

## Rehabilitation of abandoned housing projects: a comparative analysis between the law and practice in peninsular Malaysia and the Republic of Singapore

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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 the housing industry, the abandoned housing projects problem is still an unresolved issue for the Malaysian government. The real victims are the purchasers themselves. There are no specific or common ways to face the problems because the issues faced by the stakeholders vary for each and every abandoned housing project. This paper will discuss law and practice in the rehabilitation of abandoned housing projects in Peninsular Malaysia and compare them with the position in the Republic of Singapore. From the comparative approach, certain suggestions will be forwarded at the end of the paper to carry out rehabilitation in Peninsular Malaysia and Singapore.

### Introduction

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

- it is not completed within or beyond the period prescribed under the sale and purchase agreement (S&P) and on the site of the housing development project there is consecutively no construction activities for more than six months; or
- a winding-up petition has been registered in the High Court under section 218 of the Companies Act 1965; or
- the housing developer company is put under the control of the Receiver and Manager; and
- it must be endorsed by the minister of housing and local government as an abandoned housing project pursuant to section 11(1)(a) of the Housing Development (Control and Licensing) Act 1966 (Act 118).<sup>1</sup>

The roles and obligations of the Malaysian Ministry of Housing and Local Government are to gather relevant information, search and initiate ways to

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<sup>1</sup>Abdul Aziz, JI (the administrative officer at Division of Rehabilitation of Abandoned Projects, National Housing Department, Ministry of Housing and Local Government, Pusat Bandar Damansara, Kuala Lumpur), personal communication, 14 July 2010.

rehabilitate housing projects so abandoned and to identify suitable parties for the rehabilitation of the projects. Either they are rehabilitated by the original developers themselves (the first defaulting developer) or by the financiers of the projects, by the landowners of the projects or even through initiatives of the Purchasers Action Committees or through the government rehabilitating agency – Syarikat Perumahan Negara Berhad (SPNB).<sup>2</sup>

### Causes of abandonment of housing development projects in Peninsular Malaysia

There are many reasons that lead to the abandonment of housing projects. The main problems, it is submitted, are as follows:

- (1) absence of a better housing delivery system such as the 'full build then sell' system;
- (2) no mandatory 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 licence; and
- (3) no specific legal provisions governing the rehabilitation schemes, perpetuating abuses and misuses of power and authority by the rehabilitating parties to the detriment of the purchasers.<sup>3</sup>

#### 1. Absence of a better housing delivery system such as the 'full build and sell' system

One of the problems in the housing industry in Peninsular Malaysia is the lack of political will on the part of the government to introduce and adopt the 'full build then sell system'. Under this system, the developers are to build housing units to completion and be issued with a certificate of fitness for occupation (CF) or certificate of completion and compliance (CCC), as the case may be, and they (the developers) must ensure that the titles to the completed housing units are ready for due transfer to purchasers on settlement of the purchase price. Only then can the developer sell the completed units to purchasers. This system would eliminate altogether the problem of abandoned housing projects, as the planned housing will have been completed, issued with a CF or CCC and be ready for full occupation.

The current system which is mainly a 'full sell then build' – through Schedules G and H (the statutory standard sale and purchase agreements) in the Housing Development (Control and Licensing) Regulations 1989 – has many weaknesses that can lead to the abandonment of housing projects. Under this system, purchasers have to pay a deposit of the full purchase price (usually 10% of the purchase price) with the balance (90%) paid progressively in accordance with the development stages.

<sup>2</sup>Division of Supervision and Enforcement, Ministry of Housing and Local Government, *Laporan Senarai Projek Perumahan Terbengkalai Dari Tahun 1990 – Jun 2005* (Ministry of Housing and Local Government, Kuala Lumpur nd) 1.

<sup>3</sup>NHM Dahlan, 'Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework' (unpublished manuscript, Universiti Kebangsaan Malaysia).

Each of these development stages once completed, must be supported by the architect or engineer's certificate, indicating that the particular development stage has been duly completed. Full completion of the respective development stages (supported by the architect or engineer's certificates) will entitle the developer to payment. Even though there is a requirement of the law (clause 4(2) in the schedule of payment of Schedules G, H, I and J), specifying that the completion of the development stages shall be supported by the architect or engineer's certificate, this certification can be falsified by these professionals on the instruction of the developer to the detriment of purchasers' interests. As a consequence, if the project is abandoned and there is plan for rehabilitation, the available loan fund still in the hands of the financiers or in the Housing Development Account (HDA) may not be sufficient to meet the rehabilitation costs. This means that, unless there are additional funds to cover the shortfall in the balance of the loan, the rehabilitation may not be carried out.

Nonetheless, very recently, the Malaysian government introduced the 'quasi build then sell system' through the promulgation of Schedules I and J (the statutory standard sale and purchase agreements). Under this type of housing delivery system, the purchasers are to pay a deposit (usually 10% of the purchase price) to developer. The 90% balance of the purchase price shall then be paid on completion of the house and after the receipt of the delivery of vacant possession by the vendor developer to the purchaser supported by the CF or CCC, as the case may be. Nonetheless, this type of delivery may not be an effective means to eliminate the problem of abandoned housing projects. There is no guarantee that the developers can complete the construction of the house within the prescribed time period after the payment of the 10% deposit. Further there is a possibility that the developers may terminate the construction mid-stream, absconding with the 10% deposit and leaving the purchasers in the lurch.

## ***2. No mandatory legal requirement for obtaining housing development insurance***

One of the reasons rehabilitation of abandoned housing projects in Peninsular Malaysia cannot be carried out is the lack of legal provision requiring the vendor-developer to possess housing development insurance. The issue of insufficient funds to finance the rehabilitation has become a common stumbling block in carrying out the necessary rehabilitation.

The problem can become graver if the moneys available in the Housing Development Account and in the hands of the stakeholder, together with the balance of the loan still unreleased by the respective financiers of the purchasers are not enough to fund the rehabilitation of the project. Who, then, will be liable for funding and carrying out the rehabilitation?

To answer the above question, it appears that such funding either comes from the developer, from a new company injecting new funds into the project, or from the purchasers themselves who are willing to part with additional moneys. It may also come from some 'welfare' or 'soft loan' contribution by a government agency, for instance the Abandoned Housing Projects Rehabilitation Fund (Tabung Pemulihan Projek Perumahan Terbengkalai - TPPT),<sup>4</sup> Bank Negara (Central Bank

<sup>4</sup>In English it is called 'Abandoned Housing Projects Rehabilitation Fund'.

of Malaysia) or from Syarikat Perumahan Negara Berhad (SPNB) (a government company under the control of the Ministry of Finance).

However, if there is no financial assistance, then what happens? The result will be that the abandoned housing project will be stalled for an indefinite period of time without any prospect of rehabilitation unless the purchasers agree to top up the rehabilitation costs. In fact provision of additional funds provided by purchasers has occurred in some cases, for instance the rehabilitation of Taman Showkat, Lot Number 2219, Mukim 13, North East District, Pulau Pinang, Taman Desa Surada, Kajang, Selangor Darul Ehsan, Kondominium Esplanade Klebang, Melaka, Taman Perdana Muar, Mukim Serong, Johor Darul Takzim, Taman Perwira Jerantut, Fasa II, Jerantut, Pahang Darul Makmur, Taman Pinggir Rishah Hijau, Ipoh, Perak Darul Ridzuan, Taman Desa Ria, Senawang, Negeri Sembilan Darul Khusus, Taman Hamilton, Lot Numbers 163 and 2156, Bandar Jelutong, Seksyen 2, NED, Pulau Pinang, Taman Universe, Lot Number 1556, Mukim 13, North East District (NED), Pulau Pinang, Taman Cemerlang, Lot Number 3254, Mukim 13, Lebuhraya Thean Teik, Bandar Air Itam, NED, Pulau Pinang and Taman Desa Aman, Bukit Menglebang, Kelantan Darul Naim.<sup>5</sup>

In Taman Cemerlang Lot Number 3254, Mukim 13, Lebuhraya Thean Teik, Bandar Air Itam, NED, Pulau Pinang (developed by Penangan Maju Holdings Sdn Bhd), the project was a joint venture between the landowner and the developer. The project was financed by loans from the Malaysian Building Society Berhad (MBSB) and Phileo Allied Bank Berhad, secured by legal charges over the project site (secured creditors). Nevertheless, the project failed and was abandoned. Further, the developer was wound up by the unsecured creditors on 17 December, 1999. The chargee banks (secured creditors) applied to the court to sell off the security but were stopped by an application of the landowner. To date, no party has signified any interest to proceed with the rehabilitation of the project, not even SPNB. The fate of the 165 purchasers of the low-cost flats and 524 purchasers of the medium-cost flats remains uncertain and bleak. Rehabilitation has been impossible since the costs are too high.<sup>6</sup>

Further, Act 118 does not provide legal or practical solutions, in case housing development projects are abandoned to protect the rights and interests of purchasers. Such solutions might include, for example, having a specific legal rehabilitation regime and the requirement that an applicant developer possess housing development insurance before a housing developer's licence can be issued by the Housing Controller.

### *3. No specific legal provisions governing the rehabilitation schemes*

There is no requirement under the Housing Development (Control and Licensing) Act 1966 (Act 118) and its regulations for a special regulation controlling rehabilitation schemes for abandoned housing projects. It is proposed here that a specific legal regime governing the rehabilitation scheme be made by the minister of

<sup>5</sup>Ministry of Housing and Local Government file numbers: KPKT/08/824/ /337, KPKT/08/824/3579, KPKT/08/824/5976-1, KPKT/08/824/6698-1, KPKT/08/824/3947-5, KPKT/08/824/5737-1, KPKT/08/824/3040/E, KPKT/08/3013/E, KPKT/08/2349-2KPKT/08/824/7347-1, KPKT/08/824/3229-1 and KPKT/08/824/3361-1.

<sup>6</sup>Ministry of Housing and Local Government file number: KPKT/08/824/7347-1.

housing and local government and passed by parliament.<sup>7</sup> By having this regulation, problems concerning the rehabilitation of abandoned housing projects in Peninsular Malaysia could be avoided. A special law is required to control and cater for the rehabilitation of the abandoned housing projects. Without a special rehabilitation scheme governing rehabilitation of these projects, many cannot be rehabilitated or the rehabilitation may fail, to the chagrin of purchasers.

### Grievances and troubles faced by purchasers

The obvious problem faced by purchasers when housing development projects are abandoned in Peninsular Malaysia is that they (the purchasers) are unable to get vacant possession of the housing units at the time promised by the vendor-developers. The statutory standard sale and purchase agreements of housing accommodation (Schedules G, H, I and J) provide that the developer shall complete the construction and deliver vacant possession within two years (for landed property) or three years (for flats), as the case may be, from the date of the sale and purchase agreement. If the development of the project is abandoned, the units may be completed later than two or three years, after the date of the sale and purchase agreement. However, in the worst circumstances, the developer may be unable to complete the project at all, and this may mean it remains abandoned for a long time unless it can be rehabilitated and completed.<sup>8</sup>

Further, despite the fact of the project being abandoned, the purchasers will still have to bear all the monthly instalments to their respective lenders (for repayment of the housing loan granted). Otherwise the purchased lots together with the building to be erected thereon, which provides security for the housing loan to the lenders, will be sold off and if there are shortfalls on the amount owing, in the worst case scenario, the purchasers may be bankrupted. As a consequence of having been unable to occupy the planned housing units, the purchasers also have to rent other dwellings, thus adding to their monthly expenses.

Even when there is a plan for rehabilitation of abandoned housing projects, the plan may not be easy to carry out as various problems associated with the rehabilitation have to be settled. These problems are, by and large, associated with the fact that the project has been too long overdue without any prospect of revival. To rehabilitate it requires additional hefty costs and expenditure, which the balance of funds in the Housing Development Account or the balance of purchasers' loan funds in the hands of the financiers may not be enough.

The rehabilitation problems may also emanate from difficulties in reaching consensus and getting cooperation from purchasers, defaulting abandoned developers, financiers, bridging loans, contractors, consultants, technical agencies, the

<sup>7</sup>NHM Dahlan, 'Rehabilitation of Abandoned Housing Project: Experience of An Abandoned Housing Developer Through the Help of a Government Agency' (2007) 1 *Malayan Law Journal* cxxvi.

<sup>8</sup>NHM Dahlan, 'Abandoned Housing Projects in Malaysia: A Legal Perspective' (2006) 6 *Malayan Law Journal* 6; NHM Dahlan, 'Rehabilitation of Abandoned Housing Project: Experience of An Abandoned Housing Developer Through the Help of a Government Agency' 2007 1 *Malayan Law Journal* 1; NHM Dahlan, 'Rehabilitation of Abandoned Housing Project in Peninsular Malaysia by A Purchasers' Voluntary Scheme: A Preliminary Study' (2007) 4 *Malayan Law Journal* clvii; Dahlan, thesis (n 3).

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<sup>8</sup>NHM Dahlan, 'Abandoned Housing Projects in Malaysia: A Legal Perspective' (2006) 6 *Malayan Law Journal* 6; NHM Dahlan, 'Rehabilitation of Abandoned Housing Project: Experience of An Abandoned Housing Developer Through the Help of A Government Agency' 2007 1 *Malayan Law Journal* 1; NHM Dahlan, 'Rehabilitation of Abandoned Housing Project in Peninsular Malaysia by A Purchasers' Voluntary Scheme: A Case Study' (2007) 4 *Malayan Law Journal* civii; Dahlan, thesis (n 3).

local authority, land authority, state authority and planning authority. The trouble may be due to technical and legal problems faced in the attempt to rehabilitate a project. It follows that due to the abandonment and the ensuing complications, 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 action against the defaulting developer because such actions may not be beneficial or possible.

### **Rehabilitation of abandoned housing projects**

There are five ways to rehabilitate abandoned housing projects in Peninsular Malaysia. These rehabilitations 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.<sup>9</sup>

Some abandoned housing projects were taken over by the *Pengurusan Danaharta Nasional Berhad* ('Danaharta'), an agency established by the Malaysian government as part of a 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 rather acted as an 'estate agent' by selling the projects at particular prices to reduce the NPLs. The proceeds obtained from the sales were distributed to the following parties: Danaharta, the respective ailing banks, to pay off the bonds and loan debts and to the government (the Ministry of Finance, MOF). After the cessation of Danaharta on 30 September 2005, some projects, the residual surplus works still unfinished by Danaharta, were handed over to *Syarikat Prokhas Sdn Bhd* ('Prokhas'). Similarly, the function of Prokhas is akin to an 'estate agent', as Danaharta was. No projects have been rehabilitated by Prokhas; instead it is up to the buyers of these projects to resume the construction or otherwise. Thus, the existence of Danaharta and Prokhas does not provide a solution for abandoned housing projects, especially in term of protecting purchasers by carrying out the necessary rehabilitation.<sup>10</sup>

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

- Projects with potential for rehabilitation;
- Projects taken over by other new developers;

<sup>9</sup>Dahlan, thesis (n 3) 123-39.

<sup>10</sup>*Ibid* 140-41.

- Projects not suitable for rehabilitation; and
- Completed rehabilitated projects that have been completed.<sup>11</sup>

Abandoned housing projects which fall under the category of having potential for rehabilitation can further be divided into four types as follows:

- projects which are newly identified;
- projects undergoing a probability/feasibility study;
- project that are ready for rehabilitation; and
- projects under construction.<sup>12</sup>

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 to take over the projects, financial institutions, government technical agencies, local authorities, local planning authorities, purchasers' committees and Malaysia Department of Insolvency – Jabatan Insolvensi Malaysia (JIM).<sup>13</sup>

The number of projects falling under this category increased from 99 in 2003 to 121 as of June 2005. The increase was due to the financial and management problems faced by developer companies, as well as economic recession in the country.<sup>14</sup>

Most accommodation that falls under the category 'projects that are still abandoned' has the potential for rehabilitation. These accommodation types consist of low-cost houses – 4247 units (8%), condominium/apartments – 13,766 units (25%) and medium-cost flats – 13,579 units (24.4%). The remaining types of dwellings that fall under this category are: 165 bungalows (0.3%), 204 semi-detached single-storey houses (0.5%), 1 semi-detached two-storey house (0.1%), 3509 single-storey terraced houses (6%), 5268 two-storey terraced houses (10%), 197 shop/houses (0.4%), 2946 medium-cost two-storey houses (5.3%) and 11,244 low-cost flats (20%).<sup>15</sup>

All in all, the 121 abandoned housing projects that have potential for rehabilitation require an estimated financial allocation of Ringgit Malaysia (RM) 5.06 billion. This allocation is important as the Abandoned Housing Projects Rehabilitation Fund (TPPT) under the Bank Negara (Central Bank) was abolished in 1992. If this special allocation can be afforded, this would certainly help the 36,815 purchasers of these abandoned housing projects.<sup>16</sup>

### Problems in rehabilitating abandoned housing projects

The main problem in rehabilitating abandoned housing projects in Peninsular Malaysia is the shortage of funds. If there is no party willing to undertake the

<sup>11</sup> Division of Supervision and Enforcement (n 2) 1.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid. On the Malaysia Department of Insolvency, see <<http://www.insolvensi.gov.my/>>.

<sup>14</sup> Division of Supervision and Enforcement (n 2).

<sup>15</sup> Ibid 1, 5, 26.

<sup>16</sup> Ibid 26, 3.

required rehabilitation, the government may step in, under certain circumstances,<sup>17</sup> to revive the project, either through the TPPT, under Bank Negara (although this is now dissolved) or SPNB or through other federal or state government agencies/bodies. The rehabilitation funds injected into the projects by these government agencies may either be in the form of soft loans or simply a welfare fund, free of any charges on the aggrieved purchasers.

In abandoned housing projects, 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, the receiver and manager, the purchasers themselves or some other party? Further, if the available funds are insufficient, how can the rehabilitation be carried out? What are the legal and equitable remedies available to the aggrieved purchasers in abandoned housing projects?

There is also no such remedy for aggrieved purchasers in abandoned housing projects in Malaysia's insolvency law, in particular in the Companies Act 1965 and the Companies (Winding Up) Rules 1972 or in the ordinary practice of the deed of debenture prescribing the powers of the receivers and managers. Similarly, there are no such remedies to be found in 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. Likewise, none is found in the Housing Development (Control and Licensing) Act 1966 and its regulation (Act 118) that can provide certain effective, satisfactory and coherent preventive and curative remedies in protection of the purchasers' interests, in case the housing projects are abandoned, especially for carrying out necessary rehabilitation and for governing them.

Most rehabilitation is left to the discretion of the rehabilitating parties with the cooperation and assistance of the lender banks, purchasers, local planning authorities, local authorities, technical agencies, the states and federal authorities, the financiers, the land offices and the MHLG. The country's stringent laws governing housing development, land, banking, planning and building, have mostly been made more flexible to accommodate the needs and to facilitate the execution of the rehabilitation schemes.<sup>18</sup>

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

### Rehabilitation by the original developers themselves

There are two case law deliberating the rehabilitation of this nature, namely:

<sup>17</sup> Normally, the aggrieved purchasers apply for help to the Ministry of Finance (MOF), Ministry of Housing and Local Government (MHLG), Chief Ministers (Menteri Besar/Ketua Menteri) and the Prime Minister through their respective States' Assemblymen (Ahli Dewan Undangan Negeri – ADUN) or their Members of Parliament (MPs) to rehabilitate the abandoned housing projects. However, this may take some time. Sometimes, the application may not be approved due to problems related to the projects. The approval usually depends on the gravity of the problems, the availability of funds on the part of the government or the 'political interest' of the government. These parties (MOF, MHLG and the PM) may instruct SPNB/TPPT to carry out a feasibility study and rehabilitation scheme.

<sup>18</sup> Dahlan, thesis (n 3) 142–43.

- *Lim Chee Holdings Sdn Bhd v RHB Bank Bhd* (formerly known as *Kwong Yik Bank Bhd*);<sup>19</sup> and
- *Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd* (Poly Glass Fibre (M) Bhd, Applicant).<sup>20</sup>

In *Lim Chee Holdings Sdn Bhd v RHB Bank Bhd* (formerly known as *Kwong Yik Bank Bhd*), the appellant developed a housing project in Langkap, Perak. The appellant developer obtained a bridging loan from the respondent bank to finance the project. The site of the development was subject to a charge as security for the bridging loan granted by the respondent bank and the loan was also guaranteed by the developer's directors. Later, the appellant developer defaulted on the loan and abandoned the project. However, the appellant developer then managed to carry out rehabilitation with the help of a government agency – TPPT, Bank Negara. Further, the bank lender (the bridging loan financier) agreed to reduce the burden of the bridging loan and withheld action to foreclose the security of the loan. In addition, the respondent bank assisted the appellant developer to rehabilitate the project, and revised and rescheduled the repayment of the bridging loan.

Nevertheless, despite such assistance, the financial position of the appellant developer remained poor. Consequently, the respondent bank suspended the appellant developer's account. In the meantime, the appellant developer succeeded in obtaining a soft loan from TPPT, Bank Negara subject to certain conditions. The project was rehabilitated by means of this soft loan. Despite this, the project was not a complete success, ie there was still an outstanding debt owing to the respondent bank. This was because the appellant developer did not fulfil its part of the bargain when it failed to deposit the sales proceeds into the designated bank account as the appellant needed to pay 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 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, the bank had helped to revive the project and re-scheduled the repayment of the loan. As a result, the court allowed the application of the respondent bank to sell off the security to the loan by way of a court order for sale.

In *Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd* (Poly Glass Fibre (M) Bhd, Applicant), the High Court at Shah Alam allowed the application for stay of the winding-up order to enable the respondent developer to complete the rehabilitation of the abandoned housing project. In this case the respondent developer was at all times a licensed developer of a housing project situated at Lot Numbers 9887 and 9888, Mukim of Ulu Bernam, Daerah Tanjung Malaysia, Perak Darul Ridzuan. 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 works under the project. The petitioner alleged that the respondent was indebted to the sum of RM2,108,820.22, 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

<sup>19</sup>[2005] 6 MLJ 497 (Court of Appeal at Putrajaya).

<sup>20</sup>[2002] 6 MLJ 632.

section 218(1) of the Companies Act 1965 on the ground of inability of the respondent to pay. 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) had filed an application for a stay of the winding-up order. The court granted an interim stay order. The petitioner opposed this interim stay order.

The court held that it was 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 houses and land lots were sold to the public at large. If a stay was not allowed, these house and land purchasers would be put in a position of constant uncertainty. Further, according to the court, the winding-up order was made on 12 June 2000 and about five months later, on 6 November 2000, the first interim stay of the winding up was granted. From the Official Assignee's report, it was clear that the liquidation process had yet to commence. The court was of the opinion that the application for a stay should be allowed because it was made immediately after the winding-up action was initiated and the fact that liquidation had yet to commence, coupled with the public interest in allowing the respondent developer company to carry on the rehabilitation of the abandoned housing project in the protection of the purchasers' interest.

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 case law. The cases are:

- *Xavier Kang Yoon Mook v Insun Development Sdn Bhd*;<sup>21</sup>
- *Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor*;<sup>22</sup> and
- *Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd*.<sup>23</sup>

In *Xavier Kang Yoon Mook v Insun Development Sdn Bhd*, 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. The plaintiff purchaser had 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 developer failed to complete the project and abandoned the project altogether. The abandonment of the project prevailed even at the time the plaintiff purchaser filed his originating summons (OS). The purchaser had also paid 10% of the purchase price as a deposit. As the defendant developer failed to complete the project, MBF Finance agreed to become a shareholder to the defendant developer company in

<sup>21</sup>[1995] MLJU 46; [1995] 2 CLJ 471 (High Court at Johor Bahru).

<sup>22</sup>[1992] 1 MLJ 166 (High Court in Ipoh).

<sup>23</sup>[1990] 1 LNS 42; [1990] 2 MLJ 511 (High Court at Kuala Lumpur).

order to save the defendant developer company from being subject to a winding up by the creditors. Yet MBf Finance also failed to revive the project. However, with the help of TPPT, Bank Negara, and with the moneys channelled through Bank Negara (the Central Bank of Malaysia), MBf Finance eventually revived the housing project and finally surrendered the low-cost houses to the purchasers (including the plaintiff purchaser) who opted to continue with the contract. The court in its 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 RM27,680.00 commencing from 18 August 1988 (the date of the vacant possession) to 5 June 1994 (the date of the termination of the sale and purchase agreement). The court also awarded costs to the plaintiff purchaser.

*Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor*<sup>24</sup> was a case concerning 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 planned 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 the land, 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 houses were yet to be completed and the project was abandoned. Eventually, the project had to be rehabilitated by the Perak SEDC (the second defendant), being the joint venture partner. However, in order to complete the rehabilitation, the purchasers were required to top up with some additional moneys due to changes in the specifications to the housing units. The application of the plaintiff purchasers for liquidated damages from the second defendant (Perak SEDC) was dismissed by the court. However, as against the first defendant (Arief Trading Sdn Bhd), the court granted liquidated damages or indemnity for late delivery of vacant possession of the house to the plaintiffs. The ground that the second defendant was not ordered to pay damages was that this defendant had helped the plaintiffs to rehabilitate the project abandoned by the first defendant and so it was inequitable for the plaintiffs to claim liquidated damages from the second defendant. The application for a specific performance of the contract of sale and purchase was also granted by the court against both the defendants.

Meanwhile, in *Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd*<sup>25</sup> the court disallowed the petition of the unsecured creditor of the housing developer company to wind up the latter (the respondent housing developer). The application for a stay of execution for 10 months to allow the respondent housing developer to complete the abandoned housing project was made by the petitioner purchasers and the respondent housing developer. Further, the application for stay was made to allow the respondent housing developer to settle all outstanding sums due to all the respondent's creditors including the petitioner.

<sup>24</sup>See n 22.

<sup>25</sup>See n 23.

### Rehabilitation undertaken by a new developer

There is only one case dealing with the rehabilitation undertaken by a new developer and this is *Woolley Development Sdn Bhd v Mikien Sdn Bhd*.<sup>26</sup> However, this case was not about housing development but commercial development, so this case is outside the purview of Act 118 and beyond the jurisdiction of the MHLG. Nonetheless, it is the opinion of the author that this case should still be deliberated, to illustrate the difficulties on the part of the court in considering and appreciating the points raised as equitable elements on the part of the rehabilitating developer. 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. It seems unfair that the rehabilitating developer, despite not being the party at fault, still had to pay damages to the purchasers 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* held that the rehabilitating developer, Woolley Development Sdn Bhd, by stepping into the shoes of the predecessor defaulting developer and trying to 'save the day', was still subject to a penalty of paying compensation to the aggrieved purchasers. This case involves an appeal from the High Court. The fact of the first instant case of the High Court and appealed upon to the Appeal Court was straight and simple. In this case, the first defendant cum proprietor of certain lands in Mukim 9, District of Seberang Perai Utara, Pulau Pinang (Penang) contemplated developing its land into a development project known as Raja Uda Commercial Centre. The plaintiff (Mikien Sdn Bhd) entered into 12 sale and purchase agreements to purchase several commercial tenements. The purchasers paid the full purchase price for the units, amounting to RM2.3 million. The sale and purchase agreement inter alia stipulated that delivery of vacant possession should be effected within 36 months from the date of the sale and purchase agreement (S&P). Any failure on part of the first defendant developer to deliver vacant possession of the units within this stipulated period would result in liquidated damages of 11% per annum of the total purchase price of the units to be paid calculated on a daily basis. Nonetheless, after the expiry of the 36 months, the promised vacant possession for the units still could not be effected and that the project was abandoned.

In an attempt to rehabilitate the project, the first defendant developer and the second defendant (the rehabilitating developer) entered into a transfer agreement on 20 September 2000, whereby the project land was to be transferred to the second defendant (the rehabilitating developer) subject to the existing charges and without any monetary compensation. The transfer agreement took cognizance of the S&Ps with individual purchasers and this was described in Annex H of the Transfer Agreement. However the plaintiff's details were missed out in Annex H. To protect the plaintiff's interest in the land, a caveat was lodged that affected the application for subdivisions of the lands by the second defendant. On 16 January 2006, the plaintiff filed a legal action against the first and second defendants for specific performance of the 12 S&Ps and liquidated damages at the rate of 11% of the total purchase price.

In addition and as an alternative to the above application, the plaintiff also sought a rescission of the 12 S&Ps and a restitution of the total purchase price including interest at the rate of 11% of the total purchase price. On 24 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 as deemed fit by the court. At the first instance, the High Court allowed the application. The second defendant appealed against that decision on the premise that:

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

Nevertheless, the majority of the court of appeal (Tengku Baharudin Shah and Abdull Hamid Embong JJA concurring but Zaleha Zahari JCA dissenting) dismissed the second defendant's (the rehabilitating developer's) appeal.

### Rehabilitation undertaken by the purchasers themselves

The author only found one pertinent case discussing the rehabilitation undertaken by the purchasers themselves. This case is *Zainab bte Mohamed v Syarikat Permodalan Johor (PP) Sdn Bhd*.<sup>27</sup> In this case the purchaser herself had to take out her own moneys of more than RM9060.00 in order 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 terraced house to be built on the land from the defendant developer (Syarikat Permodalan Johor (PP) Sdn Bhd) at the price of RM29,900.00. The plaintiff purchaser paid 10% of the purchase price as a deposit. In this matter, the plaintiff purchaser and the defendant developer entered into a sale and purchase agreement, whereby the defendant was required to complete the construction of the unit purchased by the plaintiff within 18 months after the date of the agreement. To be exact, the defendant had to deliver vacant possession of the unit to the plaintiff purchaser by 18 August 1982. However, almost six years after the signing of the sale and purchase agreement, the defendant still had not delivered the vacant possession. The defendant only managed to complete 75% of the terraced house purchased by the plaintiff. As the defendant developer abandoned the project, including the unit purchased by the plaintiff, the plaintiff had to use her own money to complete the remaining construction of her housing unit.

Later, the defendant developer was wound up. The liquidator appointed to the defendant requested the plaintiff to pay the balance purchase price still unpaid to the defendant developer amounting to RM7475.00 or the liquidator would sell off the housing unit, if granted by the court. However, the request of the liquidator was

<sup>27</sup>[1998] MLJU 492 (High Court at Johor Bahru, Johor Darul Takzim).

rejected by the plaintiff purchaser. Thus, in order to get, *inter alia*, the title to the housing unit from the defendant liquidator, the plaintiff purchaser filed a writ of summons with Statement of Claim on 1 August 1997, seeking:

- specific performance of the agreement of sale and purchase;
- compelling the liquidator defendant to surrender the issue document of title to the terrace house to the plaintiff;
- seeking the liquidator defendant to sign Form 14A for the transfer of the terrace house failing which the Senior Assistant Registrar (SAR) to sign the document;
- damages;
- costs; and
- any other relief the court deemed fit and reasonable.

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

#### **Rehabilitation by liquidator/provisional liquidator or receiver and manager**

Pursuant to the winding up, an approved liquidator has to be appointed. An approved liquidator means according to section 4 of the Companies Act 1965 ('CA') '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 subject 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 any abandoned housing project of the wound up housing developer company, in the protection of the interest of purchasers. However, what if the creditors, contributories or the committee of inspection does not favour the planned rehabilitation? And what if the available funds are insufficient or it is not feasible to carry out the rehabilitation because it would be detrimental to the interests of the

creditors or contributories? In such cases 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, there is nothing, insofar as the provisions of priority of payments are concerned, providing protection to the customers' (purchasers) interests of the wound up housing developer companies, for example, to enable the rehabilitation of the abandoned housing projects. Thus, following this lacuna in the law, the interests of the customers/purchasers in abandoned housing projects would be detrimental, lacking any sufficient recourse under the CA.

The case law in Peninsular Malaysia that falls under the above type of rehabilitation (ie rehabilitation by liquidator/provisional liquidator or receiver and manager) are:

- (a) *Pilecon Engineering Bhd v Remaja Jaya Sdn Bhd*,<sup>28</sup> and
- (b) *Hongkong and Shanghai Banking Corporation Ltd v Kemajuan Bersatu Enterprise Sdn Bhd*.<sup>29</sup>

In *Pilecon Engineering Bhd v Remaja Jaya Sdn Bhd*, the court allowed the application of the receivers and managers (RMs) 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 RMs were 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'. Eventually, the project was abandoned. The RMs conducted a study of the project and concluded, inter alia, that:

- if completed, the project was expected to generate a surplus of RM10.437 million after accounting for construction and related expenses;
- to bring the project to completion, additional financing to the sum of approximately RM6.7 million 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 the opening words of sections 218 and 221 of the Companies Act 1965 which state that the court 'may' order the company to be wound up. The use of the word 'may' rather than 'must' vested the court with discretion. The court allowed the RMs to carry on the rehabilitation of the abandoned housing project. The RMs, according to the court, should be given one final attempt to complete the project, even though there were in fact three previous broken promises by the RMs, since the project was nearing completion and was in its final stages.

<sup>28</sup>[1997] 1 MLJ 808; [1996] 1 LNS 105 (High Court at Kuala Lumpur).

<sup>29</sup>[1992] 2 MLJ 370; [1992] 1 LNS 26 (High Court at Kuala Lumpur).

Under the prevailing circumstances, the court ordered that the petition to wind up the respondent company be stayed for a period of one year from the date of the order. If the RMs failed again in this final attempt, ie they were unable to complete the project by 13 April 1997, according to the court, then the winding-up order would be made.

The court arrived at this decision after considering the interests of the purchaser creditors, who had been kept in the dark for almost five years (since the petition to wind up was filed in 1991), to have their housing units be fully revived by the RM. If an order to wind up had been made, not only the debenture holder but also the house buyers would have been prejudiced. Based on evidence, vacant possession of the properties was given between January and February 1996. Thereafter, the only remaining matters to be attended to by the RM in rehabilitating the project were:

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

If the winding-up order had been made, then the house buyers would still have had to look to the OR and not the RMs to perform the obligations under the sale and purchase agreement. This means that it would be the OR 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 OR 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 utilise the resources. It would be against public policy if the ordinary house buyers, having paid the entire purchase price, were to be deprived of their rights under the sale and purchase agreement.

According to the court, the functions and duties of the RMs are similar to that of a liquidator appointed under an order for winding up. Section 182(1)(a) of the Companies Act 1965 specifically requires that all RMs 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*,<sup>30</sup> the developer company (respondent company/judgment debtor) was being wound up by the petitioning creditor (Hongkong and Shanghai Banking Corporation Ltd), when provisional liquidators were appointed pursuant to section 231 of the Companies Act 1965, for the purpose of carrying out the rehabilitation of the housing development project left abandoned by the developer.

<sup>30</sup>Ibid.

company (the judgment debtor). The rehabilitation of the abandoned project was financed by a loan from TPPT, Bank Negara. 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 could 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 were to be paid by TPPT Sdn Bhd. The help from TPPT came only in mid-1990, while the project had been abandoned since 1984. It is submitted, the project had been abandoned for about 10 years (1984 to mid-1990s). Finally the provisional liquidators were also appointed as liquidators of the respondent company through the winding-up order made by the court on 22 January 1992.

An example of an abandoned housing project revived by a liquidator was Taman Yew Lean (developer: Yew Lean Development Sdn Bhd) at Lot Number 664, Seksyen 2, NED, Pulau Pinang. Here the petitioning creditor succeeded in winding up the developer company and appointed a liquidator, Messrs Price Waterhouse, to revive the project on the TPPT's loan.<sup>31</sup>

### Rehabilitation by receiver and manager

Likewise, the above problems (difficulties faced when an 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 its default on debt repayments under the deed of debenture. As a result of the receivership, the developer company has no capacity or power to run its own business and affairs but subject to the control of an appointed receiver and manager under the deed of debenture. The latter (the RM) will be administering and managing the developer company 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 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 1956.

<sup>31</sup> Dahlan, thesis (n 3) 148–49.

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<sup>31</sup>Dahlan, thesis (n 3) 148–49.

In *Mohammad bin Baee v Pembangunan Farlim Sdn Bhd*,<sup>32</sup> the court refused the application of the plaintiff purchaser to have the abandoned housing project revived by the newly appointed receiver and manager because of the difficulty in supervising 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 the defendant developer company to buy a piece of land and for a single-storey house to be erected thereon. The defendant developer agreed that the house would be completed and be ready for delivery of vacant possession to the plaintiff purchaser within 18 calendar months from the date of the execution of the agreement, ie on or before 13 July 1980. However, as at 15 January 1985, being the date the plaintiff filed his writ of summons in court, the house was still not completed and delivered to the plaintiff purchaser. As a result, the plaintiff claimed specific performance 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 it had been subjected to a receivership and a receiver and manager had been appointed out of court by the debenture holder, United Asian Bank Berhad, the defendant would not be able to complete the house. Further, the defendant said that it was unable to complete due to lack 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, ie the duty to complete the construction of the house.

The High Court held that the agreement could not be specifically enforced as the court would not be able to superintend the works required to complete the construction of 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 a 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 request 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 are not 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 to revive the project so abandoned, provided there are sufficient funds to meet the entire 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 Darul Khusus, Lease Holding Number 644, PT No 1411, Mukim Ampangan, Seremban, Negeri Sembilan Darul Khusus. The rehabilitation of this project was undertaken by a receiver and manager by the name of Abdul Jabbar bin Abdul

<sup>32</sup>[1988] 3 MLJ 211 (High Court at Temerloh).

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/chargee, Messrs BBMB Kewangan Berhad, pursuant to section 256 of the National Land Code 1965 (NLC), Memorandum of Charge and Order 83 of the Rules of the High Court 1980, before YA Dato' Dr Visu Sinnadurai on 30 May 1994 at the Kuala Lumpur High Court.<sup>33</sup> Among the powers granted by the court to the said receiver and manager were the powers:

- 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;
- to apply for the necessary housing developer's licence and advertisement and sale permit from MHLG;
- to apply for the necessary approval, consent and permission from the local and land authorities;
- to appoint consultants and contractors for rehabilitation of the project; and
- to apply the proceeds and revenues generated from the sale of the housing units in the rehabilitation of the project, to pay, first, all costs, salaries and expenses of the receiver and manager; second, to pay the soft loan granted by TPPT; third, to pay off all the debts owed by the defendant to the plaintiff and, fourth, to pay back any balance, if any, to the defendant. 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.<sup>34</sup>

Following the above order of the court, the receiver and manager 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.<sup>35</sup>

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 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 has been subject to liquidation or receivership. For example, in *Bunga Nominees Sdn*

<sup>33</sup> OS No 31-4169-1986.

<sup>34</sup> Dahlan, thesis (n 3) 146-47.

<sup>35</sup> Ibid 147.

*Bhd v Abdul Jabbar Majid & Ors*,<sup>36</sup> 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 (the first and second defendants) and the developer company (the third defendant) to have liberty to dispose of or deal with the apartment bought by the plaintiff purchaser. In this case, the third defendant, a developer company, undertook a development called 'Sunrise Park'. The development was financed by a loan from Asia Commercial Finance (M) Berhad and a Deed of Debenture was executed 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 and purchase agreement, an apartment, Apartment Unit No M807 and had paid RM90,810.00 towards the purchase price (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 and 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 of or dealing with the property he had purchased.

The first two defendants (the receivers and managers) contended that they were responsible for rehabilitating 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 of 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 regarding the charge encumbering the said unit and that the plaintiff's entitlement to damages for late delivery to be deducted from the balance remaining to be paid on the unit. The plaintiff also requested that he should 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 of the purchaser's unit, being the beneficial owner to the apartment purchased, which could warrant them to dispose of and deal with the units on default of the plaintiff to pay the balance purchase price.

<sup>36</sup>[1995] MLJU 79; [1995] 3 CLJ 224 (High Court at Kuala Lumpur).

### Projects which fail to be rehabilitated and remain abandoned forever

According to the Ministry of Housing and Local Government (MHLG), any planned rehabilitation may not be carried out for the following reasons:

- There are no or insufficient purchasers interested in buying the houses.
- Work on the project has not commenced or is still at the foundation stage because of problems regarding hard rocks, granite and soils.
- The original developer has been wound up and the project financiers have auctioned off the project or sold it off to other parties. If the project has been taken over by new developers and the construction of the project is resumed by them, then the project so undertaken is considered to be a new project and no longer under the previous defaulting developers' control and will not and cannot be considered an abandoned housing project. This also means that new sale and purchase agreements will have to be executed between the purchasers and the new developer.
- 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 rehabilitation were carried out it would cause substantial losses and adverse financial effects for the rehabilitating parties.
- The developer has absconded and the existing purchasers are not interested or are unwilling to rehabilitate the projects so abandoned.
- Interested parties such as the landowners, developers, bridging loan bankers, purchasers' financiers, contractors, consultants and purchasers are unwilling to compromise. They prefer to resort to legal action to settle the problems.<sup>37</sup>

The housing projects which fall under the above category are Taman Desa Surada, Kajang, Selangor Darul Ehsan, Kondominium Esplanade, Klebang, Melaka, Taman Perdana Muar, Mukim Serong, Muar, Johor Darul Takzim, Taman Perwira Jerantut, Fasa II, Jerantut, Pahang Darul Makmur, Taman Pinggir Rishah Hijau, Ipoh, Perak Darul Ridzuan, Taman Desa Ria, Senawang, Negeri Sembilan Darul Khusus and Taman Desa Aman, Bukit Mengkebang, Kelantan Darul Naim.<sup>38</sup>

The question is, who will be responsible in the above cases and what are the remedies for the aggrieved parties, especially the purchasers in the event the developers of abandoned housing projects are wound up or under receivership or there is no party interested and capable of carrying the intended rehabilitation? The answer is: the project will be stalled forever to the detriment of the purchasers and other stakeholders' interests.

### The position in the Republic of Singapore

In Singapore more than 80% of the housing development projects are carried out by a government statutory body and housing authority known as the Housing and Development Board of Singapore (HDB).<sup>39</sup> HDB is supported by loans and grants

<sup>37</sup> Division of Supervision and Enforcement (n 2) 7, 8.

<sup>38</sup> Dahlan, thesis (n 3) 145.

<sup>39</sup> K. Driggers, *Planning of Singapore* (nd) <<http://www.maclester.edu/courses/geog61/kdriggers/housing.html>> accessed 25 November 2009.

from the Singapore government.<sup>40</sup> HDB was established under the Housing and Development Act (Cap 129) 1960 (Act 129) (section 3 of Act 129). The functions and duties of the HDB, among others, are to develop housing projects, sell them to public purchasers and provide housing loans to public purchasers (section 13 of Act 129). Other than HDB, there is another type of housing developer in Singapore, that is responsible for the remaining (less than 20%) housing projects. However, this type of developer is subject to the provisions of the Housing Developers (Control and Licensing) Act (Cap 130) 1965 (Act 130). According to section 4(1) of this Act (Act 130), no housing developer may carry out any housing development unless a licence has been issued by the Housing Controller, on application subject to certain terms and conditions pursuant to section 4(2)–(9) of Act 130. However, the licence may be revoked by the Controller if any of the events as prescribed by section 7(1) occurs, for example if the developer carries on its business in a manner detrimental to the interests of the purchasers or to the public (section 7(1)(a) of Act 130).

### **The statutory standard sale and purchase agreements of housing accommodation in Singapore**

Rule 12(1) of the Housing Developers (Control and Licensing) Act (Chapter 130, section 22), Housing Developers Rules, imposes a duty on the housing developer (other than the HDB) to apply a statutory standard sale and purchase agreement as prescribed in Form D in the Schedule for housing project not intended to comprise a lot in a strata title. In respect of a housing project that is intended to comprise a lot in a strata title plan, pursuant to rule 12(2) of these rules, the housing developer must use the statutory standard sale and purchase agreement as prescribed in Form E in the Schedule. The housing developer is not allowed to amend, delete or alter any terms and conditions provided in these statutory agreements, unless with the approval in writing of the Controller (rule 12(3)). If any amendment, deletion or alteration to the statutory agreements is made without the prior approval in writing of the Controller, the agreements shall be null and void (rule 12(4)).

The Singapore Academy of Law, established under section 3 of the Singapore Academy of Law Act (Cap 294A), is appointed as the stakeholder for the purchasers' moneys, before releasing the same to the vendor developer if all the conditions of the sale have been complied with.<sup>41</sup>

<sup>40</sup>Housing and Development Board of Singapore (7 August 2007), Housing Development Board <[http://www.hdb.gov.sg/fi10/fi10296p.nsf/WPDis/About%20UsA%20Brief%20Background%20-%20Making%20A%20Mark?OpenDocument&SubMenu=A\\_Brief\\_Background](http://www.hdb.gov.sg/fi10/fi10296p.nsf/WPDis/About%20UsA%20Brief%20Background%20-%20Making%20A%20Mark?OpenDocument&SubMenu=A_Brief_Background)> accessed 26 September 2007; Housing and Development Board of Singapore (7 August 2007), *Housing Development Board* <[http://www.hdb.gov.sg/fi10/fi10201p.nsf/WPDis/Buying%20A%20New%20HDB%20Flat%20\(e-Sales\)Policies%20-%20Housing%20Loan%20from%20Banks?OpenDocument&SubMenu=Policies](http://www.hdb.gov.sg/fi10/fi10201p.nsf/WPDis/Buying%20A%20New%20HDB%20Flat%20(e-Sales)Policies%20-%20Housing%20Loan%20from%20Banks?OpenDocument&SubMenu=Policies)>, <<http://www.hdb.gov.sg/fi10/fi10296p.nsf/WPDis/About%20UsHDB's%20Role?OpenDocument>>, and <[http://www.hdb.gov.sg/fi10/fi10296p.nsf/WPDis/About%20UsA%20Brief%20Background%20-%20HDB's%20Beginnings?OpenDocument&SubMenu=A\\_Brief\\_Background](http://www.hdb.gov.sg/fi10/fi10296p.nsf/WPDis/About%20UsA%20Brief%20Background%20-%20HDB's%20Beginnings?OpenDocument&SubMenu=A_Brief_Background)> accessed 18 October 2007.

<sup>41</sup>Rule 12(5) of the Housing Developers (Control and Licensing) (chapter 130 section 22).

The final stage of progressive construction is the completion date. This means that the completion date is when the title to the property has been duly transferred to the individual purchaser on full settlement by purchaser. The percentage of payment for this stage is 15 per cent of the purchase price. Only 2% of this figure shall be given to the vendor developer. The remaining 13% of the purchase price must be held by the stakeholder, the Singapore Academy of Law.<sup>42</sup>

The 13% is to be paid in two stages: first, only 8% can be paid to the vendor developer, once purchasers have received the certificate of statutory completion relating to the building less any allowable deductions (ie the cost of repairing defective works to the building during the defect liability period) (clause 5.3(a) of Forms D and E). Second, the balance 5% shall only be paid after all the repair works have been carried out known as the final payment date (clause 5.3(b) of Forms D and E).

In the event the Certificate of Statutory Completion is issued before the completion date (the date where the title has been registered into the name of the purchasers), then the 13% of the purchase price shall be paid to the vendor developer after the receipt of the Certificate (clause 5.4(a) of Forms D and E). However, of this 13%, only 8% can be released (clause 5.4(a)(i) Forms D and E). The balance of 5% is paid to the stakeholder, the Singapore Academy of Law. This payment (5%) can only be released after all the allowable deductions are made (for example the costs of repairing any sub-standard works to the building discovered during the defect liability period) (clause 5.4(a)(ii) of Forms D and E).

The last 2% of the purchase price shall be paid on the completion date (i.e. the date when the title is transferred to the purchaser) (clause 5.4(b) of Forms D and E). The completion date must be in accordance with the duration prescribed in the agreement or three years after the date of the delivery of vacant possession, whichever is the earlier (clause 16.1 of Form D and E).

The above provisions are good practice, compared to the position in Peninsular Malaysia, where the stakeholder's money is in the hands of the solicitor, who may abuse the same. The second problem is, in Peninsular Malaysia it used to be that the delivery of vacant possession (VP) did not require any certificate of fitness for occupation or certificate of completion and compliance (CCC), resulting in the inability of the purchasers to occupy completed units even though the units had been delivered to them. However, with an amendment in December 2007, pursuant to the new clause 23(2) of Schedule G, new clause 26(2) of Schedule H, clause 23(2) of the new Schedule I and clause 26(2) of the new Schedule J, it is a duty of the vendor developer to deliver vacant possession of the completed units together with the CCC. Third, formerly in Peninsular Malaysia, the balance purchase money (serving as a lien) in the hands of the vendor developer's solicitor can even be released after the expiry of the defect liability period without considering the possibility that CF or CCC may not as yet have been obtained, let alone ensuring due conveyance or transfer of the title to the purchasers. Even with the amendments made in December 2007, no provision for 'lien' against any defective works during the defect liability period provided in the Third Schedule (Schedule of Payment of Purchase Price) of Schedules I and J and in clause 25 (Defect Liability Period) of Schedule I and clause 29 (Defect Liability Period) of Schedule J. This is because

<sup>42</sup>Clause 5.1(4)(a)(b) of Forms D and E to the Housing Developers (Control and Licensing) Act (chapter 130, section 22).

these clauses only serve as remedial/curative and not as preventive measures. This failure may be detrimental to the purchasers' interests and rights. Another problem is the cost of repairing the defective works found during the defect liability period or the cost of carrying out rehabilitation of an abandoned housing project might outweigh the balance purchase moneys still unreleased (lien). In this situation, how can the vendor developer meet the costs? There is no provision in Schedules G, H, I and J to address this problem.

In Singapore, liquidated damages are made payable by the vendor developer to the aggrieved purchasers, calculated on a daily basis at the rate of 10% per annum on the total sum of all the instalments paid towards the purchase price (clause 13.5 of Form D and clause 12.5 of Form E), if he failed to deliver vacant possession within the time as stipulated in the agreement (pursuant to clause 13.4 of Form D and clause 12.4 of Form E). Second, liquidated damages are also chargeable by the purchasers to the vendor developer if the latter failed to submit to the former the notice to complete (completion date) within the time prescribed in the agreement or three years of the delivery of vacant possession, whichever is the earlier (pursuant to clause 16.5 of Form D and clause 15.5 of Form E).

Thus, there are additional statutory obligations and liabilities on the vendor developer in Singapore as compared to Peninsular Malaysia. In other words, in Singapore, liquidated damages are not only chargeable on the failure to deliver vacant possession within the prescribed time but also chargeable on the part of the vendor developer to ensure a completion date within the prescribed period.

Finally, in Singapore, it is a statutory requirement that all the specifications of the building such as the foundations, superstructure, walls, roof, ceiling, finishes, windows, doors, sanitary fittings, electrical installation, lightning protection, etc are additionally described in respect of the particulars and types of the materials used, classes, standards, and grades.<sup>43</sup> As a result, the purchasers can be fully aware and sure of the specifications and particulars of the building even before the units are completed. This position is unlike in Peninsular Malaysia, where the specifications mentioned in the statutory standard sale and purchase agreements of housing accommodation are quite vague and not detailed allowing the vendor developer to use lower standard of materials or other types of the specifications/materials for the building.

### **Stage three: abandonment and rehabilitation stage**

In Singapore, as more than 80% of total housing projects are undertaken by the HDB by way of the 'full build then sell' system, it is submitted that there is no issue of abandonment of housing projects on the part of the HDB. The remaining portion of housing development (less than 20%) is carried out by private developers and there is evidence that abandonment does also occur in Singapore.<sup>44</sup> This contention is made on the basis that nothing in Singapore's Housing Developers (Control and Licensing) Act (Cap 130) 1965 (Act 130) and the statutory standard sale and purchase agreements provide effective preventive and curative measures. Such

<sup>43</sup>Second Schedule to Form D and the Schedule to Form E – Specifications of the Building.

<sup>44</sup>TP Choo (Deputy Housing Controller, Urban Redevelopment Authority of Singapore), personal communication, 3 September 2007.

measures may include a requirement that the applicant developers must possess housing development insurance and a specific legal regime governing rehabilitation of abandoned housing projects controlling rehabilitation. Thus, in the opinion of the author, abandonment of housing projects and consequential problems and losses to the aggrieved purchasers as have occurred in Peninsular Malaysia, may also occur in Singapore.

Be that as it may, the number of projects carried out by this type of developer (other than the HDB) is small and manageable due to limited number of private housing developments. If there is an abandoned housing project, successful rehabilitation is usually carried out by the lender bank through the appointed liquidator or receiver and manager.<sup>45</sup> This can be illustrated in *Panorama Development Pte Ltd (In Liquidation) v Fitzroya Investments Pte Ltd & Another* [2003] 1 SLR 93. In this case, a housing project was carried out by a private housing developer licensed under and subject to Act 130. The project was abandoned mid-way as the developer was wound up by the court and its affairs were taken over and run by an appointed liquidator. The liquidator succeeded in obtaining an order to rehabilitate the project.

#### Stage four: vacant possession and occupation of the rehabilitated units

As more than 80% of the housing projects are carried out by way of 'full build then sell' system, there is no issue of abandonment of these projects in Singapore. As regards development carried out by the private developers, applying the concept of 'full sell then build', the rights of purchasers against the possibility of suffering losses due to abandonment, are to some degree protected. This is because there is clause 16(8) of the statutory standard contract of sale and purchase<sup>46</sup> prescribing the liability of the defaulting developer. The clause states that this liability shall not be absolved until all the late delivery damages due to delay to deliver vacant possession and delay to complete the sale within the prescribed time, are fully paid to purchasers, even though the project undertaken is completed. The case of *Panorama Development Pte Ltd (In Liquidation) v Fitzroya Investments Pte Ltd & Another*,<sup>47</sup> illustrates this position.

Nonetheless, in the opinion of the author, there is no term in the statutory standard contract of sale and purchase (Forms D and E) and in the Singapore Housing Developers Act that provides specific rights to purchasers if the project is subject to rehabilitation and rights after the rehabilitation of the project. Thus, it follows that problems emanating from the abandonment of housing projects and during the course of rehabilitation of the projects as occur in Peninsular Malaysia may likewise occur in Singapore. The reason is, there is nothing in the available legal provisions in Singapore that provide for a specific legal regime governing rehabilitation of abandoned housing projects to protect the rights of the aggrieved purchasers. Nevertheless, the problems in this respect may be lessened if the Housing Controller and related stakeholders are efficient in securing the interests of aggrieved

<sup>45</sup> Ibid.

<sup>46</sup> Forms D and E to the Schedule of the Housing Developers Rules (Cap 130 Section 22).

<sup>47</sup> [2003] 1 SLR 93.

purchasers against any possible losses and injuries of the purchasers resulting from the abandonment.

Thus, in the opinion of the author, there is still a need to have a specific legal regime governing the rehabilitation of abandoned housing projects in Singapore, much as there is in Peninsular Malaysia.

### **Suggestions**

It is submitted that, after deliberating on the law and practice in Peninsular Malaysia and Singapore, a new law and housing construction method is urgently required to control and cater for the rehabilitation of the abandoned housing projects and to address the problems arising from such abandonment. This is for the following reasons:

- To avoid any problem and dispute which may arise from and be caused by recalcitrant purchasers, contractors, financiers, banks, local authorities, local planning authorities, state authorities etc. This problem can be seen, for example, in Ria Kondominium, Bandar Kuah, Langkawi, Kedah Darul Aman developed by PRJ (M) Sdn Bhd, where all the attempted discussions between the purchasers, banks and developer over rehabilitating the project failed.
- To expedite the rehabilitation of the projects within a specified and definite time period. Otherwise, without systematic and concrete rehabilitation plans and law, the rehabilitation will be delayed and, in the worst cases, may not be commenced. This was evident in Taman Seri Marina, Kuala Kedah, Kota Setar District, Kedah Darul Aman developed by JB Kulim Development Sdn Bhd. The reason leading to the catastrophe was that the developer had been wound up by court on the application of the main contractor due to the default of the developer itself. To date, the project remains incomplete and abandoned and there is still no certificate of fitness for occupation, due to certain complications in the rehabilitation, even though there were several interested parties (new contractors) that attempted to revive it. It is noted that this project should have been completed by February 2001.
- The purchasers will be able to get their houses and their rights will be protected as these are provided and guaranteed by special rehabilitation statutory regime provisions. Further, the rehabilitating developers and their developments are subject to close scrutiny by the MHLG. It should be borne in mind the various problems that could occur if there is no such pre-emptive and proactive rehabilitation statutory regime in place. For example, in Taman Bunga Raya, Mukim Wang, Kangar, Perlis Indera Kayangan developed by Bintong Dasari Sdn Bhd, where the rehabilitation of the project was not properly supervised and monitored. This rehabilitation took much longer than had been initially projected, with various difficulties faced by the rehabilitating developer, including the problem of recalcitrant contractors, purchasers, bankers and authorities. However, this project was finally completed on 12 June 1998, after being abandoned since 1992.
- To avoid any abuse and misuse of duty, power, and authority, when the project is undergoing rehabilitation, by consultants, contractors, receivers, managers and liquidators. Such abuse has become typical in the rehabilitation

of abandoned housing projects in Peninsular Malaysia, much to the dismay and disadvantage of the purchasers. Taman Bistari Kamunting, Taiping, Perak Darul Ridzuan developed by Sri Ringgit Properties Sdn Bhd is a perfect example. The problem with this project is that the rehabilitating contractors, Setia Laris Sdn Bhd and Super City Triumph Sdn Bhd, failed to plan properly and transgressed certain rules and regulations, which retarded its progress. This project had been abandoned since the middle of the 1980s. Fortunately, however, with the injection of welfare funds and rehabilitation carried out by Syarikat Perumahan Negara Berhad in the early 2000s, the project is now fully rehabilitated and ready for occupation.

- To prevent any unwarranted and unnecessary disturbing actions such as legal actions by dissatisfied parties. The absence of such actions would certainly help new rehabilitating developers or previous defaulting developers if they are able and fit to resume the project to carry out the rehabilitation smoothly. This problem can be illustrated in Taman Perpaduan Permai, Bercham Ipoh, Perak Darul Ridzuan developed by Trinity Home Builders Sdn Bhd, where the project should have been completed by 1999. However, no rehabilitation has been undertaken. To make matters worse, 18 purchasers have filed writ of summons against the defaulting developer, applying for specific performance, damages and other equitable remedies against the defaulting developer.
- To prevent any abandoned housing project from being stalled for an indefinite period of time, without any positive or prospective rehabilitation plans and development. This problem can be illustrated in Taman Sri Intan, Besut, Terengganu Darul Iman, developed by Tenaga Wan Bersaudara Sdn Bhd. This project should have been occupied and completed by 1999. However, it was later abandoned and there is no current plan for rehabilitation. Furthermore, the developer failed to inform the MHLG about the latest development and plan for the rehabilitation of its project.<sup>48</sup>

If abandonment is inevitable, it is suggested that the best proposal to address the problems of abandoned housing projects in Peninsular Malaysia and the Republic of Singapore is (where practical):

- (1) To apply the concept of the 'full build then sell' system as practised by some owner-builders and developers in New South Wales (NSW), Australia as well as imposing a mandatory requirement that the applicant developer must possess housing development insurance;<sup>49</sup> or
- (2) If the above proposal is not feasible then the second best suggestion is to employ the compulsory, not optional, requirement for the developer to use the 10-90 housing development system as applied in NSW, Australia ('buying off the plan' or 'quasi build then sell' system). Under this system of housing construction, the purchaser only needs to pay 10% of the purchase price on the date of agreement of sale entered into, with the remaining balance only being paid after the completion of the project – ie.

<sup>48</sup> Dahlan, thesis (n 3) 185–88.

<sup>49</sup> Ibid 366–68 and 407–09.

when the project is fully completed with the CCC, when the vendor developer has delivered the vacant possession of the unit and title to the unit purchased is ready for transfer to the purchaser on the required settlement of the purchase price. In the event that the project is later abandoned for good, the purchaser would only suffer a loss of his/her 10% deposit. In addition to this, the developer must also obtain housing development insurance to cover any insufficient funds for carrying out the required rehabilitation to completion and to cover any losses and grievances suffered by the purchasers emanating either from the abandonment or otherwise.

- (3) In addition to suggestion no 2 above, it is proposed that a special legal regulations controlling and catering for management of abandoned housing projects be passed by parliament in Peninsular Malaysia and Singapore 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.
- (4) Certain amendments to the current Schedules G, H, I and J of the Regulations 1989 as applicable in Peninsular Malaysia, should be made to facilitate the above suggestions.<sup>50</sup> Similar amendments are also needed for the corresponding statutory standard sale and purchase agreements as enforced in Singapore.
- (5) Apart from a revamp of the statutory provisions, effective and full enforcement and implementation of the laws and administrative policies by the officers in the housing authority (MHLG), the state authority, local authority, local planning authority, appropriate authority and technical agencies is a must to ensure the efficiency of housing development in Peninsular Malaysia and Singapore.<sup>51</sup> There must be enough professional staff, enough legal and technical training and sufficient office facilities and logistics of the administration and efficient administration to ensure the success of housing development projects.
- (6) As in Peninsular Malaysia and Singapore there are no provisions in the housing statutes<sup>52</sup> which require the applicant developer to have housing development insurance or provide regulations for controlling rehabilitation of abandoned housing projects, it is advisable for the aggrieved purchasers and rehabilitating parties to get the necessary court order to facilitate the rehabilitation. The order should contain, inter alia, the mode of the rehabilitation; the responsibilities of the rehabilitating parties, the related parties and the purchasers; the management of the rehabilitation funds; and the sources of the rehabilitation funds to finance the rehabilitation costs.

<sup>50</sup>NHM Dahlan, 'Comparative Study of the Terms and Conditions in The Current Statutory Standard Sale and Purchase of Housing Accommodation in Peninsular Malaysia, The Republic of Singapore and New South Wales, Australia' (unpublished research report, Universiti Utara Malaysia, Sintok, Kedah Darul Aman, Malaysia, 2010).

<sup>51</sup>'I've nothing to hide, says Hishamuddin', 'Abdullah orders ministries to explain to cabinet', 'Ministry denies report on misuse of funds by NGOs', 'Same old story year in, year out', *The New Straits Times*, 12 September 2007, 1, 4, 12.

<sup>52</sup>The Housing Development (Control and Licensing) Act 1966 and its regulations (Act 118) and the corresponding Housing Developers Act in Singapore.

- (7) Finally, if the above suggestions cannot be implemented and if rehabilitation of abandoned housing projects seems impossible, it is proposed that the aggrieved purchasers apply to the court for recession of the sale and purchase agreements entered into with the abandoned vendor developers, claim all moneys paid and costs as well as the late delivery damages calculated from the date of the promised delivery of the vacant possession of the units purchased until the date of the recession of the sale and purchase agreement. This was finding of the court in *Diong Tieow Hong & Anor v Amalan Tepat Sdn Bhd*.<sup>53</sup> In this case, the plaintiffs entered into a sale and purchase agreement with the defendant (developer) for the purchase of a condominium at the price of RM287,900.00. The S&P was as per the prescribed Schedule H of the Housing Developers (Control and Licensing) Regulations 1989 (Schedule H). Pursuant to clauses 22 and 24 of the S&P, the defendant should deliver vacant possession of the property, complete with common facilities on or before 14 October 1998. The defendant failed to do so and the project had been abandoned. The plaintiffs had paid a total sum of RM57,000.00 towards the purchase price. The plaintiffs, vide letter dated 8 March 2004, demanded the construction of the property be completed and that vacant possession be handed over on or before 8 May 2004, failing which the S&P shall be deemed terminated. Again, the defendant failed to do so. The plaintiffs then initiated a claim against the defendant, for, inter alia, declarations to the effect that the defendant had breached the terms of the S&P and that the plaintiffs had duly terminated the same, the refund of RM57,900.00 and liquidated ascertained damages (LAD). This project was an abandoned housing project fell under the jurisdiction and power of the Ministry of Housing and Local Government and subject to the provisions of Act 118.

<sup>53</sup>[2008] 3 MLJ 411 (High Court at Kuala Lumpur).