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Modifications To The HDA 1966 Pursuant To The COVID-19 (Amendment) Act 2022

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Early this year, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Amendment) Act 2022 (the 2022 Amending Act) was gazetted.

Under the 2022 Amending Act, a new Part XIA was inserted into the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 (the Covid-19 Act), whereby additional amendments were made to the Housing Development (Control and Licensing) Act 1966 (the HDA Act).

These amendments affect parties who have entered into a sale and purchase agreement in the forms prescribed in Schedules G, H, I and J of the Housing Development (Control and Licensing) Regulations 1989 (the HD Regulation). It is material for housing developers and homebuyers to be aware of the latest amendments as these have an impact on rights and obligations of the parties under the sale and purchase agreement.

Section 38B - Late Payment Charges

Under the new Section 38B of the Covid-19 Act, a developer shall not impose any late payment charges against the purchaser if the purchaser fails to pay any instalment towards the purchase price for the period from 1 January 2021 to 31 December 2021. This exclusion applies only to sale and purchase agreements entered into before 31 May 2021.

This is in contrast to the existing measures provided to homebuyers under Part XI of the Covid-19 Act, whereby purchasers are allowed to apply to the Housing and Local Government Minister (the Minister) for an extension of time for the failure to pay any instalment to the developer other than the period between 18 March 2020 and 31 August 2020. It is worth noting that this new Section 38B applies only to default in instalment payments due to the developer. However, this does not provide relief to homebuyers who

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have defaulted on their monthly loan instalment payments to financing institutions.

Section 38C - Delivery Of Vacant Possession And Completion Of Common Facilities

The new Section 38C of the Covid-19 Act allows developers to apply to the Minister to exclude any period between 1 January 2021 to 31 December 2021 from the calculation of time for delivery of vacant possession and completion of common facilities in the housing accommodation.

Unlike Section 35 of the Covid-19 Act, which grants automatic exclusion of the period from 18 March 2020 to 31 August 2020, the new Section 38C requires an application to be made to the Minister in order for the period requested to be excluded. The Minister must be satisfied that the delay by the developer in delivering vacant possession or completing the common facilities of the housing accommodation in accordance with the agreed period was caused by reasons as set out in the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of Covid-19. The Minister may not consider the developer's application if it was made after the expiry of the stipulated time for delivery of vacant possession or completion of common facilities.

This part applies only to housing developments for which its first sale and purchase agreement was entered into before 31 May 2021.

Section 38D – Taking Of Vacant Possession By The Purchaser

The new Section 38D of the Covid-19 Act stipulates that if a purchaser is unable to take vacant possession of the property from the date of service of a notice to take vacant possession from the developer between the period 1 June 2021 to 31 October 2021 or any excluded period granted by the Minister under Section 38C (discussed above), the purchaser shall not be deemed to have taken such vacant possession.

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Section 38E – Defect Liability Period

Under a sale and purchase agreement prescribed under the HD Regulation, a defect liability period of up to two years from the date of taking of vacant possession by the purchaser was granted to a purchaser. Pursuant to the new Section 38E of the Covid-19 Act, the period between 1 June 2021 and 31 October 2021 is excluded from the calculation of the following:

- (a) The defect liability period after the date the purchaser takes vacant possession of housing accommodation.
- (b) The defect liability period after the date of completion of common facilities.
- (c) The time for the developer to carry out works to repair and make good any defects, shrinkages and other faults in the housing accommodation and common facilities.

In contrast, Section 36 of the Covid-19 Act allows a purchaser to apply to the Minister for an extension of the period excluded, whilst Section 38E does not allow for any application for an extension of time. Unlike Section 38 of the Covid-19 Act, there is no additional modification to Section 16N of the HDA Act. There is no further extension granted to the limitation period for homebuyers to file their claims before the Tribunal for Homebuyer Claims.

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Impact Of The 2022 Amending Act On Housing Developers And Purchasers

Although the amendments to the HDA Act pursuant to Part XIA of the Covid-19 Act provide relief to housing developers and purchasers, one may wonder whether the introduction of these measures could have been done earlier to provide a better relief to the affected parties. An earlier introduction of these amendments could have allowed the affected parties to assess and make the necessary arrangements in terms of their financial and contractual obligations.

Further, based on the additional modifications introduced, it can be argued that the additional amendments to the HDA

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Act heavily favours purchasers. Although the Federal Court had in the *PJD Regency* case held that the HDA Act and its subsidiary legislations were introduced to provide maximum protection to purchasers as they are a weaker class of persons, it is pertinent to note that the effects of the Covid-19 pandemic are far reaching as it has affected all including housing developers.

Authored by Khoo Jia Hui, an associate with the firm's Corporate and Commercial practice and Tax, SST & Customs practice at our Penang office.

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