Housing Developers Beware – Federal Court Upholds *Faber Union*

In a landmark decision today, 19 January 2021, the Federal Court unanimously held that ***Faber Union***[1] is good law.

There were in total seven appeals before the Federal Court today by purchasers and housing developers. The common question of law falling for consideration may be paraphrased as follows:

> "*Where there is a delay in the delivery of vacant possession, whether the date for calculation of liquidated damages ("**LAD**") begins from the date of payment of the booking fee; or from the date of the sale and purchase agreement*".[2]

For the purposes of this Article, suffice for us to refer to the appeals pertaining to **GJH Avenue Sdn. Bhd.** ("**GJH Avenue Appeals**").[3]

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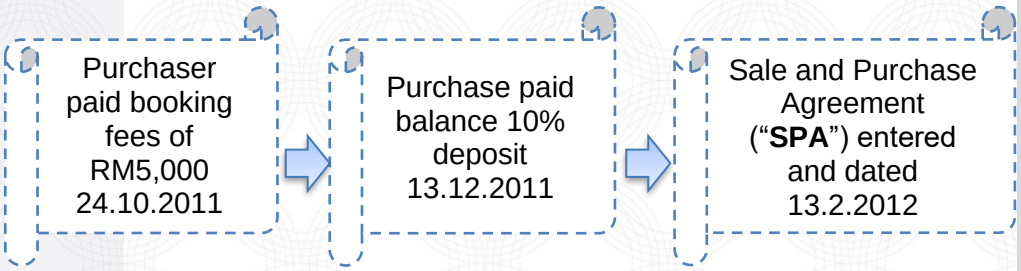
GJH Avenue Appeals

The GJH Avenue Appeals comprised of three appeals by purchasers of units of bungalows under a Schedule G statutory contract as prescribed under the Housing Development (Control and Licensing) Regulations 1989 ("**HDR**"). One of the bungalow units is known as Unit No. L.274/PT No. 5415 ("**Unit**").

The relevant timeline are as follows:

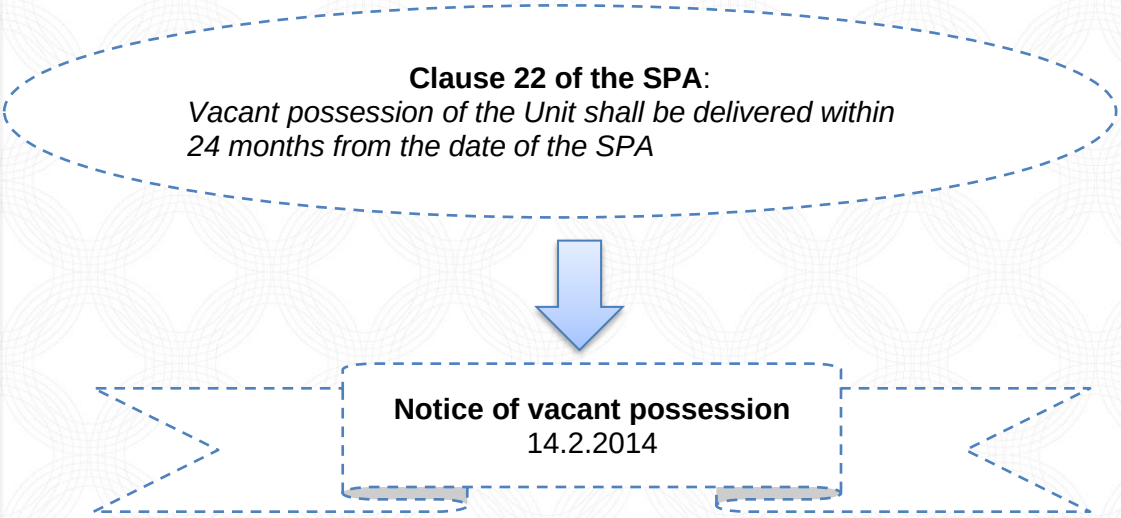


[1] *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 2 MLJ 597

[2] Where there is a delay in the delivery of vacant possession by a developer to the purchaser in respect of Schedule G and/or H type contracts under Regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (Regulation 1989) enacted pursuant to Section 24 of the Housing Development (Control and Licensing) Act 1966, whether the date for calculation of liquidated agreed damages ('LAD') begins from:
(a) the date of payment of deposit/booking fee/initial fee/expression by purchaser of his written intention to purchase; or
(b) from the date of the sale and purchase agreement,
having regard to the decisions of the Supreme Court in *Hoo See Sen & Anor v Public Bank Berhad* [1988] 2 MLJ 170 and *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597.

[3] 01(i)-40-12/2019; 01(f)-42-12/2019(M); 01(f)-41-12/2019(M)

The relevant timeline (*continued*):



Issue:

Whether the date for calculation of LAD begins from **24.10.2011** (date of payment of booking fees) or **13.2.2012** (date of the SPA)

Developer
Vacant possession was late by two (2) days (calculating LAD from the date of the SPA i.e. 13.2.2012)

Purchaser
Filed a claim in the Tribunal for Homebuyer Claims ("**Tribunal**") for a larger sum of LAD (calculating LAD from the date of payment of the booking fee i.e. 24.10.2011)

The Tribunal allowed the purchaser's claim and granted LAD in the sum of RM12,353.76. Dissatisfied with the finding of the Tribunal, the Developer filed a judicial review application at the High Court to quash the decision of the Tribunal.

The High Court dismissed the Developer's judicial review application and held that the Tribunal was correct in holding that time began to run from the date when the booking fee was paid and not the date appearing on the SPA. In so doing, the learned High Court Judge held, among others, that His Lordship was bound by the case of ***Faber Union*** and ***Hoo See Sen***[4].

Dissatisfied with the decision of the High Court, the Developer appealed to the Court of Appeal. The Court of Appeal reversed the decision of the High Court and held that based on the clear and unambiguous wordings of the provisions of the SPA, time began to run from the **date of the SPA**. Further, the Court of Appeal sought to distinguish the facts of the GJH Avenue Appeals and the cases of ***Faber Union*** and ***Hoo See Sen***.[5] The purchaser then appealed to the Federal Court.

Federal Court's Decision

The Federal Court allowed the purchaser's appeal and held, among others, that where there is a delay in the delivery of vacant possession in respect of Scheduled Contracts under the HDR, **the date for calculation of liquidated damages begins from the date of payment of the booking fee and not from the date of the SPA.**

Briefly, the grounds of the Federal Court's landmark decision are as follows:

- ***Faber Union*** is good law.

- The Housing Development (Control and Licensing) Act 1966 ("**HDA**") and its subsidiary legislations are social legislation and as such, it ought to be interpreted to give effect to the intention of Parliament.

- "*[E]ven where a term or provision of a social legislation or a statutory contract enacted thereunder is literally clear or unambiguous, the Court no less shoulders the obligation to ensure that the said term or provision is interpreted in a way which ensures maximum protection of the class in whose favour the social legislation was enacted*".

[4] Hoo See Sen & Anor v Public Bank Bhd & Anor [1988] 1 CLJ (Rep) 125
[5] GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Ors and Other Appeals [2020] 3 CLJ 307

- The *Hansard* which lead to the enactment of the HDA provides "*legislative measures should be taken to protect the people from bogus and or unscrupulous housing developers*".

- The HDR under Regulation 11(2) expressly prohibits the collection of booking fees howsoever they are called.

- A valid and binding contract came into being when the purchaser paid the booking fee to the developer, and bargain was indeed made at the time of the payment of the booking fee.

- Notwithstanding that it is standard commercial practice to collect a booking fee, the Court (having regard to the social purpose of the HAD and its subsidiary legislation) will upheld the statutory safeguards which is to ensure maximum protection of the purchasers.

Conclusion

Our apex Court's decision on 19 January 2021 seems to have put to rest the diametrical stand often adopted by housing developers and purchasers pertaining to calculation of LAD.

As it stands, the date of payment of booking fee (and not the date that appears on a sale and purchase agreement) is the starting date for the purposes of calculation of LAD.

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