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Power To Grant An Extension Of Time For The Developer

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In the landscape of housing developments, the granting of an extension of time (EOT) to deliver vacant possession (VP) – which is essentially a modification to the prescribed schedules of the Sale and Purchase Agreement (SPA) under the Housing Development Act (Control and Licensing) Act 1966 (HDA) – has been an issue frequently debated since *Ang Ming Lee & ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan* [2020] 1 MLJ 281.

The Federal Court in *Ang Ming Lee* held that the extension of time granted by the Controller had been invalid and that the Minister cannot delegate his powers under the HDA. This decision had caused quite a stir amongst the general public, and many had opined that any extension of time given to deliver VP would therefore not be in accordance with the HDA.

The Court of Appeal recently clarified some aspects of this area of the law in *Bludream City Development Sdn Bhd v Kong Thye & Ors* [2022] 2 CLJ 829.

Facts

The crux of this suit lies in the 17 months EOT granted by the Minister to the developer to complete the units for their service apartments. Based on their understanding of the principle of *stare decisis* of *Ang Ming Lee*, the High Court had decided in the purchasers' favor and granted a declaration that they were entitled to their Liquidated Ascertained Damages (LAD) claims due to the alleged late delivery of VP.

The developer appealed, arguing that it was well within the power of the Minister granted under both Section 24(2)(e) of the HAD. This provision empowers the Minister to regulate and prohibit the terms of any contract entered into between the developer and the purchasers. Additionally, Regulation 11(3) of the Housing Development (Control and Licensing) Regulations 1989 (HDR) allows the Minister to 'waive or modify the terms of any contract of sale'. In short, the Minister

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still has statutory powers to grant the EOT even though the Controller could not.

The developer further argued that the Minister had considered all relevant factors before the EOT was granted, one of the main factors being the issuance of the Stop Work Order (SWO) for 17 months, which was eventually uplifted by the Jabatan Kerja Raya. The request for EOT was reasonable as it was borne out of this unforeseeable delay where no work could be done and not because of any other negligence or delays purposely caused by the developer.

Decision

First and foremost, the Court of Appeal clarified that the Federal Court in *Ang Ming Lee* had not concluded that the Minister has no power to "vary and modify" the terms of the prescribed statutory SPA. There was no need for the Federal Court to address this as it was not an issue of contention before them. Rather, it was the Controller who was unable to grant the EOT as the Minister could not delegate such powers to them. The Federal Court held that Regulation 11(3) of the HDR was invalid, not that the Minister cannot grant an EOT on the ground of special circumstances or hardships.

What was expressly stated instead by the Federal Court was that the "*Minister is expected to apply his mind to the matter and not to delegate that responsibility to the controller*."

We must remember that in *Ang Ming Lee*, the Controller had granted the EOT, while in the present case, it was the Minister who had granted the EOT. As a result, *Ang Ming Lee* was distinguished on this basis:

> *"The material facts are poles apart and hence the proposition of law made in one case cannot be transported and transposed into a different factual matrix especially when the decision-maker is different in that he is a Controller there but a Minister here."*

The Court of Appeal went on to elaborate that the expression "regulate and prohibit" under Section 24(2)(e) of the HDA is

"*wide enough to include waive and modify any provisions under Regulation 11(3) of the HDR with respect here to the time period to complete the Units,"* thus reinforcing that the Minister indeed does have the power to grant the EOT for the delivery of VP.

Furthermore, the Minister shoulders a rather heavy responsibility in that before granting the EOT to a developer. The Minister must consider the interests of both the developer and purchaser as well. Pertaining to the facts of this case, if the EOT is not granted, would the developer still be able to complete the project in spite of the SWO, which had been enforced for 17 months?

> *"Whilst the Purchasers may only be able to see parochially through the tainted glass of 'we cannot be deprived of our right to claim for LAD for late delivery, the Minister would have to take the broader view as to whether the Developer would be in a position to complete the project if they are at the same time being saddled with a claim for LAD which worked out to be about 12% of the purchase price of each Unit delayed if there had been no second extension,"*

The Minister must consider that the delay had been due to something beyond the developer's control. Looking at the bigger picture, the EOT to complete the project was of interest to the purchasers.

The Court of Appeal went as far as to consider the hardship suffered by the developer during the SWO period where no work could be done, so no progress certificate of completion could be issued. Ultimately, there was no cash flow. Unfortunately, the developer had to bear continuing costs such as bank loans, maintenance costs, office overheads, and potentially adding exposure to LAD claims by Purchasers because of the delay. The court opined that the EOT that was sought by the developer was reasonable and corresponded to the period of the SWO. This led to the Court of Appeal to rule in favour of the developer on the premise that *"To insist on claiming LAD for the period of extension granted by the Minister and ask the Court to quash the*

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decision of the Minister would cause undue and aggravating hardship to the Developer."

Conclusion

From this case, it is clear that unlike the Controller, the Minister has the statutory powers to grant the EOT if it is requested by a developer to complete their housing development project. There is a heavy emphasis on the responsibility of the Minister to weigh between the interests of both the developer and purchaser in reaching a conclusion regarding the EOT.

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