

Corporate Real Estate

Contracts between Housing Developers and Buyers Added to Scope of COVID-19 Temporary Relief

Introduction

On 13 May 2020, the Government announced amendments to the COVID-19 (Temporary Measures) Act ("**Act**") and the COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020 ("**new Regulations**") (collectively, "**Updated Regulations**").

Without prejudice to the operation of the common law on frustration of contracts, or the applicability of the Frustrated Contracts Act, or a force majeure clause,¹ the new amendments allow property purchasers of a unit in a housing accommodation from housing developers ("**property purchaser(s)**") to obtain temporary relief under Section 5 of the Act for their inability to perform their obligations under (i) an option given by a housing developer to an intending property purchaser ("**Option**"),² and/or (ii) a sale and purchase agreement between a housing developer and a property purchaser ("**Agreement**").³

Criteria of Application

In order for a property purchaser to obtain relief, the following criteria must be satisfied:

- (a) the Option and/or the Agreement (as the case maybe) must be entered into or renewed (other than automatically) before 25 March 2020;⁴
- (b) the property purchaser must be unable to perform an obligation in the Option and/or the Agreement (as the case maybe), which is to be performed on or after 1 February 2020;⁵
- (c) the property purchaser's inability to perform the obligation must be caused by a "COVID-19 event" and its inability to perform must be to a "material extent";⁶ and

Contribution Note: This Client Update was written by Gazalle Mok, Partner, Corporate Real Estate, with contributions from Dexter Yeo, Associate, from Corporate Real Estate.

¹ S 5(13) of the Act.

² S 4(1) read with paragraph 1(i) of The Schedule of the Act.

³ S 4(1) read with paragraph 1(j) of The Schedule of the Act.

⁴ S 4(1) of the Act.

⁵ S 5(1)(a) of the Act.

⁶ S 5(1)(b) of the Act.

Corporate Real Estate

- (d) the property purchaser must serve a notification for relief on the housing developer.⁷

Where all of the requirements stated in items (a) to (d) above are satisfied, the housing developer will not be allowed to pursue, *inter alia*, the following:⁸

- (a) increase the rate of interest payable under the contract unless the amount of the increase is specified in the contract or is to be calculated by reference to a formula or other matter (such as a reference rate) set out in the contract;⁹
- (b) the withholding or forfeiture of any part of the booking fee or other consideration paid for an Option;¹⁰ and
- (c) the termination by the housing developer of an Agreement;¹¹

(collectively, "**Temporary Relief**"). The Temporary Relief will be in force for 6 months until 19 October 2020 ("**relief period**") (unless shortened or extended by the Government),¹² barring any withdrawal of notification for relief by the purchaser.¹³ However, under Regulation 3(A)(3) of the new Regulations, the Temporary Relief will not apply to anything done before the same came into effect on 13 May 2020.

Temporary Relief Under the Updated Regulations

If a property purchaser is able to obtain Temporary Relief in relation to its contractual obligation in an Option, it means that a housing developer will not be able to withhold or forfeit any part of the booking fee or other consideration given by the purchaser, even if the purchaser fails to exercise the Option at the end of the Option's exercise period.¹⁴ However, if the Temporary Relief sought by the property purchaser for a full refund of the booking fee or other consideration given by the property purchaser is not acceptable to the housing developer, then either party can make an application for an assessor's¹⁵ determination. The assessor will then seek to achieve an outcome that is just and equitable in the circumstances including whether the full or part of the booking fee or other consideration given by the purchaser is to be refunded to the property purchaser.

This Temporary Relief is only available if it is sought before the expiry of the relief period and in respect of an Option issued to the property purchaser before 25 March 2020¹⁶ with an Option exercise period

⁷ S 5(1)(c) and S 9 of the Act read with rule 9(1) of the new Regulations.

⁸ Other actions that a housing developer will not be allowed to pursue are listed under s 5(3) of the Act.

⁹ S 3A(1)(a)(i) of the Act.

¹⁰ S 5(3)(o) of the Act read with s 3A(1)(d) of the new Regulations.

¹¹ S 5(3)(o) of the Act read with s 3A(1)(e) of the new Regulations.

¹² S 5(2) of the Act read with s 2 of the COVID-19 (Temporary Measures) (Prescribed Period) Order 2020.

¹³ S 5(2)(b) of the Act.

¹⁴ This is stated under s 11(2) of the Housing Developers Rules to be three weeks starting from the date after the delivery to the Option holder.

¹⁵ S 11 of the Act.

¹⁶ S 4(1) of the Act.

Corporate Real Estate

that falls on or after 1 February 2020.¹⁷ The new Regulations does not vary the terms of the Option, such as extending the exercise period of the Option.

For a property purchaser who has entered into an Agreement with a housing developer, the Temporary Relief granted will allow the property purchaser to defer payment obligations under the Agreement subject to the payment of late payment interest¹⁸ (if provided for in the Agreement) until the expiration of the relief period as the housing developer will not be able to terminate the Agreement under the new Rule 3A of the new Regulations. In other words, since the housing developer is prohibited from terminating the Agreement during the relief period, the housing developer will not be able to put up the unit for resale to another purchaser who may be able to buy it at an earlier date.

Other Points to Note

Interestingly, from the Ministry of Law's press release¹⁹ in respect of the Updated Regulations, it is mentioned that housing developers are also entitled to seek temporary protection from being sued during the relief period in respect of a breach of the housing developer's contractual obligations from 13 May 2020 (when the new Regulations came into effect), if they are unable to perform any contractual obligation due to COVID-19. This is so even though such a temporary protection is not reflected in the Updated Regulations.

Nevertheless, regardless of whether it is the property purchaser or the housing developer that seeks to obtain Temporary Relief or temporary protection from being sued (as the case maybe) during the relief period, the other party or parties to the contract in question can still attempt to thwart such an attempt for an application for Temporary Relief or temporary protection from being sued (as the case maybe) by applying to the Registrar to appoint an assessor to determine whether the case is one that falls under Section 5 of the Act.²⁰ This means that the party or parties to the agreement must allege that the (i) inability to perform an obligation in the Agreement is not to a "material extent",²¹ (ii) the inability to perform the obligation is not caused by a "COVID-19 event",²² (iii) the notification was not served properly,²³ or (iv) (in the case of the housing developer seeking temporary relief) the obligation that the housing developer is allegedly unable to perform is to be performed before 1 February 2020.²⁴

Separately, the new Regulations further provide that the same does not apply to anything done before 13 May 2020.²⁵ Understandably, if an Agreement was already terminated by a housing developer, the

¹⁷ S 5(1)(a) of the Act.

¹⁸ Condition 9.1 of the Law Society's Conditions of Sale 2012.

¹⁹ (<https://www.mlaw.gov.sg/news/press-releases/enhancements-to-the-covid-19-temporary-measures-act-to-cover-two-new-contracts>)

²⁰ S 9(2) read with s 12 of the Act. The assessor will then have to make a determination after following the rules stated in s 13 of the Act.

²¹ S 5(1)(b) of the Act.

²² S 5(1)(b) of the Act.

²³ The notification for relief must have the required content stated in s 9(1) of the Act to the relevant parties as stipulated in s 5(1)(c) of the Act.

²⁴ S 5(1)(a) of the Act.

²⁵ Rule 3A(3) of the new Regulations.

Corporate Real Estate

new Regulations do not "revive" such an Agreement. With regards to the withholding or forfeiture of any part of the booking fee or other consideration paid under an Option issued before 25 March 2020 with an Option exercise period expiring on or after 1 February 2020, a property purchaser will not be able to benefit under the new Regulations if the booking fee or other consideration (or any part thereof) was withheld or forfeited by the housing developer before 13 May 2020.

For example, a property purchaser who was issued an Option before 25 March 2020 with a contractual obligation to exercise the Option on or after 1 February 2020, had failed to exercise the Option within the prescribed option exercise period, and consequently had its booking fee or other consideration (or any part thereof) forfeited by the housing developer prior to 13 May 2020; the property purchaser will not be able apply for Temporary Relief under the new Regulations.

In general, property purchasers who bought units governed under the Housing Developers (Control and Licencing) Act and the Housing Developers Rules with Options granted before 25 March 2020 would have lapsed prior to 13 May 2020 and the booking fees or other consideration (or any part thereof) paid to housing developer could have been forfeited earlier than 13 May 2020, unless for some reason the refund process of part of the booking fee or other consideration (or any part thereof) by the housing developer was somehow delayed. Where an option was issued before 25 March 2020 and has lapsed earlier than 13 May 2020, but 25% of the booking fees (or any part thereof) has not yet been forfeited by 13 May 2020, it may be advisable to seek clarification as to whether the housing developer is still entitled to forfeit the said 25% of the booking fees (or any part thereof) pursuant to clause 5.1 of the Option.

Conclusion

In summary, it can be seen that the Updated Regulations enacted offer much relief to property purchasers if they meet the criteria above. This is because the housing developers will not be able to forfeit or withhold the booking fee or other consideration due to the property purchaser's failure to exercise an Option, and the housing developers are also unable to terminate an Agreement if the purchaser fails to perform its obligations on time.

The Updated Regulations also strive to strike a balance by providing temporary protection to housing developers with respect to their contractual obligations under an Option and an Agreement as well, albeit only for the duration of the relief period under the Act (which is six months from 20 April 2020, unless otherwise reduced or extended), after which the right to bring an action will resume.

For further queries, please feel free to contact our team below.

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