

## Faber Union Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan dan Kerajaan Tempatan & Ors [2011] MLJU 732

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HIGH COURT (KUALA LUMPUR)

AZIAH ALI J

PERMOHONAN SEMAKAN KEHAKIMAN NO R1-25-376-2009

31 January 2011

*Ghazi Ishak (Nazeera Hanifa with him) (Messrs Ghazi & Lim) for the applicant*  
*Richard Wee (HW Yip with him) (Richard Wee & Yip) for the second respondent*  
*K Jayaratnam (Paari Perumal with him) (Jayaratnam & Partners) for the third to tenth respondents*

### AZIAH BINTI ALI J

#### Introduction

[1] This is an application for judicial review under Order 53 of the Rules of the High Court 1980 for an order of certiorari to quash the Award of the 1st Respondent, the Tribunal dated 10.11.2009 which allowed the Respondents' claim for liquidated damages for late delivery of vacant possession under the sale and purchase agreements ("the SPA") entered into between the Applicant as developer and the 2nd to 10th Respondents ("the Respondents") as purchasers for the sale and purchase of properties in a project known as 'Danau Villa Phase 1B' ("the Project").

[2] On 20.1.2006 the Respondents paid RM5,000.00 as deposit. On 16.2.2006 they paid the balance of the first 10% of the purchase price amounting to RM72,180.00. The SPA were signed only on 5.4.2006. Clause 23(1) of the SPA provides that vacant possession shall be delivered within 24 months from the date of the SPA. Vacant possession was delivered on 14.3.2007.

[3] The dispute is whether there was late delivery of vacant possession. The Applicant contends that vacant possession was delivered within the period stipulated under the SPA. The Respondents contend that notwithstanding the SPA, based on the Applicant's brochures and representations made by the Applicant's sales representatives, vacant possession was to be delivered by June 2006. The Tribunal found in favour of the Respondents and awarded damages for late delivery. The Applicant says that the Tribunal has acted in excess of its jurisdiction, has not taken into consideration relevant matters and there has been procedural improprieties.

#### Background

[4] According to the Applicant's witness DW-1 Ms Devika, the Project was first launched in June 2004. But less than 50% of the units were sold. The project was re-launched in January 2006. In December 2005 the Applicant distributed brochures to potential buyers of properties in the Project. The brochure (enc.3 exh. VN-2 p.13) states amongst others -

"Expected Date of Completion: June 2006"

[5] According to the Respondents the advertisement for the Project as approved by the Controller of Housing states the completion date as 'June 2006'. Both the witnesses for the Applicant, DW-1 and Puan Noraini (DW-2) agreed that they told purchasers that the expected completion date was June 2006. It is the Respondent's case that relying on the brochures and the representations made to them, vacant possession would be delivered in June 2006.

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**[6]**On 4.7.2006 the Applicant sent letters to all purchasers including the Respondents to inform them that there was a delay in completion of the Project and the Project was targeted to be completed by October 2006. DW-3 Ong testified that only the purchasers who bought the properties at the initial launch were compensated for late delivery but not the Respondents as the Applicant contends that vacant possession was delivered within 24 months from the date of the SPA.

**[7]**In the Award at paragraph 6.7 the Tribunal found that the Applicant had intention to complete the project by June 2006 and the Respondents had a reasonable expectation that completion would be by June 2006. The Tribunal found that statements in a brochure can be said to be undertakings which the Applicant as developer is bound to honour (*Cheong Bee Yong v MBF Finance Bhd & Anor* [2001] 1 CLJ 668).

**[8]**For the Applicant it is submitted that the jurisdiction of the Tribunal is limited by section 16Nof the Housing Development (Control and Licensing) Act 1966 ("the Act") only to a cause of action arising from a sale and purchase agreement. It is submitted that the Tribunal has acted in excess of jurisdiction as follows -

- (a) considering issues on pre-contractual misrepresentation relating to the expected date of completion which is clearly beyond the jurisdiction conferred by the Act;
- (b) determining the expected completion date based on the brochure and not based on the date in the SPA that has been mutually agreed by parties thereby abusing its jurisdiction;
- (c) determining the amount of compensation contrary to legal provisions;
- (d) amending the date of the SPA to the date the Respondents paid the deposit thereby amending the completion date from 5.4.2008 to 31.7.2006;
- (e) the Tribunal has amended the terms of the SPA as provided under Schedule G of the Housing Development (Control and Licensing) Regulations 1989 ("the Regulations).

**[9]**For the 2nd Respondent it is submitted that the Tribunal has acted within its jurisdiction as section 16Y of the Act confers express power upon the Tribunal to vary or set aside an SPA under the Act. The Tribunal has correctly held that the sale and purchase transaction should be read as a whole as the transaction involved a series of events and documents. It is submitted that the importance of information and contents in the advertisement and/or brochures is emphasized by the fact that the Applicant could not amend such information and contents without the approval of the Housing Ministry. The Applicant had failed, refused and/or neglected to do so despite knowing of the inevitable delay in completion of the Project.

Therefore it is submitted that it is ludicrous to suggest that the Tribunal should confine its jurisdiction only to the SPA. Counsel for the 3rd to 10th Respondents submits that the Tribunal has not erred in exercising its jurisdiction in considering the issue of representations made to the Respondents as this issue arose out of the sale and purchase transaction between a home buyer and a licensed housing developer. Counsel submits that in interpreting a private agreement the court is not limited to the four corners of the agreement but may look at the implied intention of the parties and the background facts may be taken into consideration.

**[10]**It is submitted for the Respondents that on 4.7.2006 the Applicant had sent letters to the Respondents informing the Respondents of a delay in completion of the Project and that the Applicant was targeting completion by October 2006. It is submitted that if it is true that vacant possession was only to be delivered by 5.4.2008 then why was there a need to notify the Respondents that the Applicant intended to complete the Project by October 2006 as opposed to June 2006? Counsel submits that the true interpretation of clause 23(1) of the SPA is that vacant possession was to be delivered by June 2006. Therefore it is submitted that the Tribunal has not erred in finding that the date of delivery of vacant possession was 31.7.2006.

**[11]**Counsel cites the case of *Tan Chee Wah v Sri Damansara Sdn Bhd* [2006] 7 CLJ 66. In that case the appellant entered into the sale and purchase agreement due to representations made by the respondent that vacant possession would be delivered within 15 months from the date of the sale and purchase agreement notwithstanding clause 20 which provided that vacant possession would be delivered within 24 months from the date of the sale and purchase agreement. The representation was made by way of advertisement and by the respondent's sales representative before the appellant executed the sale and purchase agreement. The appellant decided to purchase

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the house based on those representations. The respondent also wrote to the appellant as follows -

We are pleased to confirm that notwithstanding clause 20 of the Sale & Purchase Agreement dated 15.5.2000... we shall deliver Vacant Possession of the Property... within (15) months from the date of the SPA.

Raus Sharif J (as His Lordship then was) found that it was clear that by advertisement and oral representation vacant possession would be delivered within 15 months from the date of the SPA. His Lordship found that although the effect of the representation and the letter was to contract out of the SPA, such contracting out is permissible. In support His Lordship cited the case of *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] CLJ 305 (Rep); [1982] CLJ 355; [1982] 2 MLJ 212 wherein the Federal Court said as follows -

It would appear that only 'contracting out' in favour of the weaker party - ie, the purchaser might be countenanced by the Courts.

**[12]**In its Award the Tribunal rejected the Applicant's submissions that its jurisdiction is confined to the four corners of the SPA. I find that the Tribunal has not erred in its finding that the cause of action arises from the SPA as it is clear that the Applicant is relying on Clause 23(1) as a defence to the Respondents' claim. Notwithstanding Clause 23(1), the Respondents herein, like the appellant in Tan Chee Wah's case, are contending that representations by way of advertisement and by way of oral representations were made by the Applicant's sales representatives that the period of delivery of vacant possession has been shortened to June 2006 instead of April 2008 thus inducing them to purchase the properties. There is uncontroverted evidence from the Applicant's witnesses that they told the Respondents that vacant possession would be delivered by June 2006. Further there is the Applicant's letter dated 4.6.2006 notifying the Respondents of the delay in completion of the Project. A representation that vacant possession would be delivered earlier than the specified date would not be inconsistent with Clause 23(1) of the SPA (*SEA Housing Corporation Sdn Bhd v Lee Poh Choo*, supra). I find no error in the decision of the Tribunal that the Respondents can reasonably be expected to rely on the representations in making their decision to purchase the properties and that no exclusion clauses which are inconsistent with the SPA and to the detriment of the Respondents may be relied upon by the Applicant.

**[13]**The Applicant contends that the Tribunal erred in amending the commencement date of the SPA to the date of payment of the deposit. The Tribunal relied on the case of *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597; [1995] 3 CLJ 797 wherein the issue for determination by Supreme Court is whether, in ascertaining the date of delivery of vacant possession of a building to be constructed, time started to run from the date payment of the booking fee was made or from the date of the signing of the sale and purchase agreement. In that case the deposit was paid on 17 February 1984 and the agreement was signed on 27 June 1984. The Supreme Court held that for the purpose of ascertaining the date of delivery of vacant possession the relevant date when time starts to run is the date on which the purchaser paid the booking fee and not the date of the signing of the sale and purchase agreement. The decision of the Supreme Court was followed in *Lim Eh Fah & Ors v Seri Maju Padu* [2002] 4 CLJ 37. In that case the purchaser paid the deposit on 17.7.1992. The sale and purchase agreement was executed on 10.10.1992. Suriyadi Halim Omar J (as His Lordship then was) held that the respondent assumed the responsibility to fulfill its part of the bargain at the date the deposit was paid, ie 17.7.1992, in effect being the date when the contract was struck, and not the date the deed of assignment was signed. Otherwise, the respondent could arbitrarily choose any date it favoured to execute the sale and purchase agreement which would certainly prejudice the purchaser. Thus I find that the Tribunal has not erred in deciding that the relevant date for the purpose of calculating the amount of damages payable by the Applicant is the date the Respondents paid the deposits.

**[14]**Having considered the Award I am unable to agree with counsel for the Applicant that the Tribunal has committed errors of law that warrants curial intervention. The Tribunal has considered relevant matters and has not taken into consideration irrelevant matters. The Award does not suffer from the infirmities of illegality, irrationality or procedural impropriety. For the aforementioned reasons the application is dismissed. Costs of RM1,000 is awarded to the 2nd to the 10th Respondent.