18 NOVEMBER 2021

Loh Tina & Ors v Kemuning Setia Sdn Bhd: The Strict Interpretation Of The Housing Development (Control And Licensing) Act 1966

Contact Persons:

Chia Loong Thye
Partner
+04 370 1122
ltchia@rdslawpartners.com

Mohd Farizal Farhan
Partner
+603 6209 5400
farizal@rdslawpartners.com

Ooi Bee Hong
Partner
+603 6209 5401
beehong@rdslawpartners.com

Ong Eu Jin
Partner
+603 6209 5488
eujin@rdslawpartners.com

Tan Gek Im
Partner
+04 370 1122
gekim@rdslawpartners.com

Annabel Kok Keng Yen
Senior Associate
+603 6209 5400
annabel@rdslawpartners.com

> *"A developer that deviates from the HDA and the Regulations by modifying the standard statutory form of SPA in Schedule G without a certificate of the Controller approving the modification would be in breach of the HDA and the Regulations".*

The above were the words of the Court of Appeal in *Loh Tina & Ors v Kemuning Setia*,[1] a case that reiterates that Developers are prohibited from amending a statutorily prescribed Sale and Purchase Agreement (SPA) under the Housing Development (Control and Licensing) Act 1966 (HDA) without prior approval from the Housing Controller.

This alert summarises the facts of this case.

Facts

The Respondent (the Developer) in this case is a housing developer who had launched a housing development project to build terraces and semi-detached houses. The project was undertaken on a piece of freehold land in Penang, which was owned by another company who the proprietor of the land (the Proprietor).

The Developer had executed an amended Schedule G SPA with its Purchasers and the Proprietor. These amendments did not obtain the approval of the Housing Controller. The main root of this amendment lay in the conversion of the sale from a freehold title to a leasehold transfer of the property. Prior to the execution of the SPA, the Developer submitted the proposed amendments for approval, but they were rejected by the Housing Controller.

[1] [2020] 7 CLJ 720 (COA)

The Developer alleged that the Purchasers were aware that this purchase would be of a private leasehold interest, rather than a freehold interest. According to the Developer, the Purchasers knew that the SPA signed by them was effectively for a 99-year lease with an extension for a second period of 99-year lease.

The Purchasers explained that they had realised subsequently, the material changes made onto the SPA that did not conform with the Schedule G. They then argued that the transfer should be of freehold interest into their names as what was statutorily provided under Schedule G, rather than a leasehold interest.

Some of the material amendments to the Schedule G SPA in this case are set out in the table below:

Original Schedule G	Modified Schedule G
Title of "Sale and Purchase Agreement"	Amended to: "Build and Lease Agreement"
Preamble "Proprietor agrees to the sale of the said Property for the purpose of this Agreement."	Amended to: "Proprietor agreeing with the Vendor that it shall grant to the Purchaser a lease over the said land for a term of 99 years with an irrevocable option to extend for a further term of 99 years"
The reference to the Vendor agreeing to sell and the Purchaser greeting to purchase the whole of the said land with vacant possession together with the housing unit to be built on the said land subject to the terms and conditions there in."	This was deleted from the SPA.
Any reference to the Purchaser agreeing to	Converted into the Purchaser agreeing to the creation of a

purchase the said land.	lease in the format attached and to take a lease of the said land
Any reference to the Memorandum of Transfer [Form 14A]	Replaced with Memorandum of Lease [Form 15A]
Stamp Duty for Memorandum of Transfer	Replaced with Stamp Duty to be paid on the creation of a lease.

Findings Of The Court Of Appeal

The amendments made by the Developer were met disapprovingly by the Court of Appeal, where the court reached the decision that based on Regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989. The court held that the general rule is cemented in the HDA whereby there shall be no waiver or modification of any of the provisions in the contract of sale unless a certificate in writing had been issued and granted by the Housing Controller. If it was subsequently discovered that a developer had deviated from the prescribed Schedule G, the purchasers are entitled to enforce their rights as if the SPA they had signed had been in its prescribed form without any amendments or modification.

The Court of Appeal commented as follows:

> *Where a developer makes changes to Schedule G SPA that are not approved by the Controller, the purchaser would have a right to enforce the SPA in Schedule G as prescribed as if unamended and unmodified. The statutory prohibition against modifying Schedule G contract of sale and the protection afforded to purchasers would be lost altogether if the purchasers could not enforce what would have been their entitlement under a Schedule G SPA – a sale and transfer to them of the whole of the freehold title to the land upon which their housing accommodation had been built".*

Contact Persons:

Chia Loong Thye
Partner
+04 370 1122
ltchia@rdslawpartners.com

Mohd Farizal Farhan
Partner
+603 6209 5400
farizal@rdslawpartners.com

Ooi Bee Hong
Partner
+603 6209 5401
beehong@rdslawpartners.com

Ong Eu Jin
Partner
+603 6209 5488
eujin@rdslawpartners.com

Tan Gek Im
Partner
+04 370 1122
gekim@rdslawpartners.com

Annabel Kok Keng Yen
Senior Associate
+603 6209 5400
annabel@rdslawpartners.com

The court went on further to say that even the Proprietor was "*equally bound to transfer the whole of the subdivided title to the land to each of the purchasers in this case*" and that since they were a party to the SPA, there was a cause of action against them.

The Court of Appeal ordered that the houses and the land on which the houses were built must be transferred to and registered under the Purchasers' names, as what was intended by the prescribed Schedule G SPA under the HDA.

Conclusion

This case serves as yet another reminder that developers cannot deviate from the HDA, which is essentially a social legislation to protect the public. Hence, even in instances where an SPA had been signed by a purchaser, the rule is that no modifications can be made on the SPA under the HAD without the approval of the Housing Controller.

Authored by Kimberly Lim Ming Ying, an Associate with the firm's Corporate & Real Estate Transactions practice group.

About Us

We are a full-service commercial law firm with a head office in Kuala Lumpur and a branch office in Penang. Our key areas of practice are as follows:-

- Appellate Advocacy
- Banking & Finance (Conventional and Islamic)
- Capital Markets (Debt and Equity)
- Civil & Commercial Disputes
- Competition Law
- Construction & Arbitration
- Corporate Fraud
- Corporate & Commercial
- Personal Data Protection
- Employment & Industrial Relations
- Energy, Infrastructure & Projects
- Construction & Arbitration
- Fintech
- Government & Regulatory Compliance
- Intellectual Property
- Medical Negligence
- Mergers & Acquisitions
- Real Estate Transactions
- Shipping & Maritime
- Tax, SST & Customs
- Tax Incentives
- Trade Facilitation

REIMAGINING LEGAL SOLUTIONS