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BY VASANTHA GANESAN

Developers may not be in such a rush to collect booking fees in the future following a recent Federal Court ruling that not only is such a practice expressly prohibited by the law, but perhaps more crucially, that the calculation for late delivery of a house commences from the date a booking fee is paid, and not when the sale and purchase agreement (SPA) is signed.

Commenting on the recent landmark ruling, legal experts say developers will likely be more cautious about collecting a booking fee or initial payment on a house as this would be considered illegal. Furthermore, they expect new residential SPAs to be signed only when developers are genuinely ready to commence a project, a move that could potentially deter them from building too many houses unless there is strong demand and help to reduce the significant property glut (see accompanying story, "What should developers do moving forward?").

"It is a good decision for buyers of new residential property as it throws the onus on the developer. Should the developer collect booking fees, they would need to complete and deliver vacant possession (VP) of the property within the statutory period prescribed in the Housing Development (Control and Licensing) Act 1966 (HDA) SPA, which is from the date the booking fees are paid," Zico law partner Jeyakuhan S K Jeyasingam tells *The Edge*.

When contacted, Real Estate and Housing Developers' Association (Rehda) Malaysia president Datuk Soam Heng Choon says that as a result of the Federal Court decision, "Developers must sign the SPA once we collect money from buyers."

But he indicated an amendment to the Act may be required.

"Currently, the Act doesn't explicitly state the commencement date of the SPA. The government, together with all stakeholders, are working on the amendments to the current Housing Act, where there are many ambiguities. Hopefully, going forward, when the amendments are done, it will be clear for all parties."

But will the decision apply to all house buyers who can claim liquidated ascertained damages (LAD) and who had paid a booking fee on an earlier date?

Last Wednesday, a five-member bench — presided by Chief Justice Tengku Maimum Tuan Mat, sitting with Datuk Nallini Pathmanathan, Datuk Abdul Rahman Sebli, Datuk Zabariah Yusof and Datuk Mary Lim Thiam Suan — unanimously ruled that LAD calculation commences from the date a booking fee is paid.

The apex court dismissed the appeals by three developers — PJD Regency Sdn Bhd, GJH Avenue Sdn Bhd and Sri Damansara Sdn Bhd. PJD Regency is the developer of the You Vista Apartment in Cheras while GJH built the Taman Paya Rumput Perdana Fasa 2 project and Sri Damansara, the Foresta Damansara.

Generally, a delay in completion and delivery entitles a purchaser to LAD.

Housing legislation requires landed properties to be completed within 24 months of signing the SPA, and for high-rise units, 36 months.

In delivering the judgment, Tengku Maimum said, "Where the developer fails to deliver vacant possession according to the time stipulated in the statutory SPA, the calculation of LAD begins from the date of payment of the booking fee and not from the date of the statutory agreement."

She said the HDA and its subsidiary laws are social legislation and that is now a settled law. "It appears that even since 1982, housing developers have continued to devise ingenious and, if we may say so, devious schemes to overcome the protections afforded to purchasers by the scheme of the HDA 1966. We would say here that booking fees are one such invention," she observed.

In the PJD Regency case, the purchaser, Wong Kien Choon, paid a booking fee of RM10,000 as requested by the developer on Jan 16, 2013, but only signed the SPA on March 21, 2013.

The SPA stated that the VP of the house must be delivered to the purchaser within 42 months, or by September 2016. However, Wong was informed that the handover would be on Jan 23, 2017. He sought LAD of RM33,000, but the developer disputed the amount.

Tengku Maimum noted that the lawyers for the developers had submitted that scheduled contracts must be read literally and in accordance with the intention of parties. "And applying the principles of statutory interpretation, we ought to prioritise the literal rule, which means the date of the agreement should follow the printed date in the first page of the agreement," she said.

However, she stressed, "It is our view that the submission is untenable. When it comes to interpreting social legislation ... the courts must give effect to the intention of parliament and not the intention of parties. Otherwise, the attempt by the legislature to level the playing field by mitigating the inequality of bargaining power would be rendered nugatory and illusory."

The chief justice also highlighted that a 2015 amendment to the HAD 1989 "further cements the notion that the legislative framework has been further tightened to abrogate this practice of booking fees".

She pointed out that Regulation 11(2) also "expressly provides for an absolute prohibition against the collection of booking fees howsoever they are called or described".

"While the developers might think that it is a standard commercial practice to accept booking fees, the development of the law clearly suggests to the contrary. The courts will not condone such a practice until and unless the law says otherwise," Tengku Maimun added.

Devious methods to circumvent collection of booking fee

In acknowledging the court's in-depth look into the law to address the calculation of LAD, Jeyakuhan says, "Along the way, the tricky question of illegality was dealt with on the score [of] whether it would render the claim for LAD void. For this, the Federal Court declared "it is not the contracts per se that are illegal but rather, it is their performance that has violated the strict terms of regulation 11(2) of the HDR 1989 and the Schedules to the Scheduled Contracts".

"It is left to be seen if there will be strict enforcement of the penal provisions on the collection of booking fees henceforth by the relevant authorities. This will surely bring to a halt the practice of booking fee collection," he adds.

Lawyer Ranjan N Chandran, a commercial and construction partner at Hakem Arabi & Associates, welcomes the apex court's decision as he believes housing developers should be penalised for breaching the HDA and for illegal practices in collecting any form of deposit or booking fee, or any other label, which is strictly prohibited.

"What is happening is that developers are using ingenious means and methods to collect booking fees under the pretext of issuing credit notes. The court did not agree and decided that the LAD must be based on the agreed purchase price in the contract for sale, that is, the SPA. If this happens, developers deserve to be penalised by the court and accept the consequences," he says.

Citing the Sri Damansara case, Ranjan says the developer very cleverly tried to argue that there was an effective discount of RM63,108 via a credit note given from the purchase price of RM731,080 and therefore, the actual and real purchase price was RM667,972. The developer wanted to calculate the LAD due to the buyer based on the lower figure.

LAD is calculated at 10% interest on the purchase price multiplied by the days of delay/365 days.

"The court will not sympathise with developers when they know it is wrong in law to collect booking fees and then mischievously contend the date should be the SPA date," he says, noting the apex court's succinct point that what is important is parliament's intent and not that of the parties.

It is noteworthy that the decision of the apex court was critical of developers collecting booking fees in an HDA Agreement, which involves residences, serviced apartments and small office/home offices, and that the LAD calculation in such instances commence from the booking date.

The court also upheld the then Supreme Court's decisions in Faber Union vs Chew Nyat Shong & Anor and Hoo See Sen & Anor vs Public Bank Bhd as good law as both of these cases dealt with normal commercial agreements (covering offices; hotels; retail; business suites; small office, flexible office (Sofo); and small office, virtual office (Sovo), where there is the freedom to contract.

And what of existing contracts? What if the buyer has accepted his LAD based on the SPA date? Can the buyer now ask the developer for arrears had a booking fee been paid earlier?

Ranjan is of the view that the general position in law is that if there has been acceptance of LAD, then the buyer will be stopped in law from claiming further LAD from the time of the booking fee. "The discretion is still vested with the court whether or not to allow it," he points out.

Jeyakuhan agrees that no claims can be made. "If the LAD claims have already been settled, that is decided by the court or the parties have agreed to a final settlement. The Federal Court case of PDJ Regency Sdn Bhd cannot be relied upon."

What if the situation involves a buyer who has yet to accept the LAD, but for which compensation is being calculated based on the SPA date? "If the buyer has yet to accept the LAD, he will certainly want his compensation from the booking date and there should be no bar if the deposit was collected by the developer even for an HDA SPA," Ranjan explains.

He says that in such a situation, compensation that has to be paid by the developer may be hefty. "It is just too bad as the developer must accept the consequences of its wrongful act and devious schemes." ■