



MahWengKwai & Associates

ADVOCATES AND SOLICITORS



Speaker
Michael Koh
Senior Associate



Speaker
Noelle Au Yong
Associate



Moderator
Agalya J Munusamy
Senior Associate

Wed 28 Feb 2024
3:00 pm (GMT +8)

mwka.com/talks

MWKA ONLINE TALKS
Delays and Damages:
LAD Insights and Updates for Developers



DATO.



MahWengKwai & Associates

ADVOCATES AND SOLICITORS



Speaker
Michael Koh
Senior Associate



Speaker
Noelle Au Yong
Associate



Moderator
Agalya J Munusamy
Senior Associate

Wed 28 Feb 2024
3:00 pm (GMT +8)

mwka.com/talks

MWKA ONLINE TALKS
Delays and Damages:
LAD Insights and Updates for Developers



Trusted by small medium enterprises (SMEs),
family businesses and individuals since 1985.

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Our Services



Corporate



Dispute
Resolution



Employment



Individuals &
Families

Our Practice Groups



MWKA Online Talks

- To share knowledge, raise awareness, encourage networking
- For clients, potential clients, in-house counsel
- Recent MWKA Online Talk:
 - 21.02.2024: Navigating the Path from Unofficial Adoptions to Legal Adoptions
- Upcoming MWKA Online Talk:
 - 13.03.2024: Redeemable Convertible Preference Shares: What it is and how it can benefit you?

Michael Koh



- Senior Associate in our Dispute Resolution departments.
- Bachelor of Laws (Hons), University of Leeds
- Admitted to the Malaysian Bar in 2013.
- Did the Bar Professional Training Course at Nottingham Trent University and a member of the Honourable Society of the Middle Temple.
- Areas of practice include construction, general litigation, debt recovery, arbitration and adjudication and employment.

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Noelle Au Yong



- Associate in our Dispute Resolution departments.
- Bachelor of Laws (Hons), University of Essex
- Admitted to the Malaysian Bar in 2020.
- Completed her LLM in Bar Professional Training at City, University of London and was called to the Bar of England and Wales (Lincoln's Inn) in 2019.
- Areas of practice include construction law, land disputes and intellectual property law.

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Talk Points

- Effect of deposit payments on the date of completion
- Validity of an extension of time given by the Controller of Housing
- Notice of vacant possession and the delivery of keys
- Delivery of vacant possession and the connection of utilities

Time of Delivery of Vacant Possession

- Housing Development (Control and Licensing) Regulations 1989
- Clause 25 of Schedule H (similar to Clause 24 of Schedule G)
 - (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in clause 27 within thirty-six (36) months from the date of this Agreement.
 - (2) If the Developer fails to deliver vacant possession of the said Parcel in the manner stipulated in clause 27 within the period stipulated in subclause (1), the Developer shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry of the period stipulated in subclause (1) until the date the Purchaser takes vacant possession of the said Parcel.

Time of Delivery of Vacant Possession

- Clause 27 of Schedule H (similar to Clause 26 of Schedule G)
 - (1) The Developer shall let the Purchaser into possession of the said Parcel upon the following:
 - (a) the issuance of a certificate of completion and compliance;
 - (b) the separate strata title relating to the said Parcel has been issued by the Appropriate Authority;
 - (c) water and electricity supply are ready for connection to the said Parcel;

Time of Delivery of Vacant Possession

- (d) the Purchaser having paid all monies payable under subclause 5(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement; and
 - (e) the completion of any alteration or additional work under subclause 15(2), if any.
- (2) The delivery of vacant possession by the Developer shall be supported by a certificate of completion and compliance and includes the handing over of the keys of the Parcel to the Purchaser.

Time of Delivery of Vacant Possession

- Clause 27(3) of Schedule H (similar to Clause 26 of Schedule G)

Upon the expiry of thirty (30) days from the date of service of a notice from the Developer requesting the Purchaser to take possession of the said Parcel, whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession.

Time of Delivery of Vacant Possession

- Clause 25(1) of Schedule H:

Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in clause 27 within thirty-six (36) months **from the date of this Agreement.**

Effect of Deposit Payments on the Date of Completion

- Although developers are prohibited from collecting any booking fees pursuant to Regulation 11(2) of the Housing Developers (Control and Licensing) Regulations 1982 (“**HDR 1982**”), it remains a common industry practice for developers to request for payment of a booking fee.
- The Federal Court case of *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 CLJ 441 dealt with the law concerning the Housing Development (Control and Licensing) Act 1966 (“**HDA 1966**”) and its subsidiary legislation, particularly on calculation of LAD for late delivery of vacant possession (“**VP**”).

Effect of Deposit Payments on the Date of Completion

- 1. LAD to be calculated from the date of payment of booking fees (and not the date of the SPA)**
 - It is now settled that “where a developer fails to deliver vacant possession according to the time stipulated in the statutory sale and purchase agreement, **the calculation of the LAD begins from the date of payment of the booking fee and not from the date of that statutory agreement.**”

Effect of Deposit Payments on the Date of Completion

2. Calculation of LAD shall be based on the actual purchase price as stipulated in the SPA

- The issue before the Court is whether the calculation of LAD should be based on the actual purchase price stipulated in the SPA or the rebated purchase price, i.e. purchase price less rebate given by the developer.
- The Federal Court agreed with the Court of Appeal and held that LAD shall be calculated based on the **agreed purchase price as stipulated in the SPA.**

Effect of Deposit Payments on the Date of Completion

3. **Date of completion of common facilities shall be based on the date of the Certificate of Completion and Compliance**
 - In the event of a delay in the completion of the common facilities, LAD is calculated from the date on which the developer ought to have completed the common facilities up to the date of completion where the developer's architect "shall certify the date of completion of the common facilities."
 - The Federal Court held that to calculate the LAD payable by the developer to the purchaser for the delay in completion of the common facilities, **the date of completion shall be based on the date of Certificate of Completion and Compliance (CCC), not Certificate of Practical Completion (CPC).**

Validity of an Extension of Time given by the Controller of Housing

- The standard form prescribes 24 months or 36 months for completion.
- However, developers can obtain an extension of time for the completion.

Ang Ming Lee

- The Federal Court in ***Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162** held that Regulation 11(3) of the HDR which confers on the Housing Controller the powers to waive or modify any provisions in the statutory contract in Schedule H to the Regulations is ultra vires its enabling legislation, the Housing Development (Control and Licensing) Act 1966. **The Housing Controller has no power to waive or modify the 36-months period stipulated in the prescribed statutory SPA.**
- The Federal Court held that the Controller of Housing's power under Regulation 11(3) of the Housing Development Regulations 1989 (HDR) was ultra vires of the Housing Development Act 1966 (HDA).

Can the Minister of Housing and Local Government Grant EOT for Developers to Deliver VP?

- Bludream City Development Sdn Bhd v Kong Thye & Ors and Other [2022] 2 CLJ 829
 - The Court of Appeal distinguished Ang Ming Lee where the impugned decision to extend time for VP is made by the Controller and not the Minister.
 - The Minister has the power to waive or modify Schedule H under the power conferred on him under section 24(2)(e) of the Housing Development (Control and Licensing) Act 1966 (“HDA”) to “regulate and prohibit the conditions and terms of any contract” between a developer and its purchasers.

Can the Minister of Housing and Local Government Grant EOT for Developers to Deliver VP?

- Hearing the purchasers would make no difference and would constitute a mere formality.
- The Court finds no reason to interfere with the exercise of discretion vested in the Minister.

Obata Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other cases [2022] 9 MLJ 212 (High Court)

- In relying on the case of Ang Ming Lee, the purchaser commenced an action against developer.
- The purchaser contended that it is entitled to claim for LAD based on the 36 months delivery period under Schedule H of the Regulations, despite the terms of the SPAs.
- The High Court, among others, agreed with the developer that the purchaser's claim is time-barred. Dissatisfied with the decision, the purchaser appealed to the Court of Appeal.

Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and another appeal [2023] 4 MLJ 896 (Court of Appeal)

- The Court of Appeal's decision hinged on the following causes of action:
 - (a) That the SPAs were invalid at the time of signing, as the SPAs had failed to comply with the prescribed Schedule H; and
 - (b) That the developer had breached Schedule H of the Regulations, by amending the time for delivery of vacant possession from 36 months to 54 months.

Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and another appeal [2023] 4 MLJ 896 (Court of Appeal)

- The Court held that since the purchaser challenged the validity of the purported amendment from the inception or execution of the SPA, the purchaser's cause of action ran from the date of the SPA.
- The Court of Appeal agreed with the High Court that the purchaser's claim is barred by limitation, as the 6 years limitation period as per Section 6(1) of the Limitation Act 1953 had expired and the purchaser could no longer claim against the developer for the LAD.

Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and another appeal [2023] 4 MLJ 896 (Federal Court)

- Both the developer and purchaser appealed to the Federal Court.
- One of the issues raised by the developer was whether the Second Actor Theory applies.
- By the operation of Second Actor Theory, the developer argued that the EOT that sought to be challenged by the purchasers exist in fact and can be relied and/or acted upon by parties (both developer and purchasers).
- The appeal is currently pending decision.

-
- In ***Vignesh Naidu a/l Kuppusamy Naidu v Prema Bonanza Sdn Bhd and another appeal [2023] 2 MLJ 776***, the Court of Appeal held:
 - (a) The Housing Development Act 1966 is a social legislation with its main intent to protect the interest of home buyers.
 - (b) The Court of Appeal reaffirms the position in *Ang Ming Lee* that EOT granted by the Controller is null and void. The Controller has no powers to waive or modify the 36 months period stipulated under the statutory contract.
 - (c) The principles laid down in *Ang Ming Lee* are to be retrospectively applied, which is to say that it applies to past and future cases.
 - (d) The limitation period of 6 years should start from the time where the vacant possession is supposedly delivered to the purchaser under Schedule H.

Impact of Covid-19

- Temporary Measures For Reducing The Impact Of Coronavirus Disease 2019 (Covid-19) Act 2020
- Temporary Measures For Reducing The Impact Of Coronavirus Disease 2019 (Covid-19) (Amendment) Act 2022

Impact of Covid-19

- section 38C(1) of the Covid-19 (Amendment) Act allows a developer to apply to the Minister of Housing and Local Government (“**Housing Minister**”) to exclude any period from 1 January 2021 to 31 December 2021 from the calculation of the time for delivery of VP if he is satisfied that the developer was unable to deliver VP due to the Covid-19.
- This relief is only available in respect of a first SPA entered into before 31 May 2021.
- The Housing Minister is precluded from considering an application made after the expiry of the time period for delivery of VP specified in the SPA.

Impact of Covid-19

- **Liquidated Damages:**

Any period excluded by the Housing Minister under Section 38C(2) will not be taken into account for the purposes of assessing the liquidated damages payable to a purchaser due to the failure of the developer to deliver VP (Section 38C(5)).

Impact of Covid-19

- **Taking VP:**

- If the purchaser cannot take possession of the property from the date of the notice of VP during the MCO period, then the purchaser shall not be deemed to have accepted such VP.
- The modification brought about by Section 38D is significant as purchasers shall only be deemed to have taken VP on the date of actual delivery of possession by the developers, i.e. on the day the purchasers collect their keys and take possession of their properties.

Impact of Covid-19

- As a result of the amended Covid-19 Act, a purchaser can now claim higher LAD from the developer.
- This is because the calculation of the LAD would now be extended to a period longer than the 30 days stipulated in the Developer's letter in the event the Purchasers had collected their keys and vacant possession after the expiry of the 30 days.

Cut Off Date for LAD

Of the four options below, which option most accurately describes the cut-off date for the calculation of LAD?

- A. Up to the Date the Notice of VP is issued
- B. Up to the Date the Notice of VP is received
- C. 30 days after the Date of VP is received
- D. 30 days after the Date of VP is issued

Cut Off Date for LAD

- Clause 27 (3) of Sch H (similar to Clause 24 of Sch G)

(3)

Upon the expiry of thirty (30) days from the date of service of a notice from the Developer requesting the Purchaser to take possession of the said Property, whether or not the Purchaser has actually entered into possession or occupation of the said Property, the Purchaser shall be deemed to have taken delivery of vacant possession.

Cut Off Date for LAD

32 .Service of documents

- (1) Any notice, request or demand required to be served by either party hereto to the other under this Agreement shall be in writing and shall be deemed to be sufficiently served-
 - (a) if it is sent by the party or his solicitors by registered post addressed to the other party's address hereinbefore mentioned and in such case, the notice, request or demand shall be deemed to have been received upon the expiry of a period of five (5) days of posting of such notice, request or demand; or
 - (b) if it is given by the party or his solicitors by hand to the other party or his solicitors.

Cut Off Date for LAD

Wong San San v Tribunal Tuntutan Pembeli Rumah & Anor [2022] MLJU 2506,

It was held that the developer should be liable to pay for LD until the date when the purchaser received the notice of vacant possession, and not the date of collection of keys:

“[22] The 2nd Respondent takes the position that the actual date of delivery of vacant possession is 24.9.2020 i.e. the date when the VP Notice was given. This Court is of the considered view that the delivery date of vacant possession ought to be on 12.11.2020, when the Applicant received the VP Notice. (cont)

Cut Off Date for LAD

**Wong San San v Tribunal Tuntutan Pembeli Rumah & Anor [2022]
MLJU 2506,**

“[22] ... Although on 12.11.2020 the keys to the unit was not handed over to the Applicant as yet since the latter only took hold of the keys on 19.11.2020, the calculation of the date of vacant possession ought not to be on the date of handing over of the keys as it is of the considered view that the date of vacant possession cannot be left to the discretion of the owner/purchaser as to when he/she would want to collect the keys to the house/unit once he/she had received the VP Notice. It is not uncommon for the handing over of the keys depend very much on the mutual arrangement between both parties i.e. the purchaser and the developer.”

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Cut Off Date for LAD

In **Lawrence Lim Cheng Poh & Ors v Wealh Plateau Sdn Bhd [2022] MLJU 3390:-**

Brief Facts

The case involved 71 Sale and Purchase Agreements (SPAs) under Schedule H of the Housing Development (Control and Licensing) Act, where the defendant (Developer) agreed to sell residential units to the plaintiffs (Purchasers).

Issue of Date of Delivery:-

The Developer argued that vacant possession was given to all Purchasers on 30.3.2022, i.e the date of the Notice of Vacant Possession.

The Purchasers assert delivery dates ranging from 13.4.2022 to 29.4.2022. None exceed 30 days after 30.3.2022, the Notice of Delivery of Vacant Possession. i.e teh date they took the keys

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Cut Off Date for LAD

Court Held:-

It rejected the Developers contention.

It further held

[30] In the considered opinion of this Court, the effect of the relevant sub-clauses 27(2) and 27(3) of the aforesaid Schedule H sale and purchase agreement on delivery of vacant possession is that when a post-completion Notice of Delivery of Vacant Possession has been issued by the developer to the purchasers, a purchaser who takes the keys and vacant possession before the expiry of the 30 days thereafter is regarded as having taken delivery of the vacant possession on the day he/she takes actual vacant possession, while another purchaser who takes the keys and vacant possession after the expiry of the 30 day period is deemed to have taken vacant possession on the last day of the 30 days period.

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Cut Off Date for LAD

Court's

Reason:-

[31] The relevant sub-clauses of the Schedule H statutory contract cannot be contracted out or unilaterally excluded by any contrary words which the developer use in its Notice of Vacant Possession to the purchasers. Even in the case of non-statutory contract, a developer cannot unilaterally add or use words in its Notice of Vacant Possession to the purchasers which has purports to change the procedure and deeming effect of the contractual provisions in the contract.

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Cut Off Date for LAD

Sample Content of a Notice of Vacant Possession.

It gives us great pleasure to inform you that the construction of the said Property has been duly completed and vacant possession (VP) of the Property can now be delivered to you. A copy of the Certificate of Completion and Compliance (CCC) is enclosed herewith for your attention.

... You are required to comply with the above and to take delivery of vacant possession of the Property within fourteen (14) days from the date of this letter. We shall not be responsible ...

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Cut Off Date for LAD

Conflict between the High Court Decisions.

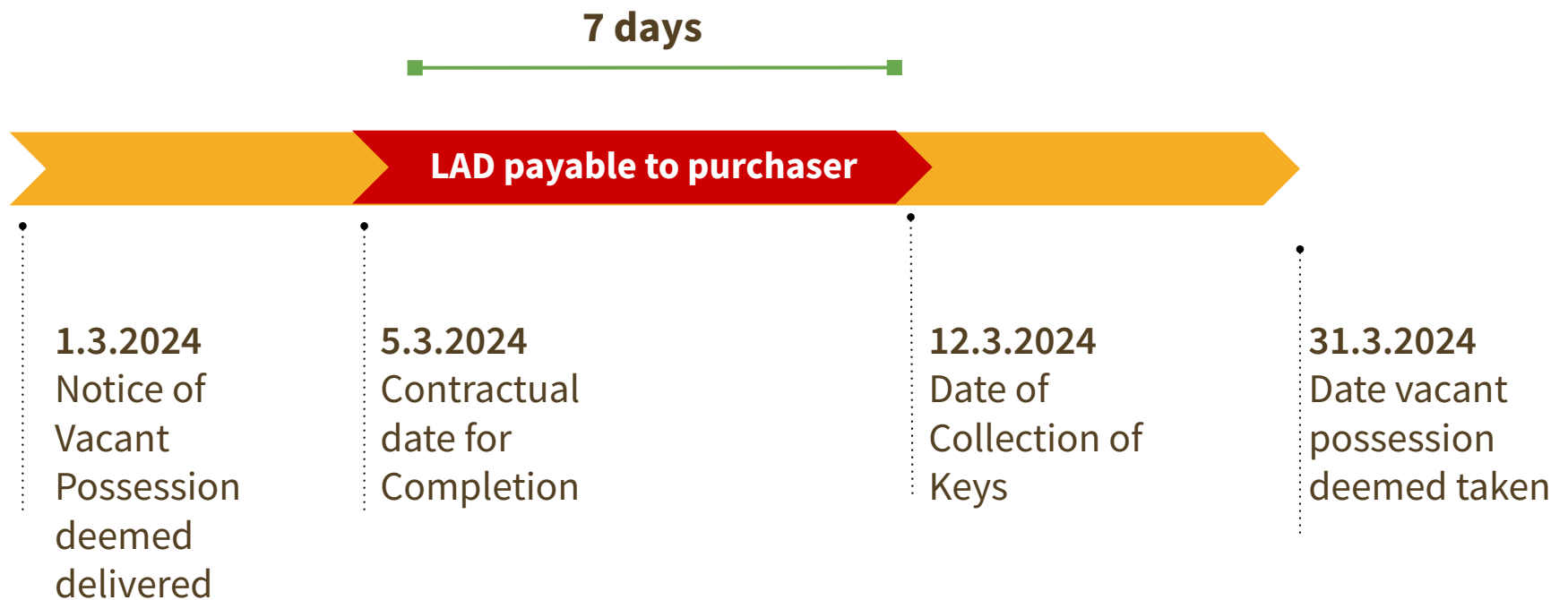
What do you do?

Better to be conservative. Plan and operate as if Lawrence Lim is the prevailing authority.

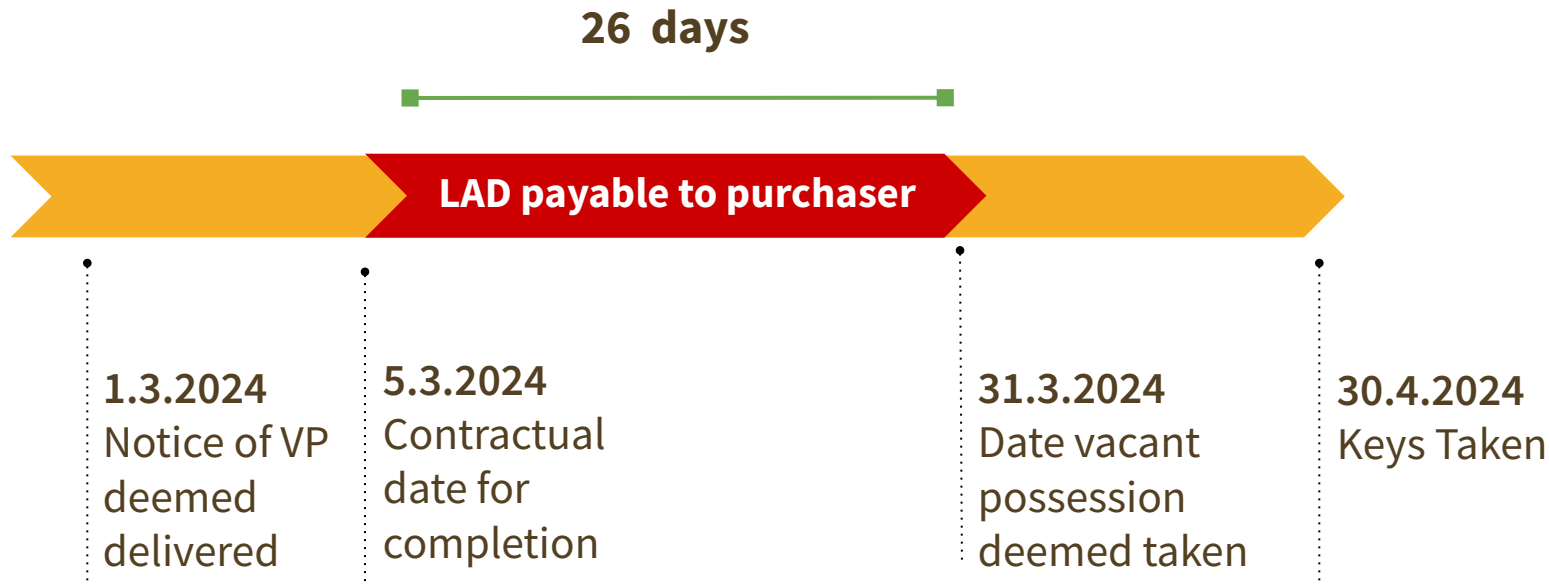
MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Scenario 1: Notice of VP is given before Contractual Date of Completion & Keys Taken Before within the 30 days from the Notice of Vacant Possession



Scenario 2: Notice of VP given before Contractual Date & Keys taken after 14 days from the Notice of VP



Ready for Connection

- **Manner Of Delivery of Vacant Possession**

Clause

27

(1)

Manner of delivery of vacant possession

The Developer shall let the Purchaser into possession of the said Property upon the following:

...

(b)

water and electricity supply are ready for connection to the said Building;

...

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Ready for Connection

Remeggiou Krishnan v SKS Southern Sdn Bhd (formerly known as MB Builders Sdn Bhd) [2023] 3 MLJ 1

Vide a notice dated 24 April 2018, the Developer informed the Purchaser of its readiness to deliver vacant possession of the property. The vacant possession was delivered with no electricity connection to the property. The application to Tenaga Nasional Bhd ('TNB') was sent on 19 June 2018 and the deposit paid by the Developer on 26 June 2018.

One of the claims in the Court was for damages because the Developer had allegedly breached the SPA by delivering Vacant possession without electricity connected to the property.

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Ready for Connection

Remeggius Krishnan v SKS Southern Sdn Bhd (formerly known as MB Builders Sdn Bhd) [2023] 3 MLJ 1

The Federal Court on the Other hand held:-

[22] Now, the Court of Appeal held that since cl 27(1)(c) of the SPA states ‘ready for connection’, it does not mean that the subject property must be installed with actual supply of electricity. With respect, this cannot be the correct interpretation as it overlooks cl 1(k) of the SPA (which when read together with cl 27(1)(c) of the SPA) provides that ‘ready for connection’ means electrical points fully functional and supply is available for tapping into the property.

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Ready for Connection

Remeggious Krishnan v SKS Southern Sdn Bhd (formerly known as MB Builders Sdn Bhd) [2023] 3 MLJ 1

The Federal Court on the Other hand held:-

[23] It must follow that there was an obligation on the developer to provide actual supply of water and electricity to the property. Any other interpretation would be unfair to the purchasers save for the payment of any deposits for the supply of water and electricity if the SPA provided for it. In the circumstances, we agreed that the respondent was in breach of cl 27 of the SPA as the delivery of vacant possession was invalid since there was no electricity supply connected at the time

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

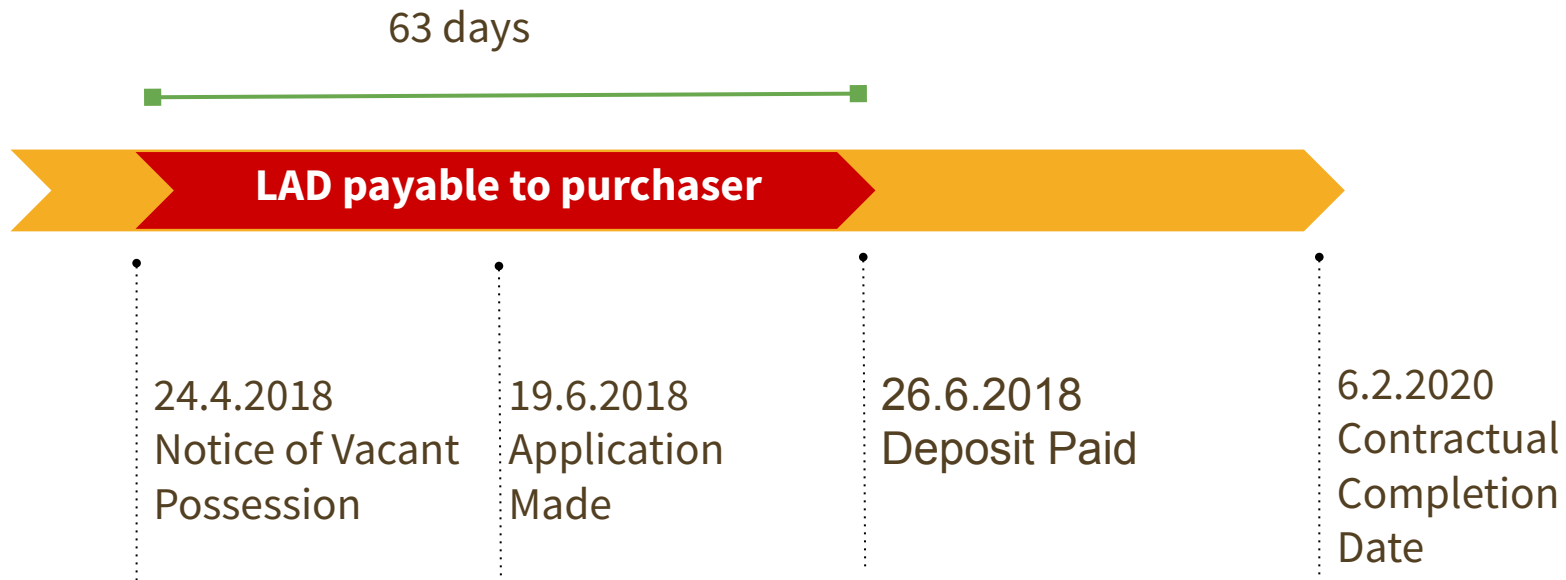
Ready for Connection

Remeggious Krishnan v SKS Southern Sdn Bhd (formerly known as MB Builders Sdn Bhd) [2023] 3 MLJ 1

1 (k)

"ready for connection" means electrical points and water fittings and fixtures in the said Parcel have been installed by the Developer and are fully functional and supply is available for tapping into individual parcels;

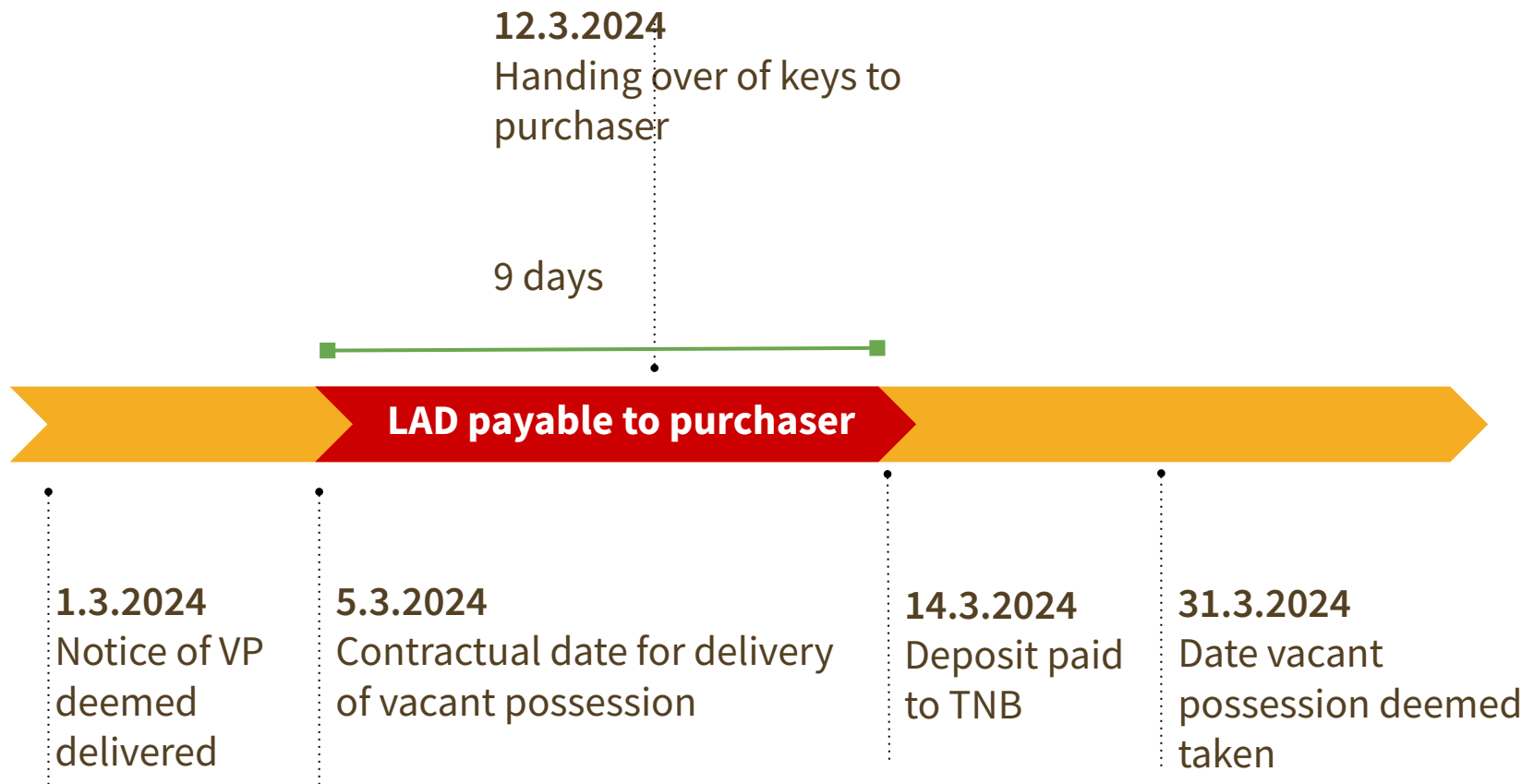
Remeggius Krishnan v SKS Southern Sdn Bhd (formerly known as MB Builders Sdn Bhd) [2023] 3 MLJ 1



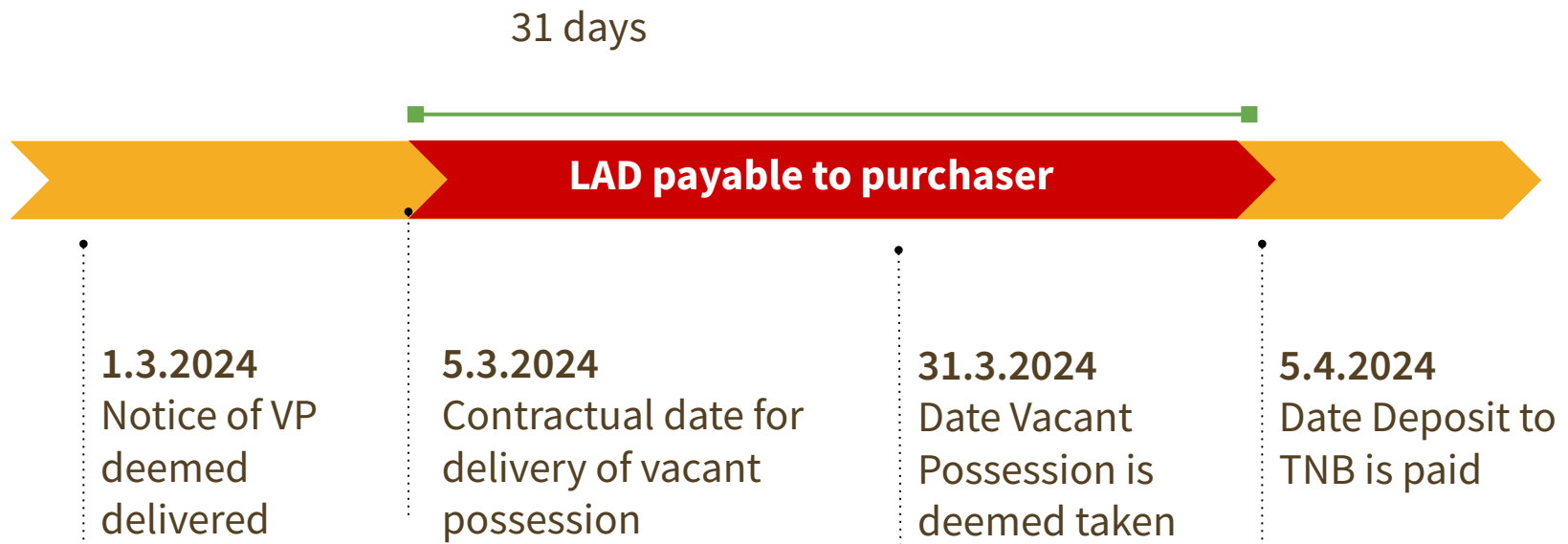
MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Scenario 3: Where the keys are handed over before the deposit to TNB is paid



Scenario 4: Where the keys are handed over before the deposit to TNB is paid



Ready for Connection

Remeggious Krishnan v SKS Southern Sdn Bhd (formerly known as MB Builders Sdn Bhd) [2023] 3 MLJ 1

[24] Now, the Court of Appeal took the position that no losses could have been suffered by the appellant here as the respondent was still within the time frame for delivery of vacant possession. With respect, we were unable to accept this proposition. In our view, the time frame for delivery of vacant possession is quite separate from the manner of delivery of vacant possession. The appellant was entitled to claim compensatory damages for breach of cl 27 of the SPA. This was separate from any claim for liquidated damages for late delivery of possession under cl 25 of the SPA. In the event, damages was justifiably ordered by the tribunal for the delay of 63 days for breach of cl 27.

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Questions?

Upcoming Talk

Date	Topic	Speakers
13 March 2023 (Wednesday)	Redeemable Convertible Preference Shares: What it is and how it can benefit you?	Cassandra Nicole Thomazios & Anis Mohd Sohaimi



Sign up for more MWKA Online Talks at
<https://mahwengkwai.com/talks-signup/>

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

MWKA Academy Talk

Date	Location	Topic	Speakers
10 May 2024 (Friday)	MWKA Conference Room	Corporate Social Responsibility (CSR), Business and Human Rights	Dato' Mah Weng Kwai



Sign up for more MWKA Online Talks at
<https://tinyurl.com/254da97z>

MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Follow us on Social Media



YouTube: www.youtube.com/user/mahwengkwai

Twitter: www.twitter.com/mahwengkwai

Instagram: www.instagram.com/mahwengkwai

Linkedin: www.linkedin.com/company/mahwengkwai

Facebook: www.facebook.com/mahwengkwai

MahWengKwai & Associates

ADVOCATES AND SOLICITORS



Complimentary Consultation

Schedule a complimentary 30 minute video-consultation with our lawyers by filling up the form at <https://mahwengkwai.com/schedule-a-meeting/>



MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Thank you!

Notice: This presentation does not constitute legal advice and its contents should not be relied upon as such. The facts and circumstances of each and every case will differ and therefore will require specific legal advice. Feel free to contact us for complimentary legal consultation.