

HOW THE COVID-19 PANDEMIC AFFECTS YOUR CONVEYANCING TRANSACTIONS AND TENANCIES?

The Covid-19 pandemic and the resulting Movement Control Order (MCO) imposed by the Government have undeniably raised a slew of legal issues, and conveyancing transactions and tenancies have not been spared.

Below are some of the common issues that may arise in relation to your conveyancing transactions and tenancies, during this unprecedented period:

A SALE AND PURCHASE OF PROPERTIES

(a) What if the SPA (sale and purchase agreement) is unable to be completed due to the Covid-19 pandemic?

A situation may arise where a party is unable to complete the SPA within the contractually prescribed time period e.g. where the completion period or extended completion period expires within the MCO period, or for other reasons related to the pandemic.

The effect of this will depend on the contractual terms, fact and circumstances of each SPA transaction. Some SPAs may include a *force majeure* clause which scope will have to be assessed. Some force majeure clauses (if there is one in the SPA), may provide that a party shall not be liable to the other party for any loss, damages or delay due to any government action which are not attributable to the default of the party, or any other cause which is not reasonably foreseeable by the party.

If there is no such *force majeure* clause or if the wording of the relevant clause does not cover the present circumstances, it is strictly a matter for the contracting parties to resolve and/or negotiate within the ambits of the contract.

Further, in the absence of a *force majeure* clause, the parties may rely on the doctrine of frustration of contract under Section 57(2) of the Contracts Act 1950. Section 57(2) provides that "A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful". The doctrine of frustration occurs whenever a contract, after its formation, becomes impossible to perform without any default by either parties and will render the contract as void. However, as Covid-19 pandemic is a new occurrence the answer as to whether it is a ground for frustration of contract will depend on, *inter alia*, the nature of the contract and the length of the delay.

- (b) *Where an offer to purchase has been made and accepted before the pandemic, can the purchaser now refuse to execute the SPA and to proceed with the purchase?***

Again, this depends on the terms of the offer. Usually an offer to purchase will only state the general terms in respect of the purchase such as the details of the parties and the property, the purchase price and the relevant timeline for completion as the parties will subsequently negotiate on further and more detailed terms before they execute the formal SPA.

Ultimately, the contractual terms, facts and circumstances of each offer are different and in the absence of any clear contractual term, all parties, including the purchaser, the vendor, the solicitors and the real estate agent (if any), can attempt to negotiate on the matter, and come to a solution acceptable to all.

- (c) *For transactions under the Housing Development (Control & Licensing) Act 1966 (“HDA”), is a purchaser entitled to an automatic extension period, free from interest, if the progressive payment became due during the MCO period?***

There is no express condition in the prescribed contracts of sale under the HDA to allow the purchaser an automatic extension period, free of interest for progressive billings issued or becoming due for payment during the MCO period, or otherwise due to the pandemic. The parties may however, negotiate amongst themselves to address any issues or difficulties that may arise due to the MCO or the pandemic.

- (d) *What about payment of stamp duties?***

An instrument is required to be stamped within 30 days of its execution if executed within Malaysia or within 30 days after it has been first received in Malaysia if the instrument is executed outside Malaysia. If the instrument is not stamped within the period stipulated, a penalty may be imposed.

In accordance with the LHDN FAQ, documents which deadline for payment of stamp duty falls between 18 March 2020 and 30 May 2020 may be stamped by 31 May 2020 without penalty.

- (e) *What if the deadline for presentation of an instrument of transfer or an instrument of charge for registration at a relevant land office or land registry fell within the MCO Period?***

An instrument of transfer or an instrument of charge must be presented for registration at a relevant land office or land registry within three months from the date of the said instrument failing which a penalty may be imposed.

In general, most land registries and land offices in Peninsular Malaysia have issued circulars relating to waiver of penalty for late presentation due to the MCO.

B **TENANCIES**

(f) *Is the tenant entitled to rent rebate or waiver due to the Covid-19 pandemic?*

It is trite that where a contract is in writing, the intention of the parties must be found within the four walls of the contractual documents. If there is no such “entitlement” or “waiver” expressly provided in the agreement, then the tenant would technically have to pay rent as per normal. Any failure or delay on his part to do so would entitle the landlord to take action against the tenant in the manner allowed by the agreement.

That being said, tenant may negotiate with the landlord to work out certain arrangements such as delaying payment of rental, reduction of rental or even suspension of rental during this difficult period.

It is noted that the Prime Minister, in his speech of 6 April 2020, had announced that landlords who waive or reduce rent for small and medium enterprises (SMEs) by at least 30% will receive the equivalent in tax deductions for the months of April until June 2020.

(g) *Can the tenant terminate, and no longer continue with, a fixed-term tenancy due to the Covid-19 pandemic although there is still a portion of the term remaining?*

Tenants who do not have an express termination clause in their tenancy agreements allowing termination in such circumstances as the present will have no right to terminate their fixed term tenancy due to the Covid-19 pandemic. In such event and subject to the contractual terms, facts and circumstances of each tenancy transaction, tenants may consider if the doctrine of frustration which is stipulated under Section 57 of the Contracts Act 1950, in particular, Section 57(2) of the Act which provides “A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful” is applicable to their case or not. Whether or not the tenants will succeed in invoking the doctrine of frustration remains to be seen as the burden is on the tenants to show that the performance of the contract has been rendered *impossible* (and not just merely more difficult to perform).

(h) *What happens if vacant possession cannot be handed over or the tenant is unable to take possession, due to the Covid-19 pandemic?*

Again, there is no standard answer to this question, and it will depend on the contractual terms, facts and circumstances of each letter of offer or tenancy agreement. Nonetheless, the parties can attempt to negotiate and agree on an extended date of delivery of vacant possession and the rent-free period.

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