

BEH LI WAN & ORS v MENTERI PERUMAHAN DAN KERAJAAN TEMPATAN & ORS

CaseAnalysis
| [2024] MLJU 1284

Beh Li Wan & Ors v Menteri Perumahan dan Kerajaan Tempatan & Ors [2024] MLJU 1284

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HIGH COURT (KUALA LUMPUR)

WAN AHMAD FARID WAN SALLEH J

PERMOHONAN SEMAKAN KEHAKIMAN NO WA-25-547-10/2022

5 June 2024

Soo Kim Yan (with Lim Ka Eng) (K Y Soo) for the applicant.

Farah Shuhada Ramli (Senior Federal Counsel, Jabatan Peguam Negara) for the first and second respondents.

Venothani a/p Raja Gopal (with Ting Kean Keat) (David Gurupatham & Koay) for the third respondent.

Wan Ahmad Farid Wan Salleh J:

JUDGMENT

The Factual Background

[1] The applicants had entered into separate Sale and Purchase Agreements (“SPA”) with the 3rd respondent, Mayland Supreme Sdn Bhd, for the purchase of the respective condominium units (“the Property”) in a project known as “Residensi Hampton Damansara” (“the Project”).

[2] The 3rd respondent is the developer of the Project.

[3] Pursuant to clauses 25(1) and 29(1) of the SPA, vacant possession of the Property shall be delivered and the commons facilities of the Project shall be completed within 48 months from the date of the SPA.

[4] However, reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (“the 1989 Regulations”) provides that:

[Where] the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.

According to cl 25(1) of Schedule H in the 1989 Regulations, “vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in clause 27 within thirty-six (36) months from the date of this Agreement”.

[5] Then, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Amendment) 2022 Act (“Covid-19 Amendment Act”) came into force on 14.1.2022.

The 1st application for exemption

[6] Vide its letter dated 24.7.2020, the 3rd respondent had applied to the Minister of Housing and Local

Government (“the Minister”) and sought an extension of time for a period of six months. The letter *inter alia* states as follows:

Kami juga ingin memaklumkan YB Menteri bahawa disebabkan wabak COVID-19 telah menjejaskan aktiviti perniagaan termasuklah industri pembinaan. Sehubungan dengan itu, pihak kami merayu agar dapat perlanjutan tempoh serahan milikan kosong kepada semua pembeli selama enam (6) bulan dari tarikh serahan yang tercatat di dalam Perjanjian Jual Beli di mana perjanjian-perjanjian tersebut telah ditandatangani sebelum PKP berkuatkuasa.

[7] The 2nd respondent, the Director General of the National Housing (“the DG”), had responded to the said letter, and a period of 167 days from 18.3.2020 to 31.8.2020 were exempted from the calculation of time to deliver vacant possession of the Property and to complete common facilities of the Project. The 3rd respondent was notified of the 1st exemption via a DG letter dated 5.11.2020.

[8] The letter from the DG’s office states *inter alia* as follows:

Berdasarkan Bahagian XI, [subseksyen 35\(1\) dan 35\(4\)](#) di bawah Akta tersebut, dimaklumkan bahawa rayuan pihak tuan bagi pemajuan yang telah dilesenkan seperti di atas telah pun dipertimbangkan dan diluluskan oleh YB Menteri untuk mengecualikan tempoh dari 18 Mac 2020 sehingga 31 Ogos 2020 (167) hari bagi pengiraan masa serahan milikan kosong dan penyiapan kemudahan bersama berdasarkan Perjanjian Jual Beli yang telah ditandatangani oleh pihak Pembeli.

The 2nd Exemption

[9] Following the 1st exemption, the Minister, vide a letter dated 21.4.2022, granted a further exemption of 122 days from 1.9.2020 to 31.12.2020 to the 3rd respondent (“the 2nd Exemption”) under [s 35\(2\) and 35\(3\)](#) of the [Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 \(Covid-19\) Act 2020](#) (“Covid-19 Act”).

[10] Due to the 2nd Exemption, the calculation of time to deliver vacant possession of the Property and to complete the common facilities of the Project would be subject to a further delay of 122 days.

[11] The letter from the DG’s office states as follows:

Justeru itu sukacita dimaklumkan bahawa YB Menteri Perumahan dan Kerajaan Tempatan setelah mempertimbangkan permohonan perlanjutan tempoh pengecualian di bawah [sub-seksyen 35\(2\) dan 35\(3\)](#), melalui no. ruj KPKT/07/PS/828/2 Jld.7(121) telah bersetuju untuk mengecualikan tempoh dari 1 September 2020 sehingga 31 Disember 2020 (122 hari) bagi pengiraan masa serahan milikan kosong dari penyiapan kemudahan bersama berdasarkan Perjanjian Jual Beli yang telah ditanda tangani dengan pihak Pembeli.

The 3rd Exemption

[12] When the Covid-19 Amendment Act came into force in 2022, the 3rd respondent applied for a further exemption period to deliver vacant possession of the Property and to complete the common facilities of the Project. The application was made pursuant to [ss 38C\(1\) and 38C\(2\)](#) of the Covid-19 Amendment Act.

[13] The Minister acceded to the request vide a letter dated 14.6.2022. The letter was issued by the Director of National Housing. The 3rd respondent was granted a further period of 365 days to be exempted from the time to deliver vacant possession of the Property.

[14] All of the letters from the DG’s office granting the Exemption periods were signed by Dato’ N Jayaselan, the Housing Controller.

The Judicial Review

[15] The applicants’ position is that the 2nd and 3rd Exemptions granted by the Minister, numbering a total of a further 487 days, would adversely affect the applicants in the following manner:

- (i) It would result in the inordinate and excessive delay on the 3rd respondent’s part in delivering vacant possession and completion of the common facilities; and
- (ii) The rights of the applicants to later claim for liquidated ascertained damages (“LAD”) would also be adversely affected.

[16] The applicants took exception to the granting of the 2nd and 3rd Exemptions. For brevity, they will collectively be referred to as the “impugned Exemptions”.

[17] In this application for judicial review, the applicants sought to quash the decisions made by the Minister, which were communicated through the DG.

[18] Leave to commence this application for judicial review was granted by this Court on 6.12.2022.

[19] The application is supported by the affidavit of the 1st applicant in Encl 3 (“AIS-3”), who also affirmed the same on behalf of the remaining applicants. There were exchanges of affidavits between the parties, which will be referred to as and when the need arises.

[20] The grounds of the application as reflected in AIS-3 can be summarised as follows:

- (a) The Minister denied the applicants, as the purchasers, the right to be heard, which is in breach of the principles of natural justice which rendered the impugned Exceptions null and void.
- (b) There are errors of law in the Minister’s impugned Exceptions in that the Minister failed to take into account the relevant matters or took into account irrelevant matters when arriving at the same.
- (c) The Housing Controller had acted out of jurisdiction in signing the letters dated 21.4.2022 and 14.6.2022 (“the impugned letters”), purportedly allowing the Exemption Periods.
- (d) The 3rd respondent had applied for the 3rd Exemption Period out of time in contravention to [s 38C\(3\)](#) of the Covid-19 Amendment Act. [S 38C\(3\)](#) provides as follows:

The Minister shall not consider an application under subsection (1) if the application is made after the expiry of the time for delivery of vacant possession or the completion of common facilities specified under the agreement.

[21] Before me, learned counsel for the applicants submitted that the Minister had failed to observe the principles of natural justice. Learned counsel submitted that the Minister should have afforded the right to be heard or even consulted the applicants before arriving at the impugned Exemptions.

[22] My attention was drawn to the judgment of the Supreme Court in *Shamsiah Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 2 MLRA 81 SC. It was held that the principle of *audi alteram partem* means that a decision-maker must afford an opportunity to be heard to a person whose interest will be adversely affected by the decision.

[23] Applying the proposition to the facts of the case, learned counsel for the applicants submitted that some form of opportunity should have been given to the applicants, whose rights would be adversely affected by the impugned decisions. This was not done and it is undisputed that the applicants were only made known of the impugned Exemptions after they were made.

[24] Secondly, learned counsel submitted that in arriving at the impugned Exemptions, the Minister should have been aware that the Housing Development (Control and Licensing) Act 1966 (“HDA”) is a social legislation designed to protect the house buyers.

[25] It is therefore the applicants’ case that the Minister should have safeguarded the interest of the applicants as the purchasers, in particular in taking cognisance that Schedule H of the 1989 Regulations, under normal circumstances, cannot be waived, modified or added to; *Ang Ming Lee & Ors v Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor & Other Appeals* [2019] 6 MLRA 494 FC.

[26] Learned counsel for the applicants, while conceding that the Covid- 19 Act and the Covid-19 Amendment Act empower the Minister to grant the exemption periods, the Minister must not forget his paramount duty in safeguarding the interests of the purchasers.

[27] Thirdly, learned counsel highlighted that the impugned Exemptions period was granted in full by the Minister without any grounds provided. The grounds, if at all, only surfaced in the affidavits in reply by the Housing Controller. The Minister did not affirm any affidavit to explain the impugned decisions.

[28] Learned counsel for the applicants contended that the grounds relied upon by the Minister were not substantiated by any cogent supporting documents. In the circumstances, and in the absence of any cogent supporting documents, learned counsel urged this Court to conclude that the Minister had acted mechanically in arriving at the impugned Exemptions.

[29] Since the Minister had acted mechanically in arriving at the impugned Exemptions, learned counsel for the applicants submitted that, he had failed to take into account relevant considerations.

[30] Fourthly, learned counsel contended that the Controller had acted out of jurisdiction in signing the impugned letters. Learned counsel for the applicants further contended that under the Covid-19 Act, only the Minister has the authority to determine whether additional time is required. [S 35\(3\)](#) of the Covid-19 Act employs the word “if the Minister is satisfied that additional time is required”. The same applies to [s 38C\(1\) to \(3\)](#) of the Covid-19 Amendment Act.

[31] As alluded to earlier, the Minister did not affirm any affidavit. Instead, the affidavits were affirmed by the Housing Controller. Learned counsel submitted that this has given rise to the question of whether the Minister has applied his mind to the matter and not delegated the responsibility to the Housing Controller. At best, according to learned counsel, the affidavits affirmed by the Housing Controller, in so far as they refer to the decisions of the Minister, are hearsay in nature.

[32] My attention was then drawn to the judgment of the Court of Appeal in *Menteri Bagi Kementerian Dalam Negeri & Anor v Jill Ireland Lawrence Bill & Anor Appeal* [2015] 6 MLRA 629 CA. The Court of Appeal held that the exercise of a statutory power may only be made in the manner intended by the legislature as expressed in the statutory provisions.

[33] Learned counsel highlighted that the Housing Controller signed all of the impugned letters. The letters did not indicate that they were signed on behalf of the Minister. They were neither issued by the Minister’s office nor were the impugned letters copied to the Minister or his private office.

[34] In short, the applicants contended that the Housing Controller was acting *ultra vires*.

[35] Relying on *Jill Ireland*, learned counsel submitted once *ultra vires* has been established, this ground alone is sufficient to quash the impugned Exemptions.

[36] Fifthly, the applicants contended that the Minister should not have acted on the request for the 3rd Exemption since it was made out of time. [S 38C\(3\)](#) of the Covid-19 Amendment Act provides that the Minister shall not consider an application for an exemption if the application is made after the time for delivery of vacant possession specified under the SPA.

[37] It is not in dispute that the letter seeking the 3rd Exemption, dated 24.3.2022, was written by the 3rd respondent’s Architect and addressed to the National Housing Department instead of to the Minister.

[38] Learned counsel for the applicants submitted, even if we were to take into account the delivery of vacant possession is 48 months under the SPA (instead of 36 months under Schedule H), which was dated 12.5.2017, the date for completion and delivery of vacant possession would be 12.5.2021. The impugned letter was issued well after the date of the time for delivery of vacant possession specified in the SPA.

The respondents’ response

[39] As to the right to be heard, the learned Senior Federal Counsel highlighted that the issue of the right to be heard, though addressed by the Court of Appeal, was not discussed by the Federal Court in *Ang Ming Lee*.

[40] The learned SFC, however, attracted my attention to the judgment of the Court of Appeal in *Bludream City Development Sdn Bhd v Kong Thye & Ors* [\[2022\] 2 MLJ 241](#) CA. The Court of Appeal held that there was no express requirement of a right to be heard that must be given to the purchasers. According to the Court of Appeal, what is more important is that the Minister must act fairly, taking into consideration that the purchasers were not obliged to consent to any extension of time implored by the developer.

[41] The learned SFC then referred me to the affidavit in reply of the Housing Controller, in Encl 20 (“AIR-20”). Paras 43 to 45 of AIR-20 state as follows:

[43] Berdasarkan maklumat-maklumat yang sepenuhnya berada di bawah pengetahuan saya dan mantan Menteri Responden Pertama, Responden Pertama berpuas hati bahawa punca-punca kelewatan yang masih berterusan sepertimana disebut di atas adalah hal-keadaan khas yang di luar kawalan Responden Ke-3.

[44] Dalam mempertimbangkan permohonan Responden Ke-3 di atas, mantan Menteri Responden Pertama memahami tanggungjawab beliau di bawah Akta 118 selaku Menteri dalam menjamin kepentingan para pembeli rumah Projek ini.

[45] Mantan Menteri Responden Pertama dalam setiap masa sedar akan sebab dan akibat sekiranya permohonan ini diluluskan, pengecualian tempoh ini boleh menjejaskan pembeli yang terpaksa menanggung bayaran faedah pinjaman perumahan, beban sewaan rumah sementara pemajuan diserahkan dan hilang hak untuk menuntut ganti rugi ke atas kelewatan serahan milikan kosong.

[42] In the circumstances, the learned SFC, to whom learned counsel for the 3rd respondent deferred, submitted that even if the applicants were to be given the right to be heard, it would not have changed the Minister's decision to approve the Exemptions.

[43] As to the contention that the Minister had mechanically granted the impugned Exemptions without addressing his mind, the learned SFC submitted that based on the impugned letters, we can conclude that the Minister was personally briefed by the Housing Controller on the necessity to allow the 3rd respondents for exemptions for the delivery of vacant possession.

[44] In any event, citing *Ang Ming Lee* as an authority, the learned SFC submitted that generally, a Minister need not sign a letter personally.

[45] As to whether the Minister ought to give reasons in the impugned letters, learned counsel for the 3rd respondent submitted that there is no legal requirement to do so. My attention was then drawn to the judgment of the Federal Court in *Kesatuan Pekerja-Pekerja bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590 FC. The Federal Court held that "the law does not at present recognise a general duty to give reasons for an administrative decision". It was further held that "in a case where the decision is one that is straight forward and one that is not mired in circumstances that would invite further or deeper rationalisation, then perhaps the need to give reason by the decision maker may not arise".

[46] On the applicant's assertion that the Minister's impugned Exemptions were unreasonable, the learned SFC attracted my attention that the grounds of the applications by the 3rd respondent that the development of the Project was affected due to the implementation of the Movement Control Order during the Covid-19 pandemic.

[47] The learned SFC contended that the Covid-19 Act was enacted and designed to give temporary release both to the developer and the purchaser. Under the Act, the purchaser's grievance relating to the late payment charges under the SPA is also addressed.

[48] The learned SFC urged this Court to apply an objective test in that any reasonable Minister appraised of the said facts would be satisfied that additional time is required.

[49] On the issue that the 3rd respondent had made an application for the 3rd Exemption period out of time in contravention to [s 38C\(3\)](#) of the Covid-19 Amendment Act, the learned SFC submitted that the new delivery of vacant possession for the respective applicants after taking into account the 1st and 2nd Exemptions was between 21.2.2023 to 19.9.2023 (based on the respective SPAs).

[50] Since the application for the 3rd Exemption was made on 24.3.2022, the 3rd respondent was well within the time stipulated under [s 38C\(3\)](#) of the Covid-19 Amendment Act.

The Analysis

[51] Let me begin by reiterating that the applicants are only concerned with the 2nd and 3rd Exemptions. The 1st Exemption, irrespective of its legal position, is not the subject matter of this application for judicial review.

[52] As to the right to be heard, I respectfully agree with the learned SFC that the Federal Court in *Ang Ming Lee* did not make any ruling on whether the purchasers ought to be given the right to be heard before the Minister exercises his discretion in granting the exemption.

[53] The Court of Appeal in *Bludream City* was of the view that there was no need for the Minister to hear the purchasers individually or independently unless he had some doubts as to how the purchasers' interest may best be safeguarded as in various options and permutations open to the purchasers. I am bound by this ratio. In any event, I find it impractical for the Minister to actually seek the view of the individual purchasers especially so during the MCO. For so long as he acts fairly, that is sufficient.

[54] But in order to ascertain whether the Minister has acted fairly or otherwise, this Court must be convinced that he had addressed his mind properly before making such a decision. After all, the HDA, the Covid-19 Act and the Covid-19 Amendment Act stipulate that the Minister must exercise his powers personally and cannot delegate it to his officers. The maxim of *delegatus non potest delegare* applies.

[55] Let us go through AIR-20, which was affirmed by Dato' Jayaseelan, the Housing Controller. This is how he explained the Minister reached his decisions in the form of the Impugned Exemptions:

- (i) From his knowledge, the Housing Controller was of the view that the Minister was satisfied that the reasons for the delay were beyond the control of the 3rd respondent.
- (ii) In deliberating the applications made by the 3rd respondent, the Minister was aware of his ministerial responsibility as stated in the HDA.
- (iii) At all material times, the Minister was cognisant of the consequences that in the event that the applications for the Exemptions were to be approved, the purchasers would be burdened by the imposition of additional interest in respect of the housing loan, the further rental costs until the delivery of vacant possession and the loss of the right to claim the LAD ("the purchasers' interest").
- (iv) However, having taken into account the impact of the Covid- 19 pandemic, the phases of the National Recovery Plan, the purchasers' interest and the impact of the pandemic on the 3rd respondent, the Housing Controller asserted that the Minister was of the view that the impugned Exemptions ought to be granted.

[56] I am having difficulty in appreciating these assertions.

[57] First, the assertions give the impression that the Housing Controller was reading the mind of the Minister. How would he know that the Minister had taken all the considerations as affirmed by him in AIR- 20? Unfortunately, the Housing Controller did not explain the failure of the Minister to affirm the affidavit himself. I believe it is normal for former ministers or deputy ministers to explain their decisions when they were in office. If this cannot be done, an explanation must be given. Was the Minister indisposed? Was he overseas?

[58] The said averments in AIR-20 are clearly hearsay. It is clear to me that the Housing Controller affirmed the affidavit on behalf of the Minister and surmised what was in the Minister's mind. The law I believe is clear. Where the proceeding is a final matter and not an interlocutory matter, hearsay evidence is inadmissible; see *Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303. This substantive proceeding of the judicial review is definitely a final matter that puts an end to the rights and obligations of the parties.

[59] I say I find it difficult to accept the assertions in AIR-20 since the part that attempts to explain the Minister's mind can only be verified by the Minister himself.

[60] The same issue arose in *Tiffany Chau v Jabatan Imigresen Malaysia & Anor* [2020] 8 MLJ 503. In the case, the impugned part of the applicant's affidavit was in para 5, which states as follows:

[5] Ibu saya pernah beberapa kali ke jabatan imigresen untuk bertanyakan prosedur dan tatacara untuk mendapatkan status kewarganegaraan kepada saya ketika saya masih berumur 12 tahun. Namun jawapan dan informasi yang ibu saya perolehi adalah tidak memuaskan kerana jabatan imigresen menyatakan secara akuan mulut sahaja bahawa saya masih lagi tidak layak secara merit untuk memohon kewarganegaraan. Saya juga tidak diterangkan apakah yang dimaksudkan dengan kelayakan bermerit tersebut. Ibu saya ada juga beberapa kali pergi ke jabatan imigresen selepas itu pada tahun bermula dari 2008, 2011, 2012 dan 2015 namun hasratnya hampa kerana tidak diterangkan secara lanjut dan terperinci tentang prosedur untuk memohon permit masuk sebelum taraf pemastautin tetap dan kewarganegaraan diberikan.

[61] Hashim Hamzah J (now JCA) held as follows:

[45] I agree with the learned SFC that this deposition was made in contravention with O 41 r 5(1) of the Rules of Court 2012 ('the ROC 2012'). An affidavit must contain facts that the deponent to his own knowledge is able to prove. The facts deposed therein can only be verified by the applicant's mother since the applicant has no direct knowledge regarding what actually transpired. This evidence is purely hearsay.

[46] Failure to observe the abovementioned requirement will discard the particular deposition or evidence of any probative

value and the impugned statement may be expunged by the court (see *Ringgit Exoticka Sdn Bhd v Pengarah Tanah & Galian Selangor & Ors* [2014] 8 MLJ 111).

I respectfully agree. As such, the learned Judge gave no weight to the applicant's deposition in para 5 of the applicant's affidavit in support for being purely hearsay evidence.

[62] Applying the law to the instant case, since there is no verification from the Minister, that part of the deposition made by the Housing Controller is to be disregarded and I so hold.

[63] In the circumstances, this Court is deprived of the explanation from the Minister. It cannot, therefore, be ascertained whether the Minister had addressed his mind fairly, within the meaning of *Bludream City*, in arriving at the impugned Exemptions.

The findings

[64] For the aforesaid reasons, my findings are as follows:

- (a) There is no legal requirement for the Minister to give the right to be heard to the purchasers before exercising his powers to grant exemption under the HDA, Covid-19 Act and Covid-19 Amendment Act unless he had some doubts as to how the purchasers' interest may best be safeguarded. Such a failure, in itself does not offend the principle of *audi alteram partem*.
- (b) The law only requires the Minister to act fairly, taking into consideration that the purchasers were not obliged to consent to any extension of time implored by the developer.
- (c) In order to ascertain that the Minister had acted fairly in the circumstances of the case, the Court has to deliberate whether he had addressed his mind to the relevant issues.
- (d) There was no affidavit by the Minister nor any explanation why such an affidavit could not be procured.
- (e) The only explanation that can be distilled is from the affidavits of the Housing Controller in AIR-20 and a further affidavit in Encl 26.
- (f) In effect, the Housing Controller explained the reasons for the impugned Exemptions on behalf of the Minister. Unless the Minister himself verified such assertions, they remain what they are – pure hearsay and should be disregarded.
- (g) In the absence of an explanation by the Minister himself, this Court cannot determine whether the Minister was acting fairly in allowing the impugned Exemptions.

[65] The impugned Exemptions are tainted with *Wednesbury* unreasonableness and procedural impropriety and therefore, susceptible to judicial review.

[66] An order of certiorari is therefore issued to quash the same.

[67] In view of my decision on the issue of the admissibility of that part of AIR-20, I will not address the remaining issues raised by the applicants.

[68] There shall be no order as to costs.