SRI DAMANSARA SDN BHD

v.

VOON KUAN CHIEN & ANOR

Court of Appeal, Putrajaya
Hasnah Mohammed Hashim, Kamaludin Md Said, Lee Swee Seng JJCA
[Civil Appeal No: W-01(A)-17-01-2019]
5 March 2020

Administrative Law: *Judicial review — Application for — Application to impugn decision of Tribunal for Homebuyer Claims — Merits of decision — Whether merits might be delved into if challenge brought on grounds of illegality and irrationality*

Land Law: *Housing developers — Damages for late delivery — Purchase of condominium unit — Purchaser paying booking fee on one date and signing Sale and Purchase Agreement at later date — Purchaser receiving ostensible "discount" on purchase price in credit note form when signing Sale and Purchase Agreement at such later date — Whether damages for late delivery reckoned from date of booking fee — Whether damages for late delivery based upon purchase price as stated in Sale and Purchase Agreement — Whether damages for late delivery ought to be based upon discounted purchase price*

Land Law: *Housing developers — Deposit of booking fee — Whether payment of deposit of less than 10% of purchase price before signing of the Sales and Purchase Agreement repugnant to whole purpose of Housing Development (Control and Licensing) Act 1966*

The appellant/Developer in the instant case had entered into a Sale and Purchase Agreement ("SPA") with the 1st respondent/Purchaser for the sale of a condominium unit ("the unit"). The Developer took a RM10,000 booking fee from the Purchaser on 6 January 2012 as part of the 10% deposit of the purchase price. The SPA however was dated 28 June 2012 at which time the Developer issued the Purchaser a credit note for the balance of 10% deposit payable (RM63,108) The credit note appeared to give the Purchaser a "discounted purchase price". However, the excess between the actual loan amount and the "discounted purchase price" (less the credit note) was in fact transferred to the Purchaser's account with the Developer to offset against the sinking fund, disbursement for electricity and water deposits and all other monies due under the SPA upon vacant possession. The Purchaser later filed a claim for late delivery damages with the 2nd respondent/Tribunal for Homebuyer Claims ("the Tribunal"). The Purchaser calculated damages from the date of the SPA which he claimed was 6 January 2012 – the date of payment of the booking fee. The Developer argued that there was nothing ambiguous with respect to the clear and plain meaning of the expression "date of the SPA" and in the instant case, vacant possession of the unit had been given within the prescribed time from the date of the SPA, which was 28 June 2012. Thus

the Developer was not liable to pay any late delivery damages. Further, the Developer claimed that since the credit note discount had been given, the real or actual purchase price of the unit was lower than that stated in the SPA and damages if awarded, ought to be reckoned based on the discounted purchase price. The Tribunal agreed with the Purchaser on both the proper date of the SPA which was taken as the date of the payment of the booking fee and that the purchase price was as stated in the SPA. Thus, the Tribunal ordered the Developer to pay the Purchaser a sum of RM40,860.36 as late delivery damages. The Developer applied for judicial review to quash the decision of the Tribunal but the High Court dismissed the Developer's application. The High Court held *inter alia* that in calculating the period of delay for the purpose of a late delivery claim, the SPA date had to be the date the booking fee was paid. Also, the Tribunal was right in taking the purchase price as stated in the SPA. The Developer appealed to the Court of Appeal.

Held (dismissing the appeal with costs):

(1) It was a principle of judicial review that merits might be delved into if the challenge was on grounds of illegality and irrationality. A tribunal did not have the licence to commit an error of law where a question of the right and proper interpretation of a contractual clause in an agreement was concerned. A Tribunal was also not to disregard relevant considerations or fail to take into account relevant considerations. (para 17)

(2) To allow a collection of a deposit of less than 10% of the purchase price before the signing of the SPA, pejoratively called a booking fee, would be repugnant to the whole purpose of the Housing Development (Control and Licensing) Act 1966 ("HDA") and the Housing Development (Control and Licensing) Regulations 1989 ("Regulations"). To allow the collection of a booking fee under the scheme of payment under the Third Schedule to the Sch H of the SPA would be to permit what was expressly prohibited by reg 11(2) of the Regulations with the effect that the protection afforded to a purchaser under the Scheme of Instalment Payment of Purchase Price could be circumvented in the SPA being signed way after the payment of the booking fee. The collection of the booking fee required the Purchaser's agreement to a host of conditions in a Letter of Acknowledgement which sought to discriminate against the Purchaser if he did not agree to use the solicitors recommended by the Developer for the SPA and loan documentation. It was tantamount to a backdoor way to introduce additional terms to the prescribed form of SPA under Sch H to the Regulations. (paras 28, 30 & 31)

(3) A developer who chose to collect less than 10% of the purchase price must be prepared to sign the SPA for there was no prohibition in granting a more favourable term to the purchaser. To sanction a payment without the signing of the SPA would go against both the letter of the prohibition in reg 11(2) and the spirit and the statutory scheme of the Schedule H of the SPA. It was irrelevant that the Purchaser consented to it because the HDA and the Regulations were there to protect the Purchaser and the prohibition would

have no bite if a booking fee or a deposit less than 10% of the purchase price was collected without the signing of the SPA. It was also irrelevant that the Purchaser could only pay the 10% of the purchase price much later and for the SPA to be dated when the 10% was paid. Such a mischief in the circumvention of the prohibition on collection of a booking fee was precisely what the HDA and the Regulations were designed to arrest. (paras 32, 33, 35 & 36)

(4) The courts would have no problem calculating the late delivery claim from the expiry of the period of completion from the date the booking fee was paid, and not from the date of the SPA. To take the SPA date would be to allow the perpetuation of a practice that the Regulations prohibited. In the instant case, the device of a credit note which could have been given at the point the booking fee was paid, was nothing more than a device to attract sales at the expense of the Purchaser who would ordinarily been able to have his SPA dated contemporaneous with the payment of the RM10,000. (paras 36 & 39)

(5) If developers were allowed to collect booking fees or any sum called by any name without the need to sign a SPA, then there would be no protection afforded to the purchaser in the event the SPA was not signed. Unscrupulous purchasers might want to forfeit the whole of the booking fee or deposit paid whereas under the Sch H of the SPA, if a purchaser's loan was not approved, he would be allowed to terminate the SPA and under cl 5(3) only 1% of the purchase price would be forfeited to the purchaser and the balance refunded to the purchaser. Being a social piece of legislation the Court should interpret the standard form Sch H of the SPA in a manner in which the purchaser would not be taken advantage of or exploited in any way or made to bear an unconscionable term. To sanction a dating of the SPA only when the full 10% of the purchase price had been paid rather than the moment a booking fee or a lesser deposit was made would be to expose the purchasers to further vulnerabilities that would make them susceptible to unscrupulous practices by developers. (paras 59, 60 & 63)

(6) There was no error in the Tribunal's finding and calculation of the liquidated claim for late delivery with reference to the date the booking fee was paid. This was especially so when at the point the SPA was signed, the Developer had given, pursuant to its representation to the Purchaser, a credit note which deemed the balance of the 10% deposit as having been paid. (para 66)

(7) The device of stating a higher purchase price in the SPA when a developer knew that it would be giving a credit note to a purchaser at the opportune time determined by the developer had the debilitating effect of the banks giving a higher margin of loan to the purchaser who might otherwise not qualify for the loan to purchase the property. (para 68)

(8) There was nothing unreasonable, illegal or improper for the Tribunal to have agreed with the Purchaser that the calculation of the late delivery claim be based on the purchase price as stated in the Schedule of the SPA. The whole landscape of the Sch H of the SPA and the HDA as well as the Regulations

did not countenance a different category or classification of "purchase price" whether it be a "discounted purchase price" or a "reduced purchase price" or "actual purchase price". (paras 71-72)

(9) The Purchaser could not be said to benefit when the SPA date was not taken to mean the date the booking fee was paid but a much later date when the SPA was signed with the result that the Purchaser would not be entitled to his late delivery claim. The Purchaser could not benefit when the "purchase price" was not as stated but a "reduced", "discounted" or "rebated" amount using the fictional device of a credit note. There did not appear to be any cogent reason to deviate from the meaning of "purchase price" for the purpose of calculating the late delivery claim under cl 25(2) of the SPA as it was on "10% of the purchase price". (paras 82-84)

(10) The Developer could not accept the good in the property having been sold and not the bad in not accepting that the purchase price was as stated in the Schedule of the SPA. The Developer ought to be estopped from contending otherwise. There was nothing wrong with the reasoning of the High Court in affirming the Tribunal's award in calculating the late delivery claim based on the "purchase price" as stated and disclosed in the SPA. (paras 85 & 89)

Case(s) referred to:

ABT Construction Sdn Bhd & Anor v. Tribunal Tuntutan Pembeli Rumah & Ors [2012] MLRHU 1454 (refd)

Faber Union Sdn Bhd v. Chew Nyat Shong & Anor [1995] 1 MLRA 623 (folld)

Faber Union Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan Dan Kerajaan Tempatan & Ors [2011] 1 MLRH 283 (refd)

GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors [2017] 3 MLRH 474 (refd)

GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan [2019] MLRAU 288 (not folld)

Hoo See Sen & Anor v. Public Bank Bhd & Anor [1988] 1 MLRA 46 (folld)

Kompobina Holding Sdn Bhd v. Tribunal Pembeli Rumah & Anor [2017] MLRAU 536 (distd)

Lee Poh Choo v. Sea Housing Corporation Sdn Bhd [1981] 1 MLRH 600 (refd)

Lembaman Development Sdn Bhd v. Ooi Lai Yin & Anor And Other Cases [2015] MLRHU 1373 (refd)

Lim Eh Fah & Ors v. Seri Maju Padu [2002] 1 MLRH 549 (refd)

Nippon Express (M) Sdn Bhd v. Che Kiang Realty Sdn Bhd & Another Appeal [2014] 1 MLRA 558 (folld)

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2012] 1 MELR 129; [2010] 5 MLRA 696 (refd)

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1996] 1 MELR 71; [1996] 1 MLRA 725 (refd)

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 1 MLRA 473 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 1 MLRA 268 (refd)

Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 2 MLRA 408 (refd)

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, ss 16M(1), 16O(1), 16P(1)

Housing Development (Control and Licensing) Regulations 1989, regs 11(1), (2), (3), 13, Schedule H

Legal Profession Act 1976, s 84

Counsel:

For the appellant: Andrew Raj Davis (Zaitul Naziah Mohd Soib with him); M/s Andrew Davies & Co

For the 1st respondent: Ariadne Lee Pei Pei; M/s Pei Chambers

JUDGMENT

Lee Swee Seng JCA:

[1] This is an appeal by a developer against the decision of the High Court dated 20 December 2018 dismissing a judicial review application. The developer in this case had failed to comply with the provision of the Housing Development (Control and Licensing) Act 1966 ("HDA") and the Regulations made thereunder with respect to the prohibition against the collection of booking fees. It collected on 6 January 2012 a booking fee of RM10,000.00 as part of the 10% deposit of the purchase price of a condominium unit and the Sale and Purchase Agreement ("SPA") following the mandatory Schedule H Agreement was dated 28 June 2012.

[2] Predictably when vacant possession was delivered to the purchasers, the respondent purchaser, on 22 December 2016, filed a claim with the Tribunal for Homebuyer Claims (the Tribunal) and calculated the late delivery damages to be from the expiry of 42 months from the date of the SPA which was taken to be the date of the payment of the booking fee on 6 January 2012 to the date of delivery of vacant possession.

[3] The developer argued that the plain meaning of the words in the late delivery claim clause should be given effect to and that the period of delay should be calculated with reference to the expiry of 42 months from the date of the SPA as stated to the date of handing over of vacant possession.

[4] The developer contended that there was nothing ambiguous with respect to the clear and plain meaning of the expression "date of the Sale and Purchase Agreement". Based on that argument the developer contended quite confidently that it is not liable to pay any late delivery claim as the vacant possession date is 22 December 2016 which is within 42 calendar months from the date of the SPA 28 June 2012.

[5] The developer here had also employed a clever device to attract sales of the housing accommodation in that upon the signing of the SPA, a credit note is given to the purchaser for the sum equivalent to the balance 10% of the purchase price!

[6] The developer argued that there was an effective discount vide the credit note given of RM63,108.00 from the purchase price stated of RM731,080.00 and so the actual and real purchase price is RM667,972.00 (claimed as RM668,778.90 before the Tribunal).

[7] That raises another interesting issue as to whether the calculation of the damages for late delivery claim should be based on the purchase price as stated in the SPA which is what the relevant clause states or should it be based on the actual purchase price or the "discounted purchase price".

[8] The developer also sought to prevail upon this court that what it had done in collecting the booking fee was to assist the purchaser such that the SPA would only be signed after the approval of the purchaser's loan and that if the loan was not approved, then an administrative charge of RM600.00 being its administrative fee shall be forfeited from the purchaser's booking fee.

[9] Thus, it was argued that such a method, innovative as it may be, actually promoted the social purpose of the HDA as well as protect the purchaser.

Award Of The Tribunal For Homebuyer Claims

[10] The Tribunal agreed with the purchaser both on the issue of the proper date of the SPA which is to be taken as the date the booking fee was paid and was stated in the SPA.

[11] Under the award of the Tribunal the developer was required to pay the purchaser a sum of RM40,860.36.

[12] Dissatisfied with the said award the developer applied for judicial review to the High Court to quash the Tribunal's decision on ground of illegality, unreasonableness and excess of jurisdiction in that the Tribunal had no business to alter the date of the SPA as stated on the Agreement. It was also argued that the Tribunal had failed to take into account relevant considerations and that it had erred in applying and construing the principles of law and had acted in breach of natural justice.

Decision Of The High Court

[13] The High Court was totally unpersuaded that there was any error of law committed by the Tribunal that would justify quashing the decision whether on ground of illegality, unreasonableness or excess of jurisdiction. After trawling through the corpus of decided cases from the Federal Court, Supreme Court and the High Court, the learned High Court Judge was convinced that the remedy of *certiorari* does not apply to quash the award of the Tribunal and where the date of the SPA, there are sufficient authorities for the Tribunal to follow the reasoning and rationale as stated in the consistent line of cases justifying taking the SPA date to be the date the booking fee was paid in calculating the period of delay for the purpose of a late delivery claim.

[14] As for the meaning of "purchase price" it was equally clear to the learned Judge that the Tribunal was right in taking the purchase price as stated in the SPA.

[15] The developer's application for judicial review was thus dismissed by the High Court.

[16] Against that decision of the High Court the developer had appealed to the Court of Appeal. The developer as appellant shall be referred to as the developer. The 1st respondent is the purchaser and shall be so referred to. The Tribunal is the 2nd respondent in this appeal.

Principles

[17] We accept as a principle of judicial review that merits may be delved into if the challenge is on grounds of illegality and irrationality. A tribunal does not have the licence to commit an error of law where a question of the right and proper interpretation of a contractual clause in an agreement is concerned. Likewise it has been said that a Tribunal is not to disregard relevant considerations nor fail to take into account relevant considerations. See the Court of Appeal case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 1 MLRA 268.

[18] In the Federal Court case of *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725 it was explained that a decision of a tribunal is susceptible to judicial review and is open to challenge not merely on ground of procedural impropriety but also on grounds of illegality and irrationality which permit the court to scrutinise decisions not only for process but also for substance.

[19] See also the same approach taken in the subsequent Federal Court case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2012] 1 MELR 129; [2010] 5 MLRA 696.

[20] Specifically in the context of challenging by way of judicial review an award of the Tribunal of Homebuyer Claims it was held in *ABT Construction*

Sdn Bhd & Anor v. Tribunal Tuntutan Pembeli Rumah & Ors [2012] MLRHU 1454 as follows:

> "[37] The court in dealing with a judicial review application was not sitting in appeal against the impugned decision or award but only exercising the court's supervisory powers over subordinate tribunals. To merit curial intervention the applicant concerned had to establish that 'errors' in the nature of 'illegality', 'irrationality' or 'procedural impropriety' (and maybe 'proportionality') had been committed during the decision making process. (*R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725; *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 1 MLRA 268 (CA); *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2012] 1 MELR 129; [2010] 5 MLRA 696; *Sheila Sangar v. Proton Edar Sdn Bhd & Anor* [2008] 3 MELR 383; [2008] 4 MLRH 278 - Mohamed Arif JC; and *Telekom Malaysia Bhd v. Tribunal Tuntutan Pengguna & Anor* [2006] 3 MLRH 528).
>
> [38] **The judicial review court's intervention on the grounds of 'illegality' would be available if it was shown that the decision maker had misconstrued any provision of a statute or misapplied a principle of general law. A decision could be quashed on the basis of 'irrationality' if it was shown that there was no basis to support the finding of fact, or the conclusion reached was diametrically contrary to evidence on record or where the decision maker had asked the wrong questions or taken into consideration irrelevant matters and omitted relevant matters**."
>
> [Emphasis Added]

Whether The Late Delivery Claim Ought To Be Calculated From The Expiry Of 42 Months From The Date Of The SPA Of 28 June 2012 Until Date Of Delivery Of Vacant Possession?

[21] The mandatory Standard Form SPA in Schedule H under the Housing Development (Control and Licensing) Regulations 1989 ("Regulations") is designed to protect purchasers and in fact no amendments can be made to it without the consent of the Controller of Housing.

[22] Regulation 11(1), (2) and (3) of the Regulations provides as follows:

> "**11. Contract of sale.**
>
> (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**.
>
> (1A) Subregulation (1) shall not apply if at the time of execution of the contract of sale, the certificate of fitness for occupation for the housing accommodation has been issued and a certified true copy of which has been forwarded to the purchaser.

(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: ..."

[Emphasis Added]

[23] Learned counsel for the appellant developer argued that cl 25(1) of the Schedule H SPA is clear in stating as follows at RR p 79:

"Clause 25

(1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in cl 26 within forty two (42) calendar months from the date of this Agreement."

The Third Schedule to the SPA provides as follows:

"SCHEDULE OF PAYMENT OF PURCHASE PRICE

Instalments Payable	%	Amount
Immediately upon the signing of this Agreement	10	RM73,108.00"

See Record of Appeal p 181.

[24] It must not be forgotten that the HDA is a social piece of legislation designed to protect the purchasers who are in a more vulnerable position because of the inequality of bargaining powers.

[25] In *Lee Poh Choo v. Sea Housing Corporation Sdn Bhd* [1981] 1 MLRH 600 Mohamed Dzaidin JC (later CJ) issued the following reminder:

"As I have stated earlier the Housing Developers (Control and Licensing) Act 1966 and its 1970 Rules **were introduced for public interest to regulate and control business of housing developers. In my opinion the Act and the rules must be strictly followed**."

[Emphasis Added]

[26] This approach has not changed and if at all it has calcified with the more recent pronouncement from the Federal Court in *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 2 MLRA 408 as follows:

"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 the developers. A developer must execute the agreement set out in the schedule to the relevant subsidiary legislation. He cannot add other clauses in it."

[27] See generally *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 1 MLRA 473, where it was observed as follows:

> "[8] ... The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. **Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract** ..."
>
> [Emphasis Added]

[28] Regulation 11(2) of the Regulations prohibits the collection of any prior payment before the signing of the SPA as follows:

> "No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale."

Thus to allow a collection of a deposit of less than 10% of the purchase price before the signing of the SPA, pejoratively called a booking fee, would be repugnant to the whole purpose of the HDA and the Regulations.

[29] It would be to allow a mode of payment outside the protection afforded by the HDA and the Regulations for the Schedule to the SPA does not envisage any other collection of part of a purchase price other than a 10% of it upon the signing of the SPA unless the developer wants to give the purchaser a more favourable term and that can only mean the signing of the SPA even when less than 10% of the purchase price had been collected.

[30] To allow the collection of a booking fee under the scheme of payment under the Third Schedule to the Schedule H SPA would be to permit what is expressly prohibited by reg 11(2) of the Regulations with the effect that the protection afforded to a purchaser under the Scheme of Instalment Payment of Purchase Price can be circumvented in the SPA being signed way after the payment of the booking fee.

[31] More than that, the collection of the booking fee came with the purchaser's agreement to a host of conditions from (a) to (h) of the "ACKNOWLEDGEMENT" letter at p 130 of the Record of Appeal which seeks to discriminate against the purchaser if he does not agree to use the solicitors recommended by the developer for the SPA and the loan documentation. So much for the need of the purchaser to have access to independent legal advice especially on the collection of booking fee without having signed the SPA. It is tantamount to a backdoor way to introduce additional terms to the prescribed form of SPA under Schedule H to the Regulations.

[32] A developer who chooses to collect less than the 10% of the purchase price must be prepared to sign the SPA for there is no prohibition in granting a more favourable term to the purchaser.

[33] To sanction a payment without the signing of the SPA would go against both the letter of the prohibition in reg 11(2) and the spirit and the statutory scheme of the Schedule H SPA.

[34] Regulation 13 of the Regulations further provides for penalties for breach of the Regulations as follows:

> "13. Penalties.
>
> (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 five thousand ringgit or to a term of imprisonment not exceeding three years or to both."

[35] It is irrelevant that the purchaser consented to it because the HDA and the Regulations are there to protect the purchaser and the prohibition would have no bite if a booking fee or a deposit less than 10% of the purchase price is collected without the signing of the SPA.

[36] It is also irrelevant that the purchaser could only pay the 10% of the purchase price much later and so when it was paid the SPA was dated. Such a mischief in the circumvention of the prohibition on collection of a booking fee is precisely what the HDA and the Regulations were designed to arrest. Therefore the courts had no problem calculating the late delivery claim from the expiry of the period of completion from the date the booking fee is paid and not from the date of the SPA for to take the SPA date would be to allow the perpetuation of a practice that the Regulations prohibit.

[37] The situation in the present case becomes more justified when the full 10% of the purchase price was deemed paid with the fiction of a giving of a credit note upon the signing of the SPA.

[38] The question then that arises becomes more acute: why was the credit note not given at the point of the booking fee was paid? Surely it cannot be that the developer decided to give an incentive of a deemed payment only some months later when the SPA was signed!

[39] The device of a credit note which could have been given at the point the booking fee was paid was nothing more than a device to attract sale at the expense of the purchaser who would ordinarily be able to have his SPA dated contemporaneous with the payment here of RM10,000.00.

[40] The award of the Tribunal and affirmed by the High Court has the support of high authorities from no less than the Federal Court and the then Supreme Court.

[41] We fail to see how a decision could be said to be manifestly unreasonable when it has the support of the apex decisions of our courts where the propositions and principles of law are concerned.

[42] In *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 MLRA 46 the apex court then in the Supreme Court had no difficulty nor delusion in deciding that the relevant date for ascertaining when time started to run for the purpose of calculation the late delivery claim was when the booking fee was paid. The Supreme Court stated categorically as follows:

> "For the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time started to run was the date of signing of the sale and purchase agreement."

[43] Subsequently in another Supreme Court's case of *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 1 MLRA 623 the same principle was reiterated and the date of payment of the booking fee on 17 February 1984 was taken to be the date for the purpose of ascertaining the date of delivery of vacant possession and not the date the SPA was signed on 27 June 1984.

[44] The liquidated damages clause of late delivery in cl 6.06 of the SPA there reads as follows:

> "... the premises shall be completed by the vendor and vacant possession delivered to the purchaser within thirty six (36) calendar months from the date of this agreement. If the vendor fails to deliver vacant possession of the premises on time the vendor shall pay to the purchaser liquidated damages to be calculated from day to day at the rate of eight per cent (8%) per annum of the purchase price."

[45] As can be seen the above clause is not materially different from the clause on late delivery claim in cl 26 of Schedule H SPA which reads as follows:

> "26. Time for delivery of vacant possession
>
> (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in cl 27 herein within thirty-six (36) calendar months from the date of this Agreement.
>
> (2) If the Vendor fails to deliver vacant possession of the said Parcel in the manner stipulated in cl 27 herein within the time stipulated in subclause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in subclause (1) until the date the Purchaser takes vacant possession of the said Parcel. Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Parcel."

[46] Learned counsel for the appellant (developer) said that there was no indication that the clause in question in the *Faber Union*'s case *(supra)* was that from the prescribed Schedule SPA under the then Regulations.

[47] Assuming for a moment it was not, it goes to show that even in cases not falling under the HDA and the Regulations the apex court was prepared to lean in favour of the purchaser who had less of a bargaining power and to hold the developer to the date the booking fee was collected; *a fortiori* what more when it is a prescribed SPA under the Regulations!

[48] Then there is also the Court of Appeal case of *Nippon Express (M) Sdn Bhd v. Che Kiang Realty Sdn Bhd & Another Appeal* [2014] 1 MLRA 558, where the Court of Appeal relied on the principle and proposition of law laid down in the *Faber Union*'s case *(supra)* was the factual matrix was the same and there was no cogent reason to deviate from the sound interpretation laid down in *Faber Union*'s case *(supra)*

[49] There are also a host of High Court cases that had followed the same approach in interpreting the late delivery claim clause by taking the date of payment of the deposit or booking fee, called by whatever name, as the relevant date for the purpose of calculating the date of delivery of vacant possession.

[50] In the High Court case of *Lim Eh Fah & Ors v. Seri Maju Padu* [2002] 1 MLRH 549 the High Court took the date the deposit was paid and not the date of the assignment for the purpose of calculating the damages for late delivery of vacant possession.

[51] In another High Court case of *Faber Union Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan Dan Kerajaan Tempatan & Ors* [2011] 1 MLRH 283 it was argued that the Tribunal was wrong to have taken the date of payment of the deposit (17 February 1984) and not the date of the SPA (27 June 1984) for the purpose of calculating the late delivery claim. Again the High Court found that "the Tribunal had not erred in deciding that the relevant date for the purpose of calculating the amount of damages payable by the applicant is the date the respondents paid the deposits". Other High Court's decisions had also consistently followed the two Supreme Court cases in *Hoo See Sen (supra)* and *Faber Union (supra).*

[52] In *Lembaman Development Sdn Bhd v. Ooi Lai Yin & Anor And Other Cases* [2015] MLRHU 1373 the High Court appreciated how developers could arbitrarily fix a later date in the SPA to prejudice the purchasers' claims for late delivery and hence once the booking fee is paid, a contract comes into existence and parties assume obligations at that juncture, a breach of which would result in certain consequences befalling the guilty party. The High Court went on to observe astutely that:

> "... The tribunal therefore had not erred when it decided **on good authority and in the absence of any authorities to the contrary**, to ascertain the date for calculation of damages for vacant possession with **reference to the booking date**."
>
> [Emphasis Added]

[53] More than just the principle of sound interpretation of a social piece of legislation which has as its object the protection to be accorded to the more vulnerable purchaser, there is also the principle of binding precedent or *stare decisis* in that a lower court should follow the ratio as laid down by a higher court and in this case none other than two authorities of the Supreme Court unless of course the factual matrix can be distinguished.

[54] This was observed in a case involving the Tribunal more recently in the High Court case of *GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors* [2017] 3 MLRH 474 where Justice Vazeer Alam J (now JCA) said as follows:

> "[14] So the law is well settled by high authority that for the purposes of determining the date of delivery of vacant possession in an agreement such as the SPA, for reasons well explained in the above cases, the date of agreement is the date when the deposit or booking fee is paid and not the date that appears on the SPA. And by the doctrine of *stare decisis*, these decisions of the superior courts are binding on the 1st respondent as a lesser tribunal, as well as this court. This doctrine was reiterated by the Federal Court in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 1 MELR 501; [2012] 1 MLRA 661, where the court held:
>
> The doctrine of precedent, a fundamental principle of English Law, is a form of reasoning and decision-making formed by case law. Precedents not only have persuasive authority but also must be followed when similar circumstances arise. Any principle announced by a higher court must be followed in later cases. In short the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the set-up precedents established by prior decisions. This legal principle is called *stare decisis*. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of *stare decisis*, ie, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law."

[55] We are not unaware that the above decision of the High Court was reversed by the Court of Appeal in *GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan* [2019] MLRAU 288 where it was held as follows:

> "[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 1 st respondent. We had no issue with the doctrine of *stare decisis* but the two Supreme Court decisions of *Hoo See Sen, supra*, and *Chew Nyet 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.

> [34] As alluded to earlier, the case of *Chew Nyet Shong, supra*, followed the decision of *Hoo See Sen, supra*, which was pre-Tribunal and pre-HDR 1989. There is one provision in HDR 1989 which had not been discussed by any of the authorities mentioned above. The provision is reg 11(2) which provides as follows:
>
> > "(2) No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale."
>
> [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 the Agreement" as provided for in the SPA is the actual date 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."

[56] For the reasons given above and with the greatest of respect, we are unanimous in not following the reasoning of the Court of Appeal in the above case.

[57] In the context of the HDA and the Regulations being a social piece of legislation designed to protect the purchasers who are more vulnerable against developers, it has not escaped the notice of this court the practice of developers like in this case, who being in a better bargaining position with their additional standard form documents or letters, to even extending to their recommendations of the use of solicitors nominated by them to represent the purchasers not only in the SPA but also in the loan documentation.

[58] Along the way there are carrots dangled in front of the purchasers that the legal fees for the SPA and here even including the legal fees for their loans and the stamp duty would be absorbed by the developer.

[59] We further note that if developers were allowed to collect booking fees or any sum called by any name without the need to sign an SPA, then there is no protection afforded to the purchaser in the event the SPA is not signed. Some unscrupulous developers might want to forfeit the whole of the booking fee or deposit paid whereas under the Schedule H SPA if the purchaser's loan is not approved, he would be allowed to terminate the SPA and under cl 5(3) only 1% of the purchase price would be forfeited to the purchaser and the balance refunded the purchaser. It reads as follows:

> "(3) If the Purchaser fails to obtain the Loan due to his ineligibility of income and has produced proof of such ineligibility to the Vendor, the Purchaser shall then be liable to pay to the Vendor **only one per centum (1 %) of the purchase price and this Agreement shall subsequently be terminated**. In such an event, the Vendor shall, within twenty-one (21) days of the date of the termination, **refund the Purchaser the balance of the amount paid by the Purchaser**."
>
> [Emphasis Added]

[60] Being a social piece of legislation the court should interpret the standard form Schedule H SPA in a manner in which the purchaser would not be taken advantage of or exploited in any way or made to bear an unconscionable term.

[61] Learned counsel for the developer had submitted that if the purchaser does not qualify for his loan then the developer would be entitled to deduct from the booking fee an administrative charge of RM600.00. However it is not expressly stated that the balance of the deposit or booking fee shall be refunded to the purchaser.

[62] It is a misnomer to say that the collection of a booking fee is to allow the purchaser to have his loan processed and approved before the signing of the SPA. That disregard totally the fact that under the scheme of the Schedule H SPA by cl 5(1) thereof the formal application for a loan can only be made after the SPA has been executed. It reads:

> "5. Loan
>
> (1) If the Purchaser is desirous of obtaining a loan to finance the payment of the purchase price of the said Parcel the Purchaser shall, within fourteen (14) days after receipt of a stamped copy of the Agreement, make a written application for such loan to the Vendor who shall use its best endeavours to obtain for the Purchaser from a bank, finance company, building society or a financial institution (hereinafter called "the Financier") a loan (hereinafter called "the Loan") and if the Loan is obtained the Purchaser shall, within a reasonable time, execute all necessary forms and documents and pay all fees, legal costs and stamp duty in respect thereof."

[63] To sanction a dating of the SPA only when the full 10% of the purchase price had been paid rather than the moment a booking fee or a lesser deposit is made would be to expose the purchaser to further vulnerabilities that would make them susceptible to unscrupulous practices by developers.

[64] We were also referred by learned counsel for the appellant to the case of *Kompobina Holding Sdn Bhd v. Tribunal Pembeli Rumah & Anor* [2017] MLRAU 536 but that case can be distinguished on the facts as the finding of the Tribunal there was that the purchaser had waived his right to claim the amount in excess of RM50,000.00 based on the calculation with reference to the date the deposit was paid. Under s 16M(1) and 16P(1) the homebuyer's claim before the Tribunal shall not exceed RM50,000.00 unless consented to in writing by the parties under s 16O(1) of the HDA.

[65] The purchaser did not apply for judicial review but rather it was the developer that did which application was dismissed. The developer had counterclaimed for the interest on the late payment of the purchase price by the purchaser which was dismissed by the Tribunal.

[66] We therefore can find in the present case, no error in the Tribunal's finding and calculation of the liquidated claim for late delivery with reference to the date the booking fee was paid and more so when at the point the SPA was signed, the developer had given, pursuant to its representation to the purchaser, a credit note which would deem the balance of the 10% deposit as having been paid!

Whether The Purchase Price For The Calculation Of The Late Delivery Claim Should Be Based On The Price As Stated In The SPA Or The Reduced Price Vide The Device Of A Credit Note Issued By The Developer?

[67] Learned counsel for the appellant argued that with the credit note of RM63,108.00 given to the purchaser, there was effectively a discount given to the purchaser such that the purchase price is RM667,972.00 (though claimed as RM668,778.90 before the Tribunal).

[68] The device of stating a higher purchaser price in the SPA when the developer knows that it would be giving a credit note to the purchaser at the opportune time determined by them has the debilitating effect of the banks giving a higher margin of loan to the purchaser who may otherwise not qualify for the loan to purchase the property.

[69] If loans are rejected the developer would suffer from the purchaser a termination of the SPA which the purchaser is permitted to under the SPA on account of his loan application been rejected. That would adversely affect the purchaser.

[70] Generally nothing is done by a developer without benefitting itself where promoting sales of its development is concerned. Nothing wrong with promoting sales but then all marketing and sales gimmicks must comply with the requirements of the HDA and the Regulations.

[71] It is against this backdrop that we find nothing unreasonable, illegal or improper for the 2nd respondent to have agreed with the purchaser that the calculation of the late delivery claim must be based on the purchase price as stated in the Schedule to the SPA.

[72] The meaning of "purchase price" in the SPA is as stated in cl 3 thereof as:

> "The purchase price of the said Parcel is as stated in s 7 of Schedule A and shall be payable in the manner hereinafter provided."

The whole landscape of the Schedule H SPA and the HDA as well as the Regulations does not countenance a different category or classification of

"purchase price" be it a "discounted purchase price" or a "reduced purchase price" or "actual purchase price".

[73] If the purchase price had been discounted there would have been no need for a credit note to be issued. The issuance of a credit note is such that the "purchase price" remained the same but that the purchaser effectively had settled the balance of the 10% deposit of RM73,108.00 being made up of RM10,000.00 booking fee and the credit note of RM63,108.00.

[74] For good optics with the borrower's bank which benefit of free loan documentation fees and even stamp duty only apply if the purchaser takes a loan from the developer's panel banks, the purchase price remained as that stated in the Schedule to the SPA. See para (f) of "Acknowledgment" which is the standard form letter prepared by the developer for the purchaser to sign and addressed to the developer at p 130 of the Record of Appeal. In journalistic term it is not unlike "a letter from the editor to the editor!"

[75] There is the same disincentive in not using the recommended solicitors of the developer for the SPA because the free legal fees of the Sale and Purchase Agreement is only applicable if the purchaser were to engage the solicitors recommended by the developer.

[76] So much for the prohibition against the developer using the same solicitors to act for themselves and for the purchaser and also the same solicitors acting later for the purchaser as borrower and the bank. See s 84 of the Legal Profession Act 1976.

[77] The purchaser as borrower stands to benefit from a higher loan margin and the developer would reap the benefit of a parcel being sold and not stuck. It cannot be denied that unsold parcels of any development would be a burden to the developer who could not recover the construction costs, not to mention the downside from unsold parcels with the need to maintain the common property without any collection of management fees from the purchasers and the unattractiveness of unsold and generally unoccupied parcels in a condominium.

[78] There is a discernible element of selfish altruism in the developer going to such length in helping the purchaser as any excess between the "discounted price" and the loan amount plus any earlier payment shall be transferred to the purchaser's account with the developer to offset against sinking fund, disbursement for electricity and water deposit and all other monies due under the SPA upon vacant possession as required under para (g) of the said "Acknowledgment" letter.

[79] Under cl 18(2) of the SPA only four months of the service charge may be collected in advance and after that it shall be payable monthly and under cl 19(2) the sinking fund is to be payable monthly.

[80] It does not require much explanation to see that the developer here wants to reserve for itself a better cash flow position with the above excess sum being retained by it.

[81] Under condition (d) the developer reserved the right to ask for payment of any other sum other than the balance of the first 10% of the purchase price before the signing of the SPA. The same is reiterated in condition (e). Clearly the use of the "Acknowledgment" letter with respect to the payment of the booking fee is to carve out for the developer terms and conditions more favour able to it than otherwise would have been possible in the Standard Form Schedule H SPA under the Regulations all under the euphemistic exercise of ensuring that the purchaser is being assisted to purchase the property.

[82] That simply would not do as it is an attempt to change Schedule H SPA and how can it be said to benefit the purchaser when the SPA date is not taken to mean the date the booking fee is paid but a much later date when the SPA is signed with the result that the purchaser here would not be entitled to his late delivery claim!

[83] How can it benefit the purchaser when the "purchase price" is not as stated but a "reduced", "discounted" or "rebated" amount using the fictional device of a credit note?

[84] Whatever may be the economic and financial benefit to the developer and the purchaser with this seemingly "win-win" device of a credit note, there does not appear to be any cogent reason to deviate from the meaning of "purchase price" for the purpose of calculating the late delivery claim under cl 25(2) of the SPA based as it is on "10% of the purchase price".

[85] The developer cannot accept the good in the property having been sold and not the bad in not accepting that the purchase price is as stated in the Schedule to the SPA. Indeed the developer is estopped from contending otherwise.

[86] Having made intrusive inroads into the standard Schedule H SPA by the ingenious and innovative device of an "Acknowledgment" letter where the purchaser is reflected as having volunteered to pay the deposit of RM10,000.00 without signing the SPA, the developer cannot now be heard to be complaining that the "purchase price" as stated in the Schedule to the SPA is not the purchase price but that the "rebate" ought to be taken into consideration in determining the actual purchase price.

[87] The device of a booking fee coupled with conditions is not as innocuous as it is made out to be subject as it is to conditions (a) to (h) as only the developer could draft.

[88] Even by the developer's own document in the "Acknowledgment" which was made to look like the purchaser having written the detailed conditions all by themselves, condition (e) referred to the following (emphasis added):

Payment details	(RM)
Purchase Price	**731,080**
Part Payment	10,000
Rebate	63,108
Nett Purchase Price	667,972
SPA PRICE	**731,080**

Both the "Purchase Price" and the "SPA PRICE" being terms introduced by the developer would be the effective "purchase price" for the purpose of cl 25(2) in calculating the late delivery claim.

[89] We therefore see nothing wrong with the reasoning of the High Court in affirming the Tribunal's award in calculating the late delivery claim based on the "purchase price" as stated and disclosed in the SPA.

[90] The Minister in charged in his wisdom has prohibited under reg 11(2) a developer from collecting any payment by whatever name called except as prescribed by the contract of sale.

[91] It does not matter if the purchaser is made to appear to be the one volunteering the payment or consenting to the payment of the booking fee; the developer shall not collect!

[92] Any attempt to collect money without the SPA being signed would lead to the introduction of an ingenious scheme outside the statutory framework which was aimed at protecting the purchaser but now circumvented with the result of the purchaser being short changed.

[93] It can only be inimical to the protection of purchasers who often have little choice than to sign at the dotted lines of all letters and documents pre-prepared and drafted by the developer especially when collecting the booking fee prohibited.

Pronouncement

[94] For all the reasons given above we had unanimously dismissed the appeal. The learned High Court Judge had proceeded on the right principles in not interfering with the award of the Tribunal.

[95] We dare not go down the slippery slope of indirectly sanctioning a collecting of booking fee or any amount less than the first 10% of the purchase price by whatever name called, without the SPA being signed, for that would open the floodgates to a developer introducing too many conditions with respect to matters prohibited by the HDA and the Regulations when receiving the booking fee.

[96] We also ordered costs of RM5,000.00 to be paid by the appellant to the respondent purchaser subject to payment of allocatur.

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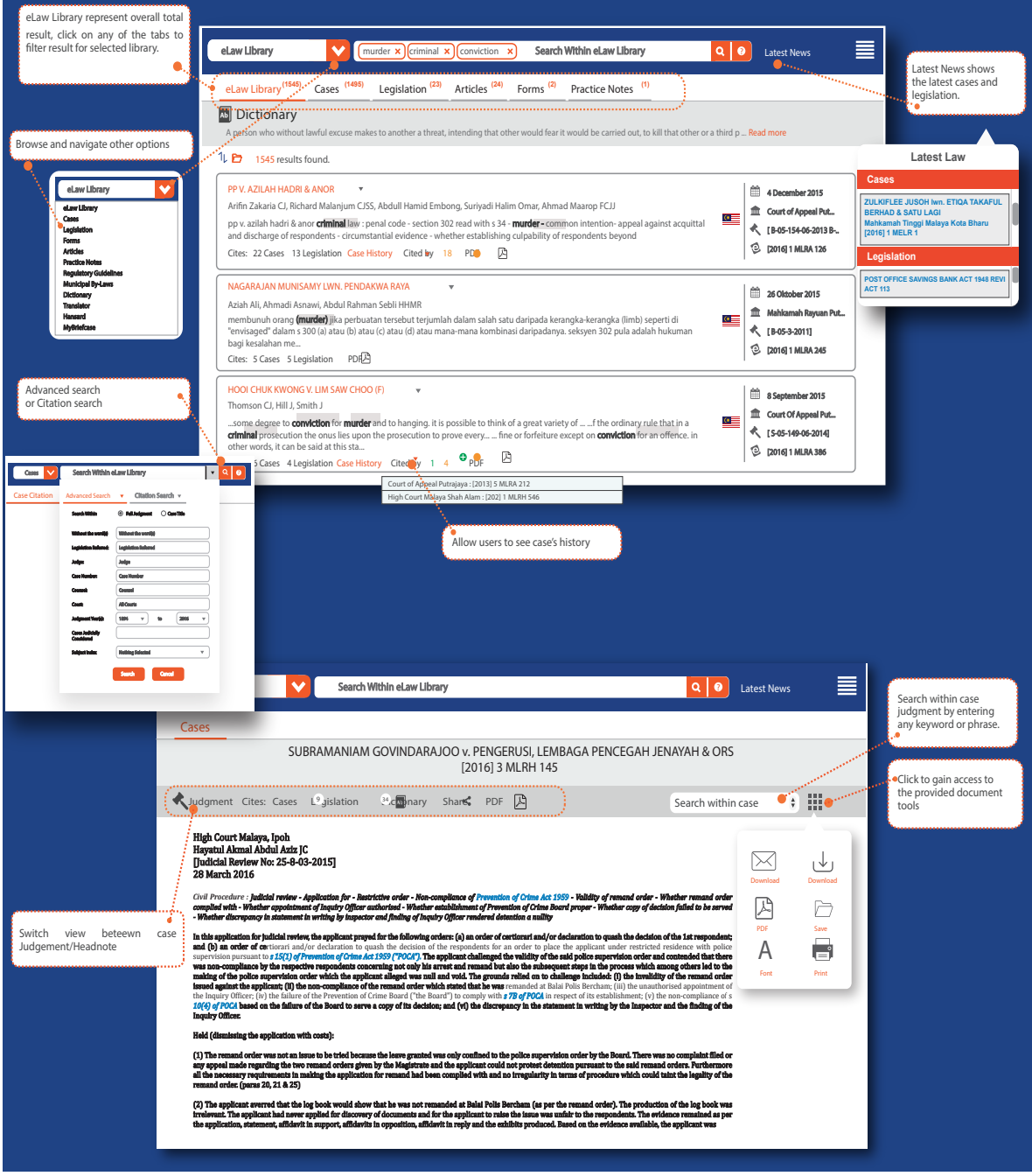

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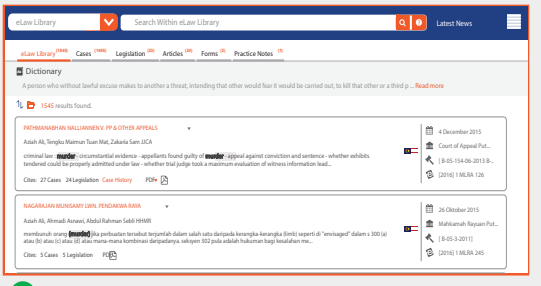

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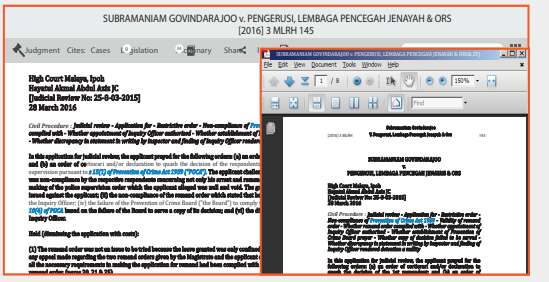

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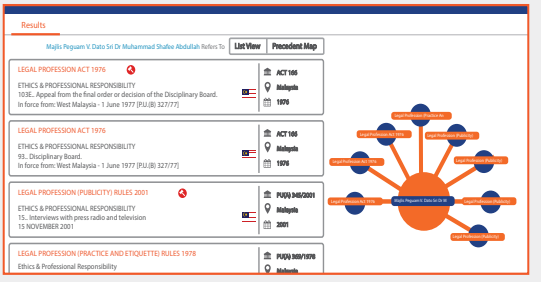

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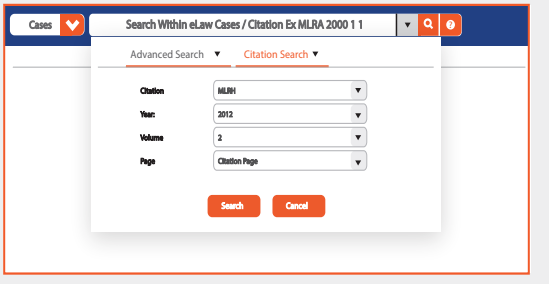

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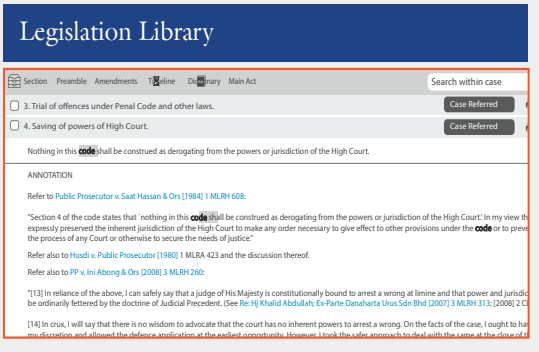

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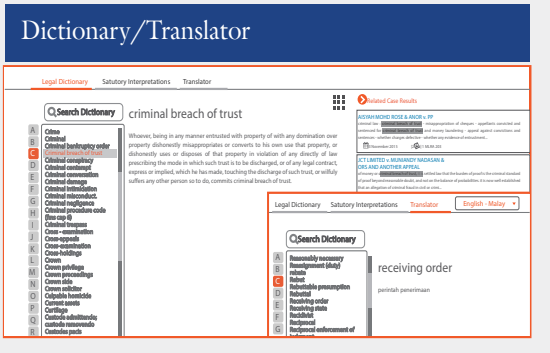

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