**R4**

**NO. W-01(A)-284-04/2024**

**CHONG YUONG WEE & ORS**

**v**

**1.MENTERI PERUMAHAN DAN KERAJAAN TEMPATAN**

**2.DATO N. JAYASELAN**

**3.SIME DARBY BRUNSFIELD RESORT SDN BHD**

THIS BROAD GROUNDS WILL BE USED IN DETERMINING THE OUTCOME OF THE REMAINING 10 APPEALS BEFORE THIS PANEL AS THE ISSUES COVERED HEREIN WILL HAVE A DETERMINATIVE EFFECT ON THE REST OF THE APPEALS.

## BROAD GROUNDS

The appeal arose from the High Court's dismissal of a judicial review application challenging the grant of a COVID-19 exemption of 214 days to the developer, Sime Darby Brunsfield Resort Sdn Bhd ("the Developer"), under Section 38C of the Temporary Measures For Reducing The Impact of Coronavirus Disease 2019 (Covid-19) (Amendment) Act 2022 ("Act A1641"). Four grounds of challenge were raised.

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## GROUND 1: ALLEGED BREACH OF SECTION 38C(3) - THE CENTRAL ISSUE

### The Appellants' Case

The Appellants' primary complaint rested on the interpretation of section 38C(3) of Act A1641, the Act amending Act 829, the main Covid 19 legislation. Section 38C(3) provides that the Minister "shall not consider" an application if it is made "after the expiry of the time for delivery of vacant possession or the completion of common facilities specified under the agreement". The Appellants argued that the phrase "shall not consider" is mandatory and admits of no exception. Since, on their calculation, the contractual date for delivery of vacant possession had already

passed by the time the Developer applied on 16 February 2022, they submitted the Minister was statutorily prohibited from entertaining the application at all, and the resulting exemption was therefore illegal.

This argument, fails on several reasons.

**Subsection (3) Cannot Be Read in Isolation from Subsection (1)**

The starting point of the analysis is that provisions of a statute must always be read as a whole. No single subsection can be construed in isolation so as to defeat the very purpose of another subsection within the same provision. This is not merely a canon of construction but a requirement expressly mandated by Section 17A of the Interpretation Acts 1948 and 1967, which obliges courts to adopt a purposive construction that promotes the object or purpose of the written law.

Section 38C(1) confers a positive right on a developer to apply to the Minister for the exclusion of any period falling between 1 January 2021 and 31 December 2021. That right is unambiguous and deliberately broad and it covers the entirety of the calendar year 2021. However, Act A1641 was only gazetted on 13 January 2022 and came into force on 14 January 2022. By that date, the entire year 2021 had already passed. There is accordingly an inherent and unavoidable chronological feature of this scheme: any developer applying for a Section 38C(1) exemption is, by the very nature of things, applying after the period in question has elapsed and, in many cases, after the contractual VP date during that period would already have expired.

To read subsection (3) as the Appellants urge as an absolute bar on any application made after the contractual VP date would mean that no developer could ever successfully apply for a Section 38C(1) exemption in respect of a project whose VP fell during 2021. This is because, since Act A1641 came into force only in January 2022, every such developer would, theoretically be applying after the VP date. The Appellants' construction would thus render Section 38C(1) entirely illusory, nugatory and incapable of practical application in precisely the cases it was designed to address. It is a cardinal principle that courts must prefer an

interpretation which gives a statutory provision practical effect over one which would render it otiose. A construction that destroys the very right Parliament chose to create cannot be the correct one. Parliament does not legislate in vain.

**The Mischief in Section 38C(3)**

Once it is accepted that subsection (3) cannot be read so as to nullify subsection (1), the question becomes: what is subsection (3) actually aimed at?

The answer is furnished by the parliamentary history of Act A1641. In his ministerial speech during the passage of the Bill, the Minister stated in Parliament that the amendment was intended only for projects "aktif dalam pembinaan" (active in construction) and which had not exceeded their "tempoh pembinaan yang asal" (original construction period). He specifically stated that "projek sakit" (sick projects) and "projek terbengkalai" (abandoned projects) would not be considered.

This statement provides the interpretive key to subsection (3). The words "time...specified under the agreement" in subsection (3) correspond directly to the Minister's reference to "tempoh pembinaan yang asal" - the original period as stipulated in the SPA. The prohibition in subsection (3) is thus directed at a specific category of case: projects whose original contractual VP date had already expired before the COVID-19 pandemic began to have legal effect, that is, before 18 March 2020, which was the date of the first nationwide lockdown under the Prevention and Control of Infectious Diseases Act 1988. Such projects would be those that were already behind schedule or had already expired - sick or abandoned projects, for reasons entirely unconnected to COVID-19.

Section 38C was never intended to provide a windfall to developers who had pre-pandemic delays and pre-pandemic defaults. Its purpose was targeted and precise - to protect developers whose projects were genuinely on track but were disrupted by the pandemic measures imposed in 2021. Subsection (3) exists to exclude the undeserving. Not to bar those whose delays squarely attributable to the pandemic.

**The Effect of the Previously Accepted Exemptions**

An independently determinative point arises from the Appellants' own position regarding the 1st and 2nd Exemptions. Those exemptions, totalling 289 days and covering the periods from 18 March 2020 to 31 August 2020 and 1 September 2020 to 31 December 2020, were granted under Act 829. The Appellants have expressly accepted those exemptions as valid. They raise no challenge to them.

The legal effect of accepting those exemptions is significant. By operation of Act 829, those exemptions modified the contractual timeline such that the completion period under the SPAs was no longer defined solely by the original "tempoh pembinaan yang asal" as stated in the SPAs. The contractual VP date was effectively pushed forward by the accumulated effect of the statutory exclusions. Once that is accepted, the completion period against which subsection (3) falls to be measured is no longer the bare original SPA date but the adjusted date after accounting for the 1st and 2nd Exemptions. The Developer's application of 16 February 2022 cannot therefore be said to have been made after the expiry of "the time...specified under the agreement" in the relevant sense, because that time had itself been extended by the force of Act 829.

More fundamentally, the Appellants cannot simultaneously accept that the 1st and 2nd Exemptions were validly granted, thereby acknowledging that the pandemic impacted construction progress during 2020 while contending that any similar impact during 2021 (when the MCOs and Recovery Phases continued with equal or greater severity) should attract no relief at all. That is an internally inconsistent position which the law does not permit.

**The Facts of the Case Confirm the Purpose of the Exemption**

The factual matrix of the case further supports the conclusion that the 3rd Exemption was legitimately granted. The Developer applied on 16 February 2022, barely one month after Act A1641 came into force. At that point, vacant possession had not yet been delivered. The Developer's application was supported by a detailed chronological table mapping the various MCO phases and Recovery Phases throughout 2021, together with technical reports from the project architect and letters from contractors confirming the disruptions encountered. Vacant

possession was ultimately delivered in December 2022, demonstrating that construction was genuinely and substantially impacted by the pandemic measures in 2021.

These facts demonstrate a clear causal connection between the pandemic measures and the delay in delivery. This is precisely the class of case that Section 38C was designed to address. The 1st Respondent, having considered the application on its merits, was fully justified in granting the exemption.

## GROUND 2: THE 2ND RESPONDENT'S AUTHORITY TO SIGN THE EXEMPTION LETTER

### A. The Appellants' Argument

The Appellants contended that the 2nd Respondent (the Director-General of the National Housing Department) had no power to sign the letter dated 26 April 2022 conveying the grant of the 3rd Exemption. The Appellants argued that such power rested exclusively with the Minister and that no gazette notification under the Delegation of Powers Act 1956 had been produced to demonstrate a valid formal delegation.

### B. The Legal Principle: Communication is Not Delegation

This ground rests on a fundamental mischaracterisation of what the 2nd Respondent did. The Appellants conflate two conceptually distinct things: the making of a decision and the communication of a decision already made.

In this case, the evidence was clear and uncontradicted. The 2nd Respondent deposed in his affidavit that the decision to grant the 3rd Exemption of 214 days was made by the 1st Respondent (the Minister). This was confirmed by documentary evidence in the form of the Minister's own written minutes recording his decision, bearing the reference KPKT/07/PS/828/6 Jld. 1(108). The letter of 26 April 2022 itself expressly stated, in paragraph 3, that the application had been

"considered and approved by the Honourable Minister" "telah pun dipertimbangkan dan diluluskan oleh YB Menteri".

The 2nd Respondent further explained that at the material time, the Minister was required to evaluate 113 other similar applications from developers across Malaysia. In those circumstances, it was entirely understandable and administratively rational for the 2nd Respondent, as the senior officer in charge of housing matters, to sign and dispatch the communication conveying the Minister's decision.

In any event the decision of the Federal Court in ***Obata***, which recognised the 2nd Actor theory nullifies all arguments of defective authorization of approvals. As described by solicitors acting for Developers, the 2nd Actor Theory is the trump card that will be flashed to demolish any argument that the extension of time was obtained for want of authority or in contravention of any law.

## GROUND 3: RIGHT TO BE HEARD AND PROCEDURAL FAIRNESS

### Right to Be Heard Does Not Apply in This Context

There are three inter-related reasons why this argument fails.

First, the nature of the relief under Act A1641 is conceptually different from an extension of time. Parliament, in the legislative debates preceding the passage of Act A1641, expressly addressed and distinguished the Ang Ming Lee Court of Appeal decision. The Minister explained that the relief under Act 829 and Act A1641 operates as an "exemption" which has the effect of "suspending" or "freezing" time, rather than extending it. Unlike an extension of time granted under Regulation 12 HDR which modifies the contractual terms agreed between the parties. The exemption under Act A1641 is a statutory response to an external force majeure event that operates by legislative force. Parliament chose, deliberately and after consideration of the Ang Ming Lee jurisprudence, not to import a right to be heard into this regime. Courts should be slow to read into a

statute a procedural requirement that Parliament, with awareness of the relevant case law, chose not to include.

Second, there were practical and policy reasons of compelling force for Parliament's choice. The Minister had to deal with applications from a very large number of developers across Malaysia, all affected by the same pandemic. To require individual hearings for each developer's application affording each set of purchasers an opportunity to be heard and respond would have created an administrative process of considerable complexity and duration, potentially defeating the very purpose of providing timely pandemic relief.

Third, and crucially, the absence of a formal hearing does not mean the purchasers' interests were ignored. This Court's decision in Bludream City Development Sdn Bhd v. Kong Thye & Ors [2022] 2 MLJ 241 which, while concerning Regulation 12 HDR, articulates principles of broader application, confirms that the Minister must act fairly and take the interests of purchasers into account, even without individual hearings. The Minister is entitled to proceed on the assumption that purchasers would not consent to an extension. He must take the broader view, including whether the developer would be able to complete the project if concurrently saddled with LAD liability. What is required is honest, fair and just conduct, not individual hearings.

The evidence in this case demonstrates affirmatively that the 1st Respondent did take the interests of purchasers into account before granting the exemption.

This evidence demonstrates that the Minister's decision was not arbitrary or unfair. It was a considered decision that weighed the competing interests of purchasers and developers in a balanced manner.

## GROUND 4: CONSTITUTIONALITY OF SECTION 38C — ARTICLE 13 OF THE FEDERAL CONSTITUTION

### The Constitutional Challenge

The Appellants' assert that Section 38C of Act A1641 is unconstitutional and violates Article 13 of the Federal Constitution.

It is our view that Section 38C is not arbitrary, vague or unjust. It is a carefully drafted legislative response to a defined and documented public health emergency. The construction industry suffered RM42 billion in losses due to MCOs between 2020 and 2021. Parliament had clear empirical justification for the measure.

Section 38C is also proportionate as the objective was to prevent the collapse of the Malaysian housing construction industry during an unprecedented global pandemic, thereby protecting not only developers but ultimately purchasers from the catastrophic consequence of mass abandoned housing projects.

A point of fundamental importance is that Section 38C is a temporary measure. The COVID-19 Acts were enacted for a specific, time-limited purpose. What is temporary by definition cannot constitute a permanent intrusion upon constitutional rights. Rights guaranteed under the Federal Constitution are permanent.

The Appellants' constitutional challenge also suffers from inconsistency in their own case. They accept the constitutionality of the 1st and 2nd Exemptions granted under Act 829 for the 2020 period. Those exemptions operated by exactly the same mechanism - a legislative suspension of the LAD accrual period. This is also provided in the 3rd Exemption under Act A1641 for the 2021 period.

To approbate the 2020 regime while reprobating the materially identical 2021 regime is a logically and legally untenable position. The Appellants cannot blow hot and cold in this manner.

The Appellants also argue that Section 38C violates Article 13(2) because it effects a compulsory acquisition or use of their LAD rights without adequate compensation.

This argument fails at its beginning. Section 38C does not transfer any property, from the Appellants to anyone else. It does not vest any asset, interest or chose in action in the Developer or in the State. The Developer does not acquire the Appellants' LAD rights. Those rights are not extinguished absolutely, they are suspended for a defined period. There is no transfer of ownership, possession or control.

Section 38C is a general legislative modification of statutory contract rights in response to a force majeure event, not a taking of property for any public or private purpose. It is analogous to force majeure clauses in contracts, which similarly excuse performance for defined periods without any suggestion that one party thereby "acquires" the other's contractual rights.

In addition, LAD is purely a contractual remedy provided for under the SPA. A breach of a provision in a SPA, cannot translate to a violation of Article 13.

**Conclusion**

In the foregoing, we see no reason to disturb the finding of the HCJ. There was no appealable error that merits any appellate intervention. The decision of the High Court is affirmed. The appeal is hereby dismissed with costs of RM 10,000.00 to be paid to each set of solicitors of the successful party.

15.5.26

**Ahmad Fairuz Zainol Abidin**
**Judge**
**Court of Appeal**
**Malaysia**