Housing Developers Beware – The Aftermath of *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor*

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On 19 January 2021, the Federal Court delivered a landmark decision in ***PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor*** ("**PJD Decision**").[1] The apex court decided that in the event of delay of delivery of vacant possession ("**VP**") for Schedule G and/or H type contracts under Regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 ("**HDR**"), the date for calculation of liquidated damages ("**LAD**") begins from the date of payment of the booking fee, not the date of the sale and purchase agreement - this has been discussed in our previous article titled "Housing Developers Beware – Federal Court Upholds Faber Union".

In this article, our discussion focuses on the aftermath of the PJD Decision on housing developers for their completed and ongoing housing projects under Schedule G and/or H of the HDR.

LAD commence from collection of booking fees

It has been a deep-rooted practice for housing developers to collect booking fees from purchasers and in most cases it would be many months before the sale and purchase agreements are signed and dated. Indeed, the Federal Court in the PJD Decision made this observation. Prior to the PJD Decision, it was presumed that the time to deliver VP, whether twenty-four (24) or thirty-six (36) months, starts running from the date of sale and purchase agreements, not the date of payment of booking fees.

The PJD Decision leaves no ambiguity as to the date when calculation of LAD should start. The Federal Court plainly held that the calculation for LAD would commence from when the booking fee was paid to the developer by the purchaser. This leaves developers who have collected such booking fees exposed if they are not going to deliver VP within time.

Moving forward, the questions that now confront the industry are as follow:

[1] [2021] MLJU 41

Can the PJD Decision be applied retrospectively in favour of purchasers' claims for LAD in ongoing and completed projects?

Generally, a pronouncement of the law by the Federal Court would apply retrospectively unless the court invokes the doctrine of prospective overruling to give only prospective effect to its judgment.

In the case of ***PJD Regency***, the Federal Court did not apply the doctrine of prospective overruling.

The High Court's decision in ***Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Applications***[2] ("***Alvin Leong***") illustrates this. The learned High Court Judge decided that the Federal Court's decision in ***Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar & Anor And Other Appeals***[3] ("***Ang Ming Lee***") applies retrospectively. The learned Judge in *Alvin Leong* discussed the rule of retrospective and prospective overruling, and having examined the case of *Ang Ming Lee*, concluded that the Federal Court's decision applies retrospectively.

In the absence of an expression that it applies only prospectively, the PJD Decision should be understood to also apply retrospectively. The strong emphasis of the Housing Development (Control and Licensing) Act 1966 ("**HDA**") and its subsidiary legislation HDR being social legislation makes this even more compelling.

Therefore, the PJD Decision is applicable to housing projects which had completed, i.e.: VP delivered before the PJD Decision, and ongoing housing projects, i.e.: projects which booking fees have been collected and under construction.

Can a purchaser who has taken VP in a Completed Project prior to the PJD Decision now claim against housing developer for LAD for delay of VP counting from the date of payment of booking fee?

At this juncture, case law answers this question in the affirmative. Be that as it may, claims under the said scenario are still subjected to various challenges, such as limitation period for claim of LAD and relief provided to housing developers under the Temporary Measures for Reducing the Impact of Coronavirus Disease (COVID-19) Act 2020 – we have written on the latter in COVID-19 Act: The Protections for Housing Developers and Homebuyers.

[2] [2020] 6 CLJ 66
[3] [2020] 1 CLJ 162

Assuming a purchaser had claimed and awarded with LAD by Homebuyers Tribunal for a Completed Project prior to the PJD Decision, can the purchaser now claim against housing developer for the remaining LAD, counting from the date of payment of booking fee (if the same is not in the existing claim)?

In particular to LAD claims which are concluded – claims that have been heard and decided upon by the Homebuyers Tribunal ("Tribunal") prior to the PJD Decision and the Tribunal's award is no longer subjected to review or appeal – if the same purchasers bring fresh claims against housing developers before the Tribunal pursuant to the PJD Decision, housing developers may argue that the fresh claims are barred or not within the jurisdiction of the Tribunal.

As for ongoing claims – LAD claims which are pending before the Tribunal – the jurisdiction of the Tribunal is confined to the prescribed form lodged by the claimant (purchaser) or written agreement between the parties (reached prior to lodgement of claim) which extends the jurisdiction of the Tribunal. That would mean the ongoing claims cannot be enlarged to LAD from the earlier date when the booking fee was paid if that was not already the subject of the claim before the Tribunal.

Extension of Time to Deliver Vacant Possession?

As for housing projects which are under construction, housing developers ought to be mindful of the PJD Decision. The clock for delivery of VP starts ticking from the date of payment of the booking fee. Even if all purchasers give written consent to extend the VP date, it must be borne in mind that the validity of such written consent is open to question, as it may amount to contracting out of the statutory safeguards and is unfavourable to the purchasers, which the PJD Decision pejoratively disapproved.

That said, do take note that in *Ang Ming Lee,* the Federal Court had only ruled that the Controller of Housing is not empowered to grant extension of time for delivery of VP. What about extension of time granted by the Minister of Urban Wellbeing, Housing and Local Government ("Minister")?

Do also note however that in *Alvin Leong*, the learned Judge had observed (although it appears to be in passing) that there is nothing in the HDR which empowers the Minister to extend or modify the prescribed period for delivery of VP in the statutory sale and purchase agreements (Schedules G & H).[4] This observation in *Alvin Leong* remains to be tested before the appellate courts. As far as ongoing housing projects are concerned, seeking an extension of time from the Minister might still be an option for housing developers (with no choice and a healthy risk appetite!).

Whilst the dust on the calculation of LAD for housing projects is now settled, the storm may be brewing for housing developers.

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[4] Paragraphs 35 & 36 of the judgment.