

## **SPECIAL FEATURE:**

# **‘SCRUTINISING’ THE DUTIES OF A LAWYER TO ADVISE THE PURCHASER IN THE PURCHASE OF A RESIDENTIAL PROPERTY AS REQUIRED BY SECTION 84 OF THE LEGAL PROFESSION ACT 1976**

## **PART I**

Baharuddeen Abu Bakar\*

## **IN MEMORIAM**

This piece is written in memory of my son Muhammad Zayd bin Bohorudin (1985-2017), advocate and solicitor, and alumnus of the Ahmad Ibrahim Kulliyah of Laws (‘AIKOL’), IIUM. He had served the Attorney-General’s Chambers and Zul Rafique and Partners (Advocates and Solicitors). He endeared himself to classmates, teachers and colleagues; and in his brief life fulfilled all his parents’ wishes for him including being chosen by his schoolteachers as a most avid reader of books in primary school.

This article was conceived by Muhammad Zayd and I, as an object lesson on how Islamic teachings may be incorporated into the Civil law to improve its moral contents. To reduce the obsession with self; the Civil law which is made without taking moral teachings into account, particularly in modern commercial transactions. May all those who read this monograph be inspired by the overarching teaching of Islam to seek justice in all civil law formulations including the Housing Ministry-drafted sale and purchase agreement. Muhammad Zayd’s mother Jamilah Begum and I dedicate this monograph as *sadaqa jariah*. May Allah s.w.t forgive him and reward him with a place in jannah. Amin.

**Keywords:** duties of solicitors, purchase of residential property, s.84 Legal Profession Act, commercial transactions

---

\* LL.B (Hons) U.M; Diploma in Syariah and Practice (DSLP) and Master in Comparative Law (MCL), IIUM: Member of the Malaysian Bar, retired Advocate and Solicitor of the High Court of Malaya; retired senior teaching fellow, Legal Practice Dept., Ahmad Ibrahim Kulliyah of Laws (AIKOL) IIUM and volunteer legal adviser to the House Buyers' Association (HBA).

**MAKALAH ISTIMEWA:**  
**MENELITI KEMBALI TUGAS-TUGAS PEGUAM DALAM**  
**MENASIHATI PEMBELI MENGENAI PEMBELIAN RUMAH**  
**KEDIAMAN SEPERTI YANG DIKEHENDAKI OLEH**  
**SEKSYEN 84 AKTA GUAMAN 1976**  
**BAHAGIAN 1**

**DALAM INGATAN**

Makalah ini di tulis sempena mengingati anakanda saya, Muhammad Zayd Bohorudin (1985-2017), seorang peguambela dan peguamcara, yang juga merupakan bekas pelajar Kulliyyah Undang-Undang Ahmad Ibrahim, UIAM. Beliau telah berkhidmat dengan Pejabat Peguam Negara dan kemudiannya beralih ke Tetuan Zul Rafique dan Rakan-Rakan (Peguambela dan Peguamcara). Muhammad Zayd telah disayangi oleh para sahabatnya, guru-guru serta rakan sekerja; dan terutamanya kedua ibubapa beliau. Walau jangka hidup beliau tidak begitu panjang, namun beliau telah berjaya memenuhi segala impian kedua ibubapanya untuk dirinya. Ini termasuk dipilih oleh guru sekolahnya sebagai seorang yang amat menggemari buku dan merupakan pembaca buku yang begitu rajin semenjak dari sekolah rendah lagi.

Makalah ini telah ditulis oleh kami sebagai panduan tentang bagaimana ajaran Islam boleh digabungkan dengan undang-undang sivil sebagai penambahbaikan kandungan moral di dalam undang-undang tersebut. Ini bagi mengurangkan obsesi diri; yang terdapat didalam Undang-undang sivil, yang dicipta tanpa mengambil kira panduan akhlak, lebih-lebih lagi dalam transaksi komersial moden. Semoga sesiapa yang membaca penulisan ini akan terinspirasi dengan ajaran islam yang menyeluruh untuk mencari keadilan dalam semua formulasi undang-undang sivil, termasuk perjanjian jual beli yang telah di deraf oleh Kementerian Perumahan. Saya dan ibu Muhammad Zayd, Jamilah Begum ingin mendedikasikan makalah ini sebagai sedekah jariah. Semoga Allah s.w.t mengampunkan beliau dan menganugerahkan beliau tempat di syurga. Amin.

**Kata kunci:** tanggungjawab peguam, pembelian rumah kediaman, s.84 Akta Profesion Undang-undang 1976, transaksi komersil

## Part 1

### THE PURCHASER'S SOLICITOR<sup>1</sup>

Ideally, the sale and purchase of a property from a developer by means of an agreement drafted by the Housing Ministry<sup>2</sup> should be sufficient protection for the purchaser.

In this type of conveyancing, i.e. the buying and selling of a 'residential accommodation' (simply, a house) under the Housing Development (Control and Licensing) Act 1966 and Regulations 1989, Schedule G and Schedule H (collectively the Sale and Purchase Agreement or hereinafter the SPA) may be said to be *sui generis*.

It should be sufficient protection for purchasers<sup>3</sup> and yet the Bar Council seems to have considered it a serious enough matter to have formulated a discrete provision, i.e. Section 84 of the Legal Profession Act 1976, for the benefit of the purchaser; to ensure independent legal representation; albeit that its observance by some members of the Bar may be debased.

Section 84 says:

"Where an advocate and solicitor acts for a housing developer in a sale of immovable property developed under a housing development neither he nor any member or assistant of the firm of which he is a member either as partner or employee shall in the same transaction act for the purchaser of that property" (1st limb) "and a written agreement prepared by an advocate and solicitor or any member or assistant of the firm acting for the developer in respect of such transaction shall be scrutinized by an advocate and solicitor acting for the purchaser" (2<sup>nd</sup> limb).

---

<sup>1</sup> The preferred term for lawyers in all non-contentious matters, i.e. involving no court work. See sec 3 (Interpretation : 'contentious business', Legal Profession Act 1976.

<sup>2</sup> Buying and selling of a residential accommodation (simply a house) under the Housing Development (Control and Licensing) Act 1966 and Regulations 1989, Sch G and Sch H may be said to be a *sui generis* conveyancing transaction.

<sup>3</sup> The Preamble: "An Act to provide for the ....the protection of the interests of purchasers..."

The provision is indeed comprehensive enough to exclude all possible evils which may include; lack of independence, conflict of interests, exclusive representation of purchasers and interference by the developer with the purchaser's solicitor.

The purpose of S. 84 is to ensure that the purchaser is entitled, if he wants it, to have the advice of a solicitor of his choice.<sup>4</sup> That is the clear, incontrovertible and 'purposive' interpretation.<sup>5</sup> In *Loh Bee Tuan v Shing Yin Construction (Kota Kinabalu) Sdn Bhd* <sup>6</sup> Charles Ho J said: "The fourth defendant (*the developer's solicitor*) should have advised the plaintiff (*purchaser*) to get another solicitor or at the very least explained the risks involved. Instead he acted for the developer and the purchaser."

Additionally, the provision states:

"iv) S.84 (5): "Subsection (1) is without prejudice to any law affecting an advocate and solicitor who acts for parties where there is a conflict of interest or where a conflict may arise."

v) Subsection (6): "That (a) ...solicitor who acts in contravention of sec 84(1) may be liable to disciplinary proceedings."

To give effect to the provision, the Bar Council has made the following rules against solicitors letting themselves into questionable situations under the Solicitor's Remuneration Order 2005:<sup>7</sup>

"5.07 Solicitors not to be present at Developer's offices as Solicitors

---

<sup>4</sup> Some solicitors may have glossed over the manner of the purchaser's solicitor's retention as stipulated in sec 84. The expression 'willing buyer willing seller' cannot apply where there is an express statutory provision; *pace* Khairul Annuar in '40 questions You Should Ask Your Lawyer Before Buying A Residential Property In Malaysia'.

<sup>5</sup> S 17 A Interpretation Act 1976 Urban Wellbeing.

<sup>6</sup> [2002] 2 MLJ 532 .

<sup>7</sup> The Solicitor's Remuneration Order 2005 (SRO) (and the Solicitor's Remuneration (Amendment) Order 2016 and Solicitor's Remuneration (Amendment) Order 2017) are subsidiary legislation made under sec 113 of the Legal Profession Act 1976 by a joint body, the Solicitors Costs Committee, comprising representatives of the judiciary, the attorney general's chambers (AGC) and the Bar Council. It has formulated the fees and expenses that solicitors may charge for non-contentious matters.

“Solicitors shall not be present by themselves as Solicitors or be represented by their Pupil/s or Clerks at the launch/promotional sites or booking/sales/registration offices (“Site/s”) of any property developers, including and not limited to housing developers under the Housing Development (Control and Licensing) Act 1966 where units are sold or offered for sale unless:

a) the Solicitors:

- i) are acting for the developer in the sale of the units under and pursuant to written retainer/s from the developer; and
- ii) shall have displayed at a conspicuous part of the Site/s easily visible to the public attending at such Site/s, a notice measuring 45cm by 75cm making known to the public that the Solicitors are acting for the Developer in the sale of the units; and
- iii) shall notify the purchaser/s of their right to appoint their own solicitors to act for them in their purchase of the unit/s as the solicitor is not permitted to act for the purchaser/s; and
- iv) shall not, under any circumstances act for the purchaser.

OR

- b) the solicitors are requested to accompany their purchaser client/s under and pursuant to prior written retainer/s from their purchaser client/s.”

In addition, the Bar Council has also provided:

“5.08 Solicitors not to insist on Purchasers appointing them.

Solicitors shall not write to any purchaser to appoint them as the purchaser’s Solicitors whether on the instructions from or at the request of any property developer.”

- x) As if to reinforce S. 84, the Solicitors’ Remuneration Order 2015 Rule 7 states:

“In any transaction referred to in the First, Second, Third, and Fourth Schedules, a solicitor shall not act for more than one party in a particular transaction. “

**The Nature of the Purchaser's Own Solicitor's Retainer and Duties owed to the Purchaser may be summarised as follows:**

- i) Once the purchaser makes the tentative decision to buy and informs the developer about it, the purchaser's duties arise.
- ii) The purchaser's solicitor must be chosen by the purchaser himself; the developer should not influence the purchaser's choice so that the purchaser's solicitor remains independent of the developer, concerned only for the purchaser.
- iii) The purchaser's solicitor's retainer is an 'entire contract'<sup>8</sup> running from the pre-retainer first interview to retainer and instructions to finally transferring the property to the purchaser.
- iv) The solicitor cannot act for a part only for the transaction unless there is agreement to that effect.
- v) The purchaser should choose his own solicitor; get advice on the SPA as envisaged by S. 84; pay the scale fees as provided under the SRO, and arrange with the solicitor to act for him in all matters except litigation that may arise between him and the developer until the property is transferred to the purchaser.
- vi) To be independent of the developer in all respects; particularly by not making himself available to the developer for empanelling and offering him to the purchaser as the purchaser's solicitor for any purchase from the developer.
- vii) However, ironically, not just the developer-chosen solicitor but also the purchaser-retained solicitor does not advise the purchaser. Some solicitors seem to rationalize that their advising would be a waste of time because the SPA being subsidiary legislation may not be altered at all, even to the advantage of the purchaser.
- viii) Even if this is true, the purchaser has the right to decide between two fundamentally different subject matter: buying a completed house from a non-developer vendor and being able to satisfy himself

---

<sup>8</sup> An entire contract or indivisible contract is one where the obligations of the parties are independent; one party can demand performance by the other without performing his own obligation. See: 'Performance of Contract' in Jonathan Law, *Oxford Dictionary of Law*, 7<sup>th</sup> Edition (Oxford University Press, 2009).

by means of a three-dimensional inspection, as to the quality of construction and materials, and the suitability of the house to the needs of the purchaser as opposed to buying from a developer a non-existent house with all the well-known risks of not being able to see the finished product before buying: poor workmanship and poor quality materials; inconsistent dimensions, delays; and additional expenses.

- ix) Act only for the purchaser, and for him again when he borrows from any financial institution to buy the property, and for the same person when he desires to sell the property (as vendor).
- x) It may be good practice to reduce the advice to writing. It would suffice if a standard letter of advice on the SPA is prepared by a law firm for the benefit of their purchaser client, which the purchaser is advised to read before signing on the dotted line, and the purchaser requested to acknowledge receipt of the advice by signing the copy of the letter which the solicitor should keep on file.

### **The purchaser's own Solicitor's Fees**

The Solicitor may charge the purchaser according to the SRO but can only collect the payments in instalments at appropriate stages. He must ensure firstly, all payments towards disbursements and the first instalment of fees have been made; the second balance of fees are to be paid only on the signing of the SPA and the third and final balance just before presenting the transfer application. (The 'entire contract' nature of the purchaser's solicitor's retainer seems to be observed only in the manner of collecting fees; the whole sum up front. The transaction may not be carried through if the purchaser changes his mind, the SPA is terminated or repudiated by the developer or as it all too often happens, the housing estate is abandoned. In such cases there will have to be a reduction of fees including refund where there has been full payment at the beginning.<sup>9</sup>

---

<sup>9</sup> Solicitors' collective experience has it that as the work done by solicitors cannot be repossessed in the manner of sale of goods or reversed, it is always advisable to collect all your fees before doing your work as the client may not be found after the work is done!

The scale fee received by purchaser's solicitors is amply justified. Firstly, it takes into account the amount of damages the solicitors would have to pay in the event of things going wrong in the transaction. Secondly, and just as importantly, it is meant to be a subsidy by society to lawyers to do unprofitable work e.g. the lawyer who acted for the purchaser in the transaction with the developer may act for the same purchaser in any problem between the purchaser and the developer which does not involve litigation. The traditional justification trotted out by English solicitors would not apply in Malaysia as most of the services rendered by them under the title deeds system has been taken over by the Government of Malaysia under the Torrens system land law.

- a. As sec 84 (ss3) requires "(t) he developer and the purchaser shall each pay... the fees of its own... solicitor.
- b. The fees and expenses chargeable by solicitors are fixed by the SRO, First Schedule.
- c. The SRO takes into account the fact that the purchaser's solicitor did not draft the SPA; it is drafted for him by the Housing Ministry as schedules G or H and therefore the solicitor has to give the following rates of discount:
  - i) RM 300, if the consideration is RM 50,000 or below;
  - ii) 75% of the applicable scale fee specified, if the consideration is in excess of RM 45,000 but not more than RM 250,000;
  - iii) 70% of the applicable scale fee specified, if the consideration is in excess of RM 250,000 but more than RM500,000; or
  - iv) 65% of the applicable scale fee specified, if the consideration is in excess of RM 500,000.

Apart from the above, the Purchaser has 3 inexpensive but less beneficial choices of professional service:

1. Ask the developer-chosen solicitor, if the developer is paying the developer's solicitor's fees, if so, the purchaser may request the solicitor to attest the purchaser's execution of the SPA for free ; Fifth Schedule rule 1(a) SRO; or



2. Choose any solicitor who is available to attest the execution of the SPA, and pay him nominal fees as provided in the Fifth Schedule rule 1(b) of the SRO; or
3. Choose any solicitor who is available to attest the execution, and request for an explanation of the SPA which will probably not go to the extent envisaged by S. 84, and which will not make such a solicitor the solicitor for the purchaser, and pay him his fees which will be more than nominal as provided under the Sixth Schedule, SRO.

### **THE DEVELOPER-CHOSEN ‘PURCHASER’S SOLICITOR’**

Developers have thwarted the purpose of S. 84. They invite law firms to tender<sup>10</sup> to become empanelled by developers, and the solicitors do so by submitting their proposed fees for acting for the developer’s buyers based on which they are offered by developers, purportedly as the purchaser’s free choice of solicitor. The fees paid by developers are low in terms of the scale fees allowed for solicitors who act for non-developer vendors. Developers justify their low fees as adequate as such solicitors are expected to make a considerable sum in purportedly acting for purchasers, which is wrong, and they do not complain. As a result they are also not expected to advise purchasers, who are their purported clients, about the inequities of the SPA because that would not be in the developers’ interest! This situation could come in various forms, as mentioned below.

---

<sup>10</sup>However, It is not an offence to call for such tenders- “5.05 Solicitation of Work-Bar Council Rulings”- neither is it, it seems, to agree fees with a certain a client for regular work in non-contentious matters-sec 114 Legal Profession Act- but to let the purchaser, who is not aware of the arrangement between the panel solicitor and the developer, to think that he is an independent solicitor and free to act for purchaser exclusively and in his best interest and charge full scale fees without scrutinizing the SPA is wrong. Rule 25: “An advocate and solicitor at the time of his being retained shall disclose to the client of all the circumstances of his relation to the parties, and any interest in connection with the controversy, which may influence the client in the selection of counsel.” Legal Profession (Practice and Etiquette) Rules 1978.

When at the outset, the would-be purchaser calls at the developer's office and his offer to purchase is accepted, he is told, invariably, to select a firm of solicitors from the list empanelled by the developer. The purchaser has to choose the solicitor chosen for him by the developer. Thinking it more convenient and perhaps even cheaper, the purchaser goes along unmindful that it is pennywise and pound foolish.

When the buyer goes to the solicitor's firm, he nearly always does not meet any solicitor instead the solicitor's clerks tell him where to sign and what fees to pay based on the buyer's solicitors scale fees but does not receive any advice. Would the advice be valid anyway? Rule 25 states:

"An advocate and solicitor at the time of his being retained shall disclose to the client of all the circumstances of his relation to the parties, and any interest in connection with the controversy, which may influence the client in the selection of counsel."

Do they disclose that they were appointed by the developer to act for the buyer and therefore no objective advice may be expected. The benefit of this unlawful exercise is that it ensures the purchaser does not receive any advice from the developer-chosen purchaser's solicitor who purports to act for the buyer. With that the purchaser loses his right to choose his own solicitor, and also does not receive any advice and illegally pays the full fees. The purchaser thinks he is represented when in fact he is not; and there is no accountability. This is something the developer-appointed solicitor would be quick to deny; they are only attesting the purchaser's signature on the SPA. If so, what is the scale fee for?

The incentive to the developer is that such a purchaser's solicitor does not advise against the developer for he owes his business to the developer notwithstanding the advice of S. 84. The offence of this practice is that it defeats the public policy object of S. 84, namely to safeguard the purchaser.

A variant of the above practice is that the developer offers a discount to the purchaser to choose the solicitor from the developer's panel so that the solicitor can be counted on not to act independently for the benefit of the purchaser, and does not ask any awkward questions of the developer. This practice is also questionable on the grounds that the solicitor has compromised his independence notwithstanding the stringent terms of S. 84.

Perhaps the most egregious variant of the developer choosing the solicitor for the purchaser and offering him as solicitor for the purchaser, is the developer's choice of solicitor acting for the developer for a nominal fee and the same solicitor acting for the purchaser as well for the full scale fee purportedly taking advantage of the proviso to S. 84. The proviso states:

"Provided that if any such agreement in respect of the transaction is not scrutinized by an advocate and solicitor acting for the purchaser, the advocate and solicitor acting for the housing developer shall obtain a certificate signed by the Purchaser showing that the Purchaser does not intend to engage an advocate and solicitor to scrutinize it for him."<sup>11</sup>

The thinking among such developer-appointed purchasers' solicitors seems to be that their certification that the purchaser does not require a solicitor to advise him clears the way for them to act for the purchaser. It does not legitimize the wrongs: the loss of choice of solicitor; the conflict of interest; and self-serving interpretation to double the income of the developer-chosen solicitor.

The professionally responsible school of thought holds that if the purchaser does not require to be advised by a solicitor of his choice, he would certainly not want to be advised by any, certainly not the one nominated by the developer in view of the conflict of interest. This view is preferable for it makes for professional rectitude, rather than a cynical interpretation to get around the basic prohibition to double the income of the developer-appointed solicitor; from developer and purchaser.

If in the above situation, the solicitor who was not retained by the purchaser denies that he is acting for the developer and insists on acting for the purchaser and claims the full purchaser's solicitors fees, the purchaser should take back his documents and see a solicitor of his

---

<sup>11</sup> Rule 25: "An advocate and solicitor at the time of his being retained shall disclose to the client of all the circumstances of his relation to the parties, and any interest in connection with the controversy, which may influence the client in the selection of counsel." Legal Profession (Practice and Etiquette) Rules 1978.

choice and ask him to attest the purchaser's signature only, (if he does not require advice) and pay only the nominal attestation fee.<sup>12</sup>

The proviso to sec<sup>84</sup> was introduced to ensure that the purchaser has the right not to retain a solicitor. Given the wording of sec 84, without the proviso, it would be a statutory offence not to retain a solicitor.<sup>13</sup>

The proviso may also be a reminder to the solicitor acting for the developer of his professional duty in respect of an unrepresented party namely to advise him retain his own solicitor. In *Loh Bee Tuan v Shing Yin Construction (Kota Kinabalu) Sdn Bhd* Charles Ho J said: "In the instant case, I hold that a duty of care<sup>14</sup> arose as the fourth defendant (*solicitor*) knew that the plaintiff (*purchaser*) was unrepresented and the transaction was fraught with risks to the plaintiff (*purchaser*) as the property was heavily charged."

Having given this advice, and if the purchaser still declines to appoint his own solicitor, the developer-appointed solicitor may then issue his certificate under the proviso to sec 84 that the purchaser does not require that the SPA be explained to him, and proceed to attest the signing without any fees.<sup>15</sup>

The above questionable practice has now become 'institutionalised', as it were; as the 'No legal fees' inducement by developers. As a result of no action being taken by the Bar Council, and the Housing Ministry, developers are now offering 'No Legal Fees' only if the purchaser opts for the solicitor chosen by the developer. Why should developers be so determined to ensure that their purchasers do not choose their own

---

<sup>12</sup> Rules under the Sixth Schedule: 1 "A solicitor is not entitled to witnessing or attestation fee-(b) in a case where he acts for one party in a transaction (in this case the developer-vendor) and witnesses or attests the signature of the other party for whom he is not acting."

<sup>13</sup> Mr TKL, obviously an experienced solicitor, explained in a K L Bar newsletter to the effect that otherwise it would become a statutory duty to retain a solicitor which was not the intention of the Bar Council.

<sup>14</sup> The learned judge based the duty on the more universal duty of care in tort presumably because the Legal Profession Act apply did not in Sabah and Sarawak.

<sup>15</sup> SRO ,Fifth Schedule, Rule I (b).

solicitors? And are not independently advised? And do not enjoy the benefit of their solicitor's scrutiny of the SPA? 'In addition the purchaser is given the impression of getting legal representation without paying fees when in fact the fee has in all likelihood been factored into the purchase price and he receives no legal advice. The developer-chosen solicitor may act for the purchaser only to the permitted extent of attesting the purchaser's signing the SPA but is still not entitled to any fees from the purchaser; not even attestation fees.<sup>16</sup> The rule that such a solicitor is entitled to fees if the party whose signature he attests wants advice does not apply here because of sec. 84.

At the most the 'no legal fees' indulgence is (an inadvertent) observance of the position that the developer-chosen solicitor cannot take fees in attesting the purchaser's signing the SPA, in any event.<sup>17</sup> However, that is not all.

The 'no legal fees' arrangement is meant to defeat sec 84; to ensure that purchasers are not advised by their own solicitors. This is a racket that must be brought to an end as it is fraught with defeating public policy considerations: the purchaser loses his choice of solicitor; does not receive any independent advice and the 'fees' paid by the developer purportedly on behalf of the purchaser would have been factored into the purchase price.

The developer-chosen solicitor may act for the purchaser only to the permitted extent attesting the purchaser signing the SPA but is still not entitled to any fees from the purchaser; not even attestation fees<sup>18</sup>

---

<sup>16</sup> Rules under the Sixth Schedule: 1 "A solicitor is not entitled to witnessing or attestation fee-(b) in a case where he acts for one party in a transaction (in this case the developer-vendor) and witnesses or attests the signature of the other party for whom he is not acting."

<sup>17</sup> *Id.*

<sup>18</sup> Rules under the Sixth Schedule: 1 "A solicitor is not entitled to witnessing or attestation fee-(b) in a case where he acts for one party in a transaction (in this case the developer-vendor) and witnesses or attests the signature of the other party for whom he is not acting."

## Part 2

The Housing Ministry now plays the central role in the housing industry but who does it protect, the developer or the purchaser? This part discusses the role of the Ministry in protecting the rights of the purchasers.

### The Role of Ministry of Housing, Local Government and Urban Wellbeing.<sup>19</sup>

The housing industry or, more precisely, the developers, is supervised by the Housing Ministry which operates the following regime:

1. Housing Development (Control and Licensing) Act 1966 (Act 118) ('the Housing Act') as revamped in 2002. **The preamble** says, inter alia, "An Act to provide for...the **protection for the interests of purchasers....**" (emphasis added)<sup>20</sup>
2. Housing Development (Control and Licensing) Regulations 1989 ('the Housing Regulations');
3. Housing Development (Housing Development Account) Regulations 1991 ('the HDA Regulations');
4. Housing Development (Tribunal for Homebuyer Claims) Regulations 2002;
5. Housing Development (Compounding of Offences) Regulations 2002; and
6. The sale and purchase agreement, schedule G for landed properties and schedule H for strata properties (after this collectively 'SPA') and is compulsory

(hereafter collectively referred to as the 'Housing Law')

---

<sup>19</sup> Properly so called as 'urban wellbeing' overlaps 'local government' and in any case is not well-defined and seems sarcastic as a description for an organisation that is the main cause of construction of house buyers' houses being abandoned, and is unwilling to do anything about it.

<sup>20</sup> Originally, the *Housing Developers Act* for such was the concern.

**License,<sup>21</sup> Capital amount Deposited Part 11 Sec's 5-6B Housing Act**

All developers are now required to be licensed.<sup>22</sup> To undertake a housing development without a license is an offence that attracts only a fine; there is no provision for blacklisting or confiscation of assets or for their being taken over by another, reputable developer without any compensation to the offending developer, and both.<sup>23</sup>

The capital amount/deposit paid by developers under sec 6, for the benefit of purchasers and intended to be kept by the Controller is now raised to "3% of the estimated cost of construction as certified by an architect in charge of the housing development."

The sale and purchase agreement (SPA), made under the Housing Regulations, is the result of public disquiet which began in the late 1970's, when each developer had his own lop-sided standard-form sale and purchase agreement which they required purchasers to accept *in toto*. Judicial appreciation of the need to protect purchasers is clear:

---

<sup>21</sup> There are detailed provisions in the Housing Development Control and Licensing) Regulations 1989.

<sup>22</sup> Where houses are not meant to be sold or they are sold only after being built do not require the developer to be licensed. *Energoprojek (M) Holdings v PP* (1988) 5 MLJ 401; Rule 11 (1b).

<sup>23</sup> Failure to obtain the licence will not enable the developer to avoid his duties as a housing developer if the facts of his operations fall within the definition of housing development; *ABT Construction Sdn Bhd & Anor v Tribunal Tuntutan Pembeli Rumah & Ors*<sup>23</sup> In this case the developer had not obtained the developer's licence for building 21 houses though only 4 were built at a time and sold. In a decision that is fully cognisant of the purposes of the housing law, the Court held that the unlicensed developer was still subject to the jurisdiction of the Homebuyer's Tribunal. (Any other interpretation would have allowed the developer to take advantage of his own wrong.) Apparently, the practice of requiring the developer to obtain the developer's licence last enables the Housing Ministry to check if the developer has taken all the above steps including the requirements of the Housing Law but this also enables the developer to start without the developer's licence as soon as the approvals with respect to the land and building have been obtained from state government departments.

“We are mindful of the fact that the Act was intended to protect innocent buyers from some unscrupulous and dishonest doings of developers. There had been instances of developers who abandoned their housing projects when they ran out of funds to complete them, or heavily indebted to banks... and absconded after having accepted deposits or full payment from prospective buyers,... many also became bankrupt while others disappeared overseas out of the clutches of the law and legal process...”

This is *per* *Jemuri bin Sarjan C J Borneo Pinang Development Corp v Teoh Eng Huat & Anor*.<sup>24</sup> In *Beca (Malaysia) Sdn Bhd v Tan Choong Kuang & Anor*,<sup>25</sup> Lee Hun Hoe C. J. (Borneo) observed; “At the height of the housing boom, the purchasers of houses were at the mercy of unscrupulous housing developers... The situation became so bad that the law had to step in to protect the house buyers.”

However subsequent developments, in the writer’s view, show that it became easier for developers to undermine purchasers; they had only to influence the Housing Ministry so that the developers’ former standard-form now became effectively the Housing Ministry’s statutorily prescribed standard-form!<sup>26</sup>

The SPA is designed to enable developers to borrow before sale by charging the whole housing estate land and after sale too. Its principal benefit is to the developer who does not risk his own security for the loans. There is no risk to the developer, only to the purchaser.

The SPA is geared to the developer building the house only after selling it (the sell then build [s.t.b] mode) and makes use of the instalments of the purchase price to meet the building expenses; the developer is assured of cash-flow; as the purchaser pays enough to build, why are houses abandoned midway through construction; presumably the purchaser’s payments are diverted.

---

<sup>24</sup> [1993] 2 MLJ p97 at pp118 D-F.

<sup>25</sup> [1968] 1 MLJ 390.

<sup>26</sup> *Daiman Development Sdn Bhd v Mathew Lu Chin Teck & Anor* [1978] 2 MLJ 31 at p 32 It is submitted that purchasers should during negotiations raise matters of their concern with developers and establish them as collateral oral warranties by means of letters to the developer.



The Housing Development Account (HDA) Regulations' were introduced to ensure that the payments made by the purchasers were paid into a bank account operated by the developer and withdrawals made only for purposes of the housing development till it was complete. The auditing and monitoring of this account is weak as it is operated by the developer himself. Investigations of abandoned projects it has often found to be exhausted by premature withdrawals; there is usually no money left for the purchaser to continue with the construction of the house by means of a substitute developer/construction company. The HDA does no more than create some documentary evidence of the traffic in such account.

The Housing Tribunal was intended to be a relatively inexpensive and expeditious specialised tribunal for the resolution of house-buyers limited monetary claims against developers.<sup>27</sup>

Enforcement of the Housing Law is the weakest part of the Housing Ministry's administration.<sup>28</sup>

### **Part 3**

Predictably, developers did not welcome the passing of the Housing Act. According to Khaw Kai Boh, the then Housing Minister, one of the developer's leaders had said that if the bill was passed developers would not be able to send their children to school!<sup>29</sup>

### **Sections 7 to 9 of the Housing Act**

In Malaysia, a very large number of houses of uniform design are mass-built by developers, (licensed and unlicensed). They are the major source

---

<sup>27</sup> The success in getting awards is not matched by the success in collecting, either voluntarily or through the courts. The thinking seems to be that house-buyers should fend for themselves; use their own lawyers which defeats the whole purpose of the Tribunal.

<sup>28</sup> *Per* Prof Salleh Buang in *Housing the Nation; Housing, Policies Issues and Prospects*, p 173 a publication by Cagamas, Bank Negara.

<sup>29</sup> *Parliamentary Debates (Hansard)* 25<sup>th</sup> March 1966.

of housing; and a major force in the economy and have considerable political influence as seen by government representatives' solicitousness at Housing Ministry meetings which, of course, should be for purchasers.

Developers are organized as the Real Estate and Housing Developers Association or 'REHDA.'

### *Unlicensed developers*

The retention of solicitors, purportedly by developers to act for purchasers, should, at least, have ensured the legality of the transactions but that is not to be. Complaints made to the Housing Ministry and brought to the knowledge of HBA, indicate that hundreds of developers are unlicensed. These complaints were forwarded to the Bar Council for disciplinary action, only to result in an advisory from the Bar Council to all solicitors to be more careful in the future. If so what did the purchasers pay their solicitors for?

Purchasers are not organized. Their concerns are voiced mainly by purchasers themselves, occasionally by the media, and by a non-profit group of volunteers, the House Buyers' Association (HBA).

Banks, both the developers' lenders, and the purchasers', are also important players in housing development but are not parties to the SPA.

### **Developers' main statutory duties:**

The developers must take the responsibility for observing all the legal requirements of housing development:

- a. apply for the approval of the housing estate requirements: the land is subdivided into housing lots for the erection of houses and earmarked for other facilities such as roads, schools and other public amenities, 'the Layout Plan',
- b. apply for approval of the design of the houses and the materials to be used in construction, the Building Plan. At this stage, the State or local government would also stipulate the categories of houses to be built: low-cost lots, 'bumiputra lots' and 'bumiputra discount' lots.

- c. if he has not obtained it already, apply for the developer's licence and meet other requirements
- d. apply for the Advertisement and Sale Permits;
- e. prepare the SPA<sup>30</sup> as the developer is required to sell the subdivided lots according to the prescribed SPA only.<sup>31</sup> Developers who attempted to avoid their statutory obligations by separating the selling of the land from the building of the house on it as if they were unrelated transactions by having two separate agreements with the purchaser have been unsuccessful: *City Investments Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd*; <sup>32</sup> Likewise developers who attempted to contract out of the SPA by having additional terms- *SEA Housing Corporation Sdn Bhd v Lee Poh Choo*<sup>33</sup>- or supplementary agreements- *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Interveners)*<sup>34</sup>
- f. Attends to the business end of dealing with purchasers and developer's banks. Where the authority of the proprietor is important to the development of the housing estate, he obtains a Power of Attorney so that the developer may attend to certain matters himself, except for signing of the transfer form in favour of the purchaser which the proprietor has to do himself.

---

<sup>30</sup> Rule 11 Housing Regulations.

<sup>31</sup> Housing Regulations.

<sup>32</sup> [1985] 1 MLJ 284.

<sup>33</sup> *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 FC.

<sup>34</sup> *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh & Ors, Interveners* [1983] MLJ 364; *Bhagat Singh s/o Surian Singh* [1984] 2 CLJ 100.

## Part 4

### **Buying a yet-to-be-built house from a developer; clauses 1-11 of the SPA**

The Duty of the purchaser's solicitor include the following:

1. He must make a search at the Housing Ministry to make sure the developer is licensed. The fact that the developer has a solicitor acting for him does not mean the purchaser's solicitor may assume the developer is licensed. There have been several instances of unlicensed developers who had retained solicitors to create an impression of legality of the transaction with disciplinary implications for the developer's solicitor. More seriously for the developer, the failure to obtain a license renders the transaction invalid as the licence as well as the legislation is for the protection of the purchaser. Acting for the purchaser from an unlicensed developer or for the unlicensed developer has certain professional negligence implications for the solicitor.
2. Make sure at the Housing Ministry that the developer has obtained the Advertisement and Sale Permits
3. He must make a search at the Insolvency Department to ascertain that the developer is not wound up nor insolvency proceedings are afoot against him such as winding up or bankruptcy; this search will have to be made against both the developer and the purchaser.
4. At the Land office check the particulars of title given by the developer, and if the developer is not the proprietor, who is the proprietor?; and, whether he is a party to the SPA?<sup>35</sup>
5. Above all, to make sure of charge/s and caveats, if any, on the title/s to the housing estate land.
6. The developer is required to sell making use of the SPA. However failing to do so is only an offence and does not invalidate the transaction.<sup>36</sup> If the purchaser goes to see his solicitor first, the

---

<sup>35</sup> It is absolutely essential that the proprietor be made a party to the SPA as he has to sign the transfer form eventually.

<sup>36</sup> Rule 11b Housing Regulations'1989.

solicitor is expected to write to the developer or the developer's solicitor for a copy of the SPA and undertake<sup>37</sup> to return it within 14 days in the event the purchaser does not proceed with the purchase. As it is a legal requirement that the SPA has to be in the prescribed form, perhaps the first duty of the purchaser's solicitor is to ensure that it complies. There should be a provision that any developer-produced sale and purchase agreement that does not comply with the statutory sale and purchase agreement should be read to comply with the norm.

7. Demand from the developer documentary evidence of the appropriate approvals and other matters referred to in the recitals: conversion of the land to 'building' category; Layout Plan Approval; and subdivision into housing lots as these are crucial requirements. As noted earlier, these are dealt with in the non-operative part of the SPA and therefore may not be enforceable.
8. Inquiries should also be made of the developer as to the amount of the developer's pre-sale loan/s secured by the housing lot in question and of the redemption sum per lot and whether the developer has any arrangement to settle it during the construction stage from the instalments of the purchase price, clause 2(1), so that it is settled by vacant possession time as he has undertaken to do.
9. Inquire of the developer whether the developer proposes to take any further loans after the sale under clause 2 and inform the developer about the purchaser's objections in terms of the impact on the redemption sum.
10. The purchaser or the purchaser's solicitor should on being retained seek information about the developer himself which he is required to under the Housing Act.
11. Do not expect any cooperation from the developer about the matters referred to above. You may have to advise your client about it and to make written inquiries (resort to requisitions, if need be), and still be prepared to be accused by your client of scuppering the deal!

---

<sup>37</sup> Rule 11 (4).

## Part 5

### Scrutiny of the SPA- Duty of the Purchaser's Solicitor

#### The preliminaries

The Bar Council has to its credit seen to the inclusion of S. 84; but how well is it observed by the legal profession?

S.84 of the Legal Profession Act 1976 specifically refers to the SPA as the focus of the purchaser's solicitor's duty of 'scrutiny' (to **examine critically or observe**<sup>38</sup>); not merely 'peruse and advise' which is the usual language of lawyers. However, this is not a clause-by- clause analysis of the SPA and related legislation. It does not substitute the purchaser's solicitor's duty.

#### i) The Commencement

The purpose of the Commencement, among other things, is to identify the parties, describe them and to give them suitable nicknames for easy reference subsequently in the document.

#### ii) Parties

Amazingly, the entity that holds the Developer's Licence is not described as the 'developer'. He is instead described as the 'vendor'. Why? As the vendor is in fact the developer and holds the developer's license all that legislation says about the developer applies to the 'vendor'. The developer and proprietor should be jointly referred to as the vendors; and as 'developer' and 'proprietor', respectively where they need to be referred to distinguishably. The 'bridging financier' or developer's bank is not a party to the SPA though an important player as he takes the charge (like a 'third party' charge) on the purchaser's property given by the developer. The 'end financier' the bank the purchaser borrows from, and takes the 2<sup>nd</sup> charge on the purchaser's property is also not a party to the agreement.

'Proprietor' Where the developer is not the registered proprietor of the land, the proprietor is required to be a party in his own right to the SPA and, state that he has, consented to the sale. The reason for this is so that the proprietor, whose role is comparatively passive, is bound to

---

<sup>38</sup> O.E.D.

perform the all- important duty of signing the transfer form eventually. In *Foong Seong Equipment Sdn Bhd v Keris Properties (PK) Sdn Bhd (no 2)* CA [2009] 5 MLJ 393 it was held that the proprietor could not refuse to sign the transfer forms in favour of the purchasers. In *Foong Seong Equipment Sdn Bhd v Keris Properties (PK) Sdn Bhd (No 1)*<sup>39</sup> it was held that the SPA was a tripartite agreement and the proprietor was therefore subject to the housing law as much as the developer and the joint venture agreement too had to be read in conjunction with the housing law.

Why is the purchaser juxtaposed between vendor/developer and proprietor as if he is entering into separate agreements with each of them; with the proprietor to buy the land, and with developer for the services and undertakings involved in building the house on it? However, as the house is part of the land<sup>40</sup> and the developer provides the service of turning the land into a housing estate, the SPA is a three-party agreement with two sides: the purchaser on one side, and the developer and the proprietor on the same side; and should be described collectively as ‘the vendors’, as they stand on the opposite side as the purchaser.

The developer and proprietor are not bound by a ‘joint and several liability’ clause. The concern of the purchaser is that disputes between the developer and the proprietor should not negatively impact on the purchaser e.g. the purchaser should not be told by the developer that the transfer cannot be done because the proprietor would not sign over his rights to the developer because of disputes between them, and the proprietor should not tell the purchaser that he would not sign the transfer form till the developer has given him what was promised. This would put the purchaser in an invidious situation; in having to decide who to sue; the purchaser may well have to decide who is at fault.

If the purchaser sues both, jointly and severally, one of them is bound to apply to the court for his name to be removed on the grounds of misjoinder, and if he is successful the purchaser will have to pay costs. The object of describing the developer and proprietor collectively as ‘vendors’ is to ensure that all the provisions of the SPA which refer to

---

<sup>39</sup> [2009] 5 MLJ 381.

<sup>40</sup> Sec 35 Interpretation (h).

one or the other party inures to the other. The developer has seen to it that it has the convenience of such a clause against joint purchasers.<sup>41</sup> Such a provision is not substantive and does not upset the balance in terms of the interests and obligations of the parties; it merely assists the operation of the SPA.

### iii) The Date of the SPA

The date is significant as the construction periods-24 months under sch G and months under sch H- begin to run from the date of the SPA. By entering a much later date, the developer is able to give himself more time for the completion of construction. Following solicitor's practice the purchaser in signing the SPA is not likely to enter the date he signed; he would forward the signed and undated and unstamped SPA to the developer to sign and enter the date, then returned to the purchaser's solicitor to do the stamping. In returning the SPA to the developer for him to sign, for what it is worth, the purchaser's solicitor should inform the developer's solicitor in writing about the date the purchaser signed the SPA; it would enable the purchaser to see if the developer has unilaterally 'extended' the construction period.

### The Recitals<sup>42</sup>

As is well-known, recitals are not the operative part of any agreement but may be referred to shed light on the operative provisions where they are ambiguous. However, the Recitals in the SPA deal with some matters of fundamental importance to the interests of the purchaser and the legality of the transaction itself:

- a. that the developer has already borrowed and has charged the land on which the housing estate is to be built as (the pre- sale loan). The serious implication of this pre-sale charge is that purchaser buys encumbered property without being advised about the total amount borrowed by the developer which the developer will have to pay to obtain release of the whole housing estate ( the developer's redemption sum ) or in respect of the

---

<sup>41</sup> Rule 31 does not include 'vendors'.

<sup>42</sup> 'Preamble' in the standard form.



subdivided lot (the 'redemption sum per lot' which is the developer's redemption sum divided equally over the number of housing units to be sold) which is important so that the purchaser may satisfy himself as to whether the purchase price of his lot is enough to settle the redemption sum per lot.

- b. the developer has, applied for subdivision of the land into the individual lots for the construction of the houses to be sold to individual purchasers;
- c. there is no mention of the conversion of the land to the building category; legal logic and rectitude dictate that land must be converted to the appropriate category of land use first before it may be so used for that purpose. With the instances of unconverted land being used for housing, it is amazing that this matter has still not been dealt with as an important undertaking to the purchaser in the operative part of the SPA. This is a serious flaw.
- d. separate documents of title have since been/not yet been issued by the Appropriate Authority. Is this because, the developer's charges are still on the land and subdivision and separate titles cannot be applied for yet. Though this is going to be the basis on which separate titles are going to be issued, it is not clear if this step has been taken yet. Some developers do this early and are able to produce the separate title documents at the time of sale. Developers seem to have an option. This uncertainty has serious implications for the purchaser's title to his property where he has paid the purchase price in getting it released from foreclosure.
- e. There should be a warranty and declaration by the developer in the operative part of the SPA that:
- f. the developer is licensed;
- g. the developer and the proprietor undertake that the matters therein are true and the basis of the SPA giving the purchaser the right to terminate the SPA if any of the matters referred to in the recitals are untrue. Without a 'warranty and declaration' clause in the operative part of the SPA, the very important matters dealt with in the recitals will remain aspirations only; things which the developer will try to do but is not liable if he does not.

- h. The purchaser must be told that the developer may terminate the SPA for even one default of the instalment and other such-like events; Clause 10(1) a-d. The developer may then his claim his losses from all from the payments made by the purchaser refunding only the residue; clause 10(i-iv). The money paid back to the purchaser bears no relation to the fact that the purchaser contributed to the cost of the construction materials which have now become incorporated into the house, and taken away by the developer for resale to a new purchaser who will compensate the developer again. The defaulting purchaser must be compensated for this. Is this a fair way of compensating the developer for the losses he claims to have suffered? No. For one thing it varies not with the extent of the breach but with the stage of the progress of the transaction at which it occurs though the breach may be the same. The principle consequent on forfeiture taken from sale and purchase of completed houses has no relevance to the transaction where the purchaser contributes to costs of construction. This way of assessing the damage is not objective but amounts to punishing the party allegedly in breach, and is unheard of, in contractual liability.
- i. the buyer should be advised that there is no provision allowing the purchaser to terminate the SPA.
- j. The sell-then-build: As the house has yet to be built, the SPA conflates two agreements: one is a typical agreement for the sale and purchase of a piece of land and the other is a building(house) construction agreement.
- k. An all important feature of the SPA is that it predicates the developer selling and only then building; the 'sell- then- build' (s-t-b system). This is one of the main causes of problems to the purchaser and not just in terms of the quality of the finish.<sup>43</sup>

---

<sup>43</sup> In fact if the houses were sold after being built, there would be no need for the SPA. Rule 11 (1B) Housing Development (Control and Licensing) Regulations 1989.

- l. As the purchaser buys 'off plan'<sup>44</sup>, the purchaser has no opportunity to inspect the property, and can only go by the documents such as the building plans, on what is to be built. These documents are important and need to be annexed to the SPA.

The Layout Plan (Recital no 4) and Building Plan (Recital no 5) should be annexed to the SPA.<sup>45</sup> In *K C Chan Bros Development Sdn Bhd*<sup>46</sup> a case of purchasers of low-cost houses who alleged that in the course of construction the developer had cut some corners in the design and specifications. The court said the complaints of the purchasers could be considered only in light of the approved plans which are to be taken as annexed to the sale and purchase agreements though these were not. It gives the purchaser the impression that the purchaser is entitled only to the four-walls-and-roof-and-handkerchief-sized open space in front of their houses. A purchaser is entitled to more.

- m. The purchaser may have been seduced by the external features too. As house purchasers, especially young couples intend to raise their families in their new homes. They are susceptible to such features as playgrounds and open spaces or green lungs. If the layout plan does not feature the playground but the developer is rather mouthy about it at the time of sale in answer to the purchaser's questions, the purchaser should take down the answers and the name of the developer's staff and designation

---

<sup>44</sup> The buyer goes into the transaction without seeing the house, the drawings are all that he sees, a situation that when things go wrong may be described as 'buying a pig in a poke'. A poke being a small bag in Scottish slang into which a farmer may have introduced a small animal and sold it as a pig which the unwary customer buys without examining its value or contents Oxford Dictionary of Idioms by John Ayto. This is a gem of a description for the way houses are sold by developers to purchasers in Malaysia.

<sup>45</sup> HBA appear to have finally succeeded in persuading the Housing Ministry to enforce the duty of developers to provide purchasers with a full set of detailed approved documents of the property purchased; Joint meeting on 22<sup>nd</sup> January 2014.

<sup>46</sup> [2001] 6 MLJ F-! and at p 848 A-1.

and have the purchaser's solicitor confirm this in writing. It may constitute what is known in law as 'a collateral oral warranty to the transaction' and may be read into the SPA to make it binding on the developer.

- n. These matters are not provided for in the SPA because the SPA is a standard form to be used in a whole range of property transactions where the details vary. However, it does not mean these details cannot be added; the law allows it but rare is the developer who would allow it. That is why the purchaser must have his own lawyer (not the worthies chosen for the purchaser by the developer) and build up his own forensic materials for future use.
- o. The density of the area is the number of people expected to live in the area. It makes all the difference between spaciousness and over-crowdedness, and it stresses the public facilities.
- p. The quality of a housing estate may also be affected by the mix of types of houses and other buildings in it. Their distribution is also to be taken note of as it may affect convenience to the occupants. Developers seeing that certain types of houses are selling well may sometimes add more houses of that type during construction than was approved. As this affects the quality of life the purchaser having bought his house believing that only a certain number of houses is going to be built, has a cause of action against the developer; he can no longer be told by the developer to talk only about what he has paid for in the SPA or to be silent.
- q. Developers have taken advantage of the lack of knowledge among purchasers to engage in corner-cutting; making unauthorised alterations in the measurements; using sub-standard or alternative materials, and changes in the facilities such as wiring and plugs; plumbing and other ways of saving costs, hoping the purchaser may not discover these things in time, at least for the duration of the Defects Liability Period. Without expert knowledge the purchasers may be handicapped in their fight with developer. They should consider engaging a private architect, of the kind that have now come into existence, to check the work of the developer.

- r. Advertisement and Promotional materials: As houses are sold and then built by developers, the non-existent houses require developers to make use of materials to aid the would-be purchaser's imagination. As these may be made use of to mislead purchasers control is necessary. Under the 1989 Regulations developers are required to give "accurate and true particulars" of the advertisements of their housing schemes, if not, on conviction be fined a sum not exceeding RM 20,000 or face imprisonment not exceeding five years or both; if ever there is a prosecution. Hence, the need for actual dimensions of the property and the purchase price is to be given. Developers are required to submit mock-ups to the Ministry for its approval. They enable the Ministry to check on the likely advertisements of developers, and also, if they are minded to, to easily prove the deviations from the approved versions.
- s. Promotional materials, not part of the SPA, which are calculated to mislead and which have misled purchasers may give purchasers a private right to a civil suit against the developer where the Housing Ministry cannot be moved to act. In a Singapore case<sup>47</sup> where the developer's brochure had boasted of 'a panoramic view of the sea', the court held that it gave the purchasers a right to sue if they had been induced by it.
- t. The concern is with the accompanying verbiage which may be more seriously misleading than the pictures: claiming an amazingly short travelling time to important places without mentioning the mode of travel! ; proximity to upmarket Mont Kiara even if the place is closer to Segambut! or that it is within sight of famous landmarks such as Petronas Twin Towers to get a higher premium;<sup>48</sup> guarantees of return on investment are promised.

---

<sup>47</sup> Chan Char Tng & Or.v Housing and Urban Development Co(Pte) S'pore[1981] 2 MLJ 298.

<sup>48</sup> Contributed by Chang Kim Loong.

## **Part 6**

### **Scrutiny of the Sale and Purchase Agreement: Developer borrowing by charging the purchaser's house**

This part deals with the greatest risk to purchasers, provisions of the SPA which allow the developer to borrow from banks on the security of the purchaser's property. It is therefore fraught with peril of the purchaser losing his property through no fault of his own. If the developer does not use the purchase price to pay the developers bank or his creditors as he should to release the housing lot from the developer's charge on it, the liability of the developer decreases by the amount recovered, but the purchaser remains liable to the developer's bank.<sup>49</sup>

It is obvious why sec 84 makes this the most important feature that the purchaser's solicitor must advise the purchaser about. It is risk-free to the developer; if he defaults it is the purchaser's house which is auctioned off. The instances this has happened are legion. The developer has all to gain and nothing to lose unlike the purchaser who still has the loan to settle with interest running on it; and no house!

### **History of the Provision: The position in 1969; the pre-sale loan; Recital 3**

Even before its sale, the developer would have borrowed on the security of the land intended for housing development without subdividing it. It is acknowledged in the recitals (No. 3 of 1989 version of the SPA) but the amount of the loan is not disclosed. The purchaser buys a property that has been encumbered. The land is divided into housing lots but the loan is not apportioned amongst the housing lots so the purchaser does not know how much of the loan is secured by his housing lot.

The story began, typically, with the developer, MK Retnam Holdings, subdividing a piece of land into housing lots and offering them for sale. The lots were sold under the then statutory standard-form sale and purchase agreement.<sup>50</sup> The statutory sale and purchase agreement

---

<sup>49</sup> See A Short Account of Experience of Purchasers at the hands of developers.

<sup>50</sup> See Housing Developers (Sale of Housing Accommodation) Rules 1969.

prohibited: “After a contract of sale has been signed, the Housing Developer shall not subject the land to any encumbrance.”

The developer then unlawfully introduced a clause 3 which said: “Subject to the provisions hereof, the purchaser agrees that the vendor may subject the land sold to the purchaser to encumbrances at any time *after* the signing of this agreement.” (There was also an additional clause which assured: “The land sold to the purchaser shall be free from encumbrance immediately prior to the handing of vacant possession of the building to the purchaser.”)

After selling the property, the developer charged it to Kheng Soon Finance as security for a loan, which was registered but the finance company, as it turned out later, did not have a licence, and the developer soon defaulted. The attempt to foreclose was defeated in the High Court because the learned judge Wan Hamzah J crafted a ground that the clause allowing the developer to borrow on the security of the purchasers’ land did not go to the extent of allowing the developer to put the land in jeopardy, and was held to be invalid, and unenforceable.<sup>51</sup> Shortly after that the purchasers successfully applied to intervene<sup>52</sup> and for specific performance.

The finance company appealed to the Federal Court where again it was unsuccessful. Salleh Abas C J (as he then was) had other reasons. The learned judge made the purchasers’ interest the court’s central concern: “Now that the respondent (developer/chargor) has failed to pay the interest and is unable to repay the capital, should the appellant (developer’s bank/chargee) be allowed to pull out from the deal, leaving the innocent purchasers in the lurch? Should the appellant be allowed to pursue its narrow interest in the preservation of its loan and interest due on it when it was a willing party to the project by lending the money to the respondent, regardless of its social and moral responsibilities and the purchaser’s equities? We have no doubt that these purchasers have acquired equities and could specifically enforce their sale and purchase

---

<sup>51</sup> As quoted by Salleh Abas C J (Malaya) ,(as the learned judge then was), in *Kheng Soon Finance Sdn Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] MLJ 364 at pp 386 H-I left column and A-F right column.

<sup>52</sup> *Bhagat Singh s/o Surian Singh v MK Retnam Holdings Bhd* [1984] 2 CLJ 100.

agreement against the respondent, but for the charge which they were gullible enough to authorize the respondent to create. It is in order to enable the court to do justice in situations such as this that the legislature thought fit to enact subsection (3) of 256 of the National Land Code in order that order of sale would be allowed only if the court is satisfied with the non- existence of a cause to the contrary.”<sup>53</sup> Not an automatic conclusion on default. The prior interest of the purchaser, known to the developer’s bank, was clearly a cause to the contrary against the developer’s bank seeking an order for sale.

The finance company then went to the Privy Council. With respect to the position of the purchasers, Lord Oliver of Aylmerton said: “Their Lordships can see no ground upon which such an equity could be claimed.”<sup>54</sup> It seemed (unduly) impressed by the fact that the purchasers had consented to the charge though they said this was by way of argument only, the more important reason being “that the appellant’s charge was duly registered.” The Privy Council was inclined to grant the application to foreclose but for the late discovery of the fact that the developer was unlicensed. It remitted the case to the Malaysian court. The Privy Council affected not to be able to understand the reasons given by Wan Hamzah J for rejecting the foreclosure and it was unduly impressed by the fact that the purchasers had consented to the charges though this was brought about by tampering with the statutory sale and purchase agreement.

At the High Court remission hearing, the learned judge, Anuar J, among other things, followed Wan Hamzah J’s decision on the illegality of clause 3: “The developer had included the above provisions with the obvious intention of circumventing the mandatory clauses made under the Rules by imposing on the purchasers a blanket approval upon the signature of the contract. Clause 3 clearly infringes the substance of r 12 (1) by negating the effect of clause 4 by purporting to confer authority on the developer to create a charge binding on the purchasers. The maxim *quando aliquid prohibiter fieri, proohibetur ex directo et per obliquum*

---

<sup>53</sup>*Keng Soon Finance Bhd v M K Retnam Holdings* [1989] 1 MLJ 457 at pp 460 F-G left column ; 1 SCR 291.

<sup>54</sup> *Keng Soon Finance Bhd v M K Retnam Holdings* [1989] 1 MLJ 457 at pp 460 F-G left column ; 1 SCR 291.



(where a thing is prohibited, it is prohibited whether done directly or indirectly), applies.”

The prolonged, expensive litigation almost ended in a Pyrrhic victory for the intervening/ purchasers, who had also applied for specific performance. The, by then abandoned, property was ordered to be transferred to the purchasers; without paying the balance of the purchase price which was set off against their claims against the developer for late delivery, which by then far exceeded the balance purchase price than was otherwise due the developer.

The redeeming feature of the cases is the concern of the Malaysian judiciary (in contrast to that of the Housing Ministry) to save the purchaser's position, as seen by the decisions of the learned Wan Hamzah J who interpreted the provision to mean that the developer could borrow without jeopardizing the purchaser's interest in the property he had bought; Abdul Razak J who had anticipated the Federal Court decision; and Salleh Abas CJ (Malaya), as he then was, on appeal in the same case, all of whom asserted the protective nature of the legislation requiring solicitous treatment of the house-buying public.

### **Amendment of the Statutory Loan Provision**

Instead of taking the right lessons from the case of a developer's willingness to flout the law, the Housing Minister, seems only to have noted the claimed necessity of developers to take further loans and how their interests may be served notwithstanding the risks to purchasers' interests. And the provision was amended. The Housing Ministry took a leaf with alacrity, from the questionable success of the developer, MK Retnam Holdings. In the very year the Privy Council remitted the decision to the Malaysian Court of Appeal, the Housing Ministry, without waiting for the decision on the remitted case, turned it into outright victory for all developers.<sup>55</sup>

For the convenience of the reader, the current state of clause 2 is unscrambled below:

---

<sup>55</sup> See the Housing Developers (Control and Licensing) Regulations 1989.

“Clause 2(1): The vendor ( i.e. developer) and the Proprietor shall not immediately and at any time after the date of execution of this Agreement subject the said land to any encumbrances without the prior approval of the Purchaser and the Vendor/developer hereby undertake that the said Property shall be free from encumbrances immediately prior to the Purchaser taking vacant possession of the said Building ,(and this after more loans is indeed meaningless), (sub - clause (2) continues contradicting sub-clause 1): “The Purchaser shall grant such approval to the Proprietor and the Vendor encumbering the said Land for the purpose of obtaining credit facilities from any bank.....(a) only if the Purchaser has received confirmation in writing from the relevant bank.....disclaiming their rights and interests over the said property-and an undertaking to exclude the said Property from any foreclosure proceedings.....”

If so, what is the value of the charge to the developer and the developer’s bank if the developer has right from the outset renounced all his interests in it?

To put it simply, it means the developer wants to borrow some more, and as if to convince the purchaser about the developer’s financial position he is to be given the developer’s redemption statement; whatever for?: so the purchaser is suitably frightened about the developer’s liabilities? so that the purchaser cannot claim that he did know?

The risk to the purchaser is that the purchaser may not even know about the loans taken by the developer as the purchaser’s consent may, according to cause 2(1), be assumed.

Would the charge created under the National Land Code (NLC) reflect that the developer would clear it by vacant possession time? The simple truth is that developer is head over heels in debt with the developer’s banks and cannot be expected to settle its debts from the purchase price paid by the individual buyer of a lot. The encumbrances are removed only at the time of registration of the purchaser as proprietor; and developers have cleverly provided vacant possession as a sop till registration of the purchaser as the proprietor to be satisfied with till completion by the developer. Therefore, the SPA provides that the developer should be able to retain it as security for as long as the developer needs it!

Clause 2(1) This clause, the oldest extant and remaining in subsequent editions of the SPA and retained after every provision of the SPA allowing the developer to borrow more and more; does not seem to have

made a dent to the developer's growing indebtedness. While the Housing Ministry is making amendments to ensure the developer can borrow some more, the Housing Ministry has in cahoots with the developer, has left clause 2(1) intact for the illusory benefit of the purchaser.

The SPA was amended again by the insertion of Clause 2(2) which promised to release the purchaser's property from foreclosure proceedings (arising from the developer's default, of course) only if the purchaser consents to the developer taking a further a loan by charging the purchase's property! Shouldn't the purchase's property be released from encumbrances as a matter of course once he pays the purchase price whether or not the developer has met his liabilities? This is indeed a double somersault by the developer making it look as if it is for the benefit of the purchaser! It seeks to assure the purchaser that the developer will ensure the release of the purchaser's securities from encumbrance by vacant possession time. This provision (extant since the first edition of the SPA when the developer secured only the purchaser's property from the first pre-sale charge) has been overtaken by circumstances. The developer has since borrowed several times: the first time before sale; clause 2(1) without express consent of the purchaser; under clause 2(2) for the expressed benefit of the developer's bank; and finally, under clause 2(3). Again and again the assurance was given though the prospect of it being honoured becomes dimmer: "The land sold to the purchaser shall be free from encumbrance immediately prior to the handing of vacant possession of the building to the purchaser."

The obvious answer is that the developer does not pay the developer's bank progressively so that property is free from encumbrances by Vacant Possession/Practical Completion Time which is why clause 2(1) the 2<sup>nd</sup> limb is a dead letter: The Proprietor and vendor (i.e. developer) hereby undertake that the said Property shall be free from encumbrances immediately prior to the Purchaser taking vacant possession of the said Building i.e. purchaser's house.

For what is worth, it is necessary to remind purchasers that the purchaser should request the developer when he announces that the property has reached Vacant Possession / Practical Completion whether the developer has settled the loan/s taken by the developer so that it is free from encumbrances. Again, the Housing Ministry did not see it fit to require the developer to state in the SPA the amount of the redemption

sum per lot (i.e. total pre or post sale loan charged on the whole housing estate divided equally by the number of housing lots) the developer has borrowed so that the purchaser can satisfy himself whether the purchase price will be enough to pay the redemption sum per lot. This is a standard precaution in all purchases of encumbered property from non-developer vendors.

Clause 2 (ii) is interesting because it acknowledges for the first time that the buyer's lot can be treated separately from the housing lots in general whereas for the purpose of securing the developers' loan/s it is taken as one security with the attendant risks if the developer borrower defaults. The implication being that the developer has the comfort of all the housing lots for the purpose of securing the loans but will the purchaser's housing lot be released once the purchaser pays the purchase price? Will the developer be entitled to say: no doubt he has paid the purchase price but not the redemption sum on the entire housing land? Or some such plausible nonsense.

However, a further question is: Why cannot this be done with respect to all the loans taken by the developer including the pre-sale loan so that each buyer who pays the purchase price can secure release of his property by vacant possession time so that even if the project is abandoned the purchaser gets his lot free from the lots encumbered by the developer's bank?<sup>56</sup>

As if to assure the purchaser, clause 2(2) states where the purchaser consents to the developer taking additional loans on the security of the purchase's property, the bank shall withdraw the property from foreclosure. What form of security is this to the developer? Is this in the NLC charge given by the developer to the developer's bank? Is this promise binding on the developer's bank which is not a party to the SPA? Is this to be done by the developer? Without payment by the developer? Without the necessary amendments to the NLC? Or the charge document? What if the developer has taken additional loans? Is it not in the developer's interest to let the property to be foreclosed so that the developer's liability is reduced?

---

<sup>56</sup> *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd* [1991] 3 MLJ 169 (SC).

Clause 2 (3) which follows is<sup>57</sup> in exactly the same terms and purported safeguards as clause 2(ii).<sup>58</sup> So is it another clause for borrowing? So there are now 3 sub-clauses in a thinly disguised manner to look as one or 3? It is far cry from the first SPA which allowed the developer to borrow only once and that too before sale. The developers/the Housing Ministry seem to have engaged a master at obfuscation to draft the SPA.

Finally, the question still remains: As the developer receives the purchase price before he builds, why does he have to borrow at all? ; and why on the security of the purchaser's house so the purchaser has to take the risk of foreclosure if the developer does not pay? And why is the purchaser allowed to borrow so much more than the purchase price which sets the stage for disasters for purchasers who have paid the full amount of the purchase price?; and why is the loan to the developer secured by the un-subdivided / whole title to housing estate not just the purchaser's title to his house. The SPA allows developers to take more than they would be entitled to as the purchase price; as it is law it is made to look bona fide and proper; and being subsidiary legislation, it is non-negotiable; to purchasers.

*(To be continued to Part II in the next volume of the IIUM Law Journal)*

---

<sup>57</sup>. The clause begins: "In the event, (in plain English 'If') the said land shall be encumbered by the developer...", why not more honestly, 'In the above case' if that was meant to be...' And how and when does it come into operation? There is no indication of the number of times, the developer may borrow: the usual phraseology: 'In addition to' ,or 'without prejudice to the generality of the foregoing', etc is absent for the obvious benefit of the developer ). the developer may borrow yet again by charging the purchaser's house.

<sup>58</sup> For an agreement meant to be read and operated by a range of purchasers of different levels of education, the SPA flouts all the standards of Plain English drafting).

