

## ISSUES IN THE STATUTORY HOUSING SALE AGREEMENTS IN PENINSULAR MALAYSIA: A CASE STUDY OF ABANDONED HOUSING PROJECTS

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The use of statutory housing sale agreements ('the said agreements') as enshrined under the Housing Development (Control & Licensing) Regulations 1989 is mandatory for all housing developers in Peninsular Malaysia. The use of the said agreements is to ensure protection to house purchasers against irresponsible housing developers. However, in practice, it is evident that the terms of the said agreements are inadequate to provide purchasers with the required protection particularly in abandoned housing projects. This paper aims to highlight this issue. This paper is also a fruit of a research exercise using legal research and qualitative case study methodologies. It finds that there are certain *lacunae* in the terms of the said agreements that have caused the said agreements inability to face the problems of abandoned housing projects to the detriment of the house purchasers' rights. Further, there are certain housing transaction practices that have caused grievances to the house purchasers. The author provides, at the ending part of this paper, some proposals to overcome the highlighted problems. This is a part of the initiatives to strengthen the said agreements to become more protective to house purchasers.

### Keywords:

Statutory Housing Sale Agreement; Issues; Abandoned Housing Projects; Peninsular Malaysia; grievances to purchasers.

### INTRODUCTION

It is well entrenched that the application of the statutory standard formatted sale and purchase agreements (Schedules G, H, I and J (hereinafter referred as 'the said agreements')) as provided in the Housing Development (Control and Licensing) Regulations 1989 ('Regulations 1989'), is mandatory for all house purchases in Peninsular Malaysia pursuant to regulations 11(1) and 11(1A) of Regulations 1989 and the principles decided in *Rasih Munusamy v. Lim Tan & Sons Sdn. Bhd* [1985] 2 MLJ 291, *Sea Housing Corporation Sdn. Bhd v. Lee Poh Choo* [1982] 2 MLJ 31 (FC), *Kimlin Housing Development Sdn. Bhd. (Appointed Receiver and Manager) (In Liquidation) v. Bank Bumiputra (M) Bhd. & Ors* [1997] 2 MLJ 805 (FC) and *MK Retnam Holdings Sdn. Bhd v. Bhagat Singh* [1985] 2 MLJ 212.

Parliament enacted the Housing Developers (Control and Licensing) Act 1966 (Act 118) ('Act 118') for the purpose of protecting the rights of the purchasers. In addition, the current aims of Act 118, as enshrined in the preamble and the long title of Act 118 is to provide for the control and licensing of the business of housing development in Peninsular Malaysia, the protection of the interest of purchasers and for matters connected therewith.

## **OBJECTIVES**

The objective of this paper is to discuss the issues arising from the use of the said agreements in the housing industry in Peninsular Malaysia. This writing is pertinent particularly in the event of abandonment of housing development projects to the detriment of the aggrieved purchasers. By identifying the issues, the author will suggest some proposal to overcome the issues and provide better protection to house purchasers.

This paper highlights and analyses legal issues pertaining to the use of the said agreements vis-à-vis the rights of purchasers in two abandoned housing projects in Peninsular Malaysia. The analysis is done by applying qualitative case study and legal researches over these two abandoned housing projects happened in Malaysia. These two housing projects are:

- 1) Taman Harmoni, Lot 82, Mukim of Cheras, District of Hulu Langat, at the State of Selangor, Malaysia; and,
- 2) Taman Lingkaran Nur, KM 21, Jalan Cheras-Kajang, Selangor at P.T. 6443, H.S(D) 16848, Mukim of Cheras, District of Hulu Langat, also at the State of Selangor, Malaysia.

## **LITERATURE REVIEW**

Pursuant to regulation 11(1) and (1A) of Regulations 1989, the statutory standard housing sale and purchase agreements in Schedules G, H, I and J shall be used in the sales and purchases of houses in Peninsular Malaysia from the licensed housing developers who are subject to Act 118 and the control of Ministry of Urban Wellbeing, Housing and Local Government ('MUWHLG') (previously known as 'Ministry of Housing and Local Government' ('MHLG')). The particulars and information about these schedules are as follows:

- 1) Schedule G: This schedule is introduced by regulation 11(1) of Regulations 1989 (PU(A) 58/1989). Schedule G is for sale and purchase of landed house (land and building) by way of 'full sell then build' concept;
- 2) Schedule H: This schedule is introduced by regulation 11(1) of Regulations 1989 (PU(A) 58/1989). Schedule H is for the sale and purchase of flat houses (building and land intended for subdivision into parcels) by way of 'full sell then build' concept;
- 3) Schedule I: This schedule is introduced by sub-regulation 11(1A) of the Regulations 1989, inserted by regulations 15 and 8(b) of the Housing

- Development (Control and Licensing) (Amendment) Regulations 2007 (PU(A) 395/2007). Schedule I is for sale and purchase of landed house (land and building) by way of ‘build then sell’ concept;
- 4) Schedule J: This schedule is introduced by sub-regulation 11(1A) of the Regulations 1989, inserted by regulations 15 and 8(b) of the Housing Development (Control and Licensing) (Amendment) Regulations 2007 (PU(A) 395/2007). Schedule I is for sale and purchase of flat house (building and land intended for subdivision into parcels) by way of ‘build then sell’ concept;

Schedules I and J came into being after the amendments made to the Regulations 1989 in 2007 effected via the Housing Development (Control and Licensing) (Amendment) Regulations 2007 (PU(A) 395/2007) (‘Regulations 2007’). Pursuant to these Regulations 2007, the Government of Malaysia introduced a ‘*quasi* build then sell’ housing delivery concept through the promulgation of the statutory standard sale and purchase agreement— Schedules I and J. By this concept, purchasers are only required to pay 10% of the purchase price on the date of signing of the sale and purchase agreement with the vendor developer. The balance 90% of the purchase price shall be paid, to the vendor developer, on completion of the house and the Certificate of Completion and Compliance (‘CCC’) has been obtained as well as the vacant possession of the completed house is ready for delivery to the purchaser on full settlement.

#### General Issues of the Said Agreements

In the rehabilitation of abandoned housing projects, there are situations where the rehabilitating developers may require new sale and purchase agreements or supplementary agreements to the previous sale agreements to be effected with the purchasers. Among the terms of these agreements, include the variation of the previous selling price to a new price--usually higher than the previous ones. The purchasers will have to bear the costs of rehabilitation, a new date for the delivery of vacant possession for the rehabilitated units, a new period of completion for the rehabilitation, the elimination of any late delivery damages due to the delay of the previous defaulting developers to complete the project, the obligation of the purchasers to redeem the project land to effect the due transfer to their respective names, the variation of the layout plan and certain descriptions of the building units and other matters required by the rehabilitating parties for the purpose of streamlining and ensuring the success of the scheme. Nevertheless, these changes were contrary to the previous sale agreements, and had not been approved by the Housing Controller (The Star 1 May, 2008). These unwarranted conditions were stipulated by the rehabilitating parties as condition precedent to their agreements to rehabilitate the project or otherwise they would not proceed with the rehabilitation. Thus, this was the dilemma faced by the purchasers who finally had to succumb to the rehabilitating parties’ requests in order to have the abandoned units be revived. These problems were illustrated in Taman Villa Fettes, Lots 141, and 3622, Mukim 18, NED, Pulau Pinang, Bayshore Apartment, Lot 3979, Tanjung Bungah, NED, Pulau Pinang, Taman Shoukat, Lot 2219, Mukim 13, NED, Pulau Pinang, Taman Julita, P.T. Lot 4910-1916, Mukim 13, NED, Pulau Pinang, Taman Padang

Tembak, Lot 688, T.S. 2, NED, Pulau Pinang, and Tingkat Nusantara, Lots 300 and 302, Section 9W, Jalan Perak, NED, Pulau Pinang (File numbers: KPKT/08/824/6397-1; KPKT/(05)/1910-1; KPKT/08/824/ /337; KPKT/08/824/2200; KPKT/08/824/2605).

Further, in the said agreements, there is no provision giving the purchasers the right to take certain pre-emptive and necessary action, if the purported housing project is subsequently abandoned. True, pursuant to the new section 7C of Act 118, purporting to give power to the Housing Controller to order the freezing of the Housing Development Account's (HDA's) money against the developer who is carrying out his business in a detrimental manner. But, this provision only gives power to the Controller, not the purchasers, who normally become the possible direct victims of the unscrupulous developers. Further, requesting the Controller to act accordingly may take some time and bearing on the inefficiency of the Controller's administrative machinery, the complaint and request may not be practical. Thus, it may be necessary that, certain provisions should be provided in Act 118 and in the said agreements to protect the rights of the purchasers. For example, there should be a special legal regime to govern the rehabilitation and a direct right of the purchasers to request for a stop of the release of the loan funds in the hands of the end-financiers, if abandonment occurs. Similarly, neither is there in the end-financing loan agreement and the bridging loan agreement, any provision purporting to give such similar rights. In the event the project is abandoned, the fate of the purchasers, insofar as the said agreements, loan agreements and the bridging loan agreements are concerned, is imminently detrimental. In abandoned housing projects, for the protection of the purchasers, it appears equitable for the purchasers to have right to request their end-financiers to stop further releases of the balance progressive payments to the developer, once there are proofs that the purported project has been abandoned. However, it appears that, it is difficult and not practical to so order, when the developer delays the construction or they slow down the progress of construction but do not abandon the project altogether. In other words, the project is being constructed at intervals, sometime stops, sometime proceeds. This involves the question of the legal and statutory definition of 'abandoned housing project'. The question is--can the purchasers request their end-financiers to stop releasing the payment under such circumstances?

The right of the purchaser to order the financial institution/bank concerned to stop making the release of the housing loan by progressive drawdown of the various stages of construction has been entrenched in the well decided case of *Hoo See Sen & Anor v. Public Bank Berhad & Anor* [1988] 2 MLJ 170, (Supreme Court). The court decided in favour of the purchaser, on the ground that the bank/financier is the agent of the purchaser and is obligated to follow the instruction of the principal (purchaser) for the protection of the purchaser's interest. The issue is--can the bank stop the release? If in the affirmative, would it not go against the term of the letter of undertaking of the bank to the developer to release the housing loan by progressive drawdowns against the production of the relevant architect's certificate of completion of the various stages of construction? (Kok, 1998).

It seems that the undertaking of the bank to release the progress payment can only be made upon the production of the architect's completion certificate of the progressive construction stage. Thus, if there is no certificate certifying the same, the bank shall not release, for otherwise they would act in conflict with the undertaking and in breach of the duty of care and breach of contractual duty toward the purchaser. One question can be raised--in case the architect certificate is false or the certificate was issued dishonestly to the detriment of the purchaser, what is the 'preventive' (not just remedial) legal protection that the purchasers have as against the end-financiers? So far there is no provision in Housing Development (Control & Licensing) Act 1966 (Act 118), Street, Drainage and Building Act 1974 (SDBA) or in the said agreements, dealing with this situation. In *Cheah Swee Fah v Bank Bumiputra Malaysia Bhd & Anor* [2007] 7 MLJ 481; [2007] 6 AMR 634, the Court of Appeal held that, end-financiers do not owe any duty to go behind the architect's certificate. If when they receive the progressive claim supported by the certificate, their duty is to release the money, *ipso facto*. They have no duty to verify the authenticity of the certificate.

## RESEARCH METHODOLOGY

The author used qualitative case study and legal research methodologies to analyze the data generated from the data sources.

The reason as to why, the author has chosen qualitative case study method is because, the author wishes to do an in-depth and detailed case studies of certain abandoned housing projects. In addition, as the nature of the research is of a case study, it warrants the qualitative approach be employed. Qualitative methodology concerns exploring people's life, histories or everyday behaviour that quantitative research is unable to grasp. Quantitative methodology, on the other hand, limits the information that certain sources could offer. The weakness of the quantitative methodology is that, it is subject to limited variables set out at the outset of the research (Silverman, 2000); Yin, 1994; Yin, 2003).

There may be other social and cultural variables and cultures that have not been contemplated and measured by previous researches or the knowledge of the researchers. The implications of this defect are that, the results produced may not be confident enough and may not represent the true state of the situation under research. It could be misleading and spurious. Much of quantitative research leads to the use of a set of *ad hoc* procedures to define, count and analyze its variable. On this basis, qualitative researchers have preferred to describe how, in everyday life, we actually go about defining, counting and analyzing (Silverman, 2000).

By using the qualitative method, information gathered will be more and enriching as it involves an in-depth and deeper understanding and study of a particular matter. For example, quantitative research could not answer questions and matters which have not been planned or thought about (Silverman, 2000). In abandoned housing projects, it is evident that there are many information that are un-explorable by simply answering the specific set of sample questions affordable by using quantitative research methodology. These matters include the idea of individual context, experience, feelings and intuitions.

Thus, it is suggested that it is more prudent to use qualitative research methodology than quantitative research so that the findings and information would be meaningful and enriching. By using qualitative methodology, many new aspects of problems can be identified and thus, once they are identified, suggestions would then follow, resulting in the research results and findings being more beneficial and practical.

Further, due to the nature of this writing, which is humanistic and subjective, this writing utilized the qualitative research approach.

The sources of data for analysis of the above two case studies are the accessible files of the Ministry of Urban Well-Being, Housing and Local Government ('MUWHLG'), Insolvency Department and District and Land offices. Apart from this, the author also carried out interviews with relevant people. The author also carried out observation in the course of eliciting data and information from the sources. The purpose of observation is to collect information that may not be obtained through ordinary methods such as file review and interviews. The information include subtle and hidden information, reactions, demeanour, culture, policies and worldviews.

The second type of methodology that the author used is the legal research methodology. This methodology is used to analyse the legal data and information contained the legal data source such as legislations and statutory provisions, case law and the accessible documents that recorded legal events and issues. According to Anwarul Yaqin, legal research means a systematic study of legal rules, principles, concepts, theories, doctrines, decided cases, legal institutions, legal problems, issues or questions or a combination of some or all of them (Yaqin, 2007). The law that involved in this legal research is the housing law concerning the said agreements as contained in Act 118. The author wishes to know and highlight the issues and grievances that the purchasers faced in abandoned housing projects that are due to the flaws of the said agreements and its law. Once the legal issues and problems are identified, the author will suggest certain legal reforms that should be made to render the said agreements more legally protective to purchasers.

## **RESULTS AND DISCUSSION**

### Case Study 1 - Taman Harmoni, Lot 82, Mukim of Cheras, District of Hulu Langat, at the State of Selangor, Malaysia

The project—Taman Harmoni at Lot 82, Mukim of Cheras, District of Hulu Langat was divided into two (2) phases—Phase I consists of single-storey-medium-cost-terraced houses, while Phase II involved the development and erection of the low-cost flats. The development for Phase I was fully completed, albeit delayed, by the defaulting developer (K&T Development Sdn. Bhd. (K&T)), whilst Phase II had not been commenced at all, except for the preliminary, piling, and levelling works done by the defaulting developer. Thus Phase II was considered an abandoned housing project. This project was a joint venture between K&T, Perbadanan Setiausaha Kerajaan Negeri Selangor (State Secretary of Selangor Incorporated (SUK (Incorporated))), being the land proprietor and Permodalan Negeri Selangor Berhad (PNSB). The major reason leading to the

abandonment of the project was the financial difficulties faced by K&T. These difficulties arose due to the lack of skills, experience, and expertise of the defaulting housing developer company (K&T), and the inappropriate selling prices for the units compared to the costs of construction and unforeseen costs (earth works and piling works) faced by K& T (File Number: KPKT/08/824/6037-1).

This project (Taman Harmoni) was also a joint venture (JV) between K&T, SUK (Incorporated) being the land proprietor, and PNSB. This JV was made effective by a Management Agreement and Power of Attorney (PA) dated 24 June 1992, a JV agreement dated 9 November 1992, a PA dated 9 November 1992, and a Supplementary Agreement dated 4 November, 1993 (File Number: KPKT/08/824/6037-1).

Fortunately, the project had been revived by the land proprietor—SUK (Incorporated) through their project manager, PNSB—until full completion and Certificate of Fitness for Occupation ('CF') were obtained on 1 July 2005. However, the rehabilitation was a loss making venture for PNSB and SUK (Incorporated). Nevertheless, the rehabilitation had proceeded, bearing on the reason that this project was for the social welfare of the low-income group in Selangor. Furthermore, the rehabilitation undertaken was not without difficulties. Among the problems were the civil suit initiated by K&T against the rehabilitating parties, and the problem of getting the required consent from Syarikat Bekalan Air Selangor Sdn. Bhd. (SYABAS), which is the water authority in the state for connecting the temporary water supply while pending on the completion of the final water supply that could take about one (1) year to complete, after which this would enable the purchasers, who had been awaiting for the delivery of vacant possession and occupation of the units for the last 10 (ten) years since the signing of the sales and purchase agreements to obtain vacant possession, to move into the completed units (File Number: KPKT/08/824/6037-1).

On the part of the purchasers, the difficulties that they had to bear were the inability to occupy the purported units on time, having to incur other costs such as rents, and inability to get any late delivery compensation from K&T. Pursuant to a resolution passed in the Selangor State Executive Council (EXCO) dated 2 October 1991 on the application of the SUK (Incorporated) to alienate a piece of land formerly known as Lot 82, Mukim of Cheras, District of Hulu Langat, Selangor (the said land) and based on the layout plan as approved by the Selangor State Department of Town and Country Planning, the Council had agreed on the proposal of alienating the said land to SUK (Incorporated). Prior to the application for such alienation, the EXCO had once approved an application for the said land to be developed into a Low-Cost-Housing-Special-Programme on 21 September 1988 (Hulu Langat Land and District office file number: P.T.D. U.L 1/2/520-91 & Kajang Municipal Council file number: MPKj PB/KM 2/41-99).

### Analysis and Findings

In the statutory standard sale and purchase agreement (Schedule H) used in the above case study, there was no provision providing the right of MHLG to request verification and certification from the local authority and technical agencies over the purported duly

completed stages of construction of the houses and the project for supporting the developers' claims to withdraw the HDA's moneys. The request is important, it is opined, to ensure that the works done by the developers are in accordance with the requirements of the SDBA, Act 118, and Uniform Building By-Law 1984 (UBBL). Similarly, there was no provision giving the right to the purchasers and MHLG to verify, inspect, supervise and carry out cross-checks against the works and the claims made by the developer. Due to the absence of these provisions in the statutory standard sale and purchase agreement, the works done by the developer may be defective and of sub-standard quality. Further these verifications, supervisions, inspections and certifications can avoid false claims issued and sub-standard works undertaken by the developers and their qualified persons/PSP.

Further, following the above contention, there is no right given to purchasers to request a stop of the release of the moneys in the housing development account on any breach committed by the developer, considered detrimental to the purchasers' interests. It is opined that, this right is pertinent because the purchasers have the right to ensure that their loan funds would not be abused by the irresponsible developers.

There was no provision in the statutory standard sale and purchase agreement, requiring that, the vacant possession of the completed unit must be supported by the CF. This is important because without Certificate of Fitness for Occupation (CF), the purchasers cannot occupy the purported completed units, even though the vacant possession has been given.

There was no provision in the statutory standard sale and purchase agreement providing the completion date of the sale. The agreement only stipulated, *inter alia*, that the duration within which the developer had to complete the construction of the unit and had to deliver the vacant possession of the unit to the purchasers. Otherwise, if the delivery passed beyond the required duration, the developer would have to pay late delivery damages. It is opined, this provision does not give sufficient protection to purchasers. The agreement should provide the completion date for the sale, as the final date for concluding the sales. It is opined that, the completion date should be the date on which, both, the developer and the purchaser have obtained their respective bargains such as the full settlement of the purchase price, the duly completed houses with the CF, the due delivery of the vacant possession of the unit to purchaser and the title to the unit purchased has been duly registered into the purchaser's name.

Finally, the specifications of the building were not sufficiently described in the Fourth Schedule of the statutory standard sale and purchase agreement. Rather, they were only generally prescribed. It is opined, this failure could allow the developer to provide materials and specifications which are of low quality.



Case Study 2 – Taman Lingkaran Nur, KM 21, Jalan Cheras-Kajang, Selangor at P.T. 6443, H.S(D) 16848, Mukim of Cheras, District of Hulu Langat, also at the State of Selangor, Malaysia

Taman Lingkaran Nur, Kajang, Selangor above was a result of a privatization project between Saktimuna Sdn. Bhd. (the defaulting developer) (Saktimuna) and the Selangor State Government. The latter was the proprietor of the project land, who later alienated the land to Saktimuna for it to develop into a housing project subject to certain terms and conditions. However, in the course of the development of the project, the project failed and was abandoned as Saktimuna faced serious financial problems due to insufficient sales and revenues generated through sales, and their inability to meet the development and construction costs, which persisted from 1992 to early 2000 (File Number: KPKT/08/824/4275).

Later the project was taken over by one Syarikat Lingkaran Nur Sdn. Bhd. (SLN)—the first rehabilitating party with the consent of the Selangor State Government and the defaulting developer. Unfortunately, SLN also suffered the same fate, i.e. it was also unable to complete the project due to financial constraints (File Number: KPKT/08/824/4275).

On the instruction of MUWHLG and numerous appeals from the aggrieved purchasers, Syarikat Perumahan Negara Berhad (SPNB) had taken over part of the project, i.e. Phase 1A from SLN, with the consent of the Selangor State Government and Saktimuna. Being a government linked company (GLC), SPNB obtained funds from the Ministry of Finance (MOF) to revive the project. The rehabilitation succeeded. However, this rescue was a welfare service, in that the available moneys in the hands of the end-financiers were insufficient to meet the rehabilitation costs. MOF had to top-up funds to ensure the completion of the rehabilitation. During the course of the rehabilitation, there were several problems faced by SPNB, and one of them was the refusal and failure of certain purchasers to give consent to SPNB to carry out the purported rehabilitation works. Thus, not all the units in Phase 1A had been fully rehabilitated and obtained CFs. The remaining phases (Phase 1B and 2), except for Phase 3 which SLN had a joint-venture with Tanming Sdn. Bhd. and it was developed into a completed housing project now known as Taman Cheras Idaman, have as yet been revived. These phases (Phases 1B and 2) are still in the course of negotiation and study for rehabilitation, both by Saktimuna, the OR (being the Kuala Lumpur Department of Insolvency—Jabatan Insolvensi, Kuala Lumpur) and the new chargee (Idaman Wajib Sdn. Bhd.)(File Number: KPKT/08/824/4275).

Saktimuna was wound up on 11 March 2005 upon application of the Inland Revenue Board (Lembaga Hasil Dalam Negeri – LHDN) for failure of the developer company (Saktimuna) to settle corporate tax to LHDN. On 11 March 2005, the Official Receiver (OR) being KL JIM, was appointed as the provisional liquidator for the developer company. Later OR was also appointed as the liquidator for the developer company on 12 May 2009 (File Number:KPKT/08/824/4275 & Kuala Lumpur Department of Insolvency file number: JIM(WP)14/2005/A).

Phases 1B and 2 at Taman Lingkaran Nur were vested in Singesinga Sdn. Bhd. (Singesinga) by the chargee lender—Messrs CIMB Bank Berhad (CIMB) in settlement of the outstanding unpaid loan of Saktimuna to CIMB (the chargee lender), through a court's vesting order (File Number: KPKT/08/824/4275 & Kuala Lumpur Department of Insolvency file number: JIM(WP)14/2005/A).

As at 31 December 2010, there is no rehabilitation or resumption of the housing development project for Phases 1B and 2 at Taman Lingkaran Nur. Nonetheless, recent news is that there is an interested party to buy the whole housing development area at Phase 2 and settle all the damage of the Phase 2's purchasers. The interested party is Messrs Idaman Wajib Sdn. Bhd. (IWSB), the developer responsible for erecting a housing development project adjacent to Taman Lingkaran Nur (File Number: KPKT/08/824/4275).

As at 15 April 2008, Phase 1B which consisted of 52 units had been fully sold to public purchasers. The completion stage for Phase 1B is between 0% and 35%, while Phase 2 consists of 108 units where 98 units had been sold to the public. However these 98 units have not been constructed at all (i.e. the project has as yet to commence, abandoned, and the land on which the project is to be erected is still barren and vacant land filled with bushes and scrubs) (File Number: KPKT/08/824/4275).

As of today, there is no plan to rehabilitate Phase 1B. However, with respect to Phase 2, there is an interested buyer, namely IWSB, to purchase the land in settlement of the redemption sum as prescribed by Sinesinga (the chargee). In this project (Phases 1A, 1B, and 2) the OR, as the liquidator to the wound up housing developer company (Saktimuna Sdn. Bhd), does not rehabilitate the project (Kuala Lumpur Department of Insolvency file number: JIM(WP)14/2005/A & PPT(WP)141/2005/A).

### Analysis and Findings

Similarly the points and problems regarding the terms in the sale and purchase agreements, that have been elaborated under Taman Harmoni above, are herein again repeated, namely:

- 1) In the statutory standard sale and purchase agreement (Schedule H) used in the above case study, there was no provision providing the right to MHLG to request verification and certification from the local authority and technical agencies in respect of the purported duly completed stages of construction of the houses and the project for supporting the developers' claims to withdraw the HDA's moneys;
- 2) There was no provision giving the right to the purchasers and MHLG to inspect and carry out cross-checks and inspections over the works and the claims made by the developer. Due to the absence of this provision in the statutory standard sale and purchase agreement, the works done by the developer may be defective and being of sub-standard quality;

- 3) There was no right given to the purchasers to request a stop of the release of the moneys in the housing development account on any breach committed by the developer, considered detrimental to the purchasers' interests;
- 4) There was no provision in the statutory standard sale and purchase agreement, requiring that, the vacant possession of the completed unit must be accompanied by CF. This is important because without CF, the purchasers cannot occupy the purported completed units, even though the vacant possession have been given;
- 5) There was no provision in the statutory standard sale and purchase agreement providing the completion date of the sale. What were available, *inter alia*, the period within which the developer had to complete the construction of the units and deliver the vacant possession of the units to the purchasers. Otherwise, if the deliveries were passed beyond the required period, the developer had to pay late delivery damages. It is opined, this provision does not give sufficient protection to the purchasers; and,
- 6) The specifications of the building and the quality of the materials used, were not sufficiently described in the Fourth Schedule to the statutory standard sale and purchase agreement. It is opined, this failure could precipitate the developer to provide materials and specifications which are of low quality.

## CONCLUSION AND RECOMMENDATIONS

The author proposes the following suggestions to overcome the above identified issues concerning the said agreements.

The proposed verification by the Housing Controller over the completion of the construction stages and the construction works and certificate by the local authority or the technical agencies, shall also be included in clause 4(2)--schedule of payment of Schedules G, H, I and J. Thus, the suggested clause shall be:

*Amendment to Clause 4(2) of Schedules G and H:*

*'Every notice referred to in the Third Schedule requesting for payment shall be supported by a certificate signed by the Vendor's architect or engineer in charge of the housing development, the verification by the Controller and the certificate issued by the appropriate authority or the technical agencies, as the case may be, in accordance with section 7D of the Act'(emphasis added).*

*Amendment to clause 4(2) of Schedules I and J:*

*'The Vendor shall, at its own cost and expense, within fourteen (14) days upon the completion of each of the following stages issue a written notice to the Purchaser which shall be supported with a certificate signed by the Vendor's architect or engineer in charge of the housing development, the verification by the Controller and the certificate issued by the appropriate*



Item No. 4

*The remaining 8% of the purchase price to be held by the Controller as stakeholder and shall be released to Vendor as follows:*

<i>(a) at the expiry of six(6) months after the completion date; and</i>	<i>...4%</i>	<i>RM</i>
<i>b) at the expiry of twenty-four (24) months (the defect liability period) after the completion date</i>	<i>...4%</i>	<i>RM</i>
	<b>TOTAL</b>	<b>RM</b>
100		

*Item No. 5 for both Schedules (G and H) are deleted.*

*The proposed amendment to Third Schedule of Schedules I and J:*

Item No. 2

*On the completion date* *...70%* *RM*

Item No. 3

*The remaining 20% of the purchase price to be held by the Controller as stakeholder and shall be released to Vendor as follows:*

<i>(a) at the expiry of six(6) months after the completion date; and</i>	<i>...10%</i>	<i>RM</i>
<i>b) at the expiry of twenty-four (24) months (the defect liability period) after the completion date</i>	<i>...10%</i>	<i>RM</i>
	<b>TOTAL 100</b>	<b>RM</b>

The above proposal for Schedules I and J also, particularly in respect of item No. 3, can serve as a lien against any defective works found during the defect liability period.

It is also proposed that purchasers are also entitled to claim for liquidated damages for any delay of the vendor developer to complete the project (i.e. the title is transferred to the purchasers) within the prescribed time period, following the practice in Singapore. For this purpose, clauses in the statutory standard contract of sale and purchase (Schedules G, H, I and J) must be amended to fit this proposal. The proposed clause is as follows:

Additional clause 22A to Schedule G and clause 25A to Schedules H, I and J

**Completion Date**

1. *The Vendor shall give to the Purchaser a Notice to Complete, indicating completion date, in accordance with this clause no later than \_\_\_\_\_ OR 3 years after the date of delivery of vacant possession of the said unit or the said parcel, whichever is the earlier.*
2. *On or before completion date, the Vendor shall execute a proper conveyance to the Purchaser of the said unit or the said parcel. The Vendor shall also deliver to the Purchaser a duplicate Certificate of Title for the said building or the said parcel. The conveyance is to be prepared by and at the expense of the Purchaser. This conveyance is to duly transfer the title of the unit purchased to the purchaser on settlement of the required purchase price.*
3. *If for any reason the Vendor does not give a Notice to Complete by the date specified in sub-clause 1, the Vendor shall pay to the Purchaser liquidated damages.*
4. *Liquidated damages under sub-clause 3 are to be calculated on a daily basis at the rate of 10% per annum on the Purchase Price, and shall run from the date on which the Notice to Complete should have been given under sub-clause 1 until the date the Notice to Complete is actually given to the Purchaser.*
5. *Any liquidated damages payable to the Purchaser under sub-clause 1 may be deducted from any instalment of the Purchase Price due to the Vendor and if the Purchase Price is insufficient, the shortfall shall be covered by the Housing Development Insurance.*
6. *Notwithstanding completion of the purchase of the said building or the said parcel, the terms of this Agreement which are not fulfilled are to remain in effect as between the Vendor and Purchaser.*

Sub-clause 6 above is intended to bind the vendor even though there has already been actual completion of the project. Thus, the liability of the vendor towards settling any liquidated damages for delay in completing the project shall subsist even after the actual completion, until and unless the said responsibility (payment of liquidated damages) has been dispensed by the vendor.

In addition to the current practice of clause 22 to Schedule G and clause 25 of Schedules H, I and J the payment for settling the liquidated damages for late delivery of vacant possession may be deducted from any instalment of the Purchase Price due to the Vendor and if the Purchase Price is insufficient, the shortfall shall be covered by the Housing Development Insurance. Thus, the following clause to Schedules G, H, I and J is proposed.

*Additional Clause 22(4) of Schedule G and clause 25(4) of Schedules H, I and J*

*Any liquidated damages payable to the Purchaser under sub-clause 2 may be deducted from any instalment of the Purchase Price due to the Vendor and if the Purchase Price is insufficient, the shortfall shall be covered by the Housing Development Insurance.*

The defect liability period also has to be amended following the introduction of the completion date. Thus, the following clauses are proposed for amendment to clause 25(1) of Schedule G, clause 29(1) of Schedule H, clause 25(1) of Schedule I and clause 29(1) of Schedule J.

*Amendment to clause 25(1) to Schedule G, clause 29(1) of Schedule H, clause 25(1) of Schedule I and clause 29(1) of Schedule J:*

*'Any defect, shrinkage or other faults in the said Building/Parcel...which shall become apparent within a period of twenty-four (24) calendar months after the completion date...' (emphasis added).*

To give effect to the suggestion that purchasers have the right to conduct any independent supervision and inspection over the construction stages of the development and may request the end-financiers to stop any payment to the vendor developer or the Housing Controller and the appropriate authority/technical agencies from issuing verification and certificate allowing the vendor developer's claims, the following clause be added to clause 13 (materials and workmanship to conform to description) of Schedules G, H, I and J:

*Additional clause 13 of Schedules G, H, I and J:*

*'Nothing in the provision of this agreement, shall bar purchaser to conduct reasonable independent inspection and supervision over the stages of construction and works as prescribed in this agreement or to appoint*

*approved consultant to do the same on the purchaser's behalf and the purchaser shall have the right to request the Financier and the Controller, pursuant to section 7(1) of the Act, to withhold any purported release of money on claims made if the works executed by the vendor developer are not satisfactorily done according to the law'*

Finally it is proposed the building description in the Fourth Schedules to Schedules G, H, I and J be particularized. This is to avoid possible fraud of the vendor developer in respect of the specifications and quality of workmanship of the completed houses. Thus, the following example is proposed:

**1. Foundation**

*State the type of foundation and material used (e.g. bore piles, precast concrete piles, steel H-piles, tanalised timber piles or bakau piles).*

**2. Superstructure**

*State the type of materials used (e.g. reinforced concrete using Grade 30 concrete manufactured from Portland Cement complying with SS26 steel reinforcement bar complying with SS22).*

**3. Walls**

*(a) External Wall — state the material used.*

*(b) Internal Wall — state the material used.*

**4. Roof**

*(a) Pitched roof:*

*(i) state the roof covering material used;*

*(ii) state the type of insulation provided;*

*(iii) state the type of roof truss construction and the treatment provided; or*

*(b) Flat roof:*

*State concrete roof with appropriate water-proofing and insulation where provided.*

**5. Ceiling**

*State type and material of ceiling to be provided and location.*

**6. Finishes**

*(a) Wall:*

*(i) state the type and extent of internal finishes (e.g. full height ceramic wall tiles for kitchen and bathrooms);*

*(ii) state the type of external finishes (e.g. plaster/others to specify).*

*(b) Floor:*



- (i) state the type and location of internal floor finishes (e.g. ceramic tiles for living room and parquet for bedrooms);
- (ii) state the type, location and extent of floor finishes of external areas.

**7. Windows**

- (a) State the type and material of windows and location (e.g. sliding anodised aluminium framed window to living room);
- (b) State the type of glazing and minimum thickness (e.g. tinted glass).

**8. Doors**

- (a) State the type and material of doors and location (e.g. plywood flush door to all bedrooms);
- (b) State the type of glazing and minimum thickness (e.g. tinted glass);
- (c) State the make/brand or equivalent of locks to be provided.

**9. Sanitary Fittings**

State the type and location (e.g. vanity basin, one water closet, one longbath, one soap holder, one towel rail to the master bedroom).

**10. Electrical Installation**

(a) State whether wiring is concealed  
e.g. Ceiling light — 7

(b) State the type and number of lighting and power points etc.

15 amp power — 2 points

Telephone — 5 points

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