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The End Of The "Booking Fee vs Date Of SPA" Saga?

PJD Regency Sdn Bhd and Tribunal Tuntutan Pembeli Rumah & Anor

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After many years of grappling around in the uncertainty of conflicting decisions, the Federal Court on 19 January 2021 finally put to rest the issue of whether the date for the calculation of liquidated ascertained damages (LAD) due to delay in the delivery of vacant possession, begins from the date of payment of the booking fee or from the date of the sale and purchase agreement (SPA). The Federal Court decision has sparked many debates among housing developers and purchasers.

In delivering its decision, the Federal Court came to a firm conclusion that the date of payment of the booking fee prevails over the date of the SPA. This alert summarises the findings of the Federal Court.

Background Facts

Three Court of Appeal decisions involving three Developers, namely PJD Regency Sdn Bhd, GJH Avenue Sdn Bhd and Sri Damansara Sdn Bhd, formed the very essence of this Federal Court decision. The developers had one common question to be decided. The purchasers in all three cases had claimed LAD due to late delivery of vacant possession. The Housing Tribunal decided that the computation of LAD started from the date of payment of the booking fee or deposit. Aggrieved, the developers filed for judicial review.
In all three cases, the High Court upheld the Housing Tribunal decisions. The Developers then appealed to the Court of Appeal.

For the cases of *PJD Regency* and *Sri Damansara*, the Court of Appeal maintained the stand that the computation of LAD starts from the payment of the booking fee. In contrast, the Court of Appeal in the *GJH Avenue* case took a different view that LAD ought to be calculated from the SPA date. Such a decision was reached by interpreting, in its literal meaning,

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the phrase "*from the date of this agreement*" found in Clause 24(1) of Schedule G, a statutory prescribed form.

The aggrieved parties appealed to the Federal Court. The appeal was to determine, once and for all, the battle between the date of the payment of booking fees and the date of the SPA. The outcome, as aforementioned, had been in favour of the purchasers.

Decision

First and foremost, the Federal Court disagreed with the Court of Appeal in the *GJH Avenue* case. They were of the opinion that the Court of Appeal should not have departed from established principles laid down by an array of binding precedents which had decided that the calculations of LAD begins from the booking fee date.

The Housing Development (Control and Licensing) Act 1966 (HDA) was coined to be a "social legislation". In the words of the Federal Court, the purpose of a social legislation is to accord maximum protection to a weaker class of persons, in this case the Purchasers. Holding onto that thought, another point discussed rather elaborately by the Federal Court was Regulation 11(2) of the Housing Development (Control and Licensing) Regulations 1989, which prohibited the collection of booking fee in the first place. Therefore, the act of collecting booking fees was an "illegal" act.

Bearing these two propositions in mind, the Federal Court was steadfast in their belief that the intention of the HDA could not be to encourage developers to bypass the statutory protection accorded to purchasers. The prevalent practice of collecting booking fees in the industry despite being "illegal" had further driven the Federal Court to reach a conclusion that there exists a "protective veil" towards the purchasers — if the developers are bold and brazen in collecting booking fees, then they must bear the consequence of having LAD computed from the date when the booking fees was paid. Deciding otherwise would dampen the spirit of the HDA as a social legislature designed to protect the purchasers.

Commentary

Interestingly, the express wordings of Clause 24(1) in Schedule G, or Clause 25(1) in Schedule H — "*from the date of the agreement*", a statutory phrase, had not been interpreted in its literal meaning as one would have expected. The justification given by the Federal Court was that the HDA being a "social legislation" had to be given a purposive interpretation even if the provision bears a clear and unambiguous meaning.

Granted, there is no denying that the HDA is a law passed to protect purchasers. However, a strong argument can be made that Clause 24(1) is clear and unambiguous and holds no room for uncertainty. There is no justification for a purposive interpretation to be undertaken and equating the "*date of the agreement*" to the date when payment of the booking fee was made.

Furthermore, the commercial practice of collecting booking fees has always been a practical mechanism for the mutual benefit of both parties. This provides for interested purchasers to reserve a unit which they like and affords developers an indicator of the popularity of their projects. The Federal Court's reasoning is that the payment of the booking fee constitutes offer and acceptance, hence forming an intention to enter into a contract. Such reasoning may be acceptable where the facts of the case suggest it.

However, the reality of this situation is that oftentimes, payment of the booking fee is not an absolute affirmation to enter into a contract like how the signing of an SPA would. The payment made is refundable in some circumstances if the purchasers decide not to proceed for whatever reason; for example, failing to obtain a loan or simply because they have changed their minds, or they wish to choose another unit. In some cases, the developers do not even cash the cheques tendered by the purchasers.

In such circumstances, where the payment is refundable or where the cheques are not even cashed, is the Federal Court's reasoning still valid given that there is no meeting of the minds and therefore no binding contract formed?

There is no doubt that this long standing battle of determining the starting point for the calculation of LAD had stirred mixed feelings among the community for many years. While it is completely understandable that the purchaser's rights should be protected, this should not, by default, mean that the developers should be completely blindsided without any sort of consideration afforded to them.

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