

Trust in the tribunal PART 2

> Pursuing non-compliance of awards

LAST week, this column discussed the formation, objectives and jurisdiction of the Homebuyer's Claim Tribunal. Today, we analyse the most frustrating problem encountered by homebuyers who have received awards in their favour from the tribunal. How to pursue developers who refuse to comply with the tribunal's award.

A HOMEBUYER'S DILEMMA ... SOLVED?

When the tribunal ordered Annette Thesan's developer to pay her RM34,000 in late delivery charges, she was surprised, yet relieved and elated. "The entire process took less than three months. Apart from transportation costs, the only other expense I had incurred was the RM10 filing fee," Thesan shares. However, what unfolded next caught her by surprise. "The developer refused to pay! How could he do this? Isn't an award by the tribunal considered binding and deemed an order of the court?"

GIVING DUE CREDIT

"The tribunal must be given credit for the straightforward, inexpensive (rather cheap) and speedy resolution of disputes," says National House Buyers Association (HBA) honorary secretary-general Chang Kim Loong.

As indicated by official statistics

from the tribunal, up until September 2014, 37,635 cases have been filed, out of which, 37,388 have been resolved. These figures reveal an impressive 99% resolution.

"The HBA has also been told of many cases where homebuyers were given awards at the very first hearing. However, unless errant developers are made to be award-compliant, homebuyers will continue to have doubts on the efficacy of the tribunal," Chang gathers.

WHERE THE ISSUE LIES

As mentioned in last week's article, there are serious consequences in failing to comply with an award specified by the tribunal. On conviction the in-compliant party can be liable to a fine of not less than RM5,000 but not exceeding RM10,000 or imprisonment for a term not exceeding two years, or both. An additional fine may be imposed on the offender after the conviction - of up to RM1,000 for each day or part of a day.

However, Chang explains that the prosecution depends on the public prosecutor (of the National Housing Unit) and not the Housing Tribunal. "Once the tribunal grants an award, it is registered at the relevant civil court where it is equivalent to a judgment. The work of the tribunal is then considered done," he says. If the developer

refuses to make the payment awarded by the tribunal, the homebuyer will have to go to the civil court for enforcement of the award.

According to the tribunal, if a developer fails to comply with an award, the homebuyer can take either civil or criminal action.

"Enforcement proceedings can range from judgment debtor summons to prohibitory orders or attachment and seizure.

They can even wind up the developer's company. Whatever the enforcement proceeding chosen to go with, the lawyers treat it independently, separate from the work done in obtaining the judgment therefore charge a separate fee for enforcement proceedings," informs Chang.

GETTING ERRANT DEVELOPERS TO COMPLY

Chang says that cases of developers being prosecuted remains sporadic because they tend to have access to some of the best lawyers. "It is common for them to walk away with trivial fines," he says.

A check with several lawyers and developers dealing with these cases reveal that the prevailing reason for developers' non-compliance is due to financial risks. Even if the developer is at fault, they feel that by paying one home owner, others will follow, resulting in the developers having to compensate some hundreds of affected buyers. Financially, developers think it too risky. Hence, they hire lawyers and put forth delaying tactics to frustrate the buyer.

Going to court is expensive and time consuming. These are the main reasons homebuyers avoid (or leave for last) using this means to resolve their housing issues. Developers on the other hand, hope that the homebuyer will be put-off by the process and not take matters up to court. Some hope the home owner will agree to a much lower settlement. "I have also received reports of cases where the developer retracts and makes an 11th hour settlement at the date of the case hearing (of the prosecution cases) thus, resulting in the case being classified as 'discharge not amounting to acquittal'," says Chang.



"This makes a mockery of the law. If an offence has been committed under Section 16AD (the section states that non-compliance of the tribunal's award is a criminal offence), then the prosecutors must press for deterrent punishment even though they (the developer) had made restitution. It is like stealing a product from a supermarket and after having been caught, the thief returns back the product," he explains.

Chang believes that the best way to get errant developers to comply with an award from the

tribunal is through effective prosecution. "In fact, I say that severe sentences, such as imprisonment, in a few or even just a couple of prosecution cases, would serve as an effective deterrent for in-compliant developers. You have to send shivers down the spines of those defiant developers."



AWARDS THAT CAN BE ISSUED BY THE HOMEBUYER'S CLAIM TRIBUNAL

Awards by the tribunal can include one or more of the following:

- ▶ That one party pays money to the other party.
- ▶ That the price or other consideration paid by the aggrieved party be refunded.
- ▶ That the party complies with the SPA.

- ▶ That money be awarded to compensate for any loss or damage suffered by the claimant.
- ▶ That the contract be varied or set aside, wholly or in part.
- ▶ The costs to or against any party be paid.
- ▶ That interest be paid on any sum or monetary award at a rate not exceeding 8% per annum.

[Source: www.consumer.org.my]

QUICK FACT

The Homebuyer's Claim Tribunal does not make any award for any non-monetary loss or damage.

[Source: www.kpkt.gov.my]

DID YOU KNOW?

HBA offers free consultation and service to the public in dealing with errant developers at its house buyers' advice centre on designated Saturdays.

[Source: www.hba.org.my]

▶ Please email your feedback and queries to: propertyqs@thesundaily.com

BY DATO' PRETAM SINGH
DARSHAN SINGH

Enforcing *the* rules

> Calling for effective monitoring of the housing development account to prevent housing projects from being abandoned

THERE are indeed many rules and regulations people need to abide by so as to have some order, a smooth flow, for development to take place. Establishing rules may be easy, but following them through may be a task.

Singapore was the first country in the world in 1985 to make it mandatory for housing developers to open and operate a special housing development account. In 1991, Malaysia followed suit, copying almost word for word, the Singapore rules. Fortunately in Singapore, abandoned projects are unheard of. However, 23 years on, Malaysia is still grappling with the issue of abandoned housing projects although the Housing Development (Housing Development Account) Regulation was established for nearly two decades. If this legislation were to be strictly followed, abandonment of housing projects would be an era of history long gone because there is existence of a strict withdrawal regime. However, this is not the case.

ROLE OF BANKERS

It is the duty of the banks that finance development projects to ensure that these development projects are residential in nature and are not passed off as commercial units. A quick check in the various advertisements that appear in the newspapers shows that there are many projects being passed off as "SOHOS" or "SOFOS", which are in fact residential units or used for human habitation, as well as business premises. By right, this would require a housing developer to have a special licence and consequently, opening of a housing development account, but this is not practised.

Still, these projects were fully funded by banks whose logos sometimes appear on developers' advertisements to lend credibility to the projects.

In *Abdul Rahim Bin Abdul Hamid & 4 Ors v Perdana Merchant Bankers Bhd* [formerly known as Intradagang Merchant Bankers (M)] & Ors the court took the view that it is the implied term of the contract between the bank and the customer, that the bank will observe reasonable skill and care. To finance a project that should have been licensed shows clear evidence of lack of skill and care.

Bankers should also familiarise themselves with the HDA account regulations wherein withdrawal from the account is strictly monitored as we are reminded of the learned words of Salleh Abbas

LP in *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2MLJ 170 at 172 when his lordship said that the Bank is holding the loan sum on behalf of the plaintiffs as trustee. The defendant as trustee has fiduciary obligation under Section 2

of the Specific Relief Act 1950. In the case of *Ng Thiam Seng & Anor v AM Finance Berhad* (formerly known as MBF Finance Berhad) [2009] 4AMR 808 - the court reminded bankers that the duty to act in the best interest of the principal includes acting with diligence. Its duty extends beyond sighting the architect certificate certifying the stage of completion and paying the amounts to the developer.

It is therefore not open to the defence that it was under no obligation to keep vigil over the progress of the construction of the condominium or that did not have any notice of the stages of its progress. (Retrial is pending)

ROLE OF AUDITORS

It is important to note that auditors of licensed housing developers have an important role to play to safeguard the purchaser's interest by effectively reporting on the developer that they are required to oversee.

The Act requires every auditor of a licensed housing developer to make a report to the controller of housing, as to the annual balance

sheet and profit-and-loss (P&L) accounts of the licensed housing developer, for whom the auditor is appointed and shall state in every such report whether or not in his opinion:

- (a) the balance sheet and the P&L accounts are properly drawn up so as to give a true and fair account of the state of the licensed housing developer's affairs;
- (b) the accounting and the records examined by him are properly kept; and
- (c) if the auditor has called for an explanation or information from the officers or agents of the licensed housing developer, such explanation or information has been satisfactory.

The auditors also have to state whether the monies in the housing development account have been withdrawn in accordance with these regulations.

An amendment to these regulations was made in 2002 PU (A) 474/02 imposing further responsibility on the auditors, namely to within six months after the close of the financial year of such developer, make an annual

report to the controller of housing as to the housing development account and shall state in every such report whether or not in his opinion:

- (a) Each and every deposit and withdrawal recorded in the account are in accordance with these regulations;
- (b) The accounting and the records examined by him are properly kept; and
- (c) If the auditor has called for an explanation or information from the officers or agents of the developer, such explanation or information has been satisfactory.

I had a chance to peruse a recent government gazette dated June 19, 2014 (Jil 58) HDA No: 160 wherein were published financial reports under Housing Development (Control and Licensing) Act 1966 (Act 118).

This is what the learned auditors stated in their reports:

*"Report on Other Legal and Regulatory Requirements
In accordance with the requirements of the Housing Development (Control and Licensing) Act 1966 in Malaysia, we also report that in our opinion:*

- (a) the accounting and other records examined by us are properly kept; and
 - (b) we have received satisfactory information and explanations from the officers and agents of the Company as required for the purposes of our audit.
- We believe that the evidence we have obtained is sufficient and appropriate to provide a basis for our conclusion."*

"Based on the procedures performed, nothing has come to our attention that causes us to believe that the withdrawals from the Company's Housing Development Account no. HDA ... for the financial year ended June 30, 2013, in all material respects, have not been withdrawn in accordance with the Regulations."

"This report is made solely to the members of the Company, as a body, in accordance with Section 174 of the Companies Act 1965 in Malaysia and for no other purpose. We do not assume responsibility to any other person for the content of this report".

"Based on our work done, nothing has come to our attention that causes us to believe that the withdrawals recorded in the Housing Development Accounts have not been made in accordance with the said Regulations."

From the above it is apparent that some auditors are clearly not keeping to heavy responsibility entrusted upon them by parliament and the rakyat.

Lest they forget, any person who contravenes any provision under these regulations shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding three years or to both.

Follow our column next week to learn the purposes for which monies in the housing development account/regulations, may be withdrawn.



City that suits premier lifestyles

SOUTHVILLE CITY by Mah Sing speaks volumes. The freehold 428-acre integrated township emphasises comfort and convenience. It offers variety in terms of spaces to live, work and play in.

The groundbreaking ceremony for Mah Sing Southville City@KL South's direct interchange access, which leads straight into and out of the guarded and gated township was recently held. Completion is estimated by 2018, to coincide with the vacant possession of Southville City's first phase development, the Savanna Executive Suites. Present to

officiate at the event was Works Minister Datuk Seri Fadillah Yusof.

At the event, Mah Sing group managing director and group chief executive Tan Sri Leong Hoy Kum said, "Southville City@KL South is a gated and guarded township which promotes urban lifestyle outside the city centre. In support of the nation's affordable homes, especially for first-time home owners, Southville City's Savanna Executive Suites offers service apartments priced from RM350,000 onwards."

Southville City is ideally located near educational, retail

and recreational venues, including 20 institutions of higher education and six prominent golf clubs.

It has direct access to the North-South Highway and makes getting into KL a breeze via the Mex, Silk, SKVE, Elite, Lekas and KL-Seremban highways. The integrated township has an estimated gross development value (GDV) of RM8.3 billion. Open for sale are its Avens Residence of 2 1/2 and three-storey link houses; three-bedroom apartments at Savanna Executive Suites; and retail space at Savanna Lifestyle Shops. For more, visit the Mah Sing website.



An artist's impression of the front facade of Savanna Executive Suites.

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BY **PRETAM SINGH DARSHAN SINGH**

MAKING rules are quite easy but keeping to them is tough. Still, rules mean nothing if not followed through. Worse still, if those creating the rules and ensuring it is complied to are the ones bending it. The consequence: people will lose faith in those making and enforcing the rules, sooner or later resulting in chaos as people take things into their own hands to resolve matters the way they deem proper.

Last week, we ran through the roles of the auditors and bankers while discussing the Housing Development Account (HDA). Today, we list out the purposes for which monies in the HDA may be withdrawn:

(a) the payment of all outgoings including quit rent, rates, taxes, assessments and other charges levied in respect of the land on which the housing development is carried out;

(b) the payment of stamp duty payable on a charge, caveat, debenture, guarantee or memorandum of deposit of title to secure any loan for the construction of housing accommodation in the housing development;

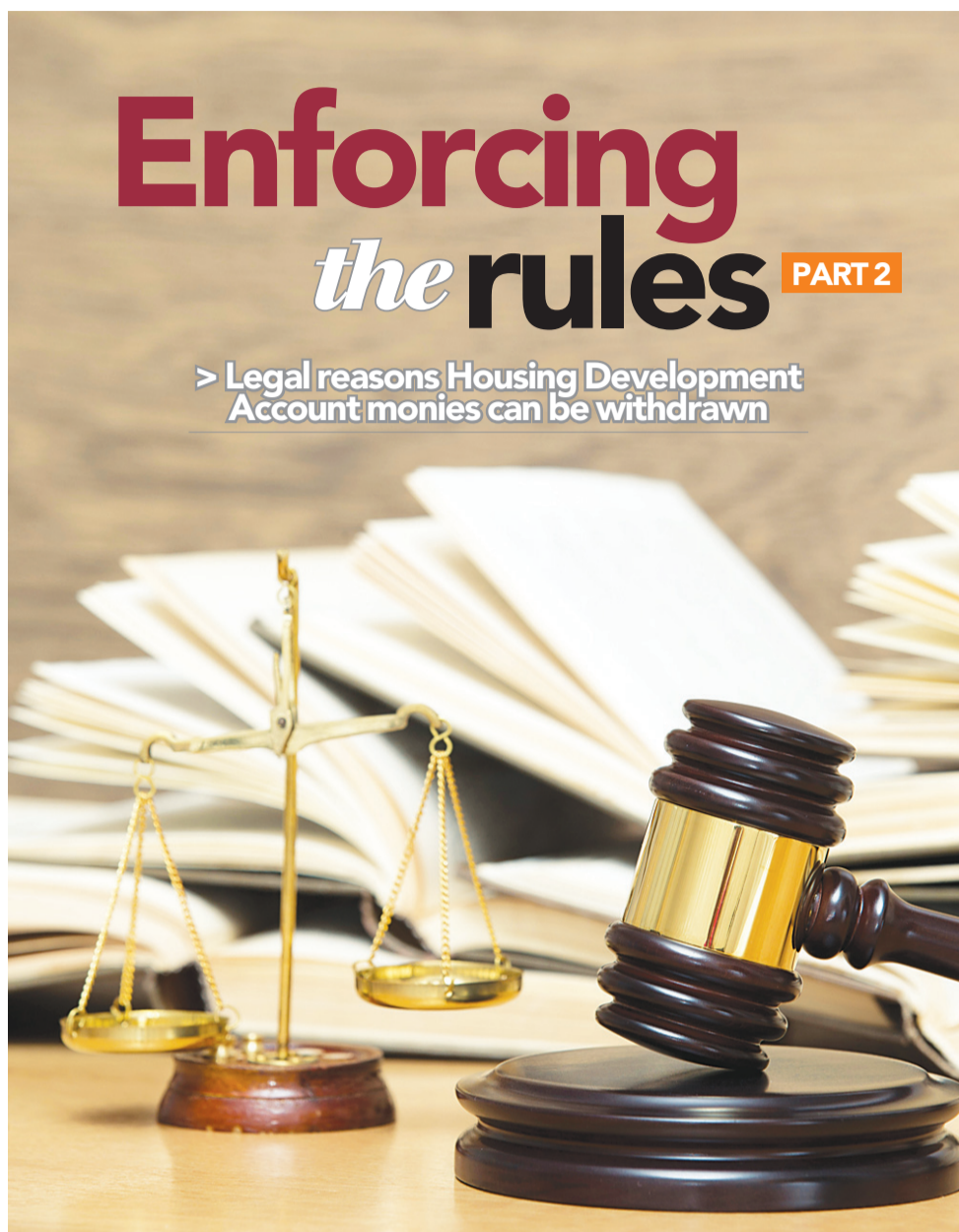
(c) the payment of legal fees in respect of a charge, caveat, debenture, guarantee or memorandum of deposit of title to secure any loan for the construction of the housing accommodation; and any other matters relating to the housing development;

(d) the payment of — insurance premiums; and architect's fees, engineer's fees, quantity surveyor's fees and consultant's fees, for the housing development;

(e) the cost of carrying out —
 (i) soil investigations;
 (ii) earthworks;
 (iii) foundation works
 (iv) building works;
 (v) external works;
 (vi) site and boundary survey for each lot;
 (vii) infrastructure works;
 (viii) relocation of squatters;
 (ix) works related to infrastructure preparation instructed by the appropriate authorities; and other works, relating to the housing development in proportion to the housing accommodations that have been approved under the licensed housing developer's licence;

(f) the payment of monies for the contribution towards the supply of water and electricity to the housing development and any other fees payable thereof to the relevant authority responsible for the supply of water and electricity in respect of the housing development;

(g) the payment of any lawful charges to any government department or other bodies in respect of the housing development;
 (h) any refund of the progress payment



Enforcing the rules **PART 2**

> Legal reasons Housing Development Account monies can be withdrawn

pursuant to the sale and purchase agreement of a housing accommodation in the housing development;

(i) the payment of interest and such other charges to the banks or finance companies on any loan taken for the housing development;

(j) the payment of any capital sum to redeem, in full or in part, the loan for the purchase of land for the housing development in proportion to the housing accommodation that have been sold;

(k) the payment of cost of land where no loan is taken for the purchase of land for the housing development, to be made as follows —
 (i) an amount equal to ten per centum (10%) of the purchase price pursuant to the sale and purchase agreement in respect of

a housing accommodation in the housing development where up to fifty-five per centum (55%) of the purchase price has been paid; and
 (ii) a further amount equal to the amount referred to in subparagraph (i) where up to sixty-five per centum (65%) of the purchase

price has been paid, provided that payment of such amounts shall be in proportion to the housing accommodation that has been sold;

(l) the payment of any capital sum to redeem, in full or in part, the loan for the construction of housing accommodation in the housing development;

(m) any administrative expenses (including marketing and advertising expenses) incurred on the housing development, subject to a maximum of ten per centum (10%) of the total cost of construction of the housing development as certified by the architect or engineer in charge of the housing development in respect of the relevant progressive payment;

(n) the payment for tax imposed on the licensed housing developer in respect of that housing development by the IRB;
 (i) any cost and expenses incurred by persons specified by the minister in carrying out the minister's direction or decision under subsection 11(1A) of the Act;
 (ii) the payment of any liquidated damages pursuant to the housing development;
 (iii) the payment of any defect, shrinkage or other fault pertaining to the project during the defect liability period; and

(o) any other expenses reasonably incurred in relation to the housing development but such amount shall only be released by the bank or finance company with whom the Housing Development Account is maintained upon receipt of the prior approval in writing of the controller.

Looking at the above, there is certainly no room for payments relating to donations, director advances, legal fees or inter-company transfers and such, as shown in some audit reports. If bankers and auditors were to strictly follow the rules and permissible withdrawals, there is no way a project can become "abandoned" and this social legislation would have played its meaningful role in ensuring protection of the purchaser.

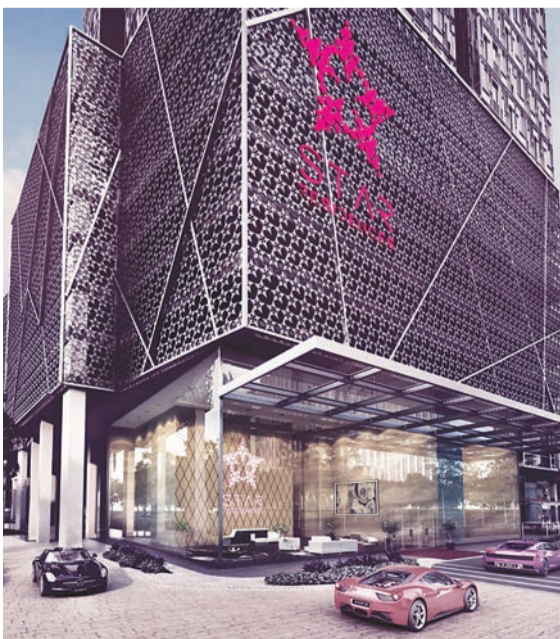


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Star Residences

REPUTABLE developers Symphony Life (formerly Bolton Bhd) and UML teamed up to offer a new development destined for stardom. Star Residences lies within the Star Development which rests on four acres of prime freehold land right, smack in town. A two-minute walk from the KLCC LRT station and the upcoming MRT station, the project will feature Malaysia's Star Walk of Fame, akin to Hollywood's Walk of Fame.

Apart from the signature retail/F&B and entertainment hub called Star Boulevard, Star Residences offers sexy fully fit-out spaces of bite-sized units, designed luxuriously, ideal for individuals or couples who form the bulk of inner-city residents. Discover what Star Residence has to offer at its sales gallery at Wisma HB, Megan Avenue II, Jalan Yap Kwan Seng.



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BY **PRETAM SINGH DARSHAN SINGH**

REFERRING to the letter from Urban Wellbeing, Housing and Local Government Minister Datuk Abdul Rahman Dahlan dated Nov 21, I fully support his view that the implementation of BTS (Build-Then-Sell) will lead to a shrinking of the housing industry.

There has been claims by the House Buyers' Association of Malaysia (HBA) and others, that BTS is THE remedy to address housing issues faced by purchasers. No doubt their intention may be noble, I beg to defer as to the mandatory introduction of BTS, mainly because we have the most benevolent social legislation in place (in the country), namely the Housing Development (Control and Licensing) Act 1966 and its various Regulations made thereunder. It is indeed a path less-travelled, breaking benevolent legislation intended to protect purchasers from being exploited by unscrupulous developers.

NO BE ALL, END ALL

The Housing Development Act introduced a comprehensive law to protect house buyers. Unfair practices and misleading conduct by developers were given legal control, and purchasers' rights to guarantees, quality of houses and enforcement powers were clearly spelt out in the act.

Selling houses via BTS will deprive house purchasers from obtaining any form of protection now guaranteed under the act as the scheme of the act was established to cover houses under construction until the issuance of the certificate of completion and compliance (CCC), although the regulation has an option schedule relating to the "10-90" scheme. No conditions can be imposed on houses sold via BTS, in regard to the right to sell at the price of the seller's choice, and to whom it can be sold as this is protected under Article 13 of the Federal Constitution.

Matters like bumiputra discounts also cannot be imposed. Buying a product on an "as is where is" basis also does not guarantee the product is free from defects and problems. In a nutshell, the term "as is where is" simply means that the buyer will inherit all of the physical and legal conditions of the property they are going to buy, as it is. Bluntly, you get everything that comes with a property at its present condition when you buy it, including the good, bad and ugly.

Most purchaser claims are mainly related to late delivery of vacant possession and defects plus non-compliance of approved plans as compared with non-completion of houses. As an example, if a property is in dire need of repair, or has illegal occupants, has a problem with the title, or is located beside a garbage dump or cemetery etcetera, the buyer expressly agrees to buy the property in such condition. Any costs related to "fixing" any of these problems will come under the account of the buyer.

This is the reason banks highly encourage

interested buyers to verify the physical and legal conditions of the properties before they purchase. Banks expect interested buyers to have already done their due diligence before signing on the dotted line, which is a binding contract. The margin of financing in the secondary market is also lower than the primary market. This being the case, there will be calls for a "Fair Housing Act" as has been done in other jurisdictions.

MORE THAN OPINION

Having served as the chairman of the Consumer Claims Tribunal as well as the president of the Tribunal for Home Buyers' Claims, I can take judicial notice of the fact that there were numerous cases filed relating to goods, which were sold on an "as is where is" basis. Some were more expensive than residential houses, yet had numerous claims on non-compliance of warranty and defects. A good example would be the motor industry. A house delivered on a full BTS basis or on a 10-90 basis will still be encumbered with issues relating to late delivery of vacant possession and defects plus non-compliance of approved plans.

One is often reminded of the maxim "caveat emptor", which means "let the buyer beware". Former Australian attorney-general Lionel Murphy once said: "That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection".

LEGISLATIVE CONTROL

The Housing Development (Control and Licensing) Act 1966 provides such protection. The preamble of the act states that it is to provide for the control and licensing of the business of housing development in Peninsular Malaysia, including the protection of the interests of purchasers and for matters connected therewith.

In Sea Housing Corporation Sdn Bhd v Lee Poh Chee [1982] CLJ 355 Suffian LP stated that the Housing Act was "... to protect homebuyers, of whom are people of modest means, from rich and powerful developers". Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the act.

In Khaw Daw Yau v Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 35, where the developer had jumped the gun and sold some bumiputra lots to non-bumiputra purchasers, V. C. George J. expressly stated: "The scheme of the Housing Developers (Control and Licensing) Act 1966 and the Rules of 1970 is to provide a measure of protection to

purchasers of housing accommodation to a housing development against unscrupulous developers."

On legislative control over developers' licensing requirements, it may not be wrong to state that the housing development business is one of the most regulated ones. A housing developer, therefore, must be in possession of a valid licence issued under the act before it undertakes any housing development; section 5 (1).

THE TRIBUNAL

The Tribunal for Homebuyers Claims is an independent body established under the act with the primary function of hearing and determining claims lodged by Purchasers under the act. It is also subject to the provisions of the act. The primary objective of establishing the tribunal is to provide an alternative channel or facility, apart from the court, to the purchaser to make claims for any loss suffered in a less cumbersome and speedy manner and at minimal cost.

Almost all cases in the tribunal are settled within 120 days and one has to pay a fee of only

RM10. The procedure is simple and all awards are binding upon the developers. Non-compliance of a tribunal award is a criminal offence. Any party who fails to comply with an award commits an offence and on conviction, can be fined up to RM5,000 or be imprisoned up to two years, or both.

In all, BTS may not be the "be all and end all" to settle house purchasers' grievances. It is apparent that there already exists sufficient legal framework to enhance purchaser protection, perhaps unparalleled in the world. Some may perceive these provisions as insufficient. However, I would say that the way forward then, would be to enhance due compliance rather than chart a new path through unknown choppy waters, which might put the purchaser in an even tighter spot.

Follow our column next week to learn of some of the principal duties of a licensed developer.

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