

Malaysia: Obata-Ambak Holdings v Prema Bonanza

A recent Federal Court decision and rulings on Ang Ming Lee.

In brief

On 31 July 2024, we wrote an alert on the Federal Court's decision of *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd* (Civil Appeal No. 02(i)- 76-08/2022(W)), which was delivered on 26 July 2024 (see [Malaysia: Federal Court in Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd](#)).

To recap, the Federal Court in *Obata-Ambak* unanimously decided that *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor* and other appeals [2020] 1 MLJ 281 is to be applied prospectively, not retrospectively.

Ang Ming Lee had previously decided that the Minister of Housing and Local Government cannot delegate his powers under the Housing Development (Control and Licensing) Act 1966 to grant an extension of time (EOT) to the Controller to a developer. As a result, the developers could not rely on EOTs obtained from the Controller and were exposed to liquidated ascertained damages.

This alert follows our previous alert on this case and looks to summarise the facts and the Federal Court's findings on the questions of law before it.

(Federal Court)

"[133]...Ang Ming Lee is not a carte blanche for purchasers to claim LAD retrospectively and to enjoy financial windfall."

Facts

There were five appeals heard together, i.e.,:

1. *Obata- Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd* ("**Obata v Prema**");
2. *Prema Bonanza Sdn Bhd v Vignesh Naidu a/l Kuppusamy Naidu* ("**Vignesh**");
3. *Sri Damansara Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Fong Soo Ken & Yoa Kian How* ("**Sri Damansara**").

We set out a table summarising the court proceedings:

Suits	Courts	Purchasers	Developers
Obata v Prema	HC	Lost Summary Judgment	Won O14A, disposal of case on points of law.
(Obata appealed)	CA	Agreed with HC	
(Obata appealed)	FC	Agreed with HC and CA	
Vignesh v Prema	HC	Lost Summary Judgment	Won O18, application to strike out.
(Vignesh appealed)	CA	Set Aside HC	
(Prema appealed)	FC	Set Aside CA Reinstate HC	
Sri Damansara	HC	Homebuyers' Tribunal decision in granting liquidated damages for late delivery of vacant possession in favour of the purchasers was quashed.	Judicial review against Homebuyers' Tribunal was allowed.

(Sri Damansara appealed)	CA	Agreed with HC
(Fong & Yoa cross-appealed)		
(Sri Damansara appealed)	FC	Set Aside CA and HC

The key facts of the various suits are summarised below:

Prema v Obata-Ambak and Vignesh

- These appeals involve the same Project where Prema is the developer and the rest are purchasers.
- The facts are similar.
- On 16 December 2010, EOTs were obtained from the Controller.
- In 2012, both entered into the SPAs, which reflected the EOT in the completion date.
- In 2017, Obata accepted payment of LAD and signed the full and final settlement.
- Vignesh had signed a letter dated 7 March 2017 undertaking to waive further claims, demand and/or not to institute any legal suit or proceedings against Prema.
- In 2019, Ang Ming Lee was decided by the Federal Court.
- In 2020, both Obata and Vignesh filed the actions in court in separate suits.
- Both purchasers applied for summary judgment, with Prema countering with a striking out application. In Obata, Prema also filed an application under Order 14A to raise legal issues for determination.
- Both the High Courts dismissed the summary judgment applications, and the High Court in Obata allowed Prema's Order 14A application.
- The purchasers appealed to the Court of Appeal.
- Vignesh succeeded in the Court of Appeal whereas Obata failed.
- The findings of the High Courts and Courts of Appeal are summarised below:

Obata

- The High Court allowed Prema's O14 application and held that:
 - Prema is not allowed to deviate from the terms of the prescribed contract of sale in Schedule H and pursuant to the doctrine of stare decisis, the ratio in Ang Ming Lee is binding on the court. As a general rule, a written judgment has retrospective effect save for situations where the doctrine of prospective overruling is applied.
 - However, in this case,
 - Obata should not have filed the suit as a decision granted by the Ministry of Housing and Local Government can only be challenged by way of judicial review, and not a writ action.
 - Obata's claims are also time barred since the breaches occurred in 2012. A judicial review application must be filed within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.
- Obata appealed. The Court of Appeal agreed with the High Court.
- Obata appealed. The Federal Court agreed with the Court of Appeal and High Court.

Vignesh

- The High Court allowed Prema's striking out application.
 - It held that Vignesh is bound by the terms of the contract entered between them, i.e., the SPA. The terms of the SPA are clear and unambiguous, and Vignesh is estopped from denying this was agreed to.

- Moreover, the Court took into account Vignesh's conduct in signing the letter of waiver, and in accepting the LAD payment in 2017.
- There was no reasonable cause of action disclosed and thus, the claim was obviously unsustainable and had to struck out.
- Vignesh appealed, and was successful in the Court of Appeal. The Court of Appeal disagreed with the High Court.
- The Court of Appeal held that:
 - The Court was bound by Ang Ming Lee. Ang Ming Lee is to be applied retrospectively.
 - The extension granted by the Controller cannot be legitimised through estoppel, waiver or agreement between parties. The principle of waiver or estoppel does not apply against a statute or statutory agreement such as the instant case involving the Housing Regulations.
 - Vignesh's claim is based on the contractual breach of the SPA and not a challenge against an administrative decision (which would require judicial review).
 - Vignesh's cause of action to claim LAD accrued only on the date he accepted delivery of vacant possession of his property unit in 2017. Vignesh's claims are therefore not barred by limitation. The cause of action accrues on the date of the SPA.
- Prema appealed. The Federal Court overturned the Court of Appeal's and reinstated the High Court's decision.

Sri Damansara

- This matter has common issues with the above, with a slight twist to the facts.
- Sri Damansara is the developer, whereas Fong and Yoa are the purchasers of a condominium unit.
- In 2011, EOTs were obtained from the Controller.
- In 2012, both entered into the SPA, which reflected the EOT in the completion date i.e., 42 months from the date of SPA.
- Fong and Yoa filed a claim at the Homebuyers' Tribunal for LAD for late delivery of the unit and common facilities.
 - They calculated LAD based on the purchase price before a rebate, and calculated 42 months from their part payment (and not the SPA).
 - Sri Damansara counterclaimed for the return of the rebate.
- The Tribunal decided in favour of Fong and Yoa, and adopted their calculation.
- Sri Damansara filed a judicial review application in the High Court, and succeeded in part.
- The High Court quashed the tribunal's decision due to illegality (i.e., applying Ang Ming Lee) and three irrationalities (i.e., the tribunal failed to consider the counterclaim, had unjustly enriched the purchasers by not accounting for a rebate, and failed to consider the delay in delivering common facilities). The High Court also noted that the lack of reasons given by the Controller in allowing the EOT is contrary to good governance and the decision may be arbitrary and unjust.
- Both parties appealed against the High Court's decision. Sri Damansara appealed, and Fong and Yoa cross-appealed.
- The Court of Appeal dismissed the appeal and held that:
 - The core issue before the High Court was on the issue of legality i.e., the EOT granted by the Controller. The High Court Judge was entitled (and duty bound) to take cognisance of illegality notwithstanding this was not alluded to by the parties.
 - The High Court Judge correctly exercised his discretion in ordering Sri Damansara to pay LAD.
- Sri Damansara appealed to the Federal Court. The Federal Court set aside the Court of Appeal and High Court decisions.

Snapshot of the Questions of Law raised in the Federal Court and its Findings

These appeals culminated in the Federal Court.

In essence, the questions before the Court can be categorised into three categories. i.e.,:

1. Whether Ang Ming Lee applies retrospectively or prospectively;
2. When does time start to run for purposes of limitation;
3. Does the second actor theory apply.

The Federal Court held as follows:

- (a) Ang Ming Lee case is silent as to whether the effect of declaring Regulation 11(3) HDR ultra vires would apply retrospectively or prospectively. It cannot be that any extension granted by the Controller would be invalid prior to Ang Ming Lee and house buyers entitled to LAD notwithstanding they may have been paid LAD and vacant possession delivered. This would result in substantive injustice as it will impair the rights of the parties involved.

(Federal Court)

"[127]...To say... Ang Ming Lee applies retrospectively will result in great injustice and devastating consequences to the housing industry that had diligently complied with the laws before Ang Ming Lee"
- (b) A cause of action arises from the date of the SPAs of if there was any breach of the terms of the SPAs. Time begins to run at the earliest point in time the claimants, Obata and Vignesh could commence action. Both knew about the extension to the completion date when they signed the SPA and an intriguing fact is that both executed a full and final settlement when they accepted the payment of the LAD in 2017 from the developer.
- (c) The Second Actor Theory basically means that an invalid decision by the first actor (the Controller) may not result in an ineffective act by the second actor (the Developer). The theory of this turns the focus from the unlawful act and on the powers of the person who acts believing the first act to be valid. The idea behind this is that unlawful administrative acts are void in law, however they clearly exist in fact and often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. The validity of these later acts depend upon the legal powers of the second actor.

Here, there is no direct challenge against the Controller's decision to grant the extension by way of judicial review. Thus, this shall not render the second act invalid as there is a reliance on validity of the first act when the second act is performed.

"[97] We agree with the submission of learned counsels for the Appellants that despite the extension having been declared unlawful and invalid by Ang Ming Lee, it should not adversely affect the parties who had relied on that decision or regulation prior to the declaration of invalidity. Ang Ming Lee can be described as a placebo to cure the ills that ail the extensions granted. However, in this case it is necessary to have a specific antidote or a cure to eradicate any negative side effects of Ang Ming Lee. What is the antidote that this Court will prescribe? On the authorities we have discussed, where an innocent party had relied on an earlier decision made by a public authority that was subsequently declared ultra vires, the Second Actor Theory is applicable and should be the perfect and preferred antidote."
- (d) The issue of unjust enrichment was considered. Purchasers who agreed to extended completion periods, received vacant possession, and accepted LAD payments without suffering losses are not entitled to claim LAD retrospectively. They were fully aware of the terms of the SPA and the parties had relied on the SPA. It was only after Ang Ming Lee that the claims were filed years after delivery of vacant possession. Further, in Sri Damansara the validity of the EOT was not challenged.
- (e) If the claims for LAD are calculated retrospectively, it would cause injustice due to the unjust enrichment. Ang Ming Lee is not a carte blanche for purchasers to enjoy financial windfall and retrospective LADs.

We set out a snapshot of questions posed to the Federal Court, and its findings:

	Suits	Questions	FC's Answers
1.	Obata v Prema	Whether a sale and purchase agreement for a housing accommodation of a high rise building between a purchaser and a developer which provides for a period for completion of the housing accommodation extended illegally under the ultra vires Regulation 11(3) of the Housing Development (Control and Licensing) Regulations 1989 should revert to the three year period as provided in the standard Schedule H Agreement?	No
2.		Whether the cause of action for the late delivery liquidated damages shall accrue to the purchaser only upon expiry of the said three year period?	No
3.		Whether the limitation period of a claim for the late delivery liquidated damages shall commence only upon the expiry of the said three year period?	No
4.	Vignesh	Does the doctrine of prospective overruling and the exceptions set out in Re Spectrum Plus Ltd (in liquidation) [2005] 2 AC 680 (" Spectrum Plus ") apply to Malaysian cases where a court's decision and/or judicial pronouncement would bring disruptive consequences to an industry as a whole?	Yes
5.		Does the reliance test (the greater the reliance on the law or legal principle being overruled, the greater the need for prospective overruling) apply to Malaysian cases where great reliance was placed on a statutory regime?	Yes
6.		When does time for a purchaser's claim for liquidated ascertained damages start to run under Section 6(1)(a) of the Limitation Act 1953 where: <ul style="list-style-type: none"> a) a purchaser and a developer enter into a sale and purchase agreement ("SPA") prescribed by Schedule H of HDR; b) the SPA expressly states a time frame of more than 36 months for delivery of vacant possession under Clause 25 and completion of common facilities under Clause 27 ("Extended Period"); c) the purchaser claims that the Extended Period deviates from the 36 months prescribed by Schedule H of the HDR; and d) the purchaser consequently claims LAD from the developer for that part of the Extended Period which exceeds 36 months. 	The cause of action accrued when there is a breach of the terms stipulated in the SPA. The SPA executed and accepted by the purchaser expressly stated that the delivery of vacant possession is 54 months. There is no breach of the terms of the SPA.
7.		Whether a purchaser is to be taken to have enjoyed benefit at the expense of a developer when the developer is required to pay Additional Liquidated Ascertained Damages to the purchaser pursuant to the statutory agreement prescribed under Schedule H of the HDR having duly adhered to the extended time period for delivery of vacant possession and completion of common facilities as agreed by the purchaser and the developer?	Yes
8.	Sri Damansara	Whether the Second Actor theory as endorsed by the United Kingdom Supreme Court in the case of R (Majera) v Secretary of State for the House Department [2022] AC 461 has any application where an innocent third party had relied on an earlier decision made by the public authority which was subsequently declared ultra vires.	Yes

Conclusion

All in all, the Federal Court decision of Obata-Ambak Holdings v Prema Bonanza has resolved various conundrums and provides better certainty to address the issues that have arisen as a result of the Ang Ming Lee decision.

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