

REHABILITATION OF ABANDONED HOUSING PROJECTS: A COMPARATIVE ANALYSIS BETWEEN THE LAW AND PRACTICE IN PENINSULAR MALAYSIA AND NEW SOUTH WALES, AUSTRALIA

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Abandoned housing projects is one of the housing problems in Peninsular Malaysia. Even though there are laws and policies provided by the Malaysian government to govern housing industry, yet abandoned housing projects problem is still an unsettled issue for the Malaysian government to tackle. The real victims are the purchasers themselves. Virtually, there is no specific and common ways to face the problems of abandoned housing projects. This is due to the fact that in each and every abandoned housing project, the problems and issues faced by the stakeholders vary. Thus, different methods are used to face the problems especially to rehabilitate the projects. If the projects are not viable for rehabilitation, the projects will be stalled forever without any prospects for rehabilitation, to the detriment of the purchasers. This paper will discuss the law and practice in rehabilitating abandoned housing projects in Peninsular Malaysia. It will also illustrate, by way of comparative method, the law and practice as applicable in New South Wales, Australia. From the comparative approach, certain suggestions will be forwarded at the end of the paper for facing the problems of abandoned housing projects and their rehabilitation in Peninsular Malaysia.

Keywords: *abandoned housing projects, rehabilitation, Peninsular Malaysia, New South Wales Australia, law and practice.*

INTRODUCTION

A housing project in Peninsular Malaysia can be deemed to be abandoned when:

- a) Construction activities on site of the housing construction project have consecutively stopped for six (6) months or more, after the expiry of the Sale and Purchase Agreement ('SAP') executed by the developer and the purchaser or; the developer has been put under the control of the Official Receiver; and,
- b) Housing Controller is of the opinion that such developer cannot duly proceed with the execution of its obligations as a developer¹.

¹ Ministry of Housing and Local Government, *Laporan Senarai Projek Perumahan Terbengkalai Dari Tahun 1990 – Jun 2005 (List of Abandoned Housing Projects From Year 1990 – June, 2005)*, 2006, p 1. This is the current definition of 'abandoned housing projects'. However, before year 2006, the definition of abandoned housing projects was – 'The construction and development works on site of the project that has been terminated for the preceding six months or more. Such termination has either occurred consecutively or occurred during the period within which the project must be completed or beyond the required completion period. Completion period means the period within which the developer has to complete the construction of the housing units. For the landed property, the completion period is 24 months calculated from the date of the sale and purchase agreement had been executed, whilst for flats the completion period is 36 months from the date after the execution of the sale and purchase agreement; or, within the said duration of six months, the developers concerned had been wound up and has been put under the control of the Official Receiver; and, the housing controller is of the opinion that a particular housing developer fails to carry out their obligation as a developer'. See Ministry of Housing and Local Government, *Senarai Projek Perumahan Terbengkalai (List of Abandoned Housing Projects)* 1999, 2000, p 1.

The roles and obligations of the Ministry of Housing and Local Government ('MHLG') are to gather relevant information, search and initiate ways to rehabilitate the housing projects so abandoned and to identify suitable parties for the rehabilitation of the said projects either they are rehabilitated by the original developers themselves (the first defaulting developer) or by the financiers to the said projects or by the land owners of the projects or even through the initiatives of the Purchasers Action Committees or through the government rehabilitating agency — Syarikat Perumahan Negara Bhd (SPNB)².

CAUSES OF ABANDONMENT OF HOUSING DEVELOPMENT PROJECTS IN PENINSULAR MALAYSIA

Among the reasons leading to the abandonment of housing projects are³:

- 1) Financial problems faced by the housing developers. The cause of this problem is owing to the problems of the developers' financial and construction management (severe liquidity problems and high gearing) to meet the construction costs and to pay the creditors;
- 2) Loose approval of the applications for housing developer licenses by MHLG. MHLG fails to obtain requisite advices and opinions from economists, legal experts, property experts and other experts in approving the applications.
- 3) The embedding and permeating illegal squatters' problems faced by the developers and this includes the formidable challenges and problems caused to the detriment of the developers concerned in getting rid them of, from the projects' sites.
- 4) Ongoing conflicts, feuds and squabbles ensued between and among the developers, land proprietors, purchasers, contractors, consultants and financiers causing further difficulty to coordinate and streamline the development and construction activities.
- 5) Insufficient coordination between the land authority, planning authority, building authority, housing authority and other technical agencies in respect of the approval for the alienation of land, land uses, subdivision of lands, planning permission, building/infrastructure plans' approval, housing developers' licenses and issuance of the certificate of fitness for occupation (CF) and Certificate of Completion and Compliance (CCC).
- 6) Fraudulent practices of the housing developers for example housing developers instructing the architects or engineers to issue false claims for the release of the purchasers housing loans' funds from the end-financiers, without supporting the claims with the appropriate progressive certificate of completion as required by the law.
- 7) Lacking of experience and skills in handling housing development projects on part of the housing developers, showing irresponsibility and even some have

² Ibid.

³ See generally in Nuarrual Hilal Md. Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework*, Unpublished Phd in Law Thesis, International Islamic University Malaysia, Gombak, 2009, Kuala Lumpur.

- absconded from completing the construction of the housing projects, after realizing that they could not complete the projects.
- 8) Blatant disregard for the laws by housing developers, throughout the course of development of the housing projects. These laws are the Housing Development (Control and Licensing) Act 1966 ('Act 118') and its 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.
 - 9) Enforcement weaknesses on part of the land authority, planning authority, building authority and the housing authority over the development of the housing projects.
 - 10) Absence of a better housing delivery system such as the 'build and sell' system.
 - 11) No legal requirement for obtaining housing development insurance imposed on the applicant developers, by the MHLG, as the condition precedent for the approval of the application for housing developer's license.
 - 12) Insufficient legal requirement and practice allowing purchasers, MHLG and local authority to supervise, inspect and monitor the due progress of the housing development works undertaken by the housing developers.
 - 13) No legal requirement and practice to get endorsement and verification from purchasers, MHLG and local authority over each and every progress claims and progress works made by the developers for the release of the loan funds from the end-financiers of the purchasers.
 - 14) No specific legal provisions governing the rehabilitation schemes, causing abuses and misuses of power and authority by the rehabilitating parties to the detriment of the purchasers.
 - 15) Economic slowdown and recession faced by the nation resulting in strict banking control over loans' approvals and regularization of the loans' repayments.
 - 16) No legal provisions regulating the loans and repayment of loans on part of the banks and financial lenders thus open to abuse and misuse of power on part of the banks and financial lenders to the detriment of the borrower developers.
 - 17) Excessive immunity enjoyed by the State Authorities and the local authorities against any legal action from aggrieved parties, even though they are negligent and in breach of the duty of care in the carrying out of the provisions contained in the Street, Drainage and Building Act 1974 (Act 133) ('SDBA') and Uniform Building By-Laws 1984 ('UBBL'), pursuant to section 95(2) of the SDBA.
 - 18) Insufficient professional staff, insufficient legal and technical training and knowledge, insufficient office facilities, inefficient administration and administrative logistics on part of the housing authority (MHLG), land authority, local authority, local planning authority, appropriate authority and technical agencies (such as the Water Authority, Sewage Service Department, Fire and Rescue Department and Public Works Department) in Peninsular Malaysia which have indirectly, by and large, contributed to the problems of abandoned housing projects.⁴

⁴ See the news in the New Strait Times (NST) dated 12th September, 2007, about the Auditor-General Report conducted by the Auditor General Office in 2006, reporting that due to inefficient and poor management of funds, lack of enforcement and man-power, lack of appropriate training, mal-administration and poor monitoring, unreasonable

GRIEVANCES AND TROUBLES FACED BY PURCHASERS

The grievances and problems faced by the purchasers, if the housing development projects abandoned in Peninsular Malaysia are⁵:

- 1) They are unable to get vacant possession of the housing units on time as promised by the vendor developers.
- 2) The construction of the houses are terminated and partly completed resulting in them to be useless for occupation, mostly for a long duration of time, unless the units can expeditiously be revived.
- 3) In the course of the abandonment of the project, purchasers still have to bear all the monthly installments to their respective end-financier lenders 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 bankrupts.
- 4) As the purported purchased units have 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, entered into with the housing developers, and claim for the return of all the purchase moneys paid to the housing developers as the housing developers 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 been too long overdue without any prospect of revival and to rehabilitate them, needing additional costs and expenditure on part of the purchasers.
- 7) Possible difficulties for reaching consensus and for getting cooperation from purchasers, defaulting abandoned developers, end-financier lenders, bridging loan lenders, contractors, consultants, technical agencies, local authority, land authority, state authority and planning authority for rehabilitating the projects. The troubles may be due to the technical and legal problems faced in the attempt to rehabilitate the projects.
- 8) Insufficient fund to generate the rehabilitation as the outstanding loan funds of the purchasers are not enough, purchasers refuse to part with their own money, no financial assistance from any agencies and the fact that the rehabilitating parties would incur losses if they were to proceed with the purported rehabilitation.
- 9) Purchasers themselves have to top-up using their own moneys, as the available funds are insufficient for meeting the rehabilitation costs and they themselves personally have to rehabilitate the projects left abandoned. Thus, they have to face

overspending, and corruptions in the states and federal agencies (including the MHLG and local councils) causing huge losses to government. See at <http://www.malaysianbar.org.my/content/view/11104/2/> on 12th September, 2007. Also in the NST, Wednesday, 12th September, 2007, pp.1, 4 and 12.

⁵ See Nuarrual Hilal Md. Dahlan, *Abandoned Housing Projects in Malaysia: A Legal Perspective* (2006) 6 MLJ i, Nuarrual Hilal Md. Dahlan, *Rehabilitation of Abandoned Housing Project: Experience of An Abandoned Housing Developer Through the Help of A Government Agency*, (2007) 1 MLJ lxxxiv and Nuarrual Hilal Md. Dahlan, *Rehabilitation of Abandoned Housing Project in Peninsular Malaysia By A Purchasers' Voluntary Scheme: A Case Study* (2007) 4 MLJ clvii. See also in Nuarrual Hilal Md. Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework*, Unpublished Phd in Law Thesis, International Islamic University Malaysia, Gombak, 2009, Kuala Lumpur.

- all kinds of music in consequence of the abandonment and initiating efforts for rehabilitation.
- 10) Purchasers would not get any compensation and damages from the defaulting housing developers as they (the defaulting housing developers) may have no monetary provisions to meet the claims.
 - 11) Purchasers may be made bankrupts or the purchased housing lots, on which the purported purchased units are to be erected, may be foreclosed by the creditors and lenders on their failures to repay the housing loans.
 - 12) No party agreeable to rehabilitate the abandoned housing projects, causing the project to be stalled for indefinite period of time or for a long period of time or may not altogether be rehabilitated.
 - 13) Other pecuniary and non-pecuniary losses subtle or otherwise, suffered by purchasers due to the abandonment and in the course of rehabilitation of the projects pending full completion, such as divorces, family breakdowns, dismissals from employment, nervous shocks, mental breakdowns and losses of future earnings.

Due to the abandonment and the ensuing complications occurring thereafter, the ordinary machinery and enforcement of the housing, planning, building and development laws become defunct, frustrated and jammed, at the expense of the public purchasers. This also includes the inability of the public purchasers to take legal actions against the defaulting developer because the actions might not be beneficial nor feasible.

REHABILITATION OF ABANDONED HOUSING PROJECTS

Generally, it appears there are five (5) ways to rehabilitate the abandoned housing projects in Peninsular Malaysia. They are:

- rehabilitation by the original developers themselves;
- rehabilitation funded by government agencies;
- rehabilitation undertaken by a new developer;
- rehabilitation by the liquidator/provisional liquidator or receiver and manager; and,
- rehabilitation undertaken by the purchasers themselves.⁶

There were abandoned housing projects taken over by Pengurusan Danaharta Nasional Berhad ('Danaharta') being part of the scheme to reduce the non-performing-loans (NPLs) of certain banks in Malaysia during the economic recession in 1998. However, Danaharta did not rehabilitate the project but acted as an 'estate agent' by selling the projects at certain prices for reducing the aggravating Non-Performing-Loans ('NPL'). The proceeds obtained from the sales were distributed to these parties-- Danaharta, the respective ailing banks, paying off the bonds and loan debts and to the government (Ministry of Finance ('MOF')). After the cessation of Danaharta on 30

⁶ Nuarrual Hilal Md. Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework*, pp. 123-139.

September, 2005, some projects, being the residual surplus works still unfinished by Danaharta, were handed over to one Syarikat Prokhas Sdn. Bhd ('Prokhas'). Similarly, the function of Prokhas is akin to an 'estate agent' as Danaharta was. There is no project rehabilitated by Prokhas. It is up to the buyers of these projects to resume the construction or otherwise. Thus, it is opined, the existence of Danaharta and Prokhas do not provide solutions for abandoned housing projects, especially for protecting the purchasers' fates by way of carrying out the necessary rehabilitation.⁷

The abandoned housing projects occurring in Peninsular Malaysia can be categorized as follows:-

- a. Projects with potential for rehabilitation;
- b. Projects taken over by other new developers;
- c. Projects not suitable for rehabilitation; and
- d. Completed rehabilitated projects.⁸

In Peninsular Malaysia, abandoned housing projects which fall under the category of having potential for rehabilitation can be divided into 4 (four) types as follows:-

- i. Project which is newly identified;
- ii. Project under probability study;
- iii. Project readied for rehabilitation;
- iv. Project under construction.⁹

Projects which fall under the category of 'having potential for rehabilitation' are projects which are in dire need of special rehabilitation schemes, plans and strategies, because these projects involve a broad spectrum of parties such as the landlords, developers/other developers for taking over the projects, financial institutions, government technical agencies, local authorities, local planning authorities, purchasers committees and Insolvency Department.¹⁰

The number of projects falling under this category increases from 99 projects in 2003 to 121 projects as of June, 2005.¹¹ The increase was due to the financial and management problems faced by developer companies, as well as the results from economic recession encountered by the nation.¹²

Most of the types of houses which fall under the category of 'Project Which Are Still Abandoned' have the possibilities and potential for rehabilitation.¹³ These houses consist of low-cost-houses – 4,247 units (8%), condominium/apartment – 13,766 units

⁷ Ibid, pp. 140-141.

⁸ Bahagian Pengawasan dan Penguatkuasa, Kementerian Perumahan dan Kerajaan Tempatan, *Laporan Senarai Projek Perumahan Terbengkalai Dari Tahun 1990—Jun, 2005* (Kuala Lumpur: Author, n.d), 1.

⁹ Ibid, p. 5.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

(25%) and medium-cost-flat – 13,579 units (24.4%).¹⁴ The other remaining types of houses that fall under the category of the category of 'Project Which Are Still Abandoned' have the possibilities and potential for rehabilitation, are 165 units of bungalow-houses (0.3%), 204 units of semi-detached-single-storey-houses (0.5%), one(1) unit of semi-detached-double-storey-house (0.1%), 3,509 units of single-storey-terrace-houses (6%), 5,268 units of double-storey-terrace-houses (10%), 197 units of shop-houses (0.4%), 2,946 units of medium-cost-double-storey-houses (5.3%) and 11,244 units of low-cost-flats (20%).¹⁵

All in all, the rehabilitation of 121 abandoned housing projects, which are still abandoned but have potential for rehabilitation, require an estimated special monetary allocation of RM 5.06 billion.¹⁶ This allocation is important as the 'Abandoned Housing Projects Rehabilitation Fund' (Tabung Pemulihan Projek Perumahan Terbengkalai - TPPT) under Bank Negara had been abolished since year 1992.¹⁷ If this special allocation can be obtained and afforded, this would certainly help the fates of the 36,815 purchasers of abandoned housing projects.¹⁸

PROBLEMS IN REHABILITATION

The main problem in rehabilitation of abandoned housing projects, in Peninsular Malaysia, is the shortage of funds on part of the rehabilitating parties to finance the rehabilitation. Thus, if this problem can be settled, the rehabilitation can be carried out. Often, if there is no party willing to undertake the required rehabilitation, the government will either through the Tabung Pemulihan Projek Perumahan Terbengkalai (TPPT), under Bank Negara (now is dissolved) or Syarikat Perumahan Negara Berhad (SPNB) or through other federal or state government agencies/bodies, may step into the shoe of the rehabilitating parties to revive the projects. The rehabilitation fund injected into the projects, by these government agencies may either be in form of soft loan or simply a welfare fund, free of any charges for the benefit and interests of the aggrieved purchasers to have their abandoned units be revived.

In abandoned housing project, the most pertinent issue is: who will rehabilitate the project if the project is abandoned due to the default of the developer? Should it be the liquidator or the provisional liquidator or the receiver and manager or the purchasers themselves or other new rehabilitating parties? Further, if the available funds are not enough, how can the rehabilitation be carried out? What are the legal and equitable remedies affordable to the aggrieved purchasers in abandoned housing projects? It seems, there is nothing in the insolvency law and the housing law, in particular in the Companies Act 1965 and the Companies (Winding Up) Rules 1972 or the ordinary practice in the deed of debenture prescribing the powers of the receivers and managers, or

¹⁴ Id, p. 5.

¹⁵ Id, p. 26.

¹⁶ Id.

¹⁷ Id, p. 3.

¹⁸ Id.

even the Malaysian case law and common law dealing with insolvency issues and laws (insofar as the provisions in the Civil Law Act 1956 (Act 67) permit) as well the Housing Development (Control and Licensing) Act 1966 and its regulation (Act 118) providing certain effective, satisfactory and coherent remedies, being preventive and curative in nature, in the full protection of the purchasers' interests, in case housing projects are abandoned, especially for carrying out necessary rehabilitation.

Most of the rehabilitations 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 schemes.¹⁹

The following sub-topics deal with the types of rehabilitation of abandoned housing projects in Peninsular Malaysia. The information of these rehabilitation are mainly derived from the reported case law from the major law reports—Malayan Law Journal (MLJ) and Current Law Journal (CLJ).

Rehabilitation By The Original Developers Themselves

There are two decided case law concerning the above type of rehabilitation, *viz*:

- a) *Lim Chee Holdings Sdn Bhd v RHB Bank Bhd (formerly known as Kwong Yik Bank Bhd)* [2005] 6 MLJ 497; and,
- b) *Sri Binaraya Sdn. Bhd v. Golden Approach Sdn Bhd. (Poly Glass Fibre (M) Bhd, Applicant)* [2002] 6 MLJ 632.

In *Lim Chee Holdings Sdn Bhd v RHB Bank Bhd (formerly known as Kwong Yik Bank Bhd)* [2005] 6 MLJ 497 (Court of Appeal at Putrajaya), the appellant developer developed a housing project in Langkat, Perak.²⁰ The appellant developer obtained a bridging loan from the respondent bank to finance the project.²¹ The project site of the development was subject to a charge as a security to the bridging loan granted by the respondent bank and the loan was also guaranteed by the directors of the appellant developer.²² Later, the appellant developer defaulted on the loan and abandoned the

¹⁹ Nuarrual Hilal Md. Dahlan, 2009: 142-143.

²⁰ The project was called Taman Mewar. The whole project was supposed to consist of 186 units of building with 127 units of single-storey terrace houses, 52 units of double-storey terrace houses and seven units of double-storey shophouses. See at page 501 of the reported case.

²¹ The bridging loan was in the form of an overdraft facilities in the sum of RM 1 million and end-financing facilities to the value of RM 2 million. See page 502 of the reported case.

²² The security for the bridging loan was a first party legal charge created by the appellant over 189 individual land titles identified as PT 2041 to PT 2229 in the Mukim of Changkat Jong, Daerah Perak Hilir, Perak covering an area of more or less 11 acres and a Directors' Joint and Several Guarantee for the sum of RM 1 million. See at page 502 to the reported case.

project.²³ Nevertheless, the appellant developer managed to carry out rehabilitation but with the help of a government agency—Tabung Pemulihan Projek Perumahan Terbengkalai, Bank Negara (TPPT, Bank Negara). Further the bank lender (bridging loan financier) agreed to reduce the burden of repaying the bridging loan of the defaulting developer. However, the respondent bank withheld the action to foreclose the security of the loan. In addition, the respondent bank assisted the appellant developer to rehabilitate the project, revised and re-scheduled the re-payment of the bridging loan.²⁴ Nevertheless, despite such assistance rendered, the financial position of the appellant developer remained poor. In the result, the respondent bank suspended the appellant developer's account. In the meanwhile, the appellant developer succeeded to obtain a soft loan from TPPT, Bank Negara subject to certain conditions.²⁵ By the soft loan of TPPT, the project was rehabilitated. Nevertheless on part of the appellant developer the project was not a complete success i.e there was still an outstanding debt towards the respondent bank. This was because the appellant developer did not fulfill its part of the bargain when it failed to deposit the sales proceeds into the designated bank account as the appellant needed to pay the staff salaries and administrative charges. The appellant developer blamed the respondent bank for the latter's 'defaults' during the course of the release of the bridging loan earlier, which by and large, had affected the smooth running of the whole project. However, the Court of Appeal held that the respondent bank was not to be blamed for the failure of the appellant developer. Instead they had helped out the appellant to revive the project and re-scheduled the repayment of the loan. In the result, the court allowed the application of the respondent bank to sell off the security to the loan by way of a court's order for sale.

In *Sri Binaraya Sdn. Bhd v. Golden Approach Sdn Bhd. (Poly Glass Fibre (M) Bhd, Applicant)* [2002] 6 MLJ 632, the court (High Court at Shah Alam) allowed the application for stay of the winding up order to enable the respondent developer completing the rehabilitation of the abandoned housing project. In this case the respondent developer was at all material times a licensed housing developer of a housing project situated at Lot Nos 9887 and 9888, Mukim of Ulu Bemam, Daerah Tanjung Malaysia, Perak. The housing development project was known as 'Diamond Creeks Country Retreat' or 'Desa Istirehat Diamond Creeks'. The respondent appointed the petitioner as the main contractor for certain works²⁶ under the project. The petitioner

²³ The appellant developer failed to meet the repayment target for the bridging loan and as at 31 May 1987 the outstanding sum due under the bridging loan was RM 777,356.34. As at 31 August 1988 the sum outstanding ('principal and accrued interest') stood at RM 931,158.88. But on the principal sum alone the amount disbursed from the bridging loan as at 31 August 1988 was RM 395,133.04. See at page 502 of the reported case.

²⁴ The respondent bank proposed and required that the cash-flow of the proceeds from the sales of the units be monitored by the respondent bank appointed representative – Messrs Hanafiah Raslan & Mohamad. The control and monitoring of the cash-flow and the proceeds would take into account the disbursement – cost of construction, administration, professional fees, infrastructure, cost to TNB, water tank (tangki) and prayer hall (surau). The balance of the proceeds after deducting against these disbursements would be released to the respondent bank. See at pages 503-504 of the reported case.

²⁵ Among the conditions were that, Messrs Peat Marwick Consultants Sdn. Bhd be appointed as an Independent Financial Consultant of the appellant developer and/or as an Independent Project Manager to monitor and manage the completion of the project, subject to the approval of TPPT and the respondent bank and a second legal charge over all the unsold lots (units) of Taman Mawar, Langkap, Perak and ranking in priority over the existing charge created by the appellant developer in favour of the respondent bank. See at pages 505-506 of the reported case.

²⁶ The main access road works and the stage one (1) civil infrastructure works. See at page 633 of the reported case (MLJ).

alleged that the respondent was indebted to them the sum of RM 2,108,820.22 being the sum due and owing for works under the project. Thus, to recover this sum, the petitioner presented a winding up petition against the respondent pursuant to section 218(1) of the Companies Act 1965. The court granted the petition. On this, the respondent appealed to the Court of Appeal against the said order for winding up. Pending disposal of the appeal, the contributories of the respondent developer company (the applicant)²⁷ had filed an application²⁸ for a stay of the winding up order.²⁹ The court granted an interim stay order. The petitioner opposed this interim stay order.

The court held that it is in the interest of the public at large that the stay should be allowed. The respondent was involved in a very large scale housing development and there was clear evidence to show that several units of houses and lands were sold to the public at large. If a stay is not allowed, the house and land purchasers of the project would be put in dilemma and in a position of constant uncertainty. Further according to the court the winding up order was made on 12 June 2000 and after about five months later, the first interim stay of the winding up was granted on 6 November 2000. From the Official Assignee's report, it is clear that the liquidation process has yet to commence. In view of the very short period, the application for a stay is made after the winding up and the fact that liquidation has yet to commence coupled with the public interest, it is appropriate for the court to be more ready to grant a stay, allowing the respondent developer company to carry on the rehabilitation of the abandoned housing project.

Further the court granted the application for a stay of winding up proceedings on the ground that there was a convincing *bona fide* dispute to the petitioner's disputed claims.

Rehabilitation Funded By Government Agencies

Under this type of rehabilitation there are three (3) reported case law. The cases are:

- a) *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd* [1995] MLJU 46; [1995] 2 CLJ 471;
- b) *Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor* [1992] 1 MLJ 166; and,
- c) *Kim Wah Theatre Sdn. Bhd v Fahlum Development Sdn. Bhd* [1990] 1 LNS 42; [1990] 2 MLJ 511.

²⁷ The applicant is a public listed company and held all the 100 millions paid up share capital of RM 1 each in the respondent company. The respondent is a licensed housing developer of the project and a licence issued under the Housing Developers (Control and Licensing) Act 1966 and the Housing Developers (Control and Licensing) Regulations 1989. See at pages 638 and 639 of the reported case (MLJ).

²⁸ The applications of the applicant contributories, by way of a notice of motion in enclosure 20, were applications for leave from the court for them to be made an applicant in the winding up proceedings and an application for an order that all proceedings in relating to the winding up of the respondent developer company be stayed pursuant to section 243 of the Companies Act 1965. See at page 636 of the reported case (MLJ).

²⁹ Pursuant to section 243 of the Companies Act 1965.

In *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd* [1995] MLJU 46; [1995] 2 CLJ 471 (High Court at Johor Bahru), an abandoned housing project was taken over by TPPT, Bank Negara to rehabilitate. In this case the plaintiff purchaser, being the aggrieved party to the abandonment, succeeded in claiming late delivery damages. In this case, the plaintiff purchaser bought a piece of land together with a single storey low cost house from the defendant developer through a sale and purchase agreement dated 19 August 1986. The defendant developer was required to complete the construction of the said property within 24 calendar months from the date of the sale and purchase agreement. However, the defendant failed to complete the project and abandoned the project altogether.³⁰ The abandonment of the project prevailed even at the time the plaintiff purchaser filed his originating summons. The purchaser also had paid 10% of the purchase price as deposit to the said sale and purchase. As the defendant developer failed to complete the project, MBf Finance agreed to become a shareholder to the defendant developer company in order to save the defendant developer company floating and from being subject to a winding up by the creditors. Nonetheless, MBf Finance also failed to revive the project. However, with the help of Tabung Pemulihan Project Perumahan Terbilang (TPPT) Bank Negara, and with the moneys channeled through Bank Negara, MBf Finance revived the housing project and finally surrendered the low cost houses to the purchasers who opted to continue with the contract. The court in their judgment ordered the defendant developer to pay immediately to the plaintiff purchaser liquidated damages calculated from day to day at the rate of 10% per annum of the purchase price of RM 27,680.00 commencing from 18 August, 1988 (the date of the vacant possession) to 5th June, 1994 (the date of the termination of the sale and purchase agreement). The court also awarded costs to the plaintiff purchaser.

In *Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor* [1992] 1 MLJ 166 (High Court in Ipoh), where this case concerns a joint venture and partnership in housing development between the first defendant developer (Arief Trading Sdn. Bhd) and the second defendant--Perak State Economic Development Corporation ('Perak SEDC'). The first defendant would carry out the development of the purported housing project on the land owned by and registered in the name of the second defendant. The purchasers had entered into agreements of sale and purchase of houses to be erected on land with the first defendant whereby the first defendant agreed to develop and complete the project within 18 months from the date of the agreement. However, after the expiry of that 18 months, the purported houses were yet completed.³¹ In other words, in the course of development of the project, the project abandoned. Finally, the project had to be rehabilitated by the Perak SEDC (second defendant), being the joint venture partner. However, in order to complete the rehabilitation, the purchasers were required to top-up some additional moneys due to changes in the specifications to the purported housing units. The prayer of the plaintiff purchasers for liquidated damages from the second defendant (Perak SEDC) was dismissed by the court. However, as against the first defendant (the developer – Arief Trading Sdn. Bhd), the court granted liquidated damages or indemnity for late delivery of

³⁰ The defendant developer abandoned the housing project on 1st January, 1992. See at page 13 of the reported case.

³¹ According to PW1 (Aw Yong Wai Choo), after the end of 18 months from the date of the purchase agreement, when the building she bought under P1 (the agreement of sale) was supposed to be built and completed, 'there was not even a brick there...there was only lallang...'. See at page 181 of the reported case.

vacant possession of the house to the plaintiffs. The ground that the second defendant was not ordered to pay damages is that the second defendant had helped out the plaintiffs to rehabilitate the project, left abandoned by the first defendant and that bearing on this, it is inequitable for the plaintiffs to claim liquidated damages from the second defendant. The prayer for a specific performance of the contract of sale and purchase also was granted by the court against both the defendants.

While in *Kim Wah Theatre Sdn. Bhd v Fahlum Development Sdn. Bhd* [1990] 1 LNS 42; [1990] 2 MLJ 511 (High Court at Kuala Lumpur), the court disallowed the petition of the unsecured creditor of the housing developer company to wind up the latter (the respondent housing developer).³² The application for a stay of execution for 10 months allowing the respondent housing developer to complete the abandoned housing project³³, was made by the petitioner purchasers³⁴ and the respondent housing developer. Further, the application for stay was made for allowing the respondent housing developer to settle all outstanding sums due to all the respondent's creditors including the petitioner.

Rehabilitation Undertaken By A New Developer

There is only one case dealing with the above sub-topic. This case is *Woolley Development Sdn. Bhd v. Mikien Sdn. Bhd* [2008] 1 MLJ 585 (Court of Appeal at Putrajaya). However, this case does not concern housing development but commercial development. Hence, this case is outside the purview of Act 118 and beyond the jurisdiction of the MHLG. This case also should be excluded from the discussion in this paper. Nonetheless, in the opinion of the author that this case is also included in order to illustrate the difficulties on part of the court to consider and appreciate the points raised by and equitable elements on part of the rehabilitating developer (white knight) in order to rehabilitate the abandoned commercial project left abandoned by the defaulting developer (the first defendant developer), in that the rehabilitating developer should not be penalized for the first defaulting developer's failure to deliver the promised vacant possession of the units sold to the purchaser on time. In other words, the white knight, even though they was not at fault, shall also have to pay damages to the purchaser because of the default of the first defendant developer.

The court of appeal in the case of *Woolley Development Sdn. Bhd v. Mikien Sdn. Bhd* [2008] 1 MLJ 585 (Court of Appeal at Putrajaya) held that the white knight (rehabilitating developer – Woolley Development Sdn. Bhd.) coming to solve substituting the ailing predecessor developer (the first defendant developer – CDSB) and trying to save the day was considered to be on the frolic of its own. This case involves an appeal from the High Court. In this case, the first defendant cum proprietor of a certain lands in Mukim 9, District of Seberang Perai Utara, Penang³⁵ contemplated to develop

³² The unsecured creditor (the petitioner) had obtained judgment against the respondent housing developer for RM 240,730.10 with interest and costs.

³³ The housing project was known as Taman Rishah, Jelapang, Ipoh, Perak Darul Ridzuan.

³⁴ Of the low cost flats at phase IV of Taman Rishah, Jelapang, Ipoh.

³⁵ The first defendant developer is the registered and beneficial proprietor of lands held under Geran No. 15113, Lot No. 190, Geran No. 4500 Lot No. 198, Geran No. 144423, Lot No. 374, Geran 4501 Lot 784, Geran No. 4502 Lot No.

their land into a development project known as 'Raja Uda Commercial Centre'. The plaintiff (Mikien Sdn. Bhd.) was enticed and henceforth entered into twelfth (12) sale and purchase agreements to purchase several units of the commercial tenements. The full purchase price for the units of RM 2.3 million had been paid by the purchasers. The sale and purchase agreement *inter alia* stipulated that delivery of vacant possession shall be effected in 36 months from the date of the sale and purchase agreement (SPA). Any failure on part of the first defendant developer to deliver the vacant possession of the units within this stipulated period, would result in an 11% per annum liquidated damages of the total purchase price of the units to be paid calculated on a daily rest basis. Time is the essence and that the SPA shall bind all the first defendants' successors in title and permitted assigns. Nonetheless, after the expiry of the said 36 months, the promised vacant possession for the units were still could not be effected and that the project was abandoned³⁶. In an attempt to rehabilitate the project, the first defendant developer and the second defendant (the white knight) had on 20th September 2000 entered into a transfer agreement, wherein the project land was to be transferred to the second defendant (white knight) subject to the existing charges and without monetary compensation. The transfer agreement had taken cognizance of the SPAs with individual purchasers and this was described in Annexure H to the Transfer Agreement. However the plaintiff's details were missed out in the Annexure H. To protect the plaintiff's interest in the said land, a caveat was lodged. Thus, this caveat had affected the purported application for subdivisions of the lands by the second defendant. On 16th January 2006, the plaintiff filed a legal action against the first and second defendants for specific performance of the 12 SPAs and liquidated damages at the rate of 11% of the total purchase price. In the alternative to the prayer as craved, the plaintiff also sought a rescission of the 12 SPAs and a restitution of the total purchase price including interest at the rate of 11% of the total purchase price. On 24th April 2006 the plaintiff applied a summary judgment under Order 81 of the Rules of the High Court 1980 against the defendant. Through this application for summary judgment, instead of specific performance, the plaintiff elected to seek rescission and other consequential orders. At the first instance, the High Court allowed the application. The second defendant appealed against that decision on the premise that:

- 1) there was no contractual relationship between the second defendant and plaintiff;
- 2) since the plaintiff's name was not listed in Annexure H to the Transfer Agreement, the second defendant was not put to notice of the plaintiff's alleged claim of the said lands; and,
- 3) a novation agreement had not been executed between the plaintiff and the defendants.

786, Geran No. 4503 Lot No. 788, all at section 2 Bandar Butterworth, Pajakan Negeri 1146 Lot No. 1, Geran No. 4503 Lot 5, Geran No. 13586 Lot No. 1961, Geran No. 45091 Lot No. 180, Geran No. 4511 Lot No. 674 all at section 3, Bandar Butterworth, Geran Mukim No. 754 Lot 117, Geran Mukim No. 770 Lot No. 134, Geran Mukim 757 Lot No 120, Geran Mukim 755 Lot No 118 all at Mukim 9, in the District of Seberang Perai Utara, State of Pulau Pinang. See at page 594 of the reported case law.

³⁶ The development project in which the plaintiff purchased the said properties was abandoned by the first defendant developer sometime in 1998. In year 2000, the first defendant developer, the first defendant developer lender (Malaysian Building Society Berhad (MBSB)) and the second defendant (white knight), reached an understanding by which agreement the second defendant (white knight – rehabilitating developer) was to rehabilitate and complete the developer project on terms. See at page 595 of the reported case law.

Nevertheless, the majority of the court of appeal (Tengku Baharudin Shah and Abdull Hamid Embong JJCA, concurring but Zaleha Zahari JCA, dissenting) dismissed the appeal of the second defendant (white knight) appeal.

Rehabilitation Undertaken By The Purchasers Themselves

Under the above type of rehabilitation only one case involved. This case is *Zainab bte Mohamed v Syarikat Permodalan Johor (PP) Sdn Bhd* [1998] MLJU 492 (High Court at Johor Bahru). In this case the purchaser herself had to take out her own moneys of more than RM 9,060.00 purposely to rehabilitate the units left abandoned by the developer. In this case, the plaintiff purchaser bought a piece of land together with a single storey low cost intermediate terrace house to be built on the land, from the defendant developer (Syarikat Permodalan Johor (PP) Sdn. Bhd) at the price of RM 29,900.00. The plaintiff purchaser paid 10% of the purchase price as deposit. For this matter, the plaintiff purchaser and the defendant developer had entered into a sale and purchase agreement, whereby the defendant was required to complete the construction of the purported unit purchased by the plaintiff in 18 months after the date of the agreement. To be exact by 18 August, 1982, the defendant had to deliver vacant possession of the unit to the plaintiff purchaser. However, after almost 6 years after signing of the sale and purchase agreement, the defendant failed to deliver the vacant possession. The defendant only managed to complete 75% of the terrace house purchased by the plaintiff. As the defendant developer abandoned the project including the unit purchased by the plaintiff, the plaintiff using her own moneys had completed the balance construction of her housing unit until full completion. Later, the defendant developer was wound up. The appointed liquidator to the defendant, requested the plaintiff to pay the balance purchase price still unpaid to the previous defendant developer amounting to RM 7,475.00 or otherwise, the liquidator would sell off the housing unit, if granted by the court. However, the request of the liquidator was rejected by the plaintiff purchaser. Thus, in order to get *inter alia*, the title to the said housing unit from the defendant liquidator, the plaintiff purchaser filed a writ of summons with Statement of Claim on 1 August, 1997, seeking:

- i) specific performance of the agreement of sale and purchase;
- ii) compelling the liquidator defendant to surrender the issue document of title to the terrace house to the plaintiff;
- iii) seeking the liquidator defendant to sign Form 14A for the transfer of the terrace house failing which the Senior Assistant Registrar to sign the document;
- iv) damages;
- v) costs; and,
- vi) any other relief the court deems fit and reasonable.

The plaintiff purchaser obtained the above applications against the defendant liquidator and against the defendant developer on the ground of equity.

Rehabilitation By Liquidator/Provisional Liquidator Or Receiver And Manager

In the winding up of a company, in the event there is an order for winding up, an approved liquidator shall have to be appointed. An approved liquidator means according to section 4 of the Companies Act 1965 ('CA') as 'an approved company liquidator who has been approved by the Minister under section 8 as a liquidator and whose approval has not been revoked'. Accordingly, any person can become an approved liquidator provided he is a company liquidator and has applied to the Minister of Finance to become an approved liquidator for the purpose of the CA, subject to the provisions in section 8 of the CA.

The powers and duties of the approved liquidator, in liquidation by court, are provided in section 236 (1) and (2) of the CA. However, the powers as prescribed under section 236(1) are subjected to the direction of the Court or of the committee of inspection. These powers, prescribed under section 236(1) and (2) are basically to run the affairs and businesses of the company for the purpose of settling all debts to the creditors – secured and unsecured and carrying out all necessary and incidental duties as far as they deem fit and necessary as directed by the Court.

The appointment of an approved liquidator for the purpose of carrying out the above functions and powers is subject to the control of the Court (section 236(3) of the CA). The appointment of the Official Receiver (OR) is only as a provisional liquidator pending the appointment of the approved liquidator by the court. The appointment of OR as the approved liquidator is only made by the order of the court, subject to the provisions in section 227(3), (4), (5), (6) and (7) of the CA.

Thus, pursuant to the above provisions, particularly section 236(1)(a), section 237(2)(j) or section 243(1) (power to stay winding up) of the CA, read together with section 246(1) of the CA (appointment of special manager) or section 236(2)(i) (appointment of an agent) the appointed approved liquidator may carry out rehabilitation of abandoned housing project of the wound up housing developer company, in the protection of the interest of purchasers. However, the problem is--what if the creditors, contributories or the committee of inspection does not favour the purported rehabilitation or that the available funds are not sufficient to run the rehabilitation or it is not feasible to carry out the purported rehabilitation for otherwise this would be detrimental to the interests of the creditors or contributories? This is being so as the order for winding up by the Court shall operate in favour of all the creditors and contributories of the company (sections 226(4) and 237(1) of the CA). Further, under section 292 (priorities of payment) of the CA, nothing whatsoever provides any provisions of priority of payments, in the protection of and favourable to the customers' (purchasers) interests of the wound up housing developer companies. Thus, following this lacuna in the law, it is submitted, the interests of the customers/purchasers in abandoned housing projects would be detrimental, without any sufficient recourse under the CA.

The reported case law in Peninsular Malaysia that fall under the above type of rehabilitation are:

- a) *Pilecon Engineering Bhd v Remaja Jaya Sdn Bhd* [1997] 1 MLJ 808; [1996] 1 LNS 105; and,
- b) *Hongkong and Shanghai Banking Corporation Ltd v Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370; [1992] 1 LNS 26.

In *Pilecon Engineering Bhd v Remaja Jaya Sdn Bhd* [1997] 1 MLJ 808; [1996] 1 LNS 105 (High Court at Kuala Lumpur), the court allowed the application of the receivers and managers ('RM') to rehabilitate the abandoned housing project and stayed the application to wind up the housing developer company by the unsecured creditor petitioner. In this case, the petitioner (Pilecon Engineering Bhd) brought a winding-up petition against the respondent (Remaja Jaya Sdn. Bhd) pursuant to section 218 of the Companies Act 1965 on the ground that the respondent was unable to pay its debt. Apart from this, the respondent was also placed under receivership. The RM were also appointed by the debenture holder. The debenture holder opposed the petition to wind up. The respondent was a housing developer and at the date of appointment of the RM, the respondent was involved in the development of a housing development project known as 'Taman Wilayah Selayang'. Later, the project was abandoned. The RM conducted a study of the project and concluded, *inter alia*, that:

- If completed, the project is expected to generate a surplus of RM 10.437 millions after accounting for construction and related expenses;
- To bring the project to completion, additional financing in the sum of approximately RM 6.7 millions is required; and,
- It would take approximately another 21 months to complete the project.

The court allowed the application of the debenture holder opposing the winding up petition. The court pointed out that the opening words of section 218 and 221 of the Companies Act 1965 which states that the court 'may' order the company to be wound up. The use of the word 'may' rather than 'must' vested the court with a discretion. The court allowed the RM to carry on the rehabilitation of the abandoned housing project. The RM, according to the court, should be given one final attempt to complete the project, even though there were in fact three broken promises by the RM before, since the project is nearing completion and is in its final states. For this matter, the court ordered the petition to wind up the respondent company be stayed for a period of one year from the date of the order. If the RM fails again in this final attempt, i.e they are unable to complete the project by 13 April 1997, according to the court, then would the winding-up order ought to be made. The court arrived at this decision, bearing in mind that the interests of the purchasers creditors, despite having statutory right to enforce their judgment, who had been queuing in the dark for almost five years (since the petition to wind-up was filed in 1991), to have their respective housing units be fully revived by the RM. On the other, if an order to wind up is made, not only the debenture holder but also the house buyers would be prejudiced. Based on evidence, vacant possession of the properties in the project was given between January and February 1996. Thereafter, the only remaining matters to be attended to by the RM in rehabilitating the project, are:

- a. the collection of the balance purchase price held by stakeholders under the standard developer's contract;
- b. the respondent's obligations under the defects liability period;
- c. the obtaining of strata titles in the case of the flats and subdivided title in the case of the landed properties;
- d. the obtaining of permanent certificates of fitness for occupation (CF);
- e. the various claims pending against the contractors and consultants; and,
- f. some vacant land to be sold.

If the winding-up order is made, then the house buyers will have to look to the official receiver³⁷—and not the RM—to perform the obligations under the sale and purchase agreement. This means that it would be the official receiver who would have to subdivide titles in the case of the landed properties and obtain strata titles in the case of the apartments, obtain permanent certificates of fitness for occupation (CF) and attend to any defects that appear within the defects liability period. The court opined that the official receiver ought not to be burdened with such mundane matters. He neither has the time nor the facilities, nor the manpower, to do such work. Besides, there are no assets available for him to utilize the resources. It would be against public policy if the ordinary house buyers, having paid the entire purchase price, were to be effectively deprived of their rights under the sale and purchase agreement.

According to the court, the functions and duties of the RM are similar to that of a liquidator appointed under an order for winding order. Section 182(1)(a) of the Companies Act 1965 specifically requires that all receivers and managers must be approved to also act as liquidators. Thus, in the court's opinion, the appointment of a liquidator would only amount to duplicity resulting in higher cost.

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 liquidators³⁸ were appointed pursuant to section 231 of the Companies Act 1965, for the purpose of carrying out the rehabilitation of the housing development project³⁹ left abandoned⁴⁰ by the developer company (the judgment debtor).

³⁷ Or the appointed approved liquidator. See section 227 of the Companies Act 1965.

³⁸ Two of the partners of the accountant firm of KPMG Peat Marwick as joint and several provisional liquidators of the respondent company until the winding-up order (if any) is made or further order. See at page 375 of the reported case (MLJ). The proposed liquidators were Abdul Jabbar bin Abdul Majid and Ng Kim Tuck.

³⁹ The housing development project was known as Taman Kemajuan at Ulu Tiram in Johore at Lot No. 2326 CT 7790, Mukim of Tebrau, District of Johore Bahru. This project consisted of 129 units, largely of single storey terrace and semi-detached houses. The registered proprietor of the land on which the project was to be implemented was not the respondent company but one Hwa and Hwa Development Sdn Bhd ('Hwa & Hwa'). In order to finance the project the respondent company (judgment debtor) obtained loan facilities from the petitioning creditor (petitioner bank). As a measure of security for the facilities, the respondent company provided the bank with a third party legal charge of the said Hwa & Hwa land on which the project was to be implemented. See at pages 373 and 380 of the reported case (MLJ).

⁴⁰ The project was not fully completed by the respondent company. The infrastructure of the project was not completed but in respect of some of the units, about 75% of the work to be done on them had been effected and in respect of others, some 25%. See at page 373 of the reported case (MLJ).

The rehabilitation of the abandoned project was financed by a loan from TPPT, Bank Negara (Tabung Pemulihan Projek Perumahan Terbengkalai). 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 Companies Act 1965. 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, at the time it was 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 by the court on 22 January 1992.

An example where an abandoned housing project was revived by a liquidator was Taman Yew Lean (developer: Yew Lean Development Sdn. Bhd) at Lot No. 664, Seksyen 2, NED, Pulau Pinang, where the petitioning creditor had succeeded in winding up the developer company and appointed a liquidator—Messrs Price Water House to revive the project on the TPPT’s loan.⁴¹

Rehabilitation by Receiver and Manager

Likewise, the above problems (difficulties faced when abandoned housing project is to be subject to rehabilitation) would still occur, when the developer company is under receivership. A developer company may be put under receivership, for instance, due to their default to repay the debts under the deed of debenture, whereby the developer company has no ability and power to run its own business and affairs but being subject to the control of an appointed receiver and manager under the deed of debenture, for the latter to administer and manage the developer company and their business towards settling all the debts owed to the debenture holders and other secured and unsecured creditors pursuant to the deed of debenture and provisions in the CA, for example section 191(1), section 292(1)(a)-(f), section 292(3), section 292(5) of the CA or other duties as

⁴¹ Nuarrual Hilal Md. Dahlan, 2009: 148-149.

directed by the Court pursuant to section 183(3) and (4) of the CA and the common law, as far as this law is permitted by the provisions of the Civil Law Act 1965.

In *Mohammad bin Bae v. Pembangunan Farlim Sdn. Bhd.* [1988] 3 MLJ 211 (High Court at Temerloh), the court refused the application of the plaintiff purchaser to have the abandoned housing project be revived by the newly appointed receiver and manager because of the difficulty to supervise the rehabilitation process. However, the court granted damages to the purchaser. In this case the plaintiff purchaser entered into a sale and purchase agreement with defendant developer company to buy a piece of land and single-storey house to be erected on it. The defendant developer agreed that the purported house would be completed and be ready for delivery of vacant possession to the plaintiff purchaser within 18 calendar months for the date of the execution of the agreement, i.e on or before 13 July 1980. However, until 15 January 1985, being the date the plaintiff filed his writ of summons in court, the purported house was still not completed and delivered to the plaintiff purchaser.⁴² As a result, the plaintiff claimed specific performance⁴³ of the agreement for the delivery of vacant possession of a complete house and for liquidated damages, special damages, damages for breach of contract and costs. The defendant developer resisted the application of the plaintiff to get specific performance. According to the defendant as they had been subjected to a receivership and a receiver and manager had been appointed out of court by debenture holder, United Asian Bank Berhad, the defendant would not be able to complete the house. Further, the defendant said that they were unable to complete due to shortage of funds. Thus, it was the contention of the defendant that the specific performance order, if it were to be granted by the court, should be directed at the receiver and manager, not the defendant developer company, pursuant to section 183 of the Companies Act 1965 (Revised 1973). However, this would be an unfair burden on the receiver to manage, i.e the duty to complete the construction of the house.

The High Court held that the agreement could not be specifically enforced as the court will not be able to superintend the works required to complete the house. Instead, the plaintiff was granted damages by the court.

It should be noted that in the event, the defaulting developer is put under the control of the receiver and manager or liquidator, in order to rehabilitate the project, the purchasers or other stakeholders can invoke section 183(3) (application for directions), section 236(1)(a) (to carry on business of the company), section 243 (power to stay winding up) or section 236(2)(j) (do all such other things as are necessary) of the CA to pray to the court to issue the necessary order to rehabilitate the project. As the moneys held under the Housing Development Account (HDA) are protected by section 7A (6)(a)(b) of Act 118 and 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, it is possible

⁴² The housing development project undertaken by the defendant developer consisted of 145 units. These units remained uncompleted (only 75% completion). These purported houses were built on Lot 76. See at page 214 of the reported case (MLJ).

⁴³ Pursuant to sections 11 and 21 of the Specific Relief Act 1950.

to revive the project so abandoned, provided, the moneys are sufficient to meet all the rehabilitation expenditure.

Another example where an abandoned housing project was revived by a court's appointed receiver and manager was Taman Desa Anggerik, Senawang, Negeri Sembilan, Lease Holding No. 644, P.T. No. 1411, Mukim Ampangan, Seremban, Negeri Sembilan. The rehabilitation of this project was undertaken by a receiver and manager by name of Abdul Jabbar bin Abdul Majid and Abdul Halim Mohyiddin of Messrs KPMG Peat Marwick, financed by a soft loan from TPPT, Bank Negara, on the application of the plaintiff/charger--Messrs BBMB Kewangan Berhad, pursuant to section 256 of the NLC, Memorandum of Charge and Order 83 of the Rules of the High Court 1980, before Y.A Dato' Dr. Visu Sinnadurai on 30 May, 1994 at the Kuala Lumpur High Court, OS No. 31-4169-1986. Among the powers granted by the court to the said receiver and manager were--the powers, *viz*:

- a) to charge assets, interests, receivables, benefits and properties of the defendant to TPPT as collateral for the soft loan granted by TPPT to revive the project;
- b) to apply for the necessary housing developer's licence and advertisement and sale permit from MHLG;
- c) to apply for the necessary approval, consent and permission from the local and land authorities;
- d) to appoint consultants and contractors for rehabilitation of the project; and,
- e) to apply the proceeds and revenues generated from the sale of the housing units in the rehabilitation of the project, to pay--firstly, all costs, salaries and expenses of the receiver and manager; secondly to pay the soft loan granted by TPPT; thirdly, to pay off all the debts owed by the defendant to the plaintiff and fourthly, to pay back any balance, if any, to the defendant.⁴⁴ Further, by the said order, no action should be instituted against the receiver and manager, in the course of carrying out the order and rehabilitation, unless with the order of the court.⁴⁵

Following the above order of the court, to effect the rehabilitation, the receiver and manager had entered into a rehabilitation agreement with the purchasers. Among the terms of the agreement were that, the purchasers would not take any legal action against the receiver and manager in the course of the rehabilitation, they should not claim any liquidated late delivery damages from receiver and manager, and they had to allow the purchased lots to be charged to TPPT in consideration of TPPT granting the soft loan for running the rehabilitation.⁴⁶

It seems that based on the above court order, the court had applied its inherent jurisdiction pursuant to Order 92 (4) of the High Court Rules 1980, to appoint a receiver and manager in order to rehabilitate the abandoned housing project. The order did not

⁴⁵ Nuarrual Hilal Md. Dahlan, 2009: 146-147.

⁴⁶ Ibid, 147.

mention the priority of payment as prescribed generally by section 191 and section 292 of the CA (under receivership and liquidation) nor was it subject to the priority of payment pursuant to section 268 of the National Land Code 1965 (NLC), even though the action was founded on the breach of the defendant towards repayment of the loan secured on the project site.

However, the position reflected by the case law is rather mixed, in that, courts are divided between allowing rehabilitation and otherwise, once the developer 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 (High Court at Kuala Lumpur), 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. In this case, the court refused the application of the Receivers and Managers (first and second defendants) and the developer company (third defendant) to have a liberty to dispose off or deal with the an apartment bought by the plaintiff purchaser. In this case, the third defendant, a developer company carried out a development project known as 'Sunrise Park'. The development was financed by a loan from Asia Commercial Finance (M) Berhad and a Deed of Debenture was made between them. However, the developer faced financial difficulties and on 8 July, 1991 the first and second defendants were appointed as Receivers and Managers of the third defendant (the developer company) pursuant to the powers under the Deed of Debenture to carry on the development of the project. The plaintiff bought from the third defendant (developer company), pursuant to a Sale & Purchase Agreement, an apartment, Apartment Unit No. M807, in the development and had paid RM 90,810.00 towards the purchase price, the amount being 90% of the purchase price. In October 1992, the plaintiff filed an action against the first three defendants (the Receivers and Managers and the developer company) and claimed, *inter alia*, for specific performance of the Sale & Purchase Agreement entered into between the plaintiff and the third defendant (developer company). On 16 December 1992 the plaintiff obtained an injunction order restraining the first three defendants (the Receivers and Managers and the developer company) from disposing off or dealing with the property he purchased.⁴⁷

The first two defendants (the Receivers and Managers) contended that, they were responsible to rehabilitate⁴⁸ the project left abandoned by the developer company (third defendant) and that they found that the plaintiff failed to pay the balance purchase price for them to complete the rehabilitation of the project. Since the plaintiff had failed to pay the balance purchase price, the Receivers and Managers terminated the sale and purchase agreement of the plaintiff and applied for a liberty to dispose off the plaintiff's unit and to re-sell the same to interested parties. However, the plaintiff in reply said that he was agreeable to take possession of the unit purchased but upon certain conditions one of which was for a letter of release in respect of Asia Commercial Finance in respect of the

⁴⁷ Until after the trial of the action or until such order as may be made by the High Court upon the application of the First and Second Defendants for directions as to matters relating to ownership affecting the disputed property.

⁴⁸ Partly financed by the government soft loan for rehabilitation of abandoned housing projects scheme.

charge encumbering the said unit, another for the plaintiff's entitlement to damages for late delivery to be deducted from the balance remaining to be paid on the said unit and yet another for the plaintiff to receive an indemnity for damages from the first two defendants in respect of any interference to its possession with regard to the claim by Messrs Colourways Sdn. Bhd for ownership of the unit. The court refused to allow the application of the three defendants on the ground that the application was misconceived and inappropriate. Secondly, there was no evidence showing that the three defendants had power or sanction from the court to dispose off the purchaser's unit, being the beneficial owner to the apartment purchased, which could warrant them to dispose off and deal with the units on default of the plaintiff to pay the balance purchase price.

Projects Which Fail To Be Rehabilitated And Remain Abandoned Forever

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 TPPT of Bank Negara has been rejected as the project is not viable for rehabilitation. This is because, according to TPPT, 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.⁴⁹

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

⁴⁹ Bahagian Pengawasan dan Penguatkuasa, n.d: 7-8.

Pinggir Rishah Hijau, Ipoh, Perak, Taman Desa Ria, Senawang, Negeri Sembilan and Taman Desa Aman Bukit Mengkebang, Kelantan.⁵⁰

The question is--who will be responsible in the above problem and what are the remedies for the aggrieved parties, especially the purchasers in the event the abandoned housing developers are wound up or under receivership or there is no party interested and capable of carrying the intended rehabilitation?

THE POSITION IN NEW SOUTH WALES (NSW), AUSTRALIA

As in NSW exists a 'full build then sell' system coupled with the statutory requirement on the owner-builder⁵¹ and the developer⁵² to possess Home Warranty Insurance, it is opined, the problems of abandoned housing project and its consequential losses will not occur in NSW. On the other hand, if the owner-builder chooses to apply the 'buying off the plan' or 'quasi build then sell' system, in the event an inevitable abandonment also does occur in NSW, the rights and interests of purchasers, to some degree, are protected, because there is a Home Warranty Insurance which could cover any non-completion of the residential works undertaken by the owner-builder, the developer and the licensed contractor due to insolvency, death or disappearance of the owner-builder, developer or contractor. (sections 92, 99(1)(a)(b), 95, 96 and 101 of the Home Building Act 1989 (HBA) and regulation 56(1) of the Home Building Regulations 2004 (HBR)).⁵³

The insurance coverage is to protect the purchaser against any risk of loss resulting from non-completion of the residential work because of the insolvency, death or disappearance of the owner-builders or the contractors and for the purpose of recovering any compensation from the owner-builders, the developers and the contractors for any breach of statutory warranty in respect of the residential building works or to have owner-builders, the developers and the contractors rectified any such non-completion of works

⁵⁰ Nuarrual Hilal Md. Dahlan, 2009: 145.

⁵¹ 'Owner-builder' means any person who carries out residential building works which involves –

- a) the reasonable market cost of the labour and materials involved in which exceeds the prescribed amount (currently being \$12,000.00) and;
- b) that relates to a single dwelling-house or a dual occupancy:
 - i) that may not be carried out on the land concerned except with development consent under Part 4 of the EPAA, or
 - ii) that is complying development within the meaning of that Environmental Planning and Assessment Act 1979 (EPAA).(section 29(1) of the Home Building Act 1989 (HBA))'

⁵² The word 'developer' has been defined by section 3A(1) of the Home Building Act 1989 ('HBA'), to mean 'an individual, a partnership or a corporation on whose behalf residential building work is done in the circumstances set out in subsection (2) is a developer who does the work' (emphasis added). While pursuant to section 3A(2) of the HBA, the circumstances as meant by section 3A(1) are:

- (a) the residential building work is done in connection with an existing or proposed dwelling in a building or residential development where 4 or more of the existing or proposed dwellings are or will be owned by the individual, partnership or corporation, or
- (b) the residential building work is done in connection with an existing or proposed retirement village or accommodation specially designed for the disabled where all of the residential units are or will be owned by the individual, partnership or corporation.

⁵³ Unless exempted pursuant to section 97 of the HBA, by application to the Director General of the Department of Commerce, New South Wales.

or defective works.(section 99 and section 101 of the HBA and regulation 56 of the HBR).

The subject matter and period of coverage of the insurance must include loss arising from non-completion of the work for a period of not less than 12 months after the failure to commence, or cessation of, the residential building works. (section 103B(1) of the HBA). Other types of losses covered are--structural defect, if discovered in 6 years after the completion of the work or the end of the contract relating to the work, whichever is the later. (section 103B(2)(a) of the HBA). For losses other than structural defect, the insurance can cover defects within 2 years after the completion of the work or the end of the contract relating to the work, whichever is the later (section 103B(2)(b) of the HBA). The contract of insurance too must contain a mandatory provision imposing obligation on part of the insurer to pay any claim once the losses as covered by the policy occurred.(section 103B(5) of the HBA). The minimum coverage for the insurance is \$300,000.00 for each dwelling.(regulation 60 of the HBR read together with section 102(3) of the HBA). For a single residential flat building where the contract price exceeds \$12,000.00, the coverage must also cover the (a) work on the common property of the existing single residential flat building and (b) work on an existing single residential flat building if the whole building is owned by the same person. (regulation 69 of the HBR).⁵⁴

State Indemnity

In Australia, there is a State Indemnity for the purpose of indemnifying insured persons who are victims in residential building works in which the insurer has become insolvent.(section 103I(1)(a)(b) of the HBA). This protection is also applicable if the insolvent insurer is dissolved.(section 103O of the HBA).

Rehabilitation of the Abandoned Housing Projects

Once the residential works are terminated due to the above reasons, the beneficiary (usually the purchasers) may claim to the Guarantee Corporation ('GC')⁵⁵ to pay all the

⁵⁴ It should be noted that, from 1 January 2004, the Home Building Act Amendment (Insurance Exemptions) Regulation 2003 exempts residential building work carried out on multi-storey-buildings and land sold by developers (owner-builders) on which residential work for that purpose has been or is to be done from the insurance requirements under the HBA. The regulation defines a multi-storey-building as a building that has a rise in storeys of more than three (3) and that contain two or more separate dwellings. Rise in storeys has the same meaning as it has in the Building Code of Australia. The amendments only apply to residential building work commenced after 1 January 2004. See regulation 2 of Schedule 1 to the Home Building Amendment (Insurance Exemptions) Regulation 2003, enforced from 31 December, 2003.

⁵⁵ GC is a statutory body and body corporate representing the Crown and known in the corporate name as the Building Insurers' Guarantee Corporation ('BIGC'). BIGC is constituted under Division 3 (section 103F of the HBA). BIGC is a fund belonging to GC. GC is managed by the Minister for Fair Trading. One of the functions of the GC is to deal with the residential work claims. See section 103F-103ZB of the HBA). To know about BIGC, please refer to the NSW Office of Fair Trading at

costs for completing the non-completion works and any defective works done. (sections 103K and 103L of the HBA).

Section 47A(1) of the HBA, empowers the Director-General of the Department of Commerce (or the Commissioner for Fair Trading, Department of Commerce),⁵⁶ to appoint a suitable person (section 47A(3) of the HBA), subject to his consent and the consent of the person for whom the work is being done (section 47A(2)(4) of the HBA), to carry on the supervision and co-ordination of the uncompleted works left by the earlier owner-builders and developers in the interests of the public, subject to certain terms and conditions he considers fit, if the owner-builder/contractor/trade person permits or certificates are suspended, cancelled or surrendered.(section 47A(5) of the HBA).

STAGE FOUR (4): VACANT POSSESSION AND OCCUPATION OF THE REHABILITATED UNITS STAGE

In NSW, the grievances of the purchasers involved in any non-completion (abandonment) or sub-standard works are eliminated with the practice of ‘full build then sell’ system by certain developers and owner-builders, added with the existence and requirement of the Home Warranty Insurance. Alternatively, if the developers and owner-builders do not apply the ‘full build then sell’ system of house building, they would still be required to apply the second method, *viz* the 10-90 practice payment (‘buying-off-the-plan’ or ‘*quasi* build then sell’ system). Under this alternative system, in the event, abandonment is still unavoidable, purchasers only lose 10% of the purchase price, as the balance 90% would only be released on full completion of the building works and on due transfer of the titles to purchasers. Furthermore, as the requirement of Home Warranty Insurance is a must for the developers, owner-builders and the licensed contractors, the issue of abandonment and the problems ensuing from it, can, to a certain degree, be eliminated and addressed.

SUGGESTIONS

It is submitted that, after considering the law and practice in NSW, a new law, construction system and special rehabilitation laws, are urgently required to control and cater for the rehabilitation of the abandoned housing projects and to face consequential problems arising from abandonment of housing projects in Peninsular Malaysia, for the following reasons:

- To avoid any problem and dispute, which may arise from and caused by recalcitrant purchasers, contractors, end-financiers, banks, local authorities, local planning authorities, state authorities, etc. This problem can be seen, for example, in Ria Kondominium, Bandar Kuah, Langkawi developed by PRJ

<http://www.fairtrading.nsw.gov.au/About_us/What_the_Office_of_Fair_Trading_does/Protection_schemes_and_systems/Building_insurers_guarantee_corporation.html> (accessed on 23 November, 2009).

⁵⁶ Section 3 of the Home Building Act 1989 (No. 149).

(M) Sdn. Bhd., where all the attempted discussions, in order to rehabilitate the project so abandoned, between the purchasers, banks and developer failed;

- To expedite the rehabilitation of the projects within a specified and definite time period. Otherwise, without systematic and concrete rehabilitation plans and law, which can control it, the rehabilitation will be delayed and in worst situations, the rehabilitation could not be commenced. This kind of trouble occurred in Taman Seri Marina, Kuala Kedah, Kota Setar District developed by JB Kulim Development Sdn. Bhd. The reason leading to such a catastrophe is that the developer had been wound up by court on the application of the main contractor due to the default of the developer itself and exacerbating the problem, currently no party is willing to rehabilitate the project. The project remains stalled, until today without any positive and possible prospect, plan and initiative to revive it. It is noted that, this project should have been completed by February, 2001;
- The purchasers will be able to get the houses and their rights will be protected as these are provided and guaranteed by the special rehabilitation statutory regime provisions. Further, the rehabilitating developers and its rehabilitation developments are subject to the close scrutiny of MHLG. It should be borne in mind that, various troubles could occur with failure to have such a pre-emptive and pro-active rehabilitation statutory regime. For example, this can be illustrated in Taman Bunga Raya, Mukim Wang, Kangar developed by Bintong Dasari Sdn. Bhd, where without being properly supervised and monitored, the rehabilitation of the project had been prolonged, much longer period than what it had been initially projected for, with various kinds of problems and difficulties faced by the rehabilitating developer, including the problem of recalcitrant contractors, purchasers, bankers and authorities. Fortunately, however, the revival of this project had, finally, been completed on 12 June, 1998, after becoming abandoned since 1992;
- To avoid any abuse and misuse of duty, power, and authority, when the project is undergoing the process of rehabilitation, caused by consultants, contractors, receivers, managers and liquidators. The rampant abuse and misuse of duty, power and authority by these irresponsible parties, has become the current typical phenomena in the rehabilitation of abandoned housing projects in Peninsular Malaysia, much to the dismay and detriment of the purchasers. Taman Bistari Kamunting, Taiping, Perak developed by Sri Ringgit Properties Sdn. Bhd is the perfect example of this phenomenon. The problem with this project is that, the rehabilitating contractors--Setia Laris Sdn. Bhd and Super City Triumph Sdn. Bhd had failed to plan properly and had transgressed certain rules and regulations, which all in all, subtle or obvious, had retarded the due progress of its rehabilitation. This project had been abandoned since the middle of 1980s but fortunately, however, with the injection of welfare funds and rehabilitation carried out by Syarikat Perumahan Negara Berhad (SPNB) in early 2000s, the project is now fully rehabilitated and ready for occupation, after it had been abandoned for almost 20 years;

- To prevent any unwarranted and unnecessary disturbing actions such as legal actions commenced by dissatisfied parties. Without any such disturbing actions, it would certainly help the new rehabilitating developers or the previous defaulting developers in case they are agreeable and are fit to resume the project, to smoothly carry out the rehabilitation. This problem, can be illustrated in Taman Perpaduan Permai, Bercham Ipoh developed by Trinity Home Builders Sdn. Bhd, where in this case, the project should have been completed by year 1999, however until now no rehabilitation has been undertaken. To worsen the matter, 18 purchasers have filed writ of summons against the defaulting developer praying for specific performance, damages and other equitable remedies against the defaulting developer; and,
- To prevent any abandoned housing project from being stalled for an indefinite period of time, without any positive and prospective rehabilitation plans and development. This problem can be illustrated in Taman Sri Intan, Besut, Terengganu, developed by Tenaga Wan Bersaudara Sdn. Bhd. This project should have been occupied and completed by year 1999. However, it was later abandoned and until now there is no plan for rehabilitation. Furthermore, the developer fails to inform MHLG the latest development and plan for the rehabilitation of its project.⁵⁷

It is suggested that the best proposal, to face the problems of abandoned housing projects and to facilitate the rehabilitation, if abandonment is inevitable, is by:

- 1) applying the concept of ‘full build then sell’ system as practiced by some owner-builders and developers in New South Wales, Australia as well as imposing a mandatory requirement that the applicant developer must possess housing development insurance; or,
- 2) If the above proposal is not feasible then the second best suggestion, is to employ the compulsory, not just optional, requirement for the developer in Peninsular Malaysia to apply the 10-90 housing development system as applied in NSW, Australia (‘buying off the plan’ or ‘*quasi* build then sell’ system). Under this concept, the purchaser only needs to pay 10% of the purchase price on the date of agreement of sale entered into and the remaining balance shall only be paid after the completion of the project i.e. when the erection of the project is fully completed with CCC, the vendor developer has delivered the vacant possession of the unit and the title to the unit purchased is ready for transfer to purchaser on the required settlement of the purchase price. In the event the project is later abandoned for good, the purchaser would only suffer a loss of 10% deposit as the balance payment has not yet been released to the developer, until the full completion of the sale. In addition to this, the developer shall have also to obtain housing development insurance to cover any insufficient cost for carrying out the required rehabilitation until full completion and to cover any losses and grievances

⁵⁷ Nuarrual Hilal Md. Dahlan, 2009: 185-188.

suffered by the purchasers emanating either from the abandonment or otherwise; and,

- 3) In addition to suggestion No. 2 above, it is proposed that a special legal regime--Regulations controlling and catering for management of abandoned housing projects be passed by Parliament by prescribing rights and duties of the rehabilitating parties and the related parties in order to protect the interests and rights of all parties in the rehabilitation.