

11 1 **Southville City Sdn Bhd (formally known as Tristar Acres Sdn Bhd)**

v

25 5 **Noranisah binti Mohamed Hisa & Anor (and Another Application)**

10 10 **High Court, Kuala Lumpur – Application for Judicial Review Nos. WA-25-326-11/2018 and WA-25-348-11/2018**
Nordin Hassan J

15 15 March 25, 2019

20 20 *Administrative law – Remedies – Judicial review – Application to quash second respondent's decision allowing claim for liquidated damages for late delivery of vacant possession and common facilities – Whether liquidated damages ought to be calculated from date of payment of booking fee or from date of sale and purchase agreement – Whether payment made by first respondent upon signing irrevocable offer to purchase, a booking fee or stakeholder sum*

25 25 The applicant in both the instant Judicial Review Application No. WA-25-326-11/2018 and Judicial Review Application No. WA-25-348-11/2018 is the developer of the Savanna Executive Suites, Southville City condominiums ("the project"). The first respondent in the aforesaid applications namely, Noranisah bte Mohamed Hisa ("Noranisah") and Chin Kim Foh ("Chin"), had respectively purchased a condominium unit from the applicant.

35 35 Noranisah did on September 21, 2013 pay a booking fee of RM3,000 to a designated lawyer from Messrs Khairin Nisa & Co ("Messrs Khairin Nisa") and on March 27, 2014, she executed the sale and purchase agreement ("the S&P agreement") for the purchase of parcel No. B1-18-13A. Chin likewise paid the sum of RM3,000 to Messrs Khairin Nisa on September 28, 2013 and thereafter executed a sale and purchase agreement for the purchase of parcel No. B1-21-06 on March 27, 2014. Clause 25(1) of both S&P agreements specifically provided that vacant possession was to be delivered within 48 months from the date of the S&P agreement failing which the applicant would be liable to pay liquidated and ascertained damages ("LAD"). The applicant only completed the project on March 29, 2018 subsequent to which notice of delivery of vacant possession was issued to both Noranisah and Chin both of whom then filed a claim for LAD. The second respondent found in favour of Noranisah and Chin and awarded damages for late delivery of their respective parcel and for the common facilities.

The applicant sought a review of the said decision on the grounds inter alia that the second respondent erred in allowing the claim for LAD as the payment of RM3,000 to Messrs Khairin Nisa was not a booking fee but a stakeholder sum held by Messrs Khairin Nisa as stakeholder; that Messrs Khairin Nisa is not an agent and/or the panel solicitors for the applicant; and that LAD ought to be calculated from the date of the S&P agreement instead of from the date of payment of the booking fee.

Issues

1. Whether Messrs Khairin Nisa was the lawyer acting for or is the agent of the applicant for the project.
2. Whether the payment of RM3,000 was the booking fee or merely a stakeholder sum pending acceptance of the offer to purchase by the applicant.
3. Whether the commencement date for the calculation of LAD begins from the date of the S&P agreement or the date when the booking fee was paid to Messrs Khairin Nisa

Held, dismissing the applications with costs

1. Based on the oral and documentary evidence, the second respondent was correct in finding for a fact that Messrs Khairin Nisa was the lawyer acting for the applicant. The mere fact that the purchasers had signed an irrevocable offer to purchase which inter alia includes a clause stating that they had appointed Messrs Khairin Nisa to represent them to make the irrevocable offer to purchase, does not dislodge the fact that the firm was the panel lawyer for the applicant for the project and was in charge of the sales agreements in relation thereto. [see p 833 paras 14-16]
2. Considering the facts in totality including the fact that Messrs Khairin Nisa was the panel lawyer for the applicant, the RM3,000 that was paid to the firm, clearly was towards the booking fee for the purchase of the property irrespective of the fact that the said sum was never received by the applicant on the payment date. [see p 834 paras 22-23]
3. Notwithstanding the fact that it was expressly stipulated in the S&P agreement that vacant possession was to be made within 48 months from the date of the agreement and that the common facilities are to be completed within the same time frame, following *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* r [1995] 3 AMR 2094, the calculation of LAD begins from the date of payment of the booking fee. In this regard, upon payment of the booking fee, the contract is valid as the consideration and object of the agreement are legal. [see p 834 paras 26-27; p 836 para 32]

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Cases referred to by the court

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah (and Another Appeal)
[2018] 2 AMR 97; [2018] 2 MLJ 537, FC (ref)

Faber Union Sdn Bhd v Chew Nyat Shong & Anor [1995] 3 AMR 2094; [1995] 2 MLJ
597; [1995] 3 CLJ 797, SC (foll)

*Faber Union Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan
dan Kerajaan Tempatan & 9 Ors* [2011] AMEJ 0177; [2011] 7 CLJ 37, HC (ref)

Hoo See Sen v Public Bank Bhd & Anor [1988] 2 MLJ 170, SC (ref)

Kin Nam Development Sdn Bhd v Khau Paw Yan [1984] 1 CLJ 347, FC (foll)

Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd (and Another Appeal) [2018] 5
AMR 349; [2018] MLJU 773, CA (ref)

Lim Eh Fah & 4 Ors v Seri Maju Padu (dituntut sebagai sebuah firma) [2002] 4 AMR
4491; [2002] 7 MLJ 262, HC (ref)

Periasamy s/o Sinnappan & Anor v PP [1996] 2 AMR 2511; [1996] 2 MLJ 557, CA (ref)

Legislation referred to by the court

Malaysia

Housing Development (Control and Licensing) Act 1966

Housing Development (Control and Licensing) Regulations 1989, regs 3(6), 5(4)

Housing Development (Tribunal for Homebuyer Claims) Regulations 2002,
Schedule H

Justin Vonn and John Kan (Justin Voon Chooi & Wing) for applicant

Shieh Chin and Yeoh Yze Hwa (Ismail Sabri Wee & Wong) for first respondent

Tribunal of Homebuyers Claims (Ministry of Housing and Local Government) for
second respondent

Judgment received: June 25, 2019

Nordin Hassan J

Introduction

[1] There are two judicial review applications filed by the same applicant against
the Tribunal of Homebuyers Claims seeking among others for an order of
certiorari to quash the award of the tribunal dated October 12, 2018 and
October 24, 2018.

[2] The application involving house buyer Noranisah binti Mohamed Hisa as
the first respondent is registered under application No. WA-25-326-11/2018
whilst application involving housebuyer Chin Kim Foh as the first respondent is
registered under application No. WA-25-348-11/2018.

[3] Both applications were heard together as the facts and issues involves are the
same which basically in respect of the calculation of the liquidated damages
("LAD") for late delivery of vacant possession of the purchased units.

The salient facts**Application No. WA-25-326-11/2018**

[4] The relevant facts in relation to this case are the following:

- (i) the applicant is a company with its registered address at Penthouse Suite 1, Wisma Mah Sing, No. 163, Jalan Sungai Besi, Kuala Lumpur and the developer of a condominium known as "Savanna Executive Suites", Southville City located at Geran No. 312323, Lot No. 1125, Mukim Dengkil, Daerah Sepang, Selangor ("the project").
- (ii) the first respondent was invited by the applicant's property agent to the show room of the project and was informed by the agent about the incentive scheme offered by the applicant for the purchaser of the project.
- (iii) the said incentive scheme as handed out to potential purchasers are as follows:

Incentive Scheme for Executive Suites:

- Promotional Rebate of 5% from the purchase price;
- Legal fee on Sale and Purchase Agreement (SPA) including disbursement fee is borne by developer;
- Legal fee on Loan Agreement is borne by developer excluding disbursement fee & stamp duty.

Terms & Conditions:

- i) To engage the developer's appointed panel of solicitors only for the preparation agreements;
- ii) To accept the Letter of Offer from the developer's appointed panel of end-financiers only for the purchase of the above mentioned property.
- (iv) On September 21, 2013, the first respondent who has decided to purchase the property paid RM3,000.00 which according to the first respondent as the booking fee to a designated lawyer from Messrs Khairin Nisa & Co at Wisma Mah Sing, Kuala Lumpur.
- (v) The first respondent was then asked to sign an irrevocable offer to purchase addressed to Messrs Khairun Nisa & Co for the purchase of Parcel No. B1-18-13A of the project.
- (vi) The particulars in the irrevocable offer to purchase are inter alia, the following:
- (a) indicative price is RM339,480.00.

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- 1 (b) stakeholder sum of RM3,000.00.
- 5 (c) appointment of Messrs Khairun Nisa & Co as stakeholder for the purchase of the property.
- 10 (vii) On March 26, 2014, the applicant obtained the housing developer's licence and advertisement and sale permit pursuant to regs 3(6) and 5(4) of the Housing Development (Control and Licensing) Regulations 1989 ("Regulations 1989").
- 15 (viii) On March 27, 2014, the applicant and the first respondent signed the sale and purchase agreement ("S&P agreement") for the first respondent to purchase parcel No. B1-18-13A with the purchase price of RM339,480.00.
- 20 (ix) Pursuant to clause 25(1) of the S&P agreement the time for delivery of vacant possession is within 48 months from the date of S&P agreement and failing which the applicant is to pay LAD in accordance with clause 25(2) which is calculated from day to day at the rate of 10% per annum of the purchase price from the expiry date of the delivery of vacant possession of the parcel.
- 25 (x) Thereafter, on March 29, 2018, upon completion of the project, the applicant issued a notice of delivery of vacant possession of the said parcel to the first respondent.
- 30 (xi) Next, on September 26, 2018, the first respondent filed her claim with the second respondent for LAD for the late delivery of the vacant possession by the applicant.
- 35 (xii) Having heard both parties, on October 12, 2018, the second respondent allowed the first respondent claim and awarded the sum of RM21,295.87 which is RM17,671.56 for the late delivery of the parcel and RM3,534.00 for the common facilities.

Application No. WA-25-348-11/2018

[5] The salient facts for this judicial review application are as follows:

- (i) The first respondent was invited to the show room of the project by the applicant's property agent. Thereafter, the first respondent was introduced to a lawyer from Messrs Khairin Nisa & Co at the sales gallery where according to the first respondent, has informed the first respondent that a discount would be given to purchaser who bought the unit at the sale gallery by paying RM3,000.00 booking fee.
- (ii) The first respondent then paid the RM3,000.00 and signed an "irrevocable offer to purchase" dated September 28, 2013 as requested. In this

irrevocable offer to purchase, the unit to be bought by the first respondent is No. B1-21-06 with an indicative price of RM343,500.00 and stakeholder sum of RM3,000.00. In the same document, it also states that the first respondent appoints Messrs Khairin Nisa & Co as the stakeholder.

(iii) On March 27, 2014, the applicant and the first respondent executed a sales & purchase agreement ("S&P") for the first respondent to purchase the said parcel No. B1-21-06 of the project for the sum of RM343,500.00.

(iv) Similarly, pursuant to clause 25(1) of the S&P agreement, the time for the delivery of vacant possession is within 48 months from the date of the S&P agreement and failing which the applicant is to pay LAD in accordance with clause 25(2) which is calculated from day to day at the rate of 10% per annum of the purchase price from the expiry date of the delivery of vacant possession of the parcel.

(v) On March 29, 2018, the applicant issued a notice of delivery of vacant possession of the parcel to the first respondent.

(vi) Next, on July 19, 2018, the first respondent filed a claim with the second respondent for LAD for the late delivery of the vacant possession by the applicant.

(viii) The second respondent having heard both parties decided to allow the first respondent's claim and awarded RM25,296.65 as liquidated damages for the late delivery of the vacant possession. Hence this judicial review application.

Grounds for the judicial review applications

[6] The common grounds for both judicial review applications are the following:

(i) the second respondent committed an error of law in allowing the first respondent's claim and awarding the LAD for the following reasons:

(a) the payment of RM3,000.00 paid to Messrs Khairin Nisa & Co was not a booking fee for the purchase of the parcel paid to the applicant but a stakeholder sum held by Messrs Khairin Nisa & Co as stakeholder appointed by the first respondent until further event which is:

(aa) If the project is open for sale and the applicant accepts the first respondent's offer to purchase, the RM3,000.00 would go to the applicant towards the first 10% of the purchase price;

(bb) If the applicant do not launch the project within 12 months, the RM3,000.00 would be refunded.

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- (ii) Messrs Khairin Nisa & Co is not an agent and/or panel of the applicant for the project.
- (iii) the applicant has not received the RM3,000.00 prior to the signing of the S&P and as such the for calculation of LAD should starts from the date of the S&P agreement.
- (iv) there was no agreement between the applicant and the first respondent prior to the signing of the S&P agreement.
- (v) the second respondent had acted out of jurisdiction and ultra vires the Housing Development (Control and Licensing) Act 1966 in awarding the LAD based on the date of the stakeholder sum were deposited whereas:
 - (a) clause 25 of the SPA specifically provides that the time for delivery of vacant possession shall be within 48 calendar month from the date of the S&P agreement;
 - (b) clause 27 of the SPA specifically provides that the completion of common facilities shall be completed within 48 calendar month from the date of the S&P agreement;
 - (c) nowhere in the S&P agreement provides that the delivery of vacant possession and completion of common facilities must be completed from any other date.
- (vi) the second respondent had committed an error of law when failed to apply the statutory law and failed to consider that the S&P agreement is a statutory contract in Schedule H of the Housing Development (Tribunal for Homebuyer Claims) Regulations 2002.
- (vii) the case of *Hoo See Sen v Public Bank Berhad & Anor* [1988] 2 MLJ 170 was wrongly adopted in the case of *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 3 AMR 2094; [1995] 2 MLJ 597 and *Lim Eh Fah & 4 Ors v Seri Maju Padu (dituntut sebagai sebuah firma)* [2002] 4 AMR 4491; [2002] 7 MLJ 262 as Schedule H came into existence on April 1, 1989 which was after the decision of *Hoo See Sen's* case.

Finding of this court

[7] The principle of law with regard to judicial review application is well settled that the court may review a decision on the grounds of illegality, irrationality or procedure impropriety. The review not only on the decision making process but also its merits. (See *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee binti Abdullah (and Another Appeal)* [2018] 2 AMR 97; [2018] 2 MLJ 537.)

[8] In the present applications, the main issue is the commencement date for the calculation of the LAD. The applicant in both applications contended that the

date starts from the date of S&P agreement whilst the first respondent submitted that it begins from the date of the booking fee paid to Messrs Khairin Nisa & Co. The chairman of the second respondent, inter alia, relying on the Supreme Court decision of *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 3 AMR 2094; [1995] 2 MLJ 597; [1995] 3 CLJ 797 has decided that for purposes of calculating the LAD on the late delivery of vacant possession, the date begins when the booking fee of RM3,000.00 was paid to Messrs Khairin Nisa & Co.

[9] In case No. WA-25-326-11/2018, the chairman of the second respondent has made his finding of fact that the first respondent has paid the booking fee on September 21, 2013. As the delivery of vacant possession supposedly to be made within 48 months from the date of the booking fee paid by the first respondent, there was a delay of 190 days. In the circumstances, the total LAD for the parcel and common facilities awarded is in the sum of RM21,250.87.

[10] In the case of No. WA-25-348-11/2018, the chairman of the second respondent has made its finding of fact that the first respondent has paid the booking fee of RM3,000.00 on September 22, 2013 through Messrs A Rahim & Co which then had transferred the sums to Messrs Khairin Nisa & Co. As the delivery of vacant possession was also on the March 29, 2018, the first respondent was awarded the LAD in the sum of RM25,296.65.

[11] In this regard, the first pertinent issue to be determined here is as to whether Messrs Khairin Nisa & Co was the lawyer acting for or agent of the applicant for the project.

[12] The chairman of the second respondent has made his finding that Messrs Khairin Nisa & Co were actually acted for the applicant and not for the first respondent. The finding was based on inter alia, the following evidence:

- (i) the applicant, during trial before the second respondent admitted that Messrs Khairin Nisa & Co was the applicant's panel lawyer.
- (ii) Messrs Khairin Nisa & Co was the lawyer who handled the sale and purchase transaction of the project and prepared the sale and purchase agreement.
- (iii) Messrs Khairin Nisa & Co's fees was paid by the applicant.
- (iv) the irrevocable offer to purchase is a standard document prepared by Messrs Khairin Nisa & Co for the Savana Executives Southville-City's project.

[13] Aside from the above reasons, lawyers from Messrs Khairin Nisa & Co were present during the ballot day of the said project and as alluded to earlier in the slip of the incentive scheme handed to potential purchaser, the terms and conditions among others states:

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Terms & Conditions:

- i) To engage the developer's appointed panel of solicitors only for the preparation agreement;
- ii) To accept the Letter of Offer from the developer's appointed panel of end-financiers only for the purchase of the above mentioned property.

[14] Based on the oral and documentary evidence, I find, the second respondent finding of fact that Messrs Khairin Nisa & Co was the lawyer for the applicant and acting for the applicant is supported by the totality of evidence.

[15] A mere fact that the first respondent signed an "irrevocable offer to purchase" which inter alia includes a clause that states the first respondent appoints Messrs Khairin Nisa & Co to represent the first respondent to make the "irrevocable offer to purchase" does not dislodge the actual fact that the firm was the panel lawyer for the applicant in the said project and in charge of the sales agreement of the project.

[16] Furthermore, beside the standard document of the "irrevocable offer to purchase", which the first respondent was asked to sign, the first respondent did not appoint Messrs Khairin Nisa & Co as their lawyer for the purchase of the parcel. Instead, as mentioned earlier, the first respondent has to comply with the terms and conditions of the incentive scheme which is to engage the applicant's appointed panel of solicitors.

[17] The next important issue, is whether the payment of RM3,000.00 was the booking fee or merely a stakeholder sum pending the acceptance of the offer to purchase by the applicant.

[18] In relation to this issue, reference to the particulars in the irrevocable offer to purchase signed by the first respondent is of assistance where, in case No. WA-25-326-11/2018 which was signed on September 21, 2013 states that the unit to be bought is No. B1-18-13A and the indicative purchase price is RM339,480.00. A sum of RM3,000.00 was in fact paid to Messrs Khairin Nisa & Co.

[19] At paragraph 22 of the irrevocable offer to purchase make reference to booking of the property where it states as follows:

22. This letter constitutes the whole agreement between me/us, and the stakeholder with regard to *the booking of the property* and the Stakeholder Sum and shall supercede all prior communications or understandings, indulgements or conditions, expressed or implied, oral or written.

[20] Eventually, S&P agreement was signed between the first respondent and the applicant on March 27, 2018 which involves the same property that is unit

No. B1-18-13A with the same purchase price of RM339,480.00 as stated in the irrevocable offer to purchase.

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[21] Likewise with the case No. WA-25-326-11/2018 where the property and the purchase price are the same as in the "irrevocable offer to purchase" signed by the first respondent.

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[22] Having considered the facts in totality including the fact that Messrs Khairin Nisa & Co was the panel lawyer for the applicant and responsible for the sales agreement of the project, I agree with the finding of the second respondent that the payment of RM3,000.00 was the booking fee for the purchase of property by the first respondent. This is so irrespective of the fact that the said sum was not received by the applicant on the payment date.

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[23] To conclude otherwise, it will also open the flood gates for developers to employ the same scheme of stakeholder sum to avoid the settled principle of law that the calculation of LAD to begin from the date of payment of the booking fee and not the date of the S&P agreement as held by the Supreme Court in *Faber Union's* case.

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[24] This will also frustrate the purpose for the calculation to begin from the date of the payment of the booking fee which is to prevent developers from arbitrariness by fixing any date for the execution of the S&P agreement to the prejudice of the house purchasers as pointed out in *Lim Eh Fah's* case which states the following:

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One must bear in mind that the date of July 17, 1992 i.e., the deposit payment date, was the date when the contract was struck, and the very date the respondent assumed responsibility to fulfil its parts of the bargain. If the date of signing of the S&P agreement were to be taken as the relevant date, when time started to run for the delivery of the vacant possession, the respondent could willy-nilly pick any dates it favoured to execute the S&P agreement, which could certainly prejudice the interest of the purchaser.

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[25] Likewise in the present case, there was a contract between the applicant and the first respondent the moment the booking fee of RM3,000.00 was paid to Messrs Khairin Nisa & Co which has been found as panel lawyers or agent of the applicant and the signing of the irrevocable offer to purchase.

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[26] Although clause 25 of the S&P agreement stipulates that the time of delivery of vacant possession shall be within 48 months from the date of the S&P agreement and clause 27 provides the completion of the common facilities shall be completed within 48 months from the date of the S&P agreement and it is a statutory contract pursuant to Schedule H of the Housing Development (Tribunal for Homebuyer Claims) Regulation 2002, it has been decided by the Supreme Court in *Faber Union's* case that the calculation for LAD begins from the date of payment of the booking fee.

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[27] In this regard, I have no reason to depart from this apex court's decision and bound to follow the said decision on the principle of stare decisis.

[28] In the Court of Appeal case of *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 AMR 2511; [1996] 2 MLJ 557:

We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of stare decisis. We thrust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

[29] Likewise in the Court of Appeal case of *Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd (and Another Appeal)* [2018] 5 AMR 349; [2018] MLJU 773 where David Wong JCA said this:

[29] There is no two ways about it here. *The concept of stare decisis is applicable to the case at hand as the factual matrix there in our view is the same as here and could not be distinguished in anyway. We are thus bound by it, irrespective what our view may be.*

[31] Finally, we reiterate that the importance of the doctrine of stare decisis must not be overlooked. As Benjamin Cardozo in his treatise, *The Natural of Judicial Process (New Haven and London: Yale University Press 1021)* at pp 9-50, says:

"It will not do to decide the same questions one way between one set of litigants and the opposite way between another. 'If a group of cases involved the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look at the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights'. *Adherence to precedent must then be the rule rather than an exception if litigants are to have faith in the evenhanded administration of justice in the Courts.*"

[30] The same issue has been raised in *Faber Union Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan dan Kerajaan Tempatan & 9 Ors* [2011] AMEJ 0177; [2011] 7 CLJ 37, which has been rejected by the court and states the following:

[13] *The applicant contends that the tribunal erred in amending the commencement date of the SPA to the date of payment of the deposit. The tribunal relied on the case of Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 3 AMR 2094; [1995] 3 CLJ 797 wherein the issue for determination by Supreme Court is whether, in ascertaining the date of delivery of vacant possession of a building to be constructed, time started to run from the date payment of the booking fee was made or from the date of the signing of the sale and purchase agreement. In that case the deposit was paid on February 17, 1984 and the agreement was signed on June 27, 1984. The Supreme Court held that for the purpose of ascertaining the date of delivery of

vacant possession the relevant date when time starts to run is the date on which the purchaser paid the booking fee and not the date of the signing of the sale and purchase agreement. The decision of the Supreme Court was followed in *Lim Eh Fah & 4 Ors v Seri Maju Padu (dituntut sebagai sebuah firma)* [2002] 4 AMR 4491; [2002] 4 CLJ 37. In that case the purchaser paid the deposit on July 17, 1992. The sale and purchase agreement was executed on October 10, 1992. Suriyadi Halim Omar J (as his Lordship then was) held that the respondent assumed the responsibility to fulfil its part of the bargain at the date the deposit was paid, i.e., July 17, 1992, in effect being the date when the contract was struck, and not the date the deed of assignment was signed. Otherwise, the respondent could arbitrarily choose any date it favoured to execute the sale and purchase agreement which would certainly prejudice the purchaser. *Thus, I find that the tribunal has not erred in deciding that the relevant date for the purpose of calculating the amount of damages payable by the applicant is the date the respondents paid the deposits.*

[31] In this case, I have also considered the fact that the booking fee of RM3,000.00 was paid before the applicant obtained its license and sale permit under regs 3(6) and 5(4), Regulations 1989.

[32] In this regard, the contract upon payment of the booking fee is valid as the consideration and object of the agreement are legal. The consideration is the booking fee and thereafter the purchase price whilst the object is the unit bought by the first respondent. In other words, the sales of the units in both cases is legal and valid.

[33] On this issue, reference to the Federal Court case of *Kin Nam Development Sdn Bhd v Khau Paw Yan* [1984] 1 CLJ 347, is instructive which held that the Rules does not affect the validity of a contract. Salleh Abbas CJ at p 186 has this to say:

In any case there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses, and neither do they come within any of the paragraphs of s. 24 quoted above, although the appellant may well be guilty of an offence under r 17 for contravening r 11(1) of the Housing Developers (Control & Licensing) Rules 1970. In other words, these Rules do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers.

Conclusion

[34] Based on the aforesaid reasons and having perused the decision by the second respondent in both judicial review application, I find the decisions were not tainted with any error of law or irrationality which warrants the curial intervention of this court.

[35] In the upshot, the judicial review application by the applicant in both cases which are No. WA-25-326-11/2018 and No. WA-25-348-11/2018 are dismissed with costs of RM5,000.00 for each case.

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