

# FAQ: COVID-19 Act 2020 – Impact on the Housing Industry

for LexisNexis Resource Hub – COVID-19



The coronavirus pandemic, as well as the implementation of the unprecedented Movement Control Order (MCO) in the country, have irreversibly and indiscriminately impacted businesses of all industries. To housing developers, one of the expected effects of the MCO is financial exposure in the form of liquidated damages (LAD) caused by the delay in delivering vacant possession of properties in accordance with the time stipulated in the statutory form of sale and purchase agreements prescribed by the Housing Development (Control and Licensing) Regulations 1989 (HDA Regulations).

The Housing Development (Control and Licensing) Act 1966 (HDA 1966) is one of the legislations which is subject to the modifications introduced by the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (COVID-19 Act), which has finally been gazetted and came into force on 23 October 2020.

This FAQ aims to address how the COVID-19 Act serves to tackle issues such as LAD, defect liability and late payment charges that are often faced by housing developers or purchasers.

## Liquidated Damages (LAD)

### 1. What is the position on LAD in the statutory sale and purchase agreements?

The terms governing the sale and purchase between housing developer and purchaser are found in the statutory forms of sale and purchase agreement in the HDA Regulations, read together with the HDA 1966.

Clauses 25 of Schedule G and 26 of Schedule H sale and purchase agreements respectively prescribe the time for the delivery of vacant possession<sup>1</sup> of property/ parcel to the purchaser, the failure of which, the housing developer shall be liable to pay the purchaser liquidated damages calculated from day to day at the rate of 10% per annum of the purchase price from the expiry of the period stipulated<sup>2</sup> until the date the purchaser takes vacant possession of the property/ parcel.

### 2. What is the position on LAD under the COVID-19 Act?

Section 35 COVID-19 Act deals with matters relating to the delivery of vacant possession and LAD. Section 35(1) seeks to exclude the period of 18 March 2020 to 31 August 2020 (Relevant Period)

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<sup>1</sup> 24 months for Schedule G; 36 months for Schedule H

<sup>2</sup> 24 months for Schedule G; 36 months for Schedule H

Updated as at 25 October 2020.

from the calculation of time for the delivery of vacant possession and LAD, notwithstanding the relevant clauses in the statutory sale and purchase agreements.

### **3. Can housing developers seek for an extension of the Relevant Period?**

Yes, under s 35(2) COVID-19 Act, the housing developer may apply to the Minister of Housing and Local Government (Housing Minister) for an extension of the Relevant Period. The Housing Minister may extend the Relevant Period up to 31 December 2020 if the said Minister is satisfied that additional time is required by the housing developer concerned.

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

- the grounds or circumstances for an application to extend the Relevant Period
- the procedure for making such an application

### **4. What if the purchaser was unable to enter into possession or occupation of the property during the Relevant Period?**

Section 35(4) COVID-19 Act provides that if the purchaser was unable to enter into possession or occupation of the property from the date of service of a notice to take vacant possession during the Relevant Period or any extension period granted by the Housing Minister under s 35(3) COVID-19 Act (if applicable), the purchaser shall not be deemed to have taken such vacant possession as ordinarily provided for under the statutory sale and purchase agreements.

### **5. Can purchasers claim for LAD before the delivery of vacant possession?**

Clause 24(4) of Schedule G and Clause 25(4) of Schedule H sale and purchase agreements respectively states that any cause of action to claim LAD by the purchaser arising from the housing developer's failure to deliver VP shall only accrue on the date the purchaser takes vacant possession of the property/ parcel.<sup>3</sup> On a plain reading of these clauses, the right of the purchaser to claim LAD only arises after the delivery of vacant possession.

## **Defect Liability Period (DLP)**

### **6. What is the position on DLP in the statutory sale and purchase agreements?**

Clause 27 of Schedule G and Clause 30 of Schedule H sale and purchase agreements state that any defect, shrinkage or other faults in the property/ parcel which become apparent within 24 months after vacant possession, and are caused by the following:

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<sup>3</sup> Clause 24(4), Schedule G; Clause 25(4), Schedule H

- defective workmanship or materials; or
- the property/ parcel is not constructed in accordance with the plans and descriptions as specified in the sale and purchase agreement

shall be repaired and made good by the housing developer at its own cost and expense within 30 days of the housing developer having received written notice from the purchaser.

An extension of 30 days shall be provided to the housing developer to rectify the defects and other faults after the purchaser has notified the developer of his intention to carry out the rectification and repair works himself.<sup>4</sup>

## **7. What is the position on DLP under the COVID-19 Act?**

Section 36(1) COVID-19 Act seeks to exclude the Relevant Period from the calculation of:

- the defect liability period
- the period for housing developer to carry out works to repair and make good defects, shrinkages and other faults in the property

## **8. Can purchasers and housing developers apply for an extension of the Relevant Period stated under s 36(1) COVID-19 Act?**

Based on s 36(2) COVID-19 Act, it appears that only the purchaser may apply to the Housing Minister for an extension of the Relevant Period. The Housing Minister may extend the Relevant Period up to 31 December 2020 if the Minister is satisfied that the additional time is required by the purchaser.

Again, the COVID-19 Act is silent on two aspects:

- the grounds or circumstances for an application to extend the Relevant Period
- the procedure for making such application

## **9. Would s 36(1) COVID-19 Act still apply if the purchaser provides the written notice of any defects, shrinkages or other faults in the property/ parcel on 1 September 2020?**

Section 36(1) COVID-19 Act seeks to exclude the Relevant Period, ie 18 March 2020 to 31 August 2020, from the calculation of the period for the housing developer to carry out works to repair and make good the defects in the property.

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<sup>4</sup> Clause 27(2), Schedule G; Clause 30(2), Schedule H

The statutory sale and purchase agreements prescribe that the 30-day period for any defects to be made good by the housing developer starts to run from the date the housing developer receives written notice of such defects from the purchaser.

If a written notice is issued on 1 September 2020, it falls outside the Relevant Period, therefore, s 36(1) COVID-19 Act would not aid the housing developer. In essence, while the purchaser enjoys the benefit of an extended DLP by virtue of s 36(1) COVID-19 Act, the housing developer unfortunately may not enjoy relief in circumstances where written notice is provided after the Relevant Period. Additionally, s 36(2) Covid-19 Act allows only the purchaser, not the housing developer, to apply to the Housing Minister for an extension of the Relevant Period.

In the circumstance, if the housing developer foresees that it is unable to comply with the prescribed 30-day period, it may be prudent for the housing developer to reach out to the purchaser to seek their agreement to extend the prescribed 30-day period.

### **Late Payment Charges**

#### **10. Is the purchaser liable to pay late payment charges for failing to pay instalments in accordance with the time stipulated in the statutory prescribed sale and purchase agreements?**

Under s 34 COVID-19 Act, where the purchaser fails to pay any instalment for the Relevant Period due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19, the housing developer shall not impose any late payment charges on the relevant unpaid instalments against the purchaser.

The Housing Minister, upon an application of the purchaser, may extend the Relevant Period up to 31 December 2020 if the said Minister is satisfied that additional time is required by the purchaser concerned.

### **Saving Provision**

#### **11. What are the issues that may arise from the saving provision in s 37(1) COVID-19 Act?**

Based on the plain wordings of s 37(1) COVID-19 Act, it appears that not all housing developers stand to benefit from the modifications/ reliefs provided under sections 34 to 36 COVID-19 Act. This saving provision effectively preserves the validity of any legal proceedings commenced or judgments obtained before the COVID-19 Act is enacted into law, ie 23 October 2020.

In other words, housing developers who have existing legal actions filed or judgments obtained against them from 18 March 2020 until 23 October 2020 will not be able to claim the relief offered by the COVID-19 Act.

Further, s 37(2) COVID-19 Act states that any late payment charges paid by the purchaser or LAD paid by the housing developer before the COVID-19 Act is enacted into law, ie 23 October 2020 shall be deemed to have been validly paid under the HDA 1966 and the HDA Regulations, and that such payment shall not be refunded to the payer.

## **Filing of Claims in Tribunal**

### **12. What happens if the purchasers have missed filing their claims in the Tribunal for Homebuyer Claims during the MCO period?**

Section 38 COVID-19 Act allows purchasers 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.

*In light of the constantly changing circumstances, this is a general overview and should not be treated as legal advice. The information presented is correct to the date of its publication.*

## **About the Authors**

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Ai Ting read law at the University of Leeds and later was admitted as a barrister at law at Lincoln's Inn, London. She was admitted as an advocate and solicitor of the High Court of Malaya in 2011.

Ai Ting, having been recommended in The Legal 500 Asia Pacific 2019 ranking, has extensive experience in complex real estate disputes and compulsory land acquisitions. She also regularly advises major developers on disputes involving homebuyers.

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Wong Eu Ca Matthew joined Lee Hishammuddin Allen & Gledhill in 2019. He graduated from the University of Manchester and was called to the Bar of England and Wales (Lincoln's Inn) in 2018.

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