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Abstract

Defect liability period clause is provided in the statutory housing agreements—Schedules G, H, I and J (“the said agreements”). However, this liability may not be provided if the housing project is abandoned. Thus, in the event of housing abandonment, the purchasers may not be able to get protection under defect liability period clause. Due to this lacuna, the rights of purchasers can be undermined. This paper aims to highlight this issue—defect liability period in the said agreements, particularly involving abandoned housing projects in Malaysia. This research paper used a pure legal research methodology. This paper finds that due to the absence of specific clause of defect liability period in the said agreements in the event of housing abandonment, the rights of the purchasers will be denied and they will suffer irreparable damage. At the ending part of this paper, the author suggests some recommendations to settle the issues identified.

Keywords: Abandoned Housing Projects in Malaysia, Defect Liability Period, Statutory Housing Agreements, Legal Issues, Purchasers’ Grievances, Recommendations.

Introduction

It is well entrenched that the application of the statutory housing agreements (Schedules G, H, I and J (hereinafter referred as “the said agreements”)) as provided in the Housing Development (Control and Licensing) Regulations 1989 (“the Regulations 1989”), is mandatory for all house purchases in Peninsular Malaysia pursuant to regulations 11(1) and 11(1A) of the Regulations 1989.

This is also supported by the principles decided in Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291, SC, SEA Housing Corp 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, SC.

In Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291, SC, the appellant purchaser alleged that the respondent vendor orally agreed to sell and transfer to the appellant a double storey terrace house which the respondent vendor undertook to build. The respondent vendor alleged that the oral agreement was not valid under rule 12(1) of the Housing Developers Rules 1970. The learned trial judge in the High Court held that since only the method or mode of entering into the agreement was in contravention of the law, the verbal agreement was valid and enforceable. Likewise, the Supreme Court, in relation to the enforceability of the oral agreement, held, inter alia, that, although the oral agreement did not comply with the provision of rule 12(1) of the Housing Developers (Control and Licensing) Rules 1970, the appellant purchaser clearly belonged to a class for whose protection the statutory prohibition was imposed and as such the appellant could enforce his right for specific performance of the oral contract of sale provided he was a bona fide purchaser. Secondly, the Supreme Court opined, in the circumstances of this case, the appellant purchaser could not be said to be a mala fide purchaser. He could not be deprived of the protection given by the housing developers legislation nor was there justification in holding that the appellant purchaser had used the housing developers legislation as an engine of fraud. The appellant purchaser has not perpetrated any fraud, legal or equitable, and his claim for specific performance should have been granted. Mohamed Azmi SCJ in this case said at pp 294-295:

Going back to the dispute on the validity and enforceability of the oral agreement under the Housing Developers legislation, the law on this point as a general rule is that although no action can arise from a prohibited and illegal act, if a plaintiff can show that he is a member of the class for whose protection the statutory prohibition was imposed, then as an exception such a person can enforce rights or recover property transferred under the illegal transaction ... Similarly, in the present appeal, the oral agreement entered into between the purchaser and the vendor is prohibited by rule 12(1) of the Housing Developers (Control and Licensing) Rules 1970 which requires "every contract of sale shall be in writing", and rule 17 provides penalty to any licensed Housing Developer who contravenes any of the provisions of the 1970 Rules. Now, what is the nature and objective of the Housing Developers legislation? As stated by Sir Garfield Barwick in Daiman Development Sdn Bhd v Mathew Lui Chin Teck [1981] 1 MLJ 56, 60, "Nothing in the rules expressly purports to invalidate a contract which does not comply with the provisions of the rules ...... In our judgment although the oral agreement does not comply with the provision of rule 12(1), the purchaser clearly belongs to a class for whose protection the statutory prohibition is imposed and as such the purchaser can enforce his right for specific performance of the oral contract of sale provided he is a bona fide purchaser ... In normal circumstances, these allegations if
unexplained would be sufficient to satisfy us that the purchaser is not a bona fide buyer and therefore would render the oral agreement unenforceable. But having regard to the whole evidence and in the light of our conclusion that the learned Judge was correct in holding that the repudiation of the contract is not valid, the impact of these four allegations has been whittled down to the extent that we are satisfied that this is merely a case of the pot calling the kettle black. We are of the view that the vendor is more guilty of the alleged unconscionable conduct assuming for one moment that such conduct is indeed unmeritorious and unconscionable. On allegation (a) that the oral agreement was at the behest of the purchaser, the simple answer to that argument is that the responsibility of having the contract in writing lies on the vendor as licensed Housing Developer. This is clear from rules 12(1) and 17. It is for the vendor to insist on the written agreement. The fact that the idea of having no written agreement had originated from the purchaser for whatever reason, does not relieve the vendor from prosecution under rule 17. The legislature has placed on the developer rather than the buyer the responsibility of ensuring compliance with the Rules which inter alia includes the requirement of the contract to be in writing failing which the developer is liable to prosecution. In the circumstances, we do not think that ground (a) would make the purchaser a mala fide buyer”. (emphasis added).

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 under the preamble and the long title of Act 118, read as follows: "An Act 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”.

In this respect also, Richard Talalla J in Limniewah Development Sdn Bhd v Dr Jasbir Singh s/o Harbhajan Singh [1993] MLJU 296 (High Court of Malaya at Muar) said at page 7 of the judgment as follows:

There is ample authority to indicate that the Act was passed to protect buyers, often individuals with limited financial resources, from victimisation by developers who usually have far more financial resources than the buyers. It was stated by Suffian LP in the SEA Housing Corporation case that a developer cannot contract out of the obligations placed upon him by the Act and regulations made thereunder. Thus the Developer whilst free to bind himself to terms outside the contract such as the terms imposed by Government in this case was not free to do so in breach of the Developer’s obligations under the contract. Accordingly it seemed to me that the Developer was duty bound either to fit whatever he undertook outside the terms of the contract within his obligations under the contract or alternatively, independently of such undertakings, the Developer should have honoured his obligations under the contract and having done so then gone ahead to seek payment or other remedy flowing from that which he so undertook. (emphasis added).
The statutory housing agreements ("the said agreements")

Pursuant to reg 11(1) and (1A) of Regulations 1989, the statutory housing 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 the Regulations 1989 (PU(A) 58/1989). Schedule G is for sale and purchase of landed houses (land and building) by way of "full sell then build" concept;

(2) Schedule H: This schedule is introduced by regulation 11(1) of the 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 regs 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 houses (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 regs 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 houses (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 agreements—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 when the Certificate of Completion and Compliance has been obtained as well as the vacant possession of the completed house is ready for delivery to the purchaser on full settlement.
Abandoned housing projects In Malaysia

It is an undisputed fact that abandoned housing projects are a negative phenomenon that has plagued the housing industry in Malaysia. The issue of abandoned housing projects began with the adoption of a housing democracy by the Malaysian government in the 1960s. Prior to the 1960s, public housing projects were provided by the government itself. However, due to insufficiency of government funds and the upsurges in demand for housing ownership and needs, the government opened the door for private housing developers as well to participate in providing public housing accommodation to the citizens. This policy was supported by aggressive government assistance, incentives and legal means to ensure its success. Despite such efforts, the occurrences of abandoned housing projects have marred the role of private housing developers towards national development and safeguarding the interests of its citizen purchasers. As a result, many purchasers have become victims of abandoned housing projects. Hitherto, there are still inadequate preventive and curative measures to protect the rights and interests of the aggrieved purchasers in abandoned housing projects.1

There are various reasons causing abandoned housing projects. The consequential problems they have caused are also grave. One of the reasons is that there are insufficient legal provisions and protection to avoid and prevent the occurrences of abandoned housing projects and to protect the interests of purchasers. In the event that rehabilitation can be carried out, the ensuing problems have caused pecuniary and non-pecuniary losses to purchasers. The problems are still left hanging and unsettled for most of the purchasers and stakeholders, without any sufficient remedies and measures to address them.2

There are still inadequate measures taken by the government to alleviate and eliminate the problems of abandoned housing projects, not even the current newly established Division of Rehabilitation of Abandoned Projects under the Department of National Housing, Ministry of Urban-Wellbeing, Housing and Local Government ("MUWHLG"), the recent amendments made to the Act 118 and the recent recommendations by PEMUDAH (the Special Task Force to Facilitate Business). The measures taken are still "too little too late" in the face of the catastrophe caused by abandoned housing projects. The fallen preys are the aggrieved purchasers themselves. The law governing the housing industry in Malaysia—the current Housing Development (Control and Licensing) Act 1966 and its regulations (Act 118) is evidently unable to fully address the problems of abandoned housing projects. The court also seems indecisive in protecting the interests

1 Md Dahlan 2011a: 1–2.
2 Md Dahlan 2011b.
of the aggrieved purchasers. This is partly due to "too many conflicting considerations and equities" that the court needs to deal with in cases involving abandoned housing projects. Thus, in certain circumstances, the rights and interests of the purchasers may not be fully appreciated and taken into consideration by the court. The problem becomes more severe where a housing developer company is subject to the insolvency administration. In the insolvency administration, the insolvent ailing company becomes bankrupt and all the assets and moneys will be used to settle the debts of the creditors and other rightful parties. There may be insufficient monetary balance left by the ailing insolvent housing developer companies which can be used to rehabilitate the abandoned housing projects and to compensate the aggrieved purchasers and other victim stakeholders.  

In the submission of the author, among the reasons leading to the occurrences of abandoned housing projects in Malaysia, are:

(1) Insufficient terms and conditions in the housing loan agreement (including the Islamic Banking Home Financing Schemes — Bay’ Bithaman al-Ajil (BBA), Istisna’, Ijarah Thamama al-Bay’, Commodity Murabahah and Musharakah al-Mutanaqisah) effected by the purchaser/borrower and the end-finance to finance the purchase of the residential unit of the purchaser/borrower against any possible grievances consequent to abandonment of housing projects.

(2) Insufficient coordination between the land administration authority, planning authority, building authority, housing authority and other technical agencies in respect of the approval for the alienation of land, conversion of land uses, subdivision of lands, planning permission, building/infrastructure plans’ approval, housing developers’ licences and issuance of the Certificate of Fitness for Occupation ("CF") and Certificate of Completion and Compliance ("CCC"), as the case may be.

(3) The developers’ blatant disregard of the laws, throughout the course of development of the residential projects. These laws are the Housing Development (Control and Licensing) Act 1966 ("Act 118") and the regulations made thereunder, the Street, Drainage and Building Act 1974 ("SDBA"), the Uniform Building By-Laws 1984 ("UBBL"), and the planning and building guidelines issued by the planning authority and the building authority.

(4) Absence of a better housing delivery system such as the "full build then sell" system.
(5) No mandatory legal requirement for obtaining housing development insurance imposed on the applicant developers, by the MUWHLG, as the condition precedent for the approval of the application for housing developer’s licence.

(6) No specific legal provisions governing the rehabilitation schemes, perpetuating abuses and misuses of power and authority by the rehabilitating parties to the detriment of the purchasers.

There are various grievances and problems faced by the purchasers, when the housing projects are abandoned. For examples, the purchasers’ grievances are:

1. The purchasers are unable to get vacant possession of the duly completed housing units on time as promised by the vendor developers;
2. The construction of the houses is terminated or partly completed resulting in them being unsuitable for occupation, mostly for a long time, unless the units can expeditiously be revived;
3. In the course of the abandonment of the project, purchasers still have to bear all and keep up the monthly instalments of the residential loans repayable to their respective end-financiers failing which the purchased lots, being the security for the housing loan, would be sold off and with the possibility of the borrower purchasers be made bankrupt by their lender bank;
4. As the purported purchased unit has been abandoned and cannot be occupied, purchasers have to rent other premises, thus adding up their monthly expenses;
5. Inability of the purchasers to revoke the sale and purchase agreements and claim for the return of all the purchase moneys paid to the developers as the developer might have run away or no monetary provisions at all to meet the claims;
6. Many problems and difficulties happen in the attempts to rehabilitate the abandoned housing units. The problems are because the projects may have too long been overdue without any prospect of revival and to rehabilitate them, needing additional costs and expenditure on part of the purchasers; and,
7. Possible difficulties for reaching consensus and for getting cooperation from purchasers, defaulting abandoned housing developers, end-financiers, bridging loan financiers, contractors, consultants, technical agencies, local authority, land authority, state authority and planning agencies; local and state authorities may be the major reason why the rehabilitation of Housing Development Projects is slow and difficult.

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8 Md Dahlan and Md Desa 2010.
9 Md Dahlan 2011b.
10 Md Dahlan 2009.
authority for rehabilitating the projects. The troubles may be due to the technical and legal problems faced in the attempt to rehabilitate the projects.

**Defect liability period**

Defect liability period means a period within which purchasers can claim damages or request the vendor developer to repair any defective works found in the completed building after the delivery of vacant possession of the completed housing units. The defect liability period is 24 months from the date of the delivery of vacant possession. If within this period there appears any defective works in the building, the purchasers are entitled to claim damages and compensation or have a right to require the vendor developer to carry out the necessary repair of the defective works.

This right is clearly provided in the provisions of the said agreements particularly pursuant 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 (Defect Liability Period)

The details of the content of the clauses are as follows:

1. **Clause 25(1) of Schedule G** provides:
   
   Any defect, shrinkage or other faults in the said Building which shall become apparent **within a period of twenty-four (24) calendar months after the date the Purchaser takes vacant possession of the said Building** and which are due to defective workmanship or materials or; the said Building not having been constructed in accordance with the plans and description as specified in the Second and Fourth Schedule as approved or amended by the Appropriate Authority, shall be repaired and made good by the Vendor at its own cost and expense within thirty (30) days of the Vendor having received written notice thereof from the Purchaser. (emphasis added).

2. **Clause 29(1) of Schedule H** provides:
   
   Any defects, shrinkage or other faults in the said Parcel or in the said Building or in the common property which shall become apparent **within a period of twenty-four (24) calendar months after the date the Purchaser takes vacant possession of the said Parcel and which are due to defective workmanship or materials or; the said Parcel or the said Building or the common property not having been constructed in accordance with the plans and description as specified in the First and Fourth Schedule as approved or amended by the Appropriate Authority, shall be repaired and made good by the Vendor at its own cost and expense within thirty (30) days of its having received written notice thereof from the Purchaser.”(emphasis added).
(3) Clause 25(1) of Schedule I reads:

Any defect, shrinkage or other faults in the said Building which shall become apparent within a period of twenty-four (24) calendar months after the date the Purchaser takes vacant possession of the said Building and which are due to defective workmanship or materials or; the said Building not having been constructed in accordance with the plans and description as specified in the Second and Fourth Schedule as approved or amended by the Appropriate Authority, shall be repaired and made good by the Vendor at its own cost and expense within thirty (30) days of its having received written notice thereof from the Purchaser. (emphasis added).

(4) Clause 29(1) of Schedule J reads as follows:

Any defect, shrinkage or other faults in the said Parcel or in the said Building or in the common property which shall become apparent within a period of twenty-four (24) calendar months after the date the Purchaser takes vacant possession of the said Parcel and which are due to defective workmanship or materials or; the said Parcel or the said Building or the common property not having been constructed in accordance with the plans and description as specified in the First and Fourth Schedule as approved or amended by the Appropriate Authority, shall be repaired and made good by the Vendor at its own cost and expense within thirty (30) days of its having received written notice thereof from the Purchaser. (emphasis added).

Nonetheless, it is submitted, the provisions regarding defect liability period in clause 25(1) of Schedule G, clause 29(1) of Schedule H, clause 25(1) of Schedules I and clause 29(1) of Schedule J are only applicable to the "normal", successful and completed housing development projects. If the housing project is abandoned and becomes subject to rehabilitation, it seems that the rights provided by these schedules (statutory housing agreements) remain uncertain. In other words, there is no clear provision conferring a right on the purchasers to have the defective works in their completed units to be rectified by the rehabilitating parties/the defaulting vendor developer similar to the "normal", successful and completed housing development. This is because usually in abandoned housing projects there is no delivery of vacant possession. Thus, if there is no delivery of vacant possession by the vendor developer, the calculation of defect liability period cannot be made. It follows that the above clause 25(1) of Schedule G, clause 29(1) of Schedule H, clause 25(1) of Schedules I and clause 29(1) of Schedule J are dysfunctional, malfunctioned and frustrated on the occurrence of abandoned housing projects where there is no delivery of vacant possession. This may result in a situation where the aggrieved purchasers will be unable to claim any damages for any defective workmanships found or unable to require the defaulting vendor developer to carry out rectification works in the abandoned housing projects.
The above lacuna of the law appears in the rehabilitation of the abandoned housing projects in Tingkat Nusantara, Lots 300 & 302, Section 9W, Georgetown, NED, Pulau Pinang (MUWHLG’s file No. KPKP/BL/19/1171-1), Taman Shoukat, Lot 2219, Mukim 13, NED, Pulau Pinang (MUWHLG’s file No. KPKT/08/824/337) and Taman Julita, Bukit Air Itam, P.T. Lots 4910-1916, Mukim 13, NED, Pulau Pinang (MUWHLG’s file No. KPKT/08/824/2200).

To worsen the above situation, the aggrieved purchasers may not also be able to opt for wider equitable remedies to protect their rights and interests. Equitable remedies are wider remedies other than what has been provided in the said agreements, based on case to case basis and insofar this can do justice to the parties.

This principle (inability of the aggrieved purchasers to obtain equitable remedies) can be found in *Limmewah Development Sdn Bhd v Dr Jasbir Singh s/o Harbhajan Singh* [1993] 1 AMR 29; [1993] MLJU 296, HC and *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31, HC. In these cases, the High Court held that, in the event of late delivery of vacant possession, the aggrieved purchaser could only be entitled to compensation and damages as stipulated by the said agreements. He is not entitled to damages for pain, anxiety, distress and humiliation. This is because the statutory provisions are intended to be comprehensive and preclude the aggrieved purchaser from recovering under any other head of damages in the event of delay in delivery of the vacant possession.

In *Limmewah Development Sdn Bhd v Dr Jasbir Singh s/o Harbhajan Singh* [1993] MLJU 296 (High Court of Malaya at Muar), the purchaser sued the vender developer for the failure of the latter to deliver vacant possession of the duly completed house bought by the purchaser within the prescribed period as provided in the sale and purchase agreement. The transaction was governed by the Housing Developement (Control and Licensing) Act 1966 (Act 118). Apart from liquidated damages, the purchaser also claimed a further RM6,000 for the travelling cost incurred by the purchaser and his grievances in having to return to Malaysia from the United Kingdom twice after receiving numerous vendor developer persistent harassment requests for the purchaser to pay interest and collecting the keys to the completed bungalow. The purchaser also claimed damages for pain, anxiety, distress and humiliation. The magistrate allowed the claim for liquidated damages but dismissed other purchaser's claims and counterclaim. The vendor developer appealed to the High Court. The High Court dismissed the vendor developer appellant's appeal and the purchaser respondent's cross-appeal.

Richard Talalla J said, in the judgment, at page 8 as follows:

As to the Magistrate's fourth finding, it seemed to me that the Magistrate was perfectly right in following the S.E.A. Housing Corporation case where at page 35 it was said in regard to the contractual provision for damages
for delay by the developer in delivery of vacant possession of a house, that such provision was intended to be comprehensive and precluded the purchaser from recovering under any other head damages in the event of delay in delivery as happened there. Thus in this case the Buyer was entitled only to the liquidated damages provided for in the contract and nothing else. It had to follow that the Buyer’s claim for $6,000.00 and damages for pain and so on was bound to fail and the Magistrate was again right in disallowing the same.

For the reasons abovesaid, the appeal and the cross-appeal are both dismissed with costs, to be taxed. (emphasis added).

Notwithstanding the above, there is an opposite judicial policy to the above principle. This has been decided by the High Court in Charanjit Singh &/ Ver Singh @ Veer Singh & Anor v Mah Seow Haung [1995] 1 AMR 204. In this case, the court decided that, “the court of equity will grant relief notwithstanding certain terms to the contrary have been stipulated, if such relief can do justice between the parties”.

This is further cemented by Thomas all Iruthayam & Anor v LSSC Development Sdn Bhd [2005] 4 MLJ 262, HC. In this case, the High Court, granted the plaintiff purchasers the right to rescind the contract of sale and recover the moneys paid to the defendant developer on the defendant developer’s default to deliver vacant possession, failure to connect the water and the electricity and to deliver the Certificate of Fitness for Occupation (“CF”) within the prescribed period of the sale and purchase agreement to the plaintiff purchasers. The housing transaction in this case fell under Act 118. The court held that, the right of the plaintiff purchasers was not only restricted to the provisions as provided in the said agreements (the statutory housing agreements), but also to the general and wider rights affordable by the contractual principles (such as rescission) and equity. Suriyadi J in the judgment at pp 268–269 said:

With the defendant having breached the contract here, the plaintiffs were automatically accorded the rights to still enforce the agreement by demanding specific performance of it pursuant to clause 12(b), and demand damages in the process as agreed upon. Regretfully the plaintiffs had taken the extreme course of action of rescinding the agreement. The pertinent questions that invariably follow, which had to be resolved emanating from that scenario could be formulated in the following forms:

(1) did the S&P, in particular cl 12(b) provide for the right of rescission of the contract by the plaintiffs in the event of a failure and/or default by the vendor defendant to complete the sale of the said property and deliver vacant possession of the same to them;

(2) even if the agreement did not provide for rescission could the plaintiffs have invoked any written law or equity to rescind that contract in the
event of a voidable contract or a fundamental breach having been committed by the defendant; and

(3) in the circumstances of the case could the plaintiffs rescind the contract and demand the return of the RM306,000 together with damages (cl 7.3)?

The defendant, in no uncertain terms had canvassed that the agreement did not provide for rescission by the plaintiffs in the event of a breach of the contract by the defendant, though did concede in the affirmative to the second question. At a very late stage of the hearing, the defendant modified its stance and advanced the argument that as the intitulment of the action did not mention s 56 of the Contract Act, the plaintiffs thus could not submit on the importation of law for purposes of rescission.

Having scrutinised cl 12(b), I found the defendant's stance rather strange and contradictory, due to the relevant words in cl 12(b), which read "without prejudice to the other provisions of this agreement or any other rights and remedies as may be available to the purchaser (s) at law or in equity". On proper construction of this clause, it clearly meant that the plaintiffs had the additional right to resort to any law or right in equity, though outside the provisions of the agreement, for remedies. As nothing had been inserted in that clause or anywhere in the agreement that limited the scope of the remedies, by necessity the latter must include rescission. As those words of cl 12(b) were provided for in the agreement, and the intitulment did make mention of that controversial agreement, though not specifically s 56 of the Contract Act, the modified stance of the defendant still did not help its case. On those grounds I was more than satisfied that cl 12(b) of the S&P did allow the plaintiffs the right of rescission, if they so wished, in the event of any failure by the defendant to deliver vacant possession.

If I might venture a step further, there was also no inhibiting provisions anywhere in the agreement that prevented the plaintiffs from adverting to any relevant law, common law, equity, written or otherwise for a right to rescind the contract in the event of any breaches as provided for under cl 12(b). On the other hand, such inclusion of provisions to remove the effect and oust the protection of relevant laws may run foul of certain public policy, and in violation of the very purpose of such laws. If the defendant is permitted to do that, then any S&P may attempt to contract outside the relevant legislations governing housing developments eg Housing Development (Control and Licensing) Act 1966 (Act 118), Housing Developers (Control & Licensing) Regulations 1989 (effective 1 April 1989) and the like, legislations meant to protect purchasers (City Investment Sdn Bhd v Koperasi Serbaguna Cuepecs Tanggungan Bhd [1988] 1 MLJ 69). (emphasis added).

Thus, it appears that in a case where the housing project is abandoned, on the basis of the above case law, the purchasers may also invoke other legal and equitable principles apart from the provisions provided in Act 118 and
the said agreements to claim equitable compensation such as exemplary and aggravated damages for the pecuniary and non pecuniary troubles leading to their chaotic and miserable lives, which has been detrimental to their health and overall happiness, consequent to the abandonment of the project and persistent defaults of the developer.

This above principle—the invocation of other legal and equitable principles apart from the provisions provided in Act 118 and the said agreements to claim equitable compensation has also been adopted by the courts in the following cases:

(1) Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308, HC. In this case the High Court was of the view that, the aggrieved purchaser might apply the provisions in the Contracts Act 1950, viz ss 56 and 76 to rescind the sale and purchase agreement and to claim compensation for any damages which he sustained through the non-fulfilment of the agreement, apart from the provisions in the agreement and Act 118;

(2) KC Chan Brothers Development Sdn Bhd v Tan Kon Seng & Ors [2001] 6 MLJ 636, HC. In this case, the court decided that although the purchaser did not strictly comply with clause 23 of the sale and purchase agreement (about notifying the defective works found during defect liability period) for the failure to notify the defective works in accordance with the clause, the purchaser was still entitled to rely on the common law principles for breach of contract against the developer in court); and

(3) LSSC Development Sdn Bhd v Thomas & Ors [2007] 4 MLJ 1, CA. In this case the Court of Appeal reversed the decision of the High Court in Thomas & Ors v LSSC Development Sdn Bhd [2005] 4 MLJ 262. The Court of Appeal in LSSC Development allowed the appeal of the appellant developer that the purchaser did not have a right to rescind the sale and purchase agreement due to the delay of the appellant developer to deliver the vacant possession on time but only entitled to damages on the ground that the delay did not tantamount to a fundamental breach of the agreement. The Court of Appeal also did not object to the approach of the High Court in applying the provisions for remedies which are outside the purview of Act 118, i.e. the provisions in the Contracts Act 1950).

In KC Chan Brothers Development Sdn Bhd v Tan Kon Seng & Ors [2001] 6 MLJ 636, HC, the vendor developer defendant failed to build the houses bought the purchaser plaintiffs in accordance with the approved building plans and forming part of the sale and purchase agreements. The magistrate decided in favour of the purchaser plaintiffs and granted their prayers for damages with costs and interests. The vendor developer defendant appealed against the magistrate's decision in the High Court. One of the issues in the High Court are as follows:
(a) Whether the purchaser plaintiffs must comply with clause 23 of the agreements which provided for the issuance of written notice of defects by the purchasers before initiating their claims in court; and

(b) Whether upon issuance of the Certificate of Fitness for Occupation, the purchaser plaintiffs were entitled to claim compensation for non-compliance with the specifications.

As regards the above first issue, the High Court held that the failure on the part of the plaintiffs as house buyers to issue any notice under clause 23 of the agreements did not preclude them from initiating their civil claim under the common law for breach of contract against the defendant in court. Consequently, the question of estoppel as raised by the defendant did not arise. While regarding the second issue, the High Court decided that the right of the purchaser plaintiffs to claim compensation for any defect or non-compliance with the specification did not depend on the issuance of the certificate of fitness for occupation. These rights were provided under clause 23 to the sale and purchase agreement as well as under the common law for breach of contract. Ramly Ali JC said at pp 644–649 of the report as follows:

Clause 23 deals with defect liability period. ... I have studied the grounds of decision by the learned magistrate ... and fully satisfied that the learned magistrate has appropriately considered the issue relating to cl 23 and has ruled that the respondents/plaintiffs need not issue the said notice under the clause, before taking their actions to court. The appellant/defendant also argued that all the respondents/plaintiffs have failed to give any notice to the appellant/defendant under cl 23, thus they are estopped from taking any action against the appellant/defendant in court. With respect, I cannot agree with this agreement. All the relevant sale and purchase agreements in these appeals were signed between the respondents/plaintiffs and the appellant/defendant in 1990. These agreements were governed by the provisions of the Housing Developers (Control and Licensing) Act 1966 and the regulations made thereunder. At that time (1990), the relevant regulations were the Housing Developers (Control and Licensing) Regulations 1982 (the 1989 Regulations only come into force after 1990). Regulation 12(1) of 1982 Regulations provides that every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant there to shall be in the form prescribed in Sch E. Regulation 12(2) further provides that no amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with the prior approval of the controller. In other words, all provisions in the sale and purchase agreement are actually statutory requirements which must strictly be complied with cl 23, particularly is meant to be as an additional protection for house buyers, without effecting or limiting their rights under the common law. This finding was clearly confirmed by the Privy Council in City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69 where Lord Templeman has expressed (at p 72) ... The same cl 23, has been dealt with
by Peh Swee Chin FCJ in Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors [1995] 2 MLJ 663 where he has said: ... On those authorities, I am of the view that the failure on the part of the respondents/plaintiffs as house buyers to issue any notice under cl 23 of the sale and purchase agreements did not preclude them from initiating their civil claim under the common law for breach of contract against the appellant/defendant in court. Consequently, the question of estoppel as raised by the appellant/defendant does not arise. ... The rights of the house buyers to claim compensation for any defect or non-compliance with the specifications, do not depend on the issuance of the CFO. These rights are provided under cl 23 to the sale and purchase agreement as well as under the common law for breach of contract. Clause 23 provides for defect liability period of 12 months after the date of delivery of vacant possession to the house buyers. Manner of delivery of vacant possession is provided under cl 19, ie upon the issue by developer's architect of a certificate certifying that the construction of the building has been duly completed and the purchaser having paid all monies payable and performed or observed all the terms and covenants on his part under the sale and purchase agreement. However, such possession shall not give the purchaser the right to occupy and the purchaser shall not occupy the said house until such time as the CFO is issued. It is the duty of the developer to procure the issue of the CFO from the appropriate authority as provided under cl 20 of the sale and purchase agreement. In reality, some defects or non-compliance of specifications can only be discovered when the purchaser has occupied the house for sometime. That is why, cl 23 gives a grace period of 12 months for the purchaser to discover the defects and non-compliance of specifications. After that 12 months period, purchaser may still enforce their rights under the common law for breach of contract. If the appellant/defendant's argument is to be accepted, then the rights and protection granted to house buyers under cl 23 as well as under the relevant laws, particularly the Housing Developers (Control and Licensing) Regulations 1982 (now as amended in 1989) and the common law for breach of contract, would be useless and serve no purpose at all. (emphasis added).

The remedies granted to the aggrieved parties in these cases were the right to rescission and the right to claim compensation due to the rescission of the contract of sale pursuant to the provisions in the Contracts Act 1950, and the right of the aggrieved purchaser to initiate a civil claim under the common law for the breach of contract against the developer being a remedy outside the purview of the statutory housing agreements and Act 118. Nevertheless, these remedies are not tortious remedies, i.e. in respect of damages for pain, anxiety, distress and humiliation. Thus, it can be said

11 Thomas all Iruthayam & Anor v LSSC Development Sdn Bhd [2005] 4 MLJ 262, HC; LSSC Development Sdn Bhd v Thomas all Iruthayam and Anor [2007] 4 MLJ 1, CA; Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308, HC.
12 KC Chan Brothers Development Sdn Bhd v Tan Kon Seng & Ors [2001] 6 MLJ 636, HC.
that until now, the courts\textsuperscript{13} in Malaysia are only ready to apply certain contractual remedies (rescission and damages under the Contracts Act 1950) being "outside remedies" other than what are afforded by Act 118 and the said agreements. However, even though certain case law are of the view that these "outside remedies" may include other equitable remedies\textsuperscript{14} which may also include, it is opined, the right to claim tortious damages and remedies, for example damages and remedies for pain, anxiety, distress and humiliation, based on case law; these damages and remedies would not be granted by the courts.\textsuperscript{15} Thus, for aggrieved purchasers in abandoned housing projects, they would not likely get these types of damages and remedies (tortious) from the defaulting abandoned housing developers.

Similarly, it is submitted, the normal provisions such as the duty to observe the defect liability period, damages for late delivery of vacant possession, duties to procure CF and Certificate of Completion and Compliance and property free from encumbrances before the purchaser takes vacant possession of the building, time for delivery of vacant possession, the manner of delivery of vacant possession, materials and workmanship to conform to description, right of the purchaser to take legal action and other terms as are commonly stipulated in the said agreements remain unclear insofar as the rehabilitation of the abandoned housing projects are concerned.

**Recommendations and conclusion**

It is recommended that one of the conditions for the applicant developer to obtain a housing developer's licence is to possess housing development insurance. With this requirement, the purchasers' interests would be protected against any abandonment and its ensuing consequences, losses and other kinds of housing problems. The insurance could also cover any shortfall in the costs for carrying out any rehabilitation or to pay compensation to the aggrieved purchasers and thus ensuring the project could be duly completed and/or finally could protect the purchasers' rights.

It is also proposed that the completion date for housing transaction should be provided in the said agreements and Act 118 as the final date on which the vendor and the purchaser obtained all their bargains and considerations. It is opined that, the proposed date should be the date when the vendor receives all the required purchase price for the unit bought by the purchaser, the CCC has been issued, the delivery of vacant possession of the unit has


\textsuperscript{14} For example Charanjit Singh all Ver Singh @ Veer Singh & Anor v Mah Seow Haung [1995] 1 AMR 204, HC; Thomas all Iruthayam & Anor v LSSC Development Sdn Bhd [2005] 4 MLJ 262, HC; LSSC Development Sdn Bhd v Thomas all Iruthayam and Anor [2007] 4 MLJ 1, CA.

\textsuperscript{15} Limmewah Development and SEA Housing Corp.
been made and the title for the unit is ready for registration in the purchaser’s name on full settlement of the required purchase price. This is to avoid any unfair practice and fraud, for example in cases where by the vendor might escape and avoid any liability after he received all the purchase money from the purchaser, while the title to the unit bought by the purchaser has yet to be registered into the purchaser’s name. It is opined, that even with the new clause 5(6) of Schedules G, H, I and J which imposes a duty on the vendor to refund the loan sums disbursed by the financier if the Memorandum of Transfer for the purported purchased unit cannot be registered in the purchaser’s name, it is still inadequate to protect the rights and interests of the purchaser. This is because this new clause only serves as a remedial/curative measure and not as a preventive one.

Thus, to give effect to the above proposal, the following proposed items and particulars under the Third Schedule to Schedules G, H, I and J should be accordingly amended to the following effect:

The proposed amendment to Third Schedule of Schedules G and H:

<table>
<thead>
<tr>
<th>Item No. 3</th>
<th>On the completion date</th>
<th>... 12%</th>
<th>RM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item No. 4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The remaining 8% of the purchase price to be held by the Controller as stakeholder and shall be released to Vendor as follows:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) at the expiry of six (6) months after the completion date; and</td>
<td></td>
<td>... 4%</td>
<td>RM</td>
</tr>
<tr>
<td>(b) at the expiry of six (6) years (the defect liability period) after the completion date</td>
<td></td>
<td>... 4%</td>
<td>RM</td>
</tr>
<tr>
<td>TOTAL 100</td>
<td></td>
<td></td>
<td>RM</td>
</tr>
</tbody>
</table>

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

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

<table>
<thead>
<tr>
<th>Item No. 2</th>
<th>On the completion date</th>
<th>... 70%</th>
<th>RM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item No. 3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The remaining 20% of the purchase price to be held by the Controller as stakeholder and shall be released to Vendor as follows:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) at the expiry of six (6) months after the completion date; and</td>
<td></td>
<td>... 10%</td>
<td>RM</td>
</tr>
<tr>
<td>(b) at the expiry of six (6) years (the defect liability period) after the completion date</td>
<td></td>
<td>... 10%</td>
<td>RM</td>
</tr>
<tr>
<td>TOTAL 100</td>
<td></td>
<td></td>
<td>RM</td>
</tr>
</tbody>
</table>
The author proposes that the defect liability period should be increased from twenty-four (24) calendar months to six (6) years from the completion date. This is because, the defective and any obvious and hidden sub-standard works or latent defects in the building works may not become apparent within twenty-four (24) months. Thus, it is submitted that six (6) years is a reasonable and fair time frame to notice any of these defects.

It is also proposed that the aggrieved purchasers in abandoned housing projects are also entitled to claim for liquidated damages and unliquidated damages being outside remedies of the said agreements and any tortious damage for the defaults of the vendor developer to complete the project (i.e. duly completion of the houses and the title is transferred to the purchasers) within the prescribed time period. For this purpose, new clauses on these rights should be introduced into the said agreements (Schedules G, H, I and J) to fit this proposal.

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Housing Development (Control and Licensing) Act 1966 (Act 118) and its regulations.

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Files


Journals


**Dissertation**

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