Majlis Peguam
Bar Council Malaysia

Tel : 03-2031 3003 (Hunting Line)
Fax : 03-20342825, 20261313, 20725818
E-mail : council@malaysianbar.org.my
Website : http://www.malaysianbar.org.my

Bar Council Malaysia
No. 13, 15 & 17, Leboh Pasar Besar
50050 Kuala Lumpur
Peti Surat 12478
50780 Kuala Lumpur, Malaysia

Bil Tuan :

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To All Members
Malaysian Bar

Q & A on Housing Development (Control and Licensing) (Amendment) Act 2007 ("Amendment Act")

The Amendment Act which amended the Housing Development (Control and Licensing) Act 1966 ("Act 118") came into force on April 12, 2007. Since then, the Conveyancing Practice Committee of the Bar Council ("CPC") has received numerous queries from lawyers, developers and the public on the operation of some of the amendments.

While it is not the policy of CPC to proffer any legal opinion on questions of law posed to them, the CPC has decided that in order to assist our members and without setting a precedent for future cases, our views on some of the queries are as follows:

Question 1:

Section 22D(1)of Act 118 stipulates beyond any doubt that the consent of the developer is not required for the absolute assignment of rights or interests in a housing accommodation. In a case where the developer is not the proprietor of the land, is it necessary to obtain the proprietor's consent to the assignment?

Answer 1:

As the consent of the proprietor to an assignment was not required before the amendment, it is also therefore not required after the amendment.

The CPC is of the view that an absolute assignment is good if served by way of a notice pursuant to section 4(3) of the Civil Law Act 1956. What section 22D seeks to do is to state the position of the law and to provide penal sanctions against a developer who requires consent to an assignment.

The CPC notes that under both the current Schedules G and H agreements, the duty to obtain the issue document of title or the strata title, as the case may be, and to deliver the same together with an instrument of transfer lies with the developer.

The CPC also notes that in a case of a sale of property for which no title has been issued at the time of sale and the developer is not the proprietor of the land, it has been the practice of solicitors for the purchaser or the purchaser's financier to obtain the proprietor's undertaking to deliver the issue document of title to the purchaser or the financier, when issued. It would therefore be prudent for a purchaser or financier to give notice of assignment to the proprietor as well, in which case, the undertaking from the proprietor to deliver title when issued is no longer necessary.

To reinforce this point, the amended Schedules G & H should be brought in line with section 22D by expressly stipulating that a purchaser may assign his rights under the sale and purchase agreement after the completion date without the consent of either the developer or the proprietor.

Question 2:

Since the developer's consent has been dispensed with, there is no longer a need for the consent page to the deed of assignment between the assignor (vendor) and the assignee (purchaser). However, the consent page normally contains an undertaking by the developer to deliver the strata title and a valid and registrable instrument of transfer thereof in favour of the assignee. Is it necessary to request the developer to issue an undertaking by way of a separate letter to the new purchaser or to the new purchaser's financier?

Answer 2:

The obligation of the developer to deliver the strata title when issued together with the instrument of transfer and the right of the first purchaser to the same is already set out in clause 11 of the Schedule H agreement. In an assignment from a first purchaser to a second purchaser, all the rights and interests of the first purchaser are assigned to the second purchaser. When the second purchaser requires financing, all the rights and interests which he obtained from the first purchaser are in turn assigned to the second purchaser's financier. Hence no further undertaking from the developer, by way of a separate letter or otherwise, is necessary.

Question 3:

Section 22(D)(4) states that the purchaser or his financier or their respective solicitors may request for the necessary confirmation from the developer, subject to payment of a fee not exceeding RM50 for every request for confirmation. Previously, it has been a normal practice to require the vendor to apply for the developer's consent, at the vendor's own cost and expense, and the developer's administrative fee usually includes the replies or confirmations made to the relevant solicitors. Section 22(D)(4) provides that the purchaser should pay the RM50.00 for every request made. Shouldn't the vendor be paying for this?

Answer 3:

The law now requires the purchaser to seek the necessary confirmation from the developer, and to pay to the developer for every request made. The Vendor is not required to pay for this.

Question 4:

The amendments provide that the developer is permitted to charge a fee not exceeding RM50 for every request of confirmation. In case of a subsequent request by the purchaser's financier's solicitors, can the developer charge a further sum of RM50?

Answer 4:

Section 22(D)(4) clearly states that a developer may charge a fee not exceeding RM50 for meeting every request for confirmation under the said section.

Question 5:

The standard clause normally used in a sub-sale transaction of a property for which title has not been issued, making it a condition precedent for the developer's consent to be obtained, will have to be amended to take into consideration the effect of section 22(D). Will the CPC be able to come up with a precedent for such a standard clause to assist the members of the Bar?

Answer 5:

Since it is no longer necessary to apply for or obtain the developer's consent to an assignment, each solicitor should be at liberty to draft the sub-sale agreement to suit the transaction at hand and with the amendments in mind. It would not be proper for the CPC to come up with any precedent for such a standard clause or for that matter any other clause in a sub-sale agreement.

Question 6:

In a sub-sale transaction, the SPA was signed before April 12 and the developer has given its conditional consent before April 12. The developer's consent was conditional, inter alia, upon:

(i) the vendor paying the administrative charges of RM500.00;

(ii) the purchaser signing a fresh deed of mutual covenants with the developer; and

(iii) the developer endorsing its consent on the deed of assignment.

All these conditions have not been complied with by the vendor and purchaser at this moment.

1. *Is the developer's consent or the endorsement of its consent on the deed of assignment still required in the above case?*

2. *Do the vendor and the purchaser still need to comply with the developer's conditions imposed before April 12, since the developer is now not permitted to impose any conditions under the section 22D?*

3. *Can the developer still insist on the compliance by the vendor and the purchaser of its conditions which were imposed before the section 22D came into force?*

Answer 6:

The answer to all the above three questions is "No".

If an application had been made for the developer's consent before April 12, and all the conditions and payments imposed or required by the developer have been fulfilled or paid, and the developer had endorsed its consent to the deed of assignment before April 12, then the parties to the transaction should continue and complete the transaction accordingly.

If the developer's consent, conditional or otherwise, was granted before April 12, and the conditions or payments imposed or required have not been fulfilled or paid and the developer has not endorsed its consent on the assignment, then the pursuit of the developer's consent should be abandoned as it no longer required. Parties are, however, required to comply with section 22(D)(2) and 22(D)(4).

After April 12, no developer is permitted to require any consent, and this will include endorsement of any consent granted before April 12. It follows that as the breach can only occur after April 12, the question of whether the legislation has any retrospective effect does not arise.

Question 7:

In a sub-sale of property where the individual strata title has not been issued, in view of the new section 22D, please confirm the conditions precedent to such an agreement (if any) as we are of the view that the vendor should obtain the developer's written confirmation on the status or details of the property before the completion period can commence.

Answer 7:

Before the Amendment Act, it had been the practice to require the vendor to obtain the developer's consent and the obtaining of such consent is usually made a condition precedent to the completion of a sale and purchase transaction. After the amendment, there should be no longer any condition precedent relating to obtaining the developer's consent.

However this should not affect the requirement of other consents from any other relevant body or authority required under any other written law, which may continue to be made as conditions precedent.

Question 8:

The amendment refers to any sub-sale or re-financing. In direct purchases from a developer, is the developer's endorsement of consent necessary for the Deed of Assignment (by way of security)?

Answer 8:

Section 22(D) applies to all these cases:

(a) financing of the acquisition by the first purchaser from the developer;

(b) sub-sale between the first purchaser and the second purchaser and purchasers subsequent thereto; and

(c) financing of the acquisition by the second purchaser and purchasers subsequent thereto.

Question 9:

Is the consent of the developer still required for a Deed of Receipt and Reassignment?

Answer 9:

A Deed of Receipt and Reassignment is essentially an instrument where the financier assigns the rights and interests back to the purchaser/borrower. As such, consent of the developer is not required.

Question 10:

No amendments have yet been made to the Schedule G and H agreement under the 1989 Regulations. The existing provisions in the Schedule G and H SPA state that the developer shall endorse its consent to the purchaser's assignment to any third party and charge an administrative fee of RM500 or 0.5% of the purchase price whichever shall be lower. In the event of a sub-sale of a property where no individual document of title has been issued, the principal SPA (whether under Schedule G or H) having such exiting provisions would be inconsistent with the Amendment Act. Are the parties still bound by the existing provisions?

Answer 10:

We understand the amended Regulations are expected to be out soon. In the meantime, where there is inconsistency, the parent Act will prevail, meaning that from April 12, no consent is required and no administrative fee is required to be paid.

Question 11:

Does the definition of "housing accommodation" in the amended Act include serviced suites or apartments?

Answer 11:

If the serviced suites or serviced apartments are intended for human habitation or partly for human habitation and partly for business premises, then they will fall within the definition of housing accommodation as amended. It does not matter if the accommodation is erected on a land designated or approved for commercial development as the Amendment Act has removed these words from the definition of housing accommodation inserted by the 2002 Amendment Act.

Question 12:

Does Section 22(D) apply to a housing development undertaken by DBKL, Perbadanan Kemajuan Negeri Selangor (PKNS) or the Perbadanan Kemajuan of other States?

Answer 12:

Unless exempted by the Minister under section 2(2), all housing developers have to comply with Act 118 since 2002. Prior to December 1, 2002, Act 118 did not apply to any society

registered or incorporated under any written law relating to co-operative societies and any body or agency established and incorporated by statute and under the control of the Federal Government or the Government of any State.

Question 13:

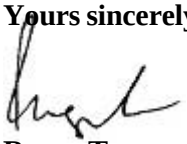
Does the Amendment Act apply to retail/commercial lots at shopping complexes?

Answer 13:

The answer is in the negative. The Amendment Act, and for that matter, Act 118, only apply to a housing accommodation undertaken by a housing developer in a housing development. Please look at section 3 of Act 118 (as amended by the Amendment Act) on the definitions of 'housing accommodation', 'housing developer' and 'housing development'.

Please note that a shorter version of this Q & A may appear in the CPC's column in *theSun* paper tomorrow.

Yours sincerely,



Roger Tan
Chairman
For and on behalf of
Conveyancing Practice Committee