COUNTRY GARDEN DANGA BAY SDN BHD
v.
TRIBUNAL TUNTUTAN PEMBELI RUMAH & ANOR

Federal Court, Putrajaya
Zaleha Yusof, Zabariah Mohd Yusof, Rhodzariah Bujang FCJJ
[Civil Appeal No: 01(f)-17-07-2020(J)]
14 April 2022

Administrative Law: *Judicial review — Certiorari, order for — Decision of Tribunal for Homebuyer Claims allowing 2nd respondent's claim for damages for breach of sale and purchase agreement entered into between housing developer and 2nd respondent — Jurisdiction of Tribunal — Estoppel — Natural justice — Whether Tribunal's decision unreasonable and irrational and also tainted with illegality*

The appellant, a licensed housing developer, had filed a judicial review application in the High Court for an order of *certiorari* to quash the decision of the Tribunal for Homebuyer Claims ("Tribunal") allowing the 2nd respondent's claim for damages for breach of the Sale & Purchase Agreement ("SPA") between the appellant and the 2nd respondent. The Tribunal's decision was upheld by the High Court and, on appeal, by the Court of Appeal. Hence, the present appeal in which leave was granted for the following questions of law: (i) whether s 16N(2) of the Housing Development (Control and Licensing) Act 1966 ("Act") precluded the Tribunal from exercising jurisdiction over a claim which was not based upon an express term of the SPA or its specifications but was a claim based on the homebuyer's expectations of the unit purchased corresponding in all respects with a display model at the developer's showroom; (ii) whether the power conferred on the Tribunal under s 16Y(2)(e) of the Act to "vary or set aside" the contract conferred a jurisdiction on the Tribunal to add specifications of its own to the unit purchased by the homebuyer to include a sheltered/covered balcony, which was not provided for in the SPA, and to award damages *in lieu* thereof, or whether the said jurisdiction was properly exercisable only to ensure that the terms of the contract were in compliance with Schedule H of the Act; (iii) whether the homebuyer's claim that he had been allotted the wrong unit by the developer was maintainable after he had inspected and taken possession of and renovated the premises or whether by the law of estoppel and acquiescence, he was precluded from maintaining any such claim; and (iv) whether a breach of natural justice occurred when the housing developer's representative at the proceedings was allotted only 15 minutes to respond to the homebuyer's allegation, made without prior notice, that his SPA was unilaterally altered and the date changed; in the circumstances, whether the Tribunal proceedings had miscarried given that legal representation was disallowed under s 16U(2) of the Act, and the fact that the Tribunal had in the end adopted and acted upon the extraneous material to make its award.

Held (allowing the appeal with costs):

(1) The Tribunal, being a creature of statute, could only act within the four walls of the statute. Section 16N(2) of the Act provided that the Tribunal's jurisdiction would be limited to a claim based on a cause of action arising from the SPA entered into between the homebuyer and the housing developer. The Tribunal had no jurisdiction over matters following outside the SPA in the form of collateral contracts, representations or warranties. In this appeal, the Tribunal was wrong in taking into consideration the display model instead of the SPA. Based on s 16 of the Act, the Tribunal did not have jurisdiction to entertain the 2nd respondent's complaint on this covered balcony issue, which was not based on the SPA. Further, the power conferred upon the Tribunal under s 16Y(2)(e) to vary or to set aside the contract must be in compliance with the terms of the SPA, and the power to vary and set aside could only be exercised in situation where there was inconsistency with Schedule H of the Regulations. Therefore, Question 1 was answered in the affirmative and the first part of Question 2 was answered in the negative. (paras 37, 38, 44, 45, 46, 47 & 48)

(2) The 2nd respondent could not be allowed to, on one hand, say that he got the wrong unit but, on the other hand, accept delivery of vacant possession and renovate it. That was to approbate and reprobate the transaction. When he did the inspection during the delivery of vacant possession, the second defendant would obviously have noticed that the unit did not carry a covered balcony; and yet he accepted it and carried on with renovation of the unit. The Tribunal was wrong when it failed to appreciate that the 2nd respondent had affirmed the contract as it stood on its terms, which did not have a term for a covered balcony, when the 2nd respondent accepted delivery and renovated the unit. There was estoppel by conduct on the part of the 2nd respondent when he signed and accepted the vacant possession of the unit and exercised his right to ownership by renovating the unit. Thus, Question 3 was answered in the negative. (paras 53-55)

(3) The appellant, from the evidence, was fully aware of the allegation of unilateral modification of the SPA about two months before the hearing and had responded in writing prior to the hearing. Hence, there was no element of surprise here. There was no breach of natural justice and the appellant was given ample opportunity before the final hearing, before the Tribunal, to check on the relevant documents. Therefore, Question 4 was answered in the negative. (paras 61-63)

(4) In the upshot, the decision of the Tribunal was irrational and unreasonable, and no sensible person who had applied the mind to the issue to be decided could have arrived at it. The decision was also tainted with illegality. (para 64)

Case(s) referred to:

Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 2 MLRA 584 (folld)

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2019] 6 MLRA 494 (folld)

Anisminic v. Foreign Compensation Tribunal [1969] 2 AC 147 (refd)

Cheah Theam Kheng v. City Centre Sdn Bhd & Other Appeals [2012] 2 MLRA 125 (folld)

Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor [2016] 2 MLRA 447 (folld)

Express Newspapers plc v. News (UK) Ltd And Others [1990] 3 All ER 376 (refd)

Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal [2020] 4 MLRA 450 (refd)

O'Reilly v. Mackman [1982] 3 All ER 1124 (refd)

Re Racal Communications Ltd (1981) AC 374 (refd)

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

Sim Chio Huat v. Wong Ted Fui [1982] 1 MLRA 379 (folld)

Southville City Sdn Bhd v. Chua Teck Kee & Anor [2019] MLRHU 957 (folld)

TTDI Jaya Sdn Bhd v. Yew Hong Teng & Anor [2017] 1 MLRA 143 (folld)

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

Westcourt Corporation Sdn Bhd lwn. Tribunal Tuntutan Pembeli Rumah [2004] 1 MLRA 775 (folld)

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, ss 16L, 16M, 16N(2), 16Y, 160,

Consumer Protection Act 1999, s 99

Housing Development (Control & Licencing) Regulations 1989, reg 11

Counsel:

For the appellant: Cyrus Das (Leonard Yeoh, Chuah Chong Ping & Nurul Qarirah with him); M/s Tay & Partners

For the 2nd respondent: Viola Lettice De Cruz (Vinobha Anthony Doss & Chua Yi Xie with her); M/s VL De Cruz & Co

For National House Buyers Association (HBA): KL Wong (Koh Kean Kang & Wong Renn Xin with him); M/s KL Wong

For the Real Estate and Housing Developers Association Malaysia (REHDA): Thoo Yee Huan (Chong Lee Hui & Alycia Chuah Yuin Ting with him); M/s Halim Hong & Quek

JUDGMENT

Zaleha Yusof FCJ:

Introduction

[1] This appeal before us relates to the following questions of law for which leave was granted on 6 July 2020:

Question 1

Whether Section 16N(2) of the Housing Development (Control and Licensing) Act 1966 (the Act) precludes the Tribunal for Homebuyer Claims (hereafter called the Tribunal) from exercising jurisdiction over a claim which is not based upon an express term of the Sale & Purchase Agreement (the SPA) or its specifications but is a claim based on the homebuyer's expectations of the unit purchased corresponding in all respects with a display model at the developer's showroom?;

Question 2

Whether the power conferred on the Tribunal under s 16Y(2)(e) of the Act to "vary or set aside" the contract confers a jurisdiction on the Tribunal to add specifications of its own to the unit purchased by the homebuyer to include a sheltered/covered balcony, which is not provided for in the SPA, and to award damages *in lieu* thereof, or whether the said jurisdiction is properly exercisable only to ensure that the terms of the contract are in compliance with Schedule H of the Act?;

Question 3

Whether the homebuyer's claim that he has been allotted the wrong unit by the developer is maintainable after he has inspected and taken possession of and renovated the premises or whether by the law of estoppel and acquiescence, he is precluded from maintaining any such claim? and

Question 4

Whether a breach of natural justice occurred when the housing developer's representative at the proceedings was allotted only 15 minutes to respond to the homebuyer's allegation, made without prior notice, that his SPA was unilaterally altered and the date changed?; in the circumstances whether the Tribunal proceedings had miscarried given that legal representation is disallowed under s 16U(2) of the Act, and the fact that the Tribunal had in the end adopted and acted upon the extraneous material to make its award?

[2] The appellant had filed a judicial review application in the High Court for an order of *certiorari* to quash the decision of the Homebuyer Claim's Tribunal which allowed the 2nd respondent's claim for damages for breach of the SPA entered into between the appellant and the 2nd respondent. The decision of the Tribunal was upheld by the High Court and on appeal, by the Court of Appeal. Hence now the appeal before us after leave was granted.

Background Facts

[3] Salient facts can be found in the grounds of judgment of the High Court and Court of Appeal as well as the submissions of the parties. We shall reproduce them below with modification.

[4] The appellant is a licensed housing developer under the Act and a developer of a project known as Country Garden Danga Bay (the Project).

[5] The 1st respondent is the Tribunal for Homebuyer Claims

[6] The 2nd respondent is one of the house buyers of one-unit apartment of the Project.

[7] On 23 August 2013, the appellant and the 2nd respondent entered into the SPA (the original SPA) for the 2nd respondent to purchase a unit described as parcel Block 11-A-3402 on the 34th storey (the said unit), with a purchase price of RM1,639,861.00. The date of the original SPA was subsequently changed to 30 December 2012. Under the original SPA, vacant possession was to be delivered within 36 months from the date of the original SPA, namely on or before 22 August 2016.

[8] However, the appellant only issued the notice to deliver vacant possession on 25 September 2017. The 2nd respondent accepted the delivery of vacant possession on 1 November 2017. After taking vacant possession, the 2nd respondent renovated the said unit to suit his requirements.

[9] On 2 January 2018, the 2nd respondent brought a home buyer's claim against the appellant, the only details given were that the wrong unit had been given which contradicted the SPA: "Pemaju memberikan unit yang salah. Bercanggah SPA".

[10] The President of the Tribunal who sat on 25 January 2018 directed that a technical team conduct an inspection of the said unit and submit a technical report for the 1st respondent's consideration. The technical report dated 15 March 2018 made a finding that the unit delivered to the 2nd respondent was in compliance with the SPA. The following is the conclusion found in the said report:

> "Tiada cadangan teknikal kerana pelan unit rumah yang diserahkan oleh pemaju sama seperti mana pelan dalam perjanjian jual beli dan pelan yang diluluskan oleh pihak berkuasa tempatan."

[11] After hearing the parties, the 1st respondent had given the ruling to amend the specifications of the SPA under paragraph (e) of subsection 16Y(2) of the Act to entitle the 2nd respondent to get a unit with covered balcony as the feature of the display model carrying a covered balcony was binding on the appellant. The following is the relevant part of the ruling of the 1st respondent.

> "Kandungan spesifikasi perjanjian jualbeli hendaklah dipinda menurut s 16Y(2)(e) Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966. Display model yang digunakan oleh PP sebagai rujukan untuk mengenalpasti unit yang dibeli oleh PYM adalah mengikat PP, iaitu bahawa PYM akan memperolehi unit yang mempunyai balcony ... berbumbung dan bukannya open balcony Jumlah kerugian yang dialami oleh PYM untuk menerima unit yang tiada balcony berbumbung dan juga spesifikasi dalaman (interior) yang berlainan adalah lebih dari RM50,000.00"

[12] The Tribunal found there was sufficient evidence to support the 2nd respondent's claim that there were unauthorized changes to the specifications in the original SPA which had caused losses to the 2nd respondent. Hence the Tribunal allowed the 2nd respondent's claim and awarded the 2nd respondent compensation in the sum of RM50,000.00.

[13] Aggrieved, the appellant filed for the judicial review at the High Court as alluded to in para 2 of this Ground of Judgment.

Issues And The Parties' Contention

[14] Before us, Dato' Cyrus Das, learned counsel for the appellant raised the following issues:

(i) The Jurisdiction Issue for Questions 1 and 2.

(ii) The Estoppel Issue for Question 3

(iii) The Natural Justice Issue for Question 4.

[15] It was learned counsel for the appellant's contention that the Tribunal was wrong in finding that the 2nd respondent was entitled to a unit with a covered balcony when that was not a term provided for by the SPA. The Tribunal had instead relied on the display model. Hence, learned counsel submitted, that the Tribunal had no jurisdiction to enforce terms which were not found in the SPA which was a statutory contract under the Act. The Act provides very limited jurisdiction to the Tribunal. This can be seen from the reading of ss 16L, 16M and 16N of the Act.

[16] On the estoppel issue, the appellant contended that the 2nd respondent must certainly be estopped from claiming that he had been given a wrong unit by the appellant when he had taken possession of the unit delivered to him by the appellant after inspection and subsequently renovated it.

[17] On the natural justice issue, it was the appellant's contention that a breach of natural justice occurred when the appellant's representative at the Tribunal proceeding was allotted only 15 minutes to respond to the 2nd respondent's allegations, which according to the appellant were brought up for the first time at the hearing. This had rendered the decision making process of the Tribunal in breach of natural justice.

[18] On behalf of the 2nd respondent, Mr Viola Lattice De Cruz submitted, on the jurisdiction issue, that the provision of the Act must be read as a whole. He further submitted that subsection 16N(2) of the Act refers to "cause of action" arising from the SPA entered into between the home buyer and the housing developer. In this case he contended, the cause of action gave rise for the 2nd respondent to enforce his rights, but it must be brought within the time limit set out in subsection 16N(2) of the Act.

[19] Therefore learned counsel for the 2nd respondent submitted that subsection 16N(2) applies to limitation period for filing the claim and not to limit the claim to the express terms of the SPA.

[20] On the display model being relied on to support the 2nd respondent's claim, he submitted that s 16N does not say that it has to be from the express term of the SPA but arising from the SPA. So, he contended, it was clear that the 2nd respondent was allowed to look at matters arising out of the SPA. He also submitted that Parliament had given ample power to the Tribunal to vary the Schedule H Agreement. Hence, although covered balcony was not provided for, the Tribunal had the power to include the missing terms to give effect to the intention of the parties. He further submitted that the Act is a safeguard to protect the interest of the purchasers. A statutory agreement, he argued can be contracted out if it is favourable to the purchaser.

[21] On the estoppel issue, learned counsel for the 2nd respondent submitted that from the moment the 2nd respondent took possession of the said unit, he had complained to the appellant. He cited the case of *Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal* [2020] 4 MLRA 450 and submitted that estoppel does not operate against a statutory form of contract.

[22] Learned counsel for the 2nd respondent also contended that there was no acquiescence on the part of the 2nd respondent and that the 2nd respondent did not give up his right to make a claim. In fact, the 2nd respondent, he said, had given notice that he would take legal action.

[23] On the natural justice issue, learned counsel for the 2nd respondent submitted, that the appellant was fully aware of the allegation of changes in the pages of the SPA even prior to the hearing, as far as April 2018. Hence, there was no surprise to the appellant that can lead to a breach of natural justice.

Our Decision

(i) Questions 1 And 2

[24] As submitted by the parties, these questions relate to the jurisdiction issue. For convenience, we shall reproduce the relevant provisions of the Act, before we begin our discussion on the issue, thus:

> "16L. A homebuyer may lodge with the Tribunal a claim in the prescribed form together with the prescribed fee claiming for any loss suffered or any matter concerning his interests as a homebuyer under this Act.
>
> Jurisdiction of Tribunal
>
> 16M. (1) Subject to ss 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.
>
> (2) Subject to subsection (1), a respondent to a claim may raise a debt or liquidated demand as:
>
> (a) a defence; or
>
> (b) a counterclaim.
>
> (3) Where a respondent raises a debt or liquidated demand under subsection (2) and the debt or demand is proved the Tribunal shall:
>
> (a) give effect to the defence; or
>
> (b) hear and determine the counterclaim notwithstanding that the original claims is withdrawn, abandoned or struck out.
>
> (4) Any claim lodged with the Tribunal may include loss or damage of a consequential nature.
>
> Limitation of jurisdiction
>
> 16N. (1) Except as expressly provided under this Act, the Tribunal shall have no jurisdiction in respect of any claim:
>
> (a) for the recovery of land, or any estate or interest in land; and
>
> (b) in which there is a dispute concerning:
>
> (i) the entitlement of any person under a will or settlement. Or on intestacy (including partial intestacy);
>
> (ii) goodwill; or
>
> (iii) any trade secret or other intellectual property right.
>
> (2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered

into between the homebuyer and the housing developer which is brought by a homebuyer not later than twelve months from:

(a) the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later;

(b) the expiry date of the defects liability period as set out in the sale and purchase agreement; or

(c) the date of termination of the sale and purchase agreement by either party and such termination occurred before the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later

(3) Notwithstanding subsection (2) no claim shall be affected or defeated on the ground that no sale and purchase agreement has been entered into between the homebuyer and the licensed housing developer at the time when the cause of action accrues if there exists a previous dealing between the homebuyer and the licensed housing developer in respect of the acquisition of the housing accommodation.

Extension of jurisdiction by agreement

16O. (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 and agreed settlement in respect of the claim under subsection 16T(3) or has determined the claim under s 16Y, as the case may be.

Awards of the Tribunal

16Y. (1) The Tribunal shall make its award without delay and, where practicable, within sixty days from the first day the hearing before the Tribunal commences.

(2) An award of the Tribunal under subsection (1) may require one or more of the following:

(a) that a party to the proceedings pay money to any other party:

(b) that the price or other consideration paid by the homebuyer or any other person be refunded to the homebuyer or that person;

(c) that a party complies with the sale and purchase agreement;

(d) that money be awarded to compensate for any loss or damage suffered by the claimant;

(f) that costs to or against any party be paid;

(g) that interest be paid on any sum or monetary award at a rate not exceeding eight per centum per annum, unless it has been otherwise agreed between the parties;

(h) that the claim is dismissed.

(3) Nothing in paragraph (2)(d) or (f) shall be deemed to empower the Tribunal to award any damages for any non-pecuniary loss or damage.

(4) The Tribunal may at any time rectify or correct clerical mistake in any award or errors arising therein from any accidental slip or omission."

[25] Having perused the relevant provisions of the Act and the submissions of the parties, we now explain our decision on the first issue. As alluded to earlier, the 2nd respondent claimed that he was given the wrong unit, namely a unit with an open balcony; when he in fact was entitled to a covered balcony. However, from the evidence we found that it was an undisputed fact that the specification for a covered balcony was not a term of the SPA. The 2nd respondent relied on the display model which he alleged carried units with a covered balcony which he identified as the type of unit he wanted to buy from the sales representative.

[26] So, the main dispute here was on the 2nd respondent's entitlement to a covered balcony. As also indicated earlier in this ground of judgment, the Technical Inspection Report which was prepared on the instruction of the President of the Tribunal had come out with the following conclusion which confirms that, as opposed to the 2nd respondent's complaint, the said unit which was delivered to the 2nd respondent was in compliance with the SPA; thus:

"Tiada cadangan teknikal kerana pelan unit rumah yang diserahkan oleh pemaju sama sepertimana pelan dalam perjanjian jual beli dan pelan yang diluluskan oleh pihak berkuasa tempatan."

[27] We had also perused the statement filed by the 2nd respondent with the Tribunal and found there was no mention of him getting a covered balcony claimed in the statement.

[28] Based on the above, it was plain to us that the award delivered by the Tribunal was against the provision of the SPA and also contradicted the finding in the Technical Inspection Report. As the provision of covered balcony was not in the SPA and yet the Tribunal decided to allow the 2nd respondent's claim, the critical issue before us was whether the Tribunal had such jurisdiction to enforce terms which parties admitted were not found in the SPA.

[29] The sale of this unit was obviously a controlled sale as the SPA was governed by the Act. It was indeed a statutory contract under the Act whereby the terms of the SPA as required by reg 11 of the Housing Development (Control & Licencing) Regulations 1989 (the Regulations), incorporate the statutory terms stipulated in Schedule H of the Regulations.

[30] There were abundance of authorities cited by the parties on the issue of jurisdiction of the Tribunal. It would be useful for us to recite them.

[31] In *Re Racal Communications Ltd* (1981) AC 374, Lord Diplock observed:

> "Where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity."

[32] In *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 2 MLRA 584 this Court observed:

> "It is an established principle that a tribunal created by statute has only such powers as are conferred by the statute which creates it... It has no inherent jurisdiction unlike the High Court... It follows that LAM had no jurisdiction to entertain the dispute between the parties. Where a tribunal makes a decision which is outside its jurisdiction it is null and void... The LAM decision is thus in that position and is of no effect."

[33] In *Anisminic v. Foreign Compensation Tribunal* [1969] 2 AC 147 Lord Pearce observed as follows:

> "Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make."

[34] In the later case of *O'Reilly v. Mackman* [1982] 3 All ER 1124 Lord Diplock observed:

> "... if a tribunal... mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination' not being a 'determination' within the meaning of the empowering legislation, was accordingly a nullity."

[35] This Court in *Westcourt Corporation Sdn Bhd lwn. Tribunal Tuntutan Pembeli Rumah* [2004] 1 MLRA 775 *inter alia* held:

> "(1) **The Tribunal has jurisdiction to hear a claim that arose from an agreement** that was entered into before 1 December 2002 and s 16AD is also applicable to an agreement entered into before that date.

(2) The court would concur with the Court of Appeal that **the jurisdiction of the Tribunal is as provided in s 16N(2)** of the Amendment Act. **The provision of the section, and of ss 16N(3) and 16O(1) thereof, show that the Tribunal's jurisdiction is loosely prescribed. This reflects Parliament's intention to provide a simple forum for homebuyers to file their claim**.

(2a) The court would further agree that, under s 16N(2), so long as the claim before the Tribunal concerned a sale and purchase agreement between a homebuyer and a licensed housing developer, and was brought by the homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation or the expiry date of the defects liability period, the Tribunal would have jurisdiction to hear the claim irrespective of the date of the agreement. This interpretation finds support in s 16N(3) of the Amendment Act.

(3) The establishment of the Tribunal is a creation of another forum intended for speed disposal at a minimum cost of a prescribed claim up to the limit of RM25,000 by homebuyer against a licensed housing developer for breach of a sale and purchase agreement entered into between the parties. There is therefore no right of anyone being eroded or removed."

[Emphasis Added]

[36] In the recent judgment of this Court in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2019] 6 MLRA 494 the court endorsed the observations made in the cases of *Sentul Raya* and *Veronica Lee* as follows:

"(38) In the case of *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 1 MLRA 473, Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal said:

"The contract which has fallen for consideration in the present case 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 contact."

(39) The Federal Court in *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 2 MLRA 408, reiterated the object of the Act by making the following observations:

"[3] Now, cl 23 is part of a statute-based contract. In this country, the relationship between a house buyer and 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."

[37] What can be deduced from the above authorities is that, the Tribunal like the one herein, being a creature of statute, can only act within the four walls of the statute. For the purpose of the Act, although the jurisdiction of the Tribunal is set out in s 16M, it is subject to s 16N which talks about limitation of jurisdiction and s 160 which talks about extension of jurisdiction subject to agreement. For the purpose of the appeal, we are concerned with limitation of jurisdiction of the Tribunal under s 16N.

[38] Subsection 16N(2) of the Act provides that the Tribunal's jurisdiction shall be limited to a claim based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the housing developer.

[39] Learned counsel for the appellant urged us to compare the provision of the Act with the one under the Consumer Protection Act 1999 (Act 599) which we did. Especially we compared subsection 16N(2) of the Act with subsection 99(2) of the Act 599. Just like the Act, Act 599 is also a social legislation. If the Act is meant for the protection of homebuyer, Act 599 is meant for protection of consumers. Subsection 99(2) of Act 599 provides that: "the jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action which accrues within three years of the claim."

[40] Upon comparing, it is clear to us that although both subsection 16N(2) of the Act and subsection 99(2) of Act 599 set the time frame for a claim to be made, the jurisdiction of the Tribunal under Act 599 is very wide and general and not limited to the purchase agreement or its terms Whereas under the Act, the jurisdiction of the Tribunal is confined to the SPA. There has to be a SPA for a claim or complaint to be made under the Act. The SPA is a condition precedent for the Tribunal's jurisdiction.

[41] In *Southville City Sdn Bhd v. Chua Teck Kee & Anor* [2019] MLRHU 957, the High Court observed and we agreed:

> "The court also refers to s 16N(2) of the Housing Development (Control and Licensing) Act 1966 where it states that the jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered between the homebuyer and the housing developer. **The jurisdiction of the Tribunal is only confined to the four corners of the SPA and does not include any purported agreement nor conduct outside the SPA**."
>
> [Emphasis Added]

[42] Hence we found the Tribunal was wrong when it varied the content of specifications under the SPA entered into between the appellant and the 2nd respondent using paragraph (e) of subsection 16Y(2). The power under s 16Y(2)(e) is in our view, a power of rectification to comply with the statutory terms provided in the Schedule. As such, we agreed with learned counsel for the appellant that the Tribunal would have no power to rectify the SPA by the

addition or exclusion of terms inconsistent with the statutory terms provided in either Schedule G or H of the Regulations. The power of the Tribunal to vary or set aside the contract wholly or in part under s 16Y(2)(e) of the Act is only when there is a clause in the SPA which is inconsistent with the statutory terms of the Schedule.

[43] In *Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor* [2016] 2 MLRA 447, the Court of Appeal, in rejecting the recognition of collateral contracts, held:

> "(41) The SPA between the respondents and the appellant, who is a housing developer, is governed by a statutory form of contract As such, the provisions in the SPA are not merely contractual, but are in effect statutory provisions, as they are actually provisions of Schedule H of the regulations, which have been imposed by law upon the parties.
>
> (42) There appears to be no evidential or **legal basis to justify the existence of representations or assurances that sit alongside this statutory form SPA**, and which are binding on the parties, as the learned judge found."
>
> [Emphasis Added]

[44] We agree with the decision of *Encony (supra)*. We were of the view that the Tribunal had no jurisdiction over matters following outside the SPA in the form of collateral contracts, representations or warranties.

[45] In this appeal, we opined the Tribunal was wrong in taking into consideration the display model instead of the SPA.

[46] To conclude on Questions 1 and 2, we were of the considered view that based on s 16 of the Act, the Tribunal did not have jurisdiction to entertain the 2nd respondent's complaint on this covered balcony issue, which was not based on the SPA.

[47] We also agreed with learned counsel for the appellant that the power conferred upon the Tribunal under s 16Y(2)(e) to vary or to set aside the contract must be in compliance with the terms of the SPA and the power to vary and set aside can only be exercised in situation where there is inconsistency with Schedule H of the Regulations.

[48] We therefore, answered Question 1 in the affirmative and the first part of Question 2 in the negative.

(ii) Question 3

[49] This concerned the estoppel issue. As alluded to earlier, the 2nd respondent had taken possession of the said unit after inspection and subsequently renovated it.

[50] In *Sim Chio Huat v. Wong Ted Fui* [1982] 1 MLRA 379, this Court held that the conduct of the owner in accepting late delivery of the houses and

subsequently ordering extra work to be done by the developer on each of the houses amounted to a waiver of his right to rescind the agreement. He is deemed to have elected the agreement as still continuing. Salleh Abas FJ (as His Lordship then was) observed as follows:

> "In this case obviously he did not choose to treat the agreement as having been repudiated. By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to rescind the agreement on account of repudiation and also the right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing."

[51] In *TTDI Jaya Sdn Bhd v. Yew Hong Teng & Anor* [2017] 1 MLRA 143, it was held that the homebuyers were estopped from claiming rescission due to total failure of consideration for delay and defects after they had accepted vacant possession. The homebuyers continued to pay their housing loan and all other outgoings subsequent to accepting vacant possession and thus they were estopped by virtue of their conduct. It was held that if it was true that there was a total failure of consideration, a reasonable purchaser would have rejected the property at the outset and exerted his rights.

[52] In *Cheah Theam Kheng v. City Centre Sdn Bhd & Other Appeals* [2012] 2 MLRA 125 the Court of Appeal quoted with approval the English case of *Express Newspapers plc v. News (UK) Ltd And Others* [1990] 3 All ER 376 as follows:

> "In the words of Sir Nocolas Browne-Wilkinson VC in *Express Newspapers pic v. News (UK) Ltd and others* [1990] 3 All ER 376, at pp 383-384:
>
> > There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. **A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance**."
>
> [Emphasis Added]

[53] In our view, the 2nd respondent cannot be allowed to, on one hand say that he got the wrong unit but on the other hand accept delivery of vacant possession and renovate it. That is to approbate and reprobate the transaction. When he did the inspection during the delivery of vacant possession, the second defendant would obviously have noticed that the said unit did not carry a covered balcony; and yet he accepted it and carried on with renovation of the said unit. We were of the view that the Tribunal was wrong when it failed to appreciate that the 2nd respondent had affirmed the contract as it stood on its terms which did not have a term for a covered balcony, when the 2nd respondent accepted delivery and renovated the said unit.

[54] We found there was an estoppel by conduct on the part of the 2nd respondent when he signed and accepted the vacant possession of the said unit and exercised his right to ownership by renovating the unit.

[55] We therefore answered Question 3 in the negative.

(iii) Question 4

[56] This issue arose as it was the appellant's contention that they were not given opportunity to be heard at the hearing before the Tribunal as they were only allotted 15 minutes to respond to the 2nd respondent's allegations which according to the appellant were brought up for the first time at the hearing.

[57] We had perused the Appeal Records. From the evidence shown, we agreed with the 2nd respondent that the appellant was fully aware of the allegation of changes in the pages of the SPA prior to the hearing on 7 June 2018. On 15 May 2018 the 2nd respondent informed the Tribunal that the SPA he signed and the stamped copy that is being relied on is different. The appellant's representative acknowledged that the person who signed on behalf of the appellant ie Chan Xin Yi, was still working with the company and called her as their witness. Therefore, it was untrue that the appellant did not have prior notice.

[58] Further based on the Statement from claimant dated 24 April 2018 the 2nd respondent had informed the appellant of the unlawful modification of the SPA as follows:

> "UNILATERAL MODIFICATION OF SPA BY DEVELOPER:
>
> SPA was signed on 26 August 2013. It contains zero attachments for the First Schedule. Details were inserted by Developer between 27 August 2013 to 30 December 2013. SPA also contains multiple cancellations, renumbering and date change (31 Dec 2013) was not endorsed by claimant. (Original copy of SPA & Deed of Mutual Covenant available)."

[59] The appellant had responded to the allegation sent to the Tribunal amongst others, that "there is no 'fundamental error'". Further, the 2nd respondent had on 4 May 2018 informed the Tribunal and the appellant that 25 of the 26 pages of the original SPA signed on 26 August 2021 were replaced. The notes of proceedings show:

> "(b) Upon investigation, owner noted that the fundamental mistake of delivering the wrong unit was concealed by Developer and/or SPA law firm removing and replacing 25 out of 26 pages of the original SPA signed on 26 August 2013. 7 additional pages were inserted without owner's consent to the benefit of the developer at the expense of owner (eg: Island kitchen removed, plot area reduced). The fraudulently amended SPA was later given a new date, 30 December 2013 and was sent to the respective ministries for endorsement and legalisation.

(a) Developer did not deny that the SPA was swapped and the official display model was inaccurate."

[60] The appellant had responded to the claimant's letter dated 4 May 2018 as follows:

"The respondent categorically deny and refute all allegations made by the claimant in the claimant's letter dated 4 May 2018. It is hereby specifically denied and refuted that "Developer did not deny that the SPA was swapped and the official display model was inaccurate". The respondent maintains that there is no "fundamental error" as alleged by the claimant and that the parcel unit in question has been completed and delivered to the parcel owner in accordance with the provisions of the relevant Sale and Purchase Agreement. The respondent reiterates that there was never any misrepresentation nor was the claimant at any point in time misled or induced to enter into the Sale and Purchase Agreement for the parcel unit in question, namely 11a-3402."

[61] Therefore, it was evidenced that the appellant was fully aware of the allegation of unilateral modification of the SPA about 2 months before the hearing on 7 June 2018 and had responded in writing prior to the hearing on 7 June 2018.

[62] Hence, we agreed with the 2nd respondent that there was no element of surprise here. We found there was no breach of natural justice and that the appellant was given ample opportunity before the final hearing, before the Tribunal, to check on the documents.

[63] We therefore answered Question 4 in the negative.

Conclusion

[64] For the reasons alluded to above, we unanimously allowed the appeal. We found the decision of the Tribunal was irrational and unreasonable, that no sensible person who had applied the mind to the issue to be decided could have arrived at it. The decision was also tainted with illegality.

[65] The appeal was therefore allowed with costs of RM30,000.00 subject to allocatur fee. We set aside the decision below and the award of the Tribunal.

Country Garden Danga Bay Sdn Bhd
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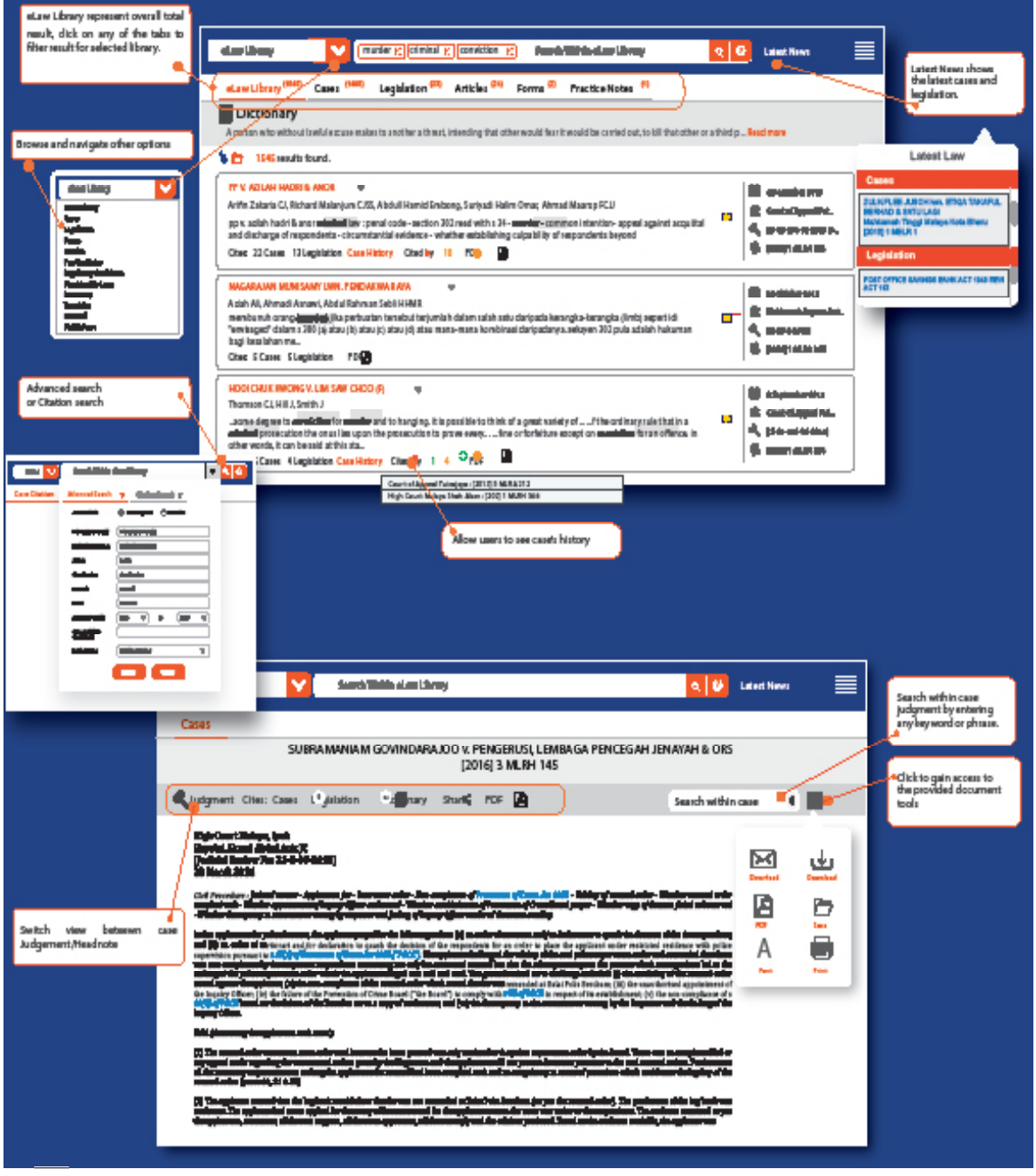

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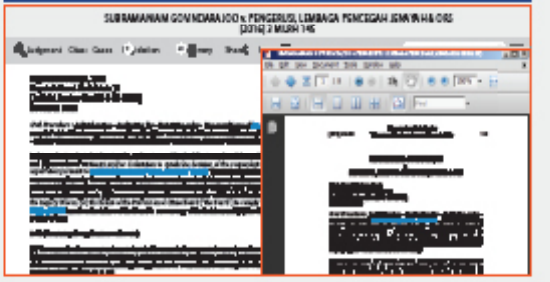

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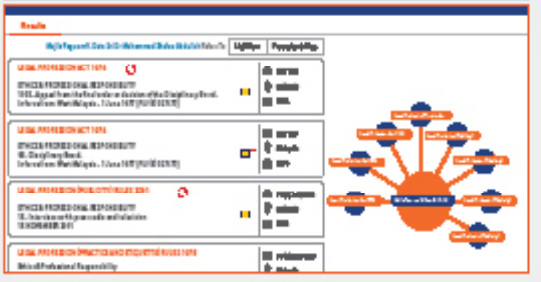

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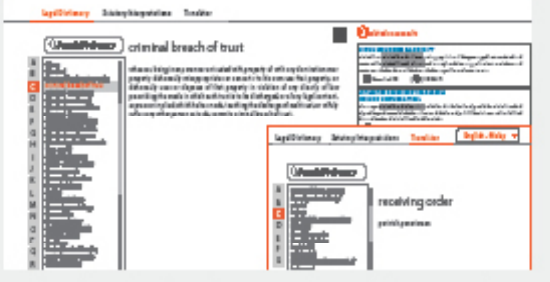

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