

**RECENT AMENDMENTS TO THE HOUSING
DEVELOPERS (CONTROL AND LICENSING) ACT 1966
AND THE NEW HOUSING DEVELOPERS
(CONTROL AND LICENSING) REGULATIONS 1989**

Legislative Background

The business of housing development in West Malaysia¹ is governed by the Housing Developers (Control and Licensing) Act 1966.² The Act came into force on 29 August 1969.³ To carry into effect the various provisions of the Act, the then Minister for Local Government and Housing⁴ made the Housing Developers (Licences) Rules 1969,⁵ the Housing Developers (Advertisement) Rules 1969⁶ and the Housing Developers (Sale of Housing Accommodation) Rules 1969.⁷ These subsidiary legislation were subsequently replaced by the Housing Developers (Control and Licensing) Rules 1970⁸ which in turn were repealed by the Housing Developers (Control and Licensing) Regulations 1982⁹ which came into force on 1 June 1982. To further tighten several of the existing provisions in the housing developers legislation so as to ensure more effective control over the business of housing development, the Housing Developers (Control and Licensing) (Amendment) Act 1988¹⁰ effected several major amendments to the 1966 Act with effect from 1 December 1988.¹¹ In

¹In Sabah, the corresponding legislation is the Housing (Control and Licensing Developers) Enactment 1978 (No 24 of 1978) which contains substantially similar provisions to the Housing Developers (Control and Licensing) Act 1966 of West Malaysia. There is, however, no such similar legislation in Sarawak to govern the business of housing development.

²Act 118 (Revised 1973), hereinafter referred to as "the 1966 Act." The Act was first enacted in 1965 as Act No 38 of 1966. It was subsequently revised in 1973 and published as Act 118.

³See PU(B) 212/69.

⁴Now known as the Minister of Housing and Local Government.

⁵See PU(A) 29/69.

⁶See PU(A) 30/69.

⁷See PU(A) 31/69.

⁸PU(A) 268/70, hereinafter referred to as the "1970 Rules". The 1970 Rules came into force on 15 July 1970.

⁹PU(A) 122/82, hereinafter referred to as the "1982 Regulations".

¹⁰Act A703.

¹¹See PU(A) 630/88.

addition, the Housing Developers (Control and Licensing) Regulations 1989¹² was enacted to give better protection to buyers of houses, flats, apartments and condominiums in keeping with the latest developments in the housing industry. The 1989 replaced the 1982 Regulations with effect from 1 April 1989.¹³

The Housing Developers (Control and Licensing) (Amendment) Act 1988

As at the end of 1988, more than 33,500 people bought houses in projects which were later abandoned by private-sector developers.¹⁴ The total value of the projects, involving 51,714 houses, was estimated at M\$3.3 billion.¹⁵ Most of the houses in the abandoned projects were medium-cost units of between M\$70,000 and M\$80,000. The Ministry of Housing and Local Government revived 46 of the projects in 1988 while 31 projects were in various stages of being revived. 14 of the abandoned projects had been placed under receivership.¹⁶ In reviving the projects, the Ministry faced many problems as the task involved getting the developers, buyers and banks to co-operate and work together.

To ensure that the incidents of housing projects being abandoned are reduced if not eliminated and to safeguard the interests of buyers, the Housing Developers (Control and Licensing) (Amendment) Act 1988¹⁷ seeks to further tighten the existing provisions in the 1966 Act without jeopardising the recovery of the housing sector.

Section 2 of the Amendment Act has inserted a definition for "housing lot" and amended the existing definitions of "housing developer", "housing development" and "purchaser" in the 1966 Act so as to widen the application of the Act. "Housing lot" is defined to mean any piece of land surveyed or otherwise, to which a lot number has been assigned to it

¹²PU(A) 58/89, hereinafter referred to as the "1989 Regulations".

¹³*Ibid.*

¹⁴Statistics released by Datuk Kamaruddin Mahmood, secretary-general to the Ministry of Housing and Local Government (see *The Star*, 16 March 1989, at p 5).

¹⁵*Ibid.*

¹⁶*Ibid.*

¹⁷Hereinafter referred to as "the Amendment Act".

and which is subject to the category "building" in accordance with the National Land Code 1965. The definition of "housing developer" is now widened to include those person who *wants* to undertake "housing development" and is not confined to those who are engaged in or carries on or undertakes a "housing development". The definition of "housing development" has in turn been widened to include the *sale* of more than four units of housing lots by the landowner or his nominee *with the view of constructing* more than four units of housing accommodation¹⁸ by the said landowner or his nominee. Before the amendment, "housing development" was defined to mean, in effect, the business of developing more than four units of housing accommodation and in the past, developers had circumvented the law by selling lots to individual purchasers and then appointing a contractor to build the houses for them. The definition of "purchaser" is now widened to include any person who has or will have any dealing with *any* housing developer and not just with a licensed housing developer.

Section 3 of the Amendment Act has also widened the prohibition in section 5(1) of the 1966 Act against housing development except by a housing developer in possession of a licence issued under the 1966 Act to those person who wants to be a housing developer. It is now mandatory for a housing developer who desires to engage in or carry out or undertake or cause to be undertaken a housing development to apply to the Controller of Housing for the required licence.

The penalty provided in section 18 of the 1966 Act for failing to obtain the required licence before engaging in or carrying out or undertaking housing development has now been revised from a fine not exceeding M\$20,000 to one between M\$10,000 and M\$100,000.¹⁹ The maximum jail sentence remains at 5 years.

To prevent developers from currently doing what they like with house-buyers money which would jeopardise the interests

¹⁸"Housing accommodation" is defined in s 2 of the 1966 Act to include any building, tenement or messuage which is wholly or principally constructed, adapted or intended for human habitation or partly for human habitation and partly for business premises.

¹⁹S 6 of the Amendment Act.

of buyers in the event of housing projects being abandoned or delayed, a new section 7A has now been incorporated into the 1966 Act by section 4 of the Amendment Act. Under section 7A, the licensed housing developer is under a duty to open and maintain a Housing Development Account with a bank licensed either under the Banking Act 1973²⁰ or under the Islamic Banking Act 1983²¹ or with a finance company licensed under the Finance Companies Act 1969.²² A Housing Development Account has to be opened for each phase of housing development undertaken where a housing development is to be developed in phases.²³ Otherwise, such an account must be opened for each housing development undertaken by the developer.²⁴ Section 7A also provides for the payment of monies into and withdrawals from such an account.²⁵ It also sets out the manner in which the monies in the account shall be used in the event that the licensed housing developer enters into any composition or arrangement with his creditors or has a receiving order or adjudication order made against him or when the developer, being a company goes into voluntary or compulsory liquidation.²⁶ The section also prohibits all the monies in the account from being garnished until all the liabilities and obligations of the developer under the sale and purchase agreements have been fully discharged.²⁷ The Minister of Housing and Local Government is empowered to appoint an auditor to investigate into the books, accounts and transactions of the Housing Development Account.²⁸ Such an account is, however, not required to be opened where all the housing accommodation in the housing development will not be offered for sale before the completion of the housing development.²⁹ It is an offence for a housing developer to contravene or to fail to comply with any of the provisions of section 7A.

²⁰Act 102. See s 3 of 1966 Act.

²¹Act 276. *Ibid.*

²²Act 6. *Ibid.*

²³S 7A(2).

²⁴S 7A(1).

²⁵S 7A(3), (4).

²⁶S 7A(5), (6).

²⁷S 7A(7).

²⁸S 7A(8).

²⁹S 7A(9).

To ensure the effective implementation of the provisions of section 7A, certain matters are being looked into by the Ministry of Housing and Local Government such as the time period within which banks must hold on to the money collected from house-buyers before it can be released to developers; whether money collected from house-buyers can be withdrawn for infrastructure costs or other costs related to the project; whether interest should be paid on the monies paid by the developers into the account and other related technical and legal questions. For the moment, there are no guidelines issued by the Ministry of Housing and Local Government as to how the provisions governing the operation of the Housing Development Account established under section 7A are to be implemented. It may be noted that under section 24(1)(h) of the 1966 Act, the Minister is now empowered to make regulations to prescribe the monies which shall be paid into or withdrawn from the Housing Development Account and the conditions for such withdrawals.

The other changes brought about by the Amendment Act includes enlarging the powers of the Controller of Housing or an Inspector of Housing under section 10 of the 1966 Act to investigate into the affairs of housing developers who are not licensed under the 1966 Act as well.³⁰ The application of section 19 of the 1966 Act which specifies the various offences of which a housing developer can be guilty of, has now been widened to apply to *any* housing developer and is no longer limited in its application to a licensed housing developer only.³¹ Section 19(cc) now makes it an offence for any housing developer who fails to comply with any direction given by the Minister of Housing and Local Government under section 11(1)(a), (b), (d) or (e) of the 1966 Act for the purpose of safe-guarding the interests of purchasers.

³⁰s 5 of the Amendment Act.

³¹*Ibid.*, s 7.

The Housing Developers (Control and Licensing) Regulations 1989

The 1989 Regulations which is an improvement over that of the 1982 Regulations, was enacted to protect the interests of purchasers of houses, flats, apartments and condominiums in the light of the many incidents of abandoned housing projects which jeopardised the interests of buyers of houses and sub-divided buildings. Complaints were often made by the public that sale and purchase agreements for sub-divided buildings leaned heavily in favour of the developers.

Some of the changes brought about by the 1989 Regulations are highlighted below. Regulation 3(5) now requires a developer to apply for a licence for each housing development and where a housing development is developed in phases, a licence is required for each phase. When applying for the renewal of a housing developer's licence, the developer is required under Regulation 4(2)(a) and (d) to give particulars of any change to the lots to be developed and to supply such other relevant particulars or information as may be required by the Controller of Housing. Any misrepresentation of the particulars or information required is made an offence under Regulation 4(4). Land for housing development can now be charged to a bank in possession of a licence issued under the Islamic Banking Act 1983 or to a finance company licensed under the Finance Companies Act 1969. Regulation 11(1) now provides for the standard sale and purchase agreement to be used by a housing developer in every case where there is a sale of a housing accommodation in a sub-divided building to a purchaser. The form of the standard sale and purchase agreement is that as prescribed in Schedule H to the 1989 Regulations. The grounds on which the Controller of Housing can waive or modify any of the provisions in the standard sale and purchase agreement, including the provision relating to the time for delivery of vacant possession, are now made more flexible under Regulation 11(3) as such waiver or modification can be made if the Controller is satisfied that compliance with any of the provisions therein is impracticable or unnecessary owing to special circumstances. The grounds for waiving or modifying any of the provisions therein are

no longer confined to cases of hardship or necessity. However, an application by the developer for such waiver or modification must be made before the expiry of the time stipulated in the standard agreement for the handing over of vacant possession or before the expiry of any extension of time, if any, granted by the Controller of Housing as required under the proviso to Regulation 11(3).

(a) **Standard Sale And Purchase Agreement (Land And Building)**

The standard Sale and Purchase Agreement (Land and Building)³² prescribed in Schedule G to the 1989 Regulations retains substantially the same provisions as that provided for under the 1982 Regulations. The changes brought about in the provisions of the 1989 standard Agreement for Land and Building take the form of modifications to existing provisions found in the 1982 standard Agreement rather than by way of incorporating new provisions therein.

One of the modifications made is that the word "proprietor"³³ is added to clauses 2 and 29 of the 1989 standard Agreement for Land and Building. The effect is that the proprietor is made a party to the subject-matter dealt with in both the said clauses, where appropriate. Thus under clause 2, the proprietor (where he is still the registered owner of the land upon which the housing development is proposed to be carried out) and the vendor³⁴ is not permitted to subject the land on which the houses are to be built to any encumbrances immediately after the date of execution of the 1989 standard Agreement without the prior approval of the purchaser and that the proprietor and the vendor undertakes that the property shall be free from encumbrances immediately prior to the handing over of vacant possession of the building to the purchaser. Under clause 29, the provisions of the 1989 standard Agreement are made binding on the heirs,

³²Hereinafter referred to as "the 1989 standard Agreement for Land and Building".

³³The word "proprietor" means any person or body for the time being registered as the proprietor of any alienated land (Regulation 2 of 1989 Regulations).

³⁴Hereinafter taken to mean the housing developer.

successors in title and permitted assigns of the proprietor where appropriate.

Under clause 9(1) of the 1989 standard Agreement for Land and Building, the fact that the purchaser had suffered any execution to be levied upon him or his goods is no longer made a ground for the vendor to annul the sale of the property and to terminate the said agreement. It may also be noted that under clause 10(2) of the 1989 standard Agreement for Land and Building, the failure of the vendor to execute a valid and registrable memorandum of transfer of the property to the purchaser, his heir or nominee or lawful assign, as the case may be, within 21 days from the material date, no longer entitles the purchaser to claim damages from the vendor. As for the cost and expense relating to the maintenance, upkeep and repair of certain infrastructure serving the housing development, clause 14 of the 1989 standard Agreement now provides for the buyer to contribute a fair and justifiable proportion of such cost and expense from the date he takes vacant possession or is deemed to have taken vacant possession of the property. Under clause 14 of the 1982 standard Agreement, the buyer was required to contribute to such cost and expense from the date of issue of the notice by the vendor to him to take vacant possession of the property.

One of the more important modifications incorporated into the provisions of the 1989 standard Agreement for Land and Building can be seen in the provisions of clause 20. Under clause 20(1), the handing over of vacant possession of the building by the vendor to the purchaser within 24 calendar months from the date of the agreement must now be together with the connection of water and electricity supply to the said building. Liquidated damages shall be payable immediately by the vendor to the purchaser in the manner prescribed in clause 20(2) in the event of the vendor's failure to do so within the stipulated period of 24 calendar months.³⁵ In *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v*

³⁵In *Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308, the High Court held that the purchaser can rescind the agreement notwithstanding the provision for payment of liquidated damages in the event of the vendor's failure to deliver vacant possession in time. See also Teo Keang Sood, "Housing Developers: Action For Damages For Late Delivery" [1988] 3 MLJ ciii at cix-cx.

Cheow Chong Thai,³⁶ the High Court dealt with clause 18 of the 1982 standard Agreement which corresponded with clause 20 of the 1989 standard Agreement for Land and Building. The issue before the learned judge was what constituted delivery of vacant possession under clause 18 of the 1982 standard Agreement, namely, whether under clause 18 of the 1982 standard Agreement the handing over of vacant possession of the building to the purchaser within 24 calendar months must also be together with the connection of water and electricity supply to the said building within the said period. It may be noted that under the said clause 18, there was no express mention of the requirement for connection of water and electricity supply to the building within the stipulated period of 24 calendar months at the expiry of which vacant possession of the building must be handed over to the purchaser, although item 3 in the Third Schedule to Schedule E of the 1982 standard Agreement which provided for the schedule of payment of the purchase price did expressly mention that the payment of 15% of the purchase price is to be made "on handing over of vacant possession *and* connection of water and electricity supply to the building". In the instant case, the housing developer had failed to deliver vacant possession of the building within the period of 24 calendar months as stipulated under clause 18 of the 1982 standard Agreement. Water and electricity supply was also not connected to the building within the said period of 24 months. The buyer eventually commenced an action in the Magistrate court for damages for late delivery of vacant possession. The magistrate allowed the buyer's claim for damages and the housing developer appealed to the High Court. Mustapha Hussain J who heard the appeal held that having regard to item 3 in the Third Schedule to Schedule E of the 1982 standard Agreement, it was clear that delivery of vacant possession under the 1982 standard Agreement had to include the connection of water and electricity supply to the building within the stipulated period of 24 months as otherwise the item of connection of water and electricity

³⁶[1988] 3 MLJ 221.

supply would have been separated and shown as another item under the Third Schedule to Schedule E of the 1982 standard Agreement. The learned judge was also of the view that the issuance of a certificate of fitness for occupation was not necessary for delivery of vacant possession under the 1982 standard Agreement. As his Lordship said:

"The certificate of fitness for occupation is not in issue as it is distinct and separate from the issue of vacant possession as provided for under cl 19 of Schedule E. In any event, the connection of water supply and electricity does not make the house fit for occupation. There are thousands of squatter huts which cannot qualify for a certificate of fitness for occupation, but still have water and electricity supplies. Nor, on the contrary, does the issuance of a certificate of fitness for occupation mean there is supply of water and electricity to the house, as one can see hundreds of houses do not have water and electricity even after the certificates of fitness for occupation had been issued ... It is clear that the certificate of fitness is not a *sine qua non* for connection of water and electricity ..."³⁷

The learned judge, accordingly, dismissed the appeal by the housing developer and affirmed the decision of the magistrate.³⁸

Clause 20 of the 1989 standard Agreement for Land and Building has, in effect, incorporated the decision of Mustapha Hussain J in *Syarikat Lean Hup's* case. In addition, item 3 in the Third Schedule to Schedule G of the 1989 standard Agreement for Land and Building expressly provides for the handing over of vacant possession with the connection of water and electricity supply to the building in question.³⁹ There will, accordingly, be no ambiguity under the 1989 standard Agreement as to whether the delivery of vacant possession must be together with the connection of water and electricity supply to the building within the stipulated period of 24 months.

³⁷*Ibid* at 223-224.

³⁸The Supreme Court, comprising Lee Hun Hoe CJ (Borneo), Eusoffe Abdoolkader and Gunn Chit Tuan SCJJ, has dismissed the appeal of the housing developer vide Supreme Court Civil Appeal No 155 of 1988. Their Lordships will deliver a written judgment later.

³⁹Item 3 in the Third Schedule to Schedule E of the 1982 standard Agreement provided to the same effect.

As to the manner of delivery of vacant possession, it may be noted that clause 21(1) of the 1989 standard Agreement for Land and Building now provides for two additional conditions to be satisfied before the vendor shall let the purchaser into possession of the property, namely, that water and electricity supply has been connected to the said building and that the vendor has applied for the issuance of the certificate of fitness for occupation from the appropriate authority. These additional conditions serve to further protect the interests of purchasers and seek to ensure that the present practice of developers in merely completing the structure of the building and handing over the keys to the purchaser will no longer be permitted.

(b) **Standard Sale And Purchase Agreement (Subdivided Building)**

The standard Sale and Purchase Agreement (Subdivided Building)⁴⁰ prescribed in Schedule H to the 1989 Regulations incorporates, *mutatis mutandis*, the provisions found in the 1989 standard Agreement for Land and Building. The 1989 standard Agreement for Subdivided Building contains provisions which deal with matters peculiar to strata scheme such as common property and facilities, accessory parcels, insurance of the subdivided building, etc. The provisions found therein seek to protect the interests of purchasers of flats, apartments and condominiums by ensuring that the agreement does not lean heavily in favour of the developers.⁴¹ The provisions also set out the rights and obligations of the respective parties. Some of the salient features of the standard Agreement for Subdivided Building are highlighted below.

Under clause 10 of the 1989 standard Agreement for Subdivided Building, the developer is under a duty to apply, at its own cost and expense, for subdivision of the building so as to obtain the issue of separate strata titles to the parcels under the Strata Titles Act 1985. Under clause 16,

⁴⁰Hereinafter referred to as "the 1989 standard Agreement for Subdivided Building".

⁴¹See Teo Keang Sood, *Strata Titles In Malaysia: Law And Practice* (1987) at 81-86 for a discussion of the protection which should be accorded to purchasers buying into a strata scheme.

the purchaser is liable to pay service charges for the maintenance and management of the common property and for the services provided by the developer (such as the collection of refuse, the cleaning of public drains and the cutting of grass as specified in the Second Schedule to the standard Agreement) from the date the purchaser takes vacant possession of the parcel in question. Clause 17 imposes a duty on the developer and the purchasers, upon the completion of the building and until the management corporation is established, to insure and keep insured the building against loss or damage by fire and all such other risks as the developer may think fit. The purchaser from the date he takes vacant possession of the parcel is required to pay a fair and justifiable proportion of the insurance premium. By clause 22(1), the developer is to hand over vacant possession of the parcel, with the connection of water and electricity supply thereto, to the purchaser within 36 calendar months from the date of the standard Agreement failing which liquidated damages shall be payable by the developer to the purchaser in the manner prescribed thereunder. In this connection, it may be noted that clause 20(1) of the standard Agreement for Land and Building provides for the handing over of vacant possession of the building to the purchaser within 24 calendar months. As regards the completion date for common facilities serving the housing development, clause 24(1) of the standard agreement for Subdivided Building stipulates that they must be completed by the developer within 36 calendar months from the date of the agreement. Failure to complete the common facilities within the stipulated period will result in the payment of liquidated damages as specified in clause 24(2). It may be noted that there is no express mention anywhere in the standard Agreement of the necessity to connect water and electricity supply to the common facilities within the stipulated period of 36 months as in the case of parcels. Unless by the word "completed" in clause 24(1) is meant that the supply of water and electricity will be required to be connected within the stipulated period of 36 months, then this will be a serious omission especially in cases where the supply of water and electricity is necessary for the enjoyment of the common facilities in question.

Conclusion

The amendments to the Housing Developers (Control and Licensing) Act 1966 and the enactment of the Housing Developers (Control and Licensing) Regulations 1989 have undoubtedly gone some way in tightening up the various existing provisions in housing developers legislation. This is indeed to be welcomed in the light of the latest developments in the housing industry where the incidents of abandoned housing projects have reached alarming proportion. Interests of purchasers of houses, flats, apartments and condominiums must, accordingly, be protected through legislation. However, at the same time, care must be taken to ensure that the implementation of the various new provisions in the newly enacted legislation will not unduly jeopardise or hamper the recovery of the housing industry. Where it does, the new provisions will inevitably have to be modified, amended or replaced so as to strike a compromise between the interests of the housing industry on the one hand and that of the purchasers on the other.

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