MAYLAND UNIVERSAL SDN BHD
v.
KONG AIK WENG & ORS

Court of Appeal, Putrajaya
Lim Chong Fong, Choo Kah Sing, Lim Hock Leng JJCA
[Civil Appeal No: W-02(NCvC)(A)-26-01-2025]
29 August 2026

Contract: *Breach — Sale and purchase agreement — Delivery of vacant possession within stipulated time but without accompanying separate strata title — Appeal against High Court's decision allowing respondents' claim for liquidated damages on basis that vacant possession delivered without separate strata title was incomplete and defective — Whether High Court erred in conflating manner of delivery of vacant possession with time of delivery of vacant possession — Whether delivery of vacant possession without separate strata title constituted breach of clause on time for delivery of vacant possession entitling respondents to claim liquidated damages — Whether breach if any, related only to manner of delivery of vacant possession and compensable under s 74 Contracts Act 1950 — Whether award of liquidated damages would unjustly enrich respondents*

The appellant was the developer of a service apartment known as 'Residensi Dorsett Sri Hartamas'. The respondents were purchasers of units in that development and had respectively entered into sale and purchase agreements ("SPA") governed by the Housing Development (Control and Licensing) Act 1966 and Schedule H of the Housing Development (Control and Licensing) Regulations 1989. Clause 25(1) of the SPAs required the appellant to deliver vacant possession within 36 months from the date of the SPAs, failing which liquidated damages were payable under cl 25(2). Clause 27(1) prescribed the manner of delivery, including issuance of the separate strata title by the appropriate authority, and cl 28(1) permitted the appellant, notwithstanding cl 27(1)(b), to obtain the Controller's written certification to deliver vacant possession within the time stipulated for the handing over of vacant possession under cl 25(1) if the separate strata title was not issued for any reason not attributable to the appellant. In or around August 2018 the appellant applied to the Controller for such certification, and on 25 January 2019 the Controller granted conditional approval permitting delivery of vacant possession of the respondents' units without the strata titles. Between March and June 2019, vacant possession was delivered to the respondents within the stipulated 36-month period, although the separate strata titles had not by then been issued and the Controller's certification was not furnished with the delivery. The respondents commenced the instant action vide originating summons claiming liquidated damages under cl 25(2) of the SPA, contending *inter alia* that notwithstanding them taking physical possession before the expiry of the

36 months' timeframe, such physical possession did not constitute 'delivery of vacant possession' as stipulated in cl 25(1) as the separate strata title for the respective units had not been issued nor was the delivery accompanied by the Controller's written certification, and therefore the delivery of vacant possession was bad and defective, and the appellant was liable to pay liquidated damages. The High Court found in favour of the respondents and held that the vacant possession delivered by the appellant was incomplete and defective and that the respondents were entitled to liquidated damages pursuant to cl 25(2) of the SPA. Hence the instant appeal. The issues before the Court of Appeal were whether the High Court had erred in conflating the manner of delivery of vacant possession with the time of delivery of vacant possession; whether delivery of vacant possession without the separate strata title constituted a breach of cl 25 of the SPA; and whether an award of liquidated damages on the facts would unjustly enrich the respondents.

Held (allowing the appellant's appeal and setting aside the High Court's order):

(1) The High Court had erred in law by conflating the manner of delivery of vacant possession with the time of delivery of vacant possession. As was held by the Federal Court in *Remeggious Krishnan v. SKS Southern Sdn Bhd*, 'the time frame for delivery of vacant possession is quite separate from the manner of delivery of vacant possession'; and that a breach in the manner of delivery of vacant possession could not trigger a claim for liquidated damages for late delivery of vacant possession. (paras 11 & 27)

(2) The breach, if any, in this instance, related to the manner of delivery of vacant possession, *vis-à-vis* a breach of cl 27(1)(b) of the SPA, and not a breach of cl 25(1) of the SPA i.e. the stipulated time frame for delivery of vacant possession. A breach of cl 27(1)(b) of the SPA could not tantamount to a breach within cl 25 of the SPA, and as such, a purchaser could not claim liquidated damages under cl 25(2) of the SPA for such a breach. Where the manner of delivery was defective, compensatory damages could be claimed, subject to proof of actual loss. The respondents could instead rely on s 74 of the Contracts Act 1950 ("CA 1950") to seek compensation for any loss caused to them which naturally arose in the usual course of things from the appellant's breach of obligation to obtain the strata titles. (paras 13, 15, 16, 27 & 28)

(3) The appellant, having complied with and satisfied the manner of delivery of vacant possession within cl 27 of the SPA, thus, had resolved the shortcoming of not being able to deliver the separate strata title at the time of delivering vacant possession, and had fulfilled its contractual obligations within the meaning of cls 25(1) and 27(1) through the saving provision in cl 28(1) of the SPA. The failure to accompany the delivery of vacant possession with the Controller's certification at the time of delivery of vacant possession could not trigger a breach under cl 25(1) or cl 27(1)

of the SPA. At most, there was a trivial breach of cl 28(1) and the failure to comply with the Controller's certification with the delivery of vacant possession did not warrant the imposition of a penalty clause within the SPA. That trivial breach could be compensated with compensatory damages, not compensation in the form of liquidated damages within cl 25(2) of the SPA. (paras 17, 18, 19, 20, 26 & 30)

(4) A distinction had to be made between compensation for loss or damage caused by breach of contract within the meaning of s 74 of the CA 1950 and compensation for breach of contract where penalty was stipulated for within the meaning of s 75 of the CA 1950. In this regard, the breach, if any, would fall within the ambit of s 74 of the CA 1950. (para 29)

(5) In the circumstances, the High Court had erred in allowing the respondents' claim for liquidated damages under cl 25(2) of the SPA. Compensation, if allowed within the aforesaid clause, would be tantamount to unjustly enriching the respondents and ignoring the true purpose of cl 25(1) of the SPA, contrary to the legal principles enunciated in *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals*. (paras 21, 22, 23 & 31)

Case(s) referred to:

Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals [2024] 6 MLRA 1 (folld)

Remeggious Krishnan v. SKS Southern Sdn Bhd [2023] 3 MLRA 386 (folld)

Legislation referred to:

Contracts Act 1950, ss 74, 75

Housing Development (Control and Licensing) Regulations 1989, Schedule H

Counsel:

For the appellant: David Ng Yew Kiat (Ananthan Moorthi with him); M/s Steven Thiru & Sudhar Partnership

For the respondents: Teo Kui Cheng; M/s Ng Teo Phin Chambers

[For the High Court judgment, please refer to *Kong Aik Weng & Ors v. Mayland Universal Sdn Bhd* [2025] MLRHU 85]

JUDGMENT

Choo Kah Sing JCA:

Introduction

[1] This is an appeal filed by Mayland Universal Sdn Bhd, the defendant in the court below, against the decision of the High Court dated 5 December 2024 which decided that the respondents were entitled to claim liquidated damages to be calculated until the issuance of separate strata titles.

[2] This Court, after having considered the respective parties' counsels' submissions, unanimously decided to reverse and set aside the decision and order of the High Court. The reasons for the decision of this Court are as set out below.

Salient Background Facts

[3] The appellant is the developer of a service apartment in a development known as "Residensi Dorsett Sri Hartamas". The respondents are the respective purchasers of the service apartment units in the development. The appellant, as the vendor, and the respondents, as the purchasers, had respectively entered into a Sale and Purchase Agreement (hereafter "the SPA"). The respective SPAs were governed under the Housing Development (Control and Licensing) Act 1966 and Schedule H of the Housing Development (Control and Licensing) Regulations 1989.

[4] The contractual time frame for delivery of vacant possession of the respective respondents' units was thirty-six (36) months from the respective dates of the SPAs. This is stated in cl 25 of the SPA, which is reproduced below:

> "Time for delivery of vacant possession
>
> 25. (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in cl 27 within thirty *[sic]* (36) months from the date of this Agreement.
>
> (2) If the Developer fails to deliver vacant possession of the said Parcel in the manner stipulated in cl 27 within the period stipulated in cl (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 the Purchaser takes vacant possession of the said Parcel.
>
> (3) The Developer shall pay any liquidated damages referred to in cl (2) to the Purchaser immediately after the Developer has given notice requesting the Purchaser to take possession of the said Parcel in the manner stipulated in cl 27, failing which the Purchaser shall be entitled to deduct such liquidated damages from any instalment of the purchase price due to the Developer.
>
> (4) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel."

[5] It is not in dispute that the respective respondents had received their keys to their respective units, *vis-à-vis* the respondents had taken physical possession of their service apartment units, within the time frame of and before the expiration of thirty-six (36) months calculated from the date of the respective SPAs to the date of physical possession.

[6] Although the respondents had taken physical possession of their respective units before the expiration of thirty-six (36) months calculated from the date of the SPAs, the respondents contended that taking physical possession did not constitute "delivery of vacant possession" as stipulated in cl 25(1) of the SPAs. The delivery of vacant possession must be in the manner as stipulated in cl 27 of the SPAs. Clause 27 states as follows:

> "Manner of delivery of vacant possession
>
> 27(1) The Developer shall let the Purchaser into possession of the said Parcel upon the following:
>
> (a) The issuance of a certificate of completion and compliance;
>
> (b) The separate strata title relating to the said Parcel has been issued by the Appropriate Authority;
>
> (c) Water and electricity supply are ready for connection to the said Parcel;
>
> (d) The Purchaser having paid all monies payable under cl (5) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement; and
>
> (e) The completion of any alteration or additional work under cl 15(2), if any.
>
> (2) The delivery of vacant possession by the Developer shall be supported by a certificate of completion and compliance and includes the handing over of the keys of the Parcel to the Purchaser.
>
> (3) Upon the expiry of thirty (30) days from the date of service of notice from the Developer requesting the Purchaser to take possession of the said Parcel, whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession."

[7] The respondents contended that at the time of taking physical possession of their respective units, the separate strata title relating to their respective units had not been issued by the Appropriate Authority. Hence, there was no delivery of vacant possession until the strata title was delivered to the respondents. The delivery of vacant possession was bad and defective, the respondents averred. Hence, the respondents contended that they were entitled to claim, and the appellant was liable to pay, liquidated damages as per cl 25(2) of the SPA.

[8] The High Court held that vacant possession delivered by the appellant was incomplete and defective as it was not accompanied by strata titles or the Controller's written certification under cl 28 of the SPA. Hence, the High Court further held that the respondents were entitled to compensation for liquidated damages as per cl 25(2) of the SPA.

[9] The appellant contends that the High Court erred in law and fact by conflating the time of delivery with the manner of delivery, thereby wrongly granting liquidated damages.

Findings And Analysis Of This Court

[10] This Court is of the considered view that the core question to be determined is whether the High Court erred in conflating the manner of delivery with the time of delivery of vacant possession. To deal with the core question, it is prudent to ask whether vacant possession delivered without strata title constitutes a breach of cl 25 of the SPA. The delivery of vacant possession without the strata title goes to the manner of delivery. The question is whether the vacant possession without the strata title would trigger the application of cl 25(2), providing for compensation for late delivery of vacant possession.

[11] This Court seeks reliance on the decision of the Federal Court in *Remeggious Krishnan v. SKS Southern Sdn Bhd* [2023] 3 MLRA 386, wherein it held that "the time frame for delivery of vacant possession is quite separate from the manner of delivery of vacant possession". It further held that a breach in the manner of delivery of vacant possession could not trigger a claim for liquidated damages for late delivery of vacant possession. At the highest, a claim for compensatory damages for breach of the manner of delivery would be permitted.

[12] The respondents' counsel also relied on *Remeggious* in his submission. However, this Court is of the considered view that the respondents' counsel's reliance on the apex court decision is misplaced. In *Remeggious*, the purchasers there were deprived of utilities (water and electricity supply to the parcels), which thus deprived the purchasers of the enjoyment of the property. Hence, the Federal Court awarded compensatory damages quantified by analogy to liquidated damages. In comparison, in the present case, the respondents had enjoyed full use of their properties, and there was no deprivation that had occurred.

[13] In the instant case, it is not in dispute that vacant possession was in fact delivered within the stipulated time, i.e., within thirty-six (36) months. The contention was that the separate strata titles for the respective units were not issued by the appropriate authority at the time of delivery of vacant possession. This clearly did not comply with cl 27(1)(b) of the SPA. Hence, the breach, if any, was clearly relating to the manner of delivery of vacant possession, *vis-à-vis* a breach of cl 27(1)(b) of the SPA, not a breach of cl 25(1) of the SPA, i.e., the stipulated time frame for delivery of vacant possession.

[14] Notwithstanding that there was a breach of cl 27(1)(b) of the SPA, Parliament has provided a saving provision in cl 28 to insulate the vendor/ developer from being sued for late delivery of vacant possession as a result of a breach in the manner of delivery of vacant possession. Parliament has

segregated a liquidated damages claim for late delivery of vacant possession, i.e., the stipulated time frame of thirty-six (36) months, from compensatory damages claim for a breach of the manner of delivery of vacant possession. Clause 28 of the SPA states as follows:

> "28. (1) Notwithstanding para 27(1)(b), if the separate strata title to the said Parcel is not issued for any reason not attributable to the Developer, then the Developer may apply to the Controller for a certification in writing to deliver the vacant possession of the said Parcel within the time stipulated for the handing over of vacant possession under cl 25(1) and in the manner stipulated in cl 27. The delivery of vacant possession of the said Parcel to the Purchaser pursuant to this clause shall be accompanied with a copy of the written certification issued by the Controller.
>
> (2) Upon the issuance of the separate strata title to the said Parcel, the Developer shall, at no additional cost and expense to the Purchaser, execute or cause the Proprietor to execute and deliver a valid and registrable instrument of transfer of the said Parcel to the Purchaser or the Purchaser's solicitor together with a separate strata title to be presented for registration in favour of the Purchaser.
>
> (3) When the document of separate strata title to the said Parcel has been registered in the name of the Purchaser, the Developer shall hand over to the Purchaser the original issue document of separate strata title registered in the name of the Purchaser within thirty (30) days from the date of registration thereof.
>
> (4) If the Developer fails to comply with cl (3), the Developer shall be liable to pay to the Purchaser liquidated damages calculated at the same rate as for delay in rendering vacant possession of the said Parcel to the Purchaser under cl 25(2)."

[15] Within cl 28 itself, Parliament has provided a compensatory clause for a purchaser to claim against the developer in the event the developer fails to hand over the original issue document of separate strata title within thirty (30) days upon registration of the purchaser's name. This provision is illuminating in that Parliament has anticipated a situation where physical handing over of vacant possession within the stipulated time is permitted without having to comply with cl 27(1)(b) of the SPA. A purchaser can seek compensatory damages within cl 28(4) of the SPA in the event there is a delay in handing over the issued separate strata title by the developer/vendor. Therefore, a breach of cl 27(1)(b) of the SPA could not be tantamount to a breach within cl 25 of the SPA; as such, a purchaser could not claim liquidated damages under cl 25(2) of the SPA.

[16] This Court is of the considered view that if the respondents intend to make a claim against the appellant with respect to breach of obligations to obtain the strata titles, the respondents could rely on s 74 of the Contracts Act 1950 to seek compensation for any loss caused to the respondents which naturally arose in

the usual course of things from the breach. In this instant case, a breach under cl 27(1)(b) of the SPA does not amount to a breach under cl 25(1) of the SPA which triggers liquidated damages under s 75 of the Contracts Act 1950, i.e., compensation for breach of contract where penalty stipulated for.

[17] It is not in dispute that sometime around August 2018, the appellant applied to the Controller for a certification to deliver the vacant possession of the units/parcels as per the time stipulated for the handing over of vacant possession under cl 25(1) and in the manner as stipulated in cl 27 of the SPA. On 25 January 2019, the Controller granted conditional approval to the appellant and permitted the appellant to proceed with the delivery of vacant possession of the respondents' units and other units as well. In other words, the appellant had complied with and satisfied the stipulated time frame to deliver vacant possession within the meaning of cl 25(1) as well as satisfied the manner of delivery of vacant possession within cl 27 of the SPA. Thus, the appellant had resolved the shortcoming of not being able to deliver the separate strata title at the time of delivering vacant possession, and had fulfilled its contractual obligations within the meaning of cls 25(1) and 27(1) through the saving provision in cl 28(1) of the SPA. Hence, the appellant was not in breach of cl 27(1)(b) of the SPA.

[18] The respondents' counsel submitted that the second part of cl 28(1) requires the appellant to accompany the delivery of vacant possession with a copy of the written certification issued by the Controller at the time of delivery of vacant possession, but the appellant failed to do so. Therefore, the stipulated time frame for delivery of vacant possession remained at large, despite the physical handing over of vacant possession of the units.

[19] This Court is of the considered view that the failure to accompany the delivery of vacant possession with the Controller's certification at the time of delivery of vacant possession could not trigger a breach under cl 25(1) or cl 27(1) of the SPA. At most, there was a trivial breach of cl 28(1) of the SPA. The failure to accompany the Controller's certification with the delivery of vacant possession did not warrant the imposition of a penalty clause within the SPA. The respondents' counsel is misconceived regarding the difference between a breach that warrants compensation for loss or damage as a result of the breach (within s 74 of the Contracts Act 1950) and a breach where compensation is by way of penalty stipulated for the breach (within s 75 of the Contracts Act 1950).

[20] The respondents' counsel also raised the issue that the Controller's certification was a conditional one, and the certification was valid until 26 July 2020, *vis-à-vis* the anticipated date that the separate strata titles would be issued and delivered to the respondents. This Court is of the considered view that although the certification imposed a validity date, that could not negate the fact that the appellant had fulfilled the requirement of cl 28(1) of the SPA, i.e. to obtain the Controller's certification/approval. The appellant's counsel

explained that several amendments to the plans of the strata title scheme and multiple rejections from the authorities over the applications had resulted in unavertable delays to the application for the separate strata titles. Further, there was an amendment to the Certificate of Share Unit Formula (SIFUS), and that process required all purchasers to give their consent to the amendment. That process had added to the delay.

[21] This Court, after having scrutinized the relevant clauses in the SPA, finds that the High Court Judge has erred in allowing the respondents' claim for liquidated damages under cl 25(2) of the SPA. The compensation stipulated as liquidated damages in cl 25(2) of the SPA is meant for compensating a purchaser by way of monetary compensation for being deprived of the enjoyment and possession of a property which he has paid for in return for a developer's promise to deliver the property on such stipulated time. This is the reason for the provision to be incorporated in the Schedule H Sale and Purchase Agreement.

[22] In the present case, the appellant did deliver vacant possession of the units to the respondents within the stipulated time. The respondents accepted delivery of vacant possession. The respondents enjoyed the use and possession of the properties that they had purchased. A mere technical non-compliance, i.e., failure to accompany a copy of the Controller's certificate/approval with the delivery of vacant possession, could not reasonably justify compensation within cl 25(2) of the SPA. Surely, that could not have been the intention of Parliament.

[23] If compensation is allowed within cl 25(2) of the SPA on these peculiar facts, it would be tantamount to unjustly enriching the respondents and ignoring the true purpose of cl 25(1) of the SPA. The respondents suffered no real loss, but are riding on the appellant's trivial breach to spin the yarn in the hope of enriching themselves contractually. In *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals* [2024] 6 MLRA 1, the apex court refused liquidated damages where its operation would unjustly enrich purchasers. In a similar vein, the respondents here ought not to be compensated with liquidated damages, which would unjustly enrich the respondents.

Summary

[24] In summary, this Court finds that it is a clear and undisputed fact that the respondents accepted vacant possession that was delivered between March and June 2019, which was within the contractual thirty-six (36) months period as stipulated in cl 25(1) of the SPA.

[25] The Controller had granted a conditional approval permitting delivery of vacant possession without strata titles on 25 January 2019, which was before the physical delivery of vacant possession. The respondents took delivery of physical possession and have occupied their units since 2019.

[26] Although the Controller's certification/approval was not accompanied by the delivery of vacant possession, that trivial breach could be compensated with compensatory damages, not compensation in the form of liquidated damages within cl 25(2) of the SPA.

[27] The compensation for liquidated damages within cl 25(2) was not envisaged to apply in these peculiar facts for the reason that the breach, if any, did not go to the time for delivery of vacant possession, but only the manner of delivery of vacant possession. The High Court erred in law by conflating the manner of delivery with the time of delivery. The respondents' complaint relates to the absence of strata titles and the non-attachment of the conditional approval letter; these were matters of manner of delivery, not the time of delivery.

[28] The Federal Court in *Remeggious* is binding in that liquidated damages in cl 25(2) of the SPA only compensates for late delivery in time, not a defective manner of delivery. Where the manner of delivery is defective, compensatory damages may be claimed, subject to proof of actual loss. The respondents adduced no evidence of loss. On the contrary, they have enjoyed occupation since 2019.

[29] A distinction has to be made between compensation for loss or damage caused by breach of contract within the meaning of s 74 of the Contracts Act 1950 and compensation for breach of contract where penalty is stipulated for within the meaning of s 75 of the Contracts Act 1950. The breach here, if any, falls within the ambit of s 74 of the Contracts Act 1950.

[30] The expiry of the conditional Controller's certification/approval could not vitiate the fact that cl 28(1) of the SPA had been complied with by the appellant at the material time of delivery of vacant possession. The appellant did obtain the Controller's certification/approval before delivery of vacant possession.

[31] The High Court's declaration that the respondents were entitled to liquidated damages would result in unjust enrichment which is contrary to the legal principles enunciated in the apex court decision in *Obata-Ambak*.

[32] Although Schedule H of the Sale and Purchase Agreement is provided under a social legislation, this Court opines that the statutory agreement must be interpreted to strike a balance between protecting the interest of a purchaser on one hand and fairness to a developer on the other hand. Compensation for liquidated damages in cl 25(2) of the SPA must be read and understood within the confines of late delivery in time, not in the manner. Extending liquidated damages to defects in the manner of delivery would distort its purpose and go against the principle prohibiting unjust enrichment.

Conclusion

[33] For the above stated reasons, this Court finds the appellant's appeal has merit and warranted an interference from this Court to set aside the High Court Order dated 5 December 2024. This Court further ordered costs of RM30,000.00 to the appellant (subject to allocatur).