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**REHABILITATION OF ABANDONED HOUSING PROJECTS OF  
LIQUIDATED HOUSING-DEVELOPER-COMPANIES: A COMPARATIVE  
LEGAL ANALYSIS BETWEEN THE POSITION IN MALAYSIA AND IN THE  
UNITED KINGDOM**

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*Although the Malaysian government has enacted law and formulated policies to govern the housing industry since it achieved Independence in 1957, abandoned housing projects remain a recurrent problem until today. The real victims are the purchasers themselves. When a housing developer company is wound up, the affair and business of the company are taken over either by the private liquidator or provisional liquidator or the official receiver ('OR') under the Department of Insolvency. The liquidator may rehabilitate the abandoned projects left by the wound up housing developer companies, if the projects are viable for rehabilitation with the approval of the creditors, contributories, the committee of inspection and the court and where there are adequate funds to finance the rehabilitation. Otherwise, if the project is not viable, particularly because there are insufficient funds to run the rehabilitation or the problems of the abandoned housing projects are too complicated, the projects may be stalled forever without any prospects for rehabilitation, to the detriment of the purchasers. This article discusses the law and practice in the rehabilitation of abandoned housing projects in Malaysia of wound-up-housing-developer-companies. The position in the United Kingdom*

*4 MLJ cxviii at cxix*  
*('UK') in respect of similar issues is also comparatively analysed. At the end of this paper, the authors propose certain suggestions in facing the problems of abandoned housing projects of wound up housing developer companies and rehabilitation in Malaysia and in the United Kingdom.*

*Key words: Comparative companies' liquidation laws; abandoned housing projects, rehabilitation, Malaysia, United Kingdom.*

## **INTRODUCTION**

If a company is unable to pay its debts, it may be subject to liquidation proceedings by the creditors. The purpose of liquidation proceedings is for the liquidator to take over the affairs of the company in order to settle the debts of the creditors and to cease the existence of the company from the company's register. The liquidator is armed with certain powers and duties in the liquidation administration.

In respect of the liquidated housing developer company, similar duties are carried out by the appointed liquidator, viz to take over the affairs of the company, to settle off all the debts of the creditors, to carry on any project and business left by the company if this is expedient in accordance with the law and to cease the operation and existence of such liquidated housing developer company.

However, an issue may arise involving the rights of purchasers of liquidated housing developer companies, particularly where the project is abandoned in the course of developing such housing development. The question is: whether the rights and interests of such purchasers are fully protected?

It is an undisputed fact that abandoned housing projects are a negative phenomenon plaguing the housing industry in Malaysia. The issue of abandoned housing projects began with the adoption of a housing democracy by the Malaysian Government in the 1960s. Prior to the 1960s, public housing was provided by the government. However, due to insufficiency of government funds and the upsurges in demand for housing ownership and needs, the government opened the door for private housing developers to participate in providing public housing to the citizens. This policy was supported by aggressive government assistance, incentives and legal means to ensure its success. Despite such efforts, the occurrences of abandoned housing projects have marred the role of private housing developers' in respect of national development and safeguarding the interests of its citizen purchasers. As a result, many purchasers have become victims of abandoned housing projects.

*4 MLJ cxviii at cxx*

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

Some quarters say that the current housing policy and industry in Malaysia is still healthy, notwithstanding the plight of purchasers of abandoned housing projects, poor workmanship of the houses and other housing problems. 'The problem of abandoned housing projects only represents 1-3% of the total housing projects'. 'The remaining 99-97% of housing projects succeeds'. 'Thus, the current system of housing delivery and policies should be continued regardless of the plaguing occurrences of abandoned housing projects' and their negative consequences befalling the purchasers'.<sup>1</sup> Unfortunately, these are some of the statements made by persons in authority in Malaysia's housing industry. Nonetheless, despite these statements, there are still inadequate measures taken by the government to alleviate the problems of abandoned housing projects, not even the current newly established Division of Rehabilitation of Abandoned Projects under the Department of National Housing, Ministry of Housing and Local Government ('MHLG'), can. The measures taken are still 'too little too late' in the face of the catastrophe caused by abandoned housing projects. The fallen preys are the aggrieved purchasers themselves. The law governing the housing industry in Malaysia – the Housing Development (Control and Licensing) Act 1966 and its regulations (Act 118) is evidently unable to fully address the problems of abandoned housing projects. The court also seems indecisive in protecting the interests of the aggrieved purchasers in abandoned housing projects. This is partly due to 'too many conflicting considerations and equities' that the court needs to deal with in cases involving abandoned housing projects. Thus in certain circumstances, the rights and interests of the purchasers may not be fully appreciated and taken into consideration by the court. The problem becomes more severe where housing

developer companies enter liquidation. In liquidation, the company becomes bankrupt and all the assets and money will

*4 MLJ cxviii at cxxi*

be used to settle off the debts of the creditors and there may not be any sufficient monetary balance which can be used to rehabilitate the abandoned housing projects and to compensate the aggrieved purchasers.<sup>2</sup>

### **DEFINITION OF ABANDONED HOUSING PROJECTS**

Currently, a housing project in Malaysia can be deemed to have been abandoned when:

- (a) the construction activities on site of the housing construction project have consecutively stopped for six months or more, after the expiry of the Sale and Purchase Agreement (S&P) executed by the developer and the purchaser; or,
- (b) the developer has been put under the control of the Official Receiver; or,
- (c) the developers admit in writing to the Housing Controller that they are unable to complete their projects; and,
- (d) the project is endorsed as an abandoned housing project by the Minister of Housing and Local Government pursuant to section 11(1)(c) of the Housing Development (Control and Licensing) Act 1966 (Act 118).<sup>3</sup>

### **WINDING UP OF COMPANIES**

In Malaysia, there are two types of winding up of companies, namely:

- (a) winding up by the court; and
- (b) voluntary winding up s 211(a)(b) of the Companies Act 1965 (Act 125) ('CA').

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For the purpose of this paper, the authors will only highlight the winding up of companies by the court as it is the most common type of winding up in the case of the housing developer companies of abandoned housing projects in Malaysia.

#### **Winding up by court**

Section 217(1)(a)-(h) of the CA provides that the following persons may petition for the winding up of a company:

- (a) the company itself;
- (b) a creditor;
- (c) a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the Official Assignee of the estate of a bankrupt contributory;
- (d) the liquidator of the company;
- (e) the Minister of Finance;
- (f) a licensed institution or a scheduled institution;
- (g) an insurance company; and,
- (h) the Registrar of Companies (now the Companies Commission of Malaysia ('CCM')).

However, in the observation of the authors, normally in abandoned housing projects in Malaysia, the petitioners who have applied to the court for winding up the defaulting housing developer companies consist of the creditors (secured and unsecured) and the aggrieved purchasers of the developer companies. This can be illustrated in the following housing projects:

- (a) Taman Harmoni, Balakong, Mukim of Cheras, District of Hulu Langat, Selangor, the developer (K&T Development Sdn Bhd) was wound up by the sewage contractor on the failure of the developer to settle the debt owed for the sewage works done;<sup>4</sup>
- (b) Taman Lingkar Nur, Kajang, Mukim of Cheras, District of Hulu Langat, Selangor Darul

Ehsan, the developer (Saktimuna Sdn Bhd) was wound up by the Inland Revenue Board ('IRB') on the failure of the

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- (c) developer to settle the outstanding tax<sup>5</sup>;  
Pangsapuri Seri Pertama, Mukim of Sungai Petani, District of Kuala Muda, Taman Seri Marina, Mukim of Kuala Kedah, District of Kota Setar and Taman Seri Simpang, Mukim of Kangkung, District of Alor Setar, Kedah Darul Aman, whose developer (JB Kulim Development Sdn Bhd) was wound up by the construction supplier on the failure of the developer to settle the debts owed despite the delivery of the construction materials;<sup>6</sup> and,
- (d) Taman Junjong Jaya, Mukim of Junjong, District of Kulim, Kedah Darul Aman, the developer (Cayman Development (SP) Sdn Bhd), was wound up on the application of the purchasers of the housing project for failure of the developer to complete the construction of the houses within the time period prescribed under the sale and purchase agreement and failure of the developer to settle the late delivery damages to purchasers.<sup>7</sup>

### **Circumstances where companies may be wound up by the court**

Pursuant to s 218 of the CA, among the circumstances where companies may be wound up by the court on the application of the petitioners, are as follows:

- (a) the company is unable to pay its debts; and,
- (b) the court is of opinion that it is just and equitable that the company be wound up.

The above reasons are the most common grounds in which housing developer companies are wound up on the application to the court. Pursuant to s 218(2) of the CA, the definition of 'inability to pay debts' is as follows:

- (a) the company is indebted a sum exceeding RM500 to a creditor and the creditor has served on the company by leaving at the registered office a demand requiring the company to pay the sum so due and that the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
- (b) the company has failed to satisfied in whole or in part the execution or other process issued on a judgment, decree or order of any court in favour of a creditor; or,
- (c) The court is satisfied that the company is unable to pay its debt including the contingent and prospective liabilities of the company.

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Compulsory liquidation is made by the order of the court. There are certain persons who are entitled to apply to the court to liquidate a company. These persons are prescribed under s 217 of the CA. These persons are:

- (a) the company;
- (b) the creditor; and,
- (c) the contributory.

### **Provisions in the CA when companies are wound up**

When a company is subject to a winding up order, the affairs and businesses of the company shall be vested in the hands of the liquidator. On a winding up order being made by the court, if an approved liquidator other than the official receiver ('OR') is not appointed to be the liquidator of the company, the OR shall become the provisional liquidator until he or another person becomes liquidator (see s 227(1) of the CA). If no liquidator is appointed, the OR shall summon separate meetings of the creditors and contributories of the wound up company for the purpose of determining whether or not an application is to be made to the court to appoint a liquidator in the place of the OR (see s 228(2) of the CA). If a liquidator is not appointed on the date when the

winding up order is made by the court, the OR shall be the liquidator of the company (see s 228(5) of the CA).

A provisional liquidator may be appointed by the court at any time after the presentation of a winding up petition and before the making of a winding up order. The provisional liquidator may exercise all the functions and powers of the liquidator subject to the limitations of the Companies (Winding-Up) Rules 1972 ('CWUR') or as the court may specify in the order appointing him as the provisional liquidator (see s 231 of the CA). The rationale for the appointment of a provisional liquidator is to maintain the status quo of the assets and liabilities of the company from being abused, thus protecting the rights and interests of the creditors and other stakeholders pending the winding up order issued by the court.

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### **Purpose of liquidation**

The purpose of liquidation is to accumulate all assets and liabilities of the company by the liquidator to settle all the debts of the creditors, to return the remaining proceeds surpluses, if any, to the members of the company and finally to cease the existence of the company. To achieve this objective, the liquidator will take over the management and affairs of the company. Generally, the directors and the shareholders no longer have power to run the company. This is the primary power of the liquidator. This power is fully prescribed under s 236(1) and (2) of the CA. The difference between s 236(1) and s 236(2) of the CA is that under s 236(1), the liquidator needs to get authority either from the court or the Committee of Inspection in order for him to execute the prescribed powers and duties.

Among the powers under s 236(1) of the CA are:

- (a) to carry on the business of the company so far as is necessary for the beneficial winding up thereof;
- (b) to make any compromise or arrangement with creditors or persons claiming to be creditors; and,
- (c) to appoint an advocate to assist him in his duties.

Among the powers under s 236(2) of the CA are:

- (a) to compromise any debt due to the company other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgit (RM1500);
- (b) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;
- (c) to do all acts and execute in the name and on behalf of the company all deeds receipts and other than documents and for that purpose use when necessary the company's seal;
- (d) to appoint an agent to do any business which the liquidator is unable to do himself; and,
- (e) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

Despite the fact that the powers under s 236(2) need not require any authority from the court or the Committee of Inspection, pursuant to s 236(3), the exercise of these powers shall be subject to the control of the court and any creditor or contributory may apply to the court to check and control the liquidator's powers. This caveat is also applicable for the powers under s 236(1) of the CA.

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Apart from s 236(3), pursuant to s 237(1) of the CA, in the administration of the assets of the company and in the distribution thereof among its creditors, the liquidator shall have regard to any directions given by

resolution of the creditors or contributories at any general meeting or by the committee of inspection. In case there is a conflict between the direction of the committee of inspection and the directions of the creditors and contributories, the directions of the latter (the creditors and contributories) shall prevail (see s 237(1) of the CA).

### Issues

A question can be raised *viz* whether the liquidator is under a responsibility to revive the abandoned housing projects of the wound up companies? Based on the above provision, it is opined that the liquidator is liable to carry out rehabilitation. Nonetheless this is subject to the sanction/authority of the creditors, contributories, committee of inspection and the court, as the case may be (see s 236(1), (3) and s 237(1) of the CA). If these parties (the creditors, contributories, committee of inspection and the court) do not allow the liquidator to carry out the intended rehabilitation, the liquidator shall not carry out the same. Yet, in the opinion of the authors, even if these parties (creditors, contributories and committee of inspection) are not agreeable to such a request, the aggrieved purchasers may invoke O 92 r 4 of the Rules of High Court 1980 (inherent power of the court) and s 23(1) of the Courts of Judicature Act 1964 to request the court to rely on its inherent power to accede to the aggrieved purchasers' request to have the abandoned housing projects to be rehabilitated by the liquidator on the ground of public interest.

The refusal to allow rehabilitation may be due to insufficient funds to finance the rehabilitation costs and other grounds which may cause the intended rehabilitation unfeasible. Thus in this circumstance, the aggrieved purchasers have neither the redress to have their abandoned housing projects revived nor do they have the right to get appropriate compensation and damages from the wound up housing developer companies.

Nonetheless, if the liquidator is of the opinion that it is viable to implement the rehabilitation of the abandoned housing projects but this is still rejected by the creditors or contributories or the committee of inspection, as the case may be, the liquidator may apply to the court for directions to obtain the required authority and sanction to proceed with the intention to rehabilitate the abandoned housing projects pursuant to s 237(3) of the CA.

On the other hand, insofar as the situation in Malaysia is concerned, if the liquidator of the company is the official receiver (OR), he may not carry out the rehabilitation. The reasons are as follows:

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- (a) the official assignee has insufficient knowledge and expertise to warrant them to carry out the rehabilitation; and,
- (b) the official assignee has insufficient staff and manpower to enable them to resume the construction or to rehabilitate the projects.<sup>9</sup>

This position can be illustrated in Taman Harmoni, Balakong, Mukim of Cheras, District of Hulu Langat, Selangor,<sup>10</sup> Taman Lingkaran Nur, Kajang, Mukim of Cheras, District of Hulu Langat, Selangor,<sup>11</sup> Taman Seri Simpang Jaya, Mukim of Kangkung, District of Kota Setar, Kedah,<sup>12</sup> Taman Seri Marina, Mukim of Kuala Kedah District of Alor Setar, Kedah<sup>13</sup> and Taman Junjong Jaya, District of Kulim, Kedah.<sup>14</sup>

The most that the OR or, sometimes, the private liquidator, may do is to find an eligible third party buyer to buy up the project together with the liabilities of the wound up housing developer company. The proceeds of the sale are to be used to pay off the debts of the creditors of the companies in accordance with s 292 of the CA (Priorities of Payment). This was done in Taman Lingkaran Nur, Kajang, Mukim of Cheras, District of Hulu Langat, Selangor,<sup>15</sup> Taman Cemerlang, Lot No 3254, Mukim 13, Thean Teik Highway, Bandar Air Itam, Pulau Pinang,<sup>16</sup> Taman Sri Angsana Hilir Ampang, Mukim of Ampang, District of Hulu Langat, Selangor,<sup>17</sup> Taman Kenanga

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Phases 2A, 3A, 3B, 4A, 5A, 4B, 5B and 5C, Bandar Baru Salak Tinggi, Mukim of Dengkil, District of Sepang, Selangor<sup>18</sup> and Desa Beruntung, Mukim of Ulu Yam, District of Hulu Selangor.<sup>19</sup>

If a private liquidator is appointed, in most cases, there is a possibility that such liquidator will rehabilitate the abandoned housing projects. This can be seen in Taman Villa Fettes, Lot Nos 141 and 3622, Mukim 18, North East District, Pulau Pinang, and Taman Junjong Jaya, Mukim of Junjong, District of Kulim Kedah. Nonetheless, the private liquidator may not proceed with the rehabilitation if there are insufficient funds to revive the projects or if the project is too difficult for rehabilitation. This situation is observed in Taman Junjong Jaya, Mukim of Junjong, District of Kulim, Kedah. The appointed liquidator, Mr Jambulingam s/o Sethuraman Raki of Messrs Rimbun Corporate Advisory Sdn Bhd was unable to proceed with the rehabilitation of the project as there was a shortage of funds to run the purported rehabilitation.<sup>20</sup>

Several questions can be posed following the above discussion:

- (a) If they (the liquidators) have defaulted in carrying out the rehabilitation, can they be considered as having breached the statutory or legal duty?
- (b) Are they (the liquidators) under a duty of care and legal duty to protect the interest of the purchasers and other stakeholders in the rehabilitation of abandoned housing projects? And if so, it is just inasmuch as the housing developer company is liable, under the provisions of Act 118?
- (c) What is meant by the word 'vendor' which includes its successors in title and permitted assigns as enshrined under cl 31 and 35 of the respective statutory standard sale and purchase agreement (Schedules G, H, I and J)? Is a liquidator (OR or the private liquidator) also covered by this provision? If in the affirmative, then the liquidator shall have to act on behalf of the vendor developer (if the vendor is wound up) to complete the construction of the project and likewise be subject to the provisions under Act 118 in as much as the vendor would be subject to and are also liable to protect the interests and rights of the purchasers, as required

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

Logically, the liquidators are liable to carry out rehabilitation and will be subject to the provisions of Act 118, insofar as this is reasonable and within their power and capability. Nevertheless, insofar as the authors' scrutiny, in case law and in practice, in no case has the liquidator been subject to Act 118 and been under any duty (legal and statutory) to rehabilitate the abandoned housing projects. The reasons are provided above, ie insufficiency of funds, no expertise and shortage of manpower on part of the liquidator. On the other hand, it is argued, that to impose a statutory and legal duty to carry out rehabilitation and to be subject to the provisions of Act 118 would be unfair and inequitable to the liquidator. This being so as the primary duty of the liquidator, insofar as insolvency law in Malaysia is concerned, is to carry out the business and affairs of the wound up companies to settle the debts of the petitioning creditors and other secured and unsecured creditors. In other words, once a housing developer company is wound up under the CA, the housing development business that was carried out is also defunct. The liability of the liquidator to carry out the development, in favour of the aggrieved purchasers (even though he (the liquidator) can be considered to be the permitted assign or successor in title of the wound up company), cannot be imposed or presumed on the part of the liquidator. One of the reasons is that there is nothing in the CA which unequivocally provides a duty on the liquidator to protect the rights of the purchasers/customers of the wound-up-company, unless, it is expedient and necessary in the opinion of the creditors, the contributories, the committee of inspection and the court in the course of managing the winding up process and insolvency administration.

Following the above contention, in abandoned housing projects in Malaysia where a housing developer company has been wound up, there is a strong possibility that the liquidator (OR or the private liquidator) may not rehabilitate the project in the protection of the purchasers' interests. This also means that, unless the project is taken over by a white knight and new funds are injected for the rehabilitating parties to finance the intended rehabilitation, the projects will be stalled forever without any relief to the detriment of the interests and rights of the purchasers.

It should be noted, provided that there are sufficient funds to run the rehabilitation and the liquidator is willing to undertake such rehabilitation of the abandoned housing project, in carrying out the business and affairs of the wound up company, and that the creditors, committee of inspection or the court have consented, the

liquidator (OR and private liquidator) may appoint

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a special manager to help them in executing the duties and to facilitate the rehabilitation works. This is provided in s 246(1) and (2) of the CA. This special manager, it is opined, may consist of a project manager or architect or engineer or building contractor to assist the liquidator to rehabilitate the abandoned housing projects.

### **THE UNITED KINGDOM ('UK') POSITION**

In the UK, it is submitted that the liquidator may carry out rehabilitation of an abandoned housing project of the insolvent wound up housing developer company with the sanction of the court or the liquidation committee, if it is expedient and necessary in the liquidation administration.<sup>21</sup> This contention is made on the ground that the duty of carrying out rehabilitation of an abandoned housing project may fall under the categories – 'effecting compromise',<sup>22</sup> 'selling company assets',<sup>23</sup> 'acting for the company',<sup>24</sup> 'appointing agents'<sup>25</sup> and 'the incidental power'.<sup>26</sup> The liquidator must also note that the creditors or contributories of the insolvent companies may apply to the court with respect to any exercise of those powers for the court to control the conduct of the liquidator (see s 167(3) of the United Kingdom Insolvency Act 1986 ('UKIA')). It follows that if the liquidation committee or the court does not sanction the carrying out of the rehabilitation, the liquidator may not be able to carry out the same.

In addition to the above, in the case of the liquidator not being the official receiver, if he disposes of any property of the insolvent company to a person who is connected<sup>27</sup> with the company or employs a solicitor to assist him in the carrying out of his functions, he must give notice to the liquidation committee of that exercise of his power (see s 167(2) of the UKIA).

The supplementary powers of the liquidator in Wales and England, as prescribed under s 168 of the UKIA, inter alia, are as follows:

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- (a) to apply to the court for directions in relation to any particular matter arising in the winding up (see s 168(3) of the UKIA); and,
- (b) to use his own discretion in the management of the assets and the distribution among the creditors (see s 168(4) of the UKIA).

Thus, pursuant to s 168(3) of the UKIA, the liquidator may apply to the court for approval allowing the liquidator to carry out rehabilitation of the abandoned housing project.

Nonetheless, any person who is aggrieved by the act or decision of the liquidator may apply to the court for a more favourable decision. The court may confirm, reverse or modify the purported complaint (of act or decision of the liquidator) and make such order in the case as it thinks just (see s 168(5) of the UKIA).<sup>28</sup> Thus, in abandoned housing projects, the aggrieved purchasers may invoke this provision, applying to the court to compel the liquidator to carry out rehabilitation if the purchasers have been unreasonably aggrieved by the conducts of the liquidator in the winding up process. This provision is lacking in the CA, which is more inclined towards favouring the creditors' interests ('creditor-centric'). If the CA has this provision, the aggrieved purchasers may have a specified right, avenue and opportunity to compel the liquidator to protect their interests, for example by requesting the liquidator to pay compensation for their losses or the utmost is to compel them to carry out rehabilitation.

A further question can be raised here: if the creditors, the contributories or the liquidation committee do not allow the liquidator to carry out rehabilitation, can the court on the application of the liquidator, grant the liquidator leave to implement the intended rehabilitation? In the opinion of the authors, the court may, in its discretion, allow such application if the outcome is deemed beneficial to the winding up process and will benefit the creditors. In making such decision, the court may consider such matters as whether the proposed rehabilitation is feasible in the views of the creditors and whether there are sufficient funds to meet the rehabilitation expenditure and whether the problems plaguing the projects are too chronic and problematic.



In respect of Scotland, where there is no liquidation committee, the liquidator's supplementary powers include the power to carry on the business of the company so far as may be necessary for its beneficial winding up without

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the sanction of the court (see s 169 of the UKIA). Some questions can be raised concerning the practice in Scotland here, for example:

- (a) whether the liquidator in carrying out rehabilitation of an abandoned housing project in Scotland, is considered 'carrying on the business of the company' which need not require the sanction of the court; and,
- (b) if the liquidator intends on implementing rehabilitation, but this is rejected by the creditors or contributories, whether under this circumstance, the liquidator can proceed to implement rehabilitation notwithstanding the disapproval of the creditors or the contributories.

To answer the above questions, the authors are of the view that, the decision of the liquidator to carry out rehabilitation and its grounds must be reasonable and should not be detrimental to the whole winding up administration and the rights of the creditors. If the outcome is beneficial to the winding up administration and to the creditors, the purported rehabilitation can be implemented. However, if otherwise (ie adversely affecting the rights of the creditors), the rehabilitation should not be carried out.

#### **Priority of debts payment**

Once the liquidator has completed carrying out the liquidation process and has realised all assets and liabilities of the company under liquidation, the proceeds from the process must be distributed to certain debts in order of preference. These debts shall be paid in priority to all other unsecured debts. The order of priority of debts pursuant to s 292(1) of the CA is as follows:

- (a) the costs and expenses of winding up;
- (b) all wages or salary under any contract of employment or award or agreement;
- (c) all amounts due in respect of worker's compensation fund;
- (d) all remuneration payable to any employee in respect of vacation leave etc;
- (e) all amounts due in respect of contributions relating to employees superannuation or provident funds or retirement benefit which is an approved scheme under the federal law relating to income tax; and,
- (f) the amount of all federal tax assessed.

Only when all the above debts have been fully settled would the unsecured debts due from the wound up company be distributed in *pari passu*.

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#### **Issues**

A question can be raised on whether the liquidator can use the proceeds from the liquidation process to fund the rehabilitation of abandoned housing projects. It is opined that the liquidator can do so, provided that there is sufficient balance of the proceeds after deducting the above priority of debts and that of the unsecured creditors'. This also may mean that, if there is insufficient balance funds, the liquidator may not be able to undertake the rehabilitation.

Alternatively, the liquidator may utilise the moneys held under the Housing Development Account ('HDA') which is protected by s 7A(6)(a)(b) of the Housing Development Act 1966 (Act 118) as this money shall not be subject to the priority of payment under the winding up and receivership, pursuant to s 191(1) and s 292 of the CA. Thus, under this circumstance, it is possible for the liquidator to revive the project so abandoned, provided, the moneys (the money in the HDA and the liquidation balance proceeds) are sufficient to meet all of the rehabilitation expenditure.

## THE POSITION IN THE UK

In the opinion of the authors, the problems faced by the aggrieved purchasers in Malaysia can also happen in the UK due to the fact that the proceeds realised from the liquidation administration undertaken by the liquidator shall only be distributed to the prescribed unsecured creditors. If the proceeds have been exhaustive as a result of settling the prescribed persons' claims, there will be no balance of proceeds which can be used to finance the rehabilitation of the abandoned housing projects in the UK.

Insofar as the rights of the aggrieved purchasers are concerned, the position in the UK is worse off than the position in Malaysia (governed by the CA). In Malaysia, there is a specific housing legislation governing the housing industry (ie the Housing Development (Control and Licensing) Act 1966 and its regulations (Act 118)), while in the UK, there is none. The rights and interests of the purchasers and the housing developers are governed by their respective contracts. These contracts are not statutorily regulated. The terms of the contract are often determined by the prudence of the respective parties - the purchasers and the developers.

One of the protections afforded by the housing legislation in Malaysia (Act 118 and its regulations) is s 7A(6)(a)(b) of Act 118. Pursuant to this section, the moneys held under the Housing Development Account (HDA) shall not be subject to the priority of payment under the winding up and receivership.

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Thus, if these moneys are available and are sufficient, the rehabilitating party can use these moneys to finance the rehabilitation.

Nonetheless, even though in the UK there is no specific legislation governing the housing industry, in the opinion of the authors, the interests of the purchasers are still to a certain extent, protected in the event of abandonment.

There are two types of housing development in the UK. Firstly, 'full build then sell' system. Under this system, the developer will construct the housing units until duly completion and once completed, these units are sold to purchasers. Secondly in the UK, there is the 'buying new homes off the plan' or 'selling off the plan' system of housing development. Under this system, the purchasers are required to pay 10% of the purchase price and the balance of 90% shall be paid on due completion of the house.<sup>29</sup> Thirdly, under the 'buying new homes off the plan', the vendor-developers may obtain a housing insurance/home warranty insurance.<sup>30</sup> In the case where the construction of the house is abandoned or stopped in the mid-stream of the development, the insurance coverage may be utilised to finance the completion or rehabilitation of the abandoned units.<sup>31</sup> Nonetheless, there is no statutory standard sale and purchase agreement governing housing purchase in the UK. The terms and conditions in the contract of sale of a house are dependent on the prudence of

*4 MLJ cxviii at cxxxv*

the vendor and purchaser or their solicitors. Thus if the vendor-developer or the purchaser does not possess housing insurance/home warranty insurance and abandonment occurs, the purchaser will become the aggrieved party. However, pursuant to cl 7.5.1, 7.5.2 and 7.5.3 of the Standard Conditions of Sales (5th Ed) (National Conditions of Sale 25th Ed, Law Society's Conditions of Sale 2011), if the seller (vendor-developer) fails to complete in accordance with a notice to complete (ie abandons the construction of the house), the buyer may rescind the housing contract and is entitled to a return of deposit with accrued interest and furthermore retains his other rights and remedies against the defaulting seller (vendor developer).<sup>32</sup>

In the UK, unless the unsecured creditors agree to become in subordinate to the aggrieved purchasers' interests and other unsecured creditors' rights, not being the parties to the insubordination agreement, the proceeds realised in the liquidation process cannot be used to specifically finance rehabilitation of an abandoned housing project and/or to pay compensation to the aggrieved purchasers (as unsecured creditors).<sup>33</sup> Hence, the rights and interests of the aggrieved purchasers in abandoned housing projects are also not fully protected in the event the insolvent ailing company enters liquidation.

It is noteworthy that the order of distribution provided in the UKIA, after secured creditors other than those with floating charges have realised their security, is through a combination of ss 107, 115, 175, 386, Schedule 6 of the UKIA and r 4.18 of the UK Insolvency Rules 1986 ('UKIR'). This order of distribution is as

follows:

- (a) costs and expenses of winding up (s 115 of the UKIA);
  - (b) preferential debts (s 175(1) of the UKIA)<sup>34</sup> ;
  - (c) secured debts pursuant to floating charges (s 175(2)(b) of the UKIA);
  - (d) any preferential charge on goods distrained that arises pursuant to s 176(3) of the UKIA;
  - (e) general body of ordinary unsecured creditors (r 4.181 of the UKIR);
- 4 MLJ cxviii at cxxxvi
- (f) post-liquidation interest on debts (s 189 of the UKIA);
  - (g) deferred creditors as prescribed under s 74(2)(f) of the UKIA;<sup>35</sup> and
  - (h) any balance is divided among the contributories pursuant to the memorandum and articles of association.

Once all the above liabilities have been fully settled, the liquidator can then use the balance (called dividends), if any, to pay other unsecured creditors not enumerated above, in *pari passu*.<sup>36</sup> This means the dividends must be struck and each creditor is paid an equal proportion of the amount owing to him.<sup>37</sup> These creditors, if submitted, may include the aggrieved purchasers of abandoned housing projects, who have filed the proof of debts ('POD') of the claims against the insolvent housing developer companies. The balance can be used to finance the rehabilitation of the abandoned housing projects or to pay compensation and other equitable claims of the purchasers. The issue is on whether there is enough balance of the proceeds or assets of the insolvent company after deducting the above enumerated liabilities. If the balance of proceeds is not enough or if no proceeds are left, then the purchasers of the abandoned housing projects in the UK will obtain nothing.

#### **The superiority of the creditors and contributories**

Clearly under the CA, the creditors and the contributories of the company enjoy a special position in the control of the powers of the liquidator in the course of undertaking the liquidation process. It is opined, unless the aggrieved purchasers in abandoned housing projects have obtained a court's judgment for all the damage they have suffered and they have filed proof of debts pursuant to s 291(1) of the CA read together with r 78 of the Companies (Winding-Up) Rules 1972, their rights may not be protected, not even for claiming compensation and damages. What more to have their project be revived. It should be borne in mind that none in the above priority of payment (under s 292(1) of the CA) provide a special provision for the stakeholder in abandoned housing projects, particularly the aggrieved purchasers, to have their abandoned houses to be rehabilitated or at least they (the purchasers) to be given compensation and damages for their losses and sufferings due to the

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abandonment.

#### **Secured creditors**

Once winding up proceedings commences (ie after the presentation of a winding up petition on the judgment debtor), no disposition of the company property, attachment, sequestration, distress or execution against the estate of the company either by the mortgagees or purchasers are allowed except with the order of the court (see ss 222, 223, 224 and 225 of the CA).

Thus, it follows that any act of the company to sell the immovable property after the petition of the winding up is served, will be null and void, unless the court so orders otherwise. The purpose of the above law is to prevent the property and assets of the to-be-wound up company from being dissipated to the detriment of the interests of the creditors and contributories. Thus, all the assets and property of the company must be intact pending the outcome of the winding up proceedings. Nonetheless, if the disposal of the assets and property is made and is proven to be for the benefit of the company or there is a guarantee that the proceeds from the disposal can be distributed fairly to the unsecured creditors and on the approval of the court, the court may allow such a disposal to take place.<sup>38</sup>

#### **Issues**

Notwithstanding the above explanation, if a chargee (secured creditor) of the judgment debtor wishes to enforce the charge and to obtain the court's order for sale of the charged land pursuant to the provisions under the National Land Code, the chargee is not to be barred from initiating the application for sale unless, on the application by any interested parties to the court, the court disallows the chargee to proceed.

Secured creditors holding valid securities over the property of a company is usually allowed leave to commence action against the company to realise the security unless some special grounds are shown, such as the secured creditor is offered immediately all that he is entitled to without need for an action or proceedings: see *Re David Lloyd & Co* (1877) 6 Ch D 339, per Jessen MR at p 343. This is because the subject matter of the security is not available to claims by the general body of unsecured creditors. Here, the liquidator cannot ask the secured creditor to surrender his security unless the secured creditor votes in  
*4 MLJ cxviii at cxxxviii*  
 respect of the whole of his debt and not the balance due from the company after having assessed the value of the security. If the amount realised from sale of the security is insufficient to cover the whole of the secured debt, the secured creditor joins the general body of unsecured creditors in proving the balance.<sup>39</sup>

In an abandoned housing project known as Phase 2, Taman Lingkaran Nur, KM 21, Jalan Cheras-Kajang, PT 6443, HS(D) 16848, Mukim of Cheras, District of Hulu Langat Selangor, the housing developer company (Saktimuna Sdn Bhd) secured a loan from CIMB Bank Berhad (the lender) and charged the project site land as a security for the loan. Upon defaulting in loan repayments, the lender bank attempted to apply for an order for sale of the land at the Land Office (as the title to the security land was a land office title). Saktimuna was subsequently wound up by the court on the application of the judgment creditor (IRB). An attempt initiated by the said lender bank to sell the said charged land by way of public auction in the land office was abortive due to there being no bidders. Later, this lender bank vested all their liabilities and interests in the said charged land to one Sinesinga Sdn Bhd ('Sinesinga') through a court's vesting order. This was made in consideration of Sinesinga purchasing the non-performing loan ('NPL') relating to the debts of Saktimuna. As the new chargee, Sinesinga also attempted to sell the charged land by way of statutory order for sale. Likewise, the attempts also failed. Later, a third party by the name of Idaman Wajib Sdn Bhd ('IWSB') became interested in purchasing the said charged land. However, the price that was offered was below the market value of the land.<sup>40</sup>

It is opined that, if Sinesinga were to proceed to sell the said charged land to IWSB, applying this below-market-value-price without obtaining leave from the court and the liquidator, this would be detrimental to the interest of the chargor (Saktimuna), the judgment creditor/petitioning creditor ('IRB') as well as the aggrieved purchasers (in terms of the possibility of getting reimbursement of the deposit, damages and compensation or possibility of getting additional fund to generate rehabilitation of their abandoned housing project, left by Saktimuna). Thus, if the liquidator has no power to intervene or having failed to intervene in this circumstance (i.e. in the attempted sale by Sinesinga to IWSB of the said charged land at a price lower than the market price) as this right is an absolute and exclusive right of the chargee (Sinesinga), this would be unfair and inequitable as against Saktimuna, the judgment

*4 MLJ cxviii at cxxxix*  
 creditor (IRB) and the aggrieved purchasers. It is opined that the liquidator should have the power to intervene and should have intervened in the arrangement to make sure that the chargee (Sinesinga) applied the market value of the charged land. This is to protect the interests of the chargor (Saktimuna), the judgment creditor/petitioning creditor (IRB) and the aggrieved purchasers to the balance of the proceeds from the sale of the said charged land after deducting the required redemption sum of Sinesinga (the chargee).

## THE POSITION IN THE UNITED KINGDOM

If the secured creditor/chargee were to realise the charged property belonging to the insolvent company at the below market value, generally and provided this is reasonable and in good faith, nothing in the law and in practice in the UK that can stop the secured creditor from doing so. This is grounded that the secured creditor has an absolute right to dispose of the charged property at whatever price suitable and appropriate for them. Thus, the liquidator generally may not have the power to stop the secured creditor from realizing the charged property below the market price.<sup>41</sup>





















