

COVID-19 Act: Are Housing Developers Relieved From LAD?

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On 23 October 2020, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (**COVID-19 Act**) was finally gazetted and came into force, seven months after the government took drastic preventive measures by implementing the unprecedented Movement Control Order (**MCO**) on 18 March 2020. The COVID-19 Act seeks to provide temporary measures to reduce the impact of the pandemic-driven crisis including to modify the provisions of certain legislations.

The pandemic, as well as the MCO, have irreversibly and indiscriminately impacted businesses of all industries. To housing developers, one of the imminent knock-on effects of the MCO manifests from the potential financial exposure in the form of liquidated ascertained damages (**LAD**) caused by the delay in delivering vacant possession (**VP**) of properties in accordance with the time stipulated in the statutory sale and purchase agreements (**SPAs**)¹ prescribed by the Housing Development (Control and Licensing) Regulations 1989 (**HDA Regulations**).

Pre-COVID-19 Act

During the MCO and up until the introduction of the COVID-19 Act, housing developers were uncertain as

to how to tackle issues relating to the late delivery of VP without any express directives or guidelines from the government ministries or agencies. A glimpse of hope came approximately one month into the MCO, when the Minister of Housing and Local Government (**Minister**) indicated during an interview² in April 2020, among others, that housing developers who were due to deliver VP during the MCO period would have an extension of time to complete their projects and that homebuyers could not claim the LAD incurred during the MCO period.

So, has the COVID-19 Act reflected the assurances made by the Minister and accorded sufficient relief or protection for housing developers?

COVID-19 Act: Modifications to HDA 1966

Part XI, ss 32 to 38 of the COVID-19 Act deal with modifications to the Housing Development (Control and Licensing) Act 1966 (**HDA 1966**) in relation to the statutory prescribed SPAs entered into before 18 March 2020.³ The modifications, which are deemed to have come into operation since 18 March 2020⁴, address issues relating to the delivery of VP, LAD, defect liability period and late payment charges on unpaid instalments by homebuyers.

Specifically, s 35 deals with matters relating to delivery of VP and LAD. Section 35(1) seeks to exclude the period of 18 March 2020 to 31 August 2020 (**Relevant Period**) from the calculation of time for delivery of VP and LAD, notwithstanding the relevant clauses in the statutory prescribed SPAs.

¹ Schedules G, H, I and J

² LHAG Update (21 April 2020), "Liquidated Ascertained Damages Incurred During the MCO"

³ COVID-19 Act, s 33

⁴ *Ibid*, s 32

For completeness, the COVID-19 Act also, among others, seeks to:

- (a) exclude the Relevant Period from the calculation of the defect liability period and the period for developers to carry out works to repair or make good defects and other faults in the properties;⁵
- (b) prevent developers from imposing late payment charges on unpaid instalments against homebuyers for the Relevant Period;⁶
- (c) prevent developers from invoking the deeming provision on delivery of VP of the property under the statutory prescribed SPAs, if the homebuyer is unable to enter into possession or occupation of the property from the date of service of a notice to take VP during the Relevant Period or any extension period granted by the Minister for delivery of VP under s 35(3) of the COVID-19 Act;⁷
- (d) allow homebuyers to file claims that have expired during the period from 18 March 2020 to 9 June 2020 in the Tribunal for Homebuyer Claims from 4 May 2020 to 31 December 2020.⁸

In all the modifications under ss 34 to 36 of the COVID-19 Act, the Minister may, upon the application of a homebuyer or developer, as the case may be, extend the Relevant Period up to 31 December 2020 if he/she is satisfied that additional time is required by the applicant concerned. Such procedure appears to give effect to the recent Federal Court decision in *Ang Ming Lee v Menteri Kesyahajaan Bandar, Perumahan Dan Kerajaan Tempatan*,⁹ where it was held, among others, that the Minister is empowered to regulate the terms and conditions of the statutory

prescribed SPAs. However, the COVID-19 Act is silent on two aspects:

- (a) the grounds or circumstances upon which an application to extend the Relevant Period can be made; and
- (b) the manner and procedure for making such application.

On 12 November 2020, the Ministry of Housing and Local Government (**KPKT**) through the Department of National Housing issued a FAQ¹⁰ explaining the application of the modifications to the HDA 1966 pursuant to the COVID-19 Act (**KPKT FAQ**). Of particular note is that the KPKT FAQ states the exclusion of the Relevant Period from the calculation of time for delivery of VP and LAD is *not* automatic and the housing developers are required to submit an application to the KPKT in order to be entitled to invoke such exclusion. The KPKT has also issued a guideline¹¹ stating the manner, procedure and supporting documents required when making such application.

Notwithstanding the foregoing, we should highlight that not all housing developers stand to benefit from the proposed modifications under ss 34 to 36 of the COVID-19 Act, as evident by the saving provision in s 37(1), which reads:

“Saving

37.(1) The modifications in sections 34, 35 and 36 shall not affect any legal proceedings commenced, or any judgment or award obtained, to recover late payment charges payable by the purchaser or liquidated damages payable by the developer or any other sum during the period from 18 March 2020 until the date of publication of this Act.”

⁵ *Ibid*, s 36

⁶ *Id*, s 34

⁷ *Id*, s 35(4)

⁸ *Id*, s 38

⁹ LHAG Update (29 November 2019), “The End: No More Extension of Time to Housing Developer”

¹⁰ Soalan Lazim Akta Covid-19 (Akta 829) Melibatkan Akta Pemajuan Perumahan (Kawalan Dan Pelesenan) 1966 (Akta 118) <https://ehome.kpkt.gov.my/index.php/dl/553239686247467549457868656d6c7449436847515645704c305a42555639425331524258304e50566b6c4558793166536c424f58307451533152664d544a66546b3957587a49774d6a41756347526d>

¹¹ Appeal Application Procedure Under the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 <http://rehda.com/wp-content/uploads/2020/10/TATACARA-PERMOHONAN-RAYUAN-PELANJUTAN-SERAHAN-MILIKAN-KOSONG-BY-KPKT-30OCTOBER-2020.pdf>

This saving provision effectively preserves the validity of any legal proceedings commenced or judgments obtained before the COVID-19 Act comes into force. In other words, housing developers who have existing legal actions filed or judgments obtained against them between 18 March 2020 and 22 October 2020 will not be able to claim the relief offered by the COVID-19 Act. Further, based on s 37(2) of the COVID-19 Act, any late payment charges paid by the homebuyer or LAD paid by the housing developer before 23 October 2020 shall be deemed to have been validly paid under the HDA 1966/HDA Regulations, and that such payment shall not be refunded to the payer.

Conclusion

Many have condemned that the COVID-19 Act is “too little too late”. Likewise, the saving provision in s 37 of the COVID-19 Act is much criticised for nullifying the objective of the modifications to the HDA 1966.

Regardless, now that the COVID-19 Act is in force, all stakeholders in the housing industry should take a moment to review the Act in tandem with their current business operations.

Firstly, it should be borne in mind that the modifications to the HDA 1966 under the COVID-19 Act only apply to statutory prescribed SPAs that were entered into before 18 March 2020. Secondly, in view of the KPKT FAQ which has now explained the exclusion of the Relevant Period from the calculation of time for delivery of VP and LAD is *not* automatic, housing developers are urged to take immediate steps to make the necessary application to KPKT.

It remains to be seen how the Minister and/or the courts will apply the COVID-19 Act in keeping with the object and purpose underlying the Act. **LH-AG**

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