CALCULATION FOR THE PERIOD OF DELIVERY OF VACANT POSSESSION

(IS IT FROM DATE OF SPA OR DATE OF BOOKING FEE?)

SRI DAMANSARA SDN BHD V VOON KUAN CHIEN & ANOR [2020] 3 AMR

INTRODUCTION

Late delivery claims usually cause many problems to both developers and purchasers. In Malaysia, the sale and purchase agreements (SPA) for acquisition of properties from developers are standard agreements as prescribed under the Housing Development (Control and Licensing) Act 1966. Pursuant to **Clause 24(1) of Schedule G** (which is the standard agreement for landed properties with individual titles) **to the Housing Development Regulations 1989 (HDR)**, the developer is to deliver vacant possession of the landed property to the purchaser within 24 months from the date of the contract of sale. **Clause 25(1) of Schedule H** (which is the standard agreement for properties with strata titles) **of the HDR** on the other hand, states that for a subdivided building, the developer is to deliver vacant possession of the property within 36 months from the date of the contract.

Failing which the purchaser has a right to claim against the developer liquidated ascertained damages (LAD) calculated on a daily basis from the contractual scheduled date for delivery of vacant possession until the actual date of vacant possession.

However, difficulties may arise in ascertaining the date from which the LAD should be calculated. Should the 24 or 36 months (as the case may be) period start from the date of the booking fees/deposit collected by the developer or from the date of the contract?

> ***Clause 24(1) of Schedule G***
>
> *Vacant possession of the said Property shall be delivered to the Purchaser in the manner stipulated in clause 26 within twenty-four (24) months "**from the date of this Agreement";***
>
> *Clause 25(1) of Schedule H*
>
> *Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in clause 27 within thirty-six (36) months "from the date of this Agreement"*

The legal quandary arises due to the phrase “from the date of this Agreement” which would, read literally, definitely refer to the date of sale and purchase agreement (“SPA”). However and usually in practice, the date of SPA will be a few months later from the date of the payment of booking fee by the purchasers. For instance, the date of the Agreement could be the date when the Developer executes the Agreement which can only happen once the developer obtains the advertising permit and developer licence from the relevant authority.

Section 11(2) of the Regulations prohibits developers from collecting any form of payment before the signing of the sale and purchase agreement. However, this practice is still being done whereby “booking fees” or “deposits” are collected prior to the execution of sale and purchase agreement. This causes problems in calculation of the LAD as the parties would refer to two different dates; the date of collecting the booking fees and the date of the SPA, as the starting date.

This difficulty has been illustrated in cases where Malaysian courts have decided differently such as Faber **Union Sdn Bhd v Chew Nyat Shong & Anor and Hoo See Sen & Anor v Public Bank Bhd** which ruled the date runs from the date of the booking fee collected while the case **of GJH Avenue Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Appeals** found that it runs from the date of the SPA. However, recently, the Court of Appeal had the opportunity to revisit this issue in the case of **Sri Damansara Sdn Bhd v Voon Kuan Chien & Anor.**

Background Facts

1. On 6 January 2012, the developer collected a booking fee of RM10,000.
2. On 28 June 2012, parties entered into a SPA following the Schedule H Agreement.
3. On 22 December 2016, vacant possession was delivered to the purchaser. The purchaser filed a claim with the Tribunal for LAD to be calculated from the expiry of 42 months of the date of the SPA, taken from the date of the booking fee.
4. The Developer contended that the date should be the date of the SPA whereby developer is not liable to pay any late delivery claim as vacant possession was delivered within 42 calendar months from the date of SPA.
5. The tribunal decided that the proper date of SPA must be taken from the date of the booking fee. Developer then brought an action of judicial review to the High Court where the High Court dismissed the application.
6. The Developer then lodged an appeal to the Court of Appeal.

DECISION OF THE HIGH COURT

The Learned High Court Judge adopted the approach taken by the Supreme Court in the cases of **Hoo See Sen & Anor v Public Bank Bhd** and **Faber Union Sdn Bhd v Chew Nyat Shong & Anor** and found that His Lordship had no reason to depart from the position taken by the decided cases. The High Court reasoned that the tribunal's decision was not flawed because there are sufficient authorities to support the approach taken by the tribunal which is that the delivery period of the property ought to be calculated from the date of the booking fees and not the date of the Sale and Purchase Agreement.

ISSUES BEFORE THE COURT OF APPEAL

A. Whether the delivery period ought to be calculated from the date of the SPA or from the date of the booking fees.

The Court of Appeal first turned to Sections 11(1), (2) and (3) of the HDR and held that HDR was legislated to protect the purchasers from the arbitrary act of developers of making amendments to the SPA. Hence, collection of payment prior to the signing of SPA is prohibited. The Court held:-

> *[28] Regulation 11(2) of the Regulations prohibits the collection of any prior payment before the signing of the SPA as follows:*
>
> > *"No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale."*
>
> *Thus to allow a collection of a deposit of less than 10% of the purchase price before the signing of the SPA, pejoratively called a booking fee, would be repugnant to the whole purpose of the HDA and the Regulations.*

Following therefrom, the Court of Appeal finds that;-

> ***[30]** To allow the collection of a booking fee under the scheme of payment under the Third Schedule to the Schedule H SPA would be to permit what is expressly prohibited by Regulation 11(2) of the Regulations with the effect that the protection afforded to a purchaser under the Scheme of Instalment Payment of Purchase Price can be circumvented in the SPA being signed way after the payment of the booking fee.*

Having held that the developer, Appellant in this case, is prohibited from collecting a booking fee prior to the execution of the sale and purchase agreement, the Court of Appeal then finds that:-

> ***[36]*** *Therefore the Courts had no problem calculating the late delivery claim from the expiry of the period of completion from the date the booking fee is paid and not from the date of the SPA for to take the SPA date would be to allow the perpetuation of a practice that the Regulations prohibit.*

It should be noted that the Court of Appeal in the above-mentioned case was unanimous in not following the decision in **GJH Avenue Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Kementrian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Appeals [2020] 3 CLJ.**

The Court of Appeal in dealing with the matter, had taken an approach that would uphold the purpose of HDA and Housing Development (Control and Licensing) Regulations 1989 (HDR) in protecting the purchasers as the vulnerable party. In doing so, the Court of Appeal took into consideration the booking fee date as the date of SPA since the HDR does not allow for the collection of booking fee. If the Court allows the SPA date to be used (instead of colletction of booking fee date), developers may be encouraged to continue with the practice to collect booking fees, in contravention of the HDR.

Approach in Faber Union and GJH Avenue:

Faber Union	GJH Avenue
The Court held that the date ought to be calculated from the date of the booking fee collection so as to uphold the HDR and to protect the purchasers.	The Court found that parties should not go beyond what is clearly enumerated in the SPA. If the SPA has stipulated that vacant possession be delivered within 24 months “from the date of agreement”, then the date of the agreement shall be used for purposes of calculation.

B. Whether the calculation of LAD should be Based on the purchase price stated in the SPA or the discounted purchase price?

The issuance of credit note is also another normal practice by developers as a means to promote sales. It serves as a medium for discount of the purchase price. Nevertheless, the purchase price stated in SPA is usually the amount before any reduction. This is to enable purchasers to obtain a higher loan margin from the bank for them to proceed with the purchase of the property.

In this case, the developer contended in the event that they have to pay LAD to the purchasers, the LAD should be based on the discounted purchase price instead of the actual purchase price as stated in the SPA. However, the Court ruled that the purchase price shall be as per the definition in the SPA and also as referred to in Clause 25(2) of the SPA which provides that the late delivery claim shall be based on the purchase price in the SPA.

Therefore, the Court of Appeal upheld the High Court's decision that the LAD to be calculated is based on the "purchase price" stated in the SPA.

SIGNIFICANCE OF CASE

Following the decision of the Court of Appeal, it now appears that:

The line of cases following the Supreme Court in Faber Union and Hoo See Sen are the preferred and adopted line of authority on this matter. The Court is unwilling to adopt the principle in GJH Avenue Sdn Bhd as there is no necessity to depart from the existing precedents. Departure from the said precedents would only bring hardships as developers would take advantage in the late execution and dating of the sale and purchase agreement.

This case also highlights that the Courts will not hesitate to dismiss any claim by the developer in a situation where the developer contravenes the HDR by collecting booking fees. However, disregarding the whole SPA would cause injustice to the purchaser. As such, the Courts are inclined to decide in a manner that upholds the HDR as well as protect the rights and to the advantage of the Purchaser.

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