

**LAND FRAUD IN MULTIPLE SALES AND FORECLOSURE ACTIONS IN HOUSING  
DEVELOPMENT PROJECTS: A CASE STUDY OF ABANDONED HOUSING PROJECT IN  
PENINSULAR MALAYSIA**

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**ABSTRACT**

Land frauds are common today. Land frauds include frauds committed by housing developers to the detriment of purchasers. It is the view of the author that examples of land fraud in housing development projects are multiple sales of the same housing units by vendor developers and technicalities in the law of foreclosure which have caused unfair losses to purchasers, particularly in abandoned housing projects. The objective of this paper is to highlight land frauds occurring in the sale and purchase of housing development projects via multiple sales and foreclosure proceedings. This paper is a result of a research using legal and qualitative research methodology. This paper finds that there are certain ways that housing developers can commit fraud in the housing transactions. One of the reasons as to why this fraud can be committed is due to the flaws in the law governing housing transactions. At the end of this paper, the author suggests certain ways to prevent the commission of frauds in housing transactions.

**Keywords:** *Abandoned Housing Projects; Multiple Sales Fraud; Foreclosure Of Property Fraud; Land Law; Housing Law; Peninsular Malaysia*

## BACKGROUND

Abandoned housing projects are a negative fact plaguing the housing industry in Peninsular Malaysia. Although the housing industry in Peninsular Malaysia plays an important role in the development of the nation, supported by dynamic policies and legal means for ensuring its success, the occurrences of abandoned housing project have, hitherto, marred its role towards national development and the safeguarding the interests of its citizen purchasers. As a result, many purchasers have become victims of abandoned housing projects. There are various reasons causing the abandonment and the consequential problems they have caused are also grave. One of the reasons is that there are insufficient legal provisions and protections for avoiding abandonment and in the protection of the interests of purchasers. In the event rehabilitation can be carried out, the ensuing problems caused--pecuniary and non-pecuniary losses, still hitherto become unsettled issues to most of the purchasers and the stakeholders, without any sufficient remedies and measures to address them<sup>1</sup>

## DEFINITION OF ABANDONED HOUSING PROJECTS

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

- a) A housing project which is not completed within or beyond prescribed period of the sale and purchase agreement and there is not obvious activities on the site project for six (6) months consecutively; or,
- b) Petition to wind up the housing developer company has been filed at the High Court pursuant to section 218 of the Companies Act 1965; or,
- c) The developer company is put under the control of the Receiver & Manager; or,
- d) The developers admit in writing to the Housing Controller that they are unable to complete their projects; and,
- e) 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>2</sup>

## CAUSES OF ABANDONMENT OF HOUSING DEVELOPMENT PROJECTS

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;

<sup>1</sup> Nuarrual Hilal Md Dahlan, “Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework”, (Phd in Law Thesis, International Islamic University Malaysia, 2009), p. 1.

<sup>2</sup> E-Home, Portal Rasmi Jabatan Perumahan Negara, “Pemaju Berstatus Sakit & Lewat”, accessed 24 April 2013; available from <http://ehome.kpkt.gov.my/main.php?Content=vertsections&SubVertSectionID=123&VertSectionID=116&CurLocation=119&IID=>.

- 2) No mandatory legal requirement for obtaining housing development insurance imposed on the applicant developers, by the Ministry of Housing and Local Government (‘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>

### **GRIEVANCES OF THE PURCHASERS IN ABANDONED HOUSING PROJECTS**

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

- 1) The purchasers are unable to get vacant possession of the units on time as promised by the vendor developers;
- 2) The construction of the houses are terminated or partly completed resulting in them to be unsuitable for occupation, mostly for a long time, unless the units can expeditiously be revived; and,
- 3) In the course of the abandonment of the project, purchasers still have to bear all and keep up the monthly installments of the housing loans repayable to their respective end-financiers failing which the purchased lots being the security for the housing loan would be sold off and with the possibility of the borrower purchasers be made bankrupts by their lender banks.<sup>4</sup>

### **LEGAL ACTIONS BY PURCHASERS IN ABANDONED HOUSING PROJECTS**

In abandoned housing projects the purchasers are the aggrieved parties. There are case law reporting the grievances of the purchasers and the remedies provided by the court to purchasers. There are five (5) stages whereby the interests of the purchasers in abandoned housing projects are affected.

The stages are as follows:

- 1) Land Related Issues Stage;
- 2) Planning Permission Stage;
- 3) Approved Plan Stage;
- 4) Housing Authority Stage; and,
- 5) Abandonment and Rehabilitation Stage.

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<sup>3</sup> Nuarrual Hilal Md Dahlan, “Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework”.

<sup>4</sup> Nuarrual Hilal Md. Dahlan & Sharifah Zubaidah Syed Abdul Kader aljunid, “Shariah and Legal Issues in House Buying in Malaysia: The Legality of Bay’ Bithaman al-Ajil (‘BBA’) with Special Reference to Abandoned Housing Projects”, *Pertanika Journal of Social Sciences & Humanities*, 19(2), 2010, pp.108—109).

However for the purpose of this paper, only stage 1 above will be elaborated.

### **LAND RELATED ISSUES STAGE**

Examples where rights and interests of purchasers are affected due to the problems under the above stage are:

- 1) Double or Multiple Fraud Sales By The Developers; and,
- 2) Fraud (Constructive or Actual) In Foreclosure of Charged Land.

#### ***Double or Multiple Fraud Sales By The Developers***

Fraud may occur in the sale of flats/apartments and sub-divided lands with qualified titles or no final titles. Unlike a land or a parcel under final title, where the purchaser could protect his prospective land or parcel by way of lodging a caveat in the land office against the title. This would prevent further dealings with the land by other unauthorized third party. However, in a situation where no final title is issued or has yet to be issued, there is no such statutory mechanism to protect the beneficial interest of the purchaser over that particular parcel/subdivided land so bought. Nevertheless, in this situation, the purchaser can caveat the whole unsubdivided master title or qualified title, if otherwise allowed by the proprietor/developer or he expeditiously on the discovery of the fraud committed by the developer applies for a registrar’s caveat to the Registrar of Land Titles or the Land Administrator against the land in question in protection of his interest in the land. The only way to prove and guarantee the ownership and right over that particular parcel or subdivided land is by creating and executing, apart from the ordinary sale and purchase agreement, an equitable document in the form of a deed of assignment and power of attorney (‘PA’). In such a case, upon payment of a certain deposit, pending the settlement of the payment of the full price by the purchaser to the vendor/developer in consideration of the full transfer of the said title to the purchaser, pursuant to such sale and purchase agreement, the deed of assignment and the PA entered into, the purchaser is deemed to become the beneficial/equitable owner of the said subdivided land or parcel.

The purpose of affecting the deed of assignment and the PA is to enable the purchaser to assign the subdivided lot/parcel purchased to the lender bank as evidence of ownership pending the issuance of separate final title/strata title to the said subdivided lot/parcel. Further, this would allow the lender bank (as lender/chargee) to subsequently charge the subdivided lot/parcel, when the title is issued, as collateral against the loans advanced to the purchasers (borrowers/chargors) to buy the subdivided lot/parcel. However, fraud (actual or constructive) may still occur, where later the developer or the vendor can dishonestly, sell the same parcel or subdivided land to other new purchasers (double or multiple sales) or subject it to enforcement of charge (foreclosure) of the said parcel/unit/subdivided land by the chargee bank due to the default of the chargor/developer on repayment of loan. This will

adversely affect the first purchaser's sale and purchase agreement, deed of assignment and PA thereby eliminating the first purchaser's evidence of sale and his beneficial ownership over that particular parcel/subdivided land. Under the sale of land involving final title, the purchaser can protect his interest over the said land by way of entering a caveat, in order to protect his interest in that land. However, regrettably speaking, in case where the land concerned has no final title and the land transaction is made only, apart from the sale and purchase agreement, by way of deed of assignment and PA, unless the whole master title is caveated if allowed by the proprietor/developer, which can dishonestly be manipulated or eliminated by the developer/vendor, the purchaser may possibly, become a victim and thereby suffer losses.

These multiple fraudulent sales can also be seen in the transactions involving the purchasers of houses at Taman Desa Gemilang, Jalan Sungai Pusu, Gombak, near the International Islamic University Malaysia (IIUM) main campus. For some insight into the facts of Taman Desa Gemilang housing project, reference could be made to the Order of the Advocates & Solicitors Disciplinary Board Complaints No. DC/07/2920, DC/07/2921, DC/07/2915, DC/07/2916, DC/07/2917, DC/07/2919, DC/07/2922, DC/07/3272, and DC/07/3273.<sup>5</sup> According to the witness and one of the purchasers in this abandoned housing project, in 2005, the developer (being a cooperative society and others) purportedly terminated the sale and purchase agreement with the first buyers and sold to second buyers at a marked up price when the first buyers refused to accede to the request of the developer to waive the liquidated ascertained damages (LAD). The developer at that point in time was seriously guilty of delays. The lawyer who acted for both the developer and the first buyers, had again acted for the developer and the second buyers in respect of the same properties was found guilty of gross misconduct and was struck off the roll of advocates and solicitors of the High Court of Malaya. The first buyers, even though they won their case against the developer at the High Court in February 2011, they are still not able to obtain all the moneys paid and the compensations from the defaulting developer. They are also still required to pay to their lender banks all loan amounts that had been disbursed to the developer. The developer has appealed to the Court of Appeal against the High Court's decision. The second buyer occupies their residential properties under separate sale and purchase agreements, and separate end financing agreements.<sup>6</sup>

Similar problem too can be illustrated in the case of Taman Universe, Lot 1556, Mukim 13, North East District (NED), Pulau Pinang (developed by Cariwang Properties Sdn. Bhd),<sup>7</sup> where upon

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<sup>5</sup> Malaysian Bar Council website, “Order of the Advocates & Solicitors Disciplinary Board Complaints.” Accessed 11 August 2011; available from [http://www.malaysianbar.org.my/disciplinary\\_orders/](http://www.malaysianbar.org.my/disciplinary_orders/); internet and Dr. Abdul Rani bin Kamaruddin, being a purchaser of Taman Desa Gemilang, interview by author, Gombak, 1 January 2013.

<sup>6</sup> Dr. Abdul Rani Kamaruddin, interview by author.

<sup>7</sup> File number: KPKT/08/824/3595. The developer obtained housing developer's licence with licence number 3596/4-88/190--valid from 17 April, 1986 until 16 April, 1988.

execution of the sale and purchase agreements with the purchasers<sup>8</sup> and after collecting the required deposit, the developer left the project and did not even proceed with an iota of development on the project land, leaving the purchasers in the lurch.<sup>9</sup> This was also the case in Taman Shoukat, Lot 2219, Mukim 13, NED, Pulau Pinang (developed by Syarikat Showkhat Industries & Realty Sdn. Bhd).<sup>10</sup>

### ***Fraud (Constructive or Actual) In Foreclosure of Charged Land***

It is a usual practice by housing developer in Malaysia to get bridging loan to fund the development of its housing development project. As a collateral to the loan given by the lender bank, the housing developer concerned will charge the project land in favour of the lender bank. In the event, the developer defaults on the loan, the lender bank will enforce the charge and sell off the collateral land and the proceeds received will be used to settle off the debts of the lender bank.

A problem will occur when parts of the land which are still subject to the charge, are sold to public purchasers. The purchasers of these land lots may have paid fully or partly the purchase price. The question is: Whether the land portions bought by the purchasers will also be subject to the foreclosure proceedings if the developer defaults on the loan? If the portions are sold and subject to the foreclosure proceedings, what will the purchasers' fates be? Are their rights and interests in the land protected?

Based on the observation of the author, insofar as the case law are concerned, the purchasers' rights and interests are subordinated to the lender banks'. In other words, the lender banks have the priority to sell off the land including the portions bought by the purchasers. It means also the rights and interests of the purchasers who have bought the portions on the project land will not be protected.

The predicament, where the purported units bought by purchasers are later sold off by the chargee bank due to the default of the borrower developer, and which may leave the purchaser without sufficient remedy, is reported in the following cases:

- a) *Tan Ah Tong v Perwira Affin Bank Bhd & Ors* [2002] 5 MLJ 49 (High Court);
- b) *Perwira Habib Bank v Oon Seng Development Sdn. Bhd* [1990] 1 MLJ 447 (High Court);
- c) *Buxton & Anor v. Supreme Finance (M) Bhd* [1992] 2 MLJ 481 (Supreme Court);
- d) *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54 (High Court of Malaya at Kuala Lumpur); and,
- e) *Bank Bumiputra Malaysia Berhad v. Mahmud Hj. Mohamed Din & Anor (Datin Hajjah Salma Bte Md Jamin, Intervener)* [1989] 1 MLJ 381; [1989] 1 CLJ 326 (Rep); [1989] 1 CLJ 1048 (High Court of Malaya at Ipoh).

<sup>8</sup> It was evident that the agreements had been executed since 1984.

<sup>9</sup> File number: KPKT/08/824/3595.

<sup>10</sup> File number: KPKT/08/824/ /337.

In *Tan Ah Tong v Perwira Affin Bank Bhd & Ors* [2002] 5 MLJ 49 (High Court of Malaya at Kuala Lumpur)<sup>11</sup>, the plaintiff chargor<sup>12</sup> claimed that the third party charges created over the housing development project lands<sup>13</sup> were illegal as the housing developer company borrower (Asialand Housing Development Sdn Bhd) did not possess a housing developer’s licence. Thus, the application of the defendant chargee bank to apply for an order for sale should not be allowed. Nevertheless, the court refused the plaintiff’s claim on the reason of the plaintiff had acted *mala fide*, had abused the process of the court and on the ground of equity and justice. Note that the sale and purchase transactions of this case, between the housing developer company borrower and the purchasers, were subject to Housing Developer’s (Control and Licensing) Act 1966 (Act 118)<sup>14</sup> and its regulation and this case involved an abandoned housing project. As interested parties, the purchasers who bought subdivided titles of master titles and who became victims of the housing developer company borrower’s failure to complete the project, had also applied to the court for a stop order of the sale and for an order of specific performance of the contract of sale and purchase entered into with the developer, in the protection of their rights in the lands. However, the case law does not further elaborate conflicting interests of the defendant chargee bank for an order of sale and of the purchasers to have the order of sale be stopped in the protection of their interests. What the court observed that the application of the plaintiff to set aside the order for sale without having to make any repayment to the defendant chargee on the ground of their housing development activity was illegal, in that the housing developer company borrower had deceived the Housing Controller by undertaking development without housing developer’s licence, was *mala fide*, unjust and an abuse of court process. The court also stated that the defence of illegality could not be invoked as this has been prevented by argument of the defendant rested on the ground of *res judicata* in that the plaintiff had failed to deny and allude in his affidavit of reply nor had the plaintiff appealed against the order for sale of the secured land in the prior proceedings.

In *Perwira Habib Bank v Oon Seng Development Sdn. Bhd* [1990] 1 MLJ 447 (High Court of Malaya at Penang), the application of the purchasers (the second, third and fourth defendants) to have the order for sale be aborted (the order of sales which was applied by the chargee bank to the High Court against the defaulting vendor for failure of the vendor to make the necessary repayment of the loan) was rejected by the court on the ground that the application did not show to the satisfaction of

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<sup>11</sup> See also *Perwira Affin Bank Bhd v Tan Ah Tong* [2003] 5 MLJ 193 (High Court of Malaya at Kuala Lumpur).

<sup>12</sup> The plaintiff chargor was the chairman, director and major shareholder of the the housing developer company borrower--Asialand Housing Development Sdn Bhd.

<sup>13</sup> The land consisted of five master titles vide Lot 4235 HS(D) 16193 to Lot 4267 HS(D) 16225 (formerly known as master title Grant 7188 Lot 94); Lot 4268 HS(M) 1725 to Lot 4287 HS(M) 1744 (formerly known as master title EMR 2532 Lot 201); Lot 4198 HS(M) 1688 to Lot 4214 HS(MK) 1704 (formerly known as master title EMR 2146 Lot 349); Lot 4215 HS(M) 1705 to Lot 4234 HS(M) 1724 (formerly known as EMR 2147 Lot 350) and Lot 4192 HS(M) 1682 to Lot 4197 HS(M) 1687 (formerly known as a master title EMR 2251 Lot 515) all were in the Mukims of Ulu Kelang, Selangor. See *Tan Ah Tong v Perwira Affin Bank Bhd & Ors* [2002] 5 MLJ 49 (High Court of Malaya at Kuala Lumpur) at page 58.

<sup>14</sup> Currently is known as the Housing Development (Control and Licensing) Act 1966 (Act 118).

the court of the existence of ‘cause to the contrary’ as required under section 256(3) of the NLC. Further as *bona fide* purchasers for value, their interest cannot prevail over that of the plaintiff’s, being the registered chargee. Unless fraud was an issue and could be proved, the charge which had been legally registered becomes indefeasible. In this case, the court ruled out that even the fourth defendant being the purchaser who had fully paid the purchase price of the purported housing lot before the said housing lot was subject to a charge by the first defendant (the defaulting vendor) to the plaintiff (chargee) would not prevail over the interest of the registered chargee. It should be noted that the other remaining purchasers being the second and third purchasers had also fully paid the purchase prices of their respective purchased lots through government housing loans.

In *Buxton & Anor v. Supreme Finance (M) Bhd* [1992] 2 MLJ 481 (Supreme Court at Kuala Lumpur) the housing developer abandoned its housing project and the project land which was subject to a charge to respondent was sold off by way of public auction. The sale of the project land included 16 units apartment. The appellant purchaser bought a few units of the apartment and had paid fully paid the purchase price. On the knowledge that the land was subject to an order for sale, the appellant intervened by way of summons-in-chambers of which the application was allowed by the court. The defence of the appellant purchasers was that they had purchased the units and fully paid the purchase price. Thus, the units they purchased should be excluded from being sold by the respondent lender. The court dismissed the appellant purchasers’ objection to have the order for sale of the charged land be set aside.

Later, the purchaser appealed to the then Supreme Court. Similarly, the appeal was dismissed. The Supreme Court was of the view that the right of the chargee bank over the charged land was indefeasible and prevailed over other interests, even the interest of the *bona fide* purchaser for value and who had paid full purchase price for the unit bought in the housing development project. The contention of the purchaser that the order for sale would be a ‘cause to the contrary’ as envisaged by section 256(2) of the NLC and the allegation of fraud on part of the chargee bank, pursuant to section 340(2)(b) of the NLC, were insufficient, according to the Supreme Court, to warrant the setting aside of the order for sale. Further there was no caveat entered in the protection of the appellant purchaser’s interest in the land<sup>15</sup>. Note that the transaction in this case involved sales and purchases of housing accommodation and housing development. However, it is observed, there was no mention in the judgment about the provision that prohibited against subjecting the property to any encumbrance unless with the consent of the purchaser, as mandatorily provided in the statutory standard sale and purchase agreement as required by rule 12(1)(b) of the Housing Developers (Control and Licensing) Rules 1970 under Act 118. It might be that this housing development project was not subject to Act 118 and fell outside the jurisdiction and power of the MHLG.

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<sup>15</sup> Compare with *Lai Soon Cheong v Kien Loong Housing Development Sdn. Bhd & Anor* [1993] 2 CLJ 199), where even though a caveat had been registered, the indefeasibility of the chargee bank was still unaffected.

In *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54 (High Court of Malaya at Kuala Lumpur), the High Court dismissed the appeal of the plaintiff lender bank (the purchaser's lender) made pursuant to section 418 of the NLC to set aside the order for sale made by the Land Administrator applied by the developer's lender bank (Bank Bumiputra (M) Bhd). The plaintiff lender bank contended that the developer's lender bank was aware that at the time it took the charge over the land, that there were purchasers of the flats in the building at Laxamana Apartments and, thus, fraud or construction fraud, as envisaged under section 340(2)(a) of the NLC was to be inferred. This fraud, if it is proven, could cause the charge defeasible. The court dismissed the appeal, and held that there is ample authority that actual fraud must be proved in order to defeat the indefeasibility provision of the statute. It has to be actual fraud and not constructive fraud. Secondly, the chargee's knowledge that there were other people's prior beneficial interests in the land is not fraud. Thirdly, the Land Administrator was right in ordering that the sale because the cause to the contrary had not been shown to his satisfaction.

In *Bank Bumiputra Malaysia Berhad v. Mahmud Hj. Mohamed Din & Anor (Datin Hajjah Salma Bte Md Jamin, Intervener)* [1989] 1 MLJ 381; [1989] 1 CLJ 326 (Rep); [1989] 1 CLJ 1048 (High Court of Malaya at Ipoh), the purchaser intervener bought a piece of land, which was later subject to a charge created by the vendor in favour of the plaintiff bank as a security for a loan granted by the latter to the vendor. Later, the vendor defaulted in repayment of the loan and due to the default, the plaintiff bank commenced a foreclosure proceedings to sell the charged land. The purchaser intervener applied to the court to set aside the order for sale made on the ground, *inter alia*, her interest in the land was stronger in law as the purchase was made earlier than the creation of the charge. However, the court dismissed the application of the intervener purchaser on the ground of the indefeasibility of the charge except if the charge was procured through fraud as spelt out in section 340(2)(b) of the NLC. Nonetheless, there was no proof of fraud on part of the plaintiff bank in the registration of the charge. Note however that this case did not involve an abandoned housing project and the transactions of the parties were not subject to Act 118 and its regulations.

The case of *Keng Soon Finance Berhad v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 (Privy Council) involved an abandoned housing project and the sales of housing units were subject to Act 118 and its regulations. The Privy Council allowed the appeal of the appellant chargee bank to foreclose the charged property. The grounds for allowing the appeal were that the order for sale would not have resulted in the 'cause to the contrary' to the parties as envisaged by section 256(3) of the NLC. This was because the interest of the purchaser in the land, who consented to the creation of the chargee's interest could not prevail over the registered chargee of the land in question. Secondly, the loan documents between the appellant chargee bank and the respondent chargor developer contained a specific covenant for the payment of interest at the end of each month and a provision enabling the chargee to call in all outstanding moneys if default is made by the respondent

chargor in performing the obligation. However, the counsel for the second respondent (purchaser) in the Privy Counsel had raised a new issue and point - the respondent borrower developer was an unlicensed housing developer and the provisions in the statutory standard sale and purchase agreement had not been duly complied with<sup>16</sup>, the Privy Council ordered the case be remitted to the Supreme Court in Malaysia for determination. This is because this new issue and point if is true and proven could lead to a finding that the charge was a void charge and might affect the whole case altogether.

It is a pity if the above fraud problems were to occur. Nevertheless, the ‘preventive’ approach is for the aggrieved purchasers to try to institute legal proceedings against the culprit developer and the irresponsible parties based on equity soonest possible. This attempt may stop the proprietor/developer from selling the portion he purchased, to warrant that the purported sale by the chargee can have resulted in the existence of ‘any cause to the contrary’, pursuant to section 256(3) of the NLC as decided in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, interveners)* [1996] 2 MLJ 431 (High Court), *Kheng Soon Finance Bhd v. MK Retnam Holdings Sdn. Bhd & Ors* [1983] 2 MLJ 384 (Federal Court),<sup>17</sup> and *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32 (Federal Court).<sup>18</sup>

However, this approach (legal action against the chargee banks, not to sell off the charged land) may be time consuming, costly and the result may be uncertain subject to the availability of sufficient proofs and the ability of the litigant lawyer to convince the judge towards favouring his client’s cause. Moreover, based on the above majority of the case law (*viz, Tan Ah Tong, Oon Seng Development Sdn. Bhd, Buxton, Tai Lee Finance, Bank Bumiputra, Mahmud Hj. Mohamed Din, Lai Soon Cheong and MK Retnam Holdings*), unless the transaction is tainted with an illegality as illustrated in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, interveners)*, the right of the purchaser for value shall not be capable of overriding the indefeasible right of the chargee bank over the unit and the land involved. So far, it seems that there has as yet any

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<sup>16</sup> *viz* that the developer shall not after a contract of sale has been signed subject the land sold to the purchaser to any encumbrance without prior approval of the purchaser and to hand over the land together with the house erected thereon, on settlement, free from any encumbrances.

<sup>17</sup> Salleh Abbas FCJ, dismissed the appeal of the plaintiff chargee bank to foreclose the land being the subject of the charge on the ground that clauses 3 and 4 of the sale and purchase agreement did not allow the respondent (the defendant chargor developer) to create the charge but only such encumbrances as would not place the land in jeopardy of being sold, because otherwise the purchasers would not be entitled to vacant possession free of encumbrances which they were entitled to under the agreement. Note also that this case involves an abandoned housing project.

<sup>18</sup> The Federal Court refused the appeal of the appellant chargee bank to foreclose the charged land on the default of the respondent chargor vendor on the ground that the order would defraud the interest of the sub-purchasers of the fragmented land bought from the respondent chargor vendor pursuant to section 340(2)(a) of the NLC. Further the appellant chargee bank knew at the outset that the fragmented land had been sold to various sub-purchasers who had gone into possession of their respective areas on part-payment of the purchase price. On the other hand, the respondent chargor vendor was only entitled to damages for breach of the contract by the respondent chargor vendor. Note also that in *Narayanasamy* the sales of land were not subject to Act 118 and its regulations made thereunder.

effective and sufficient 'preventive' provision, not even by way of caveat over the master title or even through the previous deleted rule 12(1)(b)(c) of the Housing Developers (Control and Licensing) Rules 1970,<sup>19</sup> clause 2 in the statutory standard sale and purchase agreement (Schedule E) of the Housing Developers (Control and Licensing) Regulations 1982,<sup>20</sup> and clause 2 in the statutory standard sale and purchase agreements (Schedules G and H) of the Housing Developers (Control and Licensing) Regulations 1989,<sup>21</sup> which, it is submitted, can protect the rights and interests of the purchasers in housing development projects from being subject to sale or foreclosure by the chargee banks.

The position of the purchasers in abandoned housing project is not protected in the event the housing developer abandons its housing development project. Likewise, it is opined, not even by the existence of letter of undertaking of the developer vendor to the effect of refunding back all moneys paid by the purchasers and the purchasers' finance if the vendor developer cannot make a good title to the portion bought by purchasers including, it is opined abandonment, can provide adequate remedy to purchasers.

Similarly, the author observes that the letter of disclaimer of the vendor developer's bridging lender not to foreclose the portions bought by purchasers can give sufficient protection to purchasers in abandoned housing project.

However it is pertinent to note that, in 2002, there were amendments made in Schedules G and H, whereby apart from the duty of the vendor developer to obtain consent from the purchasers before encumbering the land in question as provided in clause 2(1), by the insertion of a new clause 2(2), if the purchaser consents to the encumbrances be made against the land, the chargee bank shall

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<sup>19</sup> Rule 12(1)(b) provided that: Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely:

...

(b) provisions binding on the licensed housing developer that immediately after a contract of sale has been signed the licensed housing developer **shall not subject the land sold to the purchaser to any encumbrance without the prior approval of the purchaser**;...(emphasis added).

Rule 12(1)(c) provided that: Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely:

...

(c) provisions binding on the licensed housing developer to ensure that the land sold to the purchaser **shall be free from any encumbrance immediately prior to the handing over of vacant possession of the housing accommodation to the purchaser**...(emphasis added).

<sup>20</sup> Clause 2 provided that: 'The Vendor **shall not immediately after the date hereof subject the said Property to any encumbrances without the prior approval of the Purchaser** and the Vendor hereby undertakes that the said Property shall be free from any encumbrances immediately prior to the handing over of vacant possession of the said Building to the Purchaser'.(emphasis added).

<sup>21</sup> Clause 2 of Schedules G and H provided that: 'the \*Proprietor and the **Vendor shall not immediately after the date of execution of this Agreement subject the said Land to any encumbrances without the prior approval of the Purchaser** and the \*Proprietor and the Vendor hereby undertakes that the said Building/Parcel shall be free from encumbrances immediately prior to the handing over of vacant possession of the said Building/Parcel to the Purchaser'.(emphasis added).

undertake not to foreclose the unit bought by purchaser in the event the vendor developer is in default on the loan to the chargee bank.

These clauses are also retained in the amendment made in 2007 in Schedules G, H, I and J. Nevertheless, the effect of these clauses since introduced in 2002 until to date has yet been tested in court and there is no case law so far in respect of the conflict of interests between the chargee bank and the purchasers over the purported unit and land, and as to who has the prevalent interest over the land and the unit, insofar as these new clauses are concerned.

Thus in the above situations particularly the case law as mentioned above, the purchasers are the persons aggrieved. Not only had they lost moneys to the defaulting developer, their rights to the units bought too were not guaranteed and not protected. To pursue legal action against the defaulting developer also may not be feasible as the developers might have run away, may be to overseas where legal action may be troublesome due to cross-border-jurisdiction, or that the developers are financially not able to meet the purchasers' claims.

The current practice is that, the lender bank cannot foreclose portions of land which had been purchased by house purchasers. Only the portions which had not been sold to purchasers can be foreclosed. The lender banks may increase redemption sum of the remaining portions which are still in the name of the borrower developers, not being sold to the purchasers in order to settle off the debts of the borrower developers which cannot be obtained from the portions of land that have been sold to purchasers. Thus, in this situation the rights and interests of the purchasers are protected insofar as the portions they purchased are concerned. It is a question whether in order for the portions not to be foreclosed by the bank, the purchasers must have fully paid the purchased price or partly paid the purchased price. In clause 2(1) of Schedules G, H, I and J above only mentions the portions which have been bought by purchasers shall not be subject to any foreclosure by the lender banks. The clause does not mention the purchaser must have fully paid the purchase price. Nonetheless, the purchasers may face another problem in that how to rehabilitate the project if the developer is unable to proceed with the development? This problem is still being an unsettled problem in Peninsular Malaysia.

Apart from imposing additional redemption sums, the lender bank may also pursue legal actions against the guarantor to the bridging loan. Normally the guarantors are the directors of the housing developer companies.

However, the above protection, in the opinion of the author, only covers the sale and purchase of houses by the licensed housing developers who are subject to the provision under Act 118. If the sale and purchase agreements do not fall under the provisions of Act 118 and that the housing development does not subject to the purview of the Ministry of Housing and Local Government, the purchasers' rights and interests will be affected.

## CONCLUSION AND SUGGESTIONS

In conclusion, fraud may be inevitable in housing transactions as the governing laws are not fully capable of detecting and controlling the creative and devious ways of the fraudsters to cheat the naïve and innocent purchasers. As prudent purchasers, it is the author's advice that purchasers should not involve in any potential fraudulent housing transactions which may cause them losses. The current laws governing housing transactions contain certain flaws that even the court itself is proven not able to provide corresponding and commensurate remedies and protection to the aggrieved purchasers in housing transactions. Thus, to prevent any occurrences of losses to purchasers for instance abandoned housing projects, the followings advice should be followed, *viz*:

- 1) The purchaser should only buy houses pending completion from strongly funded vendor who has sufficient fund to complete the project or from the government developer or Government Linked Companies (GLCs) developers who have sufficient means to carry out housing development projects successfully; and,
- 2) If the above is not possible i.e if there no capable housing developers available within the purchasers' vicinity or area, the purchaser is advised to only buy duly completed houses with the CF or CCC. Thus, the possibility of occurrences of housing abandonment and other frauds as elaborated above will not become issues anymore.

On the other hand on the government's part, it is an advice to the government to adopt the following suggestions in order to settle the problems of abandoned housing projects and its consequences, including frauds in housing transactions.

- 1) The government should impose on applicant housing developers the full system of build then sell for housing delivery. This system means that the developers must fully complete constructing the housing units with the Certificate of Fitness of Occupation (CF) or Certificate of Completion and Compliance (CCC) before the units are sold to the public;
- 2) If the above may not fully complied with, the government should impose, as an alternative method to the above suggestion no. 1, a 10-19 system of housing delivery. This means the purchasers only have to pay 10% of the purchase price at the time of signing the sale and purchase agreement. The balance of 90% should only be paid on the completion of the housing units with CF or CCC;
- 3) The above systems if they were to be implemented must be supported with a housing development insurance. In other words, the government must impose on the applicant developer to get housing developer insurance before proceeding with the development of their housing projects. The function of this insurance is serve as a support in case the

housing project is later abandoned or the developers face a shortage of fund to resume the development of the project and that this insurance also can provide a source for damages and compensation to purchasers in the event the projects are later facing problems; and,

- 4) The government should introduce a special legal regime governing the rehabilitation of abandoned housing projects. The rationale of introducing this legal regime is to protect the interests of the public purchasers and to prevent any abuses and misuses of authority and power of the rehabilitating parties and to ensure that the rehabilitation can be done smoothly.

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