

RACING THE CLOCK: LIQUIDATED ASCERTAINED DAMAGES CLAIMS REVISITED IN THE WAKE OF THE OBATA-AMBAK HOLDINGS CASE

On 29.7.2024, the Federal Court heard and decided on the case of *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd & Other Appeals* [2024] CLJU 1657. While this case might be understood as a mere case of Liquidated Ascertained Damages (“LAD”) claim, this case serves a huge importance to the housing industry, as this LAD claim arose after the Federal’s Court decision in *Ang Min Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281.

Ang Min Lee: Nullifying the Controller’s Power to Grant EOT to House Developers

In the case of *Ang Min Lee* which was decided on 26.11.2019, the Federal Court heard a judicial review by the purchasers who had not been compensated with LAD after the developer was granted an extension of time (“EOT”) by the Minister, after the Housing Controller (“Controller”) initially declined the EOT request.

The Federal Court held that rule 11(3) of the Housing Development (Control and Licensing) Regulations 1989, which confers the Controller’s power to grant extensions of time to be ultra vires, beyond the power prescribed to the Minister under the Housing Development (Control and Licensing) Act 1966. As a result, any EOT granted by the Controller would be nullified.

Facts and Issues in Obata-Ambak Holdings

Following the decision in *Ang Min Lee* in November 2019, on 18.6.2020, Obata-Ambak Holdings Sdn Bhd (“Obata”), being the purchasers of an extended housing project developed by Prema Bonanza Sdn Bhd (“Prema”), initiated an action against Prema to obtain a declaration that the granting of EOT by the Controller which extended Prema’s project to 57 months vide clause 25 and clause 27 of the Sale and Purchase Agreement

dated 11.7.2012 and 18.7.2012 (“SPAs”), to be inconsistent with *Ang Min Lee* and such LAD to be granted from the end of 36 months from the initial intended date of vacant possession delivery.

In this suit, Obata filed a summary judgement application against *Prema* pursuant to Order 14 of the Rules of Court 2012, to which *Prema* filed a striking out application pursuant to Order 14A of the Rules of Court 2012, raising several questions of law, including the accrual of cause of action, and its limitation period.

The case went up to the Federal Court as several legal questions arose, which are in gist as follows:

(a) whether the SPA for an accommodation affected by the ultra vires rule of 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;

(b) whether the cause of action for the LAD shall accrue upon expiry of the said 3-year period; and

(c) whether the limitation period of a claim for the late delivery LAD shall commence only upon the expiry of the said 3-year period.

This article delves into the principles discussed surrounding the LAD claim, particularly the accrual of cause of action and its limitation period.

The Date of the SPA vs The Due Date to Deliver the Vacant Possession vs the Actual Date of Vacant Possession Delivery

At the High Court, it had been considered that irrespective of the decision in *Ang Min Lee*, the two SPAs were entered into more than 6 years when the action was initiated in June 2020. Thus, the Court would have difficulties to continue with the proceedings for all factors resulted from the effluxion of time.

The Court took cognisance of the public interest in the protection of buyer's right, as intended in Schedule H of the Housing Development (Control and Licensing) Regulations 1989. Nonetheless, the High Court balanced out the same with the prejudice caused to *Prema*, having to defend the Controller's decision in 2010 as against the *Ang Min Lee* decision in 2020.

Thus, consistent with public policy of the housing industry, the High Court held that the cause of action did not accrue at the time vacant possession was handed over to Obata.

At the Court of Appeal, the Court of Appeal affirmed the finding of the High Court and analysed further on Obata's cause of action. In gist, Obata was challenging the validity of the SPA, by contending that clause 25 and clause 27 of the SPAs breached Schedule H

of the Housing Development (Control and Licensing) Regulations 1989.

Then, it would only be relevant that the accrual of the cause of action would be at the time the SPAs were executed by the parties. Thus, the 6-year limitation period would run from the date of the SPAs and would end on 10.7.2018 and 17.7.2018 respectively. Since Obata's suit was filed on 18.6.2020, the limitation period had effectively set in.

The End of the Saga: Determining the Accrual of Cause of Action

At the Federal Court, the Court posed two possible timepoints for the cause of action to accrue; after the decision in *Ang Ming Lee* or within 6 years after the execution of the SPAs. It is pertinent to note that the clause 25(3) of the SPAs had stated that the cause of action to claim for LAD would accrue on the date the Purchaser took vacant possession of the house.

The Federal Court further examined the governing provision on limitation period, as provided in Section 6(1)(a) of the Limitation Act 1953:

"6 Limitation of actions of contract and tort and certain other actions"

*(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;..."*

The Federal Court then referred to the locus classicus on understanding the essence of the "cause of action", which is the Federal Court case of *Nasri v Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32. Gill FJ held the following:

*"A "cause of action" is 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** (per Lord Esher M in *Read v. Brown* [1889] 22 QBD 128, 131)."*

As the *Nasri v Mesah* case remain as good law and has been applied in numerous Federal Court precedents, the Court held that the cause of action would begin the moment that Obata's claim was actionable.

Since in effect, Obata was challenging the validity of the SPAs, the Federal Court held that the cause of action accrued the moment the SPAs were executed, or when the terms of the SPAs were breached. Obata's claim was indeed a claim based on contract, and thus the 6-year limitation period per Section 6(1)(a) of the Limitation Act 1953 would be applicable as well.

Additionally, Obata had full and frank knowledge when executing the SPAs that Prema had incorporated 54 months as the period required to complete the housing project. In 2017, Obata also executed a settlement agreement with Prema for the LAD claims.

Obata ought to have initiated this suit before the settlement.

Thus, to address the questions on the cause of action, the Federal Court held as follows:

(a) the cause of action for LAD claim **does not accrue** upon the expiry of the 3-year period in schedule H of the Housing Development (Control and Licensing) Regulations 1989; and

(b) the limitation period for LAD claim **does not commence** upon the expiry of the 3-year period in schedule H of the Housing Development (Control and Licensing) Regulations 1989.

Key Takeaways from the Obata-Ambak Holdings case

(a) The decision aims to strike a balance between the protection on housing developers, who had relied on the decision of the Controller pre-*Ang Ming Lee* and the real estate purchasers' interest overall. By allowing Obata's claim, the Federal Court was rightfully concerned about the potential floodgates of LAD claims when the reliance was made by numerous housing developers.

(b) While it may seem that Obata's cause of action did not accrue at the time vacant possession was taken, Obata's suit was initiated on the basis of the SPAs validity. The principle of the "cause of action" remains unchanged that only when the claim becomes actionable, and the purchasers can quantify the LAD, the cause of action accrues. Thus, purchasers must remain vigilant after taking possession of their properties, especially when there is a need to claim LAD.

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