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

by

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Abstract

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

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

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

INTRODUCTION

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

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

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

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

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

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

1 Dato' Abu Bakar Bin Hassan, Director General, National Housing Department and Dato' Zainudin bin Tala, Deputy Director (Operation), National Housing Department, Ministry of Housing and Local Government, Interview by authors, Pusat Bandar Damansara, Kuala Lumpur, 13 August 2010.

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

DEFINITION OF ABANDONED HOUSING PROJECTS

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

a. the construction activities on site of the housing construction project have consecutively stopped for six months or more, after the expiry of the Sale and Purchase Agreement (S&P) executed by the developer and the purchaser; or,

b. the developer has been put under the control of the Official Receiver; or,

c. the developers admit in writing to the Housing Controller that they are unable to complete their projects; and,

d. the project is endorsed as an abandoned housing project by the Minister of Housing and Local Government pursuant to section 11(1)(c) of the Housing Development (Control and Licensing) Act 1966 (Act 118).[3]

WINDING UP OF COMPANIES

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

a. winding up by the court; and

b. voluntary winding up s 211(a)(b) of the Companies Act 1965 (Act 125) ('CA').

2 See Nuarrual Hilal Md Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework*, (PhD diss, International Islamic University Malaysia, 2009.

3 See Portal Rasmi Kementerian Perumahan dan Kerajaan Tempatan, http://www.kpkt.gov.my/kpkt/index.php/pages/view/181 (accessed 12 August 2011).

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

Winding up by court

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

a. the company itself;

b. a creditor;

c. a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the Official Assignee of the estate of a bankrupt contributory;

d. the liquidator of the company;

e. the Minister of Finance;

f. a licensed institution or a scheduled institution;

g. an insurance company; and,

h. the Registrar of Companies (now the Companies Commission of Malaysia ('CCM')).

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

a. Taman Harmoni, Balakong, Mukim of Cheras, District of Hulu Langat, Selangor, the developer (K&T Development Sdn Bhd) was wound up by the sewage contractor on the failure of the developer to settle the debt owed for the sewage works done;[4]

b. Taman Lingkaran Nur, Kajang, Mukim of Cheras, District of Hulu Langat, Selangor Darul Ehsan, the developer (Saktimuna Sdn Bhd) was wound up by the Inland Revenue Board ('IRB') on the failure of the

4 See Ministry of Housing and Local Government File No: KPKT/08/824/6037.

developer to settle the outstanding tax[5];

c. Pangsapuri Seri Pertama, Mukim of Sungai Petani, District of Kuala Muda, Taman Seri Marina, Mukim of Kuala Kedah, District of Kota Setar and Taman Seri Simpang, Mukim of Kangkung, District of Alor Setar, Kedah Darul Aman, whose developer (JB Kulim Development Sdn Bhd) was wound up by the construction supplier on the failure of the developer to settle the debts owed despite the delivery of the construction materials;[6] and,

d. Taman Junjong Jaya, Mukim of Junjong, District of Kulim, Kedah Darul Aman, the developer (Cayman Development (SP) Sdn Bhd), was wound up on the application of the purchasers of the housing project for failure of the developer to complete the construction of the houses within the time period prescribed under the sale and purchase agreement and failure of the developer to settle the late delivery damages to purchasers.[7]

Circumstances where companies may be wound up by the court

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

a. the company is unable to pay its debts; and,

b. the court is of opinion that it is just and equitable that the company be wound up.

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

a. the company is indebted a sum exceeding RM500 to a creditor and the creditor has served on the company by leaving at the registered office a demand requiring the company to pay the sum so due and that the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

b. the company has failed to satisfied in whole or in part the execution or other process issued on a judgment, decree or order of any court in favour of a creditor; or,

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5 See Ministry of Housing and Local Government File No: KPKT/08/824/4275/E.

6 See Ministry of Housing and Local Government file numbers - KPKT/08/824/6741-1, KPKT/08/824/6741-2; KPKT/08/824/6741-3.

7 See Ministry of Housing and Local Government file number– KPKT/08/824/4705–02.

c. The court is satisfied that the company is unable to pay its debt including the contingent and prospective liabilities of the company.

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

a. the company;

b. the creditor; and,

c. the contributory.

Provisions in the CA when companies are wound up

When a company is subject to a winding up order, the affairs and businesses of the company shall be vested in the hands of the liquidator. On a winding up order being made by the court, if an approved liquidator other than the official receiver ('OR') is not appointed to be the liquidator of the company, the OR shall become the provisional liquidator until he or another person becomes liquidator (see s 227(1) of the CA). If no liquidator is appointed, the OR shall summon separate meetings of the creditors and contributories of the wound up company for the purpose of determining whether or not an application is to be made to the court to appoint a liquidator in the place of the OR (see s 228(2) of the CA). If a liquidator is not appointed on the date when the winding up order is made by the court, the OR shall be the liquidator of the company (see s 228(5) of the CA).

A provisional liquidator may be appointed by the court at any time after the presentation of a winding up petition and before the making of a winding up order. The provisional liquidator may exercise all the functions and powers of the liquidator subject to the limitations of the Companies (Winding-Up) Rules 1972 ('CWUR') or as the court may specify in the order appointing him as the provisional liquidator (see s 231 of the CA). The rationale for the appointment of a provisional liquidator is to maintain the status quo of the assets and liabilities of the company from being abused, thus protecting the rights and interests of the creditors and other stakeholders pending the winding up order issued by the court.[8]

8 See Walter CM Woon, *Walter Woon on Company Law*, General ed. Tan Cheng Han, SC, Singapore: Sweet & Maxwell, Thompson Reuters, Revised (3rd Ed), 2009, p 498.

Purpose of liquidation

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

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

(a) to carry on the business of the company so far as is necessary for the beneficial winding up thereof;

(b) to make any compromise or arrangement with creditors or persons claiming to be creditors; and,

(c) to appoint an advocate to assist him in his duties.

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

(a) to compromise any debt due to the company other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgit (RM1500);

(b) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(c) to do all acts and execute in the name and on behalf of the company all deeds receipts and other than documents and for that purpose use when necessary the company's seal;

(d) to appoint an agent to do any business which the liquidator is unable to do himself; and,

(e) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

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

Apart from s 236(3), pursuant to s 237(1) of the CA, in the administration of the assets of the company and in the distribution thereof among its creditors, the liquidator shall have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection. In case there is a conflict between the direction of the committee of inspection and the directions of the creditors and contributories, the directions of the latter (the creditors and contributories) shall prevail (see s 237(1) of the CA).

Issues

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

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

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

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

a. the official assignee has insufficient knowledge and expertise to warrant them to carry out the rehabilitation; and,

b. the official assignee has insufficient staff and manpower to enable them to resume the construction or to rehabilitate the projects.[9]

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

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

9 See Wan Mohd Fathi Wan Abdullah, interview by authors, 24 May 2010, Alor Setar, note writing, Kedah Insolvency Department officer; Dayang Saliha Noorshamsiah Awang Mustapha, interview by authors, 28 June 2010 and 1 July 2010, Shah Alam, note writing, Selangor Insolvency Department officer; and Siti Mahfuza Ahmad Walat, interview by authors, 15 June 2010, Kuala Lumpur, note writing, Kuala Lumpur Insolvency Department officer.

10 See Ministry of Housing Local Government file number KPKT/08/824/6037–1.

11 See Ministry of Housing Local Government file number KPKT/08/824/4275; Alor Setar Malaysian Department of Insolvency file number PPT(KED)346/2004(211), No Estet: JPH/KED/73502/12/2004.

12 See Ministry of Housing and Local Government file number KPKT/08/824/6741–3; Alor Setar Malaysian Department of Insolvency file no PPT(KED)346/2004(197).

13 See Ministry of Housing and Local Government file number KPKT/08/824/6741–2; Alor Setar Malaysian Department of Insolvency, file number PPT(KED) 1834/2007.

14 See Ministry of Housing and Local Government file number KPKT/08/824/4705–02.

15 See Ministry of Housing Local Government file number KPKT/08/824/4275.

16 See Ministry of Housing Local Government file number KPKT/08/824/7347–1.

17 See Ministry of Housing and Local Government file number KPKT/08/824/4375.

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

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

Several questions can be posed following the above discussion:

a. If they (the liquidators) have defaulted in carrying out the rehabilitation, can they be considered as having breached the statutory or legal duty?

b. Are they (the liquidators) under a duty of care and legal duty to protect the interest of the purchasers and other stakeholders in the rehabilitation of abandoned housing projects? And if so, it is just inasmuch as the housing developer company is liable, under the provisions of Act 118?

c. What is meant by the word 'vendor' which includes its successors in title and permitted assigns as enshrined under cll 31 and 35 of the respective statutory standard sale and purchase agreement (Schedules G, H, I and J)? Is a liquidator (OR or the private liquidator) also covered by this provision? If in the affirmative, then the liquidator shall have to act on behalf of the vendor developer (if the vendor is wound up) to complete the construction of the project and likewise be subject to the provisions under Act 118 in as much as the vendor would be subject to and are also liable to protect the interests and rights of the purchasers, as required

18 See Ministry of Housing and Local Government file number KPKT/08/824/7357–2,3, 4 and 5.

19 See Ministry of Housing and Local Government file number KPKT/08/824/6217–1.

20 See Ministry of Housing Local Government file number KPKT/08/824/63 97–1; Alor Setar Department of Insolvency, file number PPT(KED) 1834/2007 No Ester JPH/KED/73502/20/2007 Cayman Development (SP) Sdn Bhd.

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

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

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

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

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

THE UNITED KINGDOM ('UK') POSITION

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

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

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

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21 See s 143, para 13 (Part III) of Schedule 4 to the UKIA (Power to do all such other things as may be necessary for winding up the company's affairs and distributing its assets) and s 167(3) of the UKIA.

22 See paras 2, 3 and 5 of the Schedule 4 to the UKIA.

23 See para 6 of Schedule 4 to the UKIA, read together with s 167(1)(b) of the UKIA.

24 See para 7 of Schedule 4 to the UKIA.

25 See s 167(1)(b) read together with para 12 of Schedule 4 to the UKIA.

26 See para 13 of Schedule 4 to the UKIA read together with s 167(1)(b) of the UKIA.

27 A person connected with a company means, if (a) he is a director or shadow director of the company or an associate of such a director or shadow director, or (b) he is an associate of the company (see s 249 of the UKIA).

a. to apply to the court for directions in relation to any particular matter arising in the winding up (see s 168(3) of the UKIA); and,

b. to use his own discretion in the management of the assets and the distribution among the creditors (see s 168(4) of the UKIA).

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

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

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

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

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28 See *Associated Provisional Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; [1947] 2 All ER 680, and *Re Edennote Ltd* [1996] BCC 718 at p 722 ; [1996] 2 BCLC 389 at p 394 (CA).

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

a. whether the liquidator in carrying out rehabilitation of an abandoned housing project in Scotland, is considered 'carrying on the business of the company' which need not require the sanction of the court; and,

b. if the liquidator intends on implementing rehabilitation, but this is rejected by the creditors or contributories, whether under this circumstance, the liquidator can proceed to implement rehabilitation notwithstanding the disapproval of the creditors or the contributories.

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

Priority of debts payment

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

(a) the costs and expenses of winding up;

(b) all wages or salary under any contract of employment or award or agreement;

(c) all amounts due in respect of worker's compensation fund;

(d) all remuneration payable to any employee in respect of vacation leave etc;

(e) all amounts due in respect of contributions relating to employees superannuation or provident funds or retirement benefit which is an approved scheme under the federal law relating to income tax; and,

(f) the amount of all federal tax assessed.

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

Issues

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

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

THE POSITION IN THE UK

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

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

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

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

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

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

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29 See Healys, *Healy's is a full-service law firm in the UK*, http://www.healys.com/site/srvprivate/conveyancing_solicitor/conveyancing_further_information/advice_on_buying_a_new_home_off_plan.html (accessed 17 May 2011).

30 See cll 5.1.1 and 5.1.2 of *The Standard Conditions Of Sale* (5th Ed) National Conditions Of Sale (25th Ed), Law Society's Conditions Of Sale 2011, http://www.bradleys-estate-agents.co.uk/images/swwAuctions/conditionsofsale.pdf (accessed 17 May 2011). This Standard Conditions of Sale is issued by the UK Law Society as a standard form of contract of sale of residential houses and small business premises. The application of this Standard Conditions of Sale is only optional but not mandatory. Clause 5.1.1 provides that the property is at the risk of the buyer from the date of the contract. Clause 5.1.2 provides that the seller (vendor developer) is under no obligation to the buyer to insure the property unless: a) the contract provides that a policy effected by or for the seller and insuring the property or any part of it against liability for loss or damage is to continue in force; or b) the property or any part of it is let on terms under which the seller (whether as landlord or tenant) is obliged to insure against loss or damage. See also Brand Newhomes, http://www.brand-newhomes.co.uk/brand_new_home_warranty.htm> and the UK National House-Building Council (NHBC) website <http://www.nhbc.co.uk/Homeowners/ (accessed 21 May 2011).

31 See DIY Conveyancing, *Does Developer Insure a Property Until It's Completed?*, http://www.diyconveyance.co.uk/does-developer-insure-property-until-its-completed.html (accessed May 17, 2011), and Newhomes.co.uk, New houses and new properties for sale, from New Homes, Welcome to newhome.co.uk Welcome to newhome.co.uk, http://www.newhomes.co.uk/index.aspx (accessed May 17, 2011).

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

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

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

(a) costs and expenses of winding up (s 115 of the UKIA);

(b) preferential debts (s 175(1) of the UKIA)[34] ;

(c) secured debts pursuant to floating charges (s 175(2)(b) of the UKIA);

(d) any preferential charge on goods distrained that arises pursuant to s 176(3) of the UKIA;

(e) general body of ordinary unsecured creditors (r 4.181 of the UKIR);

32 See *The Standard Conditions Of Sale* (5th Ed) (National Conditions Of Sale (25th Ed), Law Society's Conditions Of Sale 2011, http://www.bradleys-estate-agents.co.uk/images/swwAuctions/conditionsofsale.pdf (Accessed 17 May 2011).

33 This is the finding of Vinelott J in *Re Maxwell Communications Corporation plc (No 3)* [1993] BCC 369.

34 For example, the Inland Revenue debts, customs and excise debts, social security contributions, contributions to occupational pension schemes, employee benefits, levies on coal and steel production. See Andrew Keay and Peter Walton, pp 406–407.

(f) post-liquidation interest on debts (s 189 of the UKIA);

(g) deferred creditors as prescribed under s 74(2)(f) of the UKIA;[35] and

(h) any balance is divided among the contributories pursuant to the memorandum and articles of association.

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

The superiority of the creditors and contributories

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

35 For example, certain debts owing to a partner of the company, certain debts which are owing to a member of the company in his or her character as such, any amount for which the company is liable where it fails to redeem its own shares before the commencement of winding up. See *ibid*, p 413.

36 *Ibid*, p 417.

37 *Ibid*.

abandonment.

Secured creditors

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

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

Issues

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

Secured creditors holding valid securities over the property of a company is usually allowed leave to commence action against the company to realise the security unless some special grounds are shown, such as the secured creditor is offered immediately all that he is entitled to without need for an action or proceedings: see *Re David Lloyd & Co* (1877) 6 Ch D 339, per Jessen MR at p 343. This is because the subject matter of the security is not available to claims by the general body of unsecured creditors. Here, the liquidator cannot ask the secured creditor to surrender his security unless the secured creditor votes in

38 See also Walter CM Woon, p 496.

respect of the whole of his debt and not the balance due from the company after having assessed the value of the security. If the amount realised from sale of the security is insufficient to cover the whole of the secured debt, the secured creditor joins the general body of unsecured creditors in proving the balance.[39]

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

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

39 See Cheang, Loh Siew, *Corporate Powers Accountability*, Petaling Jaya: LexisNexis Butterworths, (2nd Ed), 2002; Shanty Rachagan, Janine Pascoe, and Anil Joshi, *Concise Principles of Company Law in Malaysia*, Petaling Jaya: LexisNexis, 2004.

40 *Ibid.*

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

THE POSITION IN THE UNITED KINGDOM

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

Nonetheless, the exercise by the secured creditor in realizing the charged property, in the UK, is governed by the provisions in the UKIR. Pursuant to r 4.97(1) of the UKIR, the liquidator has a right to offer to the secured creditor to redeem the charged property of the company. This approach is to discourage a secured creditor from placing an artificially low value on the security.[42] Further, in the UK, in order to give further and better right and benefit to the insolvent companies and the liquidation administration, the secured creditor may serve a notice to the liquidator requiring him to elect whether to redeem the charged property or otherwise (see r 4.97(3) of the UKIR). The liquidator is also given a right to object to the price of the security offered by the secured creditor, if the liquidator is dissatisfied with the price set. In this situation, the liquidator can require the any property comprised in the security to be offered

41 See Andrew R Keay, *McPherson's Law of Company Liquidation*, (2nd Ed), Thompson Reuters (Legal) Limited, London, 2009, p 802. In *Tomlison (Trustee in Bankruptcy of Smalley) v Bridging Finance Ltd and Another* [2010] BPIR 759 (Preston County Court), the court held that that it was inconceivable that once the property had vested in a trustee in bankruptcy, a disposition of the same by a bankrupt or former bankrupt was valid, bearing in mind that pursuant to s 284 of the UKIA, such a disposition would, in the absence of consent of the court or its subsequent transaction, have been void in the preceding period beginning with the day of presentation of a petition and ending with the vesting of a bankrupt's property in a trustee in bankruptcy. Once it had vested in the trustee in bankruptcy, the bankrupt or former bankrupt did not have title to the same.

42 See Andrew R Keay ... p 804.

for sale on such terms as agreed between the liquidator and the creditor and on default as the court deems fit (see r 4.98(1) of the UKIR). If the property is offered for sale by auction, both the liquidator and the secured creditor may bid (see r 4.98(2) of the UKIR).

Thus it is submitted that the situation similar to that of Taman Lingkaran Nur, whereby the secured creditor sold the charged property below the market value may not have occurred, if it had been in the UK. This is because the liquidator has a right to request the secured creditor to revise the price to make it more reasonable and consistent with the market price for the benefit of the liquidation administration.

It should be noted that in the UK, apart from being subject to the domestic law governing liquidation (ie the UKIA and the UKIR), the liquidation administration is also subject to the provisions contained in the European Convention on Human Rights. According to s 6 of the Human Rights Act 1998, a public authority is not to act in a way which is incompatible with a right allowed for under the European Convention on Human Rights. If a public authority acts in contravention to s 6, then according to s 8 of the UKIA, the aggrieved party may be granted relief. It is argued that official receivers and liquidators fall under the definition of 'public authority'. Thus, pursuant to this provision, the aggrieved purchasers in abandoned housing projects in the UK may get certain relief in the liquidation administration, including right to have the abandoned units be rehabilitated by the liquidator and the right to get compensation.[43]

Provisional liquidator

The court may, on application of the creditors or the contributories or the company, appoint the Official Receiver or the approved liquidator as provisional liquidator, after the commencement of the winding up proceedings to preserve the status quo of the company's assets and property and facilitating the eventual beneficial winding up of the company, pending the disposal of the winding up petition. Like a liquidator, the power of the provisional liquidator

43 See also *GJ v Luxembourgh* [2000] BPIR 1021. In this case, the European Court of Human Rights gave judgment in favour of the substantial shareholder (the complainant) in the insolvent company which had been subject to liquidation administration. The complaint was that the liquidation administration was unreasonably prolonged and delayed to the detriment of the complainant's interests in the company. The court found that there was a violation of the Convention and the complainant was entitled to compensation.

is similar to the former subject to the provisions prescribed under the Companies (Winding-Up) Order 1972 and the order of the court appointing him (see s 231 of the CA).[44]

It is opined that bearing on the above law, it is possible in abandoned housing projects, for a provisional liquidator to be appointed by the creditors, contributories or the company for carrying out rehabilitation of the projects provided the funds for to undertake the rehabilitation are available and sufficient.

Issues

A question can be raised on whether the aggrieved purchasers in abandoned housing projects can apply to the court for the court to appoint a provisional liquidator to carry out the intended rehabilitation. It is opined that it depends on whether these aggrieved purchasers can be considered a creditor, or otherwise. It is also opined that the aggrieved purchasers should first obtain a court's judgment to be entitled to the debts against the company for damages, compensation or other equitable relief and file proof of debts before they can be considered as creditors to the company (judgment creditors). Nonetheless, can they (the aggrieved purchasers) also apply to the court for the same if they (the aggrieved purchasers) have yet to obtain or have failed to obtain the court's judgment on the debts or proof of debts? In the opinion of the authors, they should be able to do so. They may be entitled to get appropriate remedies from the court on the ground of equity. They may invoke O 92 r 4 of the Rules of the High Court 1980 and s 23(1) of the Courts of Judicature Act 1964 to request the court to appoint a provisional liquidator to implement rehabilitation on the ground of equity and public interest.

THE POSITION IN THE UNITED KINGDOM

It is submitted that in the UK, the aggrieved purchasers in abandoned housing projects may also be entitled to appoint a provisional liquidator in order to implement rehabilitation of their abandoned housing projects. The aggrieved purchasers may either fall into the category of 'the creditor to the housing developer company'[45] or 'any person who is entitled to petition for the winding

44 See Walter CM Woon, *Company Law* ... , p 498.

45 Under this circumstance, the aggrieved purchasers must obtain the judgment debt and file the Proof of Debts ('POD') with the liquidator (official receiver or private liquidator — the qualified insolvency practitioner).

up of the housing developer company' (see r 4.25 of the United Kingdom Insolvency Rules 1986 ('UKIR')). Alternatively, the aggrieved purchasers may request the Secretary of State for Business, Innovation and Skills (formerly the Secretary of State for Business, Enterprise and Regulatory Reform and previously the Secretary of State for Trade and Industry)[46] to apply to the court for the appointment of a provisional liquidator to carry out rehabilitation benefiting the aggrieved purchasers and in the interest of the public (see r 4.25 of the UKIR). The purpose of the appointment of a provisional liquidator is to protect the assets and affairs of the company pending the full disposal of the liquidation proceedings by the directors or the shareholders. This will protect the interests of any parties entitled to the affairs and assets of the company, including, it is submitted, the aggrieved purchasers (see s 135(1)(2) of the UKIA). The court has full discretion to issue the order appointing a provisional liquidator. The court will consider the balance of convenience as well as the balance of interests and equities of the creditors (including the aggrieved purchasers), the company and the public.[47] However, it is submitted that the attempt to appoint a provisional liquidator to carry out the intended rehabilitation are subject to the availability of funds of the company and the fact that the problem arising from the abandonment are not too complicated and troublesome. In the opinion of the authors, if the assets and moneys in the hands of the company (in the course of the liquidation administration) are insufficient, the housing developer company possessing housing insurance/home warranty insurance may use such insurance to finance the rehabilitation costs.

REHABILITATION OF ABANDONED HOUSING PROJECTS IN MALAYSIA

Most of the rehabilitation of abandoned housing projects in Malaysia are-left to the discretion of the rehabilitating parties with the cooperation and

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46 The Secretary of State for Business, Innovation and Skills (formerly the Secretary of State for Business, Enterprise and Regulatory Reform and previously Secretary of State for Trade and Industry) is a cabinet position in the United Kingdom Government. Its secondary title is the President of the Board of Trade. The Secretary of State is responsible for the Department for Business, Innovation and Skills (formerly the Department of Business, Enterprise and Regulatory Reform and previously the Department of Trade and Industry). See Wikipedia the Free Encyclopedia, 'Secretary of State for Business, Innovation and Skills,' http://en.wikipedia.org/wiki/Secretary_of_State_for_Business,_Innovation_and_Skills#Secretary_of_State_for_Business.2C_Enterprise_and_Regulatory_Reform_and_President_of_the_Board_of_Trade_.282007.E2.80.932009.29 (accessed 20 September 2011).

47 See *Re Pinstripe Farming Co Ltd* [1996] 2 BCLC 95.

assistance of the chargees, lender banks, purchasers, local planning authorities, local authorities, technical agencies, the states and federal authorities, the end-financiers, the land offices and the MHLG. The stringent laws governing housing development, land, banking, planning and building, are mostly made relaxed and flexible to accommodate the needs and to facilitate the due execution of the rehabilitation scheme. For example in *Hongkong & Shanghai Banking Corp Ltd v Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370; [1992] 1 LNS 26 (High Court), the court allowed the application of the creditor to appoint a provisional liquidator pending the disposal of a winding up petition for the purpose of rehabilitating the abandoned housing project carried out by the respondent company.

Nevertheless, there are situations where there are no required help and facility to facilitate the rehabilitation scheme, to the detriment of the purchasers desiring the project so abandoned to be revived. For example in *Mohammad bin Baee v Pembangunan Farlim Sdn Bhd* [1988] 3 MLJ 211 (High Court), the court refused the application of the purchasers to have the abandoned housing project revived by the newly appointed receiver and manager because of the difficulty to supervise the rehabilitation process. However, the court granted damages to the purchasers. In other situations, the court allowed the application of the creditor bank to order the foreclosure of the project land charged on the default of the borrower developer in the repayment of the bridging loans, to the detriment of the purchasers' right to have the project revived.

According to the MHLG, any purported rehabilitation cannot be carried out due to the following factors:

a. there are no or insufficient purchasers interested to buy the houses;

b. work on the sites of the projects have not commenced or are still at the stage of soil works because of problems associated with hard rocks, granite and the soils;

c. the original developers have been wound up and the project financiers have auctioned off the projects or sold off the projects to other parties. If the projects have been taken over by other new developers and the construction of the projects are resumed by them, then the projects so undertaken are considered to be new projects and no more under the previous defaulting developers' control and will not and cannot be considered abandoned housing projects. This also means that new sale and purchase agreements will have to be executed between the purchasers and the new developers;

d. the application to the Tabung Perumahan Projek Perumahan Terbengkalai (TPPT) (Abandoned Housing Projects Fund) of Bank Negara Malaysia (Central Bank of Malaysia) or Syarikat Perumahan Negara Berhad (SPNB — a government linked company to assist the rehabilitation of abandoned housing projects) has been rejected as the project is not viable for rehabilitation. This is because, according to the TPPT and SPNB, if the purported rehabilitation were still to proceed, it would, otherwise, cause substantial losses and adverse financial effects on the rehabilitating parties;

e. the developer has absconded and the existing purchasers are not interested or are unwilling to rehabilitate the projects so abandoned;

f. interested parties such as the land-owners, developers, bridging loan bankers and purchasers are unwilling to compromise. They prefer to resort to legal action to settle the problems faced.[48]

The housing projects which fall under the above category are Taman Desa Surada, Kajang, Selangor,[49] Kondominium Esplanade, Klebang, Melaka,[50] Taman Perdana Muar, Mukim Serong, Muar, Johor,[51] Taman Perwira Jerantut, Fasa II, Jerantut, Pahang,[52] Taman Pinggir Rishah Hijau, Ipoh, Perak,[53] Taman Desa Ria, Senawang, Negeri Sembilan[54] and Taman Desa Aman Bukit Mengkebang, Kelantan.[55]

The question is — who will be responsible in the above problem and what are the remedies for the aggrieved parties in the above situation? There is no clear provision in the CA or in Act 118. Thus, the aggrieved purchasers will become the fallen preys of the abandoned housing developer company without any sufficient recourse and remedies, including the right to have their abandoned projects rehabilitated and their rights and interests fully protected.

An example where an abandoned housing project was revived by a liquidator was Taman Yew Lean (housing developer company: Yew Lean

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48 See Division of Supervision and Enforcement, Ministry of Housing and Local Government. (n.d). *Senarai Projek Perumahan Swasta Yang Terbengkalai Tahun 1999–Jun 2005 (English: List of the Private Abandoned Housing Projects From 1999–June, 2005)*, pp 7–8.

49 See Ministry of Housing and Local Government file number KPKT/08/824/3579.

50 See Ministry of Housing and Local Government file number KPKT/08/824/5976-1.

51 See Ministry of Housing and Local Government file number KPKT/08/824/6698-1.

52 See Ministry of Housing and Local Government file number KPKT/08/824/3947-5.

53 See Ministry of Housing and Local Government file number KPKT/08/824/5737-1.

54 See Ministry of Housing and Local Government file number: KPKT/08/824/3040/E.

55 See Ministry of Housing and Local Government file number : KPKT/08/825/3229-1; KPKT/08/824/3040/E.

Development Sdn Bhd) at Lot No 664, Section 2, North East District, Pulau Pinang, where the petitioning creditor (Cooperative Central Bank Ltd — the lender bank/chargee) succeeded in winding up the developer company and appointed a liquidator — Messrs Price Water House to revive the project on the TPPT's soft loan.[56] The liquidator carried a feasibility study and found that the abandoned project was viable for rehabilitation and that the proceeds from the sales of the rehabilitated units would be more than to auction off the security land. The proceeds could be used to settle off the debts of the creditors in accordance with the law.[57]

However, the position reflected by case law is rather mixed, in that courts are divided between allowing rehabilitation and otherwise once the housing developer company is subject to liquidation or receivership. For example, in *Bunga Nominees Sdn Bhd v Abdul Jabbar Majid & Ors* [1995] MLJU 79; [1995] 3 CLJ 224, the court refused the application of the purchaser to have, inter alia, the specific performance of the sale and purchase agreement to the effect of resuming the construction (rehabilitation) of the abandoned housing units by the defaulting developer who had been put under receivership and to stop the foreclosure of the charged land by the receiver and manager, pursuant to the deed of debenture. Similar facts happened in *Mohammad bin Baee v Pembangunan Farlim Sdn Bhd* [1988] 3 MLJ 211 (where in this case, the court allowed the application for rehabilitation on the ground of equity in the event of receivership and winding up); *Pilecon Engineering Bhd v. Remaja Jaya Sdn. Bhd.* [1997] 1 MLJ 808; [1996] 1 LNS 105; *Hongkong & Shanghai Banking Corp Ltd v Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370; [1992] 1 LNS 26; and *Sri Binaraya Sdn. Bhd v. Golden Approach Sdn Bhd (Poly Glass Fibre (M) Bhd, Applicant)* [2002] 6 MLJ 632; [2000] 3 AMR 3330. While in *Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn. Bhd* [1990] 2 MLJ 511; [1990] 1 LNS 42, the court disallowed the petition of the creditor to wind up the developer but granted a stay for ten months allowing the developer to complete (rehabilitate) the abandoned housing project.

In *Hongkong & Shanghai Banking Corp Ltd v Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370; [1992] 1 LNS 26 (High Court at Kuala Lumpur), the developer company (respondent company/judgment debtor) was in the course of winding up by the petitioning creditor (Hongkong and Shanghai Banking Corporation Ltd), where later provisional liquidators were appointed pursuant to s 231 of the CA, for the purpose of carrying out the rehabilitation

56 See Ministry of Housing and Local Government file number: KPKT/08/824/365.
57 *Ibid.*

of the housing development project left abandoned by the developer company (the judgment debtor). The rehabilitation of the abandoned project was financed by a loan from the TPPT, Bank Negara Malaysia (Tabung Pemulihan Projek Perumahan Terbengkalai—TPPT (Rehabilitation of Abandoned Housing Projects Fund)). The provisional liquidators were appointed by the High Court on the application of the creditor for the purpose of rehabilitating the abandoned housing project. The power to appoint a provisional liquidator can be exercised at any time after the presentation of a winding up petition and before the making of a winding up order. Rule 35(1) of the Companies (Winding-Up) Rules 1972 provides that the application for the appointment has to be made by 'any creditor or contributory' that should prove 'sufficient ground' for the appointment by affidavit. Provisional liquidators, in this case, had been appointed to investigate the affairs of the respondent company in its own right or in its capacity as a trustee, to enable the respondent company to complete current contracts, to enter into new contracts and execute the relevant documents; and to represent the respondent company in legal proceedings. The High Court also ordered that the provisional liquidators ought to file a preliminary evaluation report on the respondent company, together with a feasibility report on whether the abandoned housing project can be successfully revived and completed together with specific recommendations as to the ways and means of achieving the required objectives. The provisional liquidators' costs, charges, and expenses for works carried out until the hearing of the petition shall be paid by TPPT Sdn Bhd. The help from the TPPT came only in mid-1990, while the project was abandoned since 1984. This means that, the project had been abandoned without any rehabilitation, for about ten years (1984 to mid-1990). The provisional liquidators were, finally, also appointed as liquidators of the respondent company through the winding up order made by the court on 22 January 1992.

FINDINGS AND SUGGESTIONS

The following are the findings and suggestions in dealing with the rehabilitation of abandoned housing projects of the wound-up-housing-developer companies in Malaysia and the UK:

a. In Malaysia and in the UK, there is no clear provision in the CA and the UKIA which expressly imposes a duty on the liquidator, either the OR, or the private liquidator, to rehabilitate abandoned housing projects and to protect the interests of the aggrieved purchasers.

b. In practice in Malaysia and in the UK, the liquidator is under no duty to

rehabilitate and to protect the interests of the aggrieved purchasers in abandoned housing projects. Insofar as the situation in Malaysia is concerned, this is due to the shortage of manpower, knowledge, time and expertise on the part of the liquidator, particularly the OR.

c. The duties of the liquidators are to accumulate and realise the assets of the insolvent company and run the affairs of the wound up company for the purposes of settling the debts of the secured or unsecured creditors and other stakeholders (including, it is opined, the aggrieved purchasers in abandoned housing projects) insofar as the creditors, contributories, committee of inspection and the court allow.

d. In Malaysia, based on the case law, in the event that the housing developer companies are wound up and the affairs are controlled by the liquidator, the policy of the court to allow rehabilitation to be carried out is not decisive. In other words, sometimes the court allows rehabilitation but in other circumstances, the court does not allow. Thus, the rights and interests of the aggrieved purchasers in abandoned housing projects to have their projects rehabilitated may not be realised and is not guaranteed;

e. However in the UK, any person, including the purchasers in abandoned housing projects, who is aggrieved by the act or decision of the liquidator, may apply to the court for a more favourable decision. The court may confirm, reverse or modify the purported complained of act or decision of the liquidator and make such order in the case as it thinks is just (see s 168(5) of the UKIA). Hence, in abandoned housing projects in the UK, the aggrieved purchasers may invoke this provision applying to the court to compel the liquidator to carry out rehabilitation if the purchasers have been unreasonably aggrieved by the conducts of the liquidator in the winding up process. This provision is lacking in the CA, which is more inclined towards favouring the creditors' interests (creditors-centric). If the CA has this provision, the aggrieved purchasers may have a certain right to request for the liquidators to protect their interests, for instance by requiring the liquidator to pay compensation for their losses and to compel them to carry out rehabilitation.

f. There is a legal and statutory gap in the CA and in the UKIA (especially when companies are wound up) when housing projects carried out by the wound-up-housing-developer-companies are abandoned for enabling effective rehabilitation be carried out in the protection of the purchasers' interests;

g. Insofar as the legal situation in Malaysia is concerned, Act 118 needs to be amended by introducing new legal provisions to cater for the problems of abandoned housing projects especially for governing their rehabilitation

and to protect the interests of the customers (purchasers) of the wound up housing developer companies.

h. The position in the UK is better than in Malaysia when dealing with the problems of abandoned housing projects. This is premised on the ground that in the UK, there are two types of housing delivery systems. Firstly, the "full then sell system' and secondly, the 'buying off the plan system'. In the former, the developer is required to duly complete the housing projects. Only then, the completed project is sold to the public. Thus, there will be no problems relating to abandoned housing projects. Further, the purchasers may also be protected if the developer possesses housing development insurance. The second method in housing delivery in the UK is 'buying off the plan'. Under this method, the purchasers would need to pay 10% of the purchase price at the signing of the sale and purchase agreement. The balance 90% shall only be paid, if the houses have been duly completed. The developers also may be armed with housing development insurance. If the construction of the houses is found not to be in accordance with law and the sale and purchase agreement, this insurance can be used to cover the losses suffered by the purchasers. Hence, if the project is abandoned mid-way, the purchasers may lose 10% deposit while the 90% payment has yet to be paid and is thus protected. The purchaser also has a right to a refund of that 10% deposit and to rescind the sale and purchase agreement in the event of abandonment. On the other hand, the insurance coverage of the developer can also be used to finance the rehabilitation of abandoned housing projects;

i. It is incumbent that all applicant developers in Malaysia who are subject to Act 118 and the MHLG should possess housing development insurance to cover any shortfall in funds to run rehabilitation, if the available moneys are not enough. This suggestion is made in order to overcome the problem of shortage of funds to finance the rehabilitation costs of the abandoned housing projects. The Government of Malaysia should follow the practice in New South Wales, Australia whereby all applicant housing developers and owner builders are required to have Home Warranty Insurance before commencing any residential work/housing development project (see s 109E(3)(b)(c)of the Environmental Planning and Assessement Act 1979 and (4) of the Environmental Planning and Assessment Act 1979 and s 95(1), (2), (2A), s 96A and s 97 of the Home Building Act 1989). This home warranty insurance scheme provides a purchaser of a property with a protection against non-completion of the residential works in the event of death, disappearance or insolvency of the owner-builder and the housing developers (see s 101 of the Home Building Act 1989 and reg 56(4) of the

Home Building Regulation 2004).[58]

j. It is high time for the Malaysian Government to introduce a special legal regime governing the rehabilitation of abandoned housing projects; for instance, a provision for appointment of a caretaker to manage rehabilitation of the abandoned housing developer companies for the benefit of the aggrieved purchasers/customers/stakeholders of the wound-up-housing-developer-companies. This approach can eliminate the problem as to who should carry out the rehabilitation of abandoned housing projects if the housing developer companies are wound up.[59]

k. Finally, in the opinion of the authors, the position in the UK need not warrant the introduction of the above proposal — the special legal regime governing rehabilitation of abandoned housing projects. This is because the housing delivery systems currently prevailing there and the existence of housing development insurance are sufficient to face the problems of abandoned housing projects and can protect the rights and interests of the purchasers.

REFERENCES

(1) Brand Newhomes. http://www.brand-newhomes.co.uk/brand_new_home_warranty.htm (accessed 21 May 2011).

(2) Cheang, Loh Siew, *Corporate Powers Accountability*, (2nd Ed) Kuala Lumpur: LexisNexis Butterworths, 2002.

(3) Dato' Zainudin bin Tala. Interview by authors. 13 August 2010. Note Taking. Deputy Director (Operation), National Housing Department, Ministry of Housing and Local Government, Pusat Bandar Damansara, Kuala Lumpur.

(4) Dato' Abu Bakar Bin Hassan. Interview by authors, 13 August 2010. Note taking. Director General, National Housing Department, National Housing Department, Ministry of Housing and Local Government, Pusat Bandar Damansara, Kuala Lumpur.

(5) Dayang Saliha Noorshamsiah Awang Mustapha. Interview by authors, 28 June 2010 and 1 July, 2010. Note taking. Selangor Insolvency Department Officer at Shah Alam.

(6) Does Developer Insure a Property until it's Completed? http://www.diyconveyance.co.uk/

58 See Nuarrual Hilal Md Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework* ....

59 *Ibid.*