

Controller of Housing Has **NO POWER** to Grant an Extension of Time (“EOT”) to Property Developers

On 26 November 2019, the Federal Court ruled that the Controller of Housing (“the Controller”) has no power to waive or modify any provision in Schedule H of the Housing Development (Control and Licensing) Regulation 1989 (“Schedule H”).

In recent years, there has been an increase in the number of property developers who have been granted EOTs for property projects that they cannot deliver to buyers on time.

An EOT is granted by the Controller for delays that could not have been reasonably foreseen at the time of contract signing. The granting of an EOT relieves the property developers from liability of damages, such as liquidated damages, from the original date of contract completion for the period of the claim.

However, in a recently decided case, the Federal Court ruled that the Controller has no power to waive or modify any provision in Schedule H. In relation to the aforesaid case, this consequently means that the Controller has no power to grant EOTs to property developers to complete their property development projects.

Background to the decision

A property developer (“the Developer”) had entered into various sale and purchase agreements (“SPAs”) with purchasers (“the Purchasers”) for units in a condominium project.

The aforesaid SPAs, made in the form prescribed in Schedule H, provide that the Developer will be liable to pay liquidated damages (“LAD”) to the Purchasers if the Developer fails to deliver vacant possession within 36 months from the date of the SPAs.

The Developer subsequently applied for an EOT to deliver vacant possession under Regulation 11(3) of the Housing Development Regulations 1989 (“Regulation 11(3)”). Regulation 11(3) stipulates that where the Controller is satisfied that owing to special circumstances or hardship or necessity, compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions.

The EOT was subsequently granted, and the Purchasers were unable to claim LAD.

The Purchasers applied for a judicial review against the Minister of Urban Wellbeing, Housing & Local Government (“the Minister”), the Controller and the Developer, challenging Regulation 11(3) and the EOT that was granted.

After going through a long legal process, the case finally reached its apex at the Federal Court, whereby at the end, the Federal Court ruled that the Controller has no power to waive or modify any provision in the Schedule H because Section 24 of Housing Development (Control and Licensing) Act 1966 does not confer power on the Minister to make regulations for the purpose of delegating the power to waive or modify the Schedule H to the Controller.

How does this affect real estate industry?

Pursuant to the requirements of paragraphs 50 and 51 of MFRS 15 *Revenue from Contract with Customers*, an entity shall account for liquidated damages as variable consideration in determining the transaction price to be recognised as revenue.

Property developers are therefore advised to assess the implication of the recent Federal Court decision on their revenue recognition under MFRS 15 and ascertain the potential liquidated damages for their past and present housing development projects that were granted with EOT.

Disclaimer

This article was contributed by Quality Assurance and Technical team of Baker Tilly Malaysia. The views expressed represent our perspectives as of January 2020. This article is not comprehensive and was prepared based on information available generally and is not intended to be relied upon as professional advice. We may identify additional issues as we analyse the standard and the entities, and our views may evolve during that process.

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