

When is the effective date of an SPA?

EFFECTIVE DATE: Pretam discusses the issue of when developers' obligations really begin - from the date of the SPA or the date when the purchasers first paid their deposit

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The statutory Sale and Purchase Agreement (SPA) has been a simmering bone of contention for years between developers and purchasers. Although the Housing Development (Control and Licensing) Regulations 1989 very strictly control the SPA that can be signed between housing developers and purchasers, most purchasers are still not aware or familiar with their rights and obligations as prescribed by the housing regulations.

The intent of the law is to avoid any dispute between housing developers and purchasers, as such, the housing law allows only certain types of agreement that can be signed between them. No changes whatsoever are allowed.

One of the bones of contention is the effective date of developers' obligations. Every SPA would have a date of agreement which supposedly signifies when the obligations of the parties are to begin. However, case law has decided that the effective date starts from the date the purchasers first paid their deposit regardless of the date stated in the SPA.

Strict rule

How did this state of affairs come about? We will trace how the courts have come to this conclusion.

Regulation 11 of the Housing Development (Control and Licensing) Regulations 1989 strictly prohibits the collection of any money from any purchaser by whatsoever name unless the purchaser has signed and dated the SPA.

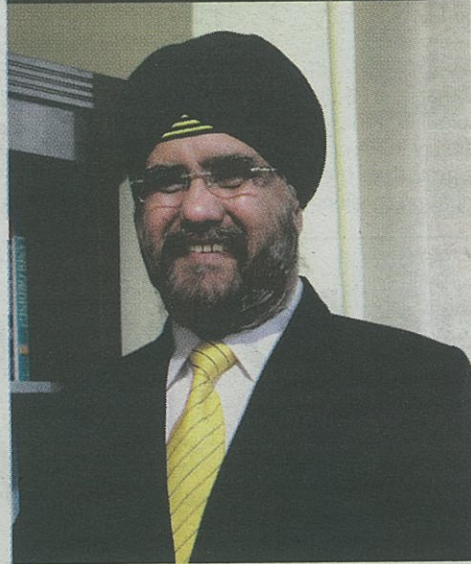
Regulation 11 (2): "No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale."

The contract of sale which is the SPA clearly states in Third Schedule that the first 10 percent can only be collected upon the signing of the SPA. If developers do collect a deposit [before the signing of the SPA], then it is an offence and on conviction, the developer is liable to a fine of not more than RM20,000 or a term of imprisonment not exceeding 5 years or to both fine and imprisonment. This safety net was introduced in 1989 when it was found that developers were absconding with money collected from innocent house purchasers before the SPA was signed.

To get round the strict rule, many a shrewd developer would sometimes ask their panel lawyers to collect such upfront deposit through appointing their lawyers as stakeholders. Such stakeholder agreements (or often times in the form of a letter) may be valid if signed by one purchaser who is desperate to lock in a unit. But if it is done for more than four potential purchasers, then this act may amount to the lawyer aiding and abetting the commission of the offence of illegal deposit collection.

Case law

In order to ascertain the date of delivery of vacant possession of a building yet to be constructed, the Supreme Court in **Faber Union Sdn Bhd v Chew Nyat Shong & Anor [1995] 3 CLJ 797** had to decide whether time starts to run from the date of payment of the booking fee or



from the date of the signing of the SPA.

In this case, the deposit was paid on 17 February 1984 and the SPA was signed about four months later on 27 June 1984. The Supreme Court held that for the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time starts to run was the date the purchaser paid the booking fee and not the date of the signing of the SPA.

For the purpose of calculating the LAD (Liquidated and Ascertained Damages) for late delivery, the Court has thus decided that the date of collection of deposit is the relevant date if it is before the date of SPA.

The decision of the Supreme Court was followed in **Lim Eh Fah & Ors v Seri Maju Padu [2002] 4 CLJ 37**. In this case, the purchaser paid the deposit on 17 July 1992. The SPA was executed three months later on 10 October 1992. Suriyadi Halim Omar J (as His Lordship then was) held that the developer assumed the responsibility to fulfil its part of the bargain at the date the deposit was paid, i.e. 17 July 1992, being the date when the contract took effect and

not the date the SPA was signed. The rationale given if it was otherwise was that the developer could then arbitrarily choose any date it favoured to execute the SPA. This would certainly prejudice the purchaser who would be unnecessarily delayed.

Recent case

Faber Union Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan dan Kerajaan Tempatan & Ors [2011] 7 CLJ 37 was a recent decision on a judicial review application made against an award I made when I sat as President at the Tribunal for Homebuyer Claims.

In its application for judicial review, the developer has contended that the Tribunal President, in considering the deposit date as the relevant date, has determined the amount of compensation contrary to legal provisions.

The High Court Judge Aziah Ali J (as Her Ladyship was then) held that having considered the award, she was unable to agree with the developer that the Tribunal has committed errors of law that warrant judicial intervention.

"... I find that the Tribunal has not erred in deciding that the relevant date for the purpose of calculating the amount of damages payable by the applicant [developer] is the date the respondents [purchasers] paid the deposits."

"The Tribunal has considered relevant matters and has not taken into consideration irrelevant matters. The award does not suffer from the infirmities of illegality, irrationality or procedural impropriety."

A note from me: Being the latest pronouncement by the High Court on this aspect of the housing law, purchasers would be well advised to carefully keep with them all the receipts relating to payment of their house purchase deposits. You may need them one day to claim for LAD from the developer in the event vacant possession is delayed.

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PROPERTY Q&A

Find answers to your questions

Q/A

Irene@Klang: We bought a landed property 8 years ago and only recently obtained vacant possession, way beyond the 36 months' completion period stated in the Sale & Purchase Agreement (SPA). The developer only offered us 40-50% of the compensation due, citing the local authorities' fault for the delay. Should we accept the proposed compensation (rather than nothing at all) or take them to court? I am already staying in the property and am generally happy with the place so far. On principle, I would like to hold the developer responsible for not honouring the contract but am afraid that any legal action on my part will be too lengthy and costly for me.

RED: It is unclear from your query whether the property purchased by you is a property governed under the Housing Development (Control & Licensing) Act 1966 ("HDA 1966") and the Regulations. If the property is governed under HDA 1966, the SPA is the statutory format in the form of Schedule G. If the property does not fall under the HDA 1966, then the format of the SPA is based on the bargaining power between the developer and the purchaser.

There is a difference in the computation for damages for late delivery depending on the actual format of the SPA executed.

If the SPA is in the Schedule G format, you can claim the late delivery damages by filing a monetary claim at the "Tribunal for Homebuyer Claims" or commonly known as the "Homebuyers Tribunal" for up to RM50,000 for late delivery interest. However, if the monetary claim is more than RM50,000 or the remedies sought for fall outside the jurisdiction of the Homebuyers Tribunal, then the claim has to be filed in the Civil Court and depending on the remedies sought, it may be the Sessions Court or the High Court.

One has to examine the exact wordings in the SPA to determine how the damages for late delivery is to be computed. It would be entirely up to you whether or not to accept the "compensation" offered by the developer.

Under Section 9 of the Housing Development (Housing Development Account) Regulations 1991, all claims arising from liquidated damages must be settled before the Housing Development Account maintained by the developer can be closed and the surplus thereof be withdrawn by the developer. **By Tan Kim Soon (tkimsoon@gmail.com)**

Ask the RED expert: Please fax your questions to: 03-2283 1700 or email to nstred@nstp.com.my