



TAY & HELEN WONG
LAW PRACTICE • AMALAN GUAMAN

LAW UPDATE

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RECENT AMENDMENTS TO HOUSING DEVELOPMENT (CONTROL AND LICENSING) ACT 1966

In this Special Issue, we wish to draw your attention to some of the recent amendments to the Housing Development (Control and Licensing) Act 1966 ("the HDA") which were effected through the Housing Development (Control and Licensing) (Amendment) Act 2007 (Act A1289) that came into force on 12 April 2007. The amendments featured herein do, in our belief, have a significant impact on some of the conveyancing practices currently observed in Malaysia and on the housing industry in general.

1. Developer's consent not required for sales of properties without separate or strata title

Whereas the consent of developer to a sale of property without separate or strata title has been required as a matter of course, the newly introduced Section 22D in the HDA obliterated such necessity. Indeed, it is an offence for any person to require any consent from a housing developer to any such sale or for any housing developer to require such consent--- S.22D(5) and (6) of the HDA states the penalty as a fine between RM50,000 to RM100,000 or imprisonment for a term of not exceeding three years or both.

S.22(D)(1) of the HDA provides that an absolute assignment in writing by the assignor of a property¹ (ie. the vendor), not purporting to be by way of charge only, of the proprietary right or interest in the property and the legal chose in action in the sale and purchase agreement in respect of a property, shall be deemed to have been effectual in law to pass and transfer the proprietary right, interest, chose in action and all legal and other remedies for the same to the assignee (ie. the new purchaser), provided certain conditions have been met. **The concurrence of the housing developer shall not be required.**

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The conditions that are required to be fulfilledⁱⁱ are as follows:-

1. Notice of assignment in writing must be delivered by the assignor or his solicitors to the housing developer at or after the completion of the sale and purchase between the assignor and the new purchaser of the property.
2. Such notice of assignment must be accompanied by:
 - (a) duly stamped sale and purchase agreement between the assignor and the new purchaser, if any;
 - (b) duly executed deed of absolute assignment between the assignor and the new purchaser together with, if applicable, a letter of undertaking from the new purchaser or the new purchaser's financier (as the case may be) to deliver the duly stamped deed of absolute assignment within 14 days after the same has been stamped;
 - (c) full payment of all sums and outgoings due to the housing developer under the sale and purchase agreement.

Subject to payment of a fee not exceeding RM50.00, a purchaser of the property or his solicitors or his financier or his financier's solicitors is entitled to request from the housing developer who is duty bound to provide confirmation in respect of:-

- (i) full particulars of the property;
- (ii) the postal address of the property;
- (iii) the current purchaser of the property;
- (iv) the current chargee or assignee of the property;
- (v) the total amount due to the developer under the sale and purchase agreement as at the date of the confirmation;
- (vi) such other matter as may be prescribed from time to time.ⁱⁱⁱ

The term "new purchaser" has been expressly stated to include a purchaser's financier or any beneficiary under the estate of a deceased purchaser or an assignee under an absolute assignment whether with or without consideration.^{iv} Thus, the new Section 22D of HDA covers transmission of property due to the demise of the proprietor and transfer of property not in pursuance of a sale and purchase agreement, eg. in consideration of love and affection. In such event, for the purpose of determining the time to notify the housing developer under Section 22D(2) of the HDA, the phrase "completion of the sale and purchase" in the said Section 22D(2) of the HDA shall mean the date of the deed of absolute assignment and Section 22D(2)(a) (which requires delivery of the duly stamped sale and purchase agreement between the assignor and the new purchaser) is also not applicable.

2. Wrongful Release of Stake Money and Wrongful Certification of Progress Works

It has now been made an offence for any stakeholder to release any money to a housing developer if such stakeholder knows that such release is contrary to the provisions of the sale and purchase agreement^v. Likewise, any architect or engineer who issues a progress

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certification knowing that the works therein referred to have not been completed in accordance with the provisions of the sale and purchase agreement shall be guilty of an offence^{vi}. On both instances, the wrongdoer is punishable by a fine between RM10,000 to RM100,000 or imprisonment for a term not exceeding five years or both.

Any person who knowingly and willfully aids, abets, counsels, procures or commands the commission of such an offence is also punishable with similar punishment provided for the offence.

3. *Locus Standi* to Sue Developer where Rights Have Been Assigned to Financier

Prior to the amendment vide Act A1289, Section 22C of the HDA provides that notwithstanding any written law or rule of law, a homebuyer^{vii} shall be entitled on his own volition and in his own name to commence and maintain an action or suit in a court or tribunal against a housing developer or any other person in respect of any matter arising out of the sale and purchase agreement entered between the purchaser and that housing developer **unless a contrary intention is expressed in the agreement, assignment or charge between the homebuyer and his financier in which case prior written consent of the financier must first be obtained before such action or suit** (the words in italics are referred to as “the said Exception”). Further amendments made to Section 22C of the HDA have taken away the said Exception and confer absolute right on the homebuyer to sue the housing developer without the need to obtain any consent^{viii}. At the same time, the scope of “notwithstanding” has been enlarged to cover “*agreement, assignment or charge lawfully entered into between a homebuyer and his financier*”. The amendment makes it crystal clear that no one can contract out of Section 22C. The only additional requirement introduced by the amendment is that the homebuyer’s financier must be notified in writing either before or within 14 days after the action or suit against the housing developer has been filed.

It is noteworthy that this amendment is applicable to any agreement, assignment or charge entered before 12 April 2007^x.

4. Expanded Scope of the Types of Housing covered by the Act

Whilst prior to 12.4.2007, the types of housing accommodation under the HDA do not include ‘*accommodation erected on any land designated for or approved for commercial development*’ (“the said Exclusion”), the definition of “housing accommodation” has been amended to delete the said Exclusion. The new definition covers ‘*such other type of accommodation as may be prescribed by the Minister from time to time to be a housing accommodation pursuant to section 3A*’^x. A new Section 3A has been inserted in the HDA which empowers the Minister to prescribe any type of accommodation to be a housing accommodation by order published in the Gazette and the Minister’s decision shall be final and shall not be questioned in any court^{xi}.

By such amendment, serviced apartments appear to have been effectively brought under the ambit of the HDA^{xii}, the part of the definition of “housing accommodation” which ‘*includes any building, tenement or messuage which is wholly or principally constructed, adapted or intended for human habitation or partly for human habitation and partly for business premises*’ being unchanged.

It is also noteworthy that housing developer of housing development on any land designated for or approved for commercial development in respect of which vacant possession of any housing accommodation in such housing development has not been handed over by 12

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April 2007 is duty-bound to apply for a housing developer's licence under the HDA within six months from such date.

5. Freezing of Housing Development Account

Extensive powers have been given to the Controller of Housing to freeze the Housing Development Account of a licensed housing developer whom he has reason to believe to have carried on business in a manner detrimental to the interests of the purchasers or contravened any of the provisions of the HDA. The Controller is empowered to direct any banking and financial institution not to part with, deal in or otherwise permit any withdrawal of any moneys from such account. Banking and financial institution acting on such order in good faith has been given protection from liability or claim^{xiii}.

ⁱ For ease of terminology, the generic term "property" is used instead of "housing accommodation" which is the exact term employed in the HDA and which defines the types of building that are governed by the HDA.

ⁱⁱ Section 22D(2) of the HDA

ⁱⁱⁱ Section 22D(4) of the HDA.

^{iv} Section 22D(7) of the HDA.

^v Section 22E of the HDA.

^{vi} Section 22F of the HDA.

^{vii} "Homebuyer" is defined as a purchaser and includes a person who has subsequently purchased a property from the first purchaser of the property.

^{viii} Section 26 of Act A1289.

^{ix} Section 29(2) of Act A1289.

^x Section 4(b) of Act A1289.

^{xi} Section 5 of Act A1289.

^{xii} See the article "Serviced apartments now under housing law" in New Straits Times, April 28, 2007 at P5.

^{xiii} See the new Section 7C of the HDA.

CONTACT US

For further information, explanation or analysis of the subject matter covered in this issue or to provide feedback, please contact us at:

TAY & HELEN WONG
LAW PRACTICE
Suite 703 Block F Phileo Damansara I
No. 9 Jalan 16/11
46350 Petaling Jaya
Selangor Darul Ehsan
Malaysia
Tel (603) 79601863 Fax (603) 79601873
email: lawpractice@thw.com.my

If you wish to unsubscribe, please email us at lawpractice@thw.com.my

To know more about us, please visit our website at www.thw.com.my

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