DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO: M-01(A)-388-10/2017

ANTARA

GJH AVENUE SDN. BHD. … PERAYU

DAN

1. **TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN**
2. **LEE SOO HAI @ LEE YOK CHAN**
3. **ONG LAN WAI … RESPONDEN -RESPONDEN**

[Dalam perkara Permohonan Semakan Kehakiman No.25-19-11-2016
Dalam Mahkamah Tinggi Malaya di Melaka

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara Aturan 15 Kaedah 12 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964

Dan

Dalam perkara Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966

Dan

Dalam perkara Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989

Dan

Dalam perkara Peraturan-Peraturan Pemajuan Perumahan (Tribunal Tuntutan Pembeli Rumah) 2002

Dan

Dalam perkara Award bertarikh 26 Oktober 2016 Tribunal Tuntutan Pembeli Rumah di Putrajaya, Negeri Wilayah Persekutuan Malaysia
Tuntutan No. TTPR/M/0842/16

Antara

GJH Avenue Sdn. Bhd. … Pemohon

Dan

1. TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN
2. LEE SOO HAI @ LEE YOK CHAN
3. ONG LAN WAI … RESPONDEN -RESPONDEN]

DIDENGAR BERSAMA DENGAN

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO: M-01(A)-389-10/2017

ANTARA

GJH AVENUE SDN. BHD. … PERAYU

DAN

1. TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN
2. ONG SEE CHEN … RESPONDEN -RESPONDEN

[Dalam perkara Permohonan Semakan Kehakiman No.25-21-11-2016
Dalam Mahkamah Tinggi Malaya di Melaka

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara Aturan 15 Kaedah 12 Kaedah-Kaedah Mahkamah 2012

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Dalam perkara Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966

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Dalam perkara Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989
Dan

Dalam perkara Peraturan-Peraturan Pemajuan Perumahan (Tribunal Tuntutan Pembeli Rumah) 2002

Dan

Dalam perkara Award bertarikh 26 Oktober 2016 Tribunal Tuntutan Pembeli Rumah di Putrajaya, Negeri Wilayah Persekutuan Malaysia
Tuntutan No. TTPR/M/0840/16

Antara

GJH Avenue Sdn. Bhd. … Pemohon

Dan

1. TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN
2. ONG SEE CHEN … RESPONDEN -RESPONDEN]

DAN

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO: M-01(A)-450-11/2017

ANTARA

GJH AVENUE SDN. BHD. … PERAYU

DAN

1. TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN
2. ONG SEE SIEW … RESPONDEN -RESPONDEN

[Dalam perkara Permohonan Semakan Kehakiman No.25-20-11-2016
Dalam Mahkamah Tinggi Malaya di Melaka

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara Aturan 15 Kaedah 12 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964

Dan

Dalam perkara Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966

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Dalam perkara Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989
Dan

Dalam perkara Peraturan-Peraturan Pemajuan Perumahan (Tribunal Tuntutan Pembeli Rumah) 2002

Dan

Dalam perkara Award bertarikh 26 Oktober 2016
Tribunal Tuntutan Pembeli Rumah di Putrajaya,
Negeri Wilayah Persekutuan Malaysia
Tuntutan No. TTPR/M/0841/16

Antara

GJH Avenue Sdn. Bhd. … Pemohon

Dan

1. TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN
2. ONG SEE SIEW … RESPONDEN -RESPONDEN]

DAN

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO: M-01(A)-451-11/2017

ANTARA

GJH AVENUE SDN. BHD. … PERAYU

DAN

1. TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN
2. ONG SEE PING … RESPONDEN -RESPONDEN

[Dalam perkara Permohonan Semakan Kehakiman No.25-18-11-2016
Dalam Mahkamah Tinggi Malaya di Melaka

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara Aturan 15 Kaedah 12 Kaedah-Kaedah Mahkamah 2012

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Dalam perkara perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964

Dan

Dalam perkara Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966

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Dalam perkara Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989
Dan

Dalam perkara Peraturan-Peraturan Pemajuan Perumahan (Tribunal Tuntutan Pembeli Rumah) 2002

Dan

Dalam perkara Award bertarikh 26 Oktober 2016 Tribunal Tuntutan Pembeli Rumah di Putrajaya, Negeri Wilayah Persekutuan Malaysia
Tuntutan No. TTPR/M/0843/16

Antara

GJH Avenue Sdn. Bhd. … Pemohon

Dan

1. TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN
2. ONG SEE PING … RESPONDEN
-RESPONDEN]

CORAM

Umi Kalthum Binti Abdul Majid, JCA
Zaleha Binti Yusof, JCA
Yaacob Bin Haji Md Sam, JCA

JUDGMENT

[1] These four appeals emanate from the orders of the High Court at Melaka, two dated 29.9.2017 and the other two dated 31.10.2017. The two orders dated 29.9.2017 were in respect of appeals M-01(A)-388-10/2017 (Appeal No. 388) and M-01(A)-389-10/2017 (Appeal No. 389) decided by Justice Vazeer Alam Mydin Meera; while the other two orders dated 31.10.2017 were in respect of appeals M-01(A)-450-11/2017 (Appeal No. 450) and M-01(A)-451-11/2017 (Appeal No. 451) decided by Justice Siti Khadijah bt S. Hassan Badjenid.

[2] The honourable justices had dismissed the appellant's judicial review (JR) applications, seeking to challenge the 1st respondent's awards dated 26.10.2016 (the awards) in favour of the other respondents wherein the appellant was ordered to pay the other respondents damages for late delivery of vacant possession. The appellant also sought for a declaration that the decision of the 1st respondent was invalid, *ultra vires* and null and void.

[3] Before us**,** parties had agreed to submit on Appeal No. 388 and the submissions would be adopted for Appeal No. 389, Appeal No. 450 and Appeal No. 451. In other words, the decision of this Court in Appeal No.

388 would bind the other appeals. Hence, our considerations are confined to Appeal No. 388.

PARTIES

[4] The parties in Appeal No. 388 are GJH Avenue Sdn Bhd as the appellant; Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan as the first respondent; Lee Soo Hai @ Lee Yok Chan as the second respondent and Ong Lan Wai as the third respondent.

[5] The appellant is a housing developer of a development project known as Taman Paya Rumput Perdana Fasa 2 situated in Mukim Paya Rumput, Daerah Melaka Tengah, Melaka ("the project").

[6] The 1st respondent is established under section 16B of the Housing Development (Control and Licensing) Act 1966 (HDA 1966) with powers and duties under HDA 1966 and also the Housing Development (Control and Licensing) Regulations 1989 (HDR 1989) and the Housing Development (Tribunal for Homebuyer Claims) Regulations 2002 (HDR 2002).

[7] The 2nd and 3rd respondents in Appeal No. 388 are individual purchasers of a bungalow unit of the project.

BRIEF FACTS

[8] One Ong See Chen, the eldest son of the 2nd respondent, had on 24.10.2011 booked to purchase three (3) bungalow units Type L of the project and paid RM5,000 for each unit as first part deposit to secure the units. One of the bungalow units is known as Unit No. L.274/PT No. 5415 (the said unit). For the purpose of this Appeal No. 388, we are only concerned with the said unit.

[9] However**,** on 3.12.2011, the said Ong See Chen made a request to cancel his name and to substitute his name with the names of the 2nd and the 3rd respondents as purchasers of the said unit.

[10] The balance of the 10% deposit of RM35,260.00 for the purchase of the said unit was paid by the 2nd and the 3rd respondents on 13.12.2011. The Sale and Purchase Agreement (SPA) for the said unit was signed between the parties on 13.2.2012 at the purchase price of RM402,600.00

[11] Notice of delivery of vacant possession for the said unit was issued by the appellant on 14.2.2014.

[12] Clause 22 of the SPA requires vacant possession to be delivered within 24 months from the date of the agreement. As the SPA was signed on 13.2.2012, and the vacant possession was issued on 14.2.2014, the appellant took a stand that they were only two (2) days late in delivering the vacant possession of the said unit.

[13] The appellant had made payment for damages for late delivery of vacant possession of the said unit on 1.4.2014 amounting to RM220.60. The payment was duly accepted by the 2nd and 3rd respondents without any dispute or protest.

[14] Nevertheless, after 2 ½ years, the 2nd and 3rd respondents filed their claim at the 1st respondent's office for Liquidated Ascertained Damages (LAD) against the appellant for a higher sum vide Tuntutan No. TTPR/M/0842/16.

[15] At the end of the hearing of the claim the 1st respondent awarded the sum of RM12,353.76 as LAD for the said unit.

[16] Dissatisfied with the award, the appellant filed the JR application at the High Court at Melaka to quash the entire decision of the 1st

respondent. The JR application was heard and disposed off as alluded to in 1 and 2 paragraphs of this judgment, and which is now the subject of appeal before us.

Issue

[17] Being a judicial review matter, the court's function is to examine the conduct of the authority to ensure that it has acted within the scope of its lawful power. The authority in this case is the first respondent. Hence, the issue before the court is whether in making the award dated 26.10.2016, the 1st respondent had contravened regulation 11 HDR 1989 and had committed a statutory breach which tantamount to an error of law and/or had acted ultra vires the HDA 1966 and the HDR 1989 and as a consequence thereof, the award was tainted with illegality. We need to decide whether the Learned High Court Judge erred in affirming the decision of the 1st respondent.

High Court's finding

[18] The Learned High Court Judge had found that the 1st respondent had neither committed any illegality nor was the decision irrational in the sense of the Wednesbury unreasonableness. His Lordship found that the 1st respondent had in fact quite correctly applied the law to the facts in making the award.

[19] The 1st respondent had decided that although Clause 22(1) of the SPA provides that vacant possession is to be delivered within twenty-four (24) calendar months from the date of the agreement, the date to be taken into consideration to calculate the LAD is not the date appearing on the SPA but the date on which the booking fee was paid.

[20] The Learned High Court Judge found that was the correct approach based on two decisions of Supreme Court in **Hoo See Sen & Anor v Public Bank Bhd & Anor** [1988] 1 CLJ (Rep) 125 and **Faber Union Sdn Bhd**. v **Chew Nyat Shong & Anor** [1995]3 CLJ 797. The 1st respondent based its decision on two decisions of the High Court in **Lim Eh Fah & Ors v Seri Maju Padu** [2002] 4 CLJ 37 and **Faber Union Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan Dan Kerajaan Tempatan & Ors** [2011] 7 CLJ 37. Both these High Court decisions had also relied on **Hoo See Sen,** *supra***,** and **Chew Nyat Shong,** *supra.* In **Chew Nyat Hong,** *supra*, the case of **Hoo See Sen,** *supra* was referred to and it was held that for the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time starts to run is the date when the purchaser paid the booking fee.

[21] His Lordship further opined that he as well as the 1st respondent were bound by those decisions by virtue of the doctrine of *stare decisis* especially when the same construction had been applied by the Court of Appeal in several cases which involved the schedule G type of sale and purchase agreements. Those cases which he cited were **Foong Seong Equipment Sdn Bhd v Keris Properties (PK) Sdn Bhd** [2009] 1 LNS 442; and **Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd & Another Appeal** [2013] 7 CLJ 713.

Our Decision

[22] Our first task was to examine the relevant provision of the SPA to ensure its conformity with the HDA 1966 and the HDR 1989. In this instant appeal, the relevant provision of the SPA is Clause 22 which reads as follows:

> "Time for delivery of vacant possession
>
> 22. (1) Vacant possession of the said Building shall be delivered to the Purchaser in the manner stipulated in clause 23 herein within twenty-four (24) calendar months from the date of this Agreement
>
> (2) If the Vendor fails to deliver vacant possession of the said Building in manner stipulated in clause 23 herein within the time stipulated in subclause (1), the Vendor shall be liable to pay to the Purchaser liquidated

damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of the vacant possession in subclause (1) until the date the Purchaser takes vacant possession of the said Building. Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Building.

(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 Building".

[23] This Clause 22, and in fact the whole SPA is a Schedule G statutory contract as prescribed by regulation 11(1) of the HDR 1989 which *inter alia* reads as follows:

"11. **Contract of sale**

(1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G; and ……"

Regulation 11 of HDR 1989 was made pursuant to section 24(2)(c) of the HDA 1966.

[24] Clause 22 as enumerated above, in our view is very clear and unambiguous. It specifically provides that vacant possession shall be delivered within twenty-four (24) calendar months "from the date of this Agreement". The date of the Agreement as stated on the first page of the SPA is 13 February 2012.

[25] With such a clear provision, does the Court still need to go through various authorities to find the meaning of the words "from the date of this Agreement"? With due respect to the two Supreme Court decisions relied upon by the Learned High Court Judge, we do not think so. The Federal Court in **Badan Peguam Malaysia v Kerajaan Malaysia** [2007] 2 MLRA 847 had, at page 868, per Hashim Yusoff FCJ stated the following :

> "The Federal Court in *Malaysian Bar v. Dato' Kanagalingam Veluppillai* [2004] 1 MLRA 542; [2004] 4 MLJ 153; [2004] 4 CLJ 194; [2004] 5 AMR 441 at p. 200 agreed with the observation made by Lord Diplock in Duport Steels Ltd & Ors v. Sirs and Ors [1980] 1 WLR 142 at p.157, wherein his Lordship said:
>
> **Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning."**

[26] See also the Federal Court case of **Far East Holding Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeal** [2018] 1 MLRA 89.

[27] The two Supreme Court decisions in **Hoo See Sen**, *supra*, and **Chew Nyat Shoong**, *supra,* concerned sale and purchase agreements which were pre-Schedule G of the HDR 1989 and pre HDR 2002. Effective 1st December 2002, the Tribunal for Homebuyers Claim (the Tribunal) was first established via the amendment to the HDA 1966. We must bear in mind that the Tribunal is an administrative tribunal and not a court of law. According to the Hansard, second and third readings, the Tribunal was established for the purpose of minimising the burden that purchasers have to face in order to claim remedies from developers.

[28] Thus, the Tribunal, in our view, is to apply the law as clearly stipulated in schedule G, particularly in Clause 22 pursuant to section 24 HDA 1966 and regulation 11(1) of HDR 1989. The amendment to the law was made and the creation of the Tribunal was to simplify the claims of home buyers. Hence, it is not for the Tribunal, in this case the 1st respondent, to sieve through the authorities to justify its finding of the meaning of the "date of this agreement", but to apply the law; in this case Clause 22; which is so clearly worded, to decide on the claim.

[29] The role of a tribunal had been considered by this Court in **Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union** [1995] 1 MLRA 268, *inter alia*, as follows:

> **"…..where Parliament confers on an administrative tribunal or authority, as distinct from a Court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for Courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority has asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a Court of law, Parliament did not intend to do so. The break-through made by Anisminic [1969] 2 AC 147 was that, as respects**

administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished."

[30] As the provision of Clause 22 is clear an unambiguous, the 1st respondent should not have been roaming over the authorities to interpret it but to simply apply the provision as it is. See the decision of this Court in **Ibrahim Ismail & Anor v Hasnah Puteh IMat & Anor and Another Appeal** [2003] 2 MLRA.

[31] The Federal Court in the case of **Krishnadas a/l Achutan Nair & Ors v. Manivam a/l Samykano** [1997] 1 MLJ 94 had stated at page 100, the following:

"…..The function of a court when construing an Act of Parliament is to interpret the statute in order ***to ascertain legislative intent primarily by reference to the words appearing*** *in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:*

As a general rule a court will adopt that construction of a statute will give some effect to all of the words which it contains. (Per Gibbs J in Beckwith v R.1976) 12 ALR 333, at p.33."

[32] A decision maker must correctly understand the law that regulates his decision making power and must give effect to it or else his decision will be tainted with illegality and be a ground for judicial review. See: **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374. This was what happened in this instant appeal. We found the 1st respondent had failed to understand that in exercising its power, it cannot go beyond the four corners of the Act and regulations that created it and gave it powers.

[33] With due respect to the Learned High Court Judge, we found that he erred when His Lordship failed to see the error of law committed by the 1st respondent. We had no issue with the doctrine of *stare decisis* but the two Supreme Court decisions of **Hoo See Sen**, *supra*, and **Chew Nyet Shong**, *supra*, as well as the two Court of Appeal cases of **Foong Seong Equipment,** *supra***, and Nippon Express (M) Sdn Bhd**, *supra*, which were relied heavily by the Learned High Court Judge could easily be distinguished. We perused the two latter cases and found that the sale

and purchase agreements involved therein were not Form G type of agreements.

[34] As alluded to earlier, the case of **Chew Nyet Shong**, *supra*, followed the decision of **Hoo See Sen**, *supra*, which was pre-Tribunal and pre-HDR 1989. There is one provision in HDR 1989 which had not been discussed by any of the authorities mentioned above. The provision is regulation 11(2) which provides as follows:

> "(2) No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale".

[35] In the appeal before us, the contract of sale is the SPA. We combed through the SPA and could not find any clause which allowed the collection of deposit. Even the 10% of purchase price, according to its Third Schedule, can only be collected upon the signing of the SPA; and not before. Learned Counsel for the 2nd and 3rd respondents in her written submissions had submitted that the appellant, by collecting deposit, had breached the law and thus precluded from defending the 2nd and 3rd respondents' claim for LAD to be calculated from the date of deposit paid.

[36] With due respect, we were of the contrary view. It was our considered view that the fact that the law prohibits the collection of deposit when it is not provided for by the SPA clearly indicates that "the date of the Agreement" as provided for in the SPA is the actual date the SPA was entered into. The Form G contract is a statutory contract, prescribed by law. The law as prescribed does not allow the parties to a contract in Form G to contract out of the scheduled form.

Conclusion

[37] For the reasons given, we were of the considered view that the 1st respondent had acted beyond the scope of its lawful powers in making the award dated 26.10.2016. Thus it had contravened regulation 11 of the HDR 1989 and had committed a statutory breach which tantamounted to an error of law and had acted *ultra vires* the HDA 1966 and the HDR 1989. As a consequence thereof the award was tainted with illegality. Following that, we found that the Learned High Court Judge had erred in affirming the decision of the 1st respondent.

[38] In **Kompobina Holding Sdn Bhd** v **Tribunal Tuntutan Pembeli Rumah & Anor** [2017] MLJU 2268, this Court had upheld the decision of the High Court which also involved the same Schedule G agreement in which Clause 22 of the SPA therein provided that the date of delivery of

vacant possession was twenty-four (24) months from the date of SPA. The High Court had decided that the clear provision of Clause 22 of the SPA must be adhered to which meant that the date of the agreement was the date the SPA was entered into.

[39] We were shown many conflicting decisions of the Tribunal on this similar Clause 22. It was our view, where the letter of the law is clear, we must take heed of it. There is indeed nothing to be interpreted on.

[40] We therefore unanimously allowed this Appeal No. 388. As parties had agreed to be bound by the decision of this Court in Appeal No. 388, we also allowed Appeal No. 389, Appeal No. 450 and Appeal No. 451. The orders of the High Court dated 29.9.2017 and 31.10.2017 in respect of all the appeals were set aside with no order as to costs.

Signed by
Dated: 20 August 2019 (**ZALEHA BINTI YUSOF**)
Judge
Court of Appeal
Malaysia

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