IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 02(i)-70-08/2022(W)

BETWEEN

OBATA-AMBAK HOLDINGS SDN BHD
(COMPANY NO. 149198-M) ... APPELLANT

AND

PREMA BONANZA SDN BHD
[COMPANY NO. 200601036174 (755933-K)] ... RESPONDENT

SUMMARY

[1] Five appeals were heard together given the commonality of issues in the questions of law raised for our determination. One appeal filed by the purchaser of the condominium units, The Sentral Residences. The other appeals are appeals filed by the developers of the projects, Prema Bonanza Sdn Bhd (Prema) and Sri Damansara Sdn Bhd (Sri Damansara). We heard oral submissions by all learned counsels representing the respective parties and at the end of those submissions

we indicated that we needed time to consider the respective submissions. We have now reached our decision and what follows below are our deliberations of the issues raised and the reasons for our decision.

[2] The central issue in all the appeals concerned the payment of Liquidated Ascertained Damages (LAD) as a result of this Court's decision in **Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals** [2020] 1 MLJ 281 (**Ang Ming Lee**) declaring that the Regulation 11(3) Housing Development (Control and Licensing) Regulations 1989 (HDR) *ultra vires* the parent Act.

APPEAL NO.: 02(i)-70-08/2022 (W) (Appeal No. 70) & 02(i)-71-08/2022 (W) (Appeal No. 71)

Obata- Ambak Holdings Sdn Bhd (Obata) v Prema Bonanza Sdn Bhd (Prema)

[3] Both the appeals have identical issues, with similar facts and arose from the same development project. Appeal No. 70 is an appeal by Obata against the decision of the Court of Appeal dismissing the appeal by Obata against the High Court's decision which allowed Prema's application under Order 14A Rules of Court 2012 (ROC). Whereas Appeal No. 71 is an appeal by Obata against the Court of Appeal's decision which

dismissed Obata's application for Summary Judgment under Order 14 ROC 2012.

[4] Briefly, the facts are as follows. The Appellant, Obata is the purchaser and owner of two (2) condominium units at the residential project known as The Sentral Residences (the Project). The Respondent, Prema is the developer of the Project. The Project comprises of 2 towers of service apartments and the development of the Project was governed by the Housing Development (Control and Licensing) Act 1966 (HDA) and the HDR. Thus, the agreement to be executed with potential purchasers shall be as prescribed under Schedule H of HDR.

[5] Due to the magnitude and the peculiarity of the bespoke design of the Project, Prema applied for modification of the prescribed SPA in particular to vary the prescribed completion period for the Project from thirty-six (36) months to fifty-four (54) months pursuant to Regulation 11(3) HDR. The extension of time (EOT) was granted by the Controller of Housing (the Controller) on **16.12.2010**, two (2) years before the execution of the SPA with the purchasers of the Project. Prema obtained EOT to extend the time period for delivery of vacant possession and completion of common facilities from 36 months to 54 months. The amended approved provisions are as reflected in Clauses 25 and 27 of

the sale and purchase agreements (SPA). It was only after procuring the approval of the EOT and the amended clauses in the SPA that Prema executed the SPAs with its purchasers.

[6] Obata entered into the SPAs with the approved amended EOT on various dates which formed the subject matter before the court, namely:

(i) SPA dated **24.7.2012** (Suit 301);

(ii) SPA dated **28.10.2013** (Suit 303); and

(iii) SPAs dated **11.7.2012** and **18.7.2012**(Suit 305)- the present appeals before us.

[7] After the Federal Court's decision in **Ang Ming Lee**, Obata commenced proceedings against Prema for the following reliefs:

i. a declaration that any letters given for extension of time pursuant to Regulation 11(3) of the HDR to deliver vacant possession of the property to the plaintiffs and the completion of the common facilities from 36 months to 54 months were inconsistent with the decision of **Ang Ming Lee**;

ii. a declaration that the defendant was required to comply with and was bound to Schedule H of the HDR to deliver vacant possession to the plaintiff and complete the common facilities in 36 months, calculated from the dates of the SPAs; and

iii. an order that the defendant pay liquidated ascertained damages for vacant possession of the property and common facilities in the amount of RM684,953.42, RM307,035.61 and RM55,230.90 for Suits 305, 301 and 303, respectively with 5% interests.

[8] Obata applied to enter a summary judgment against Prema pursuant to Order 14 of the Rules of Court 2012 (ROC) (Order 14) in all three (3) suits. Despite the court directing that an application under Order 14A of the ROC (Order 14A) be filed, Prema proceeded to file an application to strike out Obata's suits.

[9] Subsequently Prema filed an application under Order 14A and amongst the legal issues for determination were as follows:

(i) whether Prema was allowed to deviate from the terms of the prescribed contract of sale in Schedule H of the HDR;

(ii) whether a Minister, who is empowered to regulate and prohibit the conditions and terms of any contract between a licensed housing developer and his purchaser, could delegate the exercise of such powers or the performance of such duties to the Controller of Housing; and

(iii) whether the decision of **Ang Ming Lee** has a retrospective effect.

THE HIGH COURT

[10] On 18.5.2021, the High Court after hearing the arguments of the parties, dismissed the Summary Judgment application and allowed the Order 14A application with a consequential order that Obata's writ and statement of claim be struck out with costs of RM5,000.00.

[11] The High Court held that a developer such as Prema is not allowed to deviate from the terms of the prescribed contract of sale in Schedule H. Pursuant to the doctrine of stare decisis, the ratio in **Ang Ming Lee** was binding on the court.

[12] The High Judge was of the view that as a general rule, a written judgment has retrospective effect save for situations where the doctrine of prospective overruling is applied. However, this did not mean that Obata were entitled to succeed in their suit against Prema. The learned Judge concluded that Obata's contention that no obligation could be imposed on the purchasers to file a judicial review application as the EOT was not provided to them did not hold water. The predominant and sole subject matter of the Obata's suits is premised on the validity of the EOT. The same was within the sphere of public law which was challenged by Obata and the EOT being a decision granted by the Ministry of Housing and Local Government could only be challenged by way of a judicial review and not a writ action. Obata's conduct in filing this suit was improper and an abuse of court process. In a situation where a litigant uses the court's machinery improperly, the court is vested with ample powers to strike out an irregular proceeding.

[13] Further, Obata's claims, which were filed on 18.6.2020, were time-barred given that the breach as alleged occurred as early as 24.6.2012 (Suit 301), 28.10.2013 (Suit 303) and 11.7.2012 and 18.7.2012 (Suit 305). The High Court held that the cause of action for a contract accrued from the date of its breach and time begins to run from that breach. In so far as the declaratory orders sought, Obata was clearly out

of time given that a judicial review application must be filed within three (3) months from the date when the grounds of application first arose or when the decision is first communicated to the applicant in line with Order 53 Rule 3(6) of the ROC.

THE COURT OF APPEAL

[14] Obata appealed to the Court of Appeal. Having heard the arguments advanced by the parties, the Court of Appeal agreed with the High Court and dismissed both appeals with costs of RM8, 000.00.

[15] For these two appeals leave was granted on the following questions of law:

Q1. 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 3-year period as provided in the standard Schedule H Agreement?

If the above is answered in the affirmative,

Q2. whether the cause of action for the late delivery liquidated damages shall accrue to the purchaser only upon expiry of the said 3-year period?

And if Question 2 is also answered in the affirmative,

Q3. whether the limitation period of a claim for the late delivery liquidated damages shall commence only upon the expiry of the said 3-year period?

APPEAL NO.: 02(i)-72-08/2022 (W) (Appeal No. 72) and 02(i)-74-08/2022 (W) (Appeal No. 74)

Prema Bonanza Sdn Bhd v. Vignesh Naidu a/l Kuppusamy Naidu (Vignesh)

[16] These appeals involved the same Project as Obata. On 18.7.2012, Prema, the Appellant in this appeal entered into a SPA with Vignesh, the Respondent for the purchase of Parcel No. A-37-G of the Project with a purchase price of RM2,168,000.00 (the Property). Upon completion of the Project development, Prema gave a written notice to

Vignesh on 25.1.2017 stating that the Certificate of Completion and Compliance had been issued and vacant possession of the Property was ready to be delivered. However, Vignesh claimed that the last date to deliver vacant possession was supposed to be on 17.7.2015 and Prema must be liable to pay Vignesh LAD for late delivery of vacant possession.

[17] Vignesh claimed that the SPA he had signed with Prema for the purchase of the Property was not in the prescribed statutory form as mandated under the HDR. The SPA executed stipulates that the vacant possession of the Property shall be delivered by the developer within 54 months and not 36 months from the date of the signing of SPA as prescribed under Schedule H of HDR. Therefore, Vignesh claimed that any contradictions of the prescribed form are invalid and not binding. Amongst the reliefs sought by Vignesh are:

a) A declaration that any notice given in accordance to an extension of time by virtue of Regulation 11(3) HDR for Prema to deliver vacant possession of the said Property from 36 months to 54 months is invalid as in the Federal Court's decision in **Ang Ming Lee**;

b) A declaration that Prema is bound to deliver vacant possession to Vignesh within a period of 36 months in accordance with statutory form from the date of the signing of the SPA; and

c) An order for Prema to pay LAD to Vignesh for late delivery of vacant possession.

[18] Two applications were filed in the High Court. The first application was by Vignesh for Summary Judgment order against Prema and the second application is by Prema to strike out Vignesh's claim.

[19] The main thrust of Vignesh's application for summary judgment is the absence of triable issues as the SPA executed is a statutory contract. Prema as the developer cannot deviate or vary any of the terms of the prescribed form in Schedule H of HDR 1989 including extending the completion period in SPA from 36 months to 54 months. Any amendments and/or variations made to the SPA which is inconsistent and/or contradicts the terms in the prescribed Schedule H of HDR shall be of no legal effect and not binding. It therefore follows that Prema be required to deliver vacant possession within the completion period of 36 months in accordance with the prescribed form. Applying **Ang Ming Lee**, any EOT

granted by the Controller of Housing to allow a completion period of 54 months is null and void. There are no triable issues and Prema shall be liable to pay LAD to Vignesh as stated in the Statement of Claim.

[20] In the striking out application, Prema contended that the suit filed by Vignesh is frivolous and vexatious as well as an abuse of the court's process.Vignesh'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.

[21] The EOT obtained on 16.12.2010 was two (2) years before the signing of the SPA. Vignesh failed to provide particulars as to why it has the right to claim LAD outside the scope of the SPA as the 36 months are nowhere to be found within the SPA signed by both parties. Therefore, Prema argued that Vignesh's claim for LAD based on a calculation of 36 months is frivolous, scandalous and amounts to an abuse of the court's process.

[22] Furthermore, Vignesh cannot rely on the case of **Ang Ming Lee** and disregard the extension of time approved 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.

[23] In any event, Prema has paid Vignesh the full LAD sum of RM13,067.40 for late delivery of vacant possession in accordance with the terms of the SPA. In addition, Vignesh has signed a letter dated 7.3.2017 undertaking to waive any further claims, demand and/or not to institute any legal suit or proceeding against Prema. These facts are not disputed.

[24] It was further contended by Prema that Vignesh's cause of action arises from the SPA entered into by both parties. Since the SPA dated 18.7.2012 stipulated that the completion period as 54 months, the limitation set in as early as 18.7.2018. Since the SPA was entered on 18.7.2012, this claim clearly falls outside the limitation period since it was eight (8) years ago. The High Court concluded that Vignesh relied on statute of limitations but gave no reasons for the delay in filing the suit. Therefore, Vignesh's claim is barred by the limitation period as accorded in Section 6(1)(a) of the Limitation Act 1953.

[25] Vignesh's claim against Prema is based on the Federal Court's decision of **Ang Ming Lee**. The High Court opined that the timeline under Form H HDR is not rigid because the Regulations itself provides for an extension of time. Vignesh himself did not object or appeal to the Ministry as to the extension of time from 36 months to 54 months before signing the SPA. The EOT granted was already reflected in Clauses 25 and 27 of the SPAs since the EOT was approved and given two (2) years prior to the signing of the SPA. Therefore, the extension of 54 months given to the Defendant is valid and did not contravene the provisions of the HDR.

[26] Vignesh 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**. In **Ang Ming Lee** 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 which changed the completion period in delivering vacant possession.

[27] Vignesh's claim for LAD based on a calculation of 36 months has no legal basis or without merits.

[28] The High Court held that 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. 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. Vignesh is therefore estopped from denying what had been agreed between them.

[29] Moreover, Prema paid Vignesh the LAD in the sum of RM13,067.40 for the late delivery of vacant possession in accordance with the terms of the SPA. In addition, Vignesh signed a letter dated 7.3.2017 and further undertook to waive any further claims, demand and/or not to institute any legal suit or proceeding against the Defendant.

[30] The High Court allowed Prema's application to strike out Vignesh's case as Vignesh failed to disclose reasonable cause of action and thus, obviously unsustainable and ought to be struck out. The application for Summary Judgment by Vignesh was dismissed with costs of RM3,000.00.

THE COURT OF APPEAL

[31] Vignesh appealed to the Court of Appeal. The Court of Appeal allowed both appeals with costs.The Orders of the High Court were set

aside. The Court of Appeal further directed that the summary judgment application against the Prema be allowed, and the striking out application claim be dismissed.

[32] The reasons for the Court of Appeal's decision are summarised below:

(i) The application for the extension of time by the developer in **Ang Ming Lee**, unlike in the instant case, was made after the agreements had been signed by the purchasers in which the initial completion date of the agreements was contracted to be 36 months in accordance with Schedule H;

(ii) The extension was granted after the sale and purchase agreements had been signed with the purchasers, like in **Ang Ming Lee**, or prior to, like in the instant case;

(iii) As Regulation 11(3) HDR is *ultra vires*, the Controller has absolutely no power to give any extension or to amend the statutory contract, such that it is wholly inconsequential that the extension in this case was obtained before the execution of the SPA, whatever the background;

(iv) The Court is bound by the doctrine of stare decisis to follow **Ang Ming Lee**;

(v) The extension granted by the Housing Controller under regulation 11(3) HDR cannot be legitimised through estoppel, waiver or agreement between parties;

(vi) The doctrine of estoppel does not therefore apply against a statute or statutory agreement such as in the instant case which revolves around the clauses in a statutory contract as prescribed in Schedule H to the Regulations;

(vii) The principle of waiver or estoppel is in other words not applicable when regulation 11(3) of the Regulations is *ultra vires* the HAD;

(viii) Vignesh's right to claim LAD only arose on the date he accepted delivery of vacant possession of his property unit. Vignesh is deemed to have taken delivery of vacant possession of his property in early February 2017. Accordingly, Vignesh's cause of action to claim LAD accrued on that date;

(ix) The six years limitation period under Section 6 (1) (a) of the Limitation Act 1953 would only expire in early February 2023. Since the instant suit was filed on 21.8.2020, which clearly is well within the limitation period, Vignesh's claims are not barred by limitation; and

(x) Where the contractual breach concerns a claim for LAD as pleaded in this case, it is correct to hold that the cause of action accrues on the date of the SPA, despite the contention that the breach occurred when Clauses 25 and 27 were made to depart from Schedule H to the Regulations. First, no liquidated damages could be claimed by the appellant at that early stage as it could certainly not as yet be ascertained before delivery of vacant possession. Secondly, if limitation starts to run from the date of the SPA, but that a LAD claim could only be made much later on the expiry of the 36 months, the first three (3) years of the limitation period would for all intents and purposes be wholly illusory.

[33] However, the Court of Appeal opined that the action must be instituted by way of judicial review as mandated under Order 53 of the ROC as Vignesh questioned the validity of the extension granted which is an administrative decision by the Controller. The Federal Court in **Ang Ming Lee** made it crystal clear that any extension allowed by the Controller pursuant to Regulation 11(3) HDR is void. However, Vignesh's claim is based on the contractual breach of the SPA and not a challenge against an administrative decision.

[34] The Court of Appeal accepted the arguments advanced that the Federal Court in **Ang Ming Lee** did not pronounce expressly or by implication that its decision must have prospective effect on all the letters of extension of time which had been previously issued under the impugned provision of the Regulations to the developers. However, it is the Court of Appeal's view that based on cases such as **Semenyih Jaya v Pendaftar Tanah Daerah Hulu Langat** [2017] 3 MLJ 561 the application of the doctrine of prospective overruling must be declared by the Court which actually decided on the case which resulted in the clarification or the change in the law. In the absence of any further pronouncement the ruling by the Federal Court in **Ang Ming Lee** on regulation 11(3) of the Regulations being void is to be applied retrospectively.

[35] For this appeal leave was granted on the following questions of law:

Q1. 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?

Q2. 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?

Q3. 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:

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.

Q4. 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?

[36] The Sri Damansara's appeal has common issues with Obata's and Vignesh's appeals but with a slight twist of facts. The Appellant, Sri Damansara, is the developer of a condominium known as "Foresta Damansara". On 6.1.2012 the 2nd Respondent (Fong) paid RM 10,000.00 to Sri Damansara as part payment for the purchase of a unit in the said condominium costing RM735,980.00 (subsequently discounted with a rebate of RM63,598.00). Subsequently vide a letter dated 13.2.2012, Fong requested Sri Damansara to add Yoa, (the 3rd Respondent) as a co-purchaser of the said unit.

[37] On 28.6.2012, Sri Damansara entered into SPA with both Fong and Yoa. It was agreed between the parties in the SPA, amongst others, that:

a. Sri Damansara shall deliver vacant possession of the said Unit to Fong and Yoa within **42 calendar months** from the date of the SPA, as seen in Clause 25(1) of the SPA; and

b. By the terms of the SPA Sri Damansara shall complete the Condominium's common facilities within **42 calendar months** from the date of the SPA, as provided in Clause 27(1) of the SPA.

[38] Sri Damansara gave a discount of RM63,598.00 to Fong and Yoa through a credit note dated 17.7.2012. Vide letter dated 22.12.2015 (about **41 months 25 days** from the date of SPA), Sri Damansara gave Fong and Yoa a notice to take delivery of vacant possession of the said Unit.

[39] Fong and Yoa filed a claim at the Homebuyers' Tribunal (the 1st Respondent) for liquidated damages amounting to RM44,279.78 for the delay in delivering vacant possession of the Unit and completing the common facilities. They computed their claim based on the purchase price before the rebate and the 42 months period to start running from the date of their part payment of the purchase price and not from the date of the SPA. Sri Damansara counterclaimed for the return of the rebate.

[40] The tribunal adopted the calculation by Fong and Yoa and ordered Sri Damansara to pay them RM41,134.22 as liquidated damages for late delivery of vacant possession of the Unit only. Sri Damansara filed a judicial review application against the tribunal's decision and leave to review was granted.

[41] The High Court allowed parties to file further affidavits and supplemental written submissions on the effect of the inconsistency between the time stipulated in the SPA (42 months) for delivery of vacant possession with the Schedule H prescribed time (36 months). Sri Damansara affirmed an affidavit stating that they had filed an extension of time application at the end of 2011 with the Ministry of Housing and Local Government. Vide letter dated 17.1.2012, the Controller of Housing had, pursuant to Regulation 11(3) of HDR allowed an extension to 42 months instead of the 48 months sought by Sri Damansara. The Controller's extension was granted prior to the execution of the SPA.

THE HIGH COURT

[42] The High Court judge allowed Sri Damansara's judicial review application in part for the following reasons:

(a) The High Court was bound by the case of **Ang Ming Lee** due to the doctrine of stare decisis;

(b) Even if parties do not raise illegality, the court is duty bound to take cognisance of it as it is contrary to public policy for the court to allow an illegality to be perpetrated;

(c) The High Court was concerned that the court was not apprised of the reasons given by Sri Damansara to the Ministry of Housing in requesting for the extension of time, and the Controller did not give any reasons for allowing the extension of time. The lack of reasons given by the Housing Controller is contrary to good governance and the decision of the Housing Controller may be arbitrary and unjust;

(d) The High Court Judge accepted Sri Damansara's submission that the 36 months period runs from the date of the SPA, not from the date of part payment or any other case, due to the literal interpretation of clauses 25(1) and 27(1) SPA as prescribed under Schedule H which stipulates "from the date of this Agreement". Further, Yoa did not contribute to the part payment and only Fong paid Sri

Damansara. Therefore, Fong and Yoa cannot rely on the part payment as there was no contract formed with Sri Damansara when Fong paid. The tribunal therefore committed an error of law in deciding that the 42 months period commenced from the date of part payment;

(e) The tribunal ought to have considered the rebate because it amounted to a valid bilateral variation of the purchase price. By not taking the rebate into account, the tribunal unjustly enriched Fong and Yoa to Sri Damansara's detriment;

(f) The second irrationality of the tribunal was failing to consider Sri Damansara's counterclaim;

(g) The tribunal awarded liquidated damages for Sri Damansara's delay in delivering vacant possession of the condominium unit but completely omitted to give any award for the delay in completing the common facilities;

(h) Based on the illegality and the 3 irrationalities above, the High Court quashed tribunal's decision; and

(i) The court in judicial review applications has wide powers to make any order in the interest of justice. Cases decided before the above rules came into force should be read with caution.

THE COURT OF APPEAL

[47] Sri Damansara appealed against part of the High Court decision that ordered it to pay Fong and Yoa the sum of RM39,327.10 with interest until full settlement. It was contended by Sri Damansara among others, that the High Court judge erred in raising the issue of the time frame for delivery of vacant possession which was not even raised by parties at the tribunal or the High Court.

[48] Fong and Yoa filed a cross-appeal against the part of the High Court's decision that calculated liquidated damages from the date of the SPA. They contended that the time ought to be calculated from the date of the deposit or booking fee which formed part of the purchase price.

[49] The Court of Appeal unanimously dismissed the appeal on the following grounds:

(a) The core issue is whether the learned High Court Judge may decide on the issue of the legality of the extension of time granted by the Housing Controller for the delivery of vacant possession of the said Unit even though the parties did not canvas this issue either in the proceeding before the tribunal and the learned High Court Judge;

(b) The Court of Appeal opined that the learned High Court Judge was entitled to take cognisance of the issue of illegality. This is because even though the parties did not allude to the issue of illegality, the court is duty-bound to take cognisance of illegality, as the court should not knowingly be a party to the enforcement of an unlawful agreement;

(c) The learned High Court Judge had correctly exercised his discretion under ss. 25(1), 25(2) and paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and Order 1A, Order 2 Rule 1(2) and Order 53 Rule 2(3) of the ROC 2012 to order Sri Damansara to pay liquidated damages for the late delivery of vacant possession of the Unit and the late completion of the common facilities. Hence, the Court

of Appeal was of the view that the learned High Court Judge's decision was just and reasonable.

[50] The Federal Court granted leave for one question of law. The question of law to be determined by this Court is as follows:

> 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*.

Our Analysis and determination

[51] We will now address and discuss the issues in the order that we requested the parties to submit before us**.**

The Limitation Challenge

[52] In respect of Obata's appeals, the facts are straightforward. Obata, bought 2 parcels of residential units and executed the SPAs on 11.7.2012 and 18.7.2012. The period of completion of the 2 units was extended to 54 months pursuant to Regulation 11 of the HDR. Obata

alleged that the letter approving the extension from 36 months to 54 months was never given to them neither did they have any knowledge of the approval. Obata further contended that it was only after the suit was filed in the High Court post **Ang Ming Lee** that a copy of the approval was given. Vacant possession of the units was duly delivered by Prema on 25.1.2017 and as such Obata claimed that, applying **Ang Ming Lee,** there was a delay of 550 days as it exceeded the completion period of 36 months as statutorily provided in Schedule H of the HDR.

[53] In respect of Vignesh's appeal, the SPA was executed on 18.7.2012 expressly stipulating in the SPA that the completion period for the project was 54 months. The vacant possession notice stating that the unit was ready to be delivered was issued to Vignesh on 25.1.2017. Despite that vacant possession was delivered, and having accepted and received the LAD for the delay, Vignesh proceeded to file the suit in August 2020 after the **Ang Ming Lee** decision.

[54] It is an undisputed fact that Obata and Vignesh entered into a settlement agreement with Prema in 2017. Obata had accepted the payment sum of RM10,017.53 and RM16,891.51 respectively as full and final settlement of the LAD claims by a settlement letters dated 14.3.2017. In Vignesh's case there was a delay in the delivery of vacant possession.

However, by a settlement letter dated 7.3.2017 Vignesh had accepted the payment of a sum of RM13,067.40 as full and final settlement of all LAD claim under the SPA.

[55] Like Obata, Vignesh filed an application for summary judgment on 11.9.2020 and Prema filed an application to strike out the claim. The High Court allowed the striking out application by Prema. The Court of Appeal reversed the High Court's decision and allowed Vignesh's appeal.

[56] Learned Counsel for Obata, Dato' Low Joo Hean argued that the High Court Judge did not explain how he concluded that the breaches occurred on 11.7.2012 and 18.7.2012 and that the limitation periods for filing the claims expired on 11.7.2018 and 18.7.2018. Learned Counsel canvassed the following arguments in support of the appeals.

[57] The SPAs were executed on 11.7.2012 and 18.7.2012 respectively. The actions were commenced on 18.6.2020 and 21.8.2020. It is Prema's argument in the appeals before us that Obata's and Vignesh's claims clearly fall outside limitation period since the SPA was executed 8 years before the suits were filed. The Purchasers' claim is therefore barred by limitation.

[58] In Obata and Vignesh the background facts are distinctly different from **Ang Ming Lee.** The extension was granted before the SPAs were executed**.** Both had executed the SPAs where it was expressly stipulated that the completion period and delivery period were 54 months. There was a delay but both Obata and Vignesh were paid the LAD as provided under the SPAs.

[59] The issue of limitation was not before the Federal Court. Hence, the Federal Court in **Ang Ming Lee** did not address the issue of the SPA being time barred pursuant to Section 6(1) of the Limitation Act 1953 as the central issue before the court was whether Regulation 11(3) of the HDR is *ultra vires* the HDA.

[60] In respect of the appeals before us the issue to be determined is when the cause of action arose. Whether the cause of action arose after the decision of **Ang Ming Lee** or within 6 years after the execution of the SPAs?

[61] It is trite that the cause of action for a contract accrues from the date of its breach and the time runs from that breach. Section 6(1)(a) of the Limitation Act 1953 [Act 254] provides as follows:

(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say—

(a) actions founded on a contract or on tort;

(b) actions to enforce a recognisance;

(c) actions to enforce an award;

(d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[62] Lord Diplock in **Letang v Cooper** [1965] 1 QB 232 defined cause of action as 'a factual situation the existence of which entitled one person to obtain from the court a remedy against another'. This definition was adopted in **Hock Hua Bank Bhd v Leong Yew Chin** [1987] 1 MLJ 230, where Abdul Hamid Ag LP, as he then was, stated there must be a cause of action before a plaintiff can claim a relief in an action.

[63] In **Nasri v Mesah** [1970] 1 LNS 85; [1971] 1 MLJ 32, Gill FJ described cause of action as the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment. His Lordship further

articulately explained ‘the date of accrual’ in the case of a debt will be on the date the debt could be recovered.

[64] Salleh Abbas, LP in **Government of Malaysia v Lim Kit Siang** [1988] 2 MLJ 12 explained what is a cause of action:

> What then is the meaning of "a cause of action"? "A cause of action" is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action.

[65] **Nasri v Mesah** and all the cases that we have referred to above are still good law. The Federal Court cases **of Loh Wai Lian v SEA Housing Corporation Sdn Bhd** [1984] 2 MLJ 280, **Insun Development Sdn Bhd v Azali bin Bakar** [1996] 2 MLJ 188, and **The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon** (representing the estate of the deceased, NVJ Menon) [2006] 2 MLJ 209 have all followed **Nasri v Mesah**. Therefore, it is clear that a cause of action founded on a contract accrues on the date of its breach, and in the case of a debt, the cause of action arises at the time when the debt could first have been recovered by action.

[66] In the appeals before us, on the facts and evidence Obata and Vignesh are in effect challenging the validity of the clauses, which are, clauses 25 and 27 of the SPA. Terms which they have agreed to when they signed the SPAs in 2012. In respect of limitation we are of the view that based on the law on limitation it is clear that time begins to run at the earliest point of time the claimants, Obata and Vignesh could commence action. The cause of action would have accrued from the date of the execution of the SPAs or if there was any breach of the terms of the SPAs.

[67] The causes of action in the appeals before us are based on contract and section 6(1) Limitation Act requires civil claim to be filed before the expiration of six years from the date on which the cause of action accrued which would be the date the SPAs were executed. Both Obata and Vignesh executed the SPAs with the knowledge that the completion period of the housing project was 54 months. Prema had obtained the approval of the Minister of Housing and Local Government to vary the prescribed completion date by extending the completion period to 54 months prior to the execution of the SPA. When they signed the SPA at that material time they would have legal counsel and should have enquired or raised any doubts before or when executing the SPA.

[68] Obata and Vignesh had agreed when they signed the SPAs that the completion period shall be 54 months from the date of execution of the SPAs. A very intriguing and relevant fact which we cannot ignore or brush aside is that both Obata and Vignesh executed a full and final settlement when they accepted the payment of the LAD in 2017 from the developer. Obata and Vignesh could have and should have raised the issue of the validity of clauses in the SPAs before signing the full and final settlement in 2017 which they failed to do so.

[69] Both the actions were filed in 2020, that is, outside the period of limitation. And as we have explained based on the reasons above, a claim for LAD where the cause of action accrued beyond six (6) years before **Ang Ming Lee**, the claim is time barred. The claims are barred by limitation, as the six (6) year period had expired. Therefore, Obata's and Vignesh's claims must necessarily fail.

[70] The questions posed in Obata are answered as follows:

> **Q1** 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 3-year period as provided in the standard Schedule H Agreement?

A: Negative

Q2 Whether the cause of action for the late delivery liquidated damages shall accrue to the purchaser only upon expiry of the said 3-year period?

A: Negative

Q3 Whether the limitation period of a claim for the late delivery liquidated damages shall commence only upon the expiry of the said 3-year period?

A: Negative

[71] In respect of limitation the questions posed in Vignesh are answered as follows:

Q3. 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:

e) a purchaser and a developer enter into a sale and purchase agreement ("SPA") prescribed by Schedule H of HDR;

f) 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”);

g) the purchaser claims that the Extended Period deviates from the 36 months prescribed by Schedule H of the HDR; and

h) the purchaser consequently claims LAD from the developer for that part of the Extended Period which exceeds 36 months.

A: 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.

Q4. 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?

A: Affirmative

The Second Actor Theory

[72] In the Sri Damansara's appeal, the question to be determined by this Court is as follows:

> 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*.

[73] The determination of the question posed before us is important and critical, not only to this appeal but also to cases and/or disputes in respect of approval of extension of time by the Controller granted before the parties executed SPAs. It also extends to parties who had voluntarily agreed to the SPAs and accepted the extended time period for the

delivery of vacant possession. The Federal Court in **Ang Ming Lee** ruled that Regulation 11(3) of the Regulations, conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is *ultra vires* the Act. The Federal Court did not hold that the Minister is not empowered to grant an extension of time. The Federal Court said that the Minister could not delegate the power to modify or vary the prescribed form of SPA to the Controller but instead must apply his own mind to the matter of an extension of time for the developer to complete the units.

[74] In the Sri Damansara's appeal the purchasers executed the SPA sometime in June 2012. On 17.7.2012, Sri Damansara gave the 2nd and 3rd Respondents a discount of RM63,598.00 by way of a credit note. Amendment was made to the date of delivery of vacant possession from the prescribed 36 months to 42 months. In December 2015 vacant possession was delivered. The purchasers filed a claim with the Housing Tribunal in 2017 for late delivery. In their claim the 2nd and 3rd Respondents contended that the period of 42 months for the delivery of vacant possession must be computed from the date of part payment. The Tribunal allowed the claim for LAD based on the original price without considering the rebate given and computed on the basis that the 42 months took effect from the date of the part payment and ordered Sri

Damansara to pay the sum of RM41,134.22. Sri Damansara filed judicial review on the grounds that the Tribunal had erred by partially allowing the purchasers' claims. The High Court allowed in part Sri Damansara's judicial review application and reduced the amount to RM39,327.10. Even though the issue of illegality was not raised by the parties the learned High Court Judge on his own motion determined the issue. On appeal the Court of Appeal dismissed Sri Damansara's appeal.

[75] The application of the Second Actor Theory is the only argument advanced by learned counsel for Sri Damansara. Learned counsel for Sri Damansara, Dato' Lim Chee Wee submitted that an invalid decision by the first actor, the Controller, will not result in an ineffective act by the Second Actor, the developer. Sri Damansara obtained and had relied upon the approval of the extension before the SPA was executed. Learned counsel for the Appellant contended that an administrative act by a public authority declared void will not invalidate that act done before the declaration. The EOT was granted five months before any SPA was executed. Therefore, the SPAs executed by Sri Damansara and the purchasers are valid. Vacant possession was delivered on 22.12.2015.

[76] It was further argued that both the 2nd and 3rd Respondents are strangers and cannot initiate a collateral proceeding by way of the defence

and must challenge directly the extension of time granted by the first actor, the Controller. This they failed to do so.

[77] In response to the submission advanced by learned counsel for Sri Damansara, learned counsel for the 2nd and 3rd Respondents, Dato KL Wong argued that although an administrative act (the first act) has been declared void in law, it is still an act in fact. The mere factual existence of the first act provide foundation for the legal validity of the later decision (the second act).

[78] Learned counsel for the 2nd and 3rd Respondents submitted the question posed for determination presumes a fact that was neither decided by the High Court nor by the Court of Appeal and seems to suggest that an innocent third party had relied on an earlier decision made by the public authority which was subsequently declared *ultra vires*. There is no finding or decision made by the Tribunal or the High Court or even the Court of Appeal that Sri Damansara is the innocent third party. Furthermore, the issue was not raised at the High Court or the Court of Appeal; neither did the Appellant raise this as an issue before the Tribunal.

[79] More importantly it would have the effect of reversing the findings made against Sri Damansara, namely, that the extension of time granted

by the Controller pursuant to Regulation 11(3) HDR 1989 had been declared *ultra vires* by the Federal Court. Since the Federal Court in **Ang Ming Lee** declared that Regulation 11(3) *ultra vires* the parent Act, the Controller has no power under the HDA to modify or amend the statutory contract of sale. Sri Damansara cannot by way of collateral proceedings re-argue that the Controller has such power to modify or amend the statutory contract of sale. Learned counsel for the Respondents submitted that this can only be done through legislative intervention. To contend that the Controller still retains the power to modify or amend the statutory contract of sale would be against the Federal Court's decision in **Ang Ming Lee** and would tantamount to usurping the legislative's powers. The EOT granted by the Controller is null and void as it was *ultra vires* the HDA. A void decision is strictly speaking, not a decision at all and does not need to be revoked. It is as if the decision had never existed. There is thus, no necessity to file for judicial review to have it set aside.

[80] We are not persuaded with the argument advanced by learned counsel for the 2nd and 3rd Respondents that this Court is precluded from considering issues which was not raised in the courts below. Abdul Rahman Sebli, FCJ (as His Lordship then was) in **The Speaker of Dewan Undangan Negeri of Sarawak Datuk Amar Mohamad Asfia Awang**

Nassar v Ting Tiong Choon & Ors and other appeals [2020] 4 MLJ 303 made this crystal clear:

> [212] The issue of breach of the rules of natural justice was not a leave question for our determination, nor was it a matter that the Court of Appeal dealt with and decided on. It was for these reasons that learned counsel for the appellants strenuously objected to the issue being raised at the hearing of these appeals but we decided to hear submissions by the parties in view of the general importance of the matter in all the circumstances of the case, including in particular the failure by the majority to consider the issue although vigorously argued by the respondent at the hearing before the Court of Appeal and which the High Court had in fact decided in the respondent's favour.
>
> [213] Recently this court in *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah* [2018] 12 MLJ 49 reiterated the principle that the courts have untrammelled discretion to allow a question of law to be raised for the first time on appeal, in the interest of justice having regard to the circumstances of the case and where it is

appropriate to do so. The only fetter I must add is that the discretion must be exercised very sparingly and in the most suitable of cases, for if it were otherwise the statutorily prescribed procedure for appealing to this court will be rendered nugatory and open to perpetual abuse which in turn will cause uncertainty to the finality of litigation.

[81] The Second Actor Theory is a principled and practical solution to resolve the question of the validity of a subsequent decision. The validity of the second act will turn upon the proper construction of the act empowering the 'second actor' to do or not to do a specified act. The Second Actor Theory was formulated by Professor Christopher Forsyth in "The Metaphysic of Nullity" - Invalidity, Conceptual Reasoning and the Rule of Law' (Christopher Forsyth and Ivan Hare (eds) (Clarendon Press, 1998) 159). Professor Forsyth explained:

> ... unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depend upon the legal powers of the second actor. The crucial issue to be determined is whether the second actor has

legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.

[82] The theory's intent is to resolve what Forsyth described as the existence of a conundrum of validity of public administrative acts and the presumption of validity. Forsyth further explained that the "… theory of the second actor turns the focus away from the unlawful act and on to the powers of the person who acts believing that the first act is valid. All the difficulties attendant upon seeking some interim validity within the first act are side stepped; and thus, the classic principles of administrative law are reconciled with the effectiveness, in appropriate cases, of acts taken in reliance upon unlawful administrative act."

[83] Learned counsel for Sri Damansara Dato' Lim Chee Wee in his submission summarised the Forsyth theory as follows:

(a) It is in substance a licence permitting an individual to do an act which would otherwise be unlawful;

(b) The administrative act may permit an official to do what is otherwise unlawful;

(c) The administrative act may order an official to do or not to do a certain act; and

(d) An administrative decision which may order an individual to do or not to do a certain thing.

[84] In a recent Supreme Court UK case of **Regina v Majera (formerly SM (Rwanda)) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)** [2022] AC 461 the Court affirmed the doctrine of Second Actor Theory. The Supreme Court however did not embark upon the principle of the "Second Actor Theory" and only dealt with an order of a court or tribunal, and not a subordinate legislation that had been declared *ultra vires* by a superior court. Lord Reed in Majera explained that it was unnecessary to embark upon a detailed consideration of the legal consequences of administrative measures which have been held to be unlawful. It is necessary to focus only upon the question whether it is a defence to a challenge to the lawfulness of the Secretary of State's decision, on the basis that it was inconsistent with the order of the First-tier Tribunal, to establish that the order was unlawful.

[85] Even where a court has decided that an act or decision was legally defective, that does not necessarily imply that it must be held to

have had no legal effect. As the Court of Appeal correctly noted it may be, in the first place, that to treat the decision as a nullity would be inconsistent with the legislation under which it was made. Or the result of treating the decision as legally non-existent may be inconsistent with legal certainty or with the public interest in orderly administration: it may, indeed, result in administrative chaos, or expose innocent third parties to legal liabilities (as where they have acted in reliance on the apparent validity of the unlawful decision). In some such circumstances, the act or decision may have some legal effects in accordance with principles of the common law.

[86] In his speech Lord Reed highlighted an observation made by Lord Radcliffe in **Smith v East Elloe Rural District Council** [1956] AC 736 in the application of the theory. In **Smith**, Lord Radcliffe considered an argument that an ouster clause preventing a compulsory purchase order from being challenged after the expiry of a time limit must be construed as applying only to orders made in good faith, since an order made in bad faith was a nullity and therefore had no legal existence. Lord Radcliffe observed that an order, even if not made in good faith, is still an act capable of legal consequences. Such an order “bears no brand of nullity on its forehead”. Unless court proceedings are taken to establish the invalidity/nullity and get it quashed or set aside.

[87] Lord Reed concluded that if an unlawful administrative act or decision is not challenged before a court of competent jurisdiction, or if permission to bring an application for judicial review is refused, the act or decision will remain in effect. He went on further to say that even if an unlawful act or decision is challenged before a court of competent jurisdiction, the court may decline to grant relief in the exercise of its discretion, or for a reason unrelated to the validity of the act or decision. Thus, the act or decision will again remain in effect. An unlawful act or decision cannot therefore be described as void independently of, or prior to, the court's intervention. Therefore, even when an act or decision has been declared as being legally defective, that does not necessarily imply that it must be held to have had no legal effect.

[88] To treat the decision as a nullity would be inconsistent with the legislation under which it was made. The legal consequences of treating the decision as legally non-existent may be inconsistent with legal certainty or with the public interest in orderly administration and may to a certain extent result in administrative chaos, or exposing innocent third parties to legal liabilities where they have acted in reliance on the apparent validity of the unlawful decision.

[89] Thus, a legally defective act does not necessarily result in the act having no legal effect at all. The Court may declare an act to be unlawful but the Court may find it necessary in some circumstances to treat the act as having some legal effects. Therefore, even if the Court may find the act to be unlawful or legally defective, it does not necessarily imply that it does not have any legal effect. The Courts have power to afford legal effect to *ultra vires* decision for public interest or orderly administration.

[90] In Malaysia, the Second Actor Theory was discussed and applied in **Pan Wai Mei v Sam Weng Yee & Anor** [2006] 2 MLJ 1. The facts of **Pan Wai Mei** are straightforward. It was an action brought by the respondent as plaintiff to obtain vacant possession of a property occupied by the appellant, the first defendant. The Court of Appeal observed that in fact neither of the appellants had mounted a challenge that the order for sale or the public auction invalid.

[91] Justice Gopal Sri Ram, Judge of the Court of Appeal, as his Lordship was then, explained the Second Actor Theory and said that the theory has both the merit of logic and judicial support.

[92] Back to the instant appeal, the first act was the approval of extension of time by the Controller while the second act was the reliance of the developer on the Controller's extension. The parties had presumed correctly that the Controller's extension was validly granted in 2012. In fact, Sri Damansara delivered the unit within the said period as stipulated under the SPA. The complaints of the 2nd and 3rd Respondents before the Tribunal are the late delivery of vacant possession and that the payment of LAD should be calculated from the date part payment was made. The High Court found that the date of payment shall be computed from the date of the SPA and the Court of Appeal affirmed the decision of the High Court.

[93] We agree with the arguments advanced that the validity of an administrative action may, in exceptional circumstances, be challenged by way of collateral proceedings. However, in the appeal before us the 2nd and 3rd Respondents are in actual fact 'strangers' in the present dispute, and as 'strangers' they are not eligible to collaterally attack the Controller's extension through this proceeding. As explained in **Pan Wai Mei** for a collateral attack against the decision of a public decision maker to succeed, no stranger can be involved in the challenge. The contest was either between the party that did the invalid act and the victim of the act

or between two non-strangers one of whom seeks to rely on an invalid act or decision made by public decision-maker.

[94] In the appeal before us, the proper parties are the Controller who performed the administrative action and Sri Damansara who relied on the administrative decision. The 2nd and 3rd Respondents as the purchasers do not fall within the two categories of parties entitled to initiate collateral proceedings to invalidate the Controller's extension. Moreover, the Collateral Proceeding can only be used as a defence rather than an attack.

[95] Hence, the 2nd and 3rd Respondents in this case cannot initiate this collateral proceeding, as they are using it as an attack against Sri Damansara (who is the developer and the second actor) as opposed to a defence. There was no direct challenge against the Controller's decision to grant the extension by way of judicial review. Thus, it shall not render the second act invalid as there is a reliance on validity of the first act when the second act was performed.

[96] We reiterate that we are not in any way or manner departing from **Ang Ming Lee**, neither are we revisiting **Ang Ming Lee**. As learned counsel for the Appellant submitted the application of Second Actor

Theory is not to revisit **Ang Ming Lee** but to refine it and to put it in proper context. On the contrary the underlying question calling for consideration in the present appeal is the legal consequences of the aftermath of **Ang Ming Lee**. It is imperative for this Court to resolve the legal uncertainties surrounding this issue of the extension of time granted by the Controller plaguing the housing industry in this country. As we have earlier alluded the power of the Minister under the Act and the Regulations remained legally intact notwithstanding the declaration that Regulation 11(3) of the HDR is *ultra vires*.

[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.

[98] The developer, in this case Sri Damansara, relied upon the act of granting the extension. There would be substantial injustice if the act of developer is found to be void because of the invalidity of the first act by the Controller. As the 2nd and 3rd Respondents did not challenge the validity of the EOT approved by the Controller before the Tribunal, nor did they mount any challenge in the judicial review proceedings, they cannot therefore initiate a collateral proceeding. The extended period was granted before the SPA was executed and both the Respondents were fully aware of the time of completion. Hence, the 2nd and 3rd Respondents for the reasons we have alluded are not in the position to initiate a collateral proceeding against Sri Damansara.

[99] The Controller had considered the application for extension and granted the extension as the law at that time was valid. The developer had relied on the decision of the Controller who had granted the extension. Accordingly, we have no difficulty in holding that the Second Actor Theory applies. The question posed is therefore answered in the affirmative.

Prospective overruling

[100] The Federal Court in **Ang Ming Lee** having ruled that Regulation 11 HDR is *ultra vires*, did not address or discuss the issue whether such

ruling applies prospectively or retrospectively. Nor whether by virtue of the declaration of the Regulation 11(3) *ultra vires*, that all extensions granted by the Controller before **Ang Ming Lee** are invalid. Learned counsels for Obata and Vignesh argued that since the Federal Court in **Ang Ming Lee** did not state that its decision has prospective effect it would necessarily mean that the **Ang Ming Lee**'s declaration of invalidity applies retrospectively.

[101] The doctrine of prospective overruling originated in the American Judicial System. Cardozo J. the creator and propounder of Prospective overruling laid down this doctrine in the case of **Northern Railway v. Sunburst Oil and Refining Co** 287 U.S. 358 (1932) where he refused to make the ruling retroactive.

[102] Cardozo, J. was of the opinion that if the doctrine is not given effect it will wash away the whole dynamic nature of law which would be against the concept of judicial activism. The law has to be dynamic to keep up with the changes occurring in the society.

[103] In India the doctrine of prospective overruling was discussed and

adopted in the case of **Golak Nath v. State of Punjab** [1967] AIR 1643 and it has been applied in many case laws. In the Golaknath's case the court defined the doctrine of overruling as being:

> ……. a modern doctrine suitable for a fast moving society. It does not do away with the doctrine of stare decisis but confines it to past transactions. While in strict theory it may be said that the doctrine 'involves the making of law, what the court really does is to declare the law but refuse to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds the law and that it does make law and it finds law but restricts its operation to the future. It enables the court to bring about a smooth transition by correcting, its errors without disturbing the impact of those errors on past transactions. By the application of this doctrine the past may be preserved and the future protected. Our Constitution does not expressly or by necessary implication speak against the doctrine of prospective overruling.

[104] The court in **Golak Nath** laid down certain rules or guidelines restricting the application of the doctrine in the Indian system:

(i) The doctrine of prospective overruling can be invoked only in matters arising under the Indian Constitution;

(ii) it can be applied only by highest court of the country, i.e. only the Supreme Court can declare law binding on all the courts as it has in India; and

(iii) the scope of the retrospective operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.

[105] It is said that the prospective declaration of law is a device innovated by the apex court to avoid reopening of the settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of the prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest. Therefore, the subordinate forums which are legally bound to apply the declaration of law made by this Court are also duty bound to apply such cases which would arise in future only.

[106] It was held in **Golak Nath** that this doctrine can only be invoked in matters arising under the Indian Constitution and can be applied only by the Supreme Court in its discretion in accordance with the justice of the cause or matter before it. But it has now been held that application of the

doctrine of prospective overruling has been extended to the interpretation of the ordinary statutes as well.

[107] The basic objective of prospective overruling is to overrule a precedent without having a retrospective effect. Retrospective invalidation of governmental acts may have far reaching consequences especially when many parties have relied on the act and there are financial considerations and consequences involved.

[108] In **Re Spectrum Plus Ltd** [2005] UKHL 41 the House of Lords through the judgment of Lord Nicholls of Birkenhead discussed the application of prospective overruling and highlighted the basic features of the judicial system. The role of the courts is to decide the legal consequences of past happenings. The courts make findings on disputed questions of fact, identify and apply the relevant law to the findings of facts and award the appropriate remedies. The second feature is the effect of a court decision on a point of law. In order to ensure a degree of consistency and certainty about the present state of the law the courts in the UK adopted the practice of treating decisions on a point of law as being the precedents for the future i.e. the principle of stare decisis, if in the event similar issue of law arises in another case a court will treat a previous decision as binding or persuasive. His Lordship explained that the third

feature is that “From time to time court decisions on points of law represent a change in what until then the law in question was generally thought to be. This happens when a court departs from, or an appellate court overrules, a previous decision on the same point of law. The point of law may involve the interpretation of a statute or it may relate to a principle of 'judge-made' law, that is, the common law. A change of this nature does not always involve departing from or overruling a previous court decision. There are times when a court may give a statute, until then free from judicial interpretation, a different meaning from that commonly held.”

[109] The fourth feature is a consequence of the second and third features:

> A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned, as occurred with the manufacturer of the ginger beer in Donoghue v Stevenson [1932] AC 562.

[110] The House of Lords further explained that prospective overruling takes several forms:

> In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the court ruling has an exclusively prospective effect. The ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the court gave its ruling. Other forms of prospective overruling are more limited and 'selective' in their departure from the normal effect of court decisions. The ruling in its operation may be prospective and, additionally, retrospective in its effect as between the parties to the case in which the ruling is given. Or the ruling may be prospective and, additionally, retrospective as between the parties in the case in which the ruling was given and also as between the parties in any other cases already pending before the courts. There are other variations on the same theme.

[111] The House of Lords in **Spectrum** did not apply the doctrine of prospective overruling but said that prospective overruling may be necessary in certain circumstances to administer justice fairly:

[40] Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions.

[41] If, altogether exceptionally, the House as the country's supreme court were to follow this course I would not regard it as trespassing outside the functions properly to be discharged by the judiciary under this country's constitution. Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from achieving a constitutionally exemplary result, it can produce a legal system unable to function effectively in changing times. 'Never say never'

is a wise judicial precept, in the interest of all citizens of the country.

[112] Lord Nicholls said that judges had been described as "developing" the law for some time when making novel decisions, and that judges are not free to repeal laws or distance themselves from bad laws; their only power is to impose a new interpretation. His Lordship held that in exceptional cases, it would be open to the court to hold that a new interpretation of the law should be applied only prospectively:

> But, even in respect of statute law, they do not lead to the conclusion that prospective overruling can never be justified as a proper exercise of judicial power. In this country the established practice of judicial precedent derives from the common law. Constitutionally the judges have power to modify this practice.

[113] What can be discerned from the House of Lords' decision in **Re: Spectrum** is that there can be exceptional circumstances where it is necessary in the interest of justice that the decision of the court must be prospective.

[114] Consistent with the approach in the United Kingdom and Canada this Court in **Tenaga Nasional Bhd** v **Kamarstone Sdn Bhd** [2014] 1CLJ 207 elucidated that where it concerns the construction or interpretation of statute, a statute should not be interpreted retrospectively to impair an existing right or obligation.

[115] Prospective overruling and retrospectivity have been discussed and applied in many cases decided by the Federal Court. In **Letchumanan Chettiar Alagappan @ L Alagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd** [2017] 4 MLJ 697 retrospective application of a decision of the Federal Court case was discussed. In Letchumanan (supra) the main issue for the court's determination is the standard of proof in a civil claim when fraud is alleged. The Federal Court in Letchumanan (supra) considered whether the principles enunciated in **Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd** [2015] 5 MLJ 1 where it was held 'that in a civil claim even when fraud is alleged the civil standard of proof, that is, on the balance of probabilities, should apply … in the absence of a statutory provision. With respect to whether prospective overruling applies in Letchumanan, Jeffery Tan, FCJ said:

[88] In Malaysia, the doctrine of prospective overruling had been applied in criminal cases and in an application that pertained to a court circular on auction sale (Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener) [1995] 2 MLJ 421). In Public Prosecutor v Dato' Yap Peng [1987] 2 MLJ 311, it was held by the former Supreme Court (majority) that s 418A of the Criminal Procedure Code was unconstitutional and void as being an infringement of the provisions of art 121(1) of the Federal Constitution and that the doctrine of prospective overruling would be applied so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions and acquittals which had taken place under the section prior to the date of that judgment would remain undisturbed and not be affected. In Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119, it was declared by the former Supreme Court (majority) that s 298A of the Penal Code was invalid and therefore null and void and of no effect but that the declaration would not apply to the Federal Territories of Kuala Lumpur and Labuan and would take effect from the date of the order, that is 13 October 1987. In Repco Holdings Bhd v Public Prosecutor [1997] 3 MLJ 681, the Court of Appeal, per Gopal Sri Ram JCA (as he then) was, delivering

the judgment of the court, declared both s 129(2) of the Securities Industry Act 1983 and s 39(2) of the Securities Commission Malaysia Act 1993 to be unconstitutional, null and void, but the declaration was prospective only, to include that case and cases registered from the date of the declaration.

[116] This court in **Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals** [2022] 2 MLJ 273 had the opportunity to address the issue of retrospectivity and prospective overruling. In Busing the questions of law for the court's determination were related to the decision of the Federal Court in the case of **Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals** [2017] 2 MLJ 281 and the decision of the Federal Court in the case of **TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals** [2018] 1 MLJ 77 and the decision of the Court of Appeal in **Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal** [2006] 1 MLJ 256 vis a vis the 2018 amendments to the Sarawak Land Code. Tan Sri Abang Iskandar Abang

Hashim, CJSS (as His Lordship then was) delivering the judgment of the Federal Court said:

> [141] It is trite legal principle that a legislative change in a statute is not intended to have a retrospective effect 'unless a contrary intention is evinced in express and unmistakable terms or in a language which is such that it plainly requires such a construction …' (Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals [2020] 1 MLJ 311).
>
> [142] In fact, there is, at common law, a general rule 'that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events (Sir Owen Dixon CJ in Maxwell v Murphy[2022] 2 MLJ 273 at 318(1957) 96 CLR 261).

[117] In **Busing**, the Federal Court had to determine whether the 2018 amendment to the Sarawak Land Code, in respect of the issues on *Pemakai Menoa* and *Pulau Galau;* and deferred indefeasibility of provisional lease; and the effect of the amendment to the appeals before

it. The Federal Court concluded that the current regime of the statutory law must be complied with not only to cases which are yet to be filed with the courts, but also to all pending cases and all those cases still under appeals within our court system.

[118] **Busing** and the appeals before us are distinguishable on the facts and the law in that in **Busing** there was an amendment to the statute whereas in the appeals before us it is the declaration by this Court that the regulation is *ultra vires* the Act.

[119] **Ang Ming Lee**, however, is silent as to whether the effect of declaring Regulation 11 (3) HDR *ultra vires* would apply retrospectively or prospectively. Does this mean that any extension granted by the Controller would be invalid prior to **Ang Ming Lee** and house buyers would be entitled to LAD to be calculated up to **Ang Ming Lee** notwithstanding the fact that they may have been paid LAD and vacant possession have been delivered? This cannot be so, as it will result in substantive injustice as it will impair the rights of the parties involved. At the time the extension was granted the law, that is Regulation 11(3) HDR was valid and reliance was placed based not only on the statutory regime at that time allowing such extension to be granted and extending the prescribed 36 months completion period but also the terms of the

executed SPAs were based on the approved extension as required by the law.

[120] Learned Counsels for Obata and Vignesh, Dato KL Wong and Dato Low Joo Hean submitted at length that the Courts' role is only to interpret the law and as such may not be permitted to impose prospective effect of any ruling akin to legislative's act of making law and in any event, they are not permitted to violate the equal protection principle that transcends adjudicative jurisprudence in all the common law courts. The prospective overruling referred to in the various authorities are pronouncements which are consistent with retrospective effect of the decisions. Therefore, since these appeals had been filed after **Ang Ming Lee** was decided, there is no infringement of the doctrine even if the principle is applied herein.

[121] Learned counsels further argued that it is now too late to retrospectively impose prospective effect to **Ang Ming Lee** as the rights under Article 8 (fundamental right to equal protection of law) of the Appellant and many plaintiffs whose cases are pending in various courts will be violated as just like **Ang Ming Lee** who suffered the illegal act of the Controller by virtue of the illegal extension of time to the developer prior to the decision in **Ang Ming Lee**, the Appellant and most of the

plaintiffs whose cases are pending in various courts suffered also illegal extension of time granted by the Controller prior to decision of **Ang Ming Lee**.

[122] We are not persuaded with the arguments advanced by learned counsels for Obata and Vignesh. The exception as enunciated in **Re: Spectrum** suggested the application prospective overruling is an ideal resolution such that any changes in the law will not affect any causes of action in respect of extension of time and LAD arising prior to **Ang Ming Lee.** The Court may, after having considered the justice of the case and in exceptional circumstances must be prepared to hold that a new interpretation of the law should be applied only prospectively. The declaration of *ultra vires* and invalidity in **Ang Ming Lee** cannot be interpreted as giving an opportunity to all that have benefited prior to **Ang Ming Lee** to enjoy further financial gains.

[123] The statutory regime at the time when extension was applied and granted was valid. As we have stated above great reliance was placed by both the developers and Controller that the authority exists. The Minister was empowered to delegate the power to grant extension to the Controller. Furthermore, the parties, that is, the developers and the purchasers had relied and accepted the terms of the SPAs where the

extended completion period approved by the Controller had been expressly provided. Parties are bound by the terms of the contract and cannot rewrite the terms which they have accepted and from which they have benefitted.

[124] As submitted by learned Senior Federal Counsel, Liew Horng Bin, amicus curiae, a retrospective invalidation of a legislation undermines legal certainty and predictability. Unless there is exceptional public interest requiring retrospective application, an order invalidating a legislation should only take effect prospectively. The invalidation of a legislation or any provision of the legislation would have serious ramifications and implications on those who would have relied on its validity in the past. There will not only be potential administrative chaos but commercial chaos affecting the housing industry which may affect house buyers as well.

[125] Therefore, a careful consideration of the reliance interest is not only necessary but critical. Undoubtedly, laws must be given their full force and effect until they are declared invalid. An administrative decision made pursuant to a valid legislation before it is declared as *ultra vires* does not mean that the decision was void ab initio. It remains validly and legally intact.

[126] We have given our utmost consideration on the facts and the law and we are of the view that if **Ang Ming Lee** is to have retrospective effect there would be serious ramifications and repercussions to the housing industry in Malaysia in particular, the developers that had placed reliance on the existing law and diligently complied with the laws which were at that time valid.

[127] Therefore, based on the reasons we have stated above and the exceptional circumstances involved, the decision of **Ang Ming Lee** is prospective. To say otherwise that **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.** Thus, the principles enunciated in **Ang Ming Lee** will not apply to extensions granted by the Controller before **Ang Ming Lee.**

[128] In respect of prospective overruling we answered as follows:

> **Question 1**
>
> 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?

Answer: **Affirmative**

Question 2

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?

Answer**: Affirmative**

Unjust Enrichment

[129] We now turn to the arguments in respect of unjust enrichment claims. The HDA and the regulations made thereunder are social legislations with the paramount intention to protect the interest of purchasers. In order to achieve and fulfil this housing developers must be regulated to ensure that house buyers are at all times protected from unscrupulous developers who had promised to deliver their dream houses purchased within the time as stipulated in the SPA. Unfortunately, before the requirement of approved extension there were incidents where housing developers had extended the period of completion beyond the time expressly stipulated without any notice to the purchasers and some

developers even extended the time of completion and delivery of vacant possession ad infinitum resulting in abandoned projects.

[130] In its wisdom the Legislature enacted the HDA and the Minister in charge of Housing and Local Government made the Regulations pursuant to the HDA prescribing the standard form of agreement and the requirement for approval before any changes could be made to the prescribed agreement. Until **Ang Ming Lee**, approval was mandatory before any amendments or variations could be implemented. Some applications were allowed and some were not. This was to ensure that any extended time of completion will be regulated and monitored to ensure that housing developers will deliver vacant possession. In the appeals before us the developers had sought for approval prior to executing the SPAs.

[131] The Federal Court in **Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd** [2015] 2 MLJ 441 recognised the principle of unjust enrichment under Malaysian law. The Federal Court said that the most important question to ask is whether it is unjust for the plaintiff to retain the benefit and considered both the English approach and the civilian approach.

[132] Have the purchasers/house buyers benefitted pre-**Ang Ming Lee**? In this regard it is important to keep in mind of the facts that the purchasers, Obata and Vignesh had agreed to the extended completion period in the respective SPAs, vacant possession was delivered and LAD fully paid by the developer and they have accepted the LAD payment as full and final settlement. They did not suffer any losses. No doubt there was a delay but they have benefited from the approved extended time of completion; the certainty of payment of LAD and the delivery of vacant possession of the property that they had purchased. If the appeals are decided in favour of the purchasers it would result in unjust enrichment at the expense of the developers, in these appeals, Prema.

[133] On the factual matrix of the appeals before us and guided by the principles as enunciated in **Dream Property**, in our judgment the purchasers as house buyers were fully aware of the terms of SPAs with the extended period with no objection, and had benefited as vacant possession delivered and, LAD payment was accepted. The developers complied with the provisions of the law at that time and had not acted in any way unconscionably to the detriment of the interest of the purchasers. It was only after **Ang Ming Lee** that the claims were filed years after delivery of vacant possession and payment of LAD. **Ang Ming Lee** is not

a *carte blanche* for purchasers to claim LAD retrospectively and to enjoy financial windfall.

[134] In the same vein, the same principles apply to Sri Damansara. The 2nd and 3rd Respondents shall not be entitled to remedies due to inequitable conduct of unconscionability, unjust enrichment and estoppel. As we have stated above and we wish to reiterate that on the facts both the 2nd and 3rd Respondents were fully aware of the stipulated extended period and did not challenge the validity of that extension approved by the Controller before the Tribunal nor before the judicial review at the High Court, only raising at the Court of Appeal.

[135] Applying the principles as enunciated in **Dream Property** on the factual matrix of the appeals before us there would be unjust enrichment. In our judgment there would be injustice if the claims for LAD are allowed to be calculated retrospectively. The purchasers would be unjustly enriched if the claims are allowed.

Conclusion

[136] We have considered the competing submissions of counsels before us, read all the authorities cited during argument and based on all the above mentioned reasonings, our unanimous decisions are as follows:

(i) Appeal **no. 02(i)-70-08/2022 (W) & 02(i)-71-08/2022 (W)** where the Appellant is Obata-Ambak, the appeals are dismissed. The judgment of the Court of Appeal and the High Court are affirmed.

(ii) Appeals **no. 02(i)-72-08/2022 (W) & 02(i)-74-08/2022 (W)** where the Appellant is Prema Bonanza , the appeals are allowed. The judgment of the Court of Appeal is set aside and the judgment of the High Court is reinstated.

(iii) Appeal **no. 01(f)-1-01/2023** where the Appellant is Sri Damansara, the appeal is allowed. The judgments of the Court of Appeal and the High Court are set aside.

Since these are appeals involving public interest we are of the view that there should be no order as to costs for all the appeals.

[137] My learned brother, Justice Abang Iskandar Abang Hashim, PCA, my learned sister, Justice Zabariah Yusuf and my learned brothers, Justice Harmindar Singh Dhaliwal and Justice Abdul Karim Abdul Jalil

have read the judgment in draft and have expressed their agreement with it.