

## Claiming Damages for Late Delivery of Vacant Possession of Private Houses in Malaysia: Legal Issues and Challenges

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### *Abstract*

*One of the main duties of the housing developer under the statutory sale and purchase agreement is to complete the construction of the house on time. Under the Malaysian housing law, the period of completion and handing over vacant possession for landed property is 24 months and for sub-divided building is 36 months. However in practice, very rare buyers get the keys to their houses on time. According to clause 20(2) of Schedule G of the Housing Development (Control and Licensing) Act 1966, the buyer is entitled to claim for Liquidated Ascertained Damages (LAD) for the delay in completion. It is a statutory remedy to compensate the buyer for the failure of the developer to fulfill his obligation under the agreement to hand over vacant possession on a specific date. The LAD should be calculated from day to day at the rate of 10% per annum of the purchase price. However claiming the LAD is not as simple as it supposed to be since most of the time the developer refuses to pay the LAD for various reasons. Thus a claim for LAD needs to be filed in the court or the Tribunal for Homebuyer Claims. Nonetheless winning the case does not guarantee that the buyer will receive the compensation. Adopting a qualitative method of content analysis, this paper aims to examine various legal issues and challenges faced by consumers in claiming damages for late delivery of vacant possession. The paper also explores possible solutions to existing flaws in the law and practices.*

**Key Words:** LAD, late delivery, housing project, legal issues, consumers.

## Introduction

Complaints on housing-related problems have been one of major consumers' complaints in Malaysia for the past many years. The National Consumer Complaints Centre (NCCC) received 2,686 complaints on housing in 2009 and 2,059 in 2010 (Annual Report, 2010). Similarly 2,907 cases have been filed in the Tribunal for Homebuyer Claims (THC) in 2011 compared to only 1,747 cases in 2010 (MUWHLG, 2011). Most of the housing problems presently faced by consumers are a result of the system of 'sell then build' that is commonly practiced in Malaysia. One of the main complaints on housing-related problems is concerned with the issue of vacant possession. It appears that the problem of late delivery of vacant possession is a common phenomenon in a housing industry in Malaysia. In most cases buyers are forced to accept the fact that it is 'better late than never'. A delay in delivering the house to the anxious buyer may mean delaying his right to one of human basic needs. A late delivery may also cause financial, social and emotional problems to the buyers just like abandoned projects but perhaps with less degree of hardship since finally they got keys to the house. While waiting for the houses to be completed, the buyers may need to make double payments, one for the 'in progress' house and the other one for rented house.

Due to the significant nature of housing project to public at large, housing developments in Malaysia is governed by stringent laws and regulations with the main purpose of protecting the interests of buyers/consumers (A.Suffian and R.A.Rahman, 2008). The legislative measures are also aimed to ensure the residential houses to be completed on time as delay may lead to more serious problem of abandonment of the project. The most important Act to govern the housing development in Peninsular Malaysia is the Housing Development (Control and Licensing) Act 1966 (HDA) and its regulations thereunder, among other, the Housing Development (Control and Licensing) Regulations 1989. The objective of the enforcement of the Act is to protect purchasers from bogus and irresponsible developers. The existence of statutory form of sale and purchase agreement (either schedules G,H, I and J) under the Housing Development (Control and Licensing) Regulations 1989 aims to ensure that the developers will hand over the vacant possession of the completed houses without delay where it has to be completed within the specified time frame. The law provides that the period of completion and handing over vacant possession for landed property is 24 months and for sub-divided building is 36 months. However in practice, very rare buyers get the keys to their houses on time.

## Right of Purchasers

According to clause 20(2) of Schedule G and clause 26(1) of Schedule H, the buyer is entitled to claim for Liquidated Ascertained Damages (LAD) for the delay in completion. It is a statutory remedy to compensate the buyer for the failure of the developer to fulfill his obligation under the agreement to hand over vacant possession on a specific date (Meng, 2007). The LAD should be calculated from day to day at the rate of 10% per annum of the purchase price. Being a statutory remedy, LAD is mandatory in nature and its calculation is fixed. In *Brisdale Resources Sdn Bhd v Law Kim* [2004] 6 MLJ 76, it was held that the agreed liquidated damages for late delivery of vacant possession as contained in clause 22 of the sale and purchase agreement was a mandatory provision.

Therefore, the plaintiff needs not prove his losses pursuant to section 75 of the Contracts Act 1950 as usually required in most contractual claims. In addition, no excuses can be accepted for the delay as illustrated in the case of *Tang Kam Thai & Ors v Langkah Cergas Sdn Bhd & Ors*. [2005] 7 MLJ 605. Despite admitting that there was a delay, the developers in this case contended that the delay was caused by factors beyond their control which include *inter alia*, changes made by the planning authorities. However the court held that this was a matter for the defendant, as a developer of the said properties to deal with. This responsibility cannot be passed onto the purchasers as an excuse for the payment of liquidated damages.

Where the purchaser has paid the deposit or booking fee prior to the execution of the sale and purchase agreement, time commences from the date of the payment as held by the Supreme Court in the case of *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597. In this case, the booking fee or deposit was paid on 17<sup>th</sup> February 1984 but the sale and purchase agreement was only signed on 27<sup>th</sup> June 1984. The Supreme Court referred to the case of *Hoo See Sen & Anor v Public Bank Berhad* [1988] 2 MLJ 170 and held that the time started to run from the date the purchaser paid the booking fee. In other words, the developer is to deliver the vacant possession of the property within 24 months from the date of the sale and purchase agreement or the date of payment of the deposit, whichever is the earlier.

Thus it is crystal clear that the right to be paid LAD is automatic once there was a delay by the developer to hand over possession. The developer must pay the LAD to the purchaser at once, without further ado, once there was a late completion of housing project. In fact there is no obligation on the part of the purchaser to give notice to the developer about his intention to claim LAD. However in real practice, claiming the LAD is not as simple as it supposed to be since most of the time the developer refuses to pay the LAD for various reasons. More often than not the developer claims that he has no money to pay the LAD or he can only pay less amount of damages. In other occasions the developer substitutes the LAD with other items such as electrical goods, hotel voucher, golf club membership etc. As NCCC notes;

“In most cases, developers who delay the vacant possession process have to pay damages to the purchaser. This is specified in the sale and purchase agreement and also by operation of law. However, developers will not pay according to the principal sum, but will pressure the purchaser to accept a lesser amount. The consumer who has no choice will accept to avoid getting entangled in a long drawn battle in the court” (NCCC Annual Report 2010).

Moreover, as a 'non-litigious society', many buyers have opted to accept the LAD offered by the developer and waived their right to claim the full amount in the Tribunal or court. On the other hand, those who decide to exercise their rights to claim LAD may be faced with certain difficulties and challenges.

### Claiming LAD in the Tribunal

The Tribunal for Homebuyer Claims (THC) was established under the HDA as part of major revamp to the Act in 2002. The amendment aimed at providing better protection to house buyers in Peninsular Malaysia. Part VI was newly included in the amendment which established the THC and came into operation on 1<sup>st</sup> December 2002. It is one of the agencies under the jurisdiction of the Ministry of Urban Well-being, Housing and Local Government (MUWHLG). The main function of the THC is to provide an efficient, cheap and informal redress mechanism for house purchasers. The THC has received considerably good response from the public and since its operation until December 2011, more than 30,000 cases have been filed as shown in Table 1. In other words, the Tribunal has received approximately 3,500 cases per year.

Table 1- Cases filed in the Tribunal for Homebuyer Claims 2003 – 2011

Year	No of cases
2003	3554
2004	6523
2005	5622
2006	3710
2007	3299
2008	2465
2009	1990
2010	1747
2011	2907

Source: the Tribunal for Homebuyer Claims

The type of claim that can be filed in the THC is divided into two, technical and non-technical. A technical claim includes claims relating to unsafe structure and poor workmanship, lack of basic amenities and non-compliance with the housing specification stated in the sale and purchase agreement. A common example of a non-technical claim is the claim for LAD and nearly 90% of the cases were on this issue. Table 2 illustrates percentage of LAD cases filed in the TCC in 2006 until 2011.

Table 2 - Statistic of LAD cases 2006-2011

Year	Number of cases	LAD cases	Percentage (%)
2006	3,821	3,711	97.1
2007	3,299	2,911	88.2
2008	2,488	2,258	90.8
2009	1,990	1,793	90.1
2010	1,747	1,620	92.7
2011	2,907	2,285	78.6
Total	16,252	14,578	89.7

Source: The Tribunal for Homebuyer Claims

However the THC's jurisdiction is restricted to claims made by homebuyers which is defined in section 16A of the HDA as a purchaser who has bought a property or has dealing with a licensed housing developer. This also includes the second purchaser who purchased the property from the first purchaser under a sub-sale.

The jurisdiction of the THC is also limited to a claim that is based on a cause of action arising from a sale and purchase agreement entered into between the homebuyer and the licensed housing developer. Consequently unlicensed developers and other parties in the construction industry such as contractors, engineers and architects cannot be sued in the THC.

Any claims against other than the developer need to be filed in the ordinary court based on breach of duty under the law of torts. For example in *Hor Wei Kheng & Anor Tam Mui Ee v Rakyat Corporation Snd Bhd & Ors* [2010] MLJU 321, the 2nd and 3rd defendants (the architects) were held 30% liable for causing the delay to deliver the vacant possession on time. The THC's jurisdiction is also restricted to claims the amount of which does not exceed RM50,000. In view of present market value of houses in Malaysia, this limitation may deprive many victims of late delivery of vacant possession to claim their right in the Tribunal.

Another major drawback of the Tribunal is that it has no power to enforce the awards. The enforcement of the award is the responsibility of the winning party (Section 16AC(b) of the HDA). Consequently in cases where the respondent fails to comply with the award, the claimant himself would have to go to the ordinary court for execution of the order. In practical reality, this causes difficulty to consumers since the execution procedure under the Subordinate Courts Rules 1980 is not a simple process. As a result some consumers never obtained their compensation at all.

The THC has taken a positive step to reduce non-compliance with the award by allowing the housing developers to pay damages by installments. Despite this initiative, the cases of failure to comply with the Tribunal's award continue to occur. This arguably, may have an impact on consumers' confidence on the Tribunal since winning the case does not guarantee that they will receive the compensation. Table 3 shows a number of non-compliance cases for the past 10 years (2003-2012). The highest numbers of cases were recorded in 2005 (1009 cases) where 126 developers failed to comply with the Tribunal's order and the total amount of award involved in the dispute is nearly RM12 million.

Table 3 – Cases of Failure to Comply with the THC Awards (2003-2012)

Year	Number of cases	Number of developers	Amount of awards (RM)
2003	132	32	1,186,070.84
2004	410	68	4,875,278.36
2005	1009	126	11,984,111.68
2006	1000	140	11,316,353.88
2007	390	87	4,277,151.45
2008	433	86	10,379,821.41
2009	303	69	6,327,097.22
2010	250	64	3,675,150.69
2011	516	39	8,755,213.02
2012	299	57	6,368,329.91
Total	4742	768	69,144,578.46

Source: The Tribunal for Homebuyer Claims

In addition, just like other inferior courts or quasi-judicial bodies, the awards of the THC may be subject to judicial review on question of law. Judicial review is a form of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. The number of cases decided by the THC that have been subjected to judicial review is illustrated in Table 4. The percentage is perhaps small (less than 10% of the total claims) and the highest number was recorded in 2007 (243 cases).

Table 4 – Judicial Review of the THC's Awards 2003 – 2012

Year	Number of cases
2003	79
2004	92
2005	76
2006	160
2007	243
2008	157
2009	135
2010	38
2011	34
2012	86
Total	1,100

Source: The Tribunal for Homebuyer Claims

This procedure has been used by developers to challenge the Tribunal's findings. In *Faber Union Sdn.Bhd v Tribunal Tuntutan Pembeli Rumah & Ors* [2011] MLJU 732, the housing project was launched in June 2004 and was re-launched in January 2006. Based on the developer's brochures and representation that vacant possession was to be delivered by June 2006, the respondent (buyer) agreed to buy one of the houses and paid the deposit on January 2006. The SPA was signed on April 2006. Vacant possession was only delivered on March 2007. The respondent claimed damages for late delivery and was granted by the Tribunal. The developer applied for an order of certiorari to quash the award. They contended that vacant possession was delivered within the period stipulated under the SPA (24 months). The court decided in favour of the Tribunal as the court found that the Tribunal's award does not suffer from the infirmities of illegality, irrationality or procedural impropriety.

Although the decision appears favourable to consumers and the Tribunals, it does not deter developers particularly 'repeat offenders' who are backed by huge financial resources and legal experts from challenging the awards. On the other hand consumers who are dragged into the process may not be able to defend themselves without assistance from lawyers or consumer associations. For the same reason judicial review will not be used by consumers although there are instances where the Tribunal's awards were not in their favour or they are not satisfied with the decisions and there is no other way for them to challenge the awards. Despite the noble concept of judicial review, it may have an impact on consumers' confidence in seeking justice through the THC.

### Claiming LAD in the Court

Due to limited pecuniary jurisdiction of the THC, there are instances where house purchasers need to file their claims for LAD in the ordinary court. An analysis of number of court cases on LAD indicates the judicial inclination in favour of consumers in holding the true spirit of the HDA to protect house buyers. In *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 262, the court held that the purchaser can terminate the contract of sale and demand the refund of all monies paid since the vacant possession was not delivered on the scheduled date. Similarly, in *Diong Tieow Hong & Anor v Amalan Tepat Sdn Bhd* [2008] 3 MLJ 411, it was decided that the house purchasers who cancelled the sale and purchase agreement due to delay in completion of the houses are entitled to ask for refund of all monies paid and claim LAD up to the date of the termination. The court also decided that in cases of subdivided building, the purchaser is not only entitled to claim LAD for the unit of his/her house but also LAD for late delivery of common facilities. The same judgement can be found in *Hariram A/L Jayaram & Ors v Sentul Raya Sdn Bhd* [2003] 1 MLJ 22.

The court has also been consistent in holding that the doctrine of frustration under the Contract Act 1950 does not apply to a contract of sale between purchaser and housing developer. Example of cases on this point is *Tai Kim Yew & Ors v Sentul Raya Sdn Bhd* [2004] 4 MLJ 227, where a group of purchasers claimed LAD against the defendant for the delay in the delivery of vacant possession. The defendant, *inter alia*, argued that there was a frustration of the contract due to the defendant's dire financial position brought about by the 1997-1998 national economic crisis which was beyond its control. However this contention was rejected by the court on the ground that the S&P is not an ordinary contract since all the terms and conditions are actually imposed by law upon the parties. As such the Contract Act has no relevance in this regards. The court also stresses that the phrase 'shall pay immediately' in clauses 22(2) and 24(2) of the agreement means that the right to be paid LAD is automatic once there was delay by the developer to hand over possession or to complete the common facilities.

In addition, the court has also allowed the purchaser to get the LAD by way of setting off. In *Neoh Khoon Lye v Trans-Intan Sdn Bhd*. [2002]6 MLJ 8, the developer notified the plaintiff of the delivery of vacant possession of the property after a delay of 431 days. The plaintiff was to pay the sums of RM51,729.57 and RM2,300 to the developer being the final progressive payments. The plaintiff subsequently made the payments after setting off the LAD against the progressive payment but the developer refused to accept and returned the plaintiff's cheques. The High Court of Penang held that the plaintiff is entitled to set off the payments of the balance of the purchase price with that of damages for late delivery. Although this decision is obviously favourable to purchaser, in practice the developer will demand the purchasers to make full payment before handing over keys to the houses.

However, there are cases which do not seem to side with the consumer. For example in *Limmewah Development Sdn Bhd v Dr Jasbir Singh* [1993] 2 AMR 1263, it was decided that the purchaser cannot claim his or her actual loss if the loss is more than the total amount of LAD. In this case, the house which should have been handed over to the purchaser on August 25, 1981 was only completed in January 1985. The purchaser sued the developer the actual loss and expense which he incurred as a result of the long

delay. But it was rejected by the court on the ground that in view of the remedy provided under the HDA, the plaintiff cannot recover anything further or beyond it. The court has also decided that LAD cannot be claimed against 'white knights' (a person who has taken over 'problematic housing project' from the original developer) simply because the white night agreement has waived the purchasers' right to LAD (*Tan Sri G Darshan Singh v Loke Kee Development Sdn Bhd & Anor* [2009] 7 MLJ 157). Any claims for LAD may be filed against the original developer if the company is still in business. Above all, litigation is not only expensive but time-consuming, worrisome and complex. The majority of Malaysian consumers have few dealings with lawyers and legal proceedings and thus for them the mere thought of being involved in a court case is perhaps uncomfoting (Rachagan, 1992). Thus despite the courts' sympathetic judgement and constructive interpretation of housing law in favour of purchasers/consumers, the ordinary court system is not a right and practical place to seek justice for majority consumers. It may be used as a last resort.

### **Solving the Problems of Late Delivery**

Damages for late delivery and its related problems is a direct consequent of a delay in completion of housing project which has been accepted is a common phenomenon in this country (Sambasivan and Soon, 2007) . Thus the best solution to avoid the problem is by preventing or at least minimizing the occurrence of late completion. On this issue there has been many suggestion that the present system of 'sell then build' to be replaced with 'build then sell' system as practiced in many developed countries such as Australia and UK (Sufian and Sopian, 2009). Under this scheme, a buyer would pay 10 per cent down payment for a house and the rest after the project is completed. There would be no issue of late delivery since the developer will strive very hard to complete the house on time to get full payment as well as profit from the project. Furthermore any delay in the project will not have serious effect on purchasers since only small portion of payment has been made and they can simply cancel the agreement in the event of breach of contract by the developer for its failure to deliver the vacant possession according to the schedule.

While waiting for 'build then sell' scheme to be fully implemented in Malaysia, there is a need to improve the present construction processes which contributed to the delay. It has been argued that the developers and relevant government agencies are the main bodies responsible for causing the delay and subsequent abandonment of project (Nuarrul Hilal, 2009). Relevant authorities involved in housing development especially the MUWHLG contribute to the project delay due to delay in granting approval, lack of enforcement and monitoring and unreasonable variation of conditions for planning permission and plan's approval, in the course of construction of project and for obtaining the CCC. In this respect a 'delay' may be seen as a 'contagious deceases' which finally affected so many people.

From consumers' point of view, LAD is to compensate their financial, social and emotional problems while patiently waiting for keys to the houses. Thus there must be effective mechanism for immediate and automatic payment of LAD. Since the damages by way of setting off has been recognized by the court, it should be considered as practical solution to solve the problem of claiming LAD by making it as part of compulsory procedure in handling over vacant possession. It is also perhaps timely for housing industry in Malaysia to consider the introduction of home warranty insurance which among the coverage is the payment of LAD. At the same time some form of incentives should be provided for developers who have successfully completed their housing projects early or on time. This may encourage them to be more efficient, creative and innovative in avoiding or solving the problem of delay.

### **Conclusion**

The issue of late and delay is a reflection of inefficiency in housing industry. It has a negative implication on business reputation of all parties involved in construction industry – developers, contractors, consultants etc. But the ultimate victim of delay is the end-user of the construction product, i.e. the purchaser. It is thus

fair and reasonable principle of law that the victim of late delivery of vacant possession to be awarded with automatic and fixed calculation of compensation. This right should be honoured by responsible developers without further delay and excuses. Nonetheless many developers have taken advantage of the loopholes of present redress mechanism especially the THC where winning the case does not guarantee that the purchaser will receive the compensation. This scenario, to certain extent has influenced a purchaser to accept the offer given by a developer irrespective whether such an offer is equivalent or not to what he actually entitled according to contract. Thus a special mechanism needs to be introduced for immediate and automatic payment of LAD.

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