



CAN VACANT POSSESSION BE VALIDLY DELIVERED WHEN IT IS NOT FIT FOR OCCUPATION YET?

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Icon City Development Sdn Bhd v K-Shin Corporation Sdn Bhd [2022] 9 CLJ 827, explored the questions of computation of Liquidated Ascertained Damages (“LAD”), delivery of vacant possession and the issuance of Certificate of Completion and Compliance (“CCC”) for commercial properties.

Facts

The plaintiff (“K-Shin”) entered into a Sale and Purchase Agreement (“SPA”) with Icon City Development Sdn Bhd (“Icon City”), the first defendant, to purchase a shop office. The date of completion and delivery for vacant possession of the shop office was 36 months from the date of the SPA which was 04.06.2015. Nevertheless, the architect granted a further 6 months of extension of time to the developer, which was allowed under the SPA.

On 30.12.2015, Icon City issued a letter to K-Shin informing that vacant possession of the shop office was ready to be delivered together with a CCC from the architect. In accordance with the SPA, K-Shin would then be deemed to have taken possession of the property within 14 days from the date of the letter.

Clauses 13.2.1 and 13.2.2 of the SPA provide the manner in which vacant possession is delivered:

“13.2 Manner of vacant possession

13.2.1 Upon issuance of a certificate by the Developer's architect certifying that the construction of the Said Parcel has been duly completed and the Purchaser having paid all monies payable under this Agreement and having performed and observed all terms and conditions on the Purchaser's part under this Agreement, the Developer shall let the Purchaser into possession of the said Parcel PROVIDED ALWAYS THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel or to make any alterations additions or otherwise to the said Parcel until such time as the Certificate of Completion and Compliance for the said Parcel is issued.

13.2.2 Upon the expiry of fourteen (14) days from the date of notice from the Developer requesting the Purchaser to take possession of the said Parcel ... the Purchaser shall be deemed to have taken delivery of vacant possession of the said Parcel...

The issue was, at the time of the letter, the electricity supply, water supply and the permanent access road to the shop office (collectively referred to as “Essential Amenities”) were not made ready or available. The Certificate of Completion and Compliance (“CCC”) has also not been issued for the Project and remains outstanding.

On 25.2.2016, Icon City purportedly delivered the actual vacant possession of the shop office to K-Shin.

Thus, it was K-Shin's position that there was a delay of 265 days from 04.06.2015 to 25.02.2016 and Icon City was liable to pay the Liquidated Ascertained Damages (“LAD”) of RM 1,052,739.73 for the late delivery of the shop office.

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Decision of the High Court

The plaintiff's claim against the defendant for LAD due to the delay in delivery of vacant possession of the shop office **was allowed by the High Court**. It was interpreted by the court that under Clause 13.1.1 and 13.2.1 of the SPA, "delivery of vacant possession" means that the property can be occupied either by the property owner or the owner's tenant or licenses. On the facts, although it was stated by Icon City that the vacant possession of the shop office was ready to be delivered on 30.12.2015, amenities such as electricity and water supplies were yet to be available at that time. Also, it was prescribed in the SPA that vacant possession was deemed to be delivered upon the issuance of the CCC and the full performance of contractual obligations under the SPA by the purchaser. Thus, the court held that vacant possession was deemed delivered only when the CCC was issued to certify that all the essential amenities had been completed by the developer in which the purchasers were given the right to occupy the property.

Decision of the Court of Appeal

The questions of when the vacant possession is deemed to be delivered and whether the plaintiff bears the burden to prove damages were re-examined in the Court of Appeal.

The Court of Appeal opined that the High Court had **erred in interpreting the definition of the manner of vacant possession** under clause 13.2 of the SPA. The High Court had confused the manner of vacant possession and the issuance of the CCC as being one and the same but in fact, they are totally separate events and cater for different situations **under the SPA**. The court further observed that there is no statutory prohibition against the segregation of these two events and the **sanctity of the contract entered between the parties should be preserved**.

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There was a clear difference between “**occupation**” and “**possession**” whereas vacant possession was not synonymous with the right of occupation. As K-Shin was **not given a right of occupation** when vacant possession was delivered, the issue of **actual electricity and water supply is not relevant**. Thus, the awarded LAD is reduced to RM 834,246.00 which is calculated from 04.06.2015 until 30.12.2015 instead of 26.08.2015 as the **delivery of vacant possession was deemed completed** on 30.12.2015 **regardless of whether the amenities have yet to be available**.

As for the question of whether the plaintiff bears the burden to prove damages, it was held that the plaintiff **only has the burden to establish that there was a breach of contract**, and that the SPA contains a clause specifying a sum to be paid upon breach. **The burden is then shifted to the defaulting party to prove that the damages clause was unreasonable or unconscionable**. On the current facts, the **agreed rate of LAD** in the SPA is **10% per annum of the purchase price** of the shop office which is **fair and reasonable** and thus, the defendant had **failed to plead and prove that the LAD claim was an unreasonable compensation** for such delay in delivery the vacant possession.

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Key takeaways:

1. Unlike the properties which fall under the Housing Development (Control and Licensing) Act 1966 (where the delivery of vacant possession by the Developer shall be supported by a CCC and water and electricity supply shall be ready for connection to the said Building), there is no statutory protection governing the delivery and manner of vacant possession of other properties.
2. Commercial properties such as shop offices in the present case are not entitled to the statutory protection of the Housing Development (Control and Licensing) Act 1966 and thus, the court would uphold the principle of **freedom of contract** where **parties are free to agree to their own preferred arrangement**. Once the arrangement is finalised in the SPA, **both parties will be bound by the contract**.
3. It is therefore important for developers and purchasers **to be clear about their position** regarding the **manner of delivery of vacant possession** and the issuance of the CCC. This will determine the computation of LAD. The SPA must expressly and clearly set out what constitutes vacant possession, the allocation of responsibility, and the damages that will follow in the event of noncompliance.

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