

RECOVERABILITY OF LIQUIDATED ASCERTAINED DAMAGES

Liquidated ascertained damages or “**LAD**” are pre-agreed damages between parties in the event of a breach of contract. It is meant to compensate the innocent party for losses against the breaching party. For instance:

- 1.1 Party A agreed to compensate Ringgit Malaysia Ten Thousand (RM10,000.00) to Party B if Party A fails to deliver the property within one (1) year;
- 1.2 By the end of that one (1) year, the property was not delivered;
- 1.3 Party A is therefore entitled to the Ringgit Malaysia Ten Thousand (RM10,000.00).

Section 75 of the Contracts Act 1950 (“**CA 1950**”) allows for such damages to be claimed without the innocent party having to prove actual damage:

*“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, **whether or not actual damage or loss is proved to have been caused thereby**, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”*

This relief is most commonly available to property purchasers, whose sales and purchase agreements are regulated by the Housing Development (Control and Licensing) Act 1966 and Housing Development (Control and Licensing) Regulations 1989. In Malaysia, a developer cannot give vacant possession of a property to a buyer without first obtaining a certificate of completion and compliance (“**CCC**”) from the local authority. The CCC is a document issued by the local authority that certifies that a building has been completed in accordance with the approved building plans and complied with all relevant laws and regulations.

As such, the CCC must have been issued so that vacant possession can be delivered. Not having the CCC issued in time puts the developer at risk of having to pay LAD to the purchasers. The rationale behind LAD in the purchase of a property was discussed in great length in the case of *Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 5 MLJ 497. At pages 515-516 of the judgment, Abdul Aziz J (later JCA) held:

*"In a great number of cases in this country, home ownership is acquired through purchase from housing developers with the help of financing from financial institutions on the security of the property. The developer is paid the purchase price in specific stages according to the progress of construction. If there is delay in the completion of the construction, the purchaser may suffer in various ways. He may have to commence paying the loan instalments without getting the enjoyment of the house. If he is renting a house, he will have to pay both the rental and the loan instalments, whereas if there had been no delay in completion, he could have moved into his new house and pay the loan instalments, without also having to pay rental. **If he bought the house as an investment, he would have been deprived of the rental that he would have got from renting out the house. The person who is already living in his own house but is hoping to live in a better new house, and rent out his present house, will be deprived of early enjoyment of the new house and the receipt of rental from his present house, while having to pay his loan instalments. Whatever may be the circumstances and intention of the house buyer, it can be said that in every case, a delay in completion would deprive the purchaser, for the period of the delay, at least of the rental that he would have got from the house had he chosen to rent it out. It would be a substantial loss in theory. But how can he prove what the rental would be for the house, in the area and at the particular time, if, for example, the whole project is delayed so that there is no case on which to base a fair comparison?**"*

Interestingly, prior to 2019, the position of the law was that the party claiming LAD must prove his losses in Court. This means that even though there was a breach which entitles the innocent party to LAD, the innocent party must still bring evidence to the Court that it had actually suffered losses from the breach. The landmark case in this respect is the Federal Court case of *Selva Kumar A/L Murugiah v Thiagarajah A/L Retnasamy* [1995] 1 MLJ 817 ("**Selva Kumar**"). According to the Federal Court at the time, the literal reading of Section 75 CA 1950 goes against an existing law that if a plaintiff seeks to recover damages he must prove them. Peh Swee Chin FCJ held as follows on page 824 of the judgment:

"In particular, from the expression in question, the words, 'whether or not actual damage or loss is proved to have been caused thereby' (they are hereafter 'the words in question'), are unambiguous and plain, and by the primary rule of construction, ie literal construction of the same, they may seem to indicate clearly the dispensation of proof of actual damage or loss by an innocent party to a breach of contract, and this seems to be a departure from the common law brought deliberately about by the legislature. Let us examine the acceptability

of this construction. It is useful to bear in mind that there is no such thing as a fixed hierarchy of application of rules of construction in which the primary rule of literal construction will be at the top of it.

In the first place, such a literal construction would seem to be beyond the object of the section in question, viz the abolition of the distinction between a penalty and liquidated damages; secondly, **it will produce a most unreasonable result in that it will change the existing law which is that if a plaintiff seeks to recover damages for the actual damage caused, he ought to prove them**, unless he is content with the symbolic award, eg of nominal damages, for any infraction of his rights under a contract. This even seems to be a rule of some antiquity."

However, Selva Kumar is no longer the law. The Federal Court in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15 ("**Cubic Electronics**") had dispensed with the requirement to prove actual losses, departing from its earlier decision in Selva Kumar. In this case, the Federal Court held that to claim LAD, the innocent party needs to only prove that there is a breach of contract and a clause specifying a sum to be paid upon breach. Richard Malanjum CJ held as follows at para 65:

"[65] With respect and for reasons we shall set out below, we are of the view that **there is no necessity for proof of actual loss or damage in every case where the innocent party seeks to enforce a damages clause**. Selva Kumar and Johor Coastal should not be interpreted (as what the subsequent decisions since then have done) as imposing a legal straightjacket in which proof of actual loss is the sole conclusive determinant of reasonable compensation. Reasonable compensation is not confined to actual loss, although evidence of that may be a useful starting point."

Once LAD is proved, the defaulting party may only dispute if the said sum constitutes reasonable compensation. What constitutes reasonable compensation is the comparison between the LAD payable and the loss that might be sustained from the breach. Further, the stipulated sum in the LAD clause ought to be proportionate to the contract sum and not exorbitant.

In this respect, it is perhaps vital to note para 68 of Cubic Electronics:

"[68] Consequently, regardless of whether the damage is quantifiable or otherwise, it is incumbent upon the court to adopt a common sense approach by taking into account the legitimate interest which an innocent party may have and the proportionality of a damages clause in determining reasonable compensation. This means that in a straightforward case, reasonable compensation can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if indeed the breach occurred. (Emphasis added.) Thus, to derive reasonable compensation there must not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party."

Considering the above, as a housebuyer, how do you claim for LAD?

The first option is to file a claim at the Tribunal for Homebuyer Claims ("**Tribunal**"). However, all claims at the Tribunal are capped at Ringgit Malaysia Fifty Thousand (RM50,000.00) and must be brought within twelve (12) months from the date of the CCC. The claims are also limited to causes of action arising from the sale and purchase agreements entered into between a homebuyer and a licensed housing developer. The second option is to file your claims in Court. Unlike the claims at the Tribunal of Homebuyers Claims, the claims that are made in Court are not subjected to the capping amount and twelve (12) - month limitation period. The Court has wide powers and discretion to also grant other reliefs as long as one is able to prove their entitlements.

In conclusion, it is easy for parties to promise and even easier for the innocent party to claim for LAD. As such, parties must be cautious in agreeing to any LAD clauses. What originated as a harmless transaction may bring extreme financial repercussions to the defaulting party in the event the LAD clause sets in.

Written by:



Izzat Asyraf Zamri
Partner
izzate@azmilaw.com



**Raja Muhammad Zulqarnain
Raja Abd Rahman**
Associate
zulqarnain@azmilaw.com

Corporate Communications
Azmi & Associates
19 September 2024