LIQUIDATED DAMAGES

HOUSING DEVELOPMENT (CONTROL AND LICENSING) ACT 1966 – A SOCIAL LEGISLATION'S PURPOSE FULFILLED... On 19.01.2021, the Federal Court of Malaya in *PJD Regency Sdn Bhd and Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [1] finally resolved with clarity the long pending confusion among the public and ruled in favour of house buyers concerning the calculation of liquidated damages ("**LAD**") to be paid by housing developers in the late delivery of vacant possession.

This article discusses the facts, issues and judgment of the case.

INTRODUCTION It has been a practise of housing developers to require the payment of booking fees for housing units before any execution of the Sale and Purchase Agreement. The booking fees are often collected on the pretext of 'booking' or 'locking in' the unit a prospective purchaser wishes to purchase.

The Federal Court began the judgment with words that would set the tone for the findings that could be read further in the judgment:-

> "*While the developers might think that it is a standard commercial practice to accept booking fees, the development of the law clearly suggests to the contrary. The Courts will not condone such a practice until and unless the law says otherwise*"[2].

ISSUES The Federal Court had discussed the issue of late delivery of vacant possession by the developers to the house purchasers. In essence, the point of law that was before the Federal Court was this:-

> *"Where there is a delay in the delivery of vacant possession by a developer to the purchaser, whether the date for calculation of LAD begins from:-*
>
> *(a) The date of payment of deposit/ booking fee/ initial fee/ expression by purchase of his written intention to purchase; or*
> *(b) From the date of sale and purchase agreement."*

The point of law above arose for a determination as a result of the differences in interpretation between the developers and the purchasers as to the meaning of the words '*from the date of this agreement'* contained in clause 24(1) of Schedule G and clause 25 of Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ("**HDR 1989**").

THE DECISION OF THE FEDERAL COURT The Federal Court affirmed two Supreme Court cases which are *Ho See Sen & Anor v Public Bank Berhad & Anor* [1988] 2 MLJ 170 ("**Ho See Sen**") *and Faber Union Sdn Bdh v Chew Nyat Shong & Anor* [1955] 2 MLJ 597 ("**Faber Union**"). Both decisions held that the date of calculation of LAD begins from the date the booking fee was paid.

The Federal Court was of the further view that the interpretation of when the calculation of LAD should begin is supported by the nature of the Housing Development (Control and Licensing) Act 1966 ("**HDA 1966**") and HDR 1989 being a social legislation. Social legislation is laws passed by the legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. The Court in interpreting social legislation held that:-

i. Where the provision is ambiguous, Court would resort to purposive rule instead of the literal rule; and
ii. Even where the provision is literally clear or unambiguous, the Court still has the obligation to ensure the interpretation gives maximum protection of the class in whose favour the legislation was enacted, being the purchasers in this case.

[1] In the Federal Court of Malaysia (Appellate Jurisdiction), Case No. 01(f)-29-10/2019(W)

[2] Paragraph 131 of the judgment

The Federal Court referred to amongst others, the Hansard of the Housing Development (Control and Licensing) Bill on 25 March 1966 and the Housing Development (Control and Licensing) Regulations 1982 ("**HDR 1982**") and the recent amendment to the HDR 1989. The Court held that the intention of Parliament is unequivocal where the written law in force has made it crystal clear that **the collection of booking fees is to be absolutely prohibited.** The new regulation 11(2) of HDR 1989 reads:-

> "*(2) No person including parties acting as stakeholders shall collect any payment* ***by whatever name called*** *except as prescribed by the contract of sale.*"

The Federal Court does not consider the contracts that include booking fee to be illegal *per se*, rather it is the conduct of the developers in collecting booking fee that has violated the strict terms of regulation 11(2) of HDR 1989.

It was further held that a valid contract came into being when a purchaser pays the booking fee to the developers. The judgment of the Privy Council in *Daiman Development Sdn Bhd v Mathew Lui Chin Teck and another appeal* [1981] 1 MLJ 56 ("**Daiman**") and High Court in *Lim Eh Fah & Ors v Seri Maju Padu* [2002] 4 CLJ 37 ("**Lim Eh Fah**") were adopted and endorsed by the Federal Court, where it was held that the payment of a booking fee is sufficient to establish the existence of a contract.

OTHER LANDMARK FINDINGS IN THE DECISION

Aside from the main issue above, the Federal Court in dealing with the appeals also decided on two other leave questions, which are relevant and significant to the housing development industry:-

I. <u>The date of completion of common facilities should run from the date the Certificate of Completion and Compliance ("CCC") was issued</u>

The Federal Court held that the date the CCC was issued would be the date of completion of common facilities pursuant to the recently inserted clause 29 of Schedule H of the HDR 1989. In arriving to this conclusion, the Court laid down the following rationales:-

i. Reverting to the principles of interpretation of social legislation, the Court is required to construe the statutory contract in a manner most favourable to the purchaser. Absent clear legislation or written words to the effect that the certification of the architect means anything other than the CCC, the Court is not prepared to accept that the issuance of Certificate of Practical Completion ("**CPC"**) as the date of completion of common facilities; and
ii. The CCC is a legal requirement imposed by law and is only issued upon the developer complying with all regulatory laws. This affords protection to purchasers who will be assured that the relevant authorities have approved the construction. As the same cannot be said in respect of CPC, the CCC is preferred.

II. <u>No unjust enrichment when LAD is calculated based on the actual purchase price and not the rebated purchase price</u>

The developer had provided a 10% rebate on the purchase price and contended that the LAD should have been calculated on the rebated purchase price and not the purchase price stipulated in the sale and purchase agreement ("**SPA**"). The Court held that the LAD prescribed by law is a statutory remedy, and as such there can be no question of unjust enrichment upon an innocent party's right to enforce his statutory remedy against the party in breach.

CONCLUSION

In a nutshell, this landmark ruling by the Federal Court now concretely clarifies the following points of law:-

(i) Where there is a delay in delivery of vacant possession by the housing developer, in ascertaining calculation of LAD, the calculation of LAD begins from the date of payment of the booking fee and not the date of the SPA;
(ii) When it comes to ascertaining the date of completion of the common facilities, it is upon the issuance of the CCC and not the CPC; and
(iii) There is no unjust enrichment when LAD is calculated based on the actual purchase price and not the rebated purchase price.

The Federal Court in reaching the findings above clearly intended to uphold and give effect to legislation that was passed with the intent to protect purchasers.

The Federal Court in its judgment could not make its message any clearer when it held "…*to that extent where the developers act in contravention of the law, they have to accept the resulting consequences*"[3]. As purchasers celebrate, developers must take heed. A revision and reformulation of the approach in which residential properties are marketed and sold and the transactions involved in completing the sale and purchase process must be undertaken to ensure that it is in line with the provisions of HDA 1966 and HDR 1989 and this landmark decision.

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[3] Paragraph 130 of the judgment.