

23 JAN, 2021

LAD definition made clear

The Star, Malaysia



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THE Federal Court ruling which requires property developers to calculate late delivery charges based on the date developers accept buyers' booking fees is expected to impact the property development sector negatively.

Known as Liquidated Ascertained Damages (LAD), the apex court made three landmark rulings regarding late deliveries of properties between developers and house buyers.

> That late charges be calculated based on the date when booking fees were paid by the buyer and accepted by the developer.

> That late charges be calculated based on the sales and purchase agreement (SPA) and not the rebated/discounted lower amount.

> That late charges be based on the date of the certificate of completion and compliance (CCC) and not on the certificate of practical completion (CPC) which comes earlier than the CCC.

The Real Estate and Housing Developers' Association (Rehda) declined to comment.

Maybank Investment Bank research said the decision from the apex court "could be damaging" for the property sector as "developers may now have to pay higher LAD."

"We see higher risks in developers who have more high-rise and mixed-use development projects," Maybank said.

These two types of developments have "more complicated sub-structure and take longer time to build," it said.

The ruling is retrospective and involved developers who are about to pay LAD, those already paid, and those who are late in delivery would have to pay higher LAD, Maybank said.

Because of the retrospective nature of the ruling, Maybank said potential losses are even more complicated.

One property consultant says late delivery charges have "a contentious issue" and the apex court ruling have given clarity to the whole issue.

Developers will now have to consider if they want to put the inflated price on the SPA, which is also another contentious issue.

This means they may have to reconsider their marketing strategy of giving rebates and

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discounts. He declined to be named.

Another consultant who also declined to be named says developers may circumvent the Jan 19 ruling.

"Developers may now factor possible late delivery charges as a cost into the price. They will have to make provision for late delivery charges based on these rulings. In order to keep their profit margin, some may work around these court decisions," he says.

This will result in higher prices, although he says that in the short to medium term, with property market at its low point, he is able to see how prices can be increased.

Apart from the late delivery charges based on the booking date and on the SPA price, the National House Buyers Association (HIBA) also made a distinction between the CCC and the certificate of practical completion.

Secretary-general Datuk Chang Kim Loong says the certificate of practical completion is a private legal obligation between the owner and the builder or contractor.

The CCC, however, is a statutory requirement, and is only issued when the developer has complied with all regulatory laws such as the Street, Drainage and Building Act 1974.

"The CCC is to certify that the property (namely the parcels), together with the common facilities, had been constructed and completed in conformity with the approved plans and requirements of the Street, Drainage and Building Act 1974 and its by-laws," says Chang.

So the parcels (of property) and common

facilities ought to be completed and handed over to the buyers simultaneously and not separately, he said.

On the impact of the ruling on the delays as a result of the various movement control order (MCO) which has brought restrictions, Chang says the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 would "cushion" the effect.

HBA volunteer lawyers led by Datuk Andy Wong and his legal team comprising Viola DeCruz and Koh Kean Kang acted on a pro bono (no legal fees) for the house buyers.

Wong says normally, the developer would seek a booking fee from the potential house buyer and the SPA executed one or two months later. When the buyers signs the SPA, the agreement would then be dated.

Says Wong: "The question is, the developer is not allowed to collect booking fees. But because it did, the developer must therefore take the consequence. No money is supposed to be collected before the SPA is signed."

Wong's second case involves the distinction between the CCC and the certificate of practical completion.

The cases involve several house buyers and three developers.

> PJD Regency Sdn Bhd in a project known as You Vista in Cheras, Kuala Lumpur. Two appeals were filed, one being the Housing Tribunal.

> GJI Avenue Sdn Bhd for Taman Paya Rumpit Perdana Fasa 2, in Melaka. Three appeals were filed.

> Sri Damansara Sdn Bhd for Damansara

Foresta, in Bandar Sri Damansara Kuala Lumpur, which involve two appeals.

Delivering the landmark decision, Chief Justice Tengku Maimun Tuan Mat says the phrase "social legislation" attached to the Housing Development (Control and Licensing) Act 1966 and its subsidiary legislation Housing Development (Control and Licensing) Regulations 1989 is "not a fanciful label".

She said all legislation is social in nature as they are made by a publicly-elected body. But not all legislation is "social legislation".

It is a legal term for a specific set of laws passed by the legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons.

Given that one side always has the upper hand against the other due to the inequality of bargaining power, the state is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class, she said in her written judgment.

In the Sri Damansara cases, the developer had given a 10% rebate to the buyers and contended that the LAD should be calculated on the rebated purchase price.

By calculating late delivery charges based on the SPA price is tantamount to the buyer getting "an unjust enrichment", the developer contended.

Tengku Maimun ruled that "the LAD, prescribed by law, is a statutory remedy afforded to the purchasers. There can, therefore, be no question of unjust enrichment upon an innocent party's right to enforce his statutory remedy against the party in breach."

"This is especially so considering the developer's own contravention of the law by collecting an initial fee from the purchaser in express contravention of regulation 11(2) of the HDR 1989," she said.

It would defeat the purpose of the protection guaranteed by the law if a developer is allowed to cut his losses incurred by the LAD by offsetting it using the purchaser's own money, Tengku Maimun ruled.