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SPECIAL FEATURE:

SCRUTINISING THE DEVELOPERS' SALE AND PURCHASE AGREEMENT BY THE PURCHASERS' SOLICITORS AS REQUIRED BY SECTION 84 OF THE LEGAL PROFESSION ACT 1976[*]

PART II

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ABSTRACT

This article was conceived by as an object lesson on how Islamic teachings may be incorporated into the Civil law to improve its moral contents. It was written in memory the author's son Muhammad Zayd bin Bohorudin (1985-2017), advocate and solicitor, and alumnus of the Ahmad Ibrahim Kulliyyah of Laws ('AIKOL)'. It is a continuation of Part I, published in the IIUM Law Journal Vol. 26 (2) 2018.

In this part, the issue of constitutionality of the developer using the purchaser's property to secure loan is discussed. It furthermore examines the defects and weaknesses in the operation of several clauses in the Act to the purchaser. Other key issues discussed are the criticism on the house purchase loans, the purchase price and other expenses, the post-execution

[*] The title of the first part of the article was 'SCRUTINISING' THE DUTIES OF A SOLICITOR TO ADVISE THE PURCHASER IN THE PURCHASE OF A RESIDENTIAL PROPERTY AS REQUIRED BY SEC 84 OF THE LEGAL PROFESSION ACT 1976. The author wishes to amend the title as it is a more accurate reflection of the subject matter discussed in the article.

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position of the purchaser as beneficial owner, construction issues, and the developer's first duty, namely to give clean title to purchaser. At a later part of the article, the position of purchasers in relation to the abandonment of the housing estate, foreclosure, private sale and other disasters are scrutinised. Purchasers' rights pertaining to the completion of the construction, transfer and registration of the house, as well as their right to life vis-à-vis housing matters are assessed.

Keywords: duties of solicitors, purchase of residential property, right of purchaser, s.84 Legal Profession Act, right to life

MAKALAH ISTIMEWA:

MENGAMATI PERJANJIAN JUAL BELI DARI PARA PEMAJU OLEH PEGUAMCARA PARA PEMBELI SEPERTI YANG DISYARATKAN OLEH SEKSYEN 84 AKTA PROFESION UNDANG-UNDANG, 1976

BAHAGIAN II

ABSTRAK

Makalah ini telah ditulis sebegai suatu panduan tentang bagaimana ajaran Islam boleh diguna pakai di dalam undang-undang sivil bagi mempertingkatkan kandungan moral undang-undang tersebut. Ianya ditulis oleh penulis bagi memperingati anaknya, Muhammad Zayd bin Bohorudin (1985–2017), seorang peguambela dan peguamcara dan bekas pelajar di Kulliyyah Undang-undang Ahmad Ibrahim (AIKOL). Ianya merupakan sambunag dari Bahagian I yang telah diterbitkan di dalam IIUM Law Journal Vol. 26 (2) tahun 2018.

Bahagian ini menimbulkan permasalahan mengenai isu kesahan tindakan para pemaju menggunakan harta pembeli bagi mendapatkan pinjaman. Ini dilihat dari sisi perlembagaan. Ianya seterusnya memeriksa kecacatan dan kelemahan di dalam klausa yang berkenaan. Beberapa isu penting juga dibincangkan dan ini termasuk kritikan keatas pinjaman perumahan bagi membeli rumah, harga belian dan juga perbelanjaan lain, posisi pembeli sebagai pemilik yang mempunyai faedah (beneficial owner) setelah perjanjian dilaksanakan, isu pembinaan dan tanggungjawab pemaju untuk memberi geran pemilikan yang bersih kepada pembeli. Kemudian, makalah ini turut membincangkan kedudukan pembeli berhubung dengan projek perumahan yang terbengkalai, perampasan, jualan peribadi dan jika berlaku apa-apa bencana lain. Hak pembeli mengenai penyempurnaan

struktur bangunan, pemindahan dan pendaftaran rumah tersebut serta hak mereka untuk tinggal di dalam rumah tersebut turut dinilai.

Kata kunci: tanggungjawab peguamcara, pembelian harta kediaman, hak pembeli, seksyen 84, Akta Profesion Undang-undang, hak untuk hidup

Part 7

CONSTITUTIONALITY OF THE DEVELOPER USING THE PURCHASER'S PROPERTY TO SECURE ITS LOAN

The first question that arises is; whether it is constitutional for the Housing Ministry to require the purchaser to allow the developer/vendor to make use of the property beneficially owned by the purchaser as security for a loan to the developer/vendor?[1] It is submitted that this right to challenge the constitutionality of the law arises whether or not the purchaser has been aggrieved by any conduct of the developer.

Clause 1(1), Clause 2 and clause 2(3) and may be unconstitutional because Article 13 (2) declares; "*No law shall provide for the compulsory acquisition or use of property without adequate compensation*." The law in question, is of course, the Sale and Purchase Agreement.[2] Clearly, the purchaser's beneficially-owned property is *used* by the developer as security for a loan, and at great risk to the purchaser.

It may be contended that the pre-sale loan does not offend the constitutional safeguard because at the time the developer took the loan, the purchaser had not bought the property yet. If this is correct, developers may then strategize to take only the first[3] or pre-sale loan, amounting to the total cost of construction; as long as it does not exceed the credit value of the land. This would still be a good result to the purchaser, as the buyer of encumbered property, may rightfully, inquire as to the amount of the developer's loan secured by the purchaser's property i.e. redemption sum per housing lot and make sure that it does

[2] Hereinafter referred to as "SPA"

[3] They may also take the first loan, pre-sale, and tack the subsequent loans to the first.

not exceed the purchase price. He may then arrange with the purchaser's bank to pay the instalments of the purchase price directly to the developer's bank on their undertaking to deduct progressively the developer's loan first, which should be the only one taken, before handing over the balance to the developer; this way, by vacant possession time, the entire developer's loan would be settled and the property is free from any encumbrances as undertaken by the developer in clause 2(1).

Given the fact that the SPA: i) does not limit the amount borrowed; ii) that it should be conditional upon the loan being used to build the purchaser's house only; iii) the purchaser is put to the risk of even losing his house, this would make for a safer position for purchasers. If allowing the developer to borrow on the security of the purchaser's house is a risk that cannot be avoided, why allow the developer to borrow so much more than the purchase price of the purchaser's house.

Part 8

DEFECTS AND WEAKNESSES IN THE OPERATION OF THE CLAUSE TO THE PURCHASER

The following is a list of the defects and weaknesses in the operation clause of the SPA to purchasers:-

1. There is no limit on the amount that the developer may borrow by charging the purchaser's house;
2. There is no limit as to the purpose or duration of the loans;
3. If there is no limit, and if the developer borrows beyond what is recoverable from the sale of the houses, the developer will be unable to repay the developer's bank and the developer's bank will have to foreclose;
4. The Housing Ministry has now reduced the undertaking in clause 2(i) 2nd limb to a meaningless verbiage, and with it the undertaking; it did not provide the purchaser with any means to ensure compliance by the developer with the law to protect the purchaser's considerable proprietary interests;
5. In simple terms: to be safe to the purchaser, once the purchaser has paid to the developer the full amount of the purchase price, it should be paid to the developer's bank and the purchaser's house

should be (automatically) released from the developer's charge on it; even if there is a balance of the loan remaining to be paid it should be treated as an unsecured loan owed by the developer. This is not so novel or fanciful a solution; it has already been applied in the *Kuching Plaza* case).[4] Purchasers of shopping lots that had been charged by the developer were able to resist foreclosure by the developer's bank as they had paid the amount of the loan secured by the shopping lot they bought;

6. If the Housing Ministry could go to such lengths for the benefit of the developer, why could it not provide for the protection of the purchaser that the developer should not borrow and developer's bank should not lend more than the purchase price per unit;

7. Fundamentally, where the purchaser has paid the purchase, why is it necessary to allow the developer to borrow a second time and more, when they already have the pre-sale loan to meet pre-sale to expenses, and the instalments of the purchase price for subsequent expenses?

8. The amendment that the developer or the developer's bank or both shall exclude the purchaser's house from foreclosure should be extended to the pre-sale loan.

9. It should be obvious now why developers try to blind side their purchasers with their 'no legal fees' offers, and why purchaser-retained solicitors should frustrate developers.

10. And the ultimate result is that the purchaser, who may have paid the purchase price, suffers the auctioning of his house by the developer's bank, and the purchaser's bank demands the settlement of the house purchase loan and claims interest till it is settled, and in the meantime the purchaser is blacklisted by all the banks.

[4] *Kuching Plaza n Bhd v Bank Bumiputra Malaysia Bhd* [1991] 3 MLJ 169 (SC).

Part 9

RECENT REFORMS

A raft of reforms that have been made are merely cosmetics. Most significantly, there is no reform with respect to the developer borrowing by charging the purchaser's house not even to the extent of reducing the risks to the purchaser by restricting the amount, the duration or purpose or allowing the purchaser to know how much is the redemption sum per unit or allowing the purchaser to pay direct to the developer's bank.

The ineffectual provision is that the purchaser is now given the right to terminate the SPA where the developer abandons for which the developer may have to pay a fine or go to jail! This provision may be effective against developers who defalcate the purchaser's money as opposed to those who mismanage it. Nevertheless, it takes some proving by the purchaser. The provision may also be defeated by the developer 'going slow, very slow' without totally ceasing work; and it will extend only to a purchaser's part of the project or the whole project assuming all the purchasers may agree to sue.

This is an abject acknowledgement by the Housing Ministry of its failure to enforce its powers under section 11 of the Act even once in the past, which deals with the same matter; in keeping with developers, the Housing Ministry has also abandoned its powers.[5]

Part 10

TOWARDS A SAFER 'SELL AND BUILD'

This part provides suggestions for the necessary reforms to take place. The following suggestions are laid down in order to emphasise the need to ensure that the rights of the purchasers are well looked after.

[55] How does the provision for extension of time operate with the provision for liquidated and ascertained damages? Will a successful application for extension of time defeat the claim for damages? Or is it nuanced? Is the claim for extension of time itself valid seeing that it is not part of the contract as published? These are real issues and remain unanswered.

1. The existing SPA allows the developer to borrow *before* sale. The money borrowed before sale should be stated in the SPA so that the purchaser may have notice of it before buying.
2. No borrowing should be allowed on the security of the purchaser's property *after* sale.
3. If a result of this prohibition, developers take to borrowing before sale, they should be required, after sale, to divide the amount borrowed equally among all the housing lots and state it as the redemption sum/ purchase price on the agreement.
4. The amount borrowed on the security of the purchaser's lot should not exceed the purchase price.
5. It should appear as a charge on the purchaser's property and suitable amendments should be made to the National Land Code.
6. No private sale or foreclosure should be allowed while the sale to the purchasers in progress.
7. If the developer abandons, or attempts to sell by private agreement, the Housing Ministry should compulsorily acquire the property or cash the performance bond (which is to be) given to the purchaser and held by the Housing Ministry in trust for the purchaser.
8. The transfer of the property to the purchaser should take place immediately upon the Certificate of Completion and Compliance being issued to the purchaser. In order that this can be done, the developer should have the separate document of title before sale.

The SPA was crafted to enable the developer to borrow as much as possible and as much as the developer's bank would allow based on the credit value of the housing estate land. In the developer's bank's reckoning, the credit value of the land increases as construction progresses, as the sales go on; even as they are aware that land in question is less and less the developer's and more and more the purchaser's. The maximum recoverable from the housing estate is only the total of the purchase prices, which is fixed from the beginning. The amount of the recoverable sum is the amount for which the developer has sold the housing units, and this is not the same as the amount the developer has borrowed. The developer, in order to recover the amount he has borrowed, has to recover the total amount of the purchase price which he can, but not the loans from and all those other places he has

invested it. And when he cannot, he needs to buy time; the investments may take time to mature and harvest so the developer has to abandon for the time being and keep the developer's bank sweet by paying interest on the loans.

On another note, if the investments have gone bad and the developer finds it impossible to settle the loans, the developer's bank has to foreclose at the expense of the purchaser, and this reduces the developer's liabilities. The developers have suggested that they be insured against any possibility of their abandonment of the project! As an example, recently one of the bigwigs of REHDA had the galling nerve to suggest to the government to provide, at government expense, for the benefit of developers a type of insurance cover for abandoned projects which amounts to paying developers *for* abandoning the project.[6] All this at the expense of the purchasers involved in the project. It is precisely these types of manipulations against the public interest that should be done away with.

Part 11

HOUSE PURCHASE LOANS (CLAUSES 5 AND 6)

The developer arranges with banks to give its purchasers loans. This leads to several issues, which are discussed below.

The Developer-arranged Purchaser's Bank loan

Under clause 5 of the sale and purchase agreement (SPA), the developer may, on timely application by the purchaser, arrange with a bank, to give a loan to the purchaser so that he may purchase a house from the developer.

To make it a term of the SPA (rather than offering it as an off-contract favour to the purchaser), the purchaser may be expected to incur certain risks. And he does. It is provided that if for some reason a purchaser whose application for a loan is approved but does not take it up, he will have to pay the developer the entire purchase price at once or the entire

[6] The scheme can best be understood by comparison with the protection rackets operated by gangsters when business men seeking protection from gangsters paid protection money for protection from the gangsters themselves!

balance payable at that stage! Why indeed? Is it meant to be a punishment? Should it not depend on whether or not the purchaser intends to proceed with the transaction? It is a typical developers' shenanigan that they have created an event for taxing the purchaser as if he had acted in breach of the SPA in a fundamental respect rather than in a collateral sense. In any case, the developer suffers no loss.

Wouldn't a bank, acting on the application of a purchaser/borrower, without the developer supporting it, be able to evaluate it on its own? If the purchaser does not qualify, would he just because the purchaser is piggybacking the developer? Would a developer be able to evaluate objectively? One suspects it is done for the benefit of the developer. If the developer is able to shepherd a good many purchasers to a bank, the bank may show its appreciation to the developer when it comes to the developer's turn to borrow!

Borrowing from the Government in order to buy a property

Clause 6. Developers prefer this category of buyer as the payment is assured. However, government servants need to make certain that the application will be approved if not the purchaser who has signed the SPA but is unable to proceed with the sale because the loan application is unsuccessful, will have to pay the balance of the entire purchase price or the balance of the amount then due, and still not get the house of his dreams.

Why is the government servant not allowed to terminate the SPA and pay only a reasonable sum as the developer's "pre-estimate of genuine losses"? The provision is rapacious, savage and a penalty rather than compensatory which is against the jurisprudence of contract. It is meant to hold the party in breach in terror of being hit with a huge amount of payment so that whether or not he is able to buy he is forced to do so. After all, the developer will get back his property and resell it, and recover his losses.

Purchaser-Borrower's Solicitor's Fees for the Bank Loan.

1. At the stage of applying for the bank loan to purchase the property and to charge it to the purchaser's bank, the purchase-borrower will, strictly speaking, not require a solicitor to look after his interests in the transaction and does not have to retain one. If he does retain one,

it would in all likelihood be the solicitor who acted for him in the purchase of the property. There is no conflict of interest if the same solicitor acts in different capacities as the purchaser's solicitor when he buys and as the borrower's solicitor in respect of the same property.

2. ii) However, the complication in this relatively straight forward transaction is the rule by bank's that the borrower must be represented by a solicitor on their panel even if he as the purported borrower's solicitor is only acting for the borrower not the bank.

3. iii) If the borrower does not retain a panel solicitor, the purchaser's bank will select from one from its panel to look after the bank's interests including attending to the transfer to the purchaser and after that the charge in favour of the purchaser's bank.

4. iv) The purchaser-borrower will be required to pay the bank's solicitor's fees and the borrower's solicitor's fees to the same solicitor. This incentivizes solicitor's to get on the panel of banks; with the inevitable corrupt practices.

5. v) The purchaser's bank may use its own in-house lawyers to look after the bank's interests as matters are standardized so completely even a non-lawyer may accomplish the task.

6. vi) Where the borrower-purchaser has his own solicitor why does the bank require the purchaser/borrower to be on its panel? Where a purchaser/borrower engages a solicitor, it is look after the purchaser/borrower's interests; requiring the purchaser/borrower's solicitor to be on the panel of the bank creates conflict of interests in the solicitor. What blandishments do bank officers receive to insist on this practice? It is apparently endorsed by the Bar Council.

7. The only unavoidable reason for retaining solicitors is that the statutorily-prescribed forms used by the land office principally the transfer and charge forms require to be attested by a solicitor.

8. viii) The unfairness of this provision to the purchaser-borrower is that a solicitor is imposed on him by the bank and the same solicitor is also imposed on him by the purchaser's bank so that he has to pay two sets of lawyer's fees in a routine loan for purchase of a house which has the approval of the Bar Council. Even if the borrower-purchaser has his own solicitor, he will not be able to avoid paying

fees to the bank's solicitor. In terms of the ethics of the profession, the purchaser's solicitor, who is required to be a panel member of the lending bank, is conflicted between his role as the borrower-purchaser's solicitor and the lending bank's solicitor: so who does he look out for? The solicitor whether chosen by the purchaser-borrower or imposed by the purchaser's bank will not be able to influence the purchaser's bank to the extent of changing the bank's standard forms, (the loan documentation have to be bought from the bank itself!) for the benefit of the purchaser ,even to the extent of an iota.

9. As in all likelihood, the developer would not have acquired separate titles to the housing lots, no charge can be created. Instead, the security would be a modified form of charge known as deed of assignment by way of security.

10. Even so some lawyers act in seeming anticipation of the completion of the transaction, as if it is an inevitability, collect fees and disbursements for the registration of the transfer long before the event which the Bar Council has prohibited as an escrow step.[7]

11. 'Cash buyer'. A purchaser who does not require a loan from a bank (mostly Singaporeans) is known misleadingly as a 'cash buyer' and he is expected to pay the whole purchase in one lump sum at the outset, and receives a discount from the developer presumably for putting a developer in money right from the beginning. There is no provision in the SPA for this! Whether the purchaser takes a loan or not, the payment is to be made as provided in the SPA. And it is a bit risky for the purchaser to do this given the rate of abandonment, and they should arrange for the payment to be made progressively.

Part 12

THE PURCHASE PRICE AND OTHER EXPENSES

The purchaser should be advised that one may be certain only of the purchase price but there are payments, which are not spelt out so that the final cost of the house is not quantifiable at the outset.

[7] Chapter 16, rule 61.

The purchase price is to be spelt out clearly in the SPA. 10% is paid to the developer as deposit on the signing of the SPA. Developers may resort to various gimmicks in their promotional materials to state this to their greatest advantage in haggling with purchasers; e.g. the price is expressed as falling between two wide-apart figures.

The purchase price is paid in instalments following the 3rd Schedule of the SPA and it follows the stages of completion and the value of each stage has to be certified by the developer-appointed architect. A developer with cash flow problems may lean on the architect to certify a higher amount than is due. As this is a matter between the developer, his architect and the purchaser's bank, the purchaser has little or no say, assuming he knows anything about it. The purchaser's bank does not scrutinise the certificate though it may easily done so by checking to see if the amount tallies with the amount due for that stage; as the SPA does not spell out the amount, only the percentage of the purchase price due for that stage, it may require more than a superficial investigation.

The purchase price cannot be increased after the SPA has been signed by the purchaser for that would be a breach of contract.

Above all, the purchaser should be advised that he may be certain only of the purchase price as there other payments which are not spelt out so that the final cost of the house is not quantifiable at the outset:

1. Interest on delayed payments of the instalments of the purchase price paid to the developer (even where the delays were caused not by the purchaser but the purchaser's bank the most unknowable thing).
2. Payments to the purchaser's bank's solicitors towards fees and disbursements.
3. The stamp duty on the SPA on the nominal rate of RM 10 and on the transfer form (14A NLC) based on the value of the subject-matter which is to be paid only at a later stage, and;
4. The payments to be made to the land office and other payments due the government: quit rents, rates, taxes, assessment and maintenance charges payable in respect of the property till it is taken over by the appropriate authority.
5. Interest on delayed payments of the instalments of the purchase price paid to the developer (even where the delays were caused by the purchaser's bank) and;

6. The payments to be made to the land office and other payments due the government: quit rents, rates, taxes, assessment and maintenance charges payable in respect of the property till it is taken over by the appropriate authority.

Part 13

THE POST-EXECUTION POSITION: PURCHASER AS BENEFICIAL OWNER[8]

The right of the purchaser to the house starts from the execution of the SPA and payment of the deposit. He becomes the beneficial owner and the vendor/developer has a duty not to deal with property in a manner that is inimical to the rights of the beneficial owner. In *Peninsular Land Development v Ahmad*[9] Tun Suffian said: "*In my judgment, the company (the vendor) becomes in equity a trustee for the plaintiff (the purchaser) and the beneficial ownership passes to the plaintiff as soon as the purchase price has been paid*." The position is the same in English common law.

The period between execution of the sale and purchase agreement and registration of the beneficial owner as the registered proprietor should be the completion period for the developer.

Where there is no separate title, as is usually the case with developers, and therefore, no immediate prospect of transfer, the subdivided lot indicated on the First Schedule of the SPA is the only means of identification and the evidence of the purchaser's title to his subdivided lot.

Till the property is registered in the name of the purchaser, the registered proprietor/vendor becomes the equitable trustee by operation of law and has an important obligation till that event which is not to deal with the property in a manner inimical to the interests of the

[8] A Common Law concept which applied to the Torrens System of land law could only mean the status of the purchaser till he becomes the registered proprietor which should be the final act of the developer to complete the transaction.

[9] [1970] 1MLJ 149; See also *Loke Yew v Port Swettenham Rubber Co Ltd* [913] AC 491.

purchaser/beneficial owner; clause 2(1) SPA. In the meanwhile, the concept of beneficial ownership by the purchaser assumes even greater importance than in a non-developer vendor transaction.

Under Malaysian civil law as it stood before some amendments were made to favour developers, the developer as vendor could not do anything with it which would jeopardize the interest of the purchaser. Apropos, the purchaser had an unrestricted right to caveat to prevent the developer selling the property to someone else during the subsistence of the SPA and also to apply for specific performance of the SPA. This expectation of the purchaser is inherent to clause1 and the developer is duty bound to honour it.

The purchaser who performs his part of the bargain does so in the clear expectation that when he completes it, the property will be his, even allowing for delay. In this type of long drawn out transaction, the proprietary interest of the purchaser is progressively enhanced with each instalment payment of the purchase price and that of the registered proprietor diminishes.

It is in order that the ultimate object of transfer may take place the vendor is not allowed to deal with it inimically; to the detriment of the beneficial owner: *"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…."*. This is the well-known basic proposition on which the decision of the learned judge Wan Hamzah J. is based in *Kheng Soon Finance Sdn Bhd* v *MK Retnam Holdings Sdn Bhd & Or*[10]

The developer cannot apply for the transfer of the property without firstly applying for and obtaining separate titles, and the developer cannot apply for and obtain separate titles because the land office will not entertain an application for separate titles as long as the developer's charges are on all the titles; instead Clause 11 says: "*Upon the execution of this agreement the proprietor/vendor shall at its own cost and expense*[11] *and as expeditiously as possible, obtain the issue of a separate*

[10] [1983] MLJ 364 at pp 386 H-I left column and A-F right column.

[11] This expression used a number of times in the SPA. It is a lie and needlessly insulting to the purchaser as these expenses are already factored into the

document of title to the said lot." The Housing Ministry having allowed the developer to borrow and borrow (clauses 2(1), 2(2) and 2(3) on the security of the purchaser's title well knows that this will not be possible; it is a pie-in-the-sky promise even it appears in subsidiary legislation!

As for the actual act of transfer, the most important part of the transaction is framed to accommodate the developer. The time for transfer is worded in terms of the availability of separate titles so that the Land Office can be blamed if it is not available. Clause11(2)says: "Upon the issue of the separate document of title to the Lot and subject to the payment of the purchase price by the Purchaser to the developer in accordance to clause 4(1) and the observance of the terms and conditions herein provided, the Vendor shall within 21 days execute or cause the proprietor to execute a valid and registrable Instrument of Transfer of the said property in favour of the purchaser and the vendor shall forward the same together with the separate document of title to the purchaser, for the transfer of the property to the purchaser."

There is no duty cast in terms of the developer, having received the purchase price to settle it to the developer's bank to obtain the separate title, and apply for the title. Why not?

Upon the execution of this Agreement[12]Proprietor/Vendor shall, at its own cost and expense [13]and as expeditiously as possible, obtain the issue of a separate document of title to the said Lot." There is no liability to the developer for delaying the transfer: the duty is cast on the purchaser. This is the direct consequence of clause 2; as the developer's post-sale charge is still on the purchaser's house, the developer will not press the land office for the title to be released, assuming the developer already has an application for it afoot.

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purchase price. The proper way to see it would be ' without any additional expense to the purchaser.'

[12] Not immediately on execution of the SPA.

Actually by the time it is done , several months would have gone by because the purchase would have made the payment of the purchase price with the first instalment (24 or 36 instalments ago, as the case maybe,) and completed it with last instalment.

[13] The expense is met by the purchaser.

The question to ask the Housing Ministry is: why should the purchaser have to wait for as long as the developer wants to take and the developer's bank may allow, after fulfilling his obligation to the developer for the developer to obtain a separate title? If the developer can be allowed to terminate the SPA even for delay in the payment of one instalment, which is not the purchaser's fault, why shouldn't the purchaser be entitled to damages for the delay? The developer can take as long as qiamat! When finally the purchaser/beneficial owner is registered as owner, the beneficial ownership is bolstered by indefeasibility.

The developer's obligation should be expressed in terms of the date of Vacant Possession as by then the purchaser should have paid the purchase price, and the developer's charge should have been cleared. As the land office will not entertain the application for transfer before the developer's charge on the purchaser's house is removed; with the developer's charges on the purchaser's property and the time for the settlement of the developer's charges not being spelt out, it would be a long time before the separate titles are available for transfer of the property and delays may be conveniently blamed on (typical) land office's delays.

Part 14

CONSTRUCTION ISSUES

(CLAUSES 8,12,24-26)

There are many uncertainties and unsatisfactory features for the purchaser if the house is completed: delays; quality of construction; leisurely settlement of the developer's loan/s and unlimited delay in transfer to the purchaser; and the unknowable final cost of the house. It is very important that the purchaser receives independent legal advice on the implications of buying a house that has yet to be built.

The Construction Period

The developer may start construction only after the signing of the SPA and after the first payment is made i.e., after sale of the house to the purchaser. Payment of the purchase price is made in instalments according to the stages of construction on the strength of progress payments certificates issued by the architect.

During construction the purchaser is not allowed to order any variations to the design of the house as this will delay or complicate the construction which is carried out in the same phases for all the houses. The construction period**,** which is the same as the completion period for the purchaser, is 24 months for landed property and 36 months for strata property but is not the developer's completion of the transaction for the developer. During construction the purchaser is not allowed to order any variations to the design of the house as this will delay or complicate the construction which are carried out in the same phase. Though the house is meant to be ready by a fixed time, the pace is a matter for the developer and the purchasers not allowed to require the developer to build at a faster or slower pace or change his methods of construction.

What is the length of the completion period; it is indefinite. It extends over the construction period of 24 or 36 months followed by the Defects Liability Period of 24 months and the length of time the developer actually takes to clear his charge/s over the purchaser's property, (clause2 (2) & (3) do not limit the time for the charges to be cleared) so that he may then apply for subdivided titles and then only apply for transfer of the property to the purchasers which is not time- limited by the SPA.

The Architect

An important person in the construction aspect of the sale and purchase agreement is the architect. He has to make important decisions between the parties exercising his professional skill, integrity and judgment. Though the architect is selected and paid by the developer he is not the employee of the developer, acting according to which side his bread is buttered.

As a professional person he is expected to be objective and independent. His most important functions are certifying the stages of construction reached and assessing the value of it for the purpose of progress payment certification, and the completion of the works including Practical Completion for the purpose of Vacant Possession and Final Completion.

An element that needs to be considered which behoves a greater burden on the architect is that there may be a large number of buyers of various levels of education some of whom may leave all matters to the developer. They may be needed to be protected by the architect.

Architects are liable to others, under tort law particularly, professional negligence, to those who are adversely affected. Typical instances of

architectural wrongdoing are issuing certificates for payments in excess of the work done; and certifying work as complete when it is not.

The architect may be sued by the purchaser for any misconduct by the purchaser e.g. for negligent misstatement as a tort; so there is no need for a contractual relationship between the purchaser and the developer who engaged the architect. Architects tend to favour the developer/proprietor as they expect to be appointed to other housing estates initiated by the developer/proprietor; the purchaser on the other hand is a once-in- a-lifetime encounter. Complaints may also be made to the appropriate professional body to discipline the architect for misconduct.

The SPA has reduced the architect to the level of certifying progress payments only; cl. 4(2) Leaving all other issues for direct negotiation between purchaser and developer where without the buffer of the architect the superior bargaining position of the developer may prevail. Cl. 4(2) also has the effect of ousting the jurisdiction of the court which is unconstitutional:

> "Every notice referred to in the Third Schedule requesting for payment shall be supported by a certificate signed by the vendor's architect or engineer in charge of the housing development and every such certificate so signed shall be proof of the fact that the works there referred to have been completed."

Part 15

DEVELOPER'S FIRST DUTY: TO GIVE CLEAN TITLE TO PURCHASER

As the purchaser is entitled to the property from the time he signs the sale and purchase agreement and pays the deposit, the developer is reciprocally bound to transfer the property to the purchaser i.e completion by the developer.

This duty is expressed in clause 1:

"*The Vendor hereby agrees to sell and the Purchaser agrees to purchase the said Property free from any 'encumbrances…"*[14]

The word 'encumbrance'[15], whatever else it means, most importantly to the purchaser, is the 'charge/s' created by the developer on the purchaser's housing lot referred to in Recital 3 and in other parts of the SPA. (Why isn't the term' charge' used as provided in the Housing Regulations 1989, and the National Land Code?)

This undertaking by the developer is of vital importance to the purchaser becoming the registered proprietor, which cannot take place without the removal of the developer's charges and other encumbrances, which are inappropriate to a title to the house.

Part 16

ABANDONMENT OF THE HOUSING ESTATE, FORECLOSURE, PRIVATE SALE AND OTHER DISASTERS FOR PURCHASERS

Abandonment has now been statutorily defined when the developer "refuses to carry out or delays or suspends or ceases work continuously for a period of six months or more or beyond the stipulated period of completion as agreed under the sale and purchase agreement." [16]

Developers now resort to abandoning their projects where they cannot settle their debts on time rather than bring about foreclosure

[14] Rule `14 G and H.

[15] The expression 'encumbrances 'may also include: *'agricultural, industrial and building restrictions…"* imposed by the State Authority. The removal of these is absolutely essential for the development of the land into a housing estate; these are statutory conditions which are imposed by the State for the proper use of the land. The developer can only apply to the State to have them removed when he applies for change of the 'land use ' and for separate titles for the purpose of transferring the property to the purchaser. Though this may be done, the developer may apply for it because they will have to be removed before the land may be used for housing development. It is not good drafting practice to use the same term in the same document to refer to such vastly different things yet the developer's drafts men has done so.

which is a total loss to the purchaser and may cause an explosive reaction where the whole project may be affected.

The purchaser is unlikely to have the project declared as repudiated by the developer, a course that is fraught with legal peril, not to mention expenses, as it involves a general principle of contract law, there being no specific provision in the SPA, notwithstanding the frequency of the occurrence.

The developer's position is safe because the property is still his; the developer's bank still has its charge over the property, it takes a laidback approach secure in the knowledge that its security is realisable with interest running! and that it can foreclose at any time it pleases;

In such instances, it is often the case that the HDA has been cleaned out by the developer so that there is no money for the purchaser to engage a construction company to complete the job.

It is the purchaser who is in a state of utter despondence and misery. The developer pays the additional interest to keep the developer's bank sweet, to stave off of foreclosure. Shouldn't the purchaser be entitled to recover the additional interest from the developer? To date there has been no prosecution for abandoning.

The Housing Ministry, in order to spare itself the embarrassment of a large number of abandoned houses has sliced and diced the number of abandoned houses into categories: '*lewat*' (delayed); *sakit* (problematic) and *terbengkalai* (abandoned). They all mean the same thing to the purchaser!

One of the main causes of abandonment is the fact that the Housing Ministry allows the developer to borrow regardless of the developer's claimed need for more funds being unsubstantiated; before sale, after sale and after completion by not applying for transfer; there is no regard for the amount recoverable from the sale of the housing estate as the developer's bank is only focussed on the increasing credit value of the housing estate as it reaches higher and higher levels of completion in case of foreclosure

According to Prof. Saleh Buang, "*It is estimated that from 1990 to 2007 at least 300 projects were abandoned, involving 90,000 houses and*

affecting 100,000 house buyers."[17] Another source[18] has it that between 2013 and 2016, a total of 134 housing projects had been had been abandoned in Peninsula Malaysia. Given the extent of abandonment, the purchaser's solicitor is expected to warn the purchaser about it as a distinct possibility.

The only cause for hope, if any, is that the parties are still engaged; the purchaser usually does not treat the SPA as repudiated by the developer as he entertains the hope of the property being revived as he has spent a lot of money already.

The Housing Ministry's only solution so far is the 'white knight' whereby the Housing Ministry, playing the role of honest broker, may find another developer to take over the project or a construction company to complete construction

The purchaser may resort to the Contracts Act 1956 for a declaration that the developer has repudiated the SPA but such a course is fraught with legal peril not to mention the expense if the developer can be found! The developer may claim that he is only slowing down and expects to speed up construction at later stages and catch up on lost time!

The purchaser's position in abandonment is to sit and wait for the project to be revived or to cut and run to minimize his losses; which is, of course, a benefit to the developer as he gets to pick up the purchaser's house for a song.

However, the common law of contract allows an aggrieved party to consider an agreement to have been repudiated by the other party where the breach goes to the root of the contract as to make it unsalvageable to the innocent party e.g. abandonment of the project by the developer. However, this is a course fraught with legal peril to the purchaser as one among many individual purchasers. Malaysian purchasers are notorious for the wait-and-see attitude leaving it to others to do for them at their expense.

[17] Housing the Nation; Housing, Policies Issues and Prospects, p 173 a publication by Cagamas, Bank Negara.

[18] Mohd Zairul & Ainah 2008 Housing Polices, Issues and Prospect. Cagamas Bank Negara

Foreclosure is the ultimate doom for purchasers for it means that the whole housing estate may be auctioned off or sold by private treaty, and there is no weight given to purchasers' rights as beneficial owners who had purchased with the knowledge and cognizance of the developer's bank; in fact without it, the whole project would not have taken off. If the developer's bank does not allow the sale of individual house lots, there would be no sale and this is bad enough for the purchaser.

Private sale may also be caused by creditors, such as suppliers to the developer; unable to pay his debts the developer either goes into default of the judgment debt or sells the whole housing estate or acting collusively with other parties who propose to carry out the project.

The Housing Ministry also has powers under sec 11 of the Housing Act to intervene, even proactively, if it had been monitoring the situation but it has never done so proactively or after the event. It has never used the power! Still the purchaser may resort to criminal remedies against the developer such as imprisonment as the latest amendments to the Housing Act allow this. This too has never been tried.

In all cases where a developer's manner of running a project threatens the interests of purchasers the Housing Ministry must be notified by the developer or the purchasers, and the Housing ministry should oversee the transaction with powers to protect the interests of purchasers. Sec 11 of the Housing Act empowers the Housing Ministry in such instances but the powers have never been exercised. The developer would not need to borrow from the developer's bank. Foreclosure brought about by financial mismanagement.

Part 17

COMPLETION OF CONSTRUCTION: PRACTICAL COMPLETION DATE/VACANT POSSESSION; DEFECTS LIABILITY PERIOD/ MAINTENANCE CHARGE/CERTIFICATION OF RECTIFICATION OF DEFECTS, DELAY; CERTIFICATE OF COMPLETION AND COMPLIANCE BY THE DEVELOPER

The Practical Completion Date is the half way mark.[19] It means the construction of the purchaser's house is now complete in a substantial sense but not perfectly. The purchaser is given Vacant Possession but is not allowed to move in as the developer is expected to carry out rectification of defects in construction, (and the purchaser cannot require variations) which lasts about 24 months, the purchaser is required to pay the cost -Maintenance Charges- of the public services incurred by the developer the purchaser should demand the breakdown of the charges into heads of claims, till the housing estate is taken over by the local government body.

When the developer announces that the house is ready for Vacant Possession, the purchaser's solicitor should advise about the legal effects:

a) Most importantly, as the purchase price has been paid by the purchaser, inquire as to whether the developer has settled the loans he took by charging the purchaser's beneficially owned house as under clause 2(i) and other similar debts of the developer under clause 2(ii) and 2(iii);

b) The progress of the application for subdivided title which he has undertaken to do upon the signing of the SPA.

[19] What is the significance of the Practical Completion Date/Vacation Possession Date in the agreement for the sale and purchase of property? Its significance to construction is apparent; it allows the developer to claim that the transaction in terms of construction is complete before it is. And its significance to sale and purchase of property is that it allows the developer/vendor to take a long time to complete the transaction i.e. giving the purchaser a long time to do so without any liability to the purchaser. In fact no date is stated for this final event.

Delay by and Extension of time for the Developer? Rule 11(3) Regulations 1989

As if the SPA is not generous enough to the developer for his delay in achieving the Practical Completion Date, developers have now taken to applying for extension of time by invoking Rule 11 (3) and its proviso under the 1989 Regulations. Sub-rule 3 reads:

> "Where the Controller is satisfied that owing to special circumstances or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary he may , by a certificate in writing waive or modify such provisions:
>
> Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract or after the validity of an extension of time, if any granted by the Controller."

Firstly, there is no reference to Rule 11(3) in schedule G and schedule H, in the SPA. Rule 11(3), which is the extension of time proviso of the Regulations is not repeated in sch G and sch H; it is therefore not part of the contract. Rule 11B of the Regulations provides that the omission of any particular of the 1989 Regulations renders it incomplete and an offence which makes the developer liable to a fine.

Extension of time clauses should be in the contract document itself for it to be part of the contract. Given the importance of the extension of time clause its omission is a fatal flaw.

Considering that sec 84 of the Legal Profession Act 1976 stipulates with great particularity and emphasis the responsibility of the purchaser's solicitor to explain the importance of the contract to the purchaser, this smacks of pulling wool over the eyes of the purchaser.

On account of this misapprehension of a provision of doubtful validity and whose scope is little understood, it has had a devastating effect on the rights of purchasers.[20]

In the case of BHL Construction v Purchasers of istana condomium, the challenge by the purchasers to the Extension of Time, with the

[20] The comment is based on the reply given by the Deputy Housing Minister Datuk Haimah Sadique in the Dewan Negara, and quoted by Chang Kim Loong, Buyers Beware Starbiz 31st December 2016.

support of the HBA, has been upheld on the grounds of ,mainly, of the developers excluding the purchasers from the entire process- from the application for extension of time till the decision - so that the purchasers were left with a fait accompli, and other administrative law grounds, by the Court of Appeal vide W-02(20-451-03/2017 to be invalidly exercised.

When the SPA is amended, as surely REHDA would require it be, it is hoped that the extension of time would cover:

i) The delaying event should be so extraordinary as to be almost completely unforeseen. Did the developer encounter a volcano in the Jalan Kelang area?;[21]

ii) The amendment would cover the jurisprudence of extension of time clauses: causes that should be foreseen by the developer e.g. in carrying out construction in a heavily built up urban environment and should be overcome by the developer doubling up the resources needed to overcome the anticipated delays and disruptions, or such as is peculiar to the construction site; causes which were caused by the developer and causes as in (i) above.

iii) The developer is required to serve notice on all purchasers about the developer's intention to apply for extension of time and facilitating their involvement, and the Collector, or whoever is given authority, should show in his report what grounds caused the delay and for how long so that wherever appropriate extension of time is given and damages paid by the developer for the causes not covered.

As the HBA holds that the extension of time is invalid not just as an exercise but to be legally unsustainable and ought to be struck out, and has now filed an appeal which is pending.

[21] The location of the housing development in BHL v Purchasers of Istana condominiums in W-02(20-451-03/2017.

Part 18

TWO HALF PROMISES DOES NOT AMOUNT TO ONE GOOD ONE

What is the significance of the Practical Completion Date/Vacant Possession Date in the agreement for the sale and purchase of property? Its significance to construction is apparent; it allows the developer to claim that the transaction is complete before he is able to transfer the property to the purchaser. And its significance to sale and purchase of property in that it allows the developer/vendor to take a long time to complete the transaction i.e. giving the developer a long time to do so without any liability to the purchaser. In fact no date is stated for this final event.

Clause 11 is a not-so-clever piece of obfuscation. The developer promises to apply to transfer the title from the land office only when it is given by the land office. There is no mention of by when he should have applied for the title so that delays may be blamed on the land office; and certainly no mention of by when he should settle the charge on the purchaser' property. Shouldn't he have applied for it as soon as the purchaser made his last instalment of the purchase price? One suspects that the usual lackadaisical progress of the land office is used to camouflage the developer's delays.

Part 19

TRANSFER AND REGISTRATION OF THE HOUSE IN FAVOUR OF THE PURCHASER

It may be a long time yet before the house is transferred to the purchaser as the developer's charge may be still on the purchaser's house. The purchaser's solicitor must persistently query the developer about the registration of the transfer in the name of the purchaser.

After the rectification of defects have been carried out, the developer must produce the Certificate of Completion and Compliance (clause 24).

Where a purchaser does not retain a solicitor to act for him at the stage of signing the SPA, he will still have to have one when it comes to the transfer. For this service the solicitor is allowed less fees which is not

based on the value of the property but the importance of the service in ensuring that the transfer is registered in favour of the purchaser.

And when the registration of the transfer is eventually registered in the name of the purchaser, it becomes bolstered by indefeasibility; he can claim ownership against all others.

Still the following questions remain:

i) How long after payment of the last instalment of the purchase price does vacant possession occur?

ii) How long after payment of the payment of the last instalment of the purchase price does the developer apply for the separate title to the purchase's property?[22]

iii) How long after that is the separate title is given?

iv) And how long after this does the developer make the application for registration of the transfer of the property to the purchaser?

v) Why is there no time limit for this between Practical Completion/Vacant Possession and the application to transfer the property to the developer?

vi) And why is there no liability for delay in the way there is for late delivery/ completion of construction?

vii) Psychology seems to be employed in giving the purchaser satisfaction in getting the property: first, vacant possession to the purchaser which one suspects is done in hurry to avoid the late delivery claim; how long after vacant possession does the developer take to obtain the separate title, he may take forever as there is no damages for the delay; which may be due to the developer recovering the purchase price money from wherever he has invested it.

viii) Why is the purchaser not entitled to terminate the transaction when the developer may do so for the delay of even one instalment of the purchase price**?**[23]

[22] See clause 2 (1) 2nd limb SPA.
[23] Clause 10.

Part 20

A SHORT ACCOUNT OF PURCHASERS' EXPERIENCES WITH DEVELOPERS

In the case of *Tai Lee Finance Co Sdn Bhd v Official Assignees & Ors (FC)*[24]the developer who was also the registered proprietor of the land, sub-divided it and sold lots to individual buyers and then took a loan which was secured by a charge on the whole land. On discovering the charge, the buyers lodged a caveat. In the meanwhile, the buyers had been given possession and the keys to their houses. The developer failed to settle the loan; clearly the developer did not use the purchase price to settle the charge. The question arises, should the developer be allowed to hand over the title to the purchasers after they had paid so that the developer cannot borrow some more?

It was reported in the Star on the 20th May 2014 that some 900 (now elderly) purchasers of low-cost flats in Pandemaran, Klang who had paid the purchase price had not got their titles transferred to themselves as the master title had been handed over to the developer's bank to secure a further loan to the developer. The court had upheld the bank's right to the title s they were entitled to be paid without considering the purchaser's right to the title as they had paid first. Cases such as the above are legion.

A problem with a more complicated twist took place between purchasers who had already paid the purchase price and a developer's bank's foreign representatives who had been given approval by Bank Negara to collect their debts, took place at a meeting at the Housing Ministry on the 22nd January before officers of the Ministry. The purchasers' banks' representatives all admitted that the purchasers' owed nothing. The developer had obviously borrowed on the security of the purchasers' properties, and the developer's bank insisted that the purchasers' produce the letters whereby the developer' bank had consented to release the security in the event of foreclosure due to the developer's default. The purchasers' could not produce the letter. Is so serious a consequence to befall the purchasers because they could not

[24] [1983] 1 MLJ 81 The court said: In our view the chargor could be held to be guilty f fraud if the designed object of the charge was to defeat the prior beneficial interest. P 85 e-g.

produce the mere letter though the purchasers' banks had denied all liability?

This also happened to the purchasers' of houses in Taman Permai, Taiping. They had paid for their houses some 10 years ago to the developer but the developer had instead borrowed some more from his bank and secured the purchaser's property it and had not settled it. The developer insisted on the purchasers settling the debts. There were tearful scenes of the purchaser begging would-be bidders not to bid for the property.

This is a good illustration of the purchaser's property used by the developer to secure the developer's other borrowing not needed for construction of the purchaser's house, failing to release the purchaser's property in the event of foreclosure by the developer's default in breach of the clear promise of Clause 2(2). Examples like this are legion.

Part 21

A REVERSAL OF ROLES

With the Housing Ministry taking over from developers the responsibility for drafting the SPA, an opportunity was created for developers to influence the Housing Ministry in framing the SPA in their favour as seen in the ever-expanding opportunities for borrowing on the security of the purchaser's property.

The second reversal of roles is that the purchaser becomes the developer's lender with no benefit to the purchaser except the risks to the purchaser. As the developer receives the first instalment of the purchase price before he builds, and subsequent instalments before each construction stage, why does he have to borrow at all? And why on the security of the purchaser' house so the purchaser has to take the risk of foreclosure if the developer does not pay? And why is the developer 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 the housing estate not just the purchaser's title to his house?

Though it is the purchaser who is the developer's lender, the developer becomes a very unforgiving lender to the purchaser: calling off

the deal even the purchaser defaults to the extent of one instalment! 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 2nd 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.

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 .

This so-called reform, euphemistically called privatisation, reform also illustrates the difference between bribery and corruption. Good law

may be subverted by civil servants who may be bribed but to the extent that the law remains unchanged the good public policy intentions, the underlying good legal/ moral values may be discernible, and the damage is limited.

Corruption on the other hand is total subversion. "(I)n reality, neoliberal reforms (the Housing Ministry-drafted sale and purchase agreement) gave birth to extensive "crony capitalism" with powerful self-interested actors (read 'developers') gaining control over the state (read 'the Housing Ministry') to their advantage, a process that has come to be known as "state capture" or "regulatory capture." 'Crony capitalism' gives the ability to get the laws consciously adjusted to their vantage and to the detriment of the public good. When business interests succeed in shaping the legal, political or regulatory environment to suit their own interest and distort public policies. "It is in this narrow sense that corruption was understood for a long time, and when people talked about corruption, it related to bribes associated with departments like the police, revenue, commercial taxes and forest and public utilities like water, electricity, etc." [25]

The Housing Ministry taking over the drafting of the SPA from developers has resulted in a 'reverse takeover' of the Housing Ministry by developers. Is it any wonder that that the mischief makers cannot be expected to reform; they may get into the reforming process to make sure nothing effective is done against them.[26]

Part 22

HOUSING AND THE RIGHT TO LIFE; THE RULE OF LAW RATHER THAN RULE BY LAW

Art 21 of the Indian Constitution, which is repeated in the Malaysian Constitution as Article 5,[27] has been interpreted by the Indian Supreme

[25] Prof Narasimha Reddy in *Frontline, Nov 24,2017 p46 at p 47.*

[26] Shouldn't the purchaser's solicitor at least mention it to the purchaser?

[27] Article 5: "No person shall be deprived of his life or personal liberty save in accordance with law."

Court in the case of *Olga Tellis v Bombay Municipal Corpn*[28] to include the right to housing.

The *Olga Tellis* case involved a challenge by pavement dwellers against being removed: their shanties destroyed and their personal belongings taken away. The Indian apex court declared that even pavement dwellers had a right to housing. It said:

> "It is not necessary that every citizen must be ensured of living in a well-built comfortable house but a reasonable home, particularly for people in India it can even be mud-built thatched house or a mud-built fireproof accommodation. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it has to be suitable accommodation which would allow him to grow in every respect-physical, mental and intellectual." Obviously concerned that the right may be subject to carping, ridiculing, criticism by elastic interpretation, it clarified the right to housing in a subsequent case: "*They never order the state to provide a dwelling, only not to deprive the citizen of the one that is available to him".*

Article 5 should be interpreted in Malaysia to enshrine the same principle. Surely, the Malaysian house buyer deserves more than the pavement-dweller in India! In Malaysia, *Olga Tellis* raises the right to a house from a contractual right to a constitutional one and it demolishes the seemingly plausible legal excuses for denying the house buyer the right to his house-exhaustion of funds etc. The Malaysian house buyer *must* have his house; if it is abandoned then he should be given at least performance bond.

The Malaysian house buyer deserves more as he is the owner of the property, which has been put at great risk by the Housing Ministry working hand in glove with developers. The Housing Ministry has given developers the power (not right, properly speaking) to borrow on the security of the purchaser's property. How many houses worth has the developer to borrow to build the purchaser's one house? Who gave the developer the right to borrow more than is required to build the purchaser's one house; so how many houses will he developer have to sell to pay off the loan on the purchaser's loans?; whereas the original

[28] AIR [1986] SC 180 Also discussed Sangeeta Ahuja in People, Law and Justice; Casebook on Public interest Litigation vol 1 at pp 351-358.

principle of the common law says the developer will not do anything to put purchaser's property at risk during the interregnum? The Housing Ministry should prohibit borrowing on the security of the purchase's property outright. If the developer abandons or attempts to sell the housing estate in disregard of the purchaser's rights as beneficial owner the property should be compulsorily acquired by the Housing Ministry; let the developer make his claim for compensation against the Housing Ministry after setting off the purchaser's claims!

With the law allowing sell-then-build, the developer can claim his right to the payment soon after, actually before building (as the security deposit is paid before the developer does any work so that the purchaser pays before building), which means the developer need not borrow on the security of the purchaser's title so that the developer can achieve his recovery of the purchase price with each step of the way and the purchaser enjoys security of title; as the developer achieves recovery of the final instalment of the purchase price and maintenance charge, so too does the purchaser get registration of the transfer in his name; the two should be achieved in dead heat as envisaged by clause 2(1) 2nd limb.