Rehabilitation of Abandoned Housing Projects of Housing Developer Companies under Receivership in Peninsular Malaysia: Some Salient Issues and Suggestions

Nuarrual Hilal Md Dahlan*

Abandoned housing projects are one of the main problems in the housing industry in Peninsular Malaysia. Even though the Malaysian government has provided laws and policies to govern the housing industry to protect the interests of all parties in the industry, yet the problem of abandoned housing projects is still an unsettled issue until today. The real victims are the purchasers themselves. Usually when a housing developer company is under receivership, the affairs and business of the company are taken over by the appointed receiver and manager, pursuant to the terms in the deed of debentures. The receiver and manager may rehabilitate the abandoned projects left by the housing developer companies, if the projects are viable for rehabilitation, with the approval of the debenture holders. Otherwise, if the project is not viable, particularly because there are insufficient funds to run the intended rehabilitation or the problems relating to the abandoned housing projects are too great to settle, the project may be stalled forever without any prospect for rehabilitation, to the detriment of the purchasers. This article discusses the law and practice in the rehabilitation of abandoned housing projects in Peninsular Malaysia of the housing developer companies under receivership. This writing finds that there are certain lacunae in the law and practice in dealing with the problems of abandoned housing projects particularly in respect of rehabilitating the projects and protecting the purchasers' rights and interests. Further, it is submitted that the recently proposed amendments to the Housing Development (Control and Licensing Act 1966 (Act 118) and the Corporate Law Reform Committee's ("CLRC") recommendations also are still inadequate to face the problems of abandoned housing projects. In the final part of this article the author proposes certain suggestions for facing the problems of abandoned housing projects of the housing developer companies under receivership and their rehabilitation in Peninsular Malaysia in order to improve the law and practice regulating the housing industry against abandonment of housing projects in Peninsular Malaysia.

The problem of abandoned housing projects is not uncommon in Peninsular Malaysia. This problem occurred since the 1970s, after the Malaysia: 

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government introduced “housing democracy”. If previously before 1970s, the
duty to provide housing to the citizens fell on the shoulders of the government
alone, after the introduction of “housing democracy” this duty also has been
shared by the private sector. This was due to the inability of the government
to provide sufficient housing, due to the insufficient government funds, to the
citizens. As the private sector’s involvement in this industry is tremendous,
there arose a need to regulate the housing industry undertaken by them. Thus,
the Malaysian government introduced certain legislation regulating housing,
which was firstly known as the Housing Developers Act 1966 (Act 118).
Despite the existence of all the regulations governing the housing industry,
and the coherent policies of the government on housing, abandoned housing
projects are still happening until these days. In abandoned housing projects
the victims are the purchasers themselves. They cannot get the houses and
yet they have to pay the monthly instalment to their respective end-financiers.
Apart from these, there may be other kinds of pecuniary and non-pecuniary
losses and grievances suffered by the purchasers. The existing law especially
the housing law (the Housing Development (Control and Licensing) Act 1966
(“Act 118”) and its regulations are still not able to fully protect the interests of
the purchasers. In the upshot, the grievances of the purchasers in abandoned
housing projects have still not been properly addressed by the government and
the present laws and policies governing the housing industry in Peninsular
Malaysia are still inadequate.

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

(a) it is not completed within or beyond the period prescribed under the
sale and purchase agreement (“SPA”) and on the site of the housing
development project there is consecutively no construction activities
for more than six months; or

(b) a winding-up petition has been filed in the High Court under s 218 of
the Companies Act 1965 (“CA”); or

(c) the housing developer company is put under the control of a receiver
and manager; and

(d) it must be endorsed by the Minister of Housing and Local Government
as an abandoned housing project pursuant to s 11(1)(a) of the Housing
Development (Control and Licensing) Act 1966 (Act 118).\(^1\)

Some statistics on abandoned housing projects

In 2008, the Division of Rehabilitation of Abandoned Projects in the Department
of National Housing, Ministry of Housing and Local Government (“MHLG”),

\(^1\) The Official Portal of the Ministry of Housing and Local Government, Kuala Lumpur,
Kuala Lumpur was established.\textsuperscript{2} If, previously, the duty to manage the abandoned housing projects and their rehabilitation was on the shoulders of the Division of Enforcement and Supervision, MHLG, which was also overburdened with enforcement and supervision duties, the establishment of this new specialised division (Division of Rehabilitation of Abandoned Projects) would help and facilitate the government to reduce the problems emanating from the abandoned housing projects and to speed up the rehabilitation and thus help the fates of the aggrieved purchasers.

As at July 31, 2010, the number of the abandoned housing projects which are subject to rehabilitation under the management of this division is 151 projects involving 48,623 units of houses and 31,123 purchasers. Out of these numbers, 57 projects are being rehabilitated and 47 projects are completed projects.\textsuperscript{3} Below are the statistics of abandoned housing projects as at July 31, 2010 (see Table 1 and Table 2).

**Table 1: Summary of the overall status of abandoned housing projects in Peninsular Malaysia (until July 31, 2010)**

<table>
<thead>
<tr>
<th>NO.</th>
<th>STATUS</th>
<th>31 JULY 2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Initial planning (in the course of getting rehabilitating developer)</td>
<td>47 (31%)</td>
</tr>
<tr>
<td>2</td>
<td>In the course of rehabilitation</td>
<td>57 (38%)</td>
</tr>
<tr>
<td>3</td>
<td>Occupied/Completed projects</td>
<td>47 (31%)</td>
</tr>
<tr>
<td></td>
<td>(i) 2009: 15 projects</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(ii) 2010: 32 projects</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>151</td>
</tr>
</tbody>
</table>

Note:

Occupied/Completed projects

(i) 2009: 15 projects (100% achievement based on the 2009 Minister's Key Performance Index ("KPI");

(ii) 2010: 32 projects (up to July 31, 2010 92% achievement based on the 2010 Minister's KPI).


\textsuperscript{3} Bahagian Pemulihan Projek Perumahan Terbengkalai, Jabatan Perumahan Negara (English: Division of Rehabilitation of Abandoned Projects, Department of National Housing), \textit{Status Proyek Perumahan Terbengkalai Semenanjung Malaysia (sehingga Julai 31, 2010)}, t.t. (English: \textit{Status of Abandoned Housing Projects in Peninsular Malaysia (until July 31, 2010)}), n.d. This division is funded with an initial fund of RM200 million by the government to help and facilitate rehabilitating parties to revive the projects.
Rehabilitation of Abandoned Housing Projects of Housing Developer Companies under Receivership in Peninsular Malaysia: Some Salient Issues and Suggestions

Table 2: Summary of the overall status of abandoned housing projects in Peninsular Malaysia (until July 31, 2010)

<table>
<thead>
<tr>
<th>NO.</th>
<th>PROJECT'S STATUS</th>
<th>NO. OF PROJECTS</th>
<th>NO. OF HOUSING UNITS</th>
<th>NO. OF PURCHASERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>INITIAL PLANNING</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i)</td>
<td>Under rehabilitation plan&lt;sup&gt;4&lt;/sup&gt;</td>
<td>13</td>
<td>3,206</td>
<td>2,055</td>
</tr>
<tr>
<td>(ii)</td>
<td>Wound up companies&lt;sup&gt;5&lt;/sup&gt;</td>
<td>23</td>
<td>9,854</td>
<td>5,896</td>
</tr>
<tr>
<td>(iii)</td>
<td>Sold to third party (non-performing-loans)&lt;sup&gt;6&lt;/sup&gt;</td>
<td>9</td>
<td>1,159</td>
<td>505</td>
</tr>
<tr>
<td>(iv)</td>
<td>Return of deposit to purchasers&lt;sup&gt;7&lt;/sup&gt;</td>
<td>2</td>
<td>289</td>
<td>105</td>
</tr>
<tr>
<td></td>
<td>Sub-total:</td>
<td>47</td>
<td>14,508</td>
<td>8,561</td>
</tr>
</tbody>
</table>

4 Examples of the housing projects are: Taman Raya Indah Naga Lilit, Kulim, Kedah (Original developer was Cosmopolitan Builders Sdn Bhd and the joint venture partner is Logic Synergy Sdn Bhd), Sri Dahlia Timur Laut, Pulau Pinang (Developer: Bench Win Sdn Bhd) and Taman Sri Bemban, Batu Gajah, Perak (Developer: Uniservice (M) Sdn Bhd), Alam Mutiara Kuala, Selangor (Developer: MZ Development). Ibid.

5 Examples of the housing projects falling under this category are: Pangsapuri Seri Pertama Sungai Petani, Kuala Muda, Kedah (Developer: JB Kulim Development Sdn Bhd (wound up on May 25, 2004) (Liquidator: Kedah Department of Insolvency — the Official Receiver)) and Palma Ria Kondominium Kuah, Langkawi, Kedah (Developer: PRJ (M) Sdn Bhd (wound up on December 14, 2006) (Liquidator: Kuala Lumpur Department of Insolvency — the Official Receiver)). Ibid.

6 Examples of the projects which fall under this category are: Taman Subang Permai or now known as “Coral Vista Condominium”, Subang Jaya, Selangor (original developer: Coral Land Corporation Sdn Bhd (this project was sold to Sinesinga Sdn Bhd by the chargee bank)), and Taman Serosa Kajang (double-storey-terrace-houses), Kajang, Hulu Langat, Selangor (Developer: Serosa Resources Sdn Bhd (wound up on June 11, 2003 and February 26, 2004) (this project was sold to Gale Force Sdn Bhd by the chargee bank) (Liquidator: Crowe Horwath Sdn Bhd)). Ibid.

7 The housing projects are Kondominium Delima, Labu, Seremban, Negeri Sembilan (Developer: Idealmont Sdn Bhd) and Taman Repah Baru Phase 2B, Tampin, Negeri Sembilan (Developer: Nilai Tinggi Construction Sdn Bhd). Ibid.
<table>
<thead>
<tr>
<th>NO.</th>
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<th>NO. OF PROJECTS</th>
<th>NO. OF HOUSING UNITS</th>
<th>NO. OF PURCHASERS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>UNDER REHABILITATION</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i)</td>
<td>Original developer/ rehousing developer*</td>
<td>41</td>
<td>18,202</td>
<td>11,617</td>
</tr>
<tr>
<td>(ii)</td>
<td>Syarikat Perumahan Negara Berhad*</td>
<td>11</td>
<td>4,832</td>
<td>4,562</td>
</tr>
<tr>
<td>(iii)</td>
<td>Completed without CFO**</td>
<td>5</td>
<td>985</td>
<td>570</td>
</tr>
<tr>
<td></td>
<td>Sub-Total:</td>
<td>57</td>
<td>24,019</td>
<td>16,749</td>
</tr>
<tr>
<td></td>
<td>III COMPLETED</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i)</td>
<td>Completed with CFO***</td>
<td>16</td>
<td>3,731</td>
<td>3,219</td>
</tr>
</tbody>
</table>

8 Examples of these housing projects are Taman Melor Phase 4, Sungai Petani, Kuala Muda, Kedah (Developer: Double-On Corporation Sdn Bhd), Taman Terubong Indah, Timur Laut, Pulau Pinang (Developer: Majestic Heights Sdn Bhd (wound up on October 16, 2001) (Liquidator: Deloitte Corporation Solution Sdn Bhd) and Mengkuang Heights, Mengkuang, Pulau Pinang (Developer: Sri jetuda Sdn Bhd (wound up on July 13, 2006), (taken over by UDA Holdings Sdn Bhd) (Liquidator: Lam Ah Kow @ Lam Wai Min from Aljeffri Dean Sdn Bhd). Ibid.

9 Examples of these projects are Bandar Alam Perdana, Ijok, Kuala Selangor, Selangor (Developer: Vega Builders Sdn Bhd), Taman Khalid al-Walid, Lot 3236, Section 30, Kelang, Selangor (Developer: Kelland Development Sdn Bhd), Taman Khalid al-Walid, Lot 3237, Section 30, Kelang, Selangor (Developer: Kelland Development Sdn Bhd) and Taman Nuri Indah, Tanjung 12, Kuala Langat, Selangor (Developer: Konsortium Sdn Bhd). Ibid.

10 Examples of these projects are Taman Suria, Seberang Perai Selatan, Pulau Pinang (Developer: Pembinaan Renkoman Sdn Bhd) (taken over by Primawangi Sdn Bhd)), Taman Sri Abadi Phase 2, Teluk Changi, District of Kota Setar, Kedah (Developer: Grand Rejoice Sdn Bhd), Taman Seri Marina, Kuala Kedah, Kedah (Developer: JB Kulim Development Sdn Bhd (wound up on May 25, 2004) (Liquidator: Kedah Department of Insolvency as the Official Receiver) and Taman Seri Simpang Jaya, Kangkung, Kota Setar, Kedah (Developer: JB Kulim Development Sdn Bhd) (wound up on May 25, 2004) (Liquidator: Kedah Department of Insolvency as the Official Receiver). Ibid.

11 Examples of the housing projects are Kulim Height Blok D, Kulim, Kedah (Developer: KTPC Resort Development Berhad) (taken over by Kedah Holdings Sdn Bhd), Taman Perwira Indah Phase III Seberang Prai Tengah, Pulau Pinang (Developer: Perumahan Wira Seberang Sdn Bhd) (taken over by CMC Premier Planner Sdn Bhd) and Taman Sri Murni Mukim Durian Sebatang, Daerah Hilir Perak, Perak (Developer: Seema Development Sdn Bhd). Ibid.
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<th>NO. OF PURCHASERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>(ii)</td>
<td>Variation of development proposal 12</td>
<td>18</td>
<td>4,113</td>
<td>1,235</td>
</tr>
<tr>
<td>(iii)</td>
<td>Return of deposit 13</td>
<td>13</td>
<td>2,252</td>
<td>1,359</td>
</tr>
<tr>
<td></td>
<td>Sub-total</td>
<td>47</td>
<td>10,096</td>
<td>5,813</td>
</tr>
<tr>
<td></td>
<td>OVERALL TOTAL</td>
<td>151</td>
<td>48,623</td>
<td>31,123</td>
</tr>
</tbody>
</table>

Source: Bahagian Pemulihan Projek Perumahan Terbengkalai, Jabatan Perumahan Negara, Kementerian Perumahan dan Kerajaan Tempatan, Status Projek Perumahan Terbengkalai di Semenanjung Malaysia (sehingga Julai 31, 2010) (English: Division of Rehabilitation of Abandoned Projects, National Housing Department, Ministry of Housing and Local Government, Status of Abandoned Housing Projects in Peninsular Malaysia (until July 31, 2010)).

What can be deduced from the above statistics and tables in 2010, is that there is a drastic decrease of the number of abandoned housing projects in Peninsular Malaysia. Secondly, the abandoned housing projects are subject to rigorous planning for rehabilitation under strict surveillance by the Chief Secretary to the Government (Ketua Setiausaha Negara (“KSN’’)). The decrease is, it is opined, due to the following factors:

(1) the establishment of the Division of Rehabilitation of Abandoned Projects under the Department of National Housing, which is entrusted

12 The projects which fall under this category have been subject to variation of their planning permission, from housing development project to become commercial projects. As they have become commercial projects, they are not subject to the provisions under Act 118 and the control of the MHLG. Examples of these projects are Taman Junjong Jaya, Junjong, District of Kulim, Kedah (Developer: Cayman Development Sdn Bhd) (wound up on August 13, 2007) (Liquidator: Rimbun Corporate Advisory Sdn Bhd)) and Taman Cemerlang, Lebuh Raya Thein Teik, Pulau Pinang (Developer: Penangan Maju Holdings Sdn Bhd) (wound up on December 17, 1999) (taken over by Lembaman: Development Sdn Bhd). Ibid.

13 The housing projects that fall under this category are projects which are not suitable for rehabilitation: thus MHLG directed the developers to return the deposit to purchasers. The housing projects are Taman Singgsahsana Putera, Mukim of 7, Seberang Prai, Pulau Pinang (Developer: Bagan Masyhur Sdn Bhd), Taman Gelugur Mukim 13, North East District, Pulau Pinang (Developer: Rethiko Sdn Bhd), Sentul Indah, Sentul, Kuala Lumpur (Developer: Homeng Realty Sdn Bhd) (wound up on November 19, 2003) (taken over by Alam Rio Builders Sdn Bhd) (Liquidator: Shah Alam Department of Insolvency as the Official Receiver)) and Taman Suria Indah Dengkil Sepang, Selangor (Developer: DDR Properties & Development Sdn Bhd). Ibid.
by the government to specifically tackle and settle the problems of abandoned housing projects, including undertaking pro-active steps to rehabilitate the abandoned housing projects and help the aggrieved purchasers;

(2) the Key Performance Index ("KPI") as set out by the government and the concrete plan monitored by the Chief Secretary to the Government and the Secretary General of MHLG with regular scheduled meetings and checks; or

(3) the revised definition of abandoned housing project in 201014 which may still be open to abuse of the power of the Minister of Housing and Local Government to endorse or not to endorse that certain problematic housing projects are considered "abandoned housing projects". This power may be abused by the Minister in that the Minister may, in order to create a short list and statistics of abandoned housing project (distorted list), not endorse certain troublesome housing projects as "abandoned housing projects" even though they should have been so categorised.

Nonetheless, even though based on the statistics as tabled above, the number of abandoned housing projects is decreasing and the projects so abandoned are subject to rehabilitation, this is still not satisfactory, in the opinion of the author. The following are some observations and grounds of the author in respect of the above statistics and tables of abandoned housing projects in Peninsular Malaysia:

(1) The above current list of abandoned housing projects (as at July 30, 2010) does not take into account the closed abandoned housing projects’ files (i.e. abandoned housing projects found in 1970s and 1980s, which are deemed totally not suitable for rehabilitation), abandoned housing projects of the parties which have not fallen under the jurisdiction and control of the MHLG and Act 118 and abandoned housing projects in Sabah and Sarawak (East Malaysia). Thus, if these abandoned housing projects were to be taken into consideration, the list of abandoned housing projects in Malaysia would be more.

(2) The establishment of the Rehabilitation of Abandoned Projects Division also seemed not to have fully been able to help the aggrieved purchasers to have their (the aggrieved purchasers) abandoned housing units duly rehabilitated. This is evident based on the above tables, in that there are 47 projects which clearly cannot be rehabilitated at all. These hopeless projects have either been ousted from the jurisdiction of the MHLG

14 Interview with Junaid Izzuddin Abdul Aziz, an administrative officer at Division of Rehabilitation of Abandoned Projects, National Housing Department, Ministry of Housing and Local Government (Pusat Bandar Damansara, Kuala Lumpur, July 14, 2010).
by way of changing the development proposal of the projects which previously was "housing development projects" into "commercial projects" (18 projects) or the defaulting developers should return the deposit paid by purchasers and nullify the sale and purchase agreements (13 projects) to the effect that it is as if there was no contract between the housing developers and the aggrieved purchasers.

Nonetheless pursuant to the recent proposed amending s 9(2) of the Housing Development (Control and Licensing) (Amendment) Act 2012 (Act A1415), the definition of "abandoned housing project" means where the housing developer refuses to carry out or delays or suspends or ceases work continuously for a period of six months or more or beyond the stipulated period of completion as agreed under the sale and purchase agreement. However, as this proposed amendment on the definition of abandoned housing project is as yet enforced (at least at the time this writing is prepared), the administrative definition as propounded by MHLG is still applicable to categorise certain problematic housing projects as abandoned housing projects.

**Receivership**

There are two types of receiver and manager. One is appointed by the court and the other is appointed out of court. The latter may consist of three types, namely:

(i) the receiver and manager may be appointed without any intervention by the court, i.e. by consent of the parties to a dispute;

(ii) the receiver and manager may be appointed by the direction of the court to the parties to the dispute;

(iii) the receiver and manager may be appointed without the intervention of the court, but pursuant to an agreement between the parties to the dispute.

The appointment of receiver and manager is subject to certain rules, viz,

(a) that the power of appointment is to be exercised with great circumspection;

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16 The jurisdiction of the High Court to appoint a receiver and manager originates from s 25(2) of the Courts of Judicature Act 1964 (Schedule, paragraph 6 (Preservation of Property)) and s 43 of the Specific Relief Act 1950 (revised – 1974) (Appointment of Receivers Discretionary).

(b) that it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property;

(c) that there is no case in which the court appoints a receiver merely because the measure can do no harm;

(d) that fraud or imminent danger, if the immediate possession should not be taken by the court, must be clearly proved; and,

(e) that unless the necessity be of the most stringent character, the court will not appoint a receiver until the defendant is first heard in response to the application.18

Where a developer company is under receivership due to default of the developer company to repay the debts to its lender (debenture holder) under the deed of debenture, it means that the developer company (i.e. the directors and the previous management team) has no ability and power to run its own business and affairs. The company may also be subject to a receivership if the assets of the company covered by the charge are in jeopardy.19 The company may (through the order of the board of directors and the management) jeopardise the assets to the detriment of the interests of the debenture holders who have interests in the said assets. It follows that to protect the debenture holders' interests, receivership is initiated for taking over the business and affairs of the company in order to settle the debts of the debenture holders and thus protect the debenture holders' interests. The receiver and manager will administer and manage the developer company, including realising the company's assets and carrying on the company's business towards settling all the debts owed to the debenture holders and/or other secured and unsecured creditors, as the case may be, pursuant to the order of the court appointing him and/or the deed of debenture and provisions in the CA, viz s 191(1),20 s 292(1)(a)–(f),21 s 292(3),22 s 292(4),23 s 292(5)24 of the CA or other duties as

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18 See Hamid Sultan bin Abu Backer, supra, n 17, p 426.
20 This provision concerns the settlement of certain debts, and their priority of payments, from any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures.
21 These provisions concern the list of priority of payment of debts to creditors.
22 This provision concerns the right of reimbursement payment, from the assets of the company under receivership, of the person who has used his own moneys to pay the salaries of the employees of the company under receivership.
23 This provision states that all wages or salary to employees, all remuneration payable to employees, all amounts due in respect of contributions payable to employees of the company shall have priority over the debenture holders' claims under any floating charge created by the company.
24 This provision concerns the liability of the company to pay the third party for any liability covered under contract of insurance which the company had entered into, in priority to all payments in respect of the debt referred to in s 292(1) of the CA.
directed by the court pursuant to s 183(3) and (4)\textsuperscript{25} and the common law, as far as this law is permitted by the provisions of the Civil Law Act 1956.\textsuperscript{26}

The aggrieved purchasers in abandoned housing projects can request that a receiver and manager be appointed by the court, pursuant to Order 30 r 1 of the Rules of the High Court 1980 (by way of summons or motion supported by affidavit evidence), provided they (the aggrieved purchasers) are considered as "creditors" to the housing developer company. Thus, they should obtain the requisite judgment debts (for liquidated damages) and/or file proof of debts to entitle them to become the creditors to the housing developer company. Secondly, the aggrieved purchasers may claim that they are "interested parties" to the proceedings for protecting their rights and interest in the abandoned housing projects and to have the projects duly rehabilitated.\textsuperscript{27} Thirdly, they can request the creditors (unsecured or unsecured creditors) through court's order appointing a receiver and manager to carry out the rehabilitation. The court's order should provide the mode as to how the rehabilitation can be carried out and the cash flow of the funds to finance the rehabilitation and the distribution of the proceeds from the sales of the housing units to the debenture holders.

To run the intended rehabilitation, the receiver and manager can utilise the moneys held under the Housing Development Account ("HDA") which is protected by s 7A(6)(a), (b) of the Housing Development (Control and Licensing) Act 1966 (Act 118) and that this money shall not be subject to the priority of payment under the winding up and receivership, pursuant to ss 191(1) and 292 of the CA. In the event, the defaulting developer is put under the control of the receiver and manager or liquidator, in order to rehabilitate the project, the purchasers or other stakeholders can invoke ss 183(4) and 236(2)(j) of the CA to pray to the court to issue the necessary order to rehabilitate the project. As the moneys held under the HDA are protected by s 7A(6)(a), (b) of Act 118 and shall not be subject to the priority of payment under the winding up and receivership, pursuant to ss 191(1) and 292 of the CA, it is possible to

\textsuperscript{25} These provisions concern the right of the receiver or manager to apply to the court for further directions in respect of his functions and the right of the debenture holder to apply to the court for direction in relation to any matter arising in connection with the performance of the function of the receiver or manager, in respect of enforcement of any charge.

\textsuperscript{26} Dr Samsar Kamar Hj Abd Latif states that "the legal duties of receivers are derived from the terms of their contract of appointment, the general common law, the statutes, secondary legislation and rules in the profession. The duties of a receiver are owed to the company because a receiver is usually designated as the company's agent. However, under the terms of his appointment, generally it is clear that he has primary obligations to the debenture holder as well, principally, to obtain the charged assets and realize them with a view to paying the secured creditor's debt: Dr Samsar Kamar Hj Abd Latif, supra, n 17, p 113. See also ss 3(1) and 5(1) and (2) of the Civil Law Act 1956 (Revised 1972) (Act 67), which restrict importation of the laws of England into states in Malaysia.

revive the project so abandoned, provided the moneys are sufficient to meet all the rehabilitation expenditure.

An example where an abandoned housing project was revived by a court’s appointed receiver and manager was Taman Desa Anggerik, Senawang, Negeri Sembilan, Lease Holding No 644, PT No 1411, Mukim Ampangan, Seremban, Negeri Sembilan. The rehabilitation of this project was undertaken by a receiver and manager by name of Abdul Jabbar bin Abdul Majid and Abdul Halim Mohyiddin of Messrs KPMG Peat Marwick, financed by a soft loan from Tabung Pemulihan Projek Terbengkalai – Abandoned Projects Rehabilitation Fund (“TPPT”), Bank Negara, on the application of the plaintiff/chargor, Messrs BBMB Kewangan Berhad, pursuant to s 256 of the National Land Code 1965 (“NLC”), Memorandum of Charge and Order 83 of the Rules of the High Court 1980, before YA Dato’ Dr Visu Sinnadurai on May 30, 1994 at the Kuala Lumpur High Court, OS No 31-4169-1986. Among the powers granted by the court to the said receiver and manager were the powers, viz:

(a) to charge assets, interests, receivables, benefits and properties of the defendant to TPPT as collateral for the soft loan granted by TPPT to revive the project;

(b) to apply for the necessary housing developer’s licence and advertisement and sale permit from MHLG;

(c) to apply for the necessary approval, consent and permission from the local and land authorities;

(d) to appoint consultants and contractors for rehabilitation of the project; and,

(e) to apply the proceeds and revenues generated from the sale of the housing units in the rehabilitation of the project, to pay—firstly, all costs, salaries and expenses of the receiver and manager; secondly to pay the soft loan granted by TPPT; thirdly, to pay off all the debts owed by the defendant to the plaintiff and fourthly, to pay back any balance, if any, to the defendant. Further, by the said order, no action should be instituted against the receiver and manager, in the course of carrying out the order and rehabilitation, unless with the order of the court.

28 In file number: KPKT/08/824/2106/E. The defaulting developer was Pembangunan Mutiniaga Sdn Bhd.

29 Court’s order dated May 30, 1994, issued by YA Hakim Dato’ Dr Visu Sinnadurai in Originating Summons No 31-4169-1986, in the High Court of Kuala Lumpur (Civil Division), filed by Messrs Rashid & Lee of 6th Floor, No 56, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur, solicitor for the plaintiff with reference ST/90 in file number: KPKT/08/824/2106/E.

30 Ibid.

31 Ibid.
Following the above order of the court, to effect the rehabilitation, the receiver and manager had entered into a rehabilitation agreement with the purchasers. Among the terms of the agreement were that, the purchasers would not take any legal action against the receiver and manager in the course of the rehabilitation, they should not claim any liquidated late delivery damages from receiver and manager, and they had to allow the purchased lots to be charged to TPPT in consideration of TPPT granting the soft loan for running the rehabilitation.\(^{32}\)

It seems that based on the above court order, the court had applied its inherent power pursuant to Order 92(4) of the High Court Rules 1980,\(^{33}\) and s 23(1) of the Courts of Judicature Act 1964 to appoint a receiver and manager\(^{34}\) in order to rehabilitate the abandoned housing project on the ground of public interest. The order did not mention the priority of payment as prescribed generally by ss 191 and 292 of the CA (under receivership and liquidation) nor was it subject to the priority of payment pursuant to s 268 of the NLC, even though the action was founded on the breach of the defendant towards repayment of the loan secured on the project site.

Similar was the case in the rehabilitation of Bayshore Apartment, Lot 3979, Tanjong Bungah, NED, Pulau Pinang, where the developer Vigol Development Sdn Bhd defaulted in the repayment of the bridging loan to Hong Leong Finance Berhad ("HLFB"), which was secured by the project site. In the result, the lender, HLFB, instituted foreclosure proceedings to sell off the collateral land and succeeded in obtaining an order for sale. However later, 30 purchasers managed to obtain loans from Tabung Pemulihan Projek Terbengkalai of Bank Negara ("TPPT") to revive the project, to be carried out by a receiver and manager from Messrs Coopers & Lybrand, appointed by the court, pursuant to Order 30 of the Rules of the High Court 1980. In this case, the purchasers had obtained a power of attorney to proceed with the rehabilitation from the defaulting developer and with the consent of the lender HLFB (secured creditor) to withhold the sale and allowed the receiver and manager to resume the rehabilitation. In this case, there was still a shortfall, despite loan of RM2.14 million being granted by TPPT to revive the project. In this regard, the purchasers were agreeable to top up additional moneys to cover the shortfall.\(^{35}\) The project was fully rehabilitated and the Certificate of Fitness for Occupation ("CF") was obtained on November 3, 1998.\(^{36}\)

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\(^{32}\) Rehabilitation Agreement between Pembangunan Mutiniaga Sdn Bhd ( Receivers and Managers Appointed by Court over the Housing Project Known as Taman Desa Anggerik) and Heng Yee Thiam dated July 17, 1984, in ibid.

\(^{33}\) Although this was not mentioned in the said order.

\(^{34}\) Although Order 30 of the Rules of the High Court 1980 had not been mentioned.

\(^{35}\) File No KPKT/08/824/1910/E.

\(^{36}\) Ibid.
However, the position reflected by the case law is rather mixed, in that courts are divided between allowing rehabilitation and otherwise, once the developer is subject to a receivership. For example, in *Bunga Nominees Sdn Bhd v Abdul Jabbar Majid & Ors*, 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* (where 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*, and *Bank Bumiputra Malaysia Berhad v Sintisis Sdn Bhd & Ors*.

There is also a case where the court was indifferent and did not even comment on whether the receiver and manager should carry out any rehabilitation of the abandoned housing project. This is because in this case the court did not deal with the issues of the aggrieved purchasers in abandoned housing project and to have their project be rehabilitated. This case is *Emar Sdn Bhd (Under Receivership) v Aidigi Sdn Bhd and Another Appeal*. In this case the developer (the first defendant) was sued by the housing contractor (the plaintiff) for the failure of the developer to pay the contractor’s works done on the project site. This housing project development comprised in Lot No 2051, Mukim Bemban, District of Jasin, Melaka. The developer also had abandoned the project altogether. Apart from the failure of the developer to honour the

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38 [1988] 3 MLJ 211. The court refused the application of the purchaser to have specific performance of the agreement of sale over the housing project carried out by the defaulting developer, who had been put under receivership. This is because the order if granted would cause unreasonable burden to the receiver and manager to revive the project as there was not enough money to proceed with the purported revival.
39 [1997] 1 MLJ 808; [1996] 1 LNS 105. The petitioner/judgment creditor obtained the winding-up order against the respondent housing developer, pursuant to s 218 of the CA. However, the order could not be enforced on the application of the receiver and manager appointed by the debenture holder for the respondent/housing developer company who opposed such a petition and the court allowed their opposition on the ground of equity and to protect the interests of the public purchasers to have the housing units be revived by the receiver and manager.
40 [1995] 1 LNS 268 (High Court of Malaya at Kuala Lumpur). In this case, the first defendant (Sintisis Sdn Bhd, a housing developer) was the registered proprietor of the land held under Lot 155, Mukim Grant 1995 and Lot 2758 Grant 26584, Mukim of Tebrau, Johore Bahru. The first defendant developed this land into a housing development project. To finance this project, the first defendant obtained, bridging finance facilities subject to a first legal charge on the said land and guarantees of the second and third defendants. However later, the first defendant was subject to a receivership. The business and affairs of the first defendant were controlled by the appointed receiver and manager. This receiver and manager was appointed by the court and was required to undertake rehabilitation of the abandoned project left by the first defendant.
41 [1992] 1 LNS 33 (Supreme Court at Kuala Lumpur).
contract with the contractor, the developer also had defaulted on the debenture given by Perwira Habib Bank Berhad ("Perwira") (the second defendant). Following the default, Perwira appointed a receiver and manager pursuant to the provision under the deed of debenture to take over the business and affairs of the developer. The duty of the receiver and manager was also to carry on the remaining housing units left abandoned and not completed by the developer. On this the receiver and manager succeeded. The receiver and manager also was monetarily assisted by Perwira in order to complete the abandoned housing project.42

It is opined that, a special law is required to control and cater for the rehabilitation of abandoned housing projects for the following reasons:

- To avoid any problem and dispute which may arise from and be caused by recalcitrant purchasers, contractors, end-financiers, banks, local authorities, local planning authorities, state authorities, etc. This problem can be seen, for example, in Ria Kondominium, Bandar Kuah, Langkawi developed by PRJ (M) Sdn Bhd, where all the attempted discussions, in order to rehabilitate the project so abandoned, between the purchasers, banks and developer failed.43

- To expedite the rehabilitation of the projects within a specified and definite time period. Otherwise, without systematic and concrete rehabilitation plans and law which can control it, the rehabilitation will be delayed and in worst situations, the rehabilitation could not be commenced. This kind of trouble occurred in Taman Seri Marina, Kuala Kedah, Kota Setar District developed by JB Kulim Development Sdn Bhd. The reason leading to such a catastrophe is that the developer had been wound up by court on the application of the main contractor due to the default of the developer itself and exacerbating the problem, currently no party was willing to rehabilitate the project. The project remains stalled, until today without any positive and possible prospect, plan and initiative to revive it. It is noted that, this project should have been completed by February, 2001.44

- The purchasers will be able to get the houses and their rights will be protected as these are provided and guaranteed by the special rehabilitation statutory regime provisions. Further, the rehabilitating

42 In the case of Chon Ah Joe @ Chuan Teck Chun & Ors v Lim Tian Huat (as the receiver and manager appointed for Bigraise Telipok Sdn Bhd & Anor) [2010] 4 MLJ 270 (High Court of Borneo at Kota Kinabalu), even though a receiver and manager was appointed to take over the affairs of the debtor company (a housing developer) due to the default on the debenture, the case did not however explain whether the housing development left by the debtor company was fully rehabilitated by the receiver and manager.

43 File Number: KP KT/08/824/658-1.

44 File number: KP KT/08/824/6741-2.
developers and their rehabilitation developments are subject to the close scrutiny of MHLG. It should be borne in mind that various troubles could occur with failure to have such a pre-emptive and pro-active rehabilitation statutory regime. For example, this can be illustrated in Taman Bunga Raya, Mukim Wang, Kangar developed by Bintong Dasari Sdn Bhd, where without being properly supervised and monitored, the rehabilitation of the project had been prolonged, for a much longer period than it had been initially projected for, with various kinds of problems and difficulties faced by the rehabilitating developer, including the problem of recalcitrant contractors, purchasers, bankers and authorities. Fortunately, however, the revival of this project had, finally, been completed on June 12, 1998, after becoming abandoned since 1992.45

- To avoid any abuse and misuse of duty, power, and authority, when the project is undergoing the process of rehabilitation, caused by consultants, contractors, receivers, managers and liquidators. The rampant abuse and misuse of duty, power and authority by these irresponsible parties, has become the current typical phenomenon in the rehabilitation of abandoned housing projects in Peninsular Malaysia, much to the dismay and detriment of the purchasers. Taman Bistari Kamunting, Taiping, Perak developed by Sri Ringgit Properties Sdn Bhd is the perfect example of this phenomenon. The problem with this project is that, the rehabilitating contractors, Setia Laris Sdn Bhd and Super City Triumph Sdn Bhd, had failed to plan properly and had transgressed certain rules and regulations, which all in all, subtle or obvious, had retarded the due progress of its rehabilitation. This project had been abandoned since the middle of the 1980s but fortunately, however, with the injection of welfare funds and rehabilitation carried out by Syarikat Perumahan Negara Berhad (“SPNB”) in the early 2000s, the project is now fully rehabilitated and ready for occupation, after it had been abandoned for almost 20 years.46

- To prevent any unwarranted and unnecessary disturbing actions such as legal actions commenced by dissatisfied parties. Without any such disturbing actions, it would certainly help the new rehabilitating developers or the previous defaulting developers in case they are agreeable and are fit to resume the project, to smoothly carry out the rehabilitation. This problem, can be illustrated in Taman Perpaduan Permai, Bercham Ipoh developed by Trinity Home Builders Sdn Bhd, where in this case, the project should have been completed by year 1999, however until now no rehabilitation has been undertaken. To worsen the matter, 18 purchasers have filed writ of summons against

45 File number: KPKT/08/824/4756.
46 File number: KPKT/08/824/3957/E.
the defaulting developer praying for specific performance, damages and other equitable remedies against the defaulting developer.47

- To prevent any abandoned housing project from being stalled for an indefinite period of time, without any positive and prospective rehabilitation plans and development. This problem can be illustrated in Taman Sri Intan, Besut, Terengganu, developed by Tenaga Wan Bersaudara Sdn Bhd. This project should have been occupied and completed by year 1999. However, it was later abandoned and until now there is no plan for rehabilitation. Furthermore, the developer fails to inform MHLG the latest development and plan for the rehabilitation of its project.48

**Latest government measures to tackle problems of abandoned housing projects**

Recently the Malaysian government has announced certain measures to deal with the problems of abandoned housing projects. This includes the proposed amendments to Act 118. The proposed amendment is this: any housing developer which abandons its housing projects will be subject to a criminal penalty. This will come into effect with the enforcement of the new amendment to Act 118 which provides that all licensed housing developers who fail to complete a housing project or have caused the abandonment of the project shall be deemed to have committed a criminal offence. Upon conviction, such a developer is liable to a fine of not less than RM250,000 and not more than RM500,000 or to be jailed up to three years, or both. This is provided under a new section in s 9 of the Housing Development (Control and Licensing) (Amendment) Act 2012 (Act A1415).49 Apart from that, s 5 of Act A1415, which is aimed at replacing s 8A of Act 118, will also give the buyer the right to terminate the sale and purchase agreement if the developer refused to continue implementing the project after six months from the date of the agreement. Furthermore s 3 of Act A1415, which is aimed at amending s 6 of Act 118, states that the deposit to obtain a housing development licence is to be increased from RM200,000 to three per cent of the estimated cost of the project. This is to ensure that only developers who have sufficient financial ability will be allowed to implement housing projects. Section 8 of Act A1415 is aimed at amending s 16AD of Act 118 to increase the minimum penalty of RM10,000 for non-compliance with a tribunal award to a maximum of RM50,000. On the other hand, s 6 of Act A1415 is aimed at amending subsection 15N(1) of Act

47 File number: KPKT/08/824/7055-1.
48 File number: KPKT/08/824/7090-1.
49 However at the time this manuscript is prepared the said amending Act has not yet been brought into force. The Housing Development (Control and Licensing) (Amendment) Act 2012 (Act A1415) was gazetted on February 9, 2012. The effective date of the Act has yet to be announced. See Malaysian Institute of Accountants, "Implications of the Housing Development (Control and Licensing) (Amendment) Act 2012 on Insolvency Practitioners".
118 to give more power for the tribunal to hear claims on a sale and purchase agreement involving unlicensed housing developers. The proposed clause 10, however, aimed at amending s 24 of Act 118 to increase the maximum fines for any violations of the law to RM50,000 from RM20,000 previously.50

The author commends the above move by the government. However, the above approach in making the abandoned housing developers criminals only serves as a penal measure and is not preventive. The best method to arrest the occurrences of abandoned housing projects in Malaysia, it is submitted, is by way of introducing the “full build then sell” concept of housing delivery. The above penal provisions may not be effectual if the enforcement and implementation of the law is weak due to insufficient professional staff, inadequate administrative logistics, insufficient legal and technical knowledge of the staff and inefficient administration of the housing regulatory body (MHLG). Thus, the problems of abandoned housing projects still cannot be totally eliminated, even by the enforcement of the above Act A1415.

The definition of “housing developer” as defined by s 3 of Act 118 has been amended, pursuant to s 2 of Act A1415, to include a housing developer which is under liquidation as well. According to s 2 of Act A1415, if a housing developer is under liquidation, the liquidator or provisional liquidator, as the case may be, which has been appointed by the court of competent jurisdiction to take over the business and affairs of the insolvent liquidated housing developer company shall as well be considered “housing developer”. Thus, the liquidator or the provisional liquidator is also duty bound to comply with the statutory and legal duties and may be punishable if certain statutory and legal duties have not been complied with as the ordinary housing developer companies are under Act 118.

In the opinion of the author, the above amendment may still not be practicable. This is premised on the reason that imposing statutory and legal duties on the liquidator and provisional liquidator cannot solve the problems of abandoned housing projects including to cause the abandoned housing projects be rehabilitated by the liquidator or provisional liquidator. Secondly, if the available fund is not enough or the problems plaguing the projects are too great to settle, the liquidator or provisional liquidator cannot proceed with the

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Rehabilitation. Thus, this approach—that the definition of “housing developer” includes “liquidator” and “provisional liquidator” as well—will not solve the problems of abandoned housing projects. In addition, this amending section is unfair and inequitable to the liquidator or provisional liquidator as the cause of abandonment is due to the faults of the previous defaulting ailing insolvent housing developer companies, the inadequacy of funds and other plaguing problems in the abandoned housing projects, yet the liquidator or provisional liquidator has to be overburdened by and be responsible for the consequential effects of the previous defaulting housing developers’ faults.

In addition to the above contention, the author also would like to inquire whether the receiver and manager appointed for housing developer companies under receivership and the scheme of arrangement manager are equally to be subject to the responsibilities as the liquidator or provisional liquidator is, as enshrined in the above amending section, in abandoned housing projects whose developers are subject to receivership or under scheme of arrangement as well? There is no provision in the amending Act which provides certain rules on this matter.

Another new development involving abandoned housing projects are the initiatives adopted by PEMUDAH. PEMUDAH is short name for “the Special Task Force to Facilitate Business”. PEMUDAH was formed by former Prime Minister, Abdullah Ahmad Badawi on February 7, 2007, out of an obvious need for closer collaboration between the public and private sectors to enhance the public service delivery and improve Malaysia’s business environment. The teams forming PEMUDAH consist of the relevant government agencies, private agencies and employee representatives. According to PEMUDAH, in order to deal with the problems of abandoned housing projects, the government should adopt Build-Then-Sell Concept (“BTS”) in the Malaysian housing industry.51

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51 "Pasukan Petugas Khas Pemudahcara Perniagaan" or The Special Task Force to Facilitate Business (or its short-form known as PEMUDAH). It consists of Secretary General of the relevant ministries, government agencies and representatives from the private sectors and the employees. It is headed by Yang Berbahagia Tan Sri Mohd Sidek Haji Hassan, Chief Secretary to the Government of Malaysia and has as its co-chair Yang Berbahagia Datuk Yong Poh Kon, President of the Federation of Malaysian Manufacturers (“FMM”). It has completed five years of work on February 7, 2012. The Special Task Force to Facilitate Business (PEMUDAH) was formed by former Prime Minister, Yang Amat Berbahagia Tun Abdul Aziz Ahmad Badawi on February 7, 2007, out of an obvious need for closer collaboration between the public and private sectors to enhance the public service delivery and improve Malaysia’s business environment. No longer confined to the public service, the task force has expanded its work scope to include tackling private sector inefficiencies. PEMUDAH also leads the effort in improving Malaysia’s ranking in the annual World Bank Doing Business Report. As a result of all these efforts, Malaysia’s ranking improved from 23rd to 18th for the Doing Business 2012 Report. Two working groups under PEMUDAH were set up to look into the efficiency of the public service delivery system and businesses that government policy has an impact on. PEMUDAH strongly believes that reforms can be implemented successfully if the relevant stakeholders are engaged to provide the necessary input. Toward
Nonetheless BTS has not been defined by PEMUDAH. However, the question is whether this BTS is a “full build then sell” or a “quasi build then sell” concept? If it is a “full build then sell” i.e. the developer is required to duly complete the construction of the houses and only upon the receipt of CF or CCC, will the developer sell the houses, then this proposed BTS is the most appropriate measure to deal with the problems of abandoned housing projects. This method will totally eliminate the problems of abandoned housing projects.

On the other hand, if BTS means a “quasi build then sell”, or a “10-90 concept” i.e. the purchaser only needs to pay 10 per cent of the purchase price on the signing of the sale and purchase agreement and the 90 per cent purchase price will only be paid to the developer on the due completion of the houses, the author is still doubtful and sceptical as to whether this concept can eliminate the occurrences of abandoned housing projects altogether? This is because there is no guarantee that during the course of development using this concept (quasi build then sell or 10-90 concept), the developer will not abandon the project.

PEMUDAH also proposed Home Completion Insurance or Guarantee Scheme to face the problems of abandoned housing projects. In the opinion of the author this proposal (Home Completion Insurance) is a very good suggestion as this means it can settle the problem of insufficiency of funds on part of the defaulting developer and facilitate the rehabilitation by white knights. Nonetheless the details of this proposal are yet to be worked out. It is hopeful that this proposal and its details can be workable and sufficient to deal with the problems of abandoned housing projects satisfactorily.52

PEMUDAH in their final proposal also proposed that the schedule of payment for the respective agreements (Schedules G, H, I and J) should be amended. The proposal also aims to ensure that the title and the vacant possession can be made simultaneously.53

Other initiatives as proposed by PEMUDAH in order to curb the occurrences of abandoned housing projects are as follows:54
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(1) Proposed to the government to apply Build-Then-Sell ("BTS") Concept by licensed developers which is to be fully implemented by 2015 with the house buyer shariah compliance financing scheme; and

(2) Proposed to the government that certain amendment to the Housing Development (Control and Licensing) Act 1966 (Act 118) be made which included:

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- Increase in deposit from RM200,000 to three per cent of total estimated physical development cost which also includes professional fees for the Housing Development Account ("HDA");
- House buyers having the option to cancel their Sale and Purchase Agreement ("SPA") in the event that the project does not take place within six months of the agreement being signed;
- Extending the House Buyers' Claims Tribunal ("TTPR") scope to enable house buyers to claim damages from unlicensed housing projects;
- Imposing a maximum penalty of RM50,000, increased from RM20,000, for any offence made by developers to any provision under the Act 118;
- Prosecute developers responsible for abandoned housing projects; and
- Definition of "housing developer" has been expanded to include liquidators where their role is to revive abandoned projects should the developer companies go into liquidation.

The government is also planning to conduct a study to unravel the problems faced by the aggrieved purchasers who are victims in abandoned housing projects. According to the Housing and Local Government Minister, Datuk Seri Chor Chee Heung, "A special committee will be formed to look into this issue and to find ways to assist them." At present, he said, buyers who took housing loans from the government would have their loans cancelled if they became victims of abandoned projects. "They will be considered for another housing loan, or have their four per cent interest rate deferred," he added.

Further, the Minister said, MHLG has taken several initiatives to assist victims of abandoned housing projects. He said the initiatives included providing a verification letter to funding institutions that the projects have been abandoned and assisting buyers to discuss how their loans could be resumed after rehabilitation works started. "Such loans would be subjected to the funding

55 See also Housing Development (Control and Licensing) (Amendment) Act 2012 (Act A1145).
institution's valuation and based on the merits of each case but if the buyer is not assisted, a complaint can be lodged with the ministry which would be referred to Bank Negara Malaysia (BNM)”, the Minister explained. Chor said MHLG has also proposed for a working paper to be presented to the National Economic Council in order for BNM to recommend ways to assist the victims of such projects if the funding institutions fail to give them due consideration. He added that the government and related parties in the industry were discussing holistic ways to best implement the build and sell system.57

Recommendations of the Corporate Law Reform Committee (“CLRC”)58

There are recommendations provided by the CLRC in respect of the receivership of insolvent companies. These recommendations are:

(1) the agency status of the receiver or a receiver and manager be codified;

(2) once a company is in liquidation and a liquidator has been appointed, a receiver and manager should be empowered to continue to act as the agent of the company to carry on the business of the company, provided he obtains consent from the liquidator which must not be unreasonably withheld, or if the liquidator withholds the consent, the consent of the court;

(3) the agency status of the receiver or receiver and manager over the assets secured under the debenture should continue after the appointment of the liquidator;

(4) the CLRC recommends that there should be a codification of a minimum list of powers which should be applicable as a default provision in case the debenture is silent as to the powers of a receiver;

(5) the CLRC recommends that a receiver should be personally liable for debts incurred by him or his authorised agents during his tenure of


58 CLRC is headed by Dato' KC Vohrah. Its members consist of 25 persons from various backgrounds such as advocate and solicitors, representatives from the Companies Commission of Malaysia, Securities Commission, Bursa Malaysia Securities Berhad, Prime Minister’s department, Attorney General’s Chambers, Insolvency Department, company secretaries, chartered accountants and academics. CLRC also is supported by several working groups’ members and a secretariat. CLRC has conducted a research into the current provisions under the Companies Act 1965 since December 2003 which took about four years to complete. The result is the Final Report of the CLRC. See Companies Commission of Malaysia, “Review of the Companies Act 1965 – Final Report” <http://www.ssm.com.my/en/docs/CLRCFinalReport.pdf> (accessed 30 March, 2011)
offices, unless there is a specific agreement to the contrary between the contracting party;

(6) the CLRC recommends that a receiver should have the right to be indemnified out of the assets of the company which are charged under the debenture pursuant to which the receiver is appointed; and

(7) the CLRC recommends that the receiver's costs and remuneration should be given priority over all claims by other creditors.

It is opined that the above recommendations are not sufficient to cater for facing the problems of abandonment of housing development projects of the insolvent housing developer companies, especially for carrying out rehabilitation effectively in the protection of the aggrieved purchasers' rights. The author is of this view on the grounds, firstly, insofar as the receivership process is concerned, the recommendations do not provide adequate measures and remedies which are capable of protecting the aggrieved purchasers' rights (public interest) throughout the abandonment period. Secondly, there is no mention about the duties of the receiver and manager to comply with the statutory and legal obligations imposed by the Housing Development (Control and Licensing) Act 1966 and its regulations thus protecting the rights and interests of the aggrieved purchasers in the course of carrying out rehabilitation. This lacuna may lead to an abuse of power of the receiver and manager at the expense of the purchasers' rights. Thirdly, the receiver and manager is not answerable to the MHLG/Housing Controller. On the other hand, he is obliged to accede to the demands and subject to the consent of the debenture holders, thus marginalising the interests of the aggrieved purchasers and the MHLG/Housing Controller. Fourthly, if in the opinion of the receivership the purported rehabilitation plan is not feasible to the benefit of the debenture holders, the receiver and manager must not carry out the rehabilitation. These (the incapability of the receiver and manager to carry out rehabilitation and protect the interests of the aggrieved purchasers) are due to problems of insufficient funds to finance the rehabilitation costs coupled with the unsettled problems, complications and troubles that plague the abandoned projects which ultimately could affect the projects' potential to be effectively rehabilitated.

Findings and suggestions

The following are the findings and suggestions in respect of the above elaboration of receivership of the insolvent housing developer companies in Peninsular Malaysia:

(1) In Peninsular Malaysia, there is no clear provision in the CA or the insolvency law (for example through case law) which expressly imposes a duty on the receiver and manager to rehabilitate abandoned housing projects and to protect the interests of the aggrieved purchasers.
(2) The duties of the receiver and manager are to realise the assets and run the affairs of the insolvent housing developer companies under receivership for the purposes of settling the debts of the debenture holders.

(3) Based on the case law, in the event the housing developer companies are under receivership and the affairs are controlled by the receiver and manager, 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 it to be carried out by the receiver and manager. Thus, the rights and interests of the aggrieved purchasers in abandoned housing projects of the housing developer companies under receivership to have their projects be rehabilitated may be detrimental and not guaranteed.

(4) There is a legal and statutory gap in the CA (especially when companies are under receivership) when housing projects carried out by the housing developer companies under receivership are abandoned for enabling effective rehabilitation to be carried out in the protection of the purchasers' interests.

(5) The recent amendments as enshrined in the Housing Development (Control and Licensing) Act 2012 (Act A1415) and the PEMUDAH recommendations are not equally comprehensive in dealing with the problems of abandoned housing projects. In other words, the proposed provisions are still insufficient to deal with the problems of abandoned housing projects.

(6) The recommendations given by CLRC purportedly to improve the positions, rights, duties and powers of receiver and manager are not also sufficient to cater for ensuring that rehabilitation of abandoned housing projects can be effectively carried out and thus cannot guarantee protection to the purchasers.

(7) Insofar as the legal situation in Peninsular 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 housing developer companies under receivership.

(8) It is incumbent that all applicant housing developer companies in Peninsular 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 works/housing development projects (s 109E(3)(b)(c) and (4) of the Environmental Planning and Assessment Act 1979, ss 95(1), (2), (2A), 96A and 97 of the Home Building Act 1989). This home warranty insurance scheme provides a purchaser of a property protection against non-completion of the residential works, in the event of death, disappearance or insolvency of the owner-builder and the housing developers (s 101 of the Home Building Act 1989 and reg 56(4) of the Home Building Regulation 2004).59

(9) It is high time for the Malaysian government to introduce a special legal regime governing 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 housing developer companies under receivership and thus eliminate the problem as to who should carry out rehabilitation of abandoned housing projects if the housing developer companies are subject to receivership on default of the terms under the deed of debentures. This proposal is also mooted bearing in mind the fact that the purported rehabilitation of abandoned housing projects can smoothly be done without any interference by the creditors, debenture holders, contributories and other related parties such as banks, chargees, contractors and authorities. Thus, by adopting these approaches (introducing the housing development insurance and enacting special legal regime governing rehabilitation of abandoned housing projects), the rights and interests of the aggrieved purchasers in abandoned housing projects are better protected.

59 Note that this suggestion is also similar to the PEMUDAH's recommendation that proposed the government to introduce Home Completion Insurance or Guarantee Scheme to face the problems of abandoned housing projects, particularly in funding the rehabilitation costs.