

Case Update: Court of Appeal Decides Minister Can Grant Extension of Time for Vacant Possession

The Court of Appeal in *Bluedream City Development Sdn Bhd v Kong Thye & Ors* [2022] 2 MLJ 241 ([grounds of judgment dated 24 January 2022](#)) decided that the Minister has the power to grant an extension of time to a housing developer to deliver vacant possession. The Court of Appeal distinguished an earlier Federal Court decision.

Summary of the Decision and Significance

The developer in this matter, Bluedream City Development Sdn Bhd, had obtained certain extensions of time for the delivery of vacant possession to the apartment purchasers. The apartment purchasers successfully filed a judicial review challenge to set aside the Minister's decision to grant the extension of time.

The Court of Appeal reversed the judicial review challenge and upheld the Minister's decision.

First, the Minister does have the statutory power to waive or modify the sale and purchase agreements between the developer and the purchasers. Hence, the Minister has the power to extend the time under the agreements for the delivery of vacant possession.

Second, there was no procedural impropriety where the purchasers did not have a right to be heard before the Minister made its decision on the extension of time.

Introduction to the Legal Framework

The Housing Development (Control and Licensing) Act 1966 (**HDA**) and the Housing Development (Control and Licensing) Regulation 1989 (**HDR**) regulate among others, the powers of the Minister, housing developer's license, advertisement, and sale permit, as well as sale and purchase agreement between housing developer and purchasers.

Section 24(2) of the HDA allows the Minister to regulate and prohibit the conditions and terms of any contract between a licensed housing developer, his agent or nominee and his purchaser.

Regulation 11(3) of the HDR allows the Controller (appointed by Minister) to waive or modify provisions in the contract of sale, which necessitates compliance by the housing developer, due to special circumstances or hardship.

Brief Facts

Bluedream City Development Sdn Bhd (**Developer**) was the housing developer of the service apartments in the Mines Resort City (**Project**). Throughout the duration of the Project, two extensions of time for handing over of vacant possession were granted as follows:

- (a) 1st extension: 6 months granted by the Controller (**1st EOT**); and
- (b) 2nd extension: 17 months granted by the Minister (**2nd EOT**), on the basis that there was a stop work order (**SWO**) for 17 months due to suspected subsidence and cracks in the nearby school, for which the Developer was later found to be not responsible.

Dissatisfied with the Minister's decision to grant the 2nd EOT, the Purchasers of the Units challenged the Minister's decision by way of judicial review.

The High Court allowed the Purchasers' JR applications on the ground that the Federal Court in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 held that Regulation 11(3) of the HDR is *ultra vires* the HDA. The High Court further proceeded to invalidate the 1st EOT although there was no challenge on the same.

Appeals were filed to the Court of Appeal. The key issue related to the Minister's decision to grant the 2nd EOT for the Developer to complete the units in the Project, in particular, whether such decision is illegal in light of the Federal Court's decision in **Ang Ming Lee**.

Decision of the Court of Appeal

The Court of Appeal reversed the High Court's decision and upheld the Minister's decision granting the developer the extension of time.

The Court of Appeal made the following key points.

First, the Federal Court decision in **Ang Ming Lee** was not applicable to the present case. The issue before the Federal Court in **Ang Ming Lee** was whether the Controller could grant an extension of time to a developer. The Federal Court found that the Controller could not grant such an extension. This was because the Minister could not delegate to the Controller what it could regulate under the HDA.

Second, while the Minister may not delegate the power to "waive or modify" the contract of sale to the Controller, the Minister may nevertheless exercise this power himself. This was consistent with the power conferred on him under sections 24(2)(c) and 24(2)(e) of the HDA, which was to prescribe the form(s) of contract as well as regulate and prohibit the conditions and terms of any contract respectively.

Third, the expression "*regulate and prohibit*" under the HDA is wide enough to include "*waive and modify*" any provisions.

The Court of Appeal held that the facts in **Ang Ming Lee** were strikingly different from the present case. In **Ang Ming Lee**, the decision to extend time to complete the units was made by the Controller and not the Minister. Here, it was the Minister who granted the 2nd EOT.

Fourth, the 2nd EOT was reasonable, just and fair as the Developer did not take advantage of their own delay. The extension of time sought corresponded with the delay period caused by the SWO, for which the Developer was later found to be not responsible.

Fifth, on the other issues, the Court of Appeal found that:

Challenge to the 1st EOT:

- The Purchasers did not challenge the 1st EOT in the JR proceedings in the High Court. The 1st EOT had been subsumed into the 2nd EOT by the Minister. The learned High Court Judge erred in bringing the 1st EOT into play.

Procedural impropriety as the Purchasers were not heard:

- The right to be heard depends on the circumstances and nature of each case. The procedure, being administrative, rather than judicial, cannot be compared with judicial methods and procedure. There is no express requirement of a right to be heard that must be given to the Purchasers.
- It is likely to make little to no difference if the Purchasers were given the right to be heard on the Minister's decision on the 2nd EOT. This is because while the Purchasers were at liberty to adduce evidence during the JR proceedings to convince the High Court that the SWO was due to the Developer's fault or neglect, nothing was forthcoming.

Comments

The Court had to do a balancing act between the interests of the Purchasers and the hardship suffered by a developer, to avoid any probable injustice to any party.

In this regard, the Court would not interfere with the exercise of discretion of the Minister (i.e. to grant an extension of time) in valid and worthy cases, which was the Parliament's intention in conferring such power to the Minister.

Judicial review would be utilised to strike down a decision of the authority when the decision does not comport with the principle of fairness, reasonableness, and proportionality, which was not the case here.

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