Icon City Development Sdn Bhd v K-Shin Corp Sdn Bhd [2022] 6 MLJ 941

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COURT OF APPEAL (PUTRAJAYA)

LEE SWEE SENG, LEE HENG CHEONG AND MARIANA YAHYA JJCA

CIVIL APPEAL NO W-02(NCVC)(W)-1596–08 OF 2018

19 September 2022

Case Summary

Contract — Damages — Liquidated damages — Damages for late delivery of vacant possession agreed to in sale and purchase agreement — Whether trial judge correctly decided that architect's letters did not qualify as certificates of extension of time — Whether trial judge erred in defining manner of vacant possession — Whether manner of vacant possession and issuance of certificate of completion and compliance were distinct — Whether vacant possession granted without right of occupation — Whether vacant possession granted with essential utilities — Whether damages need to be proved — Whether granting of interest to run from an earlier date than judgment date proper — Whether action premature

The respondent ('the plaintiff') entered into a contract with the appellant ('the defendant') vide a sale and purchase agreement dated 30 June 2011 ('the SPA') to purchase a shop office from the first defendant. The date of completion and delivery of vacant possession of the shop office was on or before the expiry of 36 months from the date of the period of approval or the extended period of approval ('the 36 months' period'). The first defendant was to pay liquidated ascertained damages ('LAD') to the plaintiff at the rate of 10%pa of the purchase price to be calculated from day to day in the event that the first defendant failed to complete and deliver vacant possession of the shop office to be plaintiff within the specified period or the extended time allowed by the second defendant. The second defendant was appointed by the appellant to act as the appellant's consultant architect and was the appointed architect under the SPA ('architect'). Subsequently, the first defendant confirmed in a letter dated 8 March 2016 that the development order, the conversion approval and the approval of the building plans from the relevant authorities were obtained on 5 June 2012. Hence, the 36 months' period for the completion and delivery of the shop office would expire on 4 June 2015. Subsequently, the second defendant issued two letters of extensions of time ('architect's letters') to extend the 36 months' period for completion and delivery of vacant possession of the shop office, initially from 4 June 2015 to December 2015 and subsequently, from December 2015 to 15 January 2016 on the ground that there were disputes or issues arising from the contract between the first defendant and its contractor. As a result of the second defendant's letters of extensions of time, the first defendant refused to pay LAD to the plaintiff for the late completion and delivery of vacant possession of the shophouse to the plaintiff. The plaintiff disputed the validity of the second defendant's letters of extensions of time on

the ground that disputes or issues arising from the construction contract between the first defendant and the first defendant's contractor could not be considered as a cause beyond the first defendant's control. The plaintiff also took the position that the second defendant had breached the second defendant's duty of care which the second defendant owed to the plaintiff and also the second defendant's professional duty. Subsequently, on 30 December 2015, the

first defendant issued a letter to the plaintiff informing the plaintiff that vacant possession of the shop office was ready to be delivered. However, the shop office was not ready for the delivery of vacant possession as the electricity and water mains were not made available and were not ready for connection to the shop office, the permanent access road to the shop office was not made ready or available and the certificate of completion and compliance ('the CCC') had not been issued for the project and remains outstanding. Notwithstanding this, on 25 February 2016, the first defendant purported to deliver actual vacant possession of the shop office to the plaintiff. In the circumstances, the plaintiff contended that the delivery of vacant possession on 25 February 2016 was invalid as the water and electricity mains were not connected and the CCC for the project had not been issued and remains outstanding. The plaintiff also contended that even if the delivery of vacant possession on 25 February 2016 was valid, it was late as the first defendant was contractually obliged to deliver it on 4 June 2015 since the plaintiff's argument was that the second defendant's two letters of extensions of time were invalid. Hence, the plaintiff submitted that there was a delay of 265 days from 4 June 2015 to 25 February 2016. Therefore, the plaintiff filed an action to claim for declaratory relief against both defendants, the sum of RM1,052,739.73 as LAD for the first defendant's breach of contract in the late delivery of vacant possession of the shop office, alternatively, the sum of RM1,052,739.73 as damages against the second defendant for the second defendant's negligence in the issuance of the two architect's letters for extensions of time, interest and costs. The second defendant's application to strike out the action against them was allowed by the High Court. The issues that arose for determination were: (i) whether the second defendant's letters were valid extensions of time inter the SPA; (ii) when was vacant possession of the shop office delivered to the plaintiff; (iii) whether the plaintiff needed to prove damages; (iv) whether the granting of interest to run from a date earlier than the judgment date was proper; and (v) whether the plaintiff's action against the first defendant was premature.

Held, allowing the appeal in part:

(1) In making the findings that the architect's letters were not the certificates of extension of time, the High Court judge ('the HCJ') also took into consideration that the architect's letters merely served the purpose of informing the defendant of the delay of the project. As such, the architect's letters did not qualify as certificates of extension of time which

would justify the appellant's delay in delivering the vacant possession of the shop office to the respondent. The court found that the breaches caused by the main contractor's restructuring exercise were not force majeure events and were not beyond the appellant's control in the project under cl 13.1.1 of the SPA (see paras 25–27).

(2) The HCJ found that it was the obligation of the appellant to ensure the availability of permanent access road, the mains for the electricity supply and the water supply to connect them to the shop office ('essential amenities') and the CCC was issued to the respondent before the appellant could deliver vacant possession of the shop office. The HCJ was erroneous as the definition of the manner of vacant possession was clearly defined in cl 13.2 of the SPA, which stated that upon issuance of a certificate by the first defendant's architect certifying that the construction of the shop office had duly competed, the purchaser having paid all monies payable under the SPA and having performed and observed all terms and conditions on the plaintiff under the SPA, the first defendant shall let the plaintiff into possession of the shop office, however, such possession shall not give the plaintiff, the right to occupy and the plaintiff shall not occupy

the shop office or to make any alterations additions or otherwise to the said shop office until such time as the CCC for the office shop was issued. (see paras 31–32).

(3) The HCJ was confused about the manner of vacant possession and the issuance of the CCC. Under the SPA, they were totally separate events and catered for different situations. The HCJ should not have interpreted the SPA in such a manner that combined the two separate and distinct events into a single event when they were not. There was no statutory prohibition against the segregation of these two events. The appellant and the respondent had voluntarily entered into the SPA and the parties had conducted their affairs in accordance with the terms and conditions of the SPA. The sanctity of the contract entered between parties should be preserved. In so far as the HCJ's finding that the CCC procurement and the delivery of vacant possession were very much intertwined as cl 19 of the SPA could not be invoked without the fulfilment of cl 20 and cl 23 of the SPA, such a finding was erroneous as the SPA made it distinctly clear that they were not intertwined (see paras 33–35).

(4) The granting of 'vacant possession of the Shop Office without the right to occupation' was nothing novel. As such, without a right of occupation, the issue of actual electricity and water supply was not relevant and neither did the SPA specified these requirements. There was a clear difference between 'occupation' and 'possession'. Vacant possession was not synonymous with the right of occupation (see paras 36–37).

(5) Since cl 13.2.1 of the SPA clearly provided for the manner of delivery of vacant possession and which had been complied with by the appellant,

delivery of vacant possession to the respondent was on 30 December 2015 as per the appellant's letter bearing the same date. However, there was merit in the appellant's contention that cl 13 of the SPA merely required the appellant to physically complete works and provide a certificate of practical completion by the architect as sufficient to provide vacant possession and that it would matter not if the shop office was not connected with the essential utilities (see paras 38–39).

(6) The respondent had successfully discharged its burden of proof, firstly, that was a breach of contract and secondly, the SPA contained a clause specifying a sum to be paid upon breach. There were no merits in the contention of the appellant that the HCJ erred in awarding the LAD as it was not proven by the respondent. In the present case, under the SPA, the agreed rate of LAD was 10%pa of the purchase price of the shop office, which was similar to the rate of liquidated damages awarded in the statutorily prescribed sale and purchase agreements such as Schedule G or H of the Housing Development Amendment Act 2012. Thus, such a rate of LAD was fair and reasonable (see paras 44–46).

(7) There were no merits on the appellant's contention that the respondent's action was premature. The respondent took possession of the shop office on 25 February 2016 and the respondent's writ was filed on 5 August 2016. Thus, the present action was not premature. Even if the respondent did not take actual possession of the shop office, by virtue of the deeming provision of possession as stated in cl 13.1.3 of the SPA, the respondent would be deemed to have taken possession and thus entitled to initiate legal action against the appellant (see paras 54–55).

(8) The HCJ's finding that vacant possession of the shop office was given to the respondent on 26 August 2016 and that it must come together with the CCC, was plainly wrong. The HCJ made errors that warranted appellate intervention in the appellant's appeal. There were, therefore, merits in the appellant's appeal. In the premises, the appellant was ordered to pay to the respondent, the sum of RM834,246 as liquidated damages calculated from 4 June 2015 until 30 December 2015 together with interest of 5%pa from the date of the judgment of the High Court until full and final payment (see para 56–59).

Responden ('plaintif') memasuki kontrak dengan perayu ('defendan') melalui perjanjian jual beli bertarikh 30 Jun 2011 ('PJB') untuk membeli kedai pejabat daripada defendan pertama. Tarikh siap dan penghantaran milikan kosong kedai pejabat tersebut adalah pada atau sebelum tamat tempoh 36 bulan dari tarikh tempoh kelulusan atau tempoh lanjutan kelulusan ('tempoh 36 bulan'). Defendan pertama perlu membayar ganti rugi tertentu dan ditetapkan ('LAD') kepada plaintif pada kadar 10% setahun daripada harga belian yang akan

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dikira dari hari ke hari sekiranya defendan pertama gagal menyiapkan dan menyerahkan milikan kosong kedai pejabat kepada plaintif dalam tempoh yang ditetapkan atau masa lanjutan yang dibenarkan oleh defendan kedua. Defendan kedua dilantik oleh perayu untuk bertindak sebagai arkitek perunding perayu dan merupakan arkitek yang dilantik di bawah PJB ('arkitek'). Lanjutan itu, defendan pertama mengesahkan dalam surat bertarikh 8 Mac 2016 bahawa perintah pemajuan, kelulusan penukaran dan kelulusan pelan bangunan daripada pihak berkuasa yang berkaitan telah diperolehi pada 5 Jun 2012. Oleh itu, tempoh 36 bulan untuk penyiapan dan penghantaran kedai pejabat akan tamat pada 4 Jun 2015. Selepas itu, defendan kedua mengeluarkan dua surat lanjutan masa ('surat arkitek') untuk melanjutkan tempoh 36 bulan untuk penyiapan dan penghantaran pemilikan kosong kedai pejabat, pada mulanya dari 4 Jun 2015 hingga Disember 2015 dan seterusnya, dari Disember 2015 hingga 15 Januari 2016 atas alasan terdapat pertikaian atau isu yang timbul daripada kontrak antara defendan pertama dan kontraktornya. Hasil daripada surat lanjutan masa defendan kedua, defendan pertama enggan membayar LAD kepada plaintif kerana lewat menyiapkan dan penghantaran milikan kosong rumah kedai kepada plaintif. Plaintif mempertikaikan kesahihan surat lanjutan masa defendan kedua atas alasan bahawa pertikaian atau isu yang timbul daripada kontrak pembinaan antara defendan pertama dan kontraktor defendan pertama tidak boleh dianggap sebagai sebab di luar kawalan defendan pertama. Plaintif juga mengambil pendirian bahawa defendan kedua telah melanggar kewajipan jagaan defendan kedua yang dikenakan oleh defendan kedua kepada plaintif dan juga kewajipan profesional defendan kedua. Lanjutan itu, pada 30 Disember 2015, defendan pertama telah mengeluarkan surat kepada plaintif memaklumkan plaintif bahawa milikan kosong kedai pejabat sedia untuk diserahkan. Walau bagaimanapun, kedai pejabat tidak bersedia untuk penghantaran milikan kosong kerana sesalur elektrik dan air tidak disediakan dan tidak bersedia untuk sambungan ke kedai pejabat, jalan masuk tetap ke pejabat kedai tidak disediakan atau tersedia dan sijil siap dan pematuhan ('CCC') belum dikeluarkan untuk projek dan masih belum selesai. Walau bagaimanapun, pada 25 Februari 2016, defendan pertama mengaku telah menyerahkan milikan kosong sebenar pejabat kedai kepada plaintif. Dalam keadaan tersebut, plaintif berhujah bahawa penghantaran milikan kosong pada 25 Februari 2016 adalah tidak sah kerana sesalur air dan elektrik tidak disambungkan dan CCC untuk projek tersebut belum dikeluarkan dan masih belum tersedia. Plaintif juga berhujah bahawa walaupun penghantaran milikan kosong pada 25 Februari 2016 adalah sah, ianya lewat kerana defendan pertama secara kontrak diwajibkan untuk menyerahkannya pada 4 Jun 2015 memandangkan hujah plaintif adalah bahawa dua surat lanjutan masa daripada defendan kedua tidak sah. Oleh itu, plaintif berhujah bahawa terdapat kelewatan selama 265 hari dari 4

Jun 2015 hingga 25 Februari 2016. Oleh itu, plaintif memfailkan tindakan untuk menuntut relif deklarasi terhadap kedua-dua defendan, jumlah RM1,052,739.73 sebagai LAD bagi pelanggaran kontrak defendan

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pertama dalam penghantaran lewat milikan kosong kedai pejabat, sebagai alternatif, jumlah RM1,052,739.73 sebagai ganti rugi terhadap defendan kedua atas kecuaian defendan kedua dalam pengeluaran dua surat arkitek untuk lanjutan masa, faedah dan kos. Permohonan defendan kedua untuk membatalkan tindakan terhadap mereka dibenarkan oleh Mahkamah Tinggi. Isu-isu yang timbul untuk penentuan adalah: (i) sama ada surat defendan kedua adalah lanjutan masa yang sah berdasarkan SPA; (ii) bilakah milikan kosong pejabat kedai diserahkan kepada plaintif; (iii) sama ada plaintif perlu membuktikan ganti rugi; (iv) sama ada pemberian faedah yang berjalan dari tarikh lebih awal daripada tarikh penghakiman adalah wajar; dan (v) sama ada tindakan plaintif terhadap defendan pertama adalah pramatang.

Diputuskan, membenarkan sebahagian rayuan:

(1) Dalam membuat dapatan bahawa surat arkitek bukanlah sijil lanjutan masa, Hakim Mahkamah Tinggi (‘HMT’) juga mengambil kira bahawa surat arkitek hanya bertujuan untuk memaklumkan defendan tentang kelewatan projek. Oleh itu, surat arkitek tidak layak sebagai sijil lanjutan masa yang akan mewajarkan kelewatan perayu dalam menyerahkan milikan kosong kedai pejabat kepada responden. Mahkamah mendapati bahawa pelanggaran yang disebabkan oleh penstrukturan semula kontraktor utama bukanlah peristiwa force majeure dan bukan di luar kawalan perayu dalam projek di bawah klausa 13.1.1 SPA (lihat perenggan 25–27).

(2) HMT mendapati bahawa ia adalah menjadi kewajipan perayu untuk memastikan ketersediaan jalan masuk kekal, sesalur bekalan elektrik dan bekalan air untuk menyambungkannya ke kedai pejabat (‘Kemudahan Penting’) dan CCC telah dikeluarkan kepada responden sebelum perayu boleh menyerahkan milikan kosong kedai pejabat tersebut. HMT telah terkhilaf kerana takrifan cara milikan kosong telah ditakrifkan dengan jelas dalam klausa 13.2 SPA, yang menyatakan bahawa selepas pengeluaran sijil oleh arkitek defendan pertama yang memperakui bahawa pembinaan kedai pejabat telah siap dengan sewajarnya, pembeli setelah membayar semua wang yang perlu dibayar di bawah SPA dan telah melaksanakan dan mematuhi semua terma dan syarat ke atas plaintif di bawah PJB, defendan pertama hendaklah membenarkan plaintif untuk memasuki kedai pejabat, bagaimanapun, milikan tersebut tidak akan memberikan plaintif, hak untuk menduduki dan plaintif tidak boleh menduduki kedai pejabat atau membuat sebarang perubahan tambahan atau sebaliknya kepada kedai pejabat tersebut sehingga masa CCC untuk Pejabat Kedai dikeluarkan. (lihat perenggan 31–32).

(3) HMT keliru tentang cara milikan kosong dan pengeluaran CCC. Di bawah PJB, ianya adalah keadaan yang sama sekali berasingan dan memenuhi situasi yang berbeza. HMT tidak sepatutnya mentafsirkan

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PJB dengan cara yang menggabungkan dua peristiwa yang berasingan dan berbeza menjadi satu peristiwa sedangkan ia tidak. Tiada larangan undang-undang terhadap pengasingan kedua-dua keadaan ini. Perayu dan responden telah secara sukarela

memasuki PJB dan pihak-pihak telah menjalankan urusan mereka mengikut terma dan syarat PJ. Kesucian kontrak yang dimeterai antara pihak harus dipelihara. Setakatmana dapatan HMT bahawa perolehan CCC dan penyerahan milikan kosong sangat berkait kerana klausa 19 PJB tidak boleh digunakan tanpa pemenuhan klausa 20 dan klausa 23 PJB, dapatan sedemikian adalah salah kerana PJB menyatakan dengan jelas bahawa mereka tidak saling berkaitan (lihat perenggan 33–35).

(4) Penyerahan 'milikan kosong kedai pejabat tanpa hak untuk diduduki bukanlah sesuatu yang baru. Oleh itu, tanpa hak pendudukan, isu bekalan elektrik dan air sebenar tidak relevan dan PJB juga tidak menyatakan keperluan ini. Terdapat perbezaan yang jelas antara 'pendudukan' dan 'pemilikan'. Milikan kosong tidak sinonim dengan hak pendudukan (lihat perenggan 36–37).

(5) Memandangkan klausa 13.2.1 PJB dengan jelas memperuntukkan cara penyerahan milikan kosong dan telah dipatuhi oleh perayu, penyerahan milikan kosong kepada responden adalah pada 30 Disember 2015 seperti dalam surat perayu yang mengandungi tarikh yang sama. Walau bagaimanapun, terdapat merit dalam pertikaian perayu bahawa klausa 13 PJB hanya memerlukan perayu menyiapkan kerja-kerja secara fizikal dan menyediakan perakuan penyiapan praktikal oleh arkitek sebagai mencukupi untuk menyediakan milikan kosong dan tidak menjadi masalah jika kedai pejabat tersebut tidak disambungkan dengan utiliti penting (lihat perenggan 38–39).

(6) Responden telah berjaya melepaskan beban pembuktiannya, pertama, terdapat pelanggaran kontrak dan kedua, PJB mengandungi klausa yang menyatakan jumlah yang perlu dibayar sekiranya terdapat pelanggaran. Tiada merit dalam dakwaan perayu bahawa HMT terkhilaf dalam memberikan award LAD kerana ia tidak dibuktikan oleh responden. Dalam kes semasa, di bawah PJB, kadar LAD yang dipersetujui ialah 10% setahun daripada harga pembelian kedai pejabat, yang serupa dengan kadar ganti rugi yang ditentukan yang diberikan dalam perjanjian jual beli yang ditetapkan oleh undang-undang seperti Jadual G atau H Akta Pindaan Pemajuan Perumahan 2012. Oleh itu, kadar LAD sedemikian adalah adil dan munasabah (lihat perenggan 44–46).

(7) Tiada merit pada pendapat perayu bahawa tindakan responden adalah pramatang. Responden telah mengambil alih kedai pejabat pada 25 Februari 2016 dan writ responden telah difailkan pada 5 Ogos 2016. Oleh itu, tindakan semaas adalah tidak pramatang. Walaupun jika responden tidak mengambil milikan sebenar kedai pejabat, berdasarkan

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peruntukan yang sedia ada milikan seperti yang dinyatakan dalam klausa 13.1.3 PJB, responden akan dianggap telah mengambil milikan dan dengan itu berhak untuk memulakan tindakan undang-undang terhadap perayu (lihat perenggan 54–55).

(8) Dapatan HMT bahawa milikan kosong kedai pejabat telah diberikan kepada responden pada 26 Ogos 2016 dan bahawa ia mesti bersekali dengan CCC, adalah jelas salah. HMT membuat kekhilafan yang memerlukan campur tangan rayuan dalam rayuan perayu. Oleh itu, terdapat merit dalam rayuan perayu. Di dalam premis tersebut, perayu diperintahkan untuk membayar kepada responden, jumlah RM834,246 sebagai ganti rugi tertentu yang dikira dari 4 Jun 2015 hingga 30 Disember 2015 berserta faedah 5% setahun dari tarikh penghakiman Mahkamah Tinggi sehingga bayaran penuh dan muktamad (lihat perenggan 56–59).]

Cases referred to

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15; [2019] 2 CLJ 723, FC (folld)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (folld)

Sakinas Sdn Bhd v Siew Yik Hau & Anor [2002] 5 MLJ 497, HC (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 176

Contracts Act 1950 s 75

Housing Development (Control and Licensing) Regulations 1989 Schedule H

Appeal from: *K-Shin Corp Sdn Bhd v Icon City Development Sdn Bhd & Anor* [2017] MLJU 2449 (High Court, Kuala Lumpur)

Justin Voon Tiam Yu (with Lee Chooi Peng and Lim Xin Yi) (Justin Voon Chooi & Wing) for the appellant.
Joshua Chong Wan Ken (with Khor Yongshi and Chan Jia Her) (Raja, Darryl & Loh) for the respondent.

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Lee Heng Cheong JCA:

INTRODUCTION

[1] The appellant was the first defendant in the High Court ('appellant') whilst the respondent was the plaintiff in the High Court ('respondent'). The respondent's case against SN Low & Association Sdn Bhd, which is a body of professional architects and which is the second defendant in the High Court had been struck out.

[2] The appellant appealed against the decision of the High Court in allowing the claim of the respondent against the appellant pursuant to the sale and purchase agreement dated 30 June 2011 ('SPA') for the liquidated ascertained damages ('LAD') for the delay in delivery of the vacant possession of a unit of eight-storey shop offices identified as Parcel No A-16, Block No A ('shop office') in the Icon City project ('project') as well as for the refund of services charges and insurance which were paid prematurely.

BACKGROUND

[3] The pertinent facts of this case have been summarised by the learned High Court judge ('learned High Court judge') in her grounds of judgment and we will adopt the same herein for ease of reference. They are as follows:

(1) On 30 June 2011, the plaintiff entered into a contract with the first defendant vide a sale and purchase agreement to purchase the shop office from the first defendant;

(2) The date of completion and delivery of vacant possession of the shop office by the first defendant to the plaintiff as stipulated in the contract is on or before the expiry of 36 months from the date of the period of approval or the extended period of approval ('the 36 months' period');

(3) The contract defines the period of approval as 12 months from the date of the contract to obtain the development order, the conversion approval and the approval of the building plans from the relevant authorities;

(4) The contract stipulated that the first defendant shall pay LAD to the plaintiff at the rate of 10% of the purchase price to be calculated from day to day in the event that the first defendant shall fail to complete and deliver vacant possession of the shop office to be plaintiff within the specified period or the extended time allowed by the second defendant;

(5) Subsequently, the first defendant confirmed in a letter dated 8 April 2016 that the development order, the conversion approval and the approval of the building plans from the relevant authorities were obtained on 5 June 2012;

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(6) Hence, pursuant to the contract between the first defendant and the plaintiff, the 36 months' period for the completion and delivery of the shop office will expire on 4 June 2012 (should be '4 June 2015');

(7) However, the contract allows the second defendant being the architect to make a fair and reasonable extension of time of the 36 months' period for completion and delivery of vacant possession of the shop office;

(8) If in the opinion of the second defendant, the completion and delivery of vacant possession of the shop office is delayed by reason of exceptionally inclement weather, civil commotion, strikes, lockout, war, fire, flood or for any such cause beyond the first defendant's control;

(9) Subsequently, the second defendant issued two letters of extensions of time dated 14 August 2015 and 21 December 2015, respectively, purportedly to extend the 36 months' period for completion and delivery of vacant possession of the shop office, initially from 4 June 2015 to December 2015 and subsequently, from December 2015 to 15 January 2016 on the ground that there were disputes or issues arising from the contract between the first defendant and its contractor ('the first defendant's contractor');

(10) As a result of the second defendant's two letters of extensions of time, the first defendant refused to pay LAD to the plaintiff for the late completion and delivery of vacant possession of the shop house to the plaintiff;

(11) The plaintiff disputed the validity of the second defendant's two letters of extensions of time on the ground that disputes or issues arising from the construction contract between the first defendant and the first defendant's contractor could not be considered as a cause beyond the first defendant's control;

(12) This is because the plaintiff took the position that the first defendant could enforce the construction contract against the first defendant's contractor;

(13) Hence, the plaintiff took the position that the second defendant did not issue the two letters of extensions of time in accordance with the express terms of the contract between the first defendant and the plaintiff and that the

defendant's two letters of extensions of time were invalid as the second defendant had abused the power given to the second defendant under the contract between first defendant and the plaintiff to issue them;

(14) The plaintiff also took the position that the second defendant's letters of extension of time were unfairly and unreasonably issued by the second defendant;

(15) This is because of the plaintiff took the position that the second defendant owed to the plaintiff (and other purchasers) a duty of care and also a professional duty to ensure that any letter for an extension of time falls within the express contractual term between the first defendant and plaintiff;

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(16) Hence, the plaintiff took the position that the second defendant was negligent in issuing the two letters of extension of time as the second defendant had breached the second defendant's duty of care which the second defendant owed to the plaintiff (and other purchasers) and also the second defendant's professional duty;

(17) On 28 December 2015, the second defendant certified that the plaintiff had paid the purchase price in accordance with the manner of payment as stipulated in the contract;

(18) On 30 December 2015, the first defendant issued a letter to the plaintiff informing the plaintiff that vacant possession of the shop office was ready to be delivered;

(19) However, the plaintiff took the position that the shop office was not ready for delivery of vacant possession as the electricity and water mains were not made available and were not ready for connection to the shop office, the permanent access road to the shop office was not made ready or available and the certificate of completion and compliance ('the CCC') has not been issued for the project and remains outstanding;

(20) On 19 February 2016, the first defendant issued a discharge memo stating that the plaintiff had complied with all the conditions for the delivery of vacant possession to the plaintiff;

(21) On 25 February 2016, the first defendant purported to deliver actual vacant possession of the shop office to the plaintiff;

(22) But the plaintiff took the position that the delivery of vacant possession on 25 February 2016 was invalid as the water and electricity mains were not connected and the CCC for the project has not been issued and remains outstanding;

(23) The plaintiff also took the position that even if the delivery of vacant possession on 25 February 2016 was valid, it was late as the first defendant was contractually obliged to deliver it on 4 June 2015 since the plaintiff's position was that the second defendant's two letters of extensions of time were invalid;

(24) Hence, the plaintiff took the position that there was a delay of 265 days from 4 June 2015 to 25 February 2016 and the first defendant was liable to pay to the plaintiff LAD of a sum of RM1,052,739.73 at RM3,972.60 a day;

(25) This is because the formula for the calculation of the LAD for the first defendant's delay in delivering the vacant possession ofthe shop office to the plaintiff, as stipulated in cl 13.1.2 read together with s 7 of Schedule A of the contract, is 10% of the purchase price;

(26) Since the purchase price of the shop office is RM14,500,000 and 10% of the purchase price of RM14,500,000.00 is RM1,450,000, the plaintiff arrived at a daily LAD of a sum of RM3,972.60 as follows:

RM1,450,000.00 x 1/365 days= RM3,972.60

---------- ***[2022] 6 MLJ 941 at 952***

(27) The plaintiff calculated the sum of RM1,052,739.73 that the plaintiff has claimed from the first defendant as follows:

RM1,450,000.00 x 265/365 days= RM1,052,739.73

(28) Therefore, on 5 August 2016, the plaintiff filed this suit to claim for declaratory relief against both defendants, the sum of RM1,052,739.73 as LAD for the first defendant's breach of contract in the late delivery of vacant possession of the shop office to the plaintiff and any other sum of LAD as determined by the court against the first defendant, alternatively, the sum of RM1,052,739.73 as damages against the second defendant for the second defendant's negligence in the issuance of the two architect's letters for extensions of time, interest and costs.

[4] The certificate of completion and compliance ('the CCC') of the shop office was only obtained by the respondent on 26 August 2016, ie after the respondent filed its suit on 5 August 2016, which copy of the CCC was served on the respondent vide the appellant's letter dated 2 September 2016 (encl 24 at p 128; RA/2D/734).

[5] The respondent's case against the second defendant was for negligence in the issuance of two architect's letters of extension of time dated 14 August 2015 and 21 December 2015 respectively (collectively 'architect's letters'). The second defendant was appointed by the appellant to act as the appellant's consultant architect and is the appointed architect under the SPA ('architect'). The second defendant applied to strike out the suit against them vide a notice of application dated 15 September 2016 which was allowed by the High Court on 8 August 2017. An appeal by the respondent against that decision to the Court of Appeal was dismissed.

[6] The reliefs sought by the respondent against the appellant can be gleaned from the amended statement of claim (encl 24 at pp 130–149; RA/1A/136–155), particularly pp 153–154 (English version) (encl 24 at pp 147–148; RA/1A/153–154).

[7] After full trial, the learned High Court judge ('learned High Court judge') found in favour of the respondent.

[8] Dissatisfied, the appellant appealed against this decision to this court.

[9] This is an unanimous decision of the court. We heard this appeal on 6 May 2021 and allowed the appeal in part. These are our grounds for our decision.

---------- ***[2022] 6 MLJ 941 at 953***

[10] The parties herein shall be referred to, in their respective capacities before this court.

THE FINDINGS OF THE LEARNED HIGH COURT JUDGE

[11] After full trial, the learned High Court judge found in favour of the respondent, holding that the appellant was liable to the respondent for, inter alia, LAD in the sum of RM1,779,726.02 and other associated claims due to the delay of the appellant, in delivering the vacant possession of the shop office. The learned High Court judge granted, inter alia, the following orders and sums in the court judgment dated 18 July 2018 with interests and costs as follows:

(1) Surat-Surat Arkitek bertarikh 14 August 2015 dan 21 December 2015 bukan lanjutan masa di bawah klausa 13.1.1 Perjanjian Jual Beli bertarikh 30 June 2011 antara Plaintif dan Defendan;

(2) Defendan membayar kepada Plaintif jumlah sebanyak RM1,779,724.80 sebagai gantirugi jumlah tertentu;

(3) Defendan membayar kepada Plaintif jumlah sebanyak RM9,894.60 sebagai bayaran balik caj servis;

(4) Defendan membayar kepada Plaintif jumlah sebanyak RM3,957.84 sebagai bayaran balik sumbangan kumpulan wang penjelas;

(5) Defendan membayar kepada Plaintif jumlah sebanyak RM2,629.00 sebagai bayaran balik premium Insurans;

THE APPELLANT'S CONTENTIONS

[12] Before us, the appellants contended, inter alia, as follows:

(a) that the learned High Court judge erred in her decision and also granted a judgment which is excessive and beyond the ambit of the action and/or the pleaded case;

(b) that the learned High Court judge erred in awarding the LAD as it was not proven by the respondent;

(c) that the learned High Court judge was wrong in granting the interest on the LAD, to run from a date earlier than the judgment date;

(d) that there were extensions of time granted by the architect pursuant to cl 13.1.1 of the SPA by way of the architect's letters which extended the time for the appellant to deliver vacant possession until 15 January 2016;

(e) that there can be no cause of action if the respondent did not take possession as cl 13.1.3 of the SPA stipulated that the respondent can

---------- ***[2022] 6 MLJ 941 at 954***

only sue for LAD only if the respondent took possession of the shop office. Thus, the respondent had no cause of action as the CCC was only obtained on 26 August 2016 and the writ was filed on 5 August 2016. Thus, the present action was premature; and

(f) that the learned High Court judge had introduced an unpleaded cause of action based on purported 'implied term' into the SPA which is directly contradictory to the plain and ordinary meaning of words of the SPA.

THE RESPONDENT'S CONTENTIONS

[13] The respondent, inter alia, contended as follows:

(a) that the appellant allegedly delivered vacant possession of the shop office to the respondent by 25 February 2016. However, the shop office was not ready for delivery of vacant possession for various reasons;

(b) that the architect's letters cited disputes or issues arising between the appellant and its contractor, which cannot be a cause beyond the appellant's control as defined in cl 13.1.1 of the SPA. Thus, the architect's letters are invalid;

(c) further, the architect at trial admitted that the architect's letters were merely to inform the appellant of delays, and were not issued pursuant to the SPA and the architect's letters make no mention of the SPA or cl 13.1.1;

(d) that the learned High Court judge correctly found that the architect's letters were not valid and not applicable, and that the events the appellant relied on (namely, breaches and defaults by its own main contractor) were not out of the appellant's control and did not entitle the appellant to additional time;

(e) that valid vacant possession of the shop office was not delivered until essential amenities were available for the shop office and the CCC for the shop office issued;

(f) that LAD accrued from the end of the specified period on 4 June 2015 until issuance of the CCC on 26 August 2016; and

(g) that the sinking fund premium, service charges and insurance period paid by the respondent for the shop office premised on invalid vacant possession was premature and ought to be refunded to the respondent.

OUR ANALYSIS AND DECISION

[14] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor*

---------- ***[2022] 6 MLJ 941 at 955***

[2003] 2 MLJ 97; [2003] 2 CLJ 19 where the Court of Appeal held as follows:

> … an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. *But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.* (Emphasis added.)

[15] In the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, the Federal Court held that:

> [12] *In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.*

[16] In the Federal Court case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1, Zabariah Mohd Yusof FCJ delivering the judgment of the court, held, inter alia, as follows:

(1) *An appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong. The 'plainly wrong' test operates on the principle that the trial court has had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acts on the printed records.* In the UK, the test adopted by the appellate courts is not whether the higher courts feels that it would have reached a different conclusion on the same fact as the trial court, but *whether or not the decision by the lower court on findings of fact was reasonable. If the trial judge's decision can be reasonably explained and justified, then the appellate courts should refrain from intervention* (paras 33–34 & 60).

(2) *The court in Henderson separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test: (i) a material error of law; (ii) a critical finding of fact which has no basis in the evidence; (iii) demonstrable misunderstanding of relevant evidence; and (iv) a demonstrable failure to consider relevant evidence. The phrase 'lack of judicial appreciation of evidence' used in Gan Yook Chin & Anor v Lee Ing Chin & Ors could very well encompass three out of four errors of a trial judge identifiable in Henderson.*

---------- ***[2022] 6 MLJ 941 at 956***

Whilst there was a slight difference in the approach of the appellate intervention, both the UK Supreme Court and the Federal Court effectively shared a common thread where it had been held that appellate intervention was justified where there is lack of judicial appreciation of evidence. What is pertinent is that the 'plainly wrong' test is not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts (paras 54, 72, 74 & 76).

(3) *An appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached …*

… (9) … (10)

Henderson was not setting any guidelines to the plainly wrong test. It merely provided a construction as to what amounts to the 'plainly wrong' test in an appellate intervention. Rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test should be retained as a flexible guide for appellate courts. (Emphasis added.)

[17] Bearing in mind the above principles distilled from the above cases, we will now deal with the appellant's appeal.

[18] It is common ground that the appellant did not deliver vacant possession of the shop office by 4 June 2015. The respondent complained that this was a breach of the SPA and the appellant was liable to pay LAD to the respondent.

[19] The clause which is the subject matter of the dispute is cl 13 of the SPA on the 'Time and Manner of Delivery of Vacant Possession', which is reproduced here:

13.1 *Delivery of vacant possession*

13.1.1 *The Developer shall complete and deliver vacant possession of the said Parcel in accordance with the terms and conditions of this Agreement within the period stated in section 10 of Schedule A hereto PROVIDED THAT if in the opinion of the Developer's architect completion or delivery of vacant possession of the said Parcel is delayed by reason of exceptionally inclement weather, civil commotion, strikes, lockout, war, fire, flood or for any other cause beyond the Developer's control or by reason of the Purchaser requiring the execution of any addition, works or alterations to the said Parcel, then in any such cases, the Developer's architect shall make a fair and reasonable extension of time for completion of the said Parcel and delivery of vacant possession hereunder.*

13.1.2 *In the event the Developer shall fail to complete and deliver vacant possession of the said Parcel to the Purchaser within the aforesaid period or within such extended time as may be allowed by the Developer's architect under cl 13.1.1 the Developer shall pay to the Purchaser liquidated damages to be calculated from day to day at the Agreed Rate on such part of the purchase price that has been paid by the Purchaser to the Developer and*

---------- ***[2022] 6 MLJ 941 at 957***

such sums shall be calculated from the date of expiry of the period stated in Section 10 of Schedule A hereto or the extended date, as the case may be, to the actual date of delivery of vacant possession of the said Parcel to the Purchaser.

13.1.3 For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

13.2 *Manner of vacant possession*

13.2.1 *Upon issuance of a certificate by the Developer's architect certifying that the construction of the Said Parcel has been duly competed and the Purchaser having paid all monies payable under this Agreement and having performed and observed all terms and conditions on the Purchaser's part under this Agreement, the Developer shall let the Purchaser into possession of the said Parcel PROVIDED ALWAYS THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel or to make any alterations additions or otherwise to the said Parcel until such time as the Certificate of Completion and Compliance for the said Parcel is issued.*

13.2.2 *Upon the expiry of fourteen (14) days from the date of notice from the Developer requesting the Purchaser to take possession of the said Parcel whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession of the said Parcel* and the Developer shall thereafter not be liable for any loss and/or damage to the said Parcel or to the fixtures and fittings therein. (Emphasis added.)

WHETHER THE SECOND DEFENDANT'S ARCHITECT'S LETTERS ARE VALID EXTENSIONS OF TIME UNDER THE SPA?

[20] Clause 13.1.1 of the SPA states that the appellant must deliver vacant possession of shop office within 36 months from the date of the period approval or the extended period approval ('specified period'). The exception to this general rule in the SPA is that, if in the opinion of the architect, delivery of vacant possession of the shop office is delayed by reason of exceptional causes as stated in cl 13.1.1, then, the architect shall grant a fair and reasonable extension of time in favour of the appellant.

[21] Clause 13.1.2 of the SPA further states that in the event that the appellant fails to deliver vacant possession of the shop office within the specified period (or the extended time allowed by

the architect), the appellant shall pay to the respondent, liquidated damages at the rate of 10% of the purchase price per annum on daily rests pursuant to the SPA. These liquidated damages would start from the specified period to the actual date of delivery of vacant possession of the shop office to the respondent.

[22] Further, according to cl 25.1 of the SPA, the appellant shall be responsible for connecting and applying for connection of utilities and services which serves the shop office (water, electricity, sewerage, telephone, as piping, sanitary, cooling ducts and so on), at its own cost and expense.

---------- ***[2022] 6 MLJ 941 at 958***

[23] It is undisputed that the specified period in the SPA ends on 4 June 2015. The appellant's contention is that there were extensions of time granted by the architect pursuant to cl 13.1.1 of the SPA by way of the architect's letters which extended the time for the appellant to deliver vacant possession until 15 January 2016.

[24] Our perusal of the learned High Court judge's grounds of judgment showed that she has considered this issue correctly. This is what she said at paras 175 and 179 of her grounds of judgment:

> [175] Even a cursory reading of the architect's letters will show that they were *not extensions of time under the SPA. The architect's letters:*
>
> (1) *make no mention of the SPA let alone the specific cl 13.1.1;*
>
> (2) *do not state that in the opinion of the architect, the events in the said letters were events beyond the developer's control or events which fall within any of the grounds in cl 13.1.1; and*
>
> (3) *the letters do not state any opinion at all and merely state that there would be delays in the completion of the construction works.*
>
> …
>
> [179] The architect's letters *are clearly not Certificates of Extension of Time* for the following reasons:
>
> (1) *they are addressed to the first defendant and not the main contractor (they are not copied to the main contractor either);*
>
> (2) *they make no reference to the PAM Contract let alone cl 23 therein;*
>
> (3) *they do not state that they are Certificates of Extension of Time;*
>
> (4) *they make no mention of the main contractor's application for extension of time let alone that the architect accepts or rejects those applications;*
>
> (5) *they make no mention that the grounds therein are relevant events pursuant to cl 23.8 of the PAM Contract; and*
>
> (6) (*in fact, breaches by the main contractor are obviously not a relevant event pursuant to cl 23.8 of the PAM Contract)* (see: encl 24, pp 83–85). (Emphasis added.)

[25] In making the findings that the architect's letters are not the certificates of extension of time, the learned trial judge also took into consideration of the testimony of PW2, the appellant's architect, who testified that the architect's letters merely served the purpose of informing the appellant of the delay of the project.

---------- ***[2022] 6 MLJ 941 at 959***

[26] As such, we are of the opinion that the architect's letters do not qualify as certificates of extension of time which would justify the appellant's delay in delivering the vacant possession of the shop office to the respondent.

[27] We also find that the appellant's claims that the breaches by their main contractor, Sara-Timur Sdn Bhd and its application for restructuring pursuant to s 176 of the Companies Act 1965 were events beyond its control to which it was entitled to extensions of time, has no merits. The breaches caused by the main contractor's restructuring exercise were not force majeure events and were not beyond the appellant's control in the project under cl 13.1.1 of the SPA.

WHEN WAS VACANT POSSESSION OF THE SHOP OFFICE DELIVERED TO THE RESPONDENT?

[28] By a letter dated 28 December 2015, the architect of the project who is the second defendant in the High Court had duly certified that the construction of the shop office had been duly completed via the architect's certificate and letter dated 28 December 2015 (encl 24 at pp 239–240; RA/2D/892–893).

[29] On 30 December 2015, the appellant issued a letter informing the respondent that the shop office is ready for delivery of vacant possession, enclosing a certificate of completion from the architect and that the requirements for vacant possession under cl 13.2.1 of the SPA have been met.

[30] Pursuant to cl 13.2.2 of the SPA, the respondent would be deemed to have taken the possession of the shop office within 14 days from the date of the letter, which would be 13 January 2016.

[31] The learned High Court judge found that it is the obligation of the appellant to ensure the availability of permanent access road, the mains for the electricity supply and the water supply to connect them to the shop office ('essential amenities') and the CCC was issued to the respondent before the appellant can deliver vacant possession of the shop office. This is what she held:

> [143] Nevertheless, I was of the view that the words 'delivery of vacant possession' in *sub-cll 13.1.1 and 13.2.1 of the SPA must be construed to mean delivery of a vacant constructed property that can be occupied either by the plaintiff as the purchaser or the plaintiff's tenant or licensees.*
>
> [144] I was of this view even though cl 13.2.1 of the SPA expressly stipulates that upon issuance of the architect's

certificate, the defendant/developer shall let the plaintiff/purchaser into possession of the said property and it was also stated that the delivery of the vacant possession did not give the right for the plaintiff/purchaser to occupy the said property or to make any other alterations until such time as the CCC was issued.

---------- ***[2022] 6 MLJ 941 at 960***

[145] *In other words, in my view, vacant possession can only be lawfully and validly delivered under the SPA if on the date of the delivery of vacant possession, the first defendant had made available to the property, the permanent access road and the mains for the electricity supply and the water supply to enable the plaintiff to connect them to the property ('the essential amenities') and the CCC was issued to certify that all the essential amenities have been completed by the first defendant as the developer of the project.* (Emphasis added.) (see: encl 24, p 70).

[32] With respect, we are of the considered view that this finding of the learned High Court judge is erroneous as the definition of the manner of vacant possession was clearly defined in cl 13.2 of the SPA, which states that upon issuance of a certificate by the appellant's architect certifying that the construction of the shop office has been duly competed, the purchaser having paid all monies payable under the SPA and having performed and observed all terms and conditions on the respondent under the SPA, the appellant shall let the respondent into possession of the shop office however such possession shall not give the respondent, the right to occupy and the respondent shall not occupy the shop office or to make any alterations additions or otherwise to the said shop office until such time as the CCC for the office shop is issued.

[33] We are of the considered opinion that the learned High Court judge is confused about the manner of vacant possession and the issuance of the CCC. Under the SPA, it is clear that they are totally separate events and caters for different situations.

[34] We further find that the learned High Court judge should not have interpreted the SPA in such a manner that combined the two separate and distinct events into a single event when they are not. There is no statutory prohibition against the segregation of these two events. The appellant and the respondent have voluntarily entered into the SPA and parties have conducted their affairs in accordance with the terms and conditions of the SPA. The sanctity of the contract entered between parties should be preserved.

[35] In so far as the learned High Court judge's finding that the CCC procurement and the delivery of vacant possession are very much intertwined as cl 19 of the SPA could not be invoked without the fulfilment of cl 20 and cl 23 of the SPA, we are of the considered view that such a finding is erroneous as in the present case, the SPA makes it distinctly clear that they are not intertwined.

[36] We are of the considered view that the granting of 'vacant possession' of the shop office without the right to occupation is nothing novel as even in the sale of 'housing accommodation', the previous Schedule H of the Housing Development (Control and Licensing) Regulations 1989 (before the

---------- ***[2022] 6 MLJ 941 at 961***

amendments vide PU(A)106/15 which came into force on 1 February 2011) included a clause for vacant possession without according a right to occupation in cl 27(3) of the statutory sale and purchase agreement as follows:

> (3) Such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Fitness for Occupation for the said Building is issued.

[37] As such, without a right of occupation, the issue of actual electricity and water supply are not relevant and neither does the SPA in this case specified these requirements. There is a clear difference between 'occupation' and 'possession'. Vacant possession is not synonymous with the right of occupation.

[38] Since cl 13.2.1 of the SPA clearly provides for the manner of delivery of vacant possession and which has been complied with, by the appellant, we are of the considered view that delivery of vacant possession to the respondent was on 30 December 2015 as per the appellant's letter bearing the same date.

[39] Our considered view is that there is merit in that the appellant's contention that cl 13 of the SPA merely requires the appellant to physically complete works and provide a certificate of practical completion by the architect as sufficient to provide vacant possession and that it would matter not, if the shop office was not connected with the essential utilities.

WHETHER THE RESPONDENT NEEDED TO PROVE DAMAGES?

[40] The appellant contended that the learned High Court judge erred in awarding the LAD as it was not proven by the respondent.

[41] Whether the damage is quantifiable or otherwise, the court has to adopt a common sense approach by taking into account the genuine interest which an innocent party may have and the proportionality of a damages clause in determining reasonable compensation.

[42] Section 75 of the Contracts Act 1950 provides that reasonable compensation must not exceed the amount so named in the contract. Consequently, the impugned clause that the innocent party seeks to uphold would function as a cap on the maximum recoverable amount.

[43] Guidance can be found in the Federal Court's decision in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723, where Richard Malanjum (CJ (Sabah and Sarawak) as he then was) held, inter alia, as follows:

> [70] *We turn now to the issue on burden of proof. The initial onus lies on the party*

> *seeking to enforce a clause under s 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective*

of whether actual damage or loss is proven, subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.

[71] *If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause is unreasonable or to demonstrate from available evidence and under such circumstances what comprises reasonable compensation caused by the breach of contract. Failing to discharge that burden, or in the absence of cogent evidence suggesting exorbitance or unconscionability of the agreed damages clause, the parties who have equality of opportunity for understanding and insisting upon their rights must be taken to have freely, deliberately and mutually consented to the contractual clause seeking to pre-allocate damages and hence the compensation stipulated in the contract ought to be upheld.*

[72] *It bears repeating that the court should be slow to refuse to give effect to a damages clause for contracts which are the result of thorough negotiations made at arm's length between parties who have been properly advised …*

[73] *At any rate, to insist that the innocent party bears the burden of proof to show that an impugned clause is not excessive would undermine the purpose of having a damages clause in a contract, which is to promote business efficacy and minimise litigation between the parties* (see: Scottish Law Commission, Discussion Paper on Penalty Clauses (Discussion Paper No 103), December 1997, paras [5.30]–[5.40]).

[74] In summary and for convenience, the principles that may be distilled from hereinabove are these:

(a) If there is a breach of contract, any money paid in advance of performance and as part-payment of the contract price is generally recoverable by the payer. But a deposit paid which is not merely part-payment but also as a guarantee of performance is generally not recoverable.

(b) Whether a payment is part-payment of the price or a deposit is a question of interpretation that turns on the facts of a case, and the usual principles of interpretation apply. Once it has been ascertained that a payment possesses the dual characteristics of earnest money and part-payment, it is a deposit.

(c) A deposit is subject to s 75 of the Act.

(d) In determining what amounts to 'reasonable compensation' under s 75 of the Act, the concepts of 'legitimate interest' and 'proportionality' as enunciated in *Cavendish* are relevant.

(e) A sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be

a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.

(f) *Section 75 of the Act* allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point.

(g) The initial onus lies on the party seeking to enforce a damages clause under *s 75 of the Act* to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.

(h) If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable. (Emphasis added.)

[44] From the evidence adduced, we are of the view that the respondent has successfully discharged its burden of proof, firstly, that was a breach of contract and that secondly, the SPA contains a clause specifying a sum to be paid upon breach which is cl 13.1.2 of the SPA read with section 7 of Schedule A of the SPA. See: *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723.

[45] We find that there are no merits in this contention as the learned High Court judge was correctly relying on the cases of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 and *Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 5 MLJ 497 when determining that the proof of LAD was not required.

[46] In the present case, under the SPA, the agreed rate of LAD is 10%pa of the purchase price of the shop office, which is similar to the rate of liquidated damages awarded in statutorily prescribed sale and purchase agreements such as Schedule G or H of the Housing Development Amendment Act 2012. Thus, we are of the view that such a rate of LAD is fair and reasonable.

[47] In any event, we find that the appellant had failed to plead this point and to prove that the LAD claimed was unreasonable compensation for the breach that has occurred.

---------- ***[2022] 6 MLJ 941 at 964***

WHETHER THE GRANTING OF INTEREST TO RUN FROM A DATE EARLIER THAN THE JUDGMENT DATE IS PROPER?

[48] On the issue that the learned High Court judge was wrong in granting the interest on the LAD, to run from a date earlier than the judgment date, we find that there are no merits in this contention. Our considered view is that the learned High Court judge has correctly exercised his discretion and held in paras 234 and 235 of her grounds of judgment, as follows:

[234] In my view, the parties to the SPA were fully aware that if there was a delay in the delivery of vacant possession of the property by the first defendant, the first defendant would be liable to pay LAD immediately commencing on 4 June 2015 calculated in accordance with the formula stipulated in the SPA on a daily basis.

[235] *Since the plaintiff has been kept out of being paid the LAD and since vacant possession was only lawfully and validly delivered on 26 August 2016, it is only fair that the interest of 5%pa commences on that date instead of on the judgment date of 18 July 2018.* (Emphasis added.)

WHETHER THE RESPONDENT'S ACTION AGAINST THE APPELLANT IS PREMATURE?

[49] The appellant also contended that there can be no cause of action if the respondent did not take possession as cl 13.1.3 of the SPA stipulates that the respondent can only sue for LAD

only if the respondent takes possession of the shop office. Thus, the respondent has no cause of action as the CCC was only obtained on 26 August 2016 and the writ was filed on 5 August 2016. In the premises, the present action was premature.

[50] The appellant vide their letter dated 30 December 2015, gave notice of vacant possession (encl 24 at pp 241–242; RA/2D/906–907) to the respondent and the respondent would be deemed to have taken the possession within 14 days from the date of the letter, which would be 13 January 2016 pursuant to cl 13.1.3 of the SPA which stated that 'Upon the expiry of fourteen (14) days from the date of notice from the Developer requesting the Purchaser to take possession of the said Parcel whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, *the Purchaser shall be deemed to have taken delivery of vacant possession* of the said Parcel and the Developer shall thereafter not be liable for any loss and/or damage to the said Parcel or to the fixtures and fittings therein'.

[51] In the present case, the respondent took vacant possession of the shop office as stated in their letter dated 22 February 2016, in reply to the appellant's letter dated 30 December 2015. Paragraphs 2 and 3 of the respondent's said letter dated 22 February 2016 are reproduced as follows:

---------- ***[2022] 6 MLJ 941 at 965***

> 2. We shall take vacant possession of the aforesaid parcel on 25 February 2016 as per confirmation in Ms. Jen Yap email and Clearance Memo dated 19 February 2016.
>
> 3. We also note that there are substantive delays on the delivery of vacant possession of the said parcel. We reserve all our rights against you including the right to claim for liquidated damages under the sale and purchase agreement dated 30 June 2011.

[52] In the present case, the respondent took vacant possession of the shop office on 25 February 2016 as stated in their letter dated 22 February 2016.

[53] We noted that the architect who is the second defendant in the High Court, had duly certified that the construction of the shop office has been duly completed via the architect's certificate via letter dated 28 December 2015 (encl 24 at pp 239–240; RA/2D/892–893) and thus, the requirements for vacant possession under cl 13.2.1 of the SPA have been duly satisfied.

[54] Thus, in respect of this contention of the appellant, we are of the considered opinion that there are no merits in this contention as the respondent took possession of the shop office, on 25 February 2016 and the respondent's writ was filed on 5 August 2016. Thus, the present action was not premature.

[55] Even if the respondent did not take actual possession of the shop office, we are of the considered view that by virtue of the deeming provision of possession as stated in cl 13.1.3 of

the SPA, the respondent would be deemed to have taken possession and thus entitled to initiate legal action against the appellant.

OUR DECISION

[56] In reaching our conclusion, we were very much guided by the principles on appellate intervention as recently pronounced by the Federal Court in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors*. In our view, the learned High Court judge's finding that vacant possession of the shop office was given to the respondent on the 26 August 2016 and that it must come together with the CCC, was in our view, plainly wrong.

[57] We are of the considered opinion that the learned High Court judge made errors which warranted appellate intervention in the appellant's appeal. More often than not, an appellate court will not reverse a trial court's findings of facts unless that finding was 'plainly wrong'.

---------- ***[2022] 6 MLJ 941 at 966***

[58] In the light of our above findings, we are of the respectful view that there are merits in the appellant's appeal and we unanimously allow the appellant's appeal in part.

[59] In the premises, we order that the appellant shall pay to the respondent, the sum of RM834,246 as liquidated damages which is calculated from 4 June 2015 until 30 December 2015 together with interest of 5%pa from 18 July 2018 which is the date of the judgment of the High Court until full and final payment. Each party bear their own costs.

[60] The decision of the learned High Court judge of 18 July 2018 is varied/set aside.

Appeal allowed in part.
Reported by K Selvaraju