

Legal Issues in the Rehabilitation of Abandoned Housing Projects of the Liquidated Housing-Developer-Companies in Peninsular Malaysia

Nuarrual Hilal Md. Dahlan

Corresponding Author, Director, Institute of Governance, Innovation and Law (IGIL)

College of Law, Government and International Studies (COLGIS)

Universiti Utara Malaysia (UUM), 06010 UUM Sintok

Kedah Darul Aman, Malaysia

E-mail: nuarrualhilal@gmail.com or hilal@uum.edu.my

Abstract

Abandoned housing projects is one of the biggest problems in the housing industry in Peninsular Malaysia. Even though since the Independence days in 1957, the Malaysian Government have provided laws and policies to govern housing industry, yet abandoned housing projects problem is still an unsettled issue until today. The real victims are the purchasers themselves. Usually when a housing developer company is wound up, the affair and business of the company are taken over either by the private liquidator or provisional liquidator or the official Receiver (OR) under the Department of Insolvency. The liquidator may rehabilitate the abandoned projects left by the wound up housing developer companies, if the projects are viable for rehabilitation with the approval of the creditors, contributories, the committee of inspection and the court and that there is adequate fund to finance the rehabilitation. Otherwise, if the project is not viable, particularly because there are insufficient funds to run the rehabilitation, the projects may be stalled forever without any prospects for rehabilitation, to the detriment of the purchasers. This article discusses the law and practice in the rehabilitation of abandoned housing projects in Peninsular Malaysia of the wound-up-housing-developer-companies. At the ending part of this article the author proposes certain suggestions for facing the problems of abandoned housing projects of the wound up housing developer companies and their rehabilitation in Peninsular Malaysia

Keywords: Legal issues, Abandoned housing projects, Rehabilitation, Liquidation of companies, Peninsular Malaysia

Introduction

Abandoned housing projects are a negative fact plaguing the housing industry in Peninsular Malaysia. Although the housing industry in Peninsular Malaysia plays an important role in the development of the nation, supported by dynamic policies and legal means for ensuring its success, the occurrences of abandoned housing project have, hitherto, marred its role towards national development and safeguarding the interests of its citizen purchasers. As a result, many purchasers have become victims of abandoned housing projects. There are various reasons causing the abandonment and the consequential problems they have caused are also grave. One of the reasons is that there are insufficient legal provisions and protections for avoiding abandonment and in the protection of the interests of purchasers. In the event rehabilitation can be carried out, the ensuing problems caused--

pecuniary and non-pecuniary losses, still hitherto become unsettled issues to most of the purchasers and the stakeholders, without any sufficient remedies and measures to address them.

Currently, a housing project in Peninsular Malaysia can be deemed to have been abandoned when:

- a) The construction activities on site of the housing construction project have consecutively stopped for six months or more, after the expiry of the Sale and Purchase Agreement (S&P) executed by the developer and the purchaser or;
- b) The developer has been put under the control of the Official Receiver; or,
- c) The developers admit in writing to the Housing Controller that they are unable to complete their projects; and,
- d) The project is endorsed as an abandoned housing project by the Minister of Housing and Local Government pursuant to section 11(1)(c) of the Housing Development (Control and Licensing) Act 1966 (Act 118) (Ministry of Housing and Local Government Official, 2011).

Some Abandoned Housing Projects' Figures

Abandoned housing projects in Peninsular Malaysia are one of the spillover problems of the housing industry. This problem is a nightmare for the affected purchasers and becomes a burdensome social obligation for the government to tackle. As of June, 2005, there were 28 new projects which had been listed under the category of abandoned housing projects. These projects involved 5,716 purchasers, 7,946 units of houses and projects' sales value of RM 479.67 million. From the overall newly identified abandoned housing projects, majority of the projects, as of June, 2005, occurred in Johor, Selangor and Pulau Pinang which respectively have 5 projects (18%), followed by Kedah - 4 projects (14%), Perak - 3 projects (11%), and for Negeri Sembilan, Melaka and Terengganu, each of these states has 2 newly identified abandoned housing projects (7%). In other states (Perlis, Federal Territory and Kelantan), there are no new abandoned housing projects which have been identified or reported (Division of Supervision and Enforcement, Ministry of Housing and Local Government, n.d). These statistics are provided in Table 1 below.

Table 1: The Number of New Projects Which Has Been Identified As Abandoned Housing Projects According to States in Peninsular Malaysia As of June, 2005

States	Number of Projects	Number of Houses	Number of Purchasers	Sales Value (RM Million)
Perlis	0	0	0	0
Kedah	4	687	333	69.51
Pulau Pinang	5	2,495	1,965	125.73
Perak	3	161	106	21.47
Selangor	5	2,074	1,527	123.21
Federal Territory	0	0	0	0
Negeri Sembilan	2	123	43	23.37
Melaka	2	165	47	14.9
Johor	5	1,897	1,462	206.24
Kelantan	0	0	0	0
Terengganu	2	344	234	18.45
Pahang	0	0	0	0
TOTAL	28	7,946	5,716	479.67

(Division of Supervision and Enforcement, Ministry of Housing and Local Government, n.d).

However, according to another report, until December, 2006, seven (7) new projects have been identified as abandoned. These projects involved 1,278 purchasers, 2,114 housing units and sales value of RM 462.14 million. Most of the abandoned projects occurred in Selangor—3 projects (43%), Negeri Sembilan—2 projects (29%), Melaka and Johor, respectively have an abandoned housing project,

newly identified in December, 2006 (Ministry of Housing and Local Government, n.d). The statistics for these are provided in Table 2

Table 2: The Number of Newly Identified Abandoned Housing Projects According to States As of December, 2006

States	Number of Projects	Number of Houses	Number of Purchasers	Sales Value (RM Million)
Perlis	0	0	0	0
Kedah	0	0	0	0
Pulau Pinang	0	0	0	0
Perak	0	0	0	0
Selangor	3	1,448	801	424.8
Federal Territory	0	0	0	0
Negeri Sembilan	2	249	231	12.31
Melaka	1	240	160	19.2
Johor	1	177	86	5.83
Kelantan	0	0	0	0
Terengganu	0	0	0	0
Pahang	0	0	0	0
TOTAL	7	2,114	1,278	462.14

(Ministry of Housing and Local Government, n.d).

In 2008, the Division of Rehabilitation of Abandoned Projects in the Department of National Housing, Ministry of Housing and Local Government ('MHLG'), Kuala Lumpur was established. If previously, the duty to manage the abandoned housing projects and their rehabilitation was on the shoulder of the Division of Enforcement and Supervision, MHLG which was also overburdened with enforcement and supervision works, the establishment of this new specialized division (Division of Rehabilitation of Abandoned Projects) would help and facilitate the government to reduce the problems emanating from the abandoned housing projects and to speed up the rehabilitation and thus help the fates of the aggrieved purchasers (Ministry of Housing and Local Government Official Portal, 2010).

As at 31 July, 2010, the number of the abandoned housing projects which is subject to rehabilitation under the management of this division is 151 projects involving 48,623 units of house and 31,123 purchasers. Out of these numbers, 57 projects are being rehabilitated and 47 projects are completed projects (Division of Rehabilitation of Abandoned Housing Projects, Department of National Housing, Ministry of Housing and Local Government, n.d). Below are the statistics of abandoned housing projects as at 31 July, 2010 (Table 3 and Table 4).

Table 3: Summary Of The Overall Status Of Abandoned Housing Projects In Peninsular Malaysia (Until 31 July 2010)

NO.	STATUS	31 JULY 2010
1	Initial Planning (in the course of getting rehabilitating developer)	47 (31%)
2	In the course of rehabilitation	57 (38%)
3	Occupied/Completed Projects	47 (31%)
	i) 2009:15 Projects	
	ii) 2010:32 Projects	
TOTAL		151

Note:

Occupied/Completed Projects

i) 2009:15 Projects (100% achievement based on the 2009 Minister's Key Performance Index ('KPI'))

ii) 2010:32 Projects (Up to 31 July 2010 92% achievement based on the 2010 Minister's KPI)

(Division of Rehabilitation of Abandoned Projects, National Housing Department, Ministry of Housing and Local Government, n.d).

Table 4 Summary Of The Overall Status Of Abandoned Housing Projects In Peninsular Malaysia (Until 31 July 2010)

NO.	PROJECTS STATUS	NO. OF PROJECTS	NO. OF HOUSING UNITS	NO. OF PURCHASERS
I	INITIAL PLANNING			
(i)	Under Rehabilitation Plan	13	3,206	2,055
(ii)	Wound Up Companies	23	9,854	5,896
(iii)	Sold to Third Party (Non-Performing-Loans)	9	1,159	505
(iv)	Return of Deposit to Purchasers	2	289	105
	Sub-total:	47	14,508	8,561
II	UNDER REHABILITATION			
(i)	Original Developer /Rehabilitating Developer	41	18,202	11,617
(ii)	Syarikat Perumahan Negara Berhad	11	4,832	4,562
(iii)	Completed without CFO	5	985	570
	Sub-Total:	57	24,019	16,749
III	COMPLETED			
(i)	Completed With CFO	16	3,731	3,219
(ii)	Variation of Development Proposal	18	4,113	1,235
(iii)	Return of Deposit	13	2,252	1,359
	Sub-Total	47	10,096	5,813
	OVERALL TOTAL	151	48,623	31,123

(Division of Rehabilitation of Abandoned Projects, National Housing Department, Ministry of Housing and Local Government, n.d).

What can be deduced from the above latest statistics and tables in 2010, there is a drastic decrease of the number of abandoned housing projects in Peninsular Malaysia. Secondly, the abandoned housing projects are subject to rigorous planning for rehabilitation on strict surveillance by the Chief Secretary General of the Government. The decrease is, it is opined, due to the following factors:

- 1) The establishment of the Division of Rehabilitation of Abandoned Projects under the Department of National Housing, which is entrusted by the government to specifically tackle and settle the problems of abandoned housing projects, including undertaking proactive steps to rehabilitate the abandoned housing projects and help the aggrieved purchasers;
- 2) The KPI (Key Performance Index) as set out by the government and the concrete plan monitored by the Chief Secretary to the Government (in Malay is called 'Ketua Setiausaha Negara' (KSN)), and the Secretary General of MHLG with regular scheduled meetings and checks; or,
- 3) The newly revised definition of abandoned housing project in 2010 which may still open for abuse of the power of the Minister of Housing and Local Government to endorse or not to endorse that certain problematic housing projects are considered 'abandoned housing project'. This power may be abused by the Minister in that the Minister may, in order to create a short list and statistics of abandoned housing project (distorted list), not endorse certain troublesome housing projects as 'abandoned housing projects' even though they should have been so categorized (A.A. Junaid Izzuddin, personal communication, July, 14 2010 & Ministry of Housing and Local Government Official Portal, 2011).

Nonetheless, even though based on the latest statistics as tabled above, the number of abandoned housing projects is decreasing and that the projects so abandoned are subject to

rehabilitation, this is still not satisfactory, in the opinion of the author. The following are some observations and grounds of the author in respect of the above latest statistics and tables of abandoned housing projects in Peninsular Malaysia:

- 1) The above current list of abandoned housing projects (as at 30th July, 2010) does not take into account the closed abandoned housing projects' files (i.e abandoned housing projects found in 1970s, 1980s and 1990s, which are deemed totally not suitable for rehabilitation), abandoned housing projects of the parties which do not fall under the jurisdiction and control of the MHLG and Act 118 and abandoned housing projects in Sabah and Sarawak (East Malaysia). Thus, if these abandoned housing projects were to be taken into consideration, the list of abandoned housing projects in Malaysia would be more; and,
- 2) The establishment of the Rehabilitation of Abandoned Projects Division also seemed not to have fully been able to help the aggrieved purchasers to have their (the aggrieved purchasers) abandoned housing units be duly rehabilitated. This is evident based on the above tables, in that there are 47 projects which are clearly cannot be rehabilitated at all. These hopeless projects have either been ousted from the jurisdiction of the MHLG by way of changing the development proposal of the projects which previously was 'housing development projects' into 'commercial projects' (18 projects) or the defaulting developers should return the deposit paid by purchasers and nullify the sale and purchase agreements (13 projects) to the effect that as if there was no contract between the housing developers and the aggrieved purchasers.

Winding Up of Companies

In Malaysia there are two (2) types of winding up of companies. These two types of winding up are as follows:

- 1) Winding up by the court; and
- 2) Voluntary winding up (section 211(a)(b) of the Companies Act 1965 (Act 125) ('CA').

For the purpose of this paper, the author will only highlight the winding up of companies by the court. The reason is that this mode of winding up is the most common in the winding up of the housing developer companies of abandoned housing projects in Peninsular Malaysia.

Winding Up By The Court

Section 217 (1)(a-h) of the CA provides that the following persons may petition for the winding up of a company:

- a) the company itself;
- b) a creditor;
- c) a contributory or any person who is the personal representative of the a deceased contributory or the trustee in bankruptcy or the Official Assignee of the estate of a bankrupt contributory;
- d) the liquidator of the company;
- e) the Minister of Finance;
- f) a licensed institution or a scheduled institution;
- g) Insurance company; and,
- h) The Registrar of Companies (now the Malaysia Companies Commission (CCM)).

However, in the observation of the author, normally in the abandoned housing projects in Peninsular Malaysia, the petitioners who have applied to the court for winding up the defaulting housing developer companies consist of the creditors (secured and unsecured creditors) and the aggrieved purchasers of the developer companies. This can be illustrated in:

- a) Taman Harmoni, Balakong, Mukim of Cheras, District of Hulu Langat, Selangor, the developer (K&T Development Sdn. Bhd) was wound up by the sewage contractor on the failure of the developer to settle the debt owed for the sewage works done (Ministry of Housing and Local Government File No: KPKT/08/824/6037);

- b) Taman Lingkaran Nur, Kajang, Mukim of Cheras, District of Hulu Langat, Selangor Darul Ehsan, the developer (Saktimuna Sdn. Bhd) was wound up by the Inland Revenue Board (IRB) on the failure of the developer to settle the outstanding tax (Ministry of Housing and Local Government File No: KPKT/08/824/4275/E);
- c) Pangsapuri Seri Pertama, Mukim of Sungai Petani, District of Kuala Muda, Taman Seri Marina, Mukim of Kuala Kedah, District of Kota Setar and Taman Seri Simpang, Mukim of Kangkung, District of Alor Setar, Kedah Darul Aman, whose the developer (JB Kulim Development Sdn. Bhd) was wound up by the construction supplier on the failure of the developer to settle the debts owed despite the delivery of the construction materials (Ministry of Housing and Local Government files' number KPKT/08/824/6741-1, KPKT/08/824/6741-2, n.d, & KPKT/08/824/6741-3, n.d.); and,
- d) Taman Junjong Jaya, Mukim of Junjong, District of Kulim, Kedah Darul Aman, the developer (Cayman Development (SP) Sdn. Bhd), was wound up on the application of the purchasers of the housing project for failure of the developer to complete the construction of the houses within the time period prescribed under the sale and purchase agreement and failure of the developer to settle the late delivery damages to purchasers (Ministry of Housing and Local Government file number KPKT/08/824/4705-02, n.d.).

Circumstances Under Which Companies May Be Wound Up By The Court

Pursuant to section 218 of the CA, among the circumstances under which companies may be wound up by the court on the application of the petitioners, are as follows:

- a) The company is unable to pay its debts; and,
- b) The court is of opinion that it is just and equitable that the company be wound up.

The above reasons are the most common grounds in which housing developer companies are wound up on the application to the Court. Pursuant to section 218(2) of the CA, the definition of inability to pay debts is as follows:

- a) the company is indebted a sum exceeding RM 500.00 to a creditor and the creditor has served on the company by leaving at the registered office a demand requiring the company to pay the sum so due and that the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
- b) the company has failed to satisfied in whole or in part the execution or other process issued on a judgment, decree or order of any court in favour of a creditor; or,
- c) The Court is satisfied that the company is unable to pay its debt including the contingent and prospective liabilities of the company.

Compulsory liquidation is made by the order of the court. There are certain persons who are entitled to apply to the court to liquidate a company. These persons are prescribed under section 217 of the Companies Act 1965 ('CA'). These persons are:

- 1) the company;
- 2) the creditor; and,
- 3) the contributory.

Provisions in The Companies Act 1965 When The Companies Are Wound Up

When a company is subject to a winding up order, the affairs and businesses of the company shall be vested in the hands of the liquidator. On a winding up order being made by the court, if an approved liquidator other than the Official Receiver ('OR') is not appointed to be the liquidator of the company, the OR shall become the provisional liquidator until he or another person becomes liquidator (section 227(1) CA). If there is no liquidator appointed, the OR shall summon separate meetings of the creditors and contributories of the wound up company for the purpose of determining whether or not an application is to be made to the court for appointing a liquidator in the place of the OR (section 228(2))

CA). If a liquidator is not appointed, on the date when the winding up order is made by the court, the OR shall be the liquidator of the company (section 228(5) CA).

In respect of provisional liquidator, he may be appointed by the court either he is being the OR or an approved liquidator. Provisional liquidator may be appointed at any time after the presentation of a winding up petition and before the making of a winding up order. The provisional liquidator may exercise all the functions and powers of the liquidator subject to the limitations of the Companies (winding-up) Rules 1972 or as the court may specify in order appointing him as the provisional liquidator (section 231 CA). The function of the appointment of provisional liquidator is to maintain the status quo of the assets and liabilities of the company from being abused, thus protecting the rights and interests of the creditors and other stakeholders pending the winding up order issued by the court (Woon, 1988).

Purpose of Liquidation

The purpose of liquidation is to accumulate all assets and liabilities of the company by the liquidator to settle all the debts of the creditors, to return the remaining proceeds surpluses, if any, to the members of the company and finally to cease the existence of the company. To achieve this objective, the liquidator will take over the management and affairs of the company. The directors are no more having power to run the company. This is the primary power of the liquidator. This power is fully prescribed under section 236(1) and (2) of the CA. The difference between section 236(1) and section 236(2) of the CA is that under section 236(1) the liquidator needs to get authority either from the Court or of the Committee of Inspection in order for him to execute the prescribed powers and duties.

Among the powers under section 236(1) of the CA are:

- 1) to carry on the business of the company so far as is necessary for the beneficial winding up thereof;
- 2) to make any compromise or arrangement with creditors or persons claiming to be creditors; and,
- 3) to appoint an advocate to assist him in his duties.

While among the powers under section 236(2) of the CA are:

- 1) to compromise any debt due to the company other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgit (RM 1500.00);
- 2) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;
- 3) to do all acts and execute in the name and on behalf of the company all deeds receipts and other than documents and for that purpose use when necessary the company's seal;
- 4) to appoint an agent to do any business which the liquidator is unable to do himself; and,
- 5) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

Despite the fact that the powers under section 236(2) need not require any authority from the Court or the Committee of Inspection, yet pursuant to section 236(3) the exercise of these powers shall be subject to the control of the Court and any creditor or contributory may apply to the Court to check and control the liquidator's powers. This caveat also is applicable for the powers under section 236(1) of the CA.

Apart from section 236(3), pursuant to section 237(1) of the CA, in the administration of the assets of the company and in the distribution thereof among its creditors, the liquidator shall have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection. In case there is a conflict between the direction of the committee of inspection and the directions of the creditors and contributories, the directions of the latter (the creditors and contributories) shall prevail (section 237(1) of the CA).

Issues

A question can be raised *viz* whether the liquidator is under a responsibility to revive the abandoned housing projects of the wound up companies? Based on the above provision, it seems, and it is opined that the liquidator is liable to carry out rehabilitation. Nonetheless this is subject to the sanction/authority of the creditors, contributories, committee of inspection and the Court, as the case may be (section 236(1)(3) and section 237(1) of the CA). If these parties (the creditors, contributories, committee of inspection and the Court) do not allow the liquidator to carry out the intended rehabilitation, the liquidator shall not carry on the same. Yet, in the opinion of the author, even these parties (creditors, contributories and committee of inspection) are not agreeable to such a request, the aggrieved purchasers may invoke Order 92 rule 4 of the High Court's Rules 1980 (inherent power of the Court) and section 23(1) of the Courts of Judicature Act 1964 to request the Court to rely on its inherent power acceding the aggrieved purchasers' request to have the abandoned housing projects be rehabilitated by the liquidator on the ground of public interest.

The refusal to allow rehabilitation may be because there are not enough funds to finance the rehabilitation costs and other grounds which may cause the intended rehabilitation is not feasible. Thus in this circumstance, the aggrieved purchasers have no redress to have their abandoned housing projects be revived or at least to get appropriate compensation and damages from the wound up housing developer companies.

Nonetheless, if the liquidator is of the opinion that it is viable for implementing rehabilitation of abandoned housing projects yet this is still rejected by the creditors or contributories or the committee of inspection, as the case may be, the liquidator may apply to the Court for directions to obtain the required authority and sanction to proceed with the intention to rehabilitate the abandoned housing projects pursuant to section 237(3) of the CA.

On the other hand, insofar as the situation in Peninsular Malaysia is concerned, if the liquidator of the company is the Official Receiver (OR), he may not carry out the rehabilitation. The reasons are as follows:

- 1) the official assignee has insufficient knowledge and expertise to warrant them to carry out the rehabilitation; and,
- 2) the official assignee has insufficient staff and manpower to enable them to resume the construction or to rehabilitate the projects (W.M.F, Wan Abdullah, personal communication, May 24, 2010, D.S.N., Awang Mustapha, personal communication, June, 28 2010 and July 1, 2010, & S.M, Ahmad Walat, personal communication, June 15, 2010).

This position can be illustrated in Taman Harmoni, Balakong, Mukim of Cheras, District of Hulu Langat, Selangor, Taman Lingkaran Nur, Kajang, Mukim of Cheras, District of Hulu Langat, Selangor, Taman Seri Simpang Jaya, Mukim of Kangkung, District of Kota Setar, Kedah, Taman Seri Marina, Mukim of Kuala Kedah District of Alor Setar, Kedah and Taman Junjong Jaya, District of Kulim, Kedah (Ministry of Housing Local Government file number KPKT/08/824/6037-1, n.d., Ministry of Housing Local Government file number KPKT/08/824/4275, n.d., Alor Setar Malaysian Department of Insolvency file number PPT(KED)346/2004(211), No. Estet: JPH/KED/73502/12/2004, n.d., Ministry of Housing and Local Government file number KPKT/08/824/6741-3, n.d., Alor Setar Malaysian Department of Insolvency file no. PPT(KED)346/2004(197), n.d., Ministry of Housing and Local Government file number KPKT/08/824/6741-2, n.d., Alor Setar Malaysian Department of Insolvency, file number PPT(KED) 1834/2007, n.d., & Ministry of Housing and Local Government file number KPKT/08/824/4705-02, n.d.).

The most that the OR or, sometimes, the private liquidator, may do is to find eligible third party buyer to buy up the project together with the liabilities of the wound up housing developer companies. The proceeds of the sale are to be used to pay off the debts of the creditors of the companies in accordance with section 292 of the CA (Priorities of Payment). This was done in Taman Lingkaran Nur, Kajang, Mukim of Cheras, District of Hulu Langat, Selangor, Taman Cemerlang, Lot No. 3254, Mukim 13, Thean Teik Highway, Bandar Air Itam, Pulau Pinang, Taman Sri Angsana Hilir Ampang,

Mukim of Ampang, District of Hulu Langat, Selangor, Taman Kenanga Phases 2A, 3A, 3B, 4A, 5A, 4B, 5B and 5C, Bandar Baru Salak Tinggi, Mukim of Dengkil, District of Sepang, Selangor and Desa Beruntung, Mukim of Ulu Yam, District of Hulu Selangor (Ministry of Housing Local Government file number KPKT/08/824/4275, n.d., Ministry of Housing Local Government file number KPKT/08/824/7347-1, n.d., Ministry of Housing and Local Government file number KPKT/08/824/4375, n.d., Ministry of Housing and Local Government file number KPKT/08/824/7357-2,3, 4 and 5, n.d., & Ministry of Housing and Local Government file number KPKT/08/824/6217-1, n.d.).

However, if the private liquidator is appointed, in most cases, there is a possibility that they will rehabilitate the abandoned housing projects. This can be seen in Taman Villa Fettes, Lot Nos 141 and 3622, Mukim 18, North East District, Pulau Pinang, and Taman Junjong Jaya, Mukim of Junjong, District of Kulim Kedah. Nonetheless, the private liquidator may not so proceed with the rehabilitation if there is insufficient fund to revive the projects or the project is too difficult for rehabilitation. This situation happens in Taman Junjong Jaya, Mukim of Junjong, District of Kulim, Kedah. The appointed liquidator Mr. Jambulingam s/o Sethuraman Raki of Messrs Rimbun Corporate Advisory Sdn. Bhd was unable to proceed with the rehabilitation of the project as there is a shortage of funds to run the purported rehabilitation (Ministry of Housing Local Government file number KPKT/08/824/63 97-1, n.d., Alor Setar Department of Insolvency, file number PPT(KED) 1834/2007 No. Estet JPH/KED/73502/20/2007 Cayman Development (SP) Sdn. Bhd, n.d.).

Several questions can be posed following the above discussion:

- 1) If they (the liquidators) have defaulted in the carrying out the rehabilitation, whether they can be considered as having breached the statutory or legal duty?
- 2) Whether they (the liquidators) are under a duty of care and legal duty to protect the interest of the purchasers and other stakeholders in the rehabilitation of abandoned housing projects? Just inasmuch as the housing developer company is liable, under the provisions of Act 118?
- 3) What is meant by the word “Vendor” which includes its successors in title and permitted assigns’ as enshrined under clauses 31 and 35 of the respective statutory standard sale and purchase agreement (Schedules G, H, I and J)? Is also liquidator (OR or the private liquidator) covered by this provision? If in the affirmative, then the liquidator shall have to act on behalf of the vendor developer (if the vendor is wound up) for completing the construction of the project and likewise be subject to the provisions under Act 118 inasmuch as the vendor would be subject to and are also liable to protect the interests and rights of the purchasers, as required under the Housing Development (Control and Licensing) Act 1966 and its regulations (Act 118).

Logically, the liquidators are liable to carry out rehabilitation and be subject to the provisions of Act 118, insofar as this is reasonable and within their power and capability. Nevertheless, insofar as the author’s scrutiny none in the case law and in practice, the liquidator are subject to Act 118 and under any duty (legal and statutory) to rehabilitate the abandoned housing projects. The reasons are provided above, i.e no sufficient funds, no expertise and shortage of manpower. On the other hand, it is argued, to impose statutory and legal duty for carrying out rehabilitation and be subject to the provisions of Act 118 is unfair and inequitable to the liquidators. This is being so as the primary duty of the liquidator, insofar as the insolvency law in Malaysia is concerned, is to carry out the business and affairs of the wound up companies to settle the debts of the petitioning creditors and other secured and unsecured creditors. In other words, once a housing developer companies are wound up under the CA, the housing development business carried out are also defunct. The liability to carry on the development by the liquidators, in favour of the aggrieved purchasers, (even though they (the liquidators) can be considered the permitted assigns or successors in title to the wound up companies), cannot be imposed or presumed on part of the liquidators. One of the reasons is that there is nothing in the CA which provides a duty on the liquidators to protect the rights of the purchasers/customers of the wound-up-

company, unless, it is expedient and necessary in the opinion of the creditors, the contributories, the committee of inspection and the Court in the course of managing the winding up process and insolvency administration.

Following the above contention, in abandoned housing projects in Peninsular Malaysia whose housing developer companies have been wound up, there is a strong possibility that the liquidator (OR or the private liquidator) may not rehabilitate the project in the protection of the purchasers' interests. This also means that, unless the project is taken over by a white knight and new funds are injected into the rehabilitating parties to finance the intended rehabilitation, the projects will be stalled forever without any relief and the interests and rights of the purchases will be detrimental.

It should be noted, provided that there is enough funds to run rehabilitation and the liquidator is willing to undertake rehabilitation of abandoned housing projects, in carrying out the business and affair of the wound up company, and that the creditors, creditors, committee of inspection or the Court having consented, the liquidator (OR and private liquidator) may appoint special manager to help them in executing the duties and to smooth out the rehabilitation works. This is provided in section 246(1) and (2) of the CA. This special manager, it is opined, may consist of project manager or architect or engineer or building contractor to assist the liquidator to rehabilitate the abandoned housing projects.

Priority of Debts Payment

Once the liquidator has completed carrying out the liquidation process and realized all assets and liabilities of the company under liquidation, the proceeds from the process must be distributed to certain debts in the order of preference. These debts shall be paid in priority to all other unsecured debts. The order priority of debts, pursuant to section 292(1) of the CA, are as follows:

- 1) the costs and expenses of winding up;
- 2) all wages or salary under any contract of employment or award or agreement;
- 3) all amounts due in respect of worker's compensation fund;
- 4) all remuneration payable to any employee in respect of vacation leave etc;
- 5) all amounts due in respect of contributions relating to employees superannuation or provident funds or retirement benefit which is an approved scheme under the federal law relating to income tax; and,
- 6) the amount of all federal tax assessed.

Only if all the above debts having fully been settled, would then be the unsecured debts due of the wound up company distributed in *pari passu*.

Issues

A question can be raised: whether the liquidator can use the proceeds from the liquidation process to fund the rehabilitation of abandoned housing projects? It is opined, yes, the liquidator can do so, provided there is enough balance proceeds after deducting against the above priority of debts and that of the unsecured creditors'. This also may mean that, if there is not enough balance funds, the liquidator may not be able to run the rehabilitation.

Alternatively, the liquidator may utilize the moneys held under the Housing Development Account (HDA) which is protected by section 7A (6)(a)(b) of Act 118 as this money shall not be subject to the priority of payment under the winding up and receivership, pursuant to section 191(1) and section 292 of the CA. Thus, under this circumstance, it is possible for the liquidator to revive the project so abandoned, provided, the moneys (the money in the HDA and the liquidation balance proceeds) are sufficient to meet all the rehabilitation expenditure.

The Superiority of the Creditors and Contributories

Clearly under the CA, the creditors and the contributories of the company enjoy special position in the control of the powers of the liquidator in the course of undertaking the liquidation process. It is opined,

unless the aggrieved purchasers in abandoned housing projects have obtained Court's judgment for all the damage they suffered and that they have filed proof of debts pursuant to section 291(1) of the CA read together with rule 78 of the Companies (Winding-Up) Rules 1972, their rights may not be protected, not even for getting compensation and damages. What more to have their project be revived. It should be borne in mind that none in the above priority of payment (under section 292(1) CA) provide a special provision for the stakeholder in abandoned housing projects, particularly the aggrieved purchasers, to have their abandoned houses be rehabilitated or at least they (the purchasers) be given compensation and damage for their losses and sufferings due to the abandonment.

Secured Creditors

Once winding up proceedings commences (i.e. after the presentation of a winding up petition on the judgment debtor), no disposition of the company property, attachment, sequestration, distress or execution against the estate of the company either by the mortgagees or purchasers are allowed except with the order of the Court (sections 222, 223, 224 and 225 of the CA).

Thus, it follows that any act of the company to sell the immovable property after the petition of the winding up is served, will be null and void, unless the Court so orders otherwise. The purpose of the above law is to prevent the property and assets of the to-be-wound up company from being dissipated to the detriment of the interests of the creditors and contributories. Thus, all the assets and property of the company must be intact pending the outcome of the winding up proceedings. Nonetheless, if the disposal of the assets and property is made and proven for the benefit of the company or there is a guarantee the proceeds from the disposal can be distributed fairly to the unsecured creditors and on the approval of the Court, the Court may allow such a disposal to take place (See also Walter C M Woon, 496)

Issues

Notwithstanding the above explanation, if a chargee (secured creditor) of the judgment debtor wishes to enforce the charge and to obtain the Court's order for sale pursuant to the provisions under the National Land Code 1965, he is not to be barred from initiating the application for sale unless, on application, by any interested parties to the Court, the Court disallows him to proceed.

Secured creditors holding valid securities over the property of a company is usually allowed leave to commence action against the company to realize the security unless some special grounds are shown, such as the secured creditor is offered immediately all that he is entitled to without need for an action or proceedings: *Re David Lloyd & Co* [1877] 6 Ch D 339, per Jessen MR at 343. This is because the subject matter of the security is not available to claims by the general body of unsecured creditors. Here, the liquidator cannot ask the secured creditor to surrender his security unless the secured creditor votes in respect of the whole of his debt and not the balance due from the company after having assessed the value of the security. If the amount realized from sale of the security is insufficient to cover the whole of the secured debt, the secured creditor joins the general body of unsecured creditors in proving the balance (Cheang, 2004, & Rachagan et.al, 2004).

In an abandoned housing project known as Phase 2, Taman Lingkar Nur, KM 21, Jalan Cheras-Kajang, P.T 6443, H.S.(D) 16848, Mukim of Cheras, District of Hulu Langat Selangor, the housing developer company (Saktimuna Sdn. Bhd) secured a loan from CIMB Bank Berhad (the lender). The housing developer charged the project site land as a security to the loan of CIMB Bank Berhad (lender bank). Later, the housing developer defaulted on the loan. As the consequence, the lender bank attempted to apply an order for sale at the Land Office (as the title to the security land was a land office title). Saktimuna also was wound up by the court on the application of the judgment creditor (Inland Revenue). An attempt initiated by the said lender bank to sell the said security land by way of public auction in the land office was abortive due to no bidders. Later this lender bank vested all their liabilities and interests in the said security land to one Sinesinga Sdn. Bhd.('Sinesinga') through a Court's vesting order. This was made in consideration of Sinesinga purchasing the non-

performance loan (NPL) relating to the debts of Saktimuna. As the new chargee, Sinesinga also attempted to sell the land security by way of statutory order for sale. Likewise the attempts were also failed. Later a third party by name of Idaman Wajib Sdn. Bhd (IWSB) interested to purchase the said security land. However, the price offered was below market value of the land (Kuala Lumpur Insolvency Department file number JIM (WP) 141/2005/A, n.d.).

It is opined that, if Sinesinga were to proceed to sell the said security land to IWSB, applying this below-market-value-price without obtaining leave from the court and the liquidator, this would be detrimental to the interest of the chargor (Saktimuna), the judgment creditor/petitioning creditor (Inland Revenue Board) and the aggrieved purchasers (in term of the possibility of getting reimbursement of the deposit, damages and compensation or possibility of getting additional fund to generate rehabilitation of their abandoned housing project, left by Saktimuna). Thus, if the liquidator has no power to intervene or having failed to intervene in this circumstance i.e. in the attempted sale by Sinesinga to IWSB of the said security land at the price lower than the market price, as this right is an absolute and exclusive right of the chargee (Sinesinga), this would be unfair and inequitable as against Saktimuna, the judgment creditor (Inland Revenue Board) and the aggrieved purchasers. It is opined, the liquidator should have the power to intervene and should have intervened in the arrangement to make sure that the chargee (Sinesinga) to apply the market value of the security land. This is to protect the entitlement interests of the chargor (Saktimuna), the judgment creditor/petitioning creditor (Inland Revenue Board) and the aggrieved waiting purchasers to the balance of the proceeds from the sale of the said security land after deducting against the required redemption sum of Sinesinga (the chargee).

Provisional Liquidator

The Court may, on application of the creditors or the contributories or the company, appoint the Official Receiver or the approved liquidator as provisional liquidator, after the commencement of the winding up proceedings to preserve the status quo of the company's assets and property and facilitating the eventual beneficial winding up of the company, pending the disposal of the winding up petition. Like liquidator, the power of the provisional liquidator is similar to the former subject to the provisions prescribed under the Companies (Winding-Up) Order 1972 and the order of the Court appointing him (section 231 of the CA) (Woon, 1988).

It is opined, bearing on the above law, it is possible in abandoned housing projects, a provisional liquidator may be appointed by the creditors, contributories or the company for carrying out rehabilitation of the projects provided the funds for running rehabilitation are available and sufficient.

Issues

A question can be raised: whether the aggrieved purchasers in abandoned housing projects can apply to the Court for the Court to appoint provisional liquidator to carry out the intended rehabilitation? It is opined that it depends whether these aggrieved purchasers can be considered a creditor or otherwise. It is opined, the aggrieved purchasers should first obtain a Court's judgment debts against the company for damages, compensation or other equitable relief and file proof of debts before they can be considered as the creditors to the company (judgment creditors). Nonetheless, can they (the aggrieved purchasers) too apply to the court for the same if they (the aggrieved purchasers) have yet obtained or failed to obtain the Court's judgment debts or proof of debts? In the opinion of the author, still they can. They may be entitled to get appropriate remedies from the Court on the ground of equity. They may invoke Order 92 rule 4 of the Rules of the High Court 1980 and section 23(1) of the Courts of Judicature Act 1964 to request the Court to appoint provisional liquidator to implement rehabilitation on the ground of equity and public interest.

Rehabilitation of Abandoned Housing Projects in Peninsular Malaysia

Most of the rehabilitation of abandoned housing projects in Peninsular Malaysia were left to the discretion of the rehabilitating parties with the cooperation and assistance of the chargee, lender banks, purchasers, local planning authorities, local authorities, technical agencies, the states and federal authorities, the end-financiers, the land offices and MHLG. The stringent laws governing housing development, land, banking, planning and building, were mostly made relaxed and flexible to accommodate the needs and to facilitate the due execution of the rehabilitation scheme. For example in *Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn. Bhd* [1992] 1 LNS 26 (High Court), the court allowed the application of the creditor to appoint a provisional liquidator pending the disposal of a winding up petition for the purpose of rehabilitating the abandoned housing project carried out by the respondent company.

Nevertheless, there are situations where there are no required help and facility to smooth out the rehabilitation scheme, to the detriment of the purchasers desiring the project so abandoned to be revived. For example in *Mohammad bin Bae v. Pembangunan Farlim Sdn. Bhd.* [1988] 3 MLJ 211 (High Court), the court refused the application of the purchasers to have the abandoned housing project revived by the newly appointed receiver and manager because of the difficulty to supervise the rehabilitation process. However, the court granted damages to the purchasers. In other situations, the court allowed the application of the creditor bank to order the foreclosure of the project land charged on the default of the borrower developer in the repayment of the bridging loans, to the detriment of the purchasers' right to have the project revived.

According to MHLG, any purported rehabilitation cannot be carried out due to the following factors:

- There are no or insufficient purchasers interested to buy the houses;
- Works on the sites of the projects have not been commenced or are still at the stage of soil works because of the hard rocks, granite and soils' problems;
- The original developers have been wound up and the project financiers have auctioned off the projects or sold off the projects to other parties. If the projects have been taken over by other new developers and the construction of the projects are resumed by them, then the projects so undertaken are considered to be new projects and no more under the previous defaulting developers' control and will not and cannot be considered abandoned housing projects. This also means, new sale and purchase agreements will have to be executed between the purchasers and the new developers;
- The application to Tabung Perumahan Projek Perumahan Terbengkalai (TPPT) (English: Abandoned Housing Projects Fund) of Bank Negara (Central Bank of Malaysia) or Syarikat Perumahan Negara Berhad (SPNB – a government linked company to assist the rehabilitation of abandoned housing projects) has been rejected as the project is not viable for rehabilitation. This is because, according to TPPT and SPNB, if the purported rehabilitation were still to be proceeded with, it would, otherwise, cause substantial losses and adverse financial effects on the rehabilitating parties;
- The developer has absconded and the existing purchasers are not interested or are unwilling to rehabilitate the projects so abandoned; and,
- Interested parties such as the land-owners, developers, bridging loan bankers and purchasers are unwilling to compromise. They prefer to resort to legal action for settling the problems faced (Division of Supervision and Enforcement, Ministry of Housing and Local Government, n.d.).

The housing projects which fall under the above category are Taman Desa Surada, Kajang, Selangor, Kondominium Esplanade, Klebang, Melaka, Taman Perdana Muar, Mukim Serong, Muar, Johor, Taman Perwira Jerantut, Fasa II, Jerantut, Pahang, Taman Pinggir Rishah Hijau, Ipoh, Perak, Taman Desa Ria, Senawang, Negeri Sembilan and Taman Desa Aman Bukit Mengkebang, Kelantan. (Ministry of Housing and Local Government files' number KPKT/08/824/3579, n.d.,

KPKT/08/824/5976-1, n.d., file number KPKT/08/824/6698-1, n.d., file number KPKT/08/824/3947-5, n.d., file number KPKT/08/824/5737-1, n.d., file number: KPKT/08/824/3040/E, n.d., file number: KPKT/08/825/3229-1, n.d., file number: KPKT/08/824/3040/E, n.d.).

The question is--who will be responsible in the above problem and what are the remedies for the aggrieved parties in the above situation? There is no clear provision in the CA or Act 118. Thus, the aggrieved purchasers will become the fallen preys of the abandoned housing developer company without any sufficient recourse and remedies, including the right to have their abandoned projects be rehabilitated and their rights and interests are fully protected.

An example where an abandoned housing project was revived by a liquidator was Taman Yew Lean (housing developer company: Yew Lean Development Sdn. Bhd) at Lot No. 664, Section 2, North East District, Pulau Pinang, where the petitioning creditor (Cooperative Central Bank Ltd - the lender bank/chargee) succeeded in winding up the developer company and appointed a liquidator—Messrs Price Water House to revive the project on the TPPT's soft loan. The liquidator carried a feasibility study and found that the abandoned project was viable for rehabilitation and that the proceeds from the sales of the rehabilitated units would be more than to auction off the security land. The proceeds could be used to settle off the debts of the creditors in accordance with the law. (Ministry of Housing and Local Government file number: KPKT/08/824/365, n.d.).

However, the position reflected by the case law is rather mixed, in that, courts are divided between allowing rehabilitation and otherwise, once the housing developer company was subject to liquidation or receivership. For example, in *Bunga Nominees Sdn. Bhd v. Abdul Jabbar Majid & Ors* [1995] MLJU 79; [1995] 3 CLJ 224, the court refused the application of the purchaser to have, *inter alia*, the specific performance of the sale and purchase agreement to the effect of resuming the construction (rehabilitation) of the abandoned housing units by the defaulting developer who had been put under receivership and to stop the foreclosure of the charged land by the receiver and manager, pursuant to the deed of debenture. Similar facts happened in *Mohammad bin Bae v. Pembangunan Farlim Sdn Bhd* [1988] 3 MLJ 211 (where in this case, the court allowed the application for rehabilitation on the ground of equity in the event of receivership and winding up), *Pilecon Engineering Bhd v. Remaja Jaya Sdn. Bhd.* [1997] 1 MLJ 808; [1996] 1 LNS 105, *Hongkong and Shanghai Banking Corporation Ltd v Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370; [1992] 1 LNS 26 and *Sri Binaraya Sdn. Bhd v. Golden Approach Sdn Bhd. (Poly Glass Fibre (M) Bhd, Applicant)* [2002] 6 MLJ 632; [2000] 3 AMR 3330. While in *Kim Wah Theatre Sdn. Bhd v Fahlum Development Sdn. Bhd* [1990] 1 LNS 42; [1990] 2 MLJ 511, the court disallowed the petition of the creditor to wind up the developer but granted a stay for 10 months allowing the developer to complete (rehabilitate) the abandoned housing project.

In *Hongkong and Shanghai Banking Corporation Ltd v Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370; [1992] 1 LNS 26 (High Court at Kuala Lumpur), the developer company (respondent company/judgment debtor) was in the course of winding up by the petitioning creditor (Hongkong and Shanghai Banking Corporation Ltd), where later provisional liquidators were appointed pursuant to section 231 of the Companies Act 1965, for the purpose of carrying out the rehabilitation of the housing development project left abandoned by the developer company (the judgment debtor). The rehabilitation of the abandoned project was financed by a loan from TPPT, Bank Negara (Tabung Pemulihan Projek Perumahan Terbengkalai—TPPT (English: Abandoned Housing Projects Fund)). The provisional liquidators were appointed by the High Court on the application of the creditor for the purpose of rehabilitating the abandoned housing project. The power to appoint a provisional liquidator is given to the court pursuant to section 231 of the CA. It can be exercised at any time after the presentation of a winding-up petition and before the making of a winding-up order. Rule 35(1) of the Companies (Winding-Up) Rules 1972 elaborates on the power—the application for the appointment has to be made by 'any creditor or contributory' who should prove 'sufficient ground' for the appointment by affidavit. Provisional liquidators, in this case, had been appointed to investigate the affairs of the respondent company in its own right or in its capacity as a

trustee, to enable the respondent company to complete current contracts, to enter into new contracts and execute the relevant documents; and to represent the respondent company in legal proceedings. The High Court also ordered that the provisional liquidators ought to file a preliminary evaluation report on the respondent company, together with a feasibility report on whether the abandoned housing project can be successfully revived and completed together with specific recommendations as to the ways and means of achieving the required objectives. The provisional liquidators' costs, charges, and expenses for works carried out until the hearing of the petition shall be paid by TPPT Sdn. Bhd. The help from TPPT came only in the mid-1990, while the project was abandoned since 1984. This means that, it is submitted, the project had been abandoned without any rehabilitation, for about 10 years (1984 to mid-1990). The provisional liquidators were, finally, also appointed as liquidators of the respondent company through the winding up order made the court on 22 January 1992.

Findings and Suggestions

The following are the findings and suggestions in dealing with the rehabilitation of abandoned housing projects of the wound-up-housing-developer companies in Peninsular Malaysia:

- 1) In Peninsular Malaysia, there is no clear provision in the CA which expressly imposes a duty on the liquidator, either the OR or the private liquidator, to rehabilitate abandoned housing projects and to protect the interests of the aggrieved purchasers;
- 2) In practice in Peninsular Malaysia, the liquidator is under no duty to rehabilitate and to protect the interests of the aggrieved purchasers in abandoned housing projects due to shortage of manpower, knowledge, time and expertise;
- 3) The duties of the liquidators are to accumulate and realize the assets of the insolvent company and run the affairs of the wound up company for the purposes of settling the debts of the creditors secured or unsecured creditors and other stakeholders (including, it is opined, the aggrieved purchasers in abandoned housing projects) insofar as the creditors, contributories, committee of inspection and the court allow;
- 4) Based on the case law, in the event the housing developer companies are wound up and the affairs are controlled by the liquidator, the policy of the court to allow rehabilitation be carried out is not decisive. In other words, sometimes the court allows rehabilitation but in other circumstances the court does not allow. Thus, the rights and interests of the aggrieved purchasers in abandoned housing projects to have their projects be rehabilitated may be detrimental and not guaranteed;
- 5) There is a legal and statutory gap in the CA (especially when companies are wound up) when housing projects carried out by the wound-up-housing-developer-companies are abandoned for enabling effective rehabilitation be carried out in the protection of the purchasers' interests;
- 6) Insofar as the legal situation in Peninsular Malaysia is concerned, Act 118 needs to be amended by introducing new legal provisions to cater for the problems of abandoned housing projects especially for governing their rehabilitation and to protect the interests of the customers (purchasers) of the wound up housing developer companies;
- 7) It is incumbent that all applicant developers in Peninsular Malaysia who are subject to Act 118 and the MHLG should possess housing development insurance to cover any shortfall in funds to run rehabilitation, if the available moneys are not enough (Dahlan, 2009); and,
- 8) It is high time for the Malaysian government to introduce a special legal regime governing rehabilitation of abandoned housing projects, for instance a provision for appointment of a caretaker to manage rehabilitation of the abandoned housing developer companies for the benefit of the aggrieved purchasers/customers/stakeholders of the wound-up-housing-developer-companies and thus can eliminate the problem as to who should carry out rehabilitation of abandoned housing projects if the housing developer companies are wound up (Dahlan, 2009).

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