

ABANDONED HOUSING PROJECTS, LEGAL RISKS AND ISLAMIC FINANCE LEGAL DOCUMENTATION

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Abstract

This paper examines the role of effective legal documentation in mitigating the legal risks associated with abandoned housing projects in Malaysia. Specific attention is given to aspects relating to financial consumer protection, construction and interpretation of default clauses, and dispute management strategies, which seek to protect the interest of parties to the bundled agreements. Through conceptual analysis of relevant literature, legal documentary analysis, and unstructured interviews, this study adopts a qualitative legal research method to achieve its objective of ensuring legal risks associated with Islamic home financing are mitigated and financial consumers are adequately protected. Available legal remedies for the purchasers in the event of an abandoned housing project must be clearly included in the clauses relating to default in the Master agreement and financial guarantees, and effective dispute management processes should be considered to mitigate the triad of risks associated with abandoned housing projects – shari'ah, legal and reputational risks. This study provides a starting-point for further research on legal risks associated with abandoned housing projects, which seek to provide some minimum requirements for legal documentation in Islamic home financing. Legal documentation remains the bedrock of commercial dealings, and as such, it must be well crafted to avoid future disputes on contractual terms. Though previous studies have focused on the prevalence and the economic and financial impacts of abandoned housing projects, this is one of

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the earliest attempts to explore the legal risks associated with such projects with particular reference to legal documentation.

Keywords: abandoned housing projects, legal documentation, Islamic financing, legal risks

1. Introduction

Over the years the Malaysian government has placed significant emphasis on the need for citizens to own their houses through various policies and enabling laws. Some of the policies include New Economic Policies (NEP), National Development Policy (NDP), National Housing Policy (NHP), and the latest one is “Projek Perumahan Satu Malaysia (PPA1M)”. The objective of such policies is to empower and enhance the livelihood of the Malaysian citizens through affordable housing. In addition, the government also allows private housing developers to develop properties for affordable accommodation because a house is one of the basic necessities in a society. This is governed under the Housing Development (Control & Licensing) Act 1966 (as amended in 2015) and numerous Regulations made thereunder.

Due to the capital intensive nature of housing development, banks and financial intermediaries are expected by the government to assist the developers in financing the projects either by giving out the bridging loans or by directly helping the purchasers to finance the purchase of the property known as end-financing. The purchaser then may purchase the unit in the housing projects with the financial assistance from the licensed financial institutions. More often than not, the developer will have their preference financial institutions and the purchaser is expected to get financial assistance from such preferred financial institution, be it conventional or Islamic. Numerous properties have been developed and financed through this method. However, there are situations where the housing projects were left abandoned and the developers nowhere to be found. The purchaser is then left with the burden to pay the banks for the uncertain house that he may likely not get. What started as a dream

has now become the purchaser's worst nightmare.² The contract with the banks states that the purchaser has to pay for the financing no matter what and this seems to be the lacuna on the existing legal documentations that are supposed to protect the rights of the purchaser.

Since 2009, over 226 private housing development projects have been abandoned in Peninsular Malaysia alone; a phenomenon which has negatively affected 40,866 home buyers in the country. In addition, as at 30 April 2016, there were 24 major abandoned housing projects in Malaysia, which are categorized under the rehabilitation plan, i.e., in the process of identifying able developers to rehabilitate the projects. On the other hand, 30 projects have also been identified as abandoned housing projects that are currently being rehabilitated by any of the following stakeholders: original developers, rescuing developers or the National Housing Company Limited (Syarikat Perumahan Negara Berhad).

Against the backdrop above, this paper examines the significance of effective legal documentation in mitigating the legal risks associated with abandoned housing projects in Malaysia with specific reference to financial consumer protection, construction and interpretation of default clauses, and dispute management strategies. This paper exclusively focuses on the role of the Islamic home financing legal documentation for property under construction in the event of an unexpected abandonment of the housing project. Therefore, the study is organised into six distinct, but related sections. While this introductory section represents Section 1, Section 2 provides an overview of previous studies relating to the subject matter of the study. Section 3 briefly outlines the methodology adopted in the study with a focus on qualitative legal analysis. Furthermore, Section 4 specifically addresses issues relating to houses under construction, abandoned projects and legal documentation. Section 5 provides the findings and the way forward, and Section 6 is the conclusion.

² D. A. Razak, M. O. Mohammed, K. M. Tarique, "Abandoned Housing Projects in Malaysia and the Prospect of DP: An Overview." *Procedia Economics and Finance*, 31, (2015), 814.

2. Revisiting Salient Issues in Abandoned Housing Projects

Abandoned housing projects are indeed a major hiccup for purchasers who dream to have their own home. In such a situation, the Islamic bank that is the financier goes after the purchasers to claim the amount of money that has been disbursed to the developer. The purchasers are now left not only without a home, which is undoubtedly uninhabitable, but a debt owed to the bank, which cannot be claimed since the developer has either absconded wound up his business. Worst still, the purchasers may face the possibility of being declared bankrupt for the default payment owed to the bank. This creates a miserable situation for the financial consumers who may be compelled to make regular payments for a house they may never own. Over the years, there have been several attempts to address this problem from different perspectives. In fact, policy makers have proposed some reforms while a number of studies have explored possible solutions to ensure financial consumers, who seek to own their houses, are adequately protected. Available literature discuss mainly the issue such as the definition of abandoning housing projects, the causes that lead the project to be abandoned³ as well as the effect of abandoned housing projects.⁴ The following literature discuss the steps that have been taken by relevant stakeholders to overcome the issue of abandoned housing projects, but very few have touched the root of the problem, that is, the legal documentation where the rights, duties and obligations of the parties are clearly identified, negotiated and finalised at the pre-execution stage.

2.1 Definition of Abandoned Housing Projects

It has been difficult to identify a unanimously agreed definition for “abandoned housing projects” (AHP). Earlier studies have attempted to define AHP, depending on the perspectives from which such

³ Y. E. Hoe, “Causes of Abandoned Construction Projects in Malaysia.” (Doctoral Dissertation Department of Surveying, Faculty of Engineering and Science, Universiti Tunku Abdul Rahman, 2013), 13; S. Doraisamy, A. Zainal Abidin, & Y. Riduan, (2014). “A Review on Abandoned Construction Projects: Causes & Effects,” (2014), 3 & 4.

⁴ Doraisamy, “A Review on Abandoned Construction Projects...” 6 & 7.

studies consider this emerging phenomenon.⁵ For instance, Dahlan observed that in the absence of a legal definition of the said term, the definition given by the Ministry of Housing and Local Government (MHLG) was insufficient to cater for the despicable issue at that particular time.⁶ The MHLG, however, had made several efforts to define and redefine AHP. The earliest definition of housing abandonment can be traced to 1988. At that time, the abandoned housing project was defined as “a housing scheme where its activities on the site of the housing project had stopped for a duration of one year, passing beyond the required period within which the developer shall have to complete the project thereof, according to the sale and purchase agreement executed by the developer and the purchasers.”

After that, in 1990 MHLG redefined AHP as “any housing scheme where activities at the construction site have stopped for 6 months or more and it is continuous within or after the expiration of the scheduled completion period (24 months – according to the Sales and Purchase Agreement signed by the developer and buyer), or the developers are not capable of continuing the projects or the Controller considers that the developers are not keen to carry out their responsibility to complete the projects.”

In 1991, however, the MHLG came out with another version of the definition of AHP which stated that an abandoned housing project is “any housing scheme where activities at the construction site have been stopped for more than 1 year after the expiration of the scheduled completion period (24 months – according to the Sales and Purchase Agreement signed by the developer and buyer) or when the developer has collected 10 percent payment from the buyer, and the Sales and Purchase Agreement has been signed, but the developer has not carried out any activity at the construction site after a lapse of one year from the date of signing of [the] Sales and Purchase Agreement (S&P).”

Following that in 2002, the MHLG further re-defined the above definition, which said that AHP occur when “the construction

⁵ N. H. M. Dahlan, “Abandoned Housing Projects In Malaysia: A Legal Perspective.” *Malayan Law Journal*, 6 (1), (2006), 2.

⁶ N. H. M. Dahlan, “The Need to Define ‘Abandoned Housing Projects’ in Peninsular Malaysia: An Analysis.” *IJUM Law Journal*, 16 (85), (2008), 87 & 88.