Real Estate

PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah[1]: Calculation of Liquidated Agreed Damages commences from the Date of Payment of Booking Fee

A case note by Alexis Yong Mey Ling.

Introduction

In the recent case of **PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah**, the Federal Court delivered a landmark decision in affirming that where there is a delay in the delivery of vacant possession by a developer to the purchaser under a statutory form contract ("Scheduled Contract") prescribed in the Housing Development (Control and Licensing) Regulations 1989[2] ("Regulations 1989"), the date of calculation of liquidated agreed damages ("LAD") begins from the date of payment of booking fee and not from the date of the sale and purchase agreement.

Facts/common question of law

There were seven appeals before the Federal Court comprising three different set of cases.

The common question of law in all appeals was that where there is a delay in the delivery of vacant possession by a developer to the purchaser under the Scheduled Contract, whether the date of calculation of LAD commences from:

- the date of payment of the deposit/booking fee/initial fee/expression by the purchaser of his written intention to purchase; or
- the date of the sale and purchase agreement.

This question arose because of the different interpretation of the meaning of the language "*from the date of this agreement*" contained in the Scheduled Contract.

Decision of the Federal Court

The Federal Court decided that the point of law at issue in the appeals remains very much decided. Where a developer fails to deliver vacant possession according to the time stated in the Scheduled Contract, the calculation of LAD runs from the date of payment of the booking fee and not from the date of the Scheduled Contract.

The Federal Court affirmed the Supreme Court cases of **Hoo See Sen v Public Bank Berhad**[3] and **Faber Union Sdn Bhd v Chew Nyat Shong**[4], both of which are authorities for the

proposition that the date of calculation of LAD commences from the date of payment of a booking fee.

The Federal Court applied the concept of social legislation, legislative history and statutory interpretation in arriving at its judgement.

A social legislation is a legal term for a specific set of laws passed by the legislature for the purposes of regulating the relationship between a stronger class of persons and a weaker class of persons.

Statutory interpretation usually starts with the literal rule. However, when it concerns the interpretation of the protective language of social legislation, the literal rule is automatically displaced by the purposive rule.

In this case, the Federal Court did not apply the literal rule in arriving at the decision that the date of calculation of LAD begins from the date in the Scheduled Contract. It was held that in interpreting social legislation, the courts should give effect to the intention of Parliament instead of the parties.

The Federal Court also referred to the legislative history of the relevant legislations. The existing Regulation 11(2) of the Regulations 1989[5] makes it clear that the collection of a booking fee is absolutely prohibited. Therefore, to give effect to this legislative intent and taking the collective status of the **Housing Development (Control and Licensing) Act 1966** and Regulations 1989 as social legislation into consideration, it was determined that where the illegal practice of collecting booking fees takes place, the date of the contract cannot be taken to mean the date of the Scheduled Contract.

Developers who collect booking fees are in contravention of Regulation 11(2) of the Regulations 1989. If it is the developer's attempt to secure an early bargain through the illegal collection of a booking fee, the developer should be bound by the booking fee and, therefore, should bear the full extent of LAD with regard to late delivery of vacant possession.

It was further held that a valid contract is formed between the developer and the purchaser upon payment of a booking fee. Had the developer strictly complied with the terms of the Scheduled Contract, the payment of 10% deposit and the signing of the Scheduled Contract would have been done simultaneously and there would be no issue of there being separate dates for calculating LAD. The legislative intent was that the initial payment of monies as deposit is sufficient to constitute an intention to enter a contract given that the agreement should have been signed simultaneously.

Having addressed the main issue of law, the Federal Court also made other significant rulings as set out below:

- Under the Scheduled Contract, the date of completion of common facilities is the date of issuance of the certificate of completion and compliance and not the date of issuance of the certificate of practical completion; and
- There is no unjust enrichment when LAD is calculated based on the actual purchase price and not the rebated purchase price. LAD is to be calculated by reference to the purchase price and not to the rebated purchase price.

Conclusion

It is now settled that where there is a delay in the delivery of vacant possession by a developer to the purchaser according to the time stipulated in the Scheduled Contract, the date of calculation of LAD commences from the date of payment of the booking fee. It has finally clarified the legal position as to when time begins to run with regard to the calculation of LAD for late delivery of vacant possession.

Endnotes:

[1] [2021] MLJU 41.
[2] PU(A) 58/1989.
[3] [1988] 2 MLJ 170.
[4] [1995] 2 MLJ 597.
[5] Regulation 11(2) of the Regulations 1989 provides that "*No person including parties acting as stakeholders shall collect any payment by whatever name called except as prescribed by the contract of sale*".