IN THE HIGH COURT OF MALAYA, KUALA LUMPUR

WILAYAH PERSEKUTUAN, MALAYSIA

CIVIL SUIT NO. WA-22NCVC-507-08/2020

BETWEEN

VIGNESH NAIDU A/L KUPPUSAMY NAIDU

(NRIC NO: 730125-07-5693) …PLAINTIFF

AND

PREMA BONANZA SDN. BHD.

(Company No: 0601036174 (755933-K)) …DEFENDANT

JUDGMENT

A. Introduction

[1] There are two applications made before this Court. The first application is by the Plaintiff for Summary Judgment order against the Defendant pursuant to Order 14 of Rules of Court 2012 ("ROC 2012") (Enclosure 5) and the second application is by the Defendant for a Striking

Out order pursuant to Order 18 Rule 19 (1)(b), (c) and/or (d) of ROC 2012 (Enclosure 20).

B. Background Facts

[2] The Plaintiff is an owner of a unit Parcel No. A-37-G in a housing project known as The Sentral Residences ('the Housing Project').

[3] At all material times, the Defendant is a company incorporated under the Companies Act 2016 and is the developer for the Housing Project which comprises of two tower service apartments named as Tower A and Tower B.

[4] On 18.07.2012, the Plaintiff entered into a Sale and Purchase Agreement ('SPA') with the Defendant for the purchase of Parcel No. A-37-G of the Housing Project with a purchase price of RM2,168,000.00 ('the Property').

[5] On or about 16.12.2010, the completion period for the Housing Project is modified from thirty-six (36) months to fifty-four (54) months by virtue of Regulation 11(3) Housing Development (Control and Licensing) Regulations 1989 ('HDR 1989'), due to the magnitude of the Housing Project. The extension of time ('EOT') was granted by the Ministry of Housing and Local Government ('the Ministry') years before the signing of the SPA and was reflected in Clauses 25 and 27 of the SPA.

[6] Upon completion of the Housing Project development, the Defendant gave a written notice to the Plaintiff on 25.01.2017 stating that the Certificate of Completion and Compliance has been issued and vacant possession of the Property is ready to be delivered to the Plaintiff. However, the Plaintiff claimed that the last date to deliver vacant possession was supposed to be on 17.07.2015 and therefore the Defendant shall be liable to pay the Plaintiff liquidated ascertained damages ("LAD") for late delivery of vacant possession.

[7] The Plaintiff's claim is on the basis that the SPA signed between the parties was not in the prescribed statutory form under Schedule H of HDR 1989. The SPA provides that the vacant possession of the Property shall be delivered by the developer within fifty-four (54) months and not thirty-

six (36) months from the date of the signing of SPA as prescribed under Schedule H of HDR 1989. Therefore, the Plaintiff claimed that any contradictions of statutory form under Schedule H of HDR 1989 is invalid and shall not bind the Plaintiff.

[8] The Plaintiff then seeks from the Court:

[a] A declaration that any notice given in accordance to an extension of time ('EOT') by virtue of Regulation 11(3) HDR 1989 for the Defendant to deliver vacant possession of the said Property from thirty-six (36) months to fifty-four (54) months is invalid as in the Federal Court's decision in ***Ang Ming Lee v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan [2020] 1 CLJ 162;***

[b] A declaration that the Defendant is bound to deliver vacant possession to the Plaintiff within a period of thirty-six (36) months in accordance with statutory form under Schedule H of HDR 1989 from the date of the signing of the SPA.

[c] An order for the Defendant to pay LAD to the Plaintiff for late delivery of vacant possession as below:

i. A sum of RM392,021.92; and

ii. Interest at the rate of 5% per annum on the sum of RM392,021.92 from the date of filing of this claim to the date of full settlement.

[d] Costs on a solicitor and client basis.

[e] Other reliefs or orders as the Court thinks fit and just.

C. Summary Judgment (Enclosure 5)

[9] The main ground of this application by the Plaintiff is that there are no triable issues to be tried. The Plaintiff submits that the SPA signed by the parties is a statutory contract thus the Defendant as the developer is not allowed to deviate or add or vary any of the terms in the prescribed form in Schedule H of HDR 1989 including replacing the completion period in SPA from thirty-six (36) months to fifty-four (54) months.

[10] It is further submitted by the Plaintiff that any amendments and/ or variations made to the SPA which is inconsistent and/or contradicts the terms in the prescribed Schedule H of HDR 1989 shall be of no legal effect and shall not bind the Plaintiff. It therefore follows that the Defendant shall be required to deliver vacant possession within the completion period of thirty-six (36) months (not fifty-four (54) months) in accordance with the prescribed form in Schedule H of HDR 1989.

[11] The Plaintiff claimed that any EOT granted by the Controller of Housing to allow a completion period of fifty-four (54) months is null and void as in the case of ***Ang Ming Lee v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan [2020] 1 CLJ 162*** ('Ang Ming Lee'). Thus, the Plaintiff submits that this is a clear-cut case with no triable issues and therefore the Defendant shall be liable to pay LAD to the Plaintiff as stated in the Statement of Claim.

D. Striking Out (Enclosure 20)

[12] The grounds of Defendant's application to strike out the Plaintiff's claim are as follows:

[b] This suit against the Defendant is frivolous and vexatious;

[c] It may prejudice, embarrass or delay the fair trial of the action; and

[d] This suit against the Defendant is an abuse of the court's process.

[13] The Defendant submits that the Plaintiff's claim is obviously unsustainable and ought to be struck out pursuant to Order 18 Rule 19 (1)(b), (c) and/or (d) of ROC 2012.

[14] The EOT was obtained on 16.12.2010 which is two years before the signing of the SPA. Thus, the Plaintiff failed to provide particulars as to why it has the right to claim LAD outside the scope of the SPA as the thirty-six (36) months are nowhere to be found within the SPA signed by both parties. Therefore, the Defendant submits that the Plaintiff's claim for LAD based on a calculation of thirty-six (36) months is frivolous, scandalous and amounts to an abuse of the court's process.

[15] The Defendant also submits that the Plaintiff cannot rely on the case of ***Ang Ming Lee*** and proceed to disregard the extension of time provided by the Minister without first determining that the extension of time is invalid by way of Judicial Review. The law is well settled that when a person is aggrieved by a decision of a public body concerning an infringed right protected under public law, any challenge to that decision shall be by way of a judicial review and must be made in accordance to the procedural requirement prescribed in Order 53 of the ROC 2012.

[16] In any case, the Defendant has fully paid to the Plaintiff LAD in the sum of RM13,067.40 for the late delivery of vacant possession in accordance with the terms of the SPA. The Plaintiff has signed a letter dated 07.03.2017 and further undertaken to waive any further claims, demand and/or not to institute any legal suit or proceeding against the Defendant.

[17] The Defendant also submits that the Plaintiff's cause of action arises from the SPA that were entered into by both parties (founded on a contract). Since the SPA is dated 18.07.2012 which clearly sets out the completion period is fifty-four (54) months, limitation has set in as early as 18.07.2018. In this case, the Plaintiff contends that the SPA was invalid

at the time of signing as it fails to comply with the prescribed Schedule H. Since the SPA is entered into on 18.07.2012, this claim clearly falls outside limitation period since it was eight (8) years ago. Where it is clear the Defendant relied on statute of limitations and no reasons were given for delay in pleadings or affidavit, the claim ought to be struck out. Therefore, the Defendant is barred by the limitation period accorded in Section 6(1)(a) of the Limitation Act 1953.

[18] In the circumstances mentioned above, the Defendant prays that the Plaintiff's Writ and Statement of Claim be struck out with costs.

E. Analysis and Finding

[19] Both Enclosures were heard together on 31.03.2021. For an ease of reference, the Striking Out application (Enclosure 20) will be dealt first.

Striking Out - Enclosure 20

[20] The law on striking out is settled. Order 18 rule 19(1) of ROC 2012 stipulates that a suit may be struck out on the following grounds:

[a] it discloses no reasonable cause of action or defence, as the case may be;

[b] it is scandalous, frivolous or vexatious;

[c] it may prejudice, embarrass or delay the fair trial of the action; or

[d] it is otherwise an abuse of the process of the Court.

[21] The Supreme Court in ***Bandar Builder Sdn. Bhd. & Ors v. United Malayan Banking Corporation Bhd. [1993] 3 MLJ 36*** laid down the principles in respect of striking out:

> *"The principles upon which the court acts in exercising its power under any of the four limbs of O18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence."*

[22] I also refer to the case of ***Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v. Malaysia Airlines Bhd. and other appeals [2011] 1 MLJ 59***, where the Federal Court lists down the principles under Order 18 rule 19 as below:

> *"The tests for striking out application under O. 18 r. 19 ROC, as adopted by the Supreme Court in Bandar Builders are, inter alia as follows:*
>
> *(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;*
>
> *(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;*
>
> *(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;*
>
> *(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and*
>
> *(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable."*

[23] In this present case, the Plaintiff's claim against the Defendant is highly relied on ***Ang Ming Lee***. The brief background fact of the ***Ang Ming Lee*** case is as follows:

> *"The developer of Sri Istana Condominium, BHL Construction Sdn. Bhd. ('developer'), and the purchasers of the condominium units ('purchasers') had entered into sale and purchase agreements ('SPAs').*
>
> *The SPAs, made pursuant to the form under Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('Regulations'), prescribed that the delivery of vacant possession of the units was within 36 months from the date of signing of the SPAs. Sub-paragraph 25(2) of Schedule H provided that, the developer shall be liable to pay the purchasers liquidated ascertained damages ('LAD') if it fails to deliver vacant possession within 36 months.*
>
> *The developer applied to the Controller of Housing ('Controller') for an extension of time for the delivery of vacant possession of the units to the purchasers, pursuant to reg. 11(3) of the Regulations, but the application was rejected ('the Controller's decision').*
>
> *The developer then appealed against the Controller's decision, to the Minister of Urban Wellbeing, Housing and Local Government ('Ministry'), pursuant to reg. 12 of the Regulations. The Minister allowed the appeal and granted an extension of 12 months ('Minister's decision'), giving the developer 48 months to deliver vacant possession of the units to the purchasers, instead of the statutorily prescribed period of 36 months.*

Following the extension of time, the purchasers were unable to claim for LAD."

The Federal Court held that:

"[3] Notwithstanding the prescribed timeline under Form H, for the developer to complete the project, the Regulations provide for an extension of time. As regards the extension of time, the Regulations provide for a two-tier structure. The first tier is found in reg. 11(3) of the Regulations where, at first instance, the Controller is empowered to decide on an application for extension of time. Once a decision is made by the Controller, any aggrieved party may appeal to the Minister under reg. 12 of the Regulations, which is the second tier for the appeal process. If the Minister has delegated his power to the Controller, to make a decision under reg. 11(3) of the Regulations, there should not, and could not, be an appeal process from the decision of the Controller to the Minister as it is akin to an appeal to the Minister against his own decision. Regulation 12 of the Regulations, on the appeal, would be rendered superfluous and redundant.

[24] Taking into account of the above decision, to my mind, the timeline under Form H of Housing Development (Control and Licensing) Regulations 1989 (HDR 1989) i.e thirty-six (36) months is not a rigid number because the HDR 1989 provides for an extension of time under Regulation 11(3) HDR 1989. The Plaintiff, before me, did not object or appeal to the Ministry as to the extension of time from thirty-six (36)

months to fifty-four (54) months before signing the SPA. The EOT granted by the Ministry was already reflected in Clause 25 and Clause 27 of the SPA since the EOT was approved and given two (2) years prior to the signing of the SPA. Therefore, I find that the extension of fifty-four (54) months given to the Defendant is valid and did not contravene the HDR 1989.

[25] For clearer understanding, it is prudent to revisit the terms of the SPA where Clause 25 and Clause 27 provides;

> ***Clause 25 Time for delivery of Vacant Possession***
>
> *(1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in Clause 26 within fifty-four (54) calendar months from the date of this Agreement.*
>
> *(2) If the Vendor fails to deliver vacant possession in the manner stipulated in Clause 26 within the time stipulated in subclause (1), the Vendor 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 date of the delivery of vacant possession in subclause (1) until the date the Purchaser takes vacant possession of the said Parcel. Such liquidated damages shall be paid immediately upon the date the Purchaser takes vacant possession of the said Parcel.*

(3) 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.

27. Completion of common facilities

(1) The common facilities serving the said housing development shall be completed by the Vendor within fifty-four (54) calendar months from the date of this Agreement. The Vendor's architect shall certify the date of completion of the common facilities.

(2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centrum (20%) of the purchase price.

(3) 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 Vendor completes the common facilities.

[26] At this juncture, I am of the view that the Plaintiff could not rely on the ***Ang Ming Lee*** case since there are substantive differences of background facts for both cases. Further, there was also no amendments made to the completion period after the parties have signed the SPA unlike in ***Ang Ming Lee***. Contrary to ***Ang Ming Lee***, where the EOT was given after the signing of the SPA between the parties and there were

amendments made to the terms in the prescribed form in Schedule H of HDR 1989 which changed the completion period in delivering vacant possession from thirty-six (36) months to forty-eight (48) months.

[27] In addition, the Plaintiff also has failed to provide particulars as to why he has the right to claim LAD outside the scope of the SPA as the thirty-six (36) months are nowhere to be found within the SPA signed by both parties. Therefore, the Plaintiff's claim for LAD based on a calculation of thirty-six (36) months has no legal basis or without merits.

[28] It is trite law that the parties to a contract are bound by the terms of the contract entered between them to perform their respective promises. It is also clearly provided under Section 38 of the Contracts Act 1950 that a party to a contract must, unless excused under the Contracts Act or any other law, be bound by the terms of the contract so entered between them. There is no dispute between parties that the SPA has been concluded. The terms of the SPA are clear and unambiguous and the Plaintiff is bound by it. Plaintiff is therefore estopped from denying what had been agreed between them (See ***Court of Appeal in Anuar bin Abu Bakar v. Samsuri bin Booyman [2016] 8 CLJ 317; [2016] 6 MLJ 96).***

[29] Moreover, the Defendant has fully paid to the Plaintiff the LAD in the sum of RM13,067.40 for the late delivery of vacant possession in accordance with the terms of the SPA. The Plaintiff has signed a letter dated 07.03.2017 and further undertaken to waive any further claims, demand and/or not to institute any legal suit or proceeding against the Defendant.

Summary Judgment - Enclosure 5

[30] I am very well aware and it is trite that Summary Judgment is not intended to shut out a Defendant who has a bona fide defence. The Summary Judgment can only be allowed in a plain case with no triable issues to warrant a full trial. Therefore, what needs to be proven by the Plaintiff is to show that there is no triable issue or issues that ought to be heard in full. Before me, the Defendant has successfully proven that the Plaintiff's case discloses no reasonable cause of action in the Defendant's Striking Out application.

[31] In conclusion, I find that the Plaintiff's claim is obviously unsustainable and ought to be struck out pursuant to Order 18 Rule 19(1) of ROC 2012. Thus, the Defendant's striking out application in Enclosure

20 is allowed with costs of RM3,000.00. As to Enclosure 5 with the foregoing principles in mind, the application for Summary Judgment by the Plaintiff is dismissed with costs of RM3,000.00.

Sgd.

Rozana Ali Yusoff

Judge

High Court Kuala Lumpur

Dated: 15th June 2021

SOLICITORS FOR THE PLAINTIFF:

MESSRS K L WONG
Advocates & Solicitors
No. 31, 2nd Floor, Jalan Barat
Off Jalan Imbi
55100 KUALA LUMPUR

SOLICITORS FOR THE DEFENDANT:

MESSRS CHEE HOE & ASSOCIATES
Advocates & Solicitors
Suite D-06-06, Plaza Mont Kiara
No. 2, Jalan Kiara
Mont Kiara
50480 KUALA LUMPUR

CASE(S) REFERRED TO:

1. Ang Ming Lee v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan [2020] 1 CLJ 162.
2. Bandar Builder Sdn. Bhd. & Ors v. United Malayan Banking Corporation Bhd. [1993] 3 MLJ 36.
3. Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v. Malaysia Airlines Bhd. and other appeals [2011] 1 MLJ 59.
4. Anuar bin Abu Bakar v. Samsuri bin Booyman [2016] 8 CLJ 317; [2016] 6 MLJ 96.

LEGISLATIONS' REFERRED:

1. Limitation Act 1953.
2. Contracts Act 1950.
3. Rules of Court 2012.
4. Housing Development (Control and Licensing) Regulations 1989.