SKS SOUTHERN SDN BHD

v.

TRIBUNAL TUNTUTAN PEMBELI RUMAH MALAYSIA & ANOR

Court Of Appeal, Putrajaya
Nor Bee Ariffin, Azizah Nawawi, Lee Heng Cheong JJCA
[Civil Appeal No: J-01(A)-580-10-2019]
16 March 2021

Administrative Law: *Judicial review — Certiorari — Application to quash award of House-buyers Claims Tribunal against developer in favour of purchaser of subject property — Further affidavits, filing of — Delivery of vacant possession of subject property — Terms of sale and purchase agreement, construction of — Filing of split claims, whether permitted — Whether certiorari ought to have been granted*

The appellant was the developer of a residential project ("Project"); the 1st respondent was the House-buyers Claims Tribunal and the 2nd respondent was the purchaser of an apartment unit in the Project ("Subject Property"). By a Sale and Purchase Agreement dated 6 February 2017 ("SPA"), the 2nd respondent agreed to purchase the Subject Property from the appellant at the discounted price of RM569,080.00. By cl 25(1) of the SPA, the time for delivery of vacant possession of the Subject Property should be within 36 months from the date of the SPA, namely on or before 6 February 2020. The appellant informed the 2nd respondent, vide a Notice dated 24 April 2018, of its readiness to deliver vacant possession of the Subject Property. The 2nd respondent, however, did not take physical possession of the Subject Property at the material time. The 2nd respondent then filed two separate Claims with the 1st respondent against the appellant. The 1st respondent heard Claim 1 and awarded a sum of RM16,452.05 and cost of RM400.00 against the appellant in favour of the 2nd respondent ("Award"), which formed the subject matter of this Judicial Review. The 1st respondent then adjourned the hearing of Claim 2 to a date to be fixed and subsequently made another award thereunder. Based on the Grounds of the Award, the award of RM16,452.05 was computed at the rate of 10% per annum on the Purchase Price for a period of 63 days, namely from 24 April 2018 to 26 June 2018 and pursuant to cl 25(2) of the SPA. Aggrieved, the appellant filed a judicial review application seeking to declare the 1st respondent's decision as invalid, null and void and of no effect and that an order of *certiorari* be issued to quash the said decision. The Judicial Commissioner ("JC") found that the 2nd respondent's preliminary objection that the appellant failed to file any response to the 2nd respondent's Affidavit-In-Reply dated 4 July 2019 had merits since the assertions by the 2nd respondent were neither denied nor disputed, it was deemed an admission by the appellant based on the case of *Ng Hee Thoong v. Public Bank Berhad.*

On that ground alone, the JC found that the application should be dismissed. After considering the merits of the application, the JC dismissed it on the following grounds: (i) that cls 25 and 27 of the SPA stipulated that vacant possession of the Subject Property should be delivered to the 2nd respondent within 36 months from the date of the SPA and that the manner of delivery of vacant possession was upon*, inter alia*, water and electricity supply being ready for connection to the Subject Property; (ii) that although vacant possession was delivered, there was no electricity connection to the Subject Property as required by cl 27(1) of the SPA; (iii) that s 16Q of the Housing Development (Control and Licensing) Act 1966, ("HDA 1966") permitted 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; (iv) that the 1st respondent did not err in awarding damages to the 2nd respondent for the non-connection of electricity to the Subject Property as it was undisputed that vacant possession was delivered without any electricity connection to the Subject Property in breach of cl 27 of the SPA; 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 10% 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 Subject Property. Hence, the present appeal by the appellant against the JC's decision.

Held (allowing the appellant's appeal with costs):

(1) In respect of the JC's finding that the appellant's failure to file any response to the 2nd respondent's Affidavit-In-Reply dated 4 July 2019 which meant that the assertions by the 2nd respondent were neither denied nor disputed and deemed an admission by the applicant based on the case of *Ng Hee Thoong v. Public Bank Berhad (supra)*, this was erroneous as an application for judicial review differed substantively from applications of other nature. In a judicial review application, further affidavits by the applicant after leave had been obtained were only permitted by the court if new matters not already disclosed in the leave stage were raised by the other party as specifically provided in O 53 r 7(1) Rules of Court 2012. The JC did not indicate what new matters arose out of the affidavits of the 2nd respondent which required a further affidavit from the appellant, to rebut or answer. Hence, there were no merits in the JC's finding on this issue. (paras 23-24)

(2) The JC erred further in the construction of cl 27(1)(c) of the SPA and in her reliance on the case of *Hoya Holding Sdn Bhd v. Chia Thin Hing @ Cheah Thin Heng and Anor* ("*Hoya*") which was distinguishable from the present appeal. The Housing Development (Control and Licensing) Act 1966 and its Schedules thereto had since been amended after the case of Hoya and the court therein was in fact construing a provision of the Sale and Purchase Agreement which wordings were different from the relevant clause in the SPA in the present case. In *Hoya*, the court was construing the words "with the connection of" as opposed to the present case where the words used in cl 27(1)(c) of the SPA

were "ready for connection" which did not mean that the Subject Property must be installed with actual supply of electricity. In the light of this, the 1st respondent had misdirected itself in this material aspect by failing to take into consideration relevant facts. The JC had misdirected herself by premising the Award on the delay in actual installation of electricity supply to the Subject Property. As such, the 1st respondent and the JC had clearly misconstrued the true meaning of cl 27(1)(c) of the SPA, thus committing an error of law. (paras 25-31)

(3) On the issue of the late delivery of the Subject Property, both the 1st respondent and the JC, having misconstrued cl 27(1)(c) of the SPA, also erred in the computation of the late delivery period of the Subject Property. The date of the SPA was 6 February 2017 and the appellant was only required to deliver vacant possession of the Subject Property to the 2nd respondent on or before 6 February 2020. Both the 1st respondent and the JC concluded that there was a late delivery of the Subject Property of 63 days calculated from 24 April 2018 to 26 June 2018 based on their erroneous construction of cl 27(1)(c) of the SPA. Even if they were both correct in their construction of cl 27(1)(c) of the SPA that the appellant must deliver the vacant possession of the Subject Property with the electricity actually connected to the same, they were still wrong in holding that there was a delay in the delivery of vacant possession as the electricity supply was in fact connected to the Subject Property on 11 July 2018, well before the time due for delivery of vacant possession on 6 February 2020. Both the 1st respondent and the JC had no jurisdiction to commit such an error of law and misdirection. In the circumstances, the 1st respondent's Award was without any basis and was made arbitrarily. (paras 32-37)

(4) In this instance, the 2nd respondent filed two separate Claims in respect of the same subject matter of the dispute against the same party, namely under Claim 1 and Claim 2 contrary to s 16Q HDA 1966. The following sentence in s 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", clearly meant that claims filed by the 2nd respondent must refer to the same matter that was the Subject Property against the same party, the appellant. Even though Claim 1 and Claim 2 were for different claims and even though the appellant had never raised any objections to the claims before the 1st respondent, such matters were immaterial as it was clearly beyond the jurisdiction of the 1st respondent and contrary to ss 16M(1) and 16Q HDA 1966 for the 1st respondent to hear the two split claims. By proceeding with the hearing with both claims on record, and in making the Award in favour of the 2nd respondent, the 1st respondent had clearly committed an error of law and acted in excess of its jurisdiction and *ultra vires* the powers granted to it under the HDA 1966. (paras 48, 49, 50 & 53)

(5) In the circumstances, the 1st respondent had taken into consideration irrelevant matters and had failed to take into account relevant matters

rendering the Award to be manifestly unreasonable, irrational and in excess of its jurisdiction. The JC ought to have allowed the appellant's application for judicial review to quash the 1st respondent's decision. By failing to do so, the JC had erred in law and misdirected herself and occasioned a miscarriage of justice, thereby rendering her decision unsafe and unsatisfactory warranting appellate interference. (paras 56-57)

Case(s) referred to:

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 1 MLRA 683 (folld)

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 1 MLRA 183 (folld)

Booi Kim Lee v. Yb Menteri Sumber Manusia Malaysia & Anor [1999] 1 MLRH 879 (refd)

Council of Civil Service Unions and others v. Minister for the Civil Service [1984] 3 All ER 935 (refd)

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (refd)

Hoya Holding Sdn Bhd v Chia Thin Hing & Anor [1994] 3 MLRH 165 (distd)

Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 MLRA 48 (refd)

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 1 MELR 21; [2003] 2 MLRA 114 (refd)

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

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

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

Legislation referred to:

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

Rules of Court 2012, O 53 r 7

Counsel:

For the appellant: Chen Wai Jiun; M/s WJ Chen & Company

For the respondent: Lum Kok Kiong; M/s Lum Kok Kiong & Co

JUDGMENT

Lee Heng Cheong JCA:

Introduction

[1] The appellant is the developer of a residential project identified as "Sky Habitat @ Meldrum Hill, Johor Bahru" ("the Project"), whilst the 1st

respondent is the House-buyers Claims Tribunal and the 2nd respondent is the purchaser of a unit of apartment identified as Parcel No: L-15-08 in the Project ("the Subject Property").

[2] By a Sale and Purchase Agreement dated 6 February 2017 ("the SPA"), the 2nd respondent agreed to purchase the Subject Property from the appellant at the discounted price of RM569,080.00.

[3] By Clause 25(1) of the SPA, the time for delivery of vacant possession of the Subject Property shall be within 36 months from the date of the SPA, namely on or before 6 February 2020.

[4] The appellant informed the 2nd respondent vide a Notice dated 24 April 2018, of its readiness to deliver vacant possession of the Subject Property. However the 2nd respondent did not take physical possession of the Subject Property at the material time.

[5] On 21 December 2018, the 2nd respondent filed 2 separate Claims with the 1st respondent against the appellant which were registered under Claim No: TTPR/J/1094/18 ("Claim 1") and Claim No: TTPR/J/1095(T)/18 ("Claim 2") respectively. Claim 1 was expressed to be for "Non-Technical Claim for RM49,832" and whilst Claim 2 is for "Technical Claim for RM40,000".

[6] On 16 January 2019, the 1st respondent heard Claim 1 and awarded a sum of RM16,452.05 and cost of RM400.00 against the appellant, in favour of the 2nd respondent ("the Award") which formed the subject matter of this Judicial Review. The 1st respondent then adjourned the hearing of Claim 2 to a date to be fixed and subsequently made another award thereunder.

[7] Based on the Grounds of the Award, the award of RM16,452.05 was computed at the rate of 10% per annum on the Purchase Price for a period of 63 days, namely from 24 April 2018 until 26 June 2018 and pursuant to cl 25(2) of the SPA.

[8] The appellant being aggrieved with the decision and award of the 1st respondent applied for leave to issue Judicial Review against the 1st respondent. On 23 April 2019, the learned Judicial Commissioner ("the learned JC") granted leave to the appellant to commence judicial review of the Decision of the 1st respondent in making the Award in favour of the 2nd respondent ("the Impugned Decision").

[9] In the Application for Judicial Review, the appellant 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 Impugned Decision.

[10] The learned JC after hearing the application for Judicial Review, refused to quash the Impugned Decision made by the House-buyers Claims Tribunal, the 1st respondent herein. This is an appeal against the learned JC's decision in refusing to quash the Impugned Decision.

[11] We heard the appeal and after due deliberation and having carefully considered the submissions of both parties, we found that there are merits in the appeal and unanimously allowed the appeal with costs. We now give our reasons for our decision.

Findings Of 1st Respondent

[12] The 1st respondent's findings in essence are *inter alia* as follows:

(a) that it is aware of the 2 split claims of the 2nd respondent;

(b) that the appellant stated that they do not have any defence to the 2nd respondent's claims;

(c) that vacant possession must entail that "water and electricity supply are ready for connection to the said Parcel" and that the appellant must ensure that the necessary application form for electricity supply and deposit have been duly filed and paid to Tenaga Nasional Berhad ("TNB"). Only then can it be said that the appellant has complied with the manner for delivery of vacant possession;

(d) that the appellant is liable for the delay of 63 days calculated from 24 April 2018 to 26 June 2019; and

(e) that damages be awarded calculated at the rate of 10% per annum on the purchase price which amounts to RM16,453.05 inclusive of costs of RM400.00 and RM10.00 being the filing fee.

Findings Of The High Court

[13] The learned JC found as follows:

(a) that the 2nd respondent's preliminary objection that the appellant failed to file any response to the 2nd respondent's Affidavit-In-Reply dated 4 July 2019 has merits since the assertions by the 2nd respondent were neither denied nor disputed, it is deemed an admission by the appellant based on the case of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 MLRA 48. On that ground alone, the learned JC found that the Application for Judicial Review should be dismissed;

(b) that after considering the merits of the Application for Judicial Review, the learned JC dismissed the Application on the following grounds:

(i) that cls 25 and 27 of the SPA stipulate that vacant possession of the Subject 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 Subject Property.;

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

(iii) that s 16Q of the Housing Development (Control and Licensing) Act, 1966 ("HDA 1966") permits the filing of splitting 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 Subject Property as it was undisputed that vacant possession was delivered without any electrical connection to the Subject Property in breach of cl 27 of the SPA, which states that water and electricity supply are ready tor connection to the Subject 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 Subject Property.

The Appellant's Contentions Before This Court

[14] The appellant in essence contended as follows:

(a) that in an Application for 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 O 53 r 7(1) Rules of Court 2012;

(b) that the learned JC's reliance on the principle enunciated in the case of *Ng Hee Thong (supra)* which governs applications of other nature without referring to the specific provision in O 53 r 7(1) Rules of Court 2012 for Judicial Review application is a clear manifestation of misdirection and error of law on the part of the learned JC which misdirection had resulted in a miscarriage of justice;

(c) that the split claims namely the said Technical Claim for the sum of RM40,000.00 and the said Non-Technical Claim for the sum of RM49,832.60 totalling RM89,832.60 was clearly in excess of the jurisdiction of the House-buyers Claims Tribunal, the 1st respondent, which was one of RM50,000.00 only;

(d) that the learned JC erred in the construction of cl 27(1)(c) of the SPA by relying on the case of *Hoya Holding Sdn Bhd v. Chia Thin Hing & Anor* [1994] 3 MLRH 165 which contains different facts. Further the Housing Development (Control and Licensing) Act 1966, and its schedules thereto had since been amended after the case of *Hoya Holding Sdn Bhd v. Chia Thin Hing and Anor (supra)*;

(e) that the learned JC's decision in affirming the 1st respondent's decision in awarding compensation, based on the formula for Late Delivery of Vacant Possession in cl 25(2) of the SPA was without any legal basis and arbitrary as there was no late delivery of vacant possession of the Subject Property;

(f) that in granting the Award based on the delay in actual installation of electricity supply to the Subject Property, the 1st respondent had clearly misconstrued cl 27(1)(c) of the SPA;

(g) that in proceeding with the hearing and in making the Award in favour of the 2nd respondent, the 1st respondent have committed an error of law, in excess of its jurisdiction and *ultra vires* the power given to it under the HDA 1966;

(h) Further, the 1st respondent ought to have judicially appreciated the fact that the alleged late installation of electricity supply to the Subject Property on 11 July 2018 was nevertheless still within the permitted time for delivery of vacant possession by the terms of the subject Agreement, which is on or before 6 February 2020.

The 2nd Respondent's Contentions Before This Court

[15] The 2nd respondent's contentions in essence are as follows:

(a) that since the appellant had failed to file any response to the 2nd respondent's Affidavit-In-Reply dated 4 July 2019, the assertions by the 2nd respondent were neither denied nor disputed, thus it is deemed an admission by the Appellant based on the case of *Ng Hee Thoong v. Public Bank Berhad (supra)*;

(b) that vacant possession of the Subject Property shall be delivered to the 2nd respondent within 36 months from the date of the SPA together with running water and electricity supply;

(c) that s 16Q of HDA 1966, permits the filing of split claims for two different matters, namely one was for technical and the other, for a non-technical matter;

(d) that the 1st respondent did not err in awarding damages to the 2nd respondent for the non-connection of electricity to the Subject Property as it was undisputed that vacant possession was

delivered without water and electricity supplies running through the electricity and power lines; and

(e) that the 1st respondent did not err in the computation of damages as the calculation was based on the ten percent rule and that it was for compensation for the 2nd respondent who had been deprived of the opportunity to utilise and enjoy the Subject Property.

The Law

[16] The Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2012] 1 MELR 129; [2010] 5 MLRA 696 laid down the functions of the court in an application for Judicial Review and the correct test to be applied in reviewing findings of fact made by the Industrial Court, to be as follows:

> "[15] ...Historically, judicial review was only concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made an inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. **The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality" which permits the courts to scrutinize the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.**
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> [16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restraining decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the courts' liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Peransang Selangor Bhd v. Zaid Mohd Noh* [1996] 2 MLRA 398 after affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.
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> [17] The Federal Court, in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 1 MELR 21; [2003] 2 MLRA 114, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, **it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.**
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> [18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1996] 1 MELR 312; [1996] 2 MLRA 678; *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [1999] 1 MLRA 656, *Quah Swee Khoon v. Sime Darby Bhd* [2000] 1 MLRA 856, *Colgate Palmolive (M)*

Sdn Bhd v. Yap Kok Foong & Another [2001] 1 MLRA 472). However, there are exceptions to this restrictive principle where:

(a) Reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) There is no evidence to support the conclusion reached. (See *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba* [1998] 1 MELR 1; [1998] 1 MLRA 275).

[19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that **where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review**".

[Emphasis Added]

[17] In *Booi Kim Lee v. Yb Menteri Sumber Manusia Malaysia & Anor* [1999] 1 MLRH 879, the court adopted Lord Diplock's classification of grounds of judicial review in the House of Lords case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. The three (3) grounds pronounced by Lord Diplock are namely;

(i) illegality;

(ii) irrationality; and

(iii) procedural impropriety.

[18] By illegality as a ground for judicial review, it means "that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it" and that "... the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess."

[19] By irrationality it means 'Wednesbury unreasonableness' and applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided upon could have arrived at it.

[20] By procedural impropriety, it includes "failure by an administrative tribunal to observe procedural rules that are expressly laid out" and "duty to act fairly".

[21] In Malaysia, the courts have, since the decision of the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725, made inroads and held that decisions of a tribunal may be reviewed on grounds of illegality, irrationality and proportionality, not only on the decision-making process but also on the merits.

[22] Not only are the categories not exhaustive (see the Federal Court's decision of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725, but the growth and development of administrative law in Malaysia has also firmly established that whilst judicial review proceedings do not involve the exercise of an appellate function, the merits of the decisions of inferior tribunals can be reviewed in circumstances deemed to constitute an exception to the principle of the role being supervisory in nature (see the Federal Court's decision in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 1 MELR 21; [2003] 2 MLRA 114).

Findings Of This Court

[23] In respect of the learned JC's finding that the appellant's failure to file any response to the 2nd respondent's Affidavit-In-Reply dated 4 July 2019 which meant that the assertions by the 2nd respondent were neither denied nor disputed and deemed an admission by the Applicant based on the case of *Ng Hee Thoong v. Public Bank Berhad (supra)*, we are of the considered opinion that this is erroneous as an Application for Judicial Review differs substantively from applications of other nature. 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 O 53 r 7(1) Rules of Court 2012 which reads as follows:

> "The Judge may allow the statement to be amended, and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application, and where the applicant intends to amend his statement or use further affidavits, he must immediately give notice of his intention and of any proposed amendment of his statement to every other party."

[24] The learned JC did not indicate what new matters arose out of the affidavits of the 2nd respondent which requires a further affidavit from the appellant, to rebut or answer. In the premise we find that there are no merits in the learned JC's finding on this issue.

[25] We further find that the learned JC erred in the construction of cl 27(1)(c) of the SPA and in her reliance on the case of *Hoya Holding Sdn Bhd v. Chia Thin Hing @ Cheah Thin Heng and Anor (supra)* which is distinguishable from the present appeal, leading to her finding that: "Water and electricity supply are ready for connection to the said Parcel in cl 27 of the SPA, therefore, means there must be water and electricity supplies running through the electricity and power lines before the question of whether or not vacant possession has been delivered can arise."

[26] It is pertinent to note that the Housing Development (Control and Licensing) Act 1966 and its Schedules thereto had since been amended after the case of *Hoya Holding Sdn Bhd v. Chia Thin Hing and Anor (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, and the said provision reads as follows:

> At p 166, para b
>
> "The said building shall be completed by the vendor and vacant possession, **with the connection of water and electricity supply** to the said building, shall be handed over to the Purchaser within twenty (24) calendar months from the date of this Agreement."
>
> [Emphasis Added]

[27] In *Hoya Holding Sdn Bhd v. Chia Thin Hing and Anor (supra)*, the court therein was construing the words "with the connection of" as opposed to the present case where the words used in cl 27(1)(c) of the SPA were "ready for connection".

[28] Clause 27(1)(c) of the SPA reads as follows:

> "The Developer shall let the Purchaser into possession of the said Parcel 7(1) (c) upon the following:
>
> (c) water and electricity supply are **ready for connection** to the said Parcel;"
>
> [Emphasis Added]

[29] Clause 27(1)(c) of the SPA states "ready for connection" and it does not mean that the Subject Property must be installed with actual supply of electricity.

[30] In the light of the above, the 1st respondent had misdirected itself in this material aspect by failing to take into consideration relevant facts. The learned JC had misdirected herself, by premising the Award, on the delay in actual installation of electricity supply to the Subject Property. As such, the 1st respondent and the learned JC have clearly misconstrued the true meaning of cl 27(1)(c) of the SPA.

[31] By misconstruing cl 27(1) of the SPA, the 1st respondent and the learned JC have committed an error of law.

[32] On the issue of the late delivery of the Subject Property, both the 1st respondent and the learned JC, having misconstrued the provision of cl 27(1)(c) of the SPA, also erred in the computation of the late delivery period of the Subject Property. Clause 25(1) of the SPA reads as follows:

> "Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in clause 27 **within thirty-six (36) months from the date of this Agreement.**"
>
> [Emphasis Added]

[33] Clause 25(2) of the SPA reads as follows:

> "If the Developer fails to deliver vacant possession of the said Parcel in the manner stipulated in clause 27 **within the period stipulated in subclause (1)**, the Developer 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 of the period stipulated in subclause (1) until the date of the Purchaser takes vacant possession of the said Parcel.**"
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> [Emphasis Added]

[34] The date of the SPA is 6 February 2017 and the appellant is only required to deliver vacant possession of the Subject Property to the 2nd respondent on or before 6 February 2020.

[35] Both the 1st respondent and the learned JC, concluded that there was a late delivery of the Subject Property of 63 days calculated from 24 April 2018 to 26 June 2018 based on their erroneous construction of cl 27(1)(c) of the SPA.

[36] Even if both the 1st respondent and the learned JC, were correct in their construction of cl 27(1)(c) of the SPA that the appellant must deliver the vacant possession of the Subject Property with the electricity actually connected to the same, they were still wrong in holding that there was a delay in the delivery of vacant possession as the electricity supply was in fact connected to the Subject Property on 11 July 2018, well before the time due for delivery of vacant possession which was on 6 February 2020.

[37] Both the 1st respondent and the learned JC have no jurisdiction to commit such error of law and misdirection. In the circumstances, the 1st respondent's Award was without any basis and was made arbitrarily.

[38] Both Claim 1 and Claim 2 were filed by the 2nd respondent simultaneously on 21 December 2018 and were both placed and heard before the same panel of the 1st respondent on 16 January 2019. The 2nd respondent sought to limit his claims up to the sum of RM50,000.00 for Claim 1 and Claim 2 respectively, to bring the 2 claims within the jurisdiction of the 1st respondent.

[39] The 2nd respondent contended that since the appellant did not raise the issue of split claims during the proceedings before the 1st respondent, they should not be allowed to raise this issue at this stage before us. Further the 1st respondent also noted that during the proceedings before them, the appellant stated that they do not have any defence to the 2nd respondent's claims. With respect, we find that such prohibition against the raising of fresh issue although not ventilated earlier in the courts below does not apply when the fresh issue relates to the matter of jurisdiction. The same goes for admissions made.

[40] We find support for this proposition in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLRA 183, where the Federal Court held

that there could be no estoppel when the issue relates to jurisdiction. This was what the apex court said:

> "There are several authorities that deal with the validity of orders made in excess of jurisdiction by a court of unlimited jurisdiction and I find it sufficient to refer to two of them. The first is the decision of the Privy Council in *Meenakshi Naidoo v. Subramaniya Sastri* LR 14 IA 160 which concerned a case where the High Court at Madras purported to entertain an appeal against the decision of a District Judge which was not appealable. **At the hearing before the High Court, neither the parties nor the court raised the question of jurisdiction. The High Court then reversed the District Judge. On appeal to the Privy Council, it was held that consent or waiver could not cure the absence of jurisdiction.** Sir Richard Baggallay, when delivering the advice of the Board said.
>
> It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. **No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists.**"
>
> [Emphasis Added]

[41] Further guidance can be found in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 1 MLRA 683, where the Federal Court held *inter alia* as follows:

> "[17] I should start off with the first point taken on jurisdiction. **The issue is whether the preliminary issue can be raised on an appeal before this court when this issue was not raised at all by the appellant before the Court of Appeal. For my part, I fully accept the propositions advanced by learned counsel for the appellant on the law concerning jurisdiction as broadly correct. In fact, it would not be an exaggeration for me to say that there is always unavoidable and strong inclination on the part of the courts to allow jurisdiction challenge at any stage of proceedings. In saying that I should emphasise as a matter of law, that the court is competent to entertain and try a suit if it were competently brought. However, where no jurisdiction exists or the court has no inherent jurisdiction, the suit is not competently brought and the court therefore has no power to take one more step. In other words, the court is not perfectly competent to entertain and try the suit. Jurisdiction it is often said, does not originate in consent or acquiescence of the parties and cannot be established, where it is absent, by such consent, acquiescence or waiver of rights. A consideration of the authorities such as** *Datuk T P Murugasu v. Wong Hung Nung* **[1988] 1 MLRA 153;** *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd and another appeal* **[2018] 6 MLRA 210 COA and Civil Appeal No: 02(f)-2-01/2018 FC, confirms the propositions which I have expressed.**
>
> [18] **It is relevant to note that as a general rule, a judicial decision made in want of jurisdiction or in breach of statute would be considered a nullity that is amenable to review at any stage of the proceedings and that the**

> **court has inherent powers to set aside non-appealable orders exercisable on its own motion and even if parties did not raise objections as to want of jurisdiction or tacitly acquiesce in the matter or brought by the party which the order purports to affect for that purpose** (*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLRA 183). Accordingly, while the respondent is quite correct to regard the preliminary issue was raised at the eleventh hour, I see nothing in the respondents' protestation that the preliminary point was not raised in the intermediate appellate court below us to entitle this Court to refuse to hear it. I reject their argument.
>
> [Emphasis Added]

[42] In determining the jurisdiction of the 1st respondent, it is imperative that s 16M(1) HDA 1966 be read together with s 16Q of the same Act.

[43] Section 16M(1) HDA 1966 reads as follows :

> "Subject to s 16N and 16O, the Tribunal shall have jurisdiction to determine a claim lodged under s 16L where the total amount in respect of which an award of the Tribunal is sought does not exceed fifty thousand ringgit."

[44] Section 16Q HDA 1966 reads as follows :

> "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."

[45] We are of the firm opinion that in construing s 16Q HDA 1966, the learned JC erred when she held that the word used in the provision is "may" and hence it is not a strict prohibition against the filing of "split, nor more than one claim" with the House-buyers Claims Tribunal, the 1st respondent, which the 2nd respondent did.

[46] Section 16Q 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 s 16M(1) HDA 1966.

[47] The effect of s 16Q 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 House-buyers Claims Tribunal but not otherwise. We find that the learned JC's reliance on the word "may" alone without construing the provision in its full and proper context is flawed.

[48] In the present appeal, the 2nd respondent filed 2 separate Claims in respect of the same subject matter of the dispute against the same party, namely under Claim 1 and Claim 2 contrary to the strict provision in s 16Q HDA 1966.

[49] Further, the following sentence in s 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", clearly meant that claims filed by the 2nd respondent must refer to the same matter that is the Subject Property against the same party, the appellant.

[50] Even though Claim 1 and Claim 2 are for different claims, namely the technical claim and non-technical claim which was known to the 1st respondent, the House-buyers Claims Tribunal and even though the appellant has never raised any objection to the claims before the 1st respondent, we find that such matters are immaterial and we hold that the 1st respondent has no jurisdiction to hear the two split Claims, as it is clearly beyond the jurisdiction of the 1st respondent and contrary to s 16M(1) and s 16Q HDA 1966.

[51] As a general rule, a judicial decision made in want of jurisdiction or in breach of statute would be considered a nullity that is subject to attack at any stage of the proceedings and that 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. Since the two Claims before the 1st respondent are not competently brought, therefore the 1st respondent has no jurisdiction to hear the Claims.

[52] It is pertinent to note that the appellant and the 2nd respondent did not extend the jurisdiction of the 1st respondent as provided for by s 16O HDA 1966 which reads as follows:

> "16O. Extension of jurisdiction by agreement
>
> (1) Notwithstanding that the amount or value of the subject matter claimed or in issue exceeds fifty thousand ringgit, the Tribunal shall have jurisdiction to hear and determine the claim if the parties have entered into an agreement in writing that the Tribunal shall have jurisdiction to hear and determine the claim.
>
> (2) An agreement may be made under subsection (1)
>
> (a) before a claim is lodged under s 16L; or
>
> (b) where a claim has been lodged under s 16L, at any time before the Tribunal has recorded an agreed settlement in respect of the claim under subsection 16T(3) or has determined the claim under s 16Y, as the case may be."

[53] The 1st respondent ought to have forthwith declined entertaining the two split claims on ground of jurisdiction and struck out both Claim 1 and Claim 2 but it did not. Alternatively, the 1st respondent should have directed the 2nd respondent to make an election as to which Claim he wished to proceed, not both. In any event, by proceeding with the hearing with both Claims on record, and in making the Award in favour of the 2nd respondent, the 1st respondent had clearly committed an error of law and

acted in excess of its jurisdiction and *ultra vires* the powers granted to it under the HDA 1966.

[54] It is trite law that courts should not reverse an award of a tribunal unless there is proven a clear jurisdictional error. A jurisdictional error can arise when a tribunal does not act within the proper scope of its statutory function such as whether it has acted without sufficient evidence or on no evidence, or has misconstrued the law on an issue on which its decision is founded. (Re: *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 1 MLRA 268).

[55] As a judge, in exercising judicial review powers, the learned JC must examine the decision of the 1st respondent not only in relation to the process, but also for substance in order to ascertain if such decision was tainted with illegality, irrationality or procedural impropriety within the principles amongst others outlined in the case of *Council of Civil Service Unions and others v. Minister for the Civil Service* [1984] 3 All ER 935, *R Rama Chandran v. The Industrial Court of Malaysia* [1996] 1 MELR 71; [1996] 1 MLRA 725 and *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd (supra).*

[56] In the circumstances, the 1st respondent had taken into consideration, irrelevant matters and had failed to take into account relevant matters rendering the Award to be manifestly unreasonable, irrational and in excess of its jurisdiction.

[57] We find that, in all circumstances of the case, the learned JC ought to have allowed the appellant's application for Judicial Review and quash the Impugned Decision. By failing to quash the Impugned Decision, the learned JC has erred in law and had misdirected herself which error of law and misdirection had occasioned a miscarriage of justice thereby rendering her Decision unsafe and unsatisfactory warranting appellate interference.

Conclusion

[58] Premised on the reasons enumerated above, we find that there are merits in the appeal. In the premises, the appeal is hereby allowed with cost of RM8,000.00 being costs here and below, to be paid by the 2nd respondent to the appellant, subject to payment of allocator fee. The decision of the High Court dated 22 September 2019 is set aside and an Order for *certiorari* is issued to quash the Award of the 1st respondent dated 16 January 2019.

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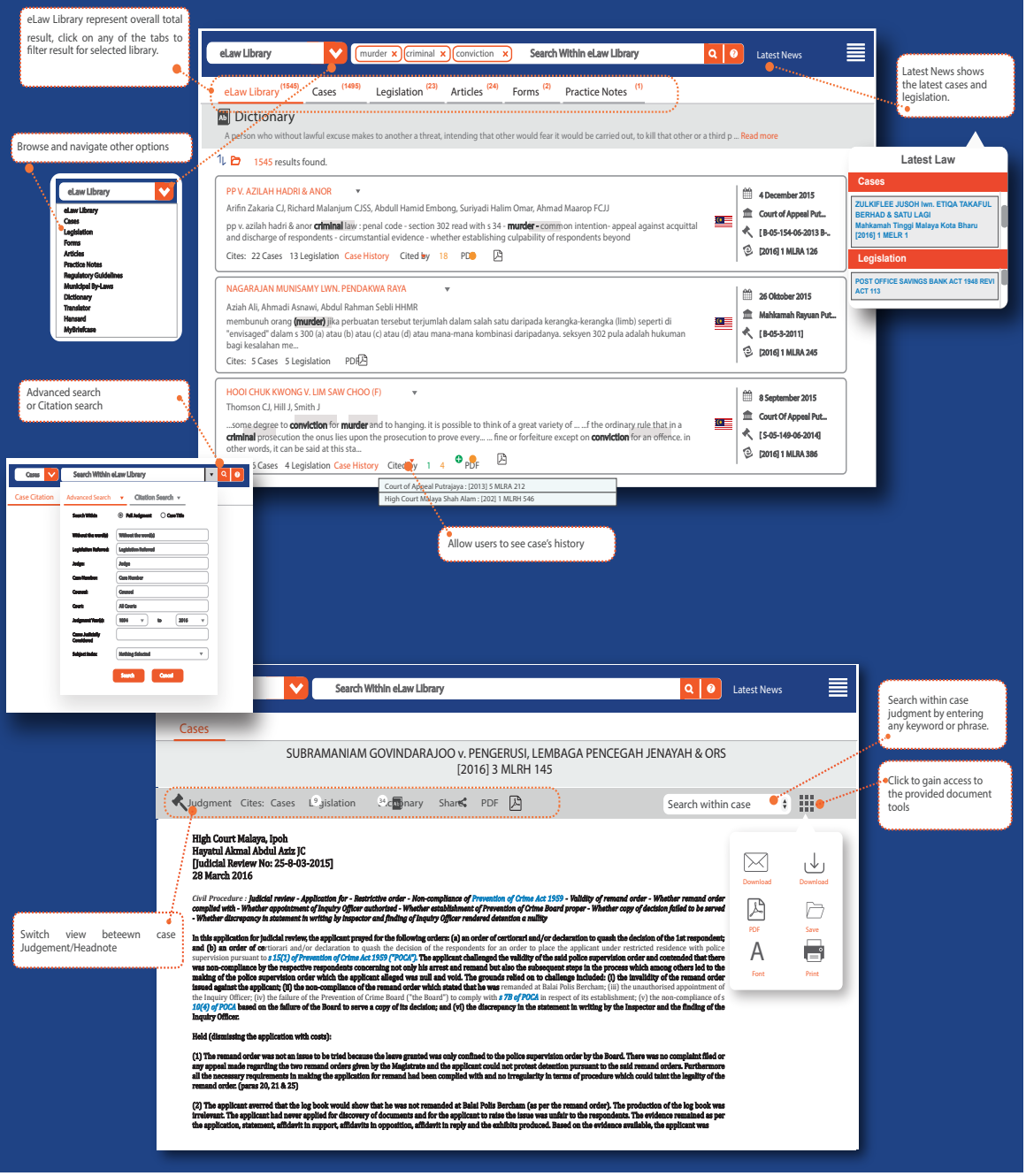

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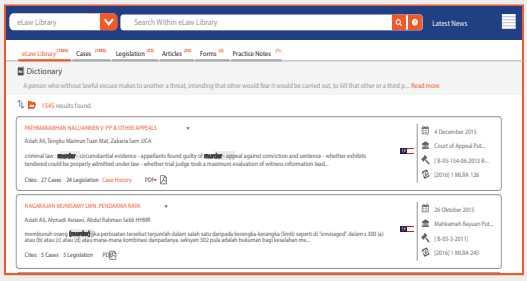

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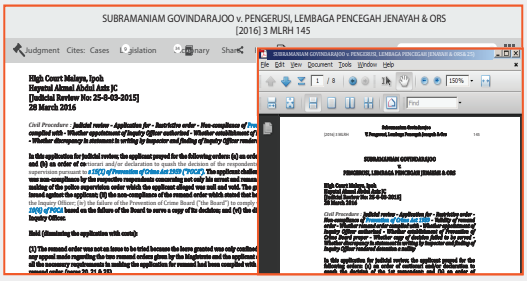

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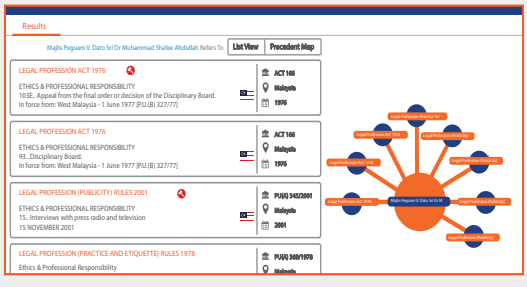

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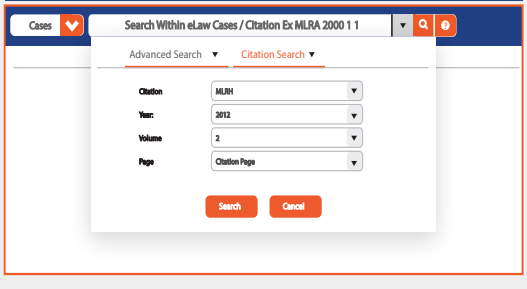

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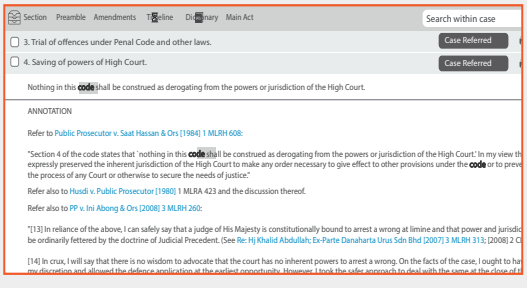

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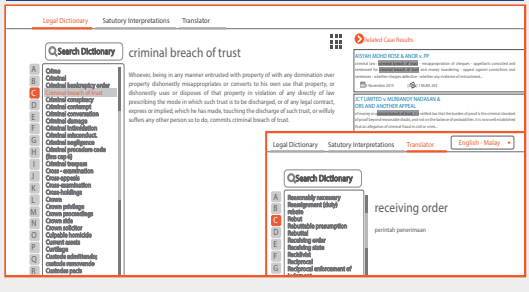

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