ISSUES IN CLAIMING DAMAGES INVOLVING ABANDONED HOUSING PROJECTS IN PENINSULAR MALAYSIA

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Abstract

The licensed housing industry in Peninsular Malaysia is governed by the Housing Development (Control and Licensing) Act 1966 (Act 118) and its regulations. The licensed housing developers are required to use the statutory contract of sale and purchase as prescribed in the Housing Development (Control & Licensing) Regulations 1989, *viz.* in Schedules G, H, I and J ('the said agreements'). The said agreements provide the duties, responsibilities and liabilities of the vendor developer and the purchasers. It also provides the remedies to the contractual parties. According to some case law, the remedies for grievances of the parties are exhaustive in that the remedies are restricted to the ones that are spelt out in the said agreements. Thus, the aggrieved purchasers cannot claim for other types of damages, such as exemplary, aggravated and non-pecuniary damages for their inconveniences, troubles, anxiety, mental pressure, distress, humiliation, personal, family and employment problems that have led to their lives being chaotic and miserable and that have been detrimental to their personal, professional, family (including divorce and its consequences) and societal health and overall happiness due to the losses caused by the default of the vendor developer. Nonetheless, there are case law that held otherwise, in that the aggrieved purchasers can invoke general and wider damages affordable by the contractual principles (such as rescission) and equity, other than what are provided in the said agreements. This paper will highlight and discuss the divergent principles of law decided by case law in Malaysia in regard to the damages and remedies for the aggrieved purchasers in abandoned housing projects. The methodology used in this paper is a composite of the legal and social research methodologies. The end part of this paper will be the conclusion and recommendations of the author in the face of the issues highlighted.

Keywords: Housing sale and purchase; statutory housing contracts; Peninsular Malaysia; purchasers' grievances; Legal and equitable damages and remedies

Introduction

It is well entrenched that the application of the statutory standard formatted sale and purchase agreements (Schedules G, H, I and J (hereinafter referred as 'the said agreements')) as provided in the Housing Development (Control and Licensing) Regulations 1989 ('Regulations 1989'), is mandatory for all house purchases in Peninsular Malaysia pursuant to regulations 11(1) and 11(1A) of Regulations 1989 and the principles decided in *Rasiah Munusamy v. Lim Tan & Sons*

Sdn. Bhd [1985] 2 MLJ 291, *Sea Housing Corporation Sdn. Bhd v. Lee Poh Choo* [1982] 2 MLJ 31 (FC), *Kimlin Housing Development Sdn. Bhd. (Appointed Receiver and Manager) (In Liquidation) v. Bank Bumiputra (M) Bhd. & Ors* [1997] 2 MLJ 805 (FC) and *MK Retnam Holdings Sdn. Bhd v. Bhagat Singh* [1985] 2 MLJ 212.

Parliament enacted the Housing Developers (Control and Licensing) Act 1966 (Act 118) ('Act 118') for the purpose of protecting the rights of the purchasers. In addition, the current aims of Act 118, as enshrined in the preamble and the long title of Act 118, reads 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'.[1]

The Statutory Standard Sale and Purchase Agreement

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

1) Schedule G: This schedule is introduced by regulation 11(1) of Regulations 1989 (PU(A) 58/1989). Schedule G is for sale and purchase of landed house (land and building) by way of 'full sell then build' concept;
2) Schedule H: This schedule is introduced by regulation 11(1) of Regulations 1989 (PU(A) 58/1989). Schedule H is for the sale and purchase of flat houses (building and land intended for subdivision into parcels) by way of 'full sell then build' concept;
3) Schedule I: This schedule is introduced by sub-regulation 11(1A) of the Regulations 1989, inserted by regulations 15 and 8(b) of the Housing Development (Control and Licensing) (Amendment) Regulations 2007 (PU(A) 395/2007). Schedule I is for sale and purchase of landed house (land and building) by way of 'build then sell' concept;
4) Schedule J: This schedule is introduced by sub-regulation 11(1A) of the Regulations 1989, inserted by regulations 15 and 8(b) of the Housing Development (Control and Licensing) (Amendment) Regulations 2007 (PU(A) 395/2007). Schedule I is for sale and purchase of flat house (building and land intended for subdivision into parcels) by way of 'build then sell' concept;

Schedules I and J came into being after the amendments made to the Regulations 1989 in 2007 effected via the Housing Development (Control and Licensing) (Amendment) Regulations 2007 (PU(A) 395/2007) ('Regulations 2007'). Pursuant to these Regulations 2007, the Government of Malaysia introduced a '*quasi* build then sell' housing delivery concept through the promulgation of the statutory standard sale and purchase agreement— Schedules I and J. By this concept, purchasers are only required to pay 10% of the purchase price on the date of signing of the sale and purchase agreement with the vendor developer. The balance 90% of the purchase price shall

[1] [29 August 1969, P.U. (B) 212/1969] [Am. Act A1289: section 2]. The sentence 'the protection of the interest of purchasers was inserted by section 2 of the Housing Development (Control and Licensing) (Amendment) Act 2007 (Act A1289), enforced since 12 February, 2007 (Royal Assent) and 15 February, 2007 (publication in the gazette).

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be paid, to the vendor developer, on completion of the house and the CCC[2] has been obtained as well as the vacant possession of the completed house is ready for delivery to the purchaser on full settlement.

Damages That Can Be Claimed By The Aggrieved Purchasers

Purchasers in the housing development projects are entitled to claim damages, compensation or refund from the defaulting vendors on the latter's breaches or failure to carry out some terms and conditions prescribed in the said agreements. For instances in respect of the breaches and defaults of the vendors to:

1) register Memorandum of Transfer in favour of the purchaser despite the purchaser having paid all the required payment pursuant to the Third Schedule. The defaulting vendor must refund all payment made to the purchaser. This is spelt out in clause 4(6) of Schedule G, clause 5(6) of Schedule H, clause 5(6) of Schedule I, and 5(6) of Schedule J.

2) provide building and housing materials and that the workmanship not in accordance with the description of the said agreements, the purchasers are entitled to a corresponding reduction in the purchase price or to damages. This is pursuant to clause 13 of Schedule G, clause 12(2) of Schedule H, clause 13 of Schedule I, and clause 12(3) of Schedule J.

3) deliver vacant possession of the housing units to purchasers within 2 years or 3 years as the case made by, the purchasers are entitled to liquidated damages of 10% per annum of the purchase price from the expiry date of the delivery of vacant possession until the date the purchasers take vacant possession of the said units. This is spelt out in clause 22(2) of Schedule G, clause 25(2) of Schedule H, clause 22(2) of Schedule I and clause 25(2) of Schedule J.

4) duly construct the said housing units and the building works are defective not accordance with the terms and conditions in the said agreements and the law for instance the requirements under the Street, Drainage and Building Act 1974 and Uniform Building By-Law 1984, discovered during the defect liability period, the purchasers are entitled to

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[2] CCC means Certificate of Completion and Compliance. This certificate is issued by the Principal Submitting Person (PSP) indicating that the purported building works have been duly completed, safe and fit for occupation in accordance with the law. See section 70(20) and (21) of the SDBA, section 3 of Act 118 under certificate of completion and compliance, clause 23(2) of Schedules G and I and clause 26(2) of Schedules H and J of the Housing Development (Control and Licensing) Regulations 1989. For the State of Selangor, the conditions and requirements for the issuance of the CCC are provided in the by-law 25(1)(a)—(d) of the Selangor Uniform Building By-Laws 1986 [Sel.P.U.26/1985], inserted by by-law 15 of the Selangor Uniform Building By-Laws (Amendment) 2007 [Sel.P.U.9]. See also by-law 25(1)(a)—(d) of the Kedah Uniform Building By-Laws. According to by-law 25(1) of the Selangor Uniform Building By-Laws 1986 [Sel. P.U.26/1985]: 'A CCC...shall be issued by the principal submitting person-

(a) when all the technical conditions as imposed by the local authority have been duly complied with;
(b) when Form G1 to G21...have been duly certified and received by him;
(c) when all the essential services...have been provided; and
(d) when he certifies in Form F that he has supervised the erection and completion of the building and that to the best of his knowledge and belief the building has been constructed and completed in accordance eith the Act, these By-Laws and the approved plans.'.

This new by-law is inserted by by-law 15 of the Selangor Uniform Building By-Laws (amendment) 2007 [Sel. P.U. 9], enforced from 12 April, 2007. See also by-law 25(1) of the Kedah UBBL, inserted by by-law 14 of the Uniform Building By-Laws (Amendment) 2007.[K.P.U.6](Kedah), enforced from 12 April, 2007.

claim damages and/or entitled to a right to request the vendor to repair the defective works. This right is stated in clause 25 of Schedule G, clause 29 of Schedule H, clause 25 of clause I and clause 29 of Schedule J.

Abandoned Housing Projects In Peninsular Malaysia

As of June 2005, there were 28 new projects listed under the category of abandoned housing projects.[3] These projects involved 5,716 purchasers, 7,946 units of houses and projects' sales value of RM 479.67 million (this is the latest report available from the Ministry of Housing and Local Government ('MHLG')(now is known as the Ministry of Urban Wellbeing, Housing and Local Government ('MUWHLG')).[4] From the overall newly identified abandoned housing projects, the majority of the projects, as of June, 2005, occurred in Johor, Selangor and Penang which respectively had 5 projects (18%), followed by Kedah with 4 projects (14%), Perak with 3 projects (11%), and for Negeri Sembilan, Melaka and Terengganu, each of these states had 2 newly identified abandoned housing projects (7%).[5] In other states (Perlis, Federal Territory and Kelantan), there were no new abandoned housing projects which had been identified or reported.[6] It should be noted that the total number of abandoned housing projects in Peninsular Malaysia is still unknown and must be more than that had been reported by the above statistics, as there are also housing developers who are outside the purview and jurisdiction of the Ministry of Urban Wellbeing, Housing and Local Government ('MUWHLG') and beyond being subjected to Act 118, such as abandoned housing projects of individual developers and cooperative societies and abandoned housing projects in Sabah and Sarawak (East Malaysia).[7]

Causes of Housing Abandonment

Based on the authors' general observation, it is found that relatively, some of the grounds that lead to such a catastrophe in the housing industry are as follows:

1) mismanagement (reckless or calculated) of the developer's affairs (especially financial);
2) extravagant dissipation of purchasers' fund; and,
3) the projects had been undertaken by unqualified developers.

However, according to certain researches made amongst the causes leading to the abandoned housing projects in Peninsular Malaysia are:

1) Financial problems faced by the developers. The cause of this problem is owing to the problems with the developers' financial and construction management (severe liquidity problems and high gearing) to meet the construction costs and to repay creditors;
2) Loose approval of the applications for housing developer licences by MUWHLG. MUWHLG fails to obtain the requisite advice and opinions from economists, legal experts, property experts and other experts in approving the applications;
3) Challenges and problems of dealing with and clearing the project site of squatters;

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[3] Bahagian Pengawasan dan Penguatkuasa, Kementerian Perumahan dan Kerajaan Tempatan, *Laporan Senarai Projek Perumahan Terbengkalai Dari Tahun 1990-Jan 2005*, 2.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Ibid.

4) Ongoing conflicts, feuds and squabbles ensuing 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 administration authority, planning authority, building authority, housing authority and other technical agencies [8]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[9]), as the case may be.

Grievances of Purchasers in Abandoned Housing Projects

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

1) The purchasers are unable to get vacant possession of the units on time as promised by the vendor developers;
2) The construction of the houses are terminated or partly completed resulting in them to be 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 installments of the housing loans repayable to their respective

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[8] In the opinion of the author the inadequacy and non-coordination in the administration, policies and procedures involving housing development between the state governments' agencies and the federal government agencies is due to the separate jurisdiction and power that the states and the federal government possess and enjoy that are spelt out in the Federal Constitution (FC). See List 1 (Federal List), II(State List) and III (Concurrent List) to the Ninth Schedule of the FC. Thus it is opined, if certain exclusive powers and jurisdictions over certain matters (for example land matters) are held by the state government and its agencies, there may be occasions that the federal government's procedures, policies and circulars relating to the states' matters (eg land) may not be fully abide by the state government and its agencies. Thus, this state-federal constitutional tussle will still become a major hurdle and issue in streamlining the national housing development and other related development.

[9] CCC means Certificate of Completion and Compliance. This certificate is issued by the Principal Submitting Person (PSP) indicating that the purported building works have been duly completed, safe and fit for occupation in accordance with the law. See section 70(20) and (21) of the SDBA, section 3 of Act 118 under certificate of completion and compliance, clause 23(2) of Schedules G and I and clause 26(2) of Schedules H and J of the Housing Development (Control and Licensing) Regulations 1989. For the State of Selangor, the conditions and requirements for the issuance of the CCC are provided in the by-law 25(1)(a)—(d) of the Selangor Uniform Building By-Laws 1986 [Sel.P.U.26/1985], inserted by by-law 15 of the Selangor Uniform Building By-Laws (Amendment) 2007 [Sel.P.U.9]. See also by-law 25(1)(a)—(d) of the Kedah UBBL. According to by-law 25(1) of the Selangor Uniform Building By-Laws 1986 [Sel. P.U.26/1985]: 'A CCC…shall be issued by the principal submitting person-

(e) when all the technical conditions as imposed by the local authority have been duly complied with;
(f) when Form G1 to G21…have been duly certified and received by him;
(g) when all the essential services…have been provided; and
(h) when he certifies in Form F that he has supervised the erection and completion of the building and that to the best of his knowledge and belief the building has been constructed and completed in accordance with the Act, these By-Laws and the approved plans.'.

This new by-law is inserted by by-law 15 of the Selangor Uniform Building By-Laws (amendment) 2007 [Sel. P.U. 9], enforced from 12 April, 2007. See also by-law 25(1) of the Kedah UBBL, inserted by by-law 14 of the Uniform Building By-Laws (Amendment) 2007.[K.P.U.6](Kedah), enforced from 12 April, 2007.

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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 bankrupts by their lender bank;

4) Further, 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;
7) Possible difficulties for reaching consensus and for getting cooperation from purchasers, defaulting abandoned developers, end-financiers, bridging loan financiers, 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 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 abandoned developers as they (the defaulting abandoned developers) may have no monetary provisions to meet the claims;
11) There may be 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 in the worst situation, the abandoned project may not altogether be rehabilitated;
12) 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; and,
13) Due to the abandonment and the ensuing complications occurring thereafter, the ordinary machinery and enforcement of the insolvency, 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.[10]

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[10] Nuarrual Hilal Md. Dahlan, "Projek Perumahan Terbengkalai dan Pemulihan oleh Penerima dan Pengurus", *KANUN Jurnal Undang-undang Malaysia*, March, (2008): 1—71; Nuarrual Hilal Md. Dahlan & Sharifah Zubaidah Syed Abdul Kader aljunid, "Shariah and Legal Issues in the Bay' Bithaman al-Ajil (BBA): A Viewpoint", *Shariah Law Reports*, Vol 3, (2010): 108—109; Nuarrual Hilal Md. Dahlan, "Abandoned Housing Projects in Malaysia: A Legal Perspective," *Malayan Law Journal* 6 (2006): xxviii—xxxiii, Nuarrual Hilal Md. Dahlan, "Rehabilitation of Abandoned Housing Project: Experience of An

There are certain purchasers who have waited many long years in Taman Senawang Jaya, Fasa 1-C, Senawang, Negeri Sembilan, as a result of the abandonment of the project and persistent defaults of the developer.[11] These problems were also evident in Taman Universe, Lot 1556, Mukim 13, NED, Pulau Pinang,[12] Taman Hamilton, Lots 163 and 2156, Bandar Jelutong, Seksyen 2, NED, Pulau Pinang,[13] Taman Shoukat, Lot 2219, Mukim 13, NED, Pulau Pinang,[14] Taman Sri Aman, Kampung Idaman, Pandamaran, Selangor,[15] as well as from decided cases as in *Zainab bte Mohamed v. Syarikat Permodalan Johor (PP) Sdn. Bhd* [1998] MLJU 492,[16] *Mahfar bin Alwee v. Jejaka Megah Sdn Bhd & Anor* [2004] MLJU 107, *Tan Ah Tong v. Perwira Affin Bank Berhad & Ors* [2002] 5 MLJ 49, *Tai Lee Finance Co Sdn. Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81, *Public Finance Bhd v. Narayasamy* [1971] 2 MLJ 32, *Perwira Habib Bank (M) Berhad v. Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54, *Perwira Habib Bank v Oon Seng Development Sdn. Bhd* [1990] 1 MLJ 447, *Buxton & Anor v. Supreme Finance (M) Bhd* [1992] 2 MLJ 481, and *Bank Bumiputra Malaysia Berhad v. Mahmud Hj. Mohamed Din & Anor* [1989] 1 CLJ 326(Rep); [1989] 1 CLJ 1048[17].

In *Tan Ah Tong v. Perwira Affin Bank Berhad & Ors* [2002] 5 MLJ 49 (High Court of Malaya at Kuala Lumpur)[18], the plaintiff chargor[19] claimed that the third party charges created over the housing development project lands[20] were illegal as the housing developer company borrower

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Abandoned Housing Developer Through the Help of A Government Agency," *Malayan Law Journal*, 1 (2007): lxxxiv—cxxvi, Nuarrual Hilal Md. Dahlan "Rehabilitation of Abandoned Housing Project in Peninsular Malaysia by A Purchasers' Voluntary Scheme: A Case Study," *Malayan Law Journal*, 4 (2007): clvii—cxcvi, Nuarrual Hilal Md. Dahlan, *Comparative Housing Sale and Purchase Agreements Under the Malaysia, Singapore and New South Wales Housing Laws* (Sintok: UUM Press, 2011) and Nuarrual Hilal Md. Dahlan, *Legal Issues in the Rehabilitation of Abandoned Housing Projects* (Sintok: UUM Press, 2011).

[11] File number: KPKT/08/824/983/E. This project was abandoned due to financial problems faced by the developer.

[12] File number: KPKT/08/2349-2.

[13] Where the projects were considered unsuitable for rehabilitation and that the purchasers had paid substantial deposit, but later the culprit developer abandoned the project and left the country with the deposit paid, in file number: KPKT/08/3013/E.

[14] Where the purchasers had to face all the troubles to rehabilitate the project themselves, they had to top up additional moneys for the rehabilitation, to redeem the land and that they had to wait for four (4) years for the completion of the rehabilitation (if the date of the CF obtained is to be taken into account), before they could occupy the units, or about 12 (twelve) years, if on account of the full redemption and due transfer of the subdivided units to the individual purchasers' names. This is based on file number: KPKT/08/824/ /337.

[15] Where the purchasers had to wait for 17 years before the project was revived and during that course of abandonment, many housing facilities and public infrastructure had been damaged and stolen by irresponsible parties. See in Harian Metro, 19 January, 2001, "Tunggu Rumah Siap 17 Tahun" <http://www.hba.org.my/news/2001/101/tunggu_rumah.htm> (viewed on 8 April, 2007).

[16] Where the purchaser herself had to take out her own moneys of more than RM 9,000.00 purposely to rehabilitate the units left abandoned by the developer.

[17] Where the fate of purchasers to have the abandoned units to be revived seemed dim as the project sites were sold off by the chargee bank to settle the debts owed by the defaulting developers.

[18] See also *Perwira Affin Bank Bhd v Tan Ah Tong* [2003] 5 MLJ 193 (High Court of Malaya at Kuala Lumpur).

[19] The plaintiff chargor was the chairman, director and major shareholder of the the housing developer company borrower--Asialand Housing Development Sdn Bhd.

[20] The land consisted of five master titles vide Lot 4235 HS(D) 16193 to Lot 4267 HS(D) 16225 (formerly known as master title Grant 7188 Lot 94); Lot 4268 HS(M) 1725 to Lot 4287 HS(M) 1744 (formerly known as master title EMR 2532 Lot 201); Lot 4198 HS(M) 1688 to Lot 4214 HS(MK) 1704 (formerly known as master title EMR 2146 Lot 349); Lot 4215 HS(M) 1705 to Lot 4234 HS(M) 1724 (formerly known as EMR 2147 Lot 350) and Lot 4192 HS(M) 1682 to Lot 4197 HS(M) 1687 (formerly known as a

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(Asialand Housing Development Sdn Bhd) did not possess a housing developer's licence. Thus, the application of the defendant chargee bank to apply for an order for sale should not be allowed. Nevertheless, the court refused the plaintiff's claim on the reason of the plaintiff had acted *mala fide*, had abused the process of the court and on the ground of equity and justice. Note that the sale and purchase transactions of this case, between the housing developer company borrower and the purchasers, were subject to Housing Developer's (Control and Licensing) Act 1966 (Act 118)[21] and its regulation and this case involved an abandoned housing project. As interested parties, the purchasers who bought subdivided titles of master titles and who became victims of the housing developer company borrower's failure to complete the project, had also applied to the court for a stop order of the sale and for an order of specific performance of the contract of sale and purchase entered into with the developer, in the protection of their rights in the lands. However, the case law does not further elaborate conflicting interests of the defendant chargee bank for an order of sale and of the purchasers to have the order of sale be stopped in the protection of their interests. What the court observed that the application of the plaintiff to set aside the order for sale without having to make any repayment to the defendant chargee on the ground of their housing development activity was illegal, in that the housing developer company borrower had deceived the Housing Controller by undertaking development without housing developer's licence, was *mala fide*, unjust and an abuse of court process. The court also stated that the defence of illegality could not be invoked as this has been prevented by argument of the defendant rested on the ground of *res judicata* in that the plaintiff had failed to deny and allude in his affidavit of reply nor had the plaintiff appealed against the order for sale of the secured land in the prior proceedings.

In *Perwira Habib Bank v Oon Seng Development Sdn Bhd* [1990] 1 MLJ 447 (High Court of Malaya at Penang), the application of the purchasers (the second, third and fourth defendants) to have the order for sale be aborted (the order of sales which was applied by the chargee bank to the High Court against the defaulting vendor for failure of the vendor to make the necessary repayment of the loan) was rejected by the court on the ground that the application did not show to the satisfaction of the court of the existence of 'cause to the contrary' as required under section 256(3) of the NLC. Further as *bona fide* purchasers for value, their interest cannot prevail over that of the plaintiff's, being the registered chargee. Unless fraud was an issue and could be proved, the charge which had been legally registered becomes indefeasible. In this case, the court ruled out that even the fourth defendant being the purchaser who had fully paid the purchase price of the purported housing lot before the said housing lot was subject to a charge by the first defendant (the defaulting vendor) to the plaintiff (chargee) would not prevail over the interest of the registered chargee. It should be noted that the other remaining purchasers being the second and third purchasers had also fully paid the purchase prices of their respective purchased lots through government housing loans.

Issue

An issue that can be raised in respect of claiming damages in housing development projects' legal action is this: Can the aggrieved purchasers claim other types of damages apart from what have been prescribed under the said agreements? These damages may include exemplary, aggravated and non-pecuniary/pecuniary damages for their (purchasers) inconveniences, troubles, anxiety, mental pressure, distress, personal and employment problems, that have led to their lives being chaotic and miserable, and that have been detrimental to their health and overall happiness?

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master title EMR 2251 Lot 515) all were in the Mukims of Ulu Kelang, Selangor. See *Tan Ah Tong v Perwira Affin Bank Bhd & Ors* [2002] 5 MLJ 49 (High Court of Malaya at Kuala Lumpur) at page 58.

[21] Currently is known as the Housing Development (Control and Licensing) Act 1966 (Act 118).

Case Law Dealing With Damages in Housing Transactions

In respect of the rights of the purchasers to claim other relief than the relief provided by the said agreements, in *Limmewah Development Sdn. Bhd v. Dr Jasbir Singh s/o Harbhajan Singh* [1993] 1 AMR 29; [1993] MLJU 296 (High Court) and *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31 (High Court), the High Courts held that, in the event of late delivery of vacant possession, the aggrieved purchaser could only be entitled to the compensation and damages as stipulated by the said agreements as the statutory contracts. 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] 1 AMR 29 (High Court of Malaya at Muar), the respondent, who was a government servant, bought a bungalow (the said property) from the appellant housing developer pursuant to a contract (the said contract) governed by the Housing Developers (Control and Licensing) Act 1966 (the Act). The appellant knew that the respondent had applied to the government for a housing loan. The respondent claimed liquidated damages as a result of the appellant's failure or refusal to deliver vacant possession of the bungalow within the contracted time and damages for pain, anxiety, distress and humiliation. Although under the contract, the date for completion and delivery of vacant possession was August 25, 1991, vacant possession was only given to the appellant on January 16, 1985. The appellant argued that it was the respondent who had delayed the scheduled installment payment and counterclaimed interest for late payment. Furthermore, it was contended that the appellant was estopped from relying on the schedule of payments and terms governing payment of interest provided in the contract as the appellant had accepted the government's schedule of payments. Judgment for liquidated damages only for late delivery of vacant possession was given to the respondent. Both parties appealed.

One of the issues raised in the court is this; Whether the respondent was entitled to liquidated/non-liquidated, pecuniary and non-pecuniary damages for late delivery as well as damages for inconveniences, pains, troubles, anxieties, mental pressures, distresses, humiliations, personal, family and other problems?

The court held that the provision in the contract of sale and purchase for late delivery of vacant possession is comprehensive and precludes a purchaser from recovering damages under any other head. Richard Talalla, J said at page 1268 of the reported case as follows:

> "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. In any event it was conceded in the submission that as at August 25, 1981, the date for completion and delivery of vacant possession the glass doors, pipes and basins were not fitted and the drains were not done. That being the case it

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cannot be seen how it can be argued that the bungalow was completed and ready for delivery of vacant possession on the completion date. The reason given for non completion was that these items were likely to be vandalized or stolen. To my mind, that was not a legally binding reason for not fulfilling the developer's obligation under the agreement. The developer could easily have saved the situation by employing a watchman to guard its housing development. Then it was argued that the developers' architect had in evidence given an undertaking to install these fittings as soon as the buyer moved in promising that the installation could be done in one day. Again in my view there was no legal obligation on the part of the buyer to accept the undertaking and assurance. It had to follow that the developer's appeal against the second, third and fifth findings of the Magistrate had to fail. **As to the Magistrate's fourth finding, it seemed to me that the Magistrate was perfectly right in following the *SEA Housing Corporation* case where at p 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 RM6,000/- and damages for pain and so on was bound to fail and the Magistrate was again right in disallowing the same**" (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 a/l 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'. In this case, the defendant entered into an agreement to sell his property to the plaintiffs for the sum of RM 97,000/-. PW2 was appointed as common solicitor for both parties. Although the 10% deposit was paid, the transaction was not completed by the completion date of December 10, 1979. The plaintiffs entered into possession with the defendant's consent. The defendant advised the plaintiff on December 31, 1979 that as the plaintiffs had failed to complete the agreement, he had a right to forfeit the said deposit and to treat the agreement as null and void. This is the plaintiffs' action for specific performance alleging that the defendant has refused to complete the sale and purchase agreement. The defendant counterclaimed for possession and contends that they are willing to complete the agreement. Clause 4 of the agreement states that the transfer was to be executed by the defendant upon payment of the balance of the purchase price. The court allowed the plaintiff's claim. Mohd Ghazali b Mohd Yusoff, JC in the reported case said at pages 209- 211:

"Counsel for the plaintiffs however argued that it was the defendant who had delayed the matter. He argued that the defendant had acted unreasonably byrefusing to respond to PW2's request to sign the transfer document earlieralthough PW2 had given his undertaking as stakeholder ensuring that his rights will be protected and as such was in no danger of losing his property. To me the banks's requirement that the transfer document be executed first before the loan monies can be released was not anticipated by both parties and to act upon it would, on the surface of it tantamount to a deviation from the said agreement as claimed by the defendant. But on the other hand, the above events and the correspondence between PW2, the bank

and the defendant, show that the refusal by the defendant to execute the transfer was unreasonable under the circumstances. He had refused to respond to the letters and the advice given by PW2 although the latter was also acting for him. He had allowed the plaintiffs to enter into possession a few days after the agreement was signed and had even requested for a further sum of money. These events would in my view also tantamount to "deviations" from the terms of the said agreement by the defendant. He was indeed in urgent need of money and was willing to request for further part payments although they were not due. Counsel for the plaintiffs had further argued that the plaintiffs were in a position to perform the said agreement even before the agreed completion date but that the delay was due to the defendant's refusal to execute the transfer document which would have made it possible for the bank to release the loan monies immediately. He argued that the defendant knew that the plaintiffs were applying for a bank loan. Furthermore PW2 had even requested him to collect the balance of the purchase price immediately when the bank released the loan monies to their solicitors on December 12, 1979, but there was no response from the defendant. Counsel then argued that time has not of the essence in the agreement by virtue of the above circumstances and to support his contention referred to *Sinnadurai's* SALE AND PURCHASE OF REAL PROPERTY IN MALAYSIA 1981 Edition, at p 394 where the author said -

> "Generally when time is stipulated in a contract for the sale of land, failure to perform within the stipulated time has no serious consequences. Even the defaulting party may obtain a decree of specific performance of the contract if no injustice would be caused in so doing. For this purpose it is usually said that in equity time is not of the essence of the contract. To quote Viscount Haldane again:
>
> > 'A Court of Equity will indeed relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract; either for completion or for the steps towards completion if it can do justice between the parties and if ... there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances' which would inequitable to interfere with and modify the legal right. (*Jamshed K Irani v Burjorji Dhunjibhai* (1915) LR 43 IA 2 at p 32)'
>
> The reason for this rule is that equity treats any stipulation as to time as merely of secondary importance to the main purpose of the parties."

I would tend to agree with the arguments of counsel for the plaintiffs. Both the solicitor for the bank and PW2 had endeavoured to obtain the release of the loan monies before December 12, 1979, that is, the agreed completion date. They had each given their undertakings respectively to the relevant persons. PW2 had demonstrated that he had acted in the interest of both the plaintiffs and the defendant to see that the agreement is finalised after they had agreed to appoint him as common solicitor. The evidence clearly show that the plaintiffs' application for the loan had been approved on October 19, 1979, that is, nine (9) days after the signing of the agreement. Section 23(b) of the Specific Relief Act 1950 provides that specific performance of a contract

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> cannot be enforced in favour of a person who has become incapable of performing any essential term of the contract that on his part remains to be performed. The plaintiffs were definitely capable of performing this part of the contract, that is to pay the balance of the purchase price long before the agreed completion date as this loan had already been approved. To support his arguments, counsel for the plaintiffs referred to the case of *Chan Fook Shen v Tan Suan Sim* [1980] 1 MLJ 105: this case relates to an action for specific performance of an agreement for sale of land. The defendant had agreed to sell the plaintiff her land and collected RM2,000/- as deposit. It was agreed that the balance would be paid at a later date. In his evidence the plaintiff explained to the court that by "a later date" it was meant that they had to wait until he got a bank loan. The plaintiff had obtained a bank loan but it appeared that the loan could not be released until the transfer has executed. The defendant insisted upon payment of the balance before a certain date, failing which the defendant purported to cancel the contract. The plaintiff sued for specific performance which was granted by the court. It was held that this was a case in which the plaintiff was in a position to perform the contract and should have been given reasonable time to do so."

This is further cemented by *Thomas a/l Iruthayam & Anor v. LSSC Development Sdn Bhd* [2005] 4 MLJ 262. In this case, the High Court, had 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 CF to the plaintiff purchasers. The right of the plaintiff purchasers is not only restricted to the provisions as provided in the said agreement, but also to the general and wider rights affordable by the contractual principles (such as rescission) and equity. In this case, the plaintiffs were purchasers of a house from the defendant, who were the developers of a housing project. A sale and purchase agreement was executed between them. It was one of the conditions of the sale and purchase agreement that the handing over of the house was to occur within 24 months from the date of the agreement. Subsequently, the plaintiff sent a letter of rescission of the sale and purchase agreement to the defendant. The plaintiffs had stated that the defendant had failed to deliver vacant possession of the property, due to its failure to connect the water and the electricity and the delivery of the certificate of fitness for occupation. The plaintiffs had filed an originating summons, praying amongst others, a declaration that the defendant had breached the impugned sale and purchase agreement and that the plaintiffs had rightfully rescinded that agreement, or in the alternative a declaration that the said agreement was rescinded by reason of breach of the contract by the defendant. Further the plaintiffs had sought liquidated damages, a refund of the consideration sum, incidental charges and other damages. The court allowed the plaintiff's application and held *inter alia* when the sale and purchase agreement was executed by the plaintiffs and the defendant, time was intended to be of the essence of the agreement. The defendant had failed to deliver vacant possession as the water and electricity mains had yet to be connected and the certificate of fitness never handed over to the plaintiffs. Secondly, the court held that the plaintiffs had the additional right to resort to any law or right in equity, though outside the provisions of the sale and purchase agreement, for remedies. Clause 12 (b) of the sale and purchase agreement allowed the plaintiffs the right of rescission, in the event of any failure by the defendant to deliver vacant possession. Suriyadi J said at page 268 of the case law as follows:

> **"Having scrutinized clause 12(b), I found the defendant's stance rather strange and contradictory, due to the relevant words in clause 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 clause 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" (emphasis added).

Thus, it appears that in a case where the housing project is abandoned, the purchasers may also invoke other legal and equitable principles apart from the provisions provided in Act 118 to claim 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 principle was also adopted by the High Court in *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308 (High Court), *KC Chan Brothers Development Sdn. Bhd v. Tan Kon Seng & Ors* [2001] 6 MLJ 636 (High Court)[22] and the Court of Appeal in *LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor* [2007] 4 MLJ 1[23].

In *Chye Fook*, the High Court was of the view that, the aggrieved purchaser might apply the provisions in the Contracts Act 1950, *viz* sections 56 and 76 to rescind the sale and purchase agreement and to claim compensation for any damages which he sustained through the non-fulfillment of the agreement, apart from the provisions in the agreement and Act 118. In this case, by a consent order following a summons for directions, the plaintiffs and the defendant asked for the preliminary issue of 'whether the plaintiffs can sue for rescission on the agreement of 8 August 1984 as the house is not completed by 7 August 1986 which is the completion date' be first determined by arguments in open court. The agreement was signed on 8 August 1984 and the completion date was on 7 August 1986 which was 24 months after. The building was not completed on the completion date and the plaintiffs sent a notice to the defendants on 19 January 1987 to rescind the agreement in view of the non-compliance with the 24-month period. The building was finally completed in May 1987 and the certificate of fitness was issued on 9 December 1987. Clause 7 of the agreement provides, inter alia, that 'time shall be the essence of the contract in relation to all the provisions of this agreement'. Clause 18(2) of the agreement

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[22] 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.

[23] In this case the Court of Appeal reversed the decision of the High Court in *Thomas a/l Iruthayam & Anor v LSSC Development Sdn Bhd* [2005] 4 MLJ 262. The Court of Appeal 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.

stipulates that 'if the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price'. The court inter alia held that as provided by section 76 of the Contracts Act 1950, a party who rightly rescinds contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract. The plaintiffs 'entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.

Abdul Malek J said in relation to the above finding said as follows at page 309 of the case law:

> "At this stage of the proceedings, this court was not asked to determine whether the rescission would result in the plaintiffs not being able to receive the liquidated damages but in passing I would say that, as provided by s 76 of the Contracts Act 1950, a party who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract. **I had in fact made it clear in my ruling that the plaintiffs' entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.**
> There was no evidence as to what stage of building progress the building was at the completion date but from the photographs taken in July 1987, only the plaintiffs' house had been built out of a row of terrace houses and also no other houses could be seen in the area. Since, from the photographs, the plaintiffs' house appears to be the only house built in the area, it is possible that the construction could have even begun after the completion date. That, however, is of secondary importance.
> What is relevant here is that the plaintiffs had entered into a sale and purchase agreement with the defendants to buy the house and had expected to move into the house two years later. They certainly would have made the necessary preparations for this event and any change in plans would have caused them a great deal of inconvenience and expense. **Therefore, if the house was not completed on the appointed date and in fact had not been completed even five months thereafter when the notice to terminate was sent to the defendants and was only completed nine months later and the certificate of fitness issued 16 months after the appointed date, the court is of the view that it is within the right of the purchaser plaintiffs to rescind the contract with the defendants based on legal principles and case law"** (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 (*LSSC Development* (in the High Court and in the Court of Appeal) and *Chye Fook*), 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 standard sale and purchase agreement and Act 118 (*KC Chan Brothers*). Nevertheless, these remedies **are not** tortious remedies i.e in respect of damages for inconveniences, pain, anxiety, distress and humiliation. Thus, it can be said that until now, the courts[24] in Malaysia are only ready to apply certain contractual remedies (rescission and damages under the Contracts Act

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[24] *Chye Fook* (High Court), *KC Chan Brothers* (High Court) and *LSSC Development* (High Court and Court of Appeal).

1950) being 'outside remedies' other than what are afforded by Act 118 and the standard statutory sale and purchase agreement. However, even though certain case law are of the view that these 'outside remedies' may include other equitable remedies[25] which may also include, it is opined, the right to claim tortious damages and remedies, for example damages and remedies for inconveniences, pain, anxiety, distress and humiliation, based on case law, these damages and remedies would not be granted by the courts (*Limmewah Development* and *SEA Housing Corporation*). Thus, for aggrieved purchasers in housing projects, particularly in abandoned housing projects, based on the above case law, they would not likely get these types of damages and remedies (tortious) from the courts.

Comment

So far there is no case law in Malaysia that involve purchasers' application for damages for inconveniences, pains, troubles, anxieties, mental pressures, distresses, humiliations, personal, family and other problems resulting from defaults and breaches of the defaulting vendor developers in abandoned housing projects.

The authors hope that in the near future aggrieved purchasers in abandoned housing projects should claim damages for inconveniences, pains, troubles, anxieties, mental pressures, distresses, humiliations, personal, family and other problems resulting from defaults and breaches of the defaulting vendor developers as well, apart from the damages that are prescribed under the said agreements.

It the authors' view the aggrieved purchasers in abandoned housing projects are entitled not only to the damages as spelt out in the said agreements, but also all other damages that are not provided under the said agreements. These damages include general damages, non-pecuniary damages, punitive/exemplary damages and damages for inconveniences, pains, troubles, anxieties, mental pressures, distresses, humiliations, personal, family and other problems as consequences of abandonment of their housing projects by the defaulting vendor developers.

This view is grounded on the court must do justice and equity as enshrined under Order 92 Rule 4 of the High Court's Rules 1980 (inherent power of the Court)[26] and section 23(1) of the Courts of Judicature Act 1964[27]. Secondly, it is submitted, the purpose of judicial proceedings is to achieve justice and comply with the maxim that when law against equity, equity prevails.

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[25] For example *Charanjit Singh a/l Ver Singh* and *LSSC Development*.

[26] Note that from 1 August 2012 onward, the Rules of High Court 1980 has been repealed and replaced by new rules known as the Rules of Court 2012 (P.U.(A) 205). There are many amendments made to the previous Rules of High Court 1980 and the new rules have been incorporated into the Rules of Court 2012. However, Order 92 rule 4 is still retained in the new Rules of Court 2012. The repeal and amendments were made vide Rules of Court (Amendment) 2012 P.U.(A)232.

[27] Section 23(1) of the Courts of Judicature Act 1964 provides:

Subject to the limitations contained in Article 128 of the Constitution, the High Court shall have jurisdiction to try **all** civil proceedings where-

- i) the cause of action arose; or
- ii) the defendant or one of several defendants resides or has his place of business; or
- iii) the facts on which the proceedings are based exist or are alleged to have occurred; or
- iv) any land the ownership if which is disputed is situated within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing, within the local jurisdiction of the other High Court. (emphasis added).

There are many cases that allowed the aggrieved parties to claim for damages due to inconvenience, distress and anxiety resulting from defaults and breaches of the defaulting parties. Below are examples of the cases:

1) *Hong Leong Co Ltd v Pearlson Enterprises (No. 2)* [1968[1 MLJ 62 (HC Singapore);
2) *Jarvis v Swan Tours Ltd* [1973] 1 QB 233;
3) *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468; and,
4) *Heywood v Wellers* [1976] QB 446.

In *Hong Leong* the court, in dealing with the counterclaim of the defendant, took into consideration the inconvenience caused to the defendant by the breach committed by the plaintiff, and ordered that the plaintiff pay the defendant the cost of retrial and the original trial of the counterclaim to be taxed on the lower scale.[28] Ambrose J observed that:

> "I held, however, that the defendants were entitled to recover nominal damages for breach of contract: 11 Halsbury's Laws of England (3rd edition) pages 220, paragraph 388. I accordingly awarded the defendant the sum or RM 10 as nominal damages. It seemed to me that, although the defendants were, in my opinion, not entitled to any damages in respect of the counterclaim, for reasons given above, the plaintiffs by their breach of contract had caused the defendants considerable inconvenience and unreasonably delayed the construction of the block of flats planned by the defendants, and should, therefore, pay the defendants the costs of the retrial and also the original trial of the counterclaim. And I accordingly made an order to that effect and directed the costs be taxed on the lower scale"

In *Jarvis* and *Jackson* cases, damages may be granted for emotional distress and upsets caused by a breach of contract. In contracts to provide a holiday, it is clear that the plaintiff intends to have some peace of mind and thus any 'damage' caused to him by a breach of the contract by the defendant should be compensated for.[29]

In *Heywood*, the plaintiff brought an action against her solicitors for breach of contract in negligently failing to obtain an injunction to restrain her former boyfriend from molesting her. The court allowed the recovery of damages for the emotional distress which the plaintiff had suffered as a result of the breach. Lord Denning said that the damage which the plaintiff suffered 'was within their (defendant) contemplation' within the rule in *Hadley v Baxendale*.[30]

Similarly in *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1995] 4 All ER 745; [1996] 1 WLR 38, (PC) on appeal from Hong Kong, another case dealing with breach of contract for a package tour. In this case it was held that the tour operators were liable for damages for breach of an implied term to use reasonable skill in rendering services relating to the package tour. It was held that the tour operators were liable for their failure in providing the requisite skill and care when crossing a lake in China when the plaintiff's daughter was drowned.[31]

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[28] See also Visu Sinnadurai, *Law of Contract*, 3rd edition, volume one, LexisNexis Butterworths, Kuala Lumpur, 2003, 734—741.
[29] Ibid.
[30] Ibid.
[31] Ibid.

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In short, the law relating to the recovery of damages for inconveniences, distress and anxiety has been restated in a number of cases. These cases include *Watts v Marrow* [1991] 4 All ER 937, *Farley v Skinner* [2001] 4 All ER 802 (HL) and *Ruxley Electronics and Construction Ltd v Forsyth, Laddingford Eenclosures Ltd* [1995] 3 All ER 268 (HL).[32]

It is the authors' opinion that the aggrieved purchasers in abandoned housing projects are entitled to wider and equitable damages for all the inconveniences, anxiety and distress caused due to the default of the vendor developers to have abandoned the projects, apart from the damages as prescribed under the said agreements.

Alternatively, the terms and conditions of the said agreement should be amended to include non-pecuniary damages and un-liquidated damages as well to give better protection to purchasers in the event of default by the vendor developers particularly when the latter abandon the projects. The purpose of this suggestions have two fold. Firstly, to give better protection to purchasers and provide greater confidence to purchasers in the Malaysian rule of law and legal system. Secondly, to as a warning to discourage the vendor developer from abandoning their housing projects and comply fully with the terms and conditions of the said agreements.

Conclusion

The said agreements are statutory formatted agreements that must be used in all housing transactions falling under the meaning of Act 118. The objective of the said agreements is to provide standardized, systematic and streamlined terms and conditions protective to the rights and interests of the vendor developers and the purchasers. Nonetheless, the objective has been marred by the occurrences of abandoned housing projects. Until todate there is no decisive and comprehensive approach that can settle once-and-for-all the problems of abandoned housing projects including the terms and conditions in the said agreements. This includes the lack of clear terms and conditions in the said agreements that can provide comprehensive relief and remedies to purchasers for instance non-pecuniary damages for inconveniences, distress and anxiety. Thus it is timely for the court and the Malaysian government to recognize this type of damages for the better protection of the general purchasers by recognizing it in the judgment and incorporating it in the said agreements. This right also has been recognized in other common law jurisdiction as illustrated in the above case law.

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[32] Ibid.