REHDA

30 JAN, 2021

Of LAD and booking fees

The Star, Malaysia

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Inside Insights
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TWO landmark judgements by the Federal Court – one in November 2019 and the other just last week – have significant impact on the property sector, as the court's ruling has thrown a spanner in the works of how developers behave in practice.

In the first case, the Federal Court in Ang Min Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and Other Appeals, ruled that the Controller of Housing has no power to grant an extension of time (EOT) for a housing developer to complete a project.

The apex court held that regulation 11(3) of the Housing Development (Control and Licensing) Regulations 1989 (HDR), which confers power on the controller to waive or modify the provisions of a prescribed contract of sale between the developer and a purchaser if the controller is satisfied that owing to special circumstances or hardship or necessity, it is impracticable or unnecessary to comply with the provisions of such a contract, was void as it was ultra vires the Housing Development (Control and Licensing) Act 1966 (HDA).

Second, in several multiple cases involving developers and purchasers last week, the Federal Court ruled that where a developer fails to deliver vacant possession (VP) according to the time stipulated in the statutory SPA, the calculation of the liquidated ascertained damages (LAD) begins from the date of payment of the booking fee and not from the date of that statutory agreement.

The Chief Justice of Malaysia, Tun Tengku Maimun Tuan Mat, said that the HDA and its subsidiary laws are social legislation. In the judgement, the apex court also said that Regulation 11(2) was amended to even stricter terms, and everyone, not just developers, is prohibited from collecting booking fees. The Chief Justice was also quoted as saying "the courts will not condone such a practice until and unless the law says otherwise".

The two cases have basically opened up a can of worms for developers, as this may give rise to an avalanche of actions against developers who had failed to deliver VP in time, and in time now means from the payment of the booking fees and not from the date of the SPA.

In addition, the first case too has now established that the controller has no power to provide an EOT. As it is, the current mandated period of contract for SPAs is 24 months for landed developments, which are mainly covered under Schedule G, and for high-rises, 36 months under Schedule H.

The Federal Court ruling effectively means that a developer cannot contract out of the statutory period provided for in the HDA/HDR. Clearly, the two Federal Court judgements will have far-reaching consequences, not only on SPAs already entered into but also on future contracts entered into between developers and purchasers.

For past SPAs, and as the court ruling has a retrospective effect, it is really up to the buyers or deprived purchasers to pursue the legal avenue to enjoy the benefit of these court rulings.

It is also obvious that not many purchasers would be legally aware of the ruling in the first place, let alone take the messy and lengthy legal route to challenge developers who have violated the HDA or HDR. In most cases, a collective act among several buyers is more likely as in that instance, the action of a group would reduce the legal cost as well as be a bargaining chip in a class action.

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Booking fee issue needs to be put to rest with an amendment

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In addition, in some cases, the legal challenge would be on the two counts that the Federal Court has already ruled, ie, in relation to the EOT and the calculations of the LAD from the booking date.

For the EOT, most of the developments that will be affected are those under the high-rise category where developments in major cities, especially in cities like Kuala Lumpur, Johor Baru or Penang, are in excess of 25-30 storeys in height and some even up to 60-70 storeys.

Most of these developers would have entered into SPAs with buyers with contract periods that are way beyond the 36-month period, with some up to even 60 months.

These contracts entered into with buyers too are now deemed to be beyond what is provided for in the statutory acts and can be challenged by buyers as the EOT is deemed illegal, as per the apex court's ruling.

HDA/HDR amendments likely

While the Federal Court has taken the view that the HDA/HDR are social contracts and are meant to protect house buyers, it is likely the view taken by developers is completely the opposite.

The Federal Court's ruling, if not corrected via a Parliamentary amendment to the HDA/HDR, means that developers would need to change their game plan in terms of new launches and how contracts are entered into between them and homebuyers.

For some, the period of 36 months allowed for under the HDR too will be a great hindrance for large-scale developments, especially those that require deep piling works and a height of beyond 30 storeys.

For example, if a development requires 48 months to complete, the time period allowed for contracts under Schedule H suggests that developers should only start marketing their projects to buyers and enter into contracts when the time to VP is not more than 36 months.

This now requires a significant outlay among property developers upfront, as they would need to fund not only the cost of the land that is in their books but the initial construction work before they can market their projects.

An amendment must also be made to the legislation to enable the booking date to be the effective date of contract for the purpose of calculation of the 24 or 36-month period of the SPA and for LAD calculations.

Time to regulate booking fees

The booking fees are not defined in the HDA/HDR as they are deemed illegal.

While we know developers have been flouting this rule for the longest time, it is now time to put the issue to rest with an amendment under the HDR.

As typically, booking fees are collected about two to three months (in some cases even more than six months to a year) before the signing of the SPA and are also seen as an important consideration for both parties to commit themselves to a contract, it will be good for both parties if they are actually regulated.

Here, an amendment can be made to the HDR whereby an SPA must be entered into within a certain time frame, let's say within 30 business days from booking date.

An amendment must also be made to the legislation to enable the booking date to be the effective date of contract for the purpose of calculation of the 24 or 36-month period of the SPA and for the purpose of LAD calculations.

In addition, there must also be an escape clause for buyers to terminate their intention to purchase a home should they have a change of mind – sort of a cooling-off period – and of course in cases where their loan application is rejected by the bank within a certain time frame.

In both instances, the booking fee that has been paid should be fully refundable.

Duration of SPA needs to be fine-tuned

There is not much of an issue for landed property developers to deliver within the stipulated 24-month period, but it is an issue when it comes to high-rise developments.

In those days, we hardly had high-rise developments and it was thought then that a 36-month SPA was sufficient for buildings that are erected for residential purposes, as most of them were well below 25 or 30 storeys in height.

But today, we see high-rise living as part of city living.

In areas which are deemed to be prime, the height of buildings meant for residential living can go up even beyond 60-storeys high.

It is a fact that there is no way a property developer would be able to complete that sort of height in 36 months.

Hence, the developers ought to be allowed to have a longer SPA period on a scale basis. If an amendment is not made to the HDA/HDR, only developers with deep pockes would be able to embark on projects that are beyond 30 storeys.

Due to scarcity of land in these prime locations and of course with it comes much higher plot ratios, having a scale-based SPA period depending on the height of the building is appropriate.

For example, the HDA/HDR could be amended to have SPA periods of up to 36 months for buildings that are up to 30 storeys in height.

For buildings that are between 31 storeys and up to 50 storeys, a 48-month period is allowed.

Further, for buildings between 50 storeys and 70 storeys, a period of 60 months ought to be allowed.

Residential developments beyond a height of 70 storeys should be based on the actual development plan and the minister should be empowered to approve a duration that is not more than 72 months.

While the Federal Court judgement favours the man on the street and rightly so, the ministry, Real Estate & Housing Developers' Association (Rehda) and the National House Buyers Association (HBA) should come together and amend the HDA/HDR for the benefit of everyone and to make the rules and regulations clear for once and for all.

Only then can we rebuild the trust that has been somewhat lost with developers who seem to be always having an upper hand with their own scheme of things.

Pankaj C Kumar is a long-time investment analyst. Views expressed here are his own.