



The Aftershocks in the Housing Development Industry In Malaysia - The Ang Ming Lee Effect!

In November 2019, the Federal Court's decision in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor* and other appeals (**AML**) upended the housing development industry. Overnight, housing developers were potentially liable for monumental Liquidated Ascertained Damages (**LAD**) claims. The Federal Court held that the Controller of Housing (**Controller**)'s power under Regulation 11(3) of the Housing Development Regulations 1989 (**HDR**) was ultra vires of the Housing Development Act 1966 (**HDA**).

Subsequently, in *UE E&C Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor* and another appeal, the Court of Appeal further expounded on the principles of AML. The developer attempted to distinguish AML on the fact that the extension of time to deliver vacant possession was obtained before the sale and purchase agreements (**SPA**) were executed.

The Court of Appeal dismissed the developer's argument and held that whether the approval for the extension of time was obtained before the SPAs were executed was irrelevant as the Controller has no power to waive and modify the terms of the SPA in the first place. The SPA was thus void for illegality and parties were entitled to be restored back to the position as if the SPAs were not entered into. This case had been affirmed in the Federal Court after the application for leave to appeal was dismissed.

Are housing developers now left with no alternative but to bite the bullet? That might not be the case as recent Court of Appeal cases appear to provide some leeway.

Only the Minister allowed to grant extension

In *BluDream City Development Sdn Bhd v Kong Thye & 184 Ors* and 5 other appeals (**Bludream**), the purchasers relied on AML and filed a judicial review against the decision of the Minister in granting an extension of time. The purchasers' judicial review was allowed in the High Court and the developer appealed.

The Court of Appeal distinguished the case of AML and held that the Federal Court's decision dealt with the Controller's power under Regulation 11(3) of the HDR and not the Minister's power under section 24 of the HDA to regulate and prohibit the conditions and terms of the SPA. The Minister retains the power to grant an extension of time for the developer to complete the units.

Limitation period starts from date of Agreement

Further, in *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd* and another appeal (**Obata**), AML was once again distinguished.

In *Obata*, the purchaser relied on AML and sought for LAD. The Court of Appeal dismissed the claim on the basis that it was time-barred.

A legal action to enforce one's rights must be commenced within a certain period. This period is known as limitation period. In Malaysia, limitation period to commence an action for breach of an agreement is six years.

The SPA was executed in 2012. Vacant possession was delivered in 2017 but the purchaser's action was only commenced in 2020.

Upon a careful examination of the purchaser's claim, the Court of Appeal held that the purchaser's claim was in fact a claim for breach of contract as it was premised on the validity of the amended clauses in the SPA pursuant to the extension of time granted by the Controller. The purchaser's claim was not simply a claim for LAD. Thus, limitation period starts to run at the date of execution of the SPA in 2012. The purchaser's claim was time-barred as the suit was filed in 2020.

The two aforementioned cases are currently pending appeal at the Federal Court. However, these cases may provide some leeway for developers to distinguish AML currently. Crucially, Bludream may allow developers to apply for an extension of time so long as it is approved and signed by the Minister instead of the Controller. Ultimately, a balance must be sought between protecting the rights of purchasers as intended by AML and the rights of the developers, especially where there are cogent reasons for an extension of time.

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