



07 OCT, 2019

When does time for delivery of vacant possession actually start to run?

The Star, Malaysia



REHDA

Page 1 of 2

When does time for delivery of vacant possession actually start to run?

Comment
MAY CHUA



WHEN one buys housing accommodation from a developer in Malaysia, the terms of the sale and purchase agreement with the developer are prescribed by law (S&P), specifically the Housing Development (Control and Licensing) Regulations 1989 (HDR 1989).

Depending on the type of development, a developer is required to deliver vacant possession of the property (commonly referred to as VP) within 24 months or 36 months from the date of the S&P. If the VP is delivered after the prescribed period, the developer needs to compensate the purchaser for every day of the delay, unless extension of time is granted under the HDR 1989.

So, when does the 24-month or 36-month period start? From the date the booking fee is paid? Or from the date of the S&P?

This seemingly straightforward question has caused dispute between developers and home buyers. Past cases have held that for purposes of ascertaining the date of delivery of VP, time starts to run when the purchaser paid the booking fee.

These are the cases of *Hoo See Sen & Anor v Public Bank Bhd & Anor*, 1988 (*Hoo See Sen*) and *Faber Union Sdn Bhd v Chew Nyat Shong & Anor*, 1995 (*Chew Nyat Shong*). The question then seemed settled.

This position is beneficial to pur-

chasers since the booking fee is usually paid before signing of the S&P. However, to be clear, the S&P prescribed under the current HDR 1989 in fact states that time starts from the date of the S&P.

So, when does time for delivery of VP actually start to run? The Court of Appeal has, in two recent cases, added some confusion to the seemingly settled question.

GJH Avenue case

In the recent judgement of *GJH Avenue Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors* (*GJH Avenue case*), the Court of Appeal clarified the words "from the date of this agreement" should be interpreted as the date of the S&P. In other words, the period for delivery VP commences from the date of the S&P. Therefore, the sooner one signs the S&P, the earlier one can expect to get VP.

Case background

In the *GJH Avenue case*, the purchasers bought a bungalow from the developer and paid the booking fee to the developer on Nov 24, 2011. The statutorily prescribed S&P for the bungalow was signed on Feb 13, 2012. The S&P requires VP to be delivered within 24 months "from the date of the agreement" and VP was delivered on Feb 14, 2014. As the S&P was dated Feb 13, 2012, the developer compensated the purchaser for the two-day delay.

The purchasers subsequently initiated a claim with the Tribunal for Homebuyer Claims (Tribunal) for a higher sum and the Tribunal granted the award. Dissatisfied with Tribunal's decision, the developer

filed a claim (by way of judicial review) to the High Court to set aside the Tribunal's award.

High Court findings

The High Court did not find any illegality in the Tribunal's decision and had instead decided that the Tribunal had applied the law to the facts correctly. This was on the basis that the Tribunal had taken into account two previous decisions of the High Court, which in turn relied on the decision of the Supreme Court (as it then was) in *Hoo See Sen and Chew Nyat Shong*. The High Court believed that the Tribunal is bound by the Supreme Court in those cases. Following this outcome, the developer filed an appeal to the Court of Appeal.

Decision of the Court of Appeal

On appeal, the Court of Appeal decided that the Tribunal had acted beyond the scope of the Tribunal's powers under the HDR 1989 in making the award. This resulted in the award being tainted with illegality. The Court was of the opinion that the Tribunal had made an error of law when making the decision as the relevant clause in the S&P was very clear and unambiguous. The Tribunal should have just applied the law by giving plain meaning to the words in deciding the purchasers' claim, without sieving through various authorities to justify the findings.

This also follows the Court's earlier decision in *Kompobina Holding Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors* and *Anor*

(*Kompobina case*), where the Court upheld the decision of the Tribunal that the timeline for delivery of VP is 24 months from the date of the S&P although the deposit was paid more than one year after the S&P was signed.

PJD Regency case

In the second decision of *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors* (*PJD Regency case*), delivered just two days after the *GJH Avenue case*, a separate panel of the Court of Appeal decided that the time for delivery of VP actually starts to run from the date the purchaser paid the booking fee and, not the date of the S&P.

Case background

In this case, the purchaser paid a booking fee to the developer on Jan 16, 2013. The time for signing of the S&P lapsed but the parties proceeded to sign the S&P on March 21, 2013. The developer delivered vacant possession on Jan 23, 2017, which was later than the 42 months contracted under the S&P. The Tribunal calculated the time for delivery of VP from the date of payment of the booking fee and awarded the purchaser damages for late delivery accordingly. The developer applied by way of judicial review to the High Court to set aside the Tribunal's award.

High Court's decision

The High Court applied the case of *Chew Nyat Shong* and, agreeing with the decision of the Tribunal, dismissed the developer's applica-

tion. The developer appealed to the Court of Appeal.

Decision of the Court of Appeal

The Court of Appeal agreed with the decision of the High Court and dismissed the appeal. The Court of Appeal affirmed that the case of *Chew Nyat Shong* was binding. This decision meant that the time for delivery of VP actually starts to run from the date the purchaser paid the booking fee and, not the date of the S&P.

Conclusion

The result of both the *GJH Avenue* and *PJD Regency* cases is that it is now uncertain as to when the period for delivering VP starts from. With these conflicting decisions, we will have to wait for the Federal Court to resolve the question.

In the writer's opinion, the decision in the *GJH Avenue case* is preferred. It is a move in the right direction, and reflects the original intention of Parliament when enacting this piece of social legislation in the Housing Development (Control And Licensing) Act, 1966 which outlawed the collection of any monies by a housing developer from a purchaser other than at or upon the signing of the S&P, which was then prevalent to the detriment of house buyers.

May Chua, a lawyer practising at Messrs Wong & Partners, is a member of the Conveyancing Practice Committee, Bar Council, Malaysia. This column does not constitute legal advice and the views expressed are solely that of the writer.



07 OCT, 2019

When does time for delivery of vacant possession actually start to run?

The Star, Malaysia



Page 2 of 2

SUMMARIES

WHEN one buys housing accommodation from a developer in Malaysia, the terms of the sale and purchase agreement with the developer are prescribed by law (S&P), specifically the Housing Development (Control and Licensing) Regulations 1989 (HDR 1989). Depending on the type of development, a developer is required to deliver vacant possession of the property (commonly referred to as VP) within 24 months or 36 months from the date of the S&P.