for a further 17-month extension from the Controller to extend the time for delivery of VP to 59 months (due to a 17-month stop work order).
5. The Controller partially allowed the Developer's request to a period of 54 months.
6. Dissatisfied, the Developer appealed to the Minister[3] who allowed the Developer's appeal and extended the deadline to deliver VP to 59 months ("**2nd Extension**").
7. The letter communicating the decision of the 2nd Extension was signed by the Minister himself.

1 *Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications [2020] 10 MLJ 689*
2 *Bludream City Development Sdn Bhd v Kong Thye & Ors and other appeals [2022] 2 MLJ 241*
3 *Regulation 12 of the HDR allows any person aggrieved by the decision of the Controller to appeal to the Minister*

Dissatisfied with the decision of the Minister, the Purchasers filed judicial review applications seeking to, among others, quash the decision of the Minister i.e. the 2nd Extension.

High Court's Decision

The High Court allowed the Purchasers' judicial review applications and quashed the decision of the Minister.

Court of Appeal's Decision

In setting aside the decision of the High Court and holding that the decision of the Minister was valid, the Court of Appeal held as follows:

1. **No issue with the 1st Extension**

   This 1st Extension was granted on 10.3.2013. The Court of Appeal rejected the Purchasers' submission that they had been unaware of the 1st Extension. The Purchasers did not file a leave for judicial review within the time frame provided under the Rules of Court 2012, did not apply for an extension of time to file a judicial review application nor did the Purchasers amend their existing judicial review applications even when prompted by the High Court. The High Court judge had erred in bringing the 1st Extension into play on his own accord when none of the purchasers took issue with the 1st Extension.

2. **Ang Ming Lee case distinguished**

   The Federal Court in *Ang Ming Lee* case did not hold that the Minister has no power to 'vary and modify' the terms of the statutory SPA. The Federal Court simply decided that the Controller could not grant an extension of time because the Minister was not empowered to delegate his powers to regulate the terms and conditions of a statutory SPA to the Controller. In *Ang Ming Lee* case, the decision to extend time to deliver VP was made by the Controller. In the present case, the 2nd Extension was made by the Minister himself.

3. **Minister's power to grant extension of time**

   Whilst the Federal Court in *Ang Ming Lee* case held that regulation 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ("**HDR**") was *ultra vires*, the Minister is still seized with power to 'waive and modify' the time period to deliver VP under section 24(2)(e) of the Housing Development (Control and Licensing) Act 1966 ("**HDA**").

4. **2nd Extension does not suffer from procedural impropriety**
   The crux of the Purchasers argument in this respect was that they had not been given the rights to be heard. There is no express requirement in the HDA/HDR for the rights to be heard. As such, it is important that the Minister acts fairly and takes into consideration the interests of the Purchasers. The Court of Appeal held that the Minister had discharged the said duty.

5. **2nd Extension should not be set aside for irrationality**
   Parliament in all its wisdom granted flexibility to the Minister to extend time of completion in appropriate circumstances. The Court of Appeal took into consideration the housing and construction industry, commercial realities and possible ramifications should the 2nd Extension were not granted i.e. whether the Developer would suffer liquidation and the liquidator would have to deal with subcontractors, suppliers, purchasers and bankers. Should a rescue contractor have come along, the Purchasers may have had to have paid an enhanced purchase price to complete the project. Further, considering that the stop work order had been issued by no fault of the Developer, the 2nd Extension could not be said to be irrational.

Food for Thought

The decision of the Court of Appeal is definitely a welcomed one. The Court appreciated the provisions of law, nuances to a precedent and commercial realities. It evinces the unenviable task that Judges so often find themselves in – that of balancing the rights of conflicting parties whilst bearing commercial realities in mind. This decision would serve to encourage housing developers that whilst the HDA and HDR are pieces of social legislations, housing developers are not left without redress.

*For any enquiries, please contact **Bahari Yeow** (bahari@ganlaw.my) or **Alex Choo** (wenchun@ganlaw.my).*