Feasibility of Corporate Voluntary Arrangement ("CVA") in Solving Insolvency Issues in Abandoned Housing Projects: A Comparative Legal Analysis between Malaysia and the United Kingdom

Nuarrual Hilal Md Dahlan ACIS* and Ahmad Masum**

Abstract

The Malaysian Corporate Law Reform Committee ("CLRC") was established among others to review the provisions under the Companies Act 1965 (Act 165) and recommend to the Malaysian government new corporate laws to accelerate the due development of the Malaysian corporate sector. CLRC has conducted 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. Under this report, the CLRC has recommended the establishment of a Corporate Voluntary Arrangement ("CVA") to take over the affairs of insolvent companies and rescue them. This paper is a result of a pure legal research that relates to abandoned housing projects in Malaysia. The authors also analysed the CVA’s provisions vis-à-vis the insolvency issues in abandoned housing projects in Malaysia. The objective of this paper is to study the feasibility of the establishment and powers of the CVA in dealing with the insolvency issues in abandoned housing projects and in protecting the rights of the purchasers. Through this writing, the authors are of the view that, the recommendation of the CLRC for the establishment of CVA is commendable. Nonetheless, it is submitted that, in the case of abandoned housing projects, despite having statutory and legal powers, the proposed CVA still cannot fully provide a comprehensive solution in dealing with the insolvency issues in abandoned housing projects, let alone protect the purchasers’ interests. A comparative legal analysis with the United Kingdom’s Company Voluntary Arrangement ("UK CVA") is also done to find out any lessons and advantages that the UK CVA may have in the face of insolvency issues in abandoned housing projects. This paper suggests certain legal approaches to improve the rehabilitation mechanism of abandoned housing projects purportedly to be carried out through CVA and for protecting the rights and interests of the stakeholders.

Keywords: Corporate Voluntary Arrangement (CVA); the United Kingdom Company Voluntary Arrangement (UK CVA); Abandoned Housing Projects; Malaysia; United Kingdom

* Institute for Governance and Innovation Studies, College of Law, Government and International Studies, Universiti Utara Malaysia. Email: nuarrualhilal@gmail.com; hilal@uum.edu.my.

* Institute for Governance and Innovation Studies, College of Law, Government and International Studies, Universiti Utara Malaysia. Email: asmad@uum.edu.my.
Introduction

If a company is unable to pay its debts, it may be subject to various insolvency proceedings on the application of the creditors and other stakeholders. The objective of the insolvency approach is for the insolvency administrator to take over the affairs of the company in order to settle the debts of the creditors. Even though there are a number of other objectives set by legal jurists on insolvency administration, the dominant objective is to settle the debts of the creditors even at the expense of other stakeholders such as consumers, purchasers, and public shareholders. Among the other encapsulated objectives in insolvency administration propounded by the legal jurists are: to underpin the credit system and cope with its casualties; to diagnose and treat an imminent insolvency at an early rather than at late stages; and to prevent conflicts between individual creditors.¹

There are many types of insolvency approach in Malaysia. The most popular ones are: liquidation, receivership and Scheme of Arrangement ("SOA"). The newly introduced methods by the Corporate Law Reform Committee ("CLRC") are the Corporate Voluntary Arrangement ("CVA") and Judicial Management.

The CLRC is headed by Dato' K C Vohrah. Its members consist of 25 persons from various backgrounds such as advocates and solicitors, representatives from the Companies Commission of Malaysia, the Securities Commission, Bursa Malaysia, the Prime Minister’s department, the Attorney General’s Chambers, the Insolvency Department, company secretaries, chartered accountants and academics. CLRC also is supported by several working groups’ members and a secretariat. CLRC has conducted research into the current provisions under the Companies Act 1965 ("CA") since December 2003 which took about four years to complete. The result is the Final Report of the CLRC.²

For the purpose of this paper, only CVA will be discussed in relation to abandoned housing projects in Malaysia. Further, the authors will make a

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comparative study of the provisions of Company Voluntary Arrangement applicable in the UK (the "UK CVA") in dealing with the insolvency issues of abandoned housing projects. The comparative study is done to identify any lessons and advantages that the UK CVA may have for consideration of adoption into the Malaysian CVA.

Problem statement

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

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

Some quarters say that the current housing policy and industry in Malaysia is still healthy, notwithstanding the plight of purchasers of abandoned housing projects, late delivery of vacant possession of housing units, poor workmanship of the houses and other housing problems. "The problem of abandoned housing projects only represents 1%-3% of the total housing projects". "The remaining 97%-99% of housing projects succeeds". "Thus, the current system of housing delivery and policies should be continued regardless of the plaguing occurrences of abandoned housing projects and their negative consequences befalling the purchasers". 3

Unfortunately, these are some of the statements made by persons in authority in Malaysia's housing industry. Nonetheless, despite these statements, there are

3 Dato' Abu Bakar b Hassan, Director General, National Housing Department and Dato' Zainudin b Tala, Deputy Director (Operation), National Housing Department, Ministry of Housing and Local Government, Interview by author, Pusat Bandar Damansara, Kuala Lumpur, August 13, 2010.
still inadequate measures taken by the government to alleviate the problems of
abandoned housing projects, not even the current newly established Division
of Rehabilitation of Abandoned Projects under the Department of National
Housing, Ministry of Urban Well-Being, Housing and Local Government
("MWHLG"), would be able to deal with this problem. The measures taken
are still "too little too late" in the face of the catastrophe caused by abandoned
housing projects. The fallen preys are the aggrieved purchasers themselves. The
law governing the housing industry in Malaysia—the Housing Development
(Control and Licensing) Act 1966 (Act 118) and its regulations—is evidently
unable to fully address the problems of abandoned housing projects. The
court also seems indecisive in protecting the interests of the aggrieved
purchasers in abandoned housing projects. This is partly due to "too many
conflicting considerations and equities" that the court needs to deal with in
cases involving abandoned housing projects. Thus in certain circumstances,
the rights and interests of the purchasers may not fully be appreciated and
taken into consideration by the court. The problem becomes more severe where
the housing developer company is subject to the insolvency administration.
In the insolvency administration, the insolvent ailing company becomes
bankrupt and all the assets and moneys will be used to settle the debts of the
creditors and there may not be any sufficient monetary balance which can
be used to rehabilitate the abandoned housing projects and to compensate
the aggrieved purchasers.\(^4\)

Among the reasons leading to the abandonment of housing projects, in
Malaysia, are:\(^5\)

(1) ongoing conflicts, feuds and squabbles ensuing between and among
the developers, land proprietors, purchasers, contractors, consultants
and financiers causing further difficulty to coordinate and streamline
the development and construction activities;

(2) insufficient coordination between the land administration authority,
planning authority, building authority, housing authority and other
technical agencies\(^6\) in respect of the approval for the alienation of land,

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\(^4\) Nuurrial Hilal Md Dahlan, "Abandoned Housing Projects in Peninsular Malaysia: Legal
and Regulatory Framework" (PhD dissertation, International Islamic University Malaysia,
2009).

\(^5\) Ibid.

\(^6\) In the opinion of the authors the inadequacy and non-coordination in the administration,
policies and procedures involving housing development between the state governments' agencies and the federal government agencies is due to the separate jurisdiction and power that the states and the federal government possess and enjoy that are spelt out in the Federal Constitution ("FC"). See List 1 (Federal List), II (State List) and III (Concurrent List) in the Ninth Schedule to the FC. Thus it is opined, if certain exclusive powers and jurisdictions over certain matters (for example land matters) are held by the state government and its agencies, there may be occasions when the federal government's procedures, policies and circulars relating to the states' matters (e.g. land) may not fully abide by the states' government and their agencies. Thus, this state-federal constitutional tussle will still become a major hurdle and issue in streamlining the national housing development and other related development.
conversion of land uses, subdivision of lands, planning permission, building/infrastructure plans' approval, housing developers' licences and issuance of the Certificate of Fitness for Occupation ("CF") and Certificate of Completion and Compliance ("CCC"), as the case may be;

(3) fraudulent practices of the housing developers, for example, by instructing the architects or engineers to issue false claims for the release of the purchasers housing loans' funds from the end-financiers dishonestly; and,

(4) lacking of and insufficient experience and skills in handling housing development projects on the part of the developers, leading to incompetency and thus, irresponsibility. Some have even absconded after realising that they could not complete the projects.

The grievances and problems faced by the purchasers, if a housing development project is abandoned, are:

(a) Many problems and difficulties happen in the attempts to rehabilitate the abandoned housing units. The problems are because the projects may have too long been overdue without any prospect of revival and to rehabilitate them needs additional costs and expenditure on part of the purchasers.

7 CCC means Certificate of Completion and Compliance. This certificate is issued by the Principal Submitting Person ("PSP") indicating that the purported building works have been duly completed, and are safe and fit for occupation in accordance with the law. See section 70(20) and (21) of the SDBA, section 3 of Act 118 under certificate of completion and compliance, clause 23(2) of Schedules G and I and clause 26(2) of Schedules H and J to the Housing Development (Control and Licensing) Regulations 1989. For the State of Selangor, the conditions and requirements for the issuance of the CCC are provided in the by-law 25(1)(a)-(d) of the Selangor Uniform Building By-Laws 1986 [Sel PU 26/1985], inserted by by-law 15 of the Selangor Uniform Building By-Laws (Amendment) 2007 [Sel PU 9]. See also by-law 25(1)(a)-(d) of the Kedah UBBL. According to by-law 25(1) of the Selangor Uniform Building By-Laws 1986 [Sel PU 26/1985]: "A CCC ... shall be issued by the principal submitting person:

(a) when all the technical conditions as imposed by the local authority have been duly complied with;
(b) when Forms G1 to G21 ... have been duly certified and received by him;
(c) when all the essential services ... have been provided; and
(d) when he certifies in Form F that he has supervised the erection and completion of the building and that to the best of his knowledge and belief the building has been constructed and completed in accordance with the Act, these By-Laws and the approved plans".

This new by-law is inserted by by-law 15 of the Selangor Uniform Building By-Laws (amendment) 2007 [Sel PU 9], enforced from April 12, 2007. See also by-law 25(1) of the Kedah UBBL, inserted by by-law 14 of the Uniform Building By-Laws (Amendment) 2007 [K PU 6](Kedah), enforced from April 12, 2007.

Possible difficulties for reaching consensus and for getting cooperation from purchasers, defaulting abandoned housing developers, end-financiers, bridging loan financiers, contractors, consultants, technical agencies, local authority, land authority, state authority and planning authority for rehabilitating the projects. The troubles may be due to the technical and legal problems faced in the attempt to rehabilitate the projects.

Insufficient fund to generate the rehabilitation as the outstanding loan funds of the purchasers are not enough, purchasers refuse to part with their own money, there is no financial assistance from any agencies and the fact that the rehabilitating parties would incur losses if they were to proceed with the purported rehabilitation.

Purchasers themselves have to top-up using their own moneys, as the available funds are insufficient for meeting the rehabilitation costs and they themselves personally have to rehabilitate the projects left abandoned. Thus, they have to face all kinds of music in consequence of the abandonment and initiating efforts for rehabilitation.

Purchasers would not get any compensation and damages from the defaulting abandoned developers as they (the defaulting abandoned developers) may have no monetary provisions to meet the claims.

Research questions

A few questions can be posed regarding the functions of a CVA in dealing with insolvency issues in abandoned housing projects whose housing developer companies are subject to the CVA administration. These questions are:

(i) whether the rights and interests of the purchasers, in the abandoned housing projects of the insolvent housing developer companies which are subject to CVA administration can be fully protected; and

(ii) if not protected, how could the proposed CVA law be improved and improvised for the benefits and protections of the purchasers’ interests?

Objectives of the paper

(1) To study the rights and interests of the purchasers in abandoned housing projects whose housing developer companies are subject to a CVA.

(2) To study the proposed CVA legal provisions as recommended by the CLRC insofar as these provisions can deal with the insolvency problems in abandoned housing projects and its rehabilitation.

(3) To analyse comparatively the law and practice of CVA in the UK in dealing with the insolvency issues and problems in abandoned housing projects.
(4) To suggest certain legal provisions to improve the proposed CVA provisions so that the proposed CVA can be sufficiently able to deal with the insolvency problems in abandoned housing projects and their rehabilitation.

It is opined that this paper will be beneficial to the purchasers in abandoned housing projects and the government regulatory bodies in Malaysia on housing industry and insolvency matters by way of highlighting the insolvency problems they may face in dealing with insolvent housing developer companies which are subject to the CVA administration and abandoned housing projects. Certain proposed recommendations are also provided in this paper for consideration of these stakeholders to adopt for the betterment in the insolvency management of abandoned housing projects in Malaysia.

Research methodology

The research methodology that had been used by the authors in this research paper was the legal research methodology. The legal research that the authors wished to undertake was a mixture between applied research and academic research. Basically applied research is concerned with action or practical research in order to improve the applicability of the legal rules, whereas academic research is concerned with analysing and criticising certain aspects of the law in order to improve the law and the legal theory. This is so because the objectives of this research paper fit into the definition of applied research and academic research.

In another category, this research too comprises an analytical/critical research and descriptive legal research. The nature of this research paper fits the features of analytical research as this research paper will analyse relevant legal aspects concerning abandoned housing projects and the CVA administration as recommended by the CLRC. This research paper will also state the rules, principles of the law and decided cases involved in each and every stage of abandoned housing projects. This is a feature of descriptive legal research.

Finally, this legal research paper is a library-type. Library-type research means the research and issues involved and their sources of reference are widely available in libraries, internet and computer software. The purported research activities also included the discovery of the principles, rules and case law in order to explain and resolve the problem statements, objectives and research questions. The sources were that of the traditional legal authorities, revolving principally around liquidation law, insolvency laws and other branches of law (such as equity) that are relevant to the topic under research.

The examples of these sources were: the statutes, case law, practice notes, circulars and directions etc.\textsuperscript{12}

This paper also is a result of a comparative legal research undertaken on the law and practice of UK CVA. Through this comparative study, the research analysis and finding will be more meaningful and beneficial. The inputs and findings elicited from this comparative study will be beneficial for the Malaysian CVA to learn and adopt in ensuring vibrant and successful insolvency administration through CVA. According to Wilson, “by looking overseas, by looking at other legal systems, it has been hoped to benefit the national legal system of the observer, offering suggestions for future developments, providing warnings of possible difficulties, giving an opportunity to stand back from one’s own national system and look at it more critically”.\textsuperscript{13}

**Definition of abandoned housing projects in Malaysia**

Currently, a housing project in Malaysia can be deemed to have been abandoned when:\textsuperscript{14}

(a) a housing project is not completed within or beyond the prescribed period of the sale and purchase agreement and there are not obvious activities on the site project for six months consecutively; or,

(b) a petition to wind up the housing developer company has been filed at the High Court pursuant to s 218 of the Companies Act 1965; or

(c) the developer company is put under the control of the receiver and manager; or,

(d) the developers admit in writing to the Housing Controller that they are unable to complete their projects; and,

(e) the project is endorsed as an abandoned housing project by the Minister of Urban Wellbeing, Housing and Local Government pursuant to s 11(1) (c) of the Housing Development (Control and Licensing) Act 1966 (Act 118).

However, based on the new proposed definition, a housing project in Malaysia can be deemed to have been abandoned (failed), if the housing developer has refused to carry out or delays or suspends or ceases housing development work continuously for a period of 6 months or more or beyond the stipulated

\textsuperscript{12} McConville, Mike and Wing Hong Chui, “Introduction and Overview” in McConville, Mike and Wing Hong Chui (eds), Research Methods for Law (Edinburgh: Edinburgh University Press, 2007), pp 1–15.

\textsuperscript{13} Wilson, Geoffrey, “Comparative Legal Scholarship,” in McConville, Mike and Wing Hong Chui (eds) Research Methods for Law (Edinburgh: Edinburgh University Press, 2007), p 87.

period of completion as agreed under the sale and purchase agreement. This
definition is pursuant to the proposed amendment vide s 9(2) of the Housing
Development (Control and Licensing) (Amendment) Act 2012 (Act A1415).

**Corporate voluntary arrangement ("CVA")**

The CLRC recommends the introduction of the CVA mechanism as an
alternative to the rehabilitation schemes of the insolvent companies. The
CVA is made on the agreement of the creditors, the company or the directors
of the company. The appointment of CVA is made outside court on the
agreement of the related parties. The qualified insolvency practitioner will
be appointed to carry out the CVA. In undertaking this duty, the qualified
insolvency practitioner is also armed with moratorium powers as stipulated
in the agreement of the parties. CLRC has proposed that CVA too be made
applicable in Malaysia as a means to solve corporate insolvency problems.
However, the name as proposed by the CLRC is not "Company Voluntary
Arrangement" but "Corporate Voluntary Arrangement". The functions
and rules of the proposed CVA in Malaysia are substantially similar to the
functions and rules as enjoyed by CVA in the UK. However, certain UK CVA's
functions and powers are not included in the proposed Malaysian CVA and
in this respect the CLRC proposed certain variations of the CVA according
to the Malaysian needs. One of them is that the moratorium period provided
should apply to both small and large companies seeking to propose a CVA
in their rehabilitation process (recommendation 4.41 of the Review). This
position is unlike the UK approach, which limits the moratorium to small
companies only.

Some of the recommendations of the proposed CVA suggested by the CLRC
are as follows:

1. a moratorium period for a CVA scheme should be automatically in
   force upon the filing of relevant documents in court without the need
   for a court order (recommendation 4.42);

2. a moratorium period for a CVA scheme may be extended for up to
   sixty days if both the creditors and the insolvency practitioner agree
   to it (recommendation 4.43);

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Corporate Insolvency Regime—The Proposal for a Corporate Rehabilitation Framework; (2)
Reviewing the Company Receivership Process; and (3) Company Charges and Registration
(3) the court’s involvement in a CVA should be limited to hearing challenges to such scheme on the grounds of material irregularity, or unfair prejudice to the interest of a creditor or a member or that such scheme is anticipated to be ineffective in practice (recommendation 4.44);

(4) the proposal for a CVA scheme be approved by a majority vote of not less than 75% of the total value of the creditors who may vote in person or by proxy and that the proposal as so approved would be binding on the creditors of the company and that any modifications to the proposal should not be allowed. If there were any modifications, the creditors should vote on any modified proposal in the next meeting. The result of the meeting should also be reported to the court (recommendation 4.45);

(5) that the CVA scheme itself or the procedure involved in its approval should be subject to challenge in court. An application for such challenge should be made within 28 days beginning with the first day the report is made to the court. If a creditor alleges that he has not been given notice, he should be entitled to challenge the decision of the meeting within 28 days on which he became aware that the meeting had taken place (recommendation 4.46); and,

(6) the management of a financially distressed company under a CVA scheme should remain with the directors (recommendation 4.47).

The position in the United Kingdom

Under the UK Company Voluntary Arrangement ("UK CVA") an insolvent company may opt for a step and mode to arrange the settlement of debts with the creditors. In doing this, the directors of the company or the liquidator\(^\text{16}\) or the administrator\(^\text{17}\) (s 1 of the Insolvency Act 1986 (UK) ("UKIA")), as the case may be, may appoint a nominee who will receive a UK CVA proposal. The directors or the liquidator or the administrator will make the UK CVA proposal to the company or its creditors (s 1(1)(3) of the UKIA).

The nominee as the trustee in the UK CVA can be a qualified insolvency practitioner (s 1(2) of the UKIA) or if the company is in liquidation or administration, he (the nominee) will be the liquidator or the administrator himself.\(^\text{18}\) This nominee or the authorised nominee also will become the supervisor for the intended UK CVA (s 7(2) of the UKIA).

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\(^{16}\) When the company is wound up.

\(^{17}\) When the company is under administration.

The nominee will summon the creditors of the company for a meeting to discuss the proposal (ss 3(2), (3) of the UKIA). The meetings so summoned shall decide whether to approve the proposed UK CVA or otherwise (s 4(1) of the UKIA).19

In order to obtain a moratorium power against any acts of the creditors detrimental to the interests of the company under a UK CVA, the nominee in carrying out the purported UK CVA needs to choose administration.20 By opting for UK CVA in the administration, a voluntary arrangement with the creditors in settling the company's debts, the company may hope not to be subject to a winding up action by the creditors and thus open new hope for survival and rehabilitation of the company as a going concern. It saves the company. On part of the creditors, a UK CVA might seem more attractive than to resort to a winding up action, if the proposals provided are more favourable than entering liquidation. The administrator may propose a certain plan to settle the debts to the creditors and on approval of the requisite number of members and creditors, the administrator would then proceed with the approved proposal (rule 1.19 of the Insolvency Rules 1986 (UK) (“UKIR”)).21

It is also possible for the nominee to proceed with a UK CVA without resorting to administration. But this mode will not provide the nominee with the moratorium power and thus his operation and authority in the course of carrying out the UK CVA may be subject to interfering actions by the creditors which could affect the UK CVA process.22

In formulating the proposal in the UK CVA, the parties must adhere to the requirements under rules 1.3(1) and (2) of the UKIR. Among the matters that should be included in the proposal are:

(1) the directors' proposal shall provide a short explanation why, in their opinion, a voluntary arrangement under Part 1 of the UKIA is desirable,

19 But the meeting so summoned shall not approve any proposal or modification which affects the right of a secured creditor of the company to enforce his security, except with the concurrence of the creditor concerned (s 4(3) of the UKIA).
20 In order to obtain the moratorium the directors need to file with the court a copy of the proposal, a statement of affairs of the company, a statement that the company is eligible and that the nominee has the favourable opinions (para 7 of Schedule A1 UKIA). The moratorium comes into effect on these documents being filed. The moratorium ends after 28 days, or earlier on both the creditors and company meetings being held (para 8 of Schedule A1 UKIA). The moratorium may be extended for a further two-month period by the agreement of both meetings (para 32 of Schedule A1). See also Keay, Andrew and Walton, Peter, *Insolvency Law, Corporate and Personal* (Essex: Pearson Education Ltd, 2003), p 134.
21 Under ss 4(3) and (4) of the UKIA the proposal cannot affect the rights of secured or preferential creditors without their consent.
22 But following the UK CVA provisions in the Insolvency Act 2000 (in force since January 1, 2003), it is now possible for "small companies" to obtain a short-term moratorium pending the drafting of a UK CVA proposal, without the need to put the company into administration.
and give reasons why the company's creditors may be expected to concur with such an arrangement;

(2) the proposed dates of distributions to creditors, with estimates of their amounts;

(3) the amount proposed to be paid to the nominee (as such) by way of remuneration and expenses; and,

(4) the manner in which it is proposed that the supervisor of the arrangement should be remunerated and his expenses defrayed.

Under rules 1.23 and 5.21 of the UKIR, after the approval of an arrangement, the company and the debtor respectively must do all that is required for putting the supervisor into possession of the assets included in the arrangement. The supervisor will then carry out the intended UK CVA in accordance with the approved proposal.

The approved UK CVA proposal takes effect as if made by the company at the creditors' meeting and binds every person who, in accordance with the UKIR, was entitled to vote at that meeting (whether or not he was present or represented at it), or would have been so entitled if he had notice of it, as if he were a party to the UK CVA (s 5(2) of the UKIA).

Any person who is entitled to vote at the meetings (namely the member, creditor and nominee) or the liquidator or the administrator may apply to the court on the grounds that: (s 6(2) of the UKIA)\(^23\)

(a) the UK CVA unfairly prejudices the interests of a creditor, member or contributory of the company; or

(b) there has been some material irregularity at the meeting.

On a finding of unfair prejudice or material irregularity, the court may revoke or suspend the approval of the UK CVA and/or order that further meetings be called to consider a revised proposal (s 6(4) of the UKIA).

Where on such an application to the court, that the UK CVA unfairly prejudices the interests of a creditor, member or contributory or that there was some material irregularity at the meeting, the court may do one or both of the following, namely:

(a) revoke or suspend any decision approving the UK CVA;

\(^23\) See also s 7(3) of the UKIA which confers a right on the dissatisfied creditors with the act of the supervisor in managing the UK CVA to apply to the court for confirming, reversing or modifying any acts or decisions of the supervisor.
(b) give a direction to any person to summoning of further meetings to revise or reconsider the proposals (s 6(4) of the UKIA).24

It is submitted, if abandoned housing projects occurred in the UK, and the insolvent housing developer company opted for a UK CVA, that the rights and interests of the aggrieved purchasers may be affected to the extent that there may be a possibility that no rehabilitation can be carried out or appropriate compensation be made payable by the company. This is because all the terms in the UK CVA proposal shall be approved by the creditors before the UK CVA supervisor/manager applies to the court for approval. The refusal of the creditors may be on the reason that there are insufficient funds to finance the rehabilitation and other problems in the purported rehabilitation which may affect their interests. In the upshot, unless the creditors agree to allow rehabilitation and/or compensation to be made payable to the aggrieved purchasers, the latter’s (the purchasers’) rights may not be protected.

It is noteworthy that pursuant to s 7(3) of the UKIA the creditors or any other person who is dissatisfied with the acts of the supervisor in managing the UK CVA may apply to the court for an order confirming, reversing or modifying any acts or decisions of the supervisor. It follows that pursuant to this s (s 7(3) of the UKIA), any aggrieved purchasers in abandoned housing projects, whose housing developer company is put under a UK CVA, may apply to the court if the acts of the supervisor do not favour them. However, in the opinion of the authors, if the proposed UK CVA does not provide any

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24 See for example Her Majesty’s Revenue and Customs v (1) Portsmouth City Football Club Ltd (2) Kubic and Kiely (Joint Administrators of Portsmouth City Football Club Ltd) [2010] EWHC 2013 (Ch); [2010] BPIR 1123 (Chancery Division), and Macaria Investments Ltd v Sanders & Anor [2010] EWHC 3353 (Ch); [2010] All ER (D) 233 (Dec) (Chancery Division, Companies Court). In Macaria Investments Ltd the decision in a creditors’ meeting to approve a CVA, that was carried only because of the votes based on alleged liabilities which did not in truth exist, constituted a material irregularity within the terms of section 6(l)(b) of the UKIA. See also Mourant & Co Trustees Ltd & Anor v Sixty UK Ltd (in liquidation) & Ors [2010] EWHC 1890 (Ch); [2010] All ER (D) 250 (Jul), where the court said:

The following principles in respect of CVAs could be distilled. ... First, any CVA which left a creditor in a less advantageous position than before the CVA would be prejudicial to a creditor: the real issue was generally whether the prejudice was “unfair”. Secondly, there was no single and universal test for judging unfairness and the question had to depend on all the circumstances of the case, including the alternatives available and the practical consequences of a decision to confirm or reject the arrangement. Thirdly, in assessing the question of unfairness, a number of techniques could be used, including “vertical” and “horizontal” comparisons. A vertical comparison was one between the position that a creditor would occupy and the benefits it would enjoy in a hypothetical liquidation as compared with its position under a CVA. The importance of such a comparison was that it generally identified the irreducible minimum below which the return in the CVA could not go. A horizontal comparison was one between the position of the applicant and the position of other creditors or classes of creditors. The fact that a CVA involved differential treatment of creditors was a relevant factor which called for careful scrutiny, although it would not automatically render a CVA unfairly prejudicial. [Emphasis added.]
measures and steps to protect the interests of the aggrieved purchasers, for example allowing the supervisor to implement rehabilitation, the aggrieved purchasers may apply to the court to compel the supervisor, the UK CVA or the company to carry out rehabilitation and provide other equitable remedies based on the spirit and intent of the contract of sale executed between the insolvent housing developer companies and the purchasers. The housing development insurance which has been possessed by the insolvent housing developer company can be utilised to fund the rehabilitation of the abandoned housing projects left, if the available funds under the UK CVA are insufficient.

It should be borne in mind that if the supervisor faces problems and there is no clear policy and rule to handle any issues or disputes arising in the course of managing the UK CVA, he may apply to the court for directions (s 7(4) of the UKIA).

The UK housing delivery system

There are two types of housing development in the UK. Firstly, the “full build then sell” system. Under this system, the developer will construct the housing units until due completion and once completed, these units are sold to purchasers. Secondly, in the UK there is the “buying new homes off plan” or “selling off plan” system of housing development. Under this system, the purchasers are required to pay 10% of the purchase price and the balance 90% shall be paid on due completion of the house.25 Under the “buying new homes off plan”, the vendor-developers may obtain a housing insurance/ home warranty insurance.26 In case the construction of the house is abandoned or stopped in the mid-stream of the development or the developer becomes bankrupt and terminates the construction of the project, the insurance coverage may be utilised to finance the completion or rehabilitation of the abandoned

25 See Healy’s website (Healy’s is a full-service law firm in the UK), www.healys.com/site/srvprivate/conveyancing_solicitor/conveyancing_further_information/advice_on_buying_a_new_home_off_plan.html (accessed May 17, 2011).
26 See clauses 5.1.1 and 5.1.2 of the Standard Conditions of Sale (Fifth Edn) (National Conditions of Sale 25th Edn, Law Society’s Conditions of Sale 2011), at www.bradleys-estate-agents.co.uk/images/swvAuctions/conditions_of_sale.pdf (accessed May 17, 2011). These Standard Conditions of Sale are issued by the UK Law Society as a standard form of contract of sale of residential houses and small business premises. The application of these Standard Conditions of Sale is only optional but not mandatory. Clause 5.1.1 provides the property is at the risk of the buyer from the date of the contract. Clause 5.1.2 provides the seller (vendor developer) is under no obligation to the buyer to insure the property unless (a) the contract provides that a policy effected by or for the seller and insuring the property or any part of it against liability for loss or damage is to continue in force; or (b) the property or any part of it is let on terms under which the seller (whether as landlord or tenant) is obliged to insure against loss or damage. See also Brand Newhomes Website at www.brand-newhomes.co.uk/brand_new_home_warranty.htm and the UK National House Building Council (NHBC) website www.nhbc.co.uk/Homeowners/ (accessed May 21, 2011).
units. Nonetheless there is no statutory standard sale and purchase agreement governing housing purchase in the UK. The terms and conditions in the contract of sale of a house are dependent on the prudence of the vendor and purchasers or their solicitors. Thus if the vendor-developer or the purchaser do not possess housing insurance/home warranty insurance, if abandonment occurs, the purchaser will become an aggrieved party. However, pursuant to clauses 7.5.1, 7.5.2 and 7.5.3 of the Standard Conditions of Sale (Fifth Edition) (National Conditions of Sale 25th Edition, Law Society's Conditions of Sale 2011) if the seller (vendor developer) fails to complete in accordance with a notice to complete (i.e. abandons the construction of the house), the buyer may rescind the housing contract and would be entitled to a return of the deposit with accrued interest and the buyer retains his other rights and remedies against the defaulting seller (vendor developer).

As mentioned earlier, there is no legislation in the United Kingdom making new home warranties/housing development insurance compulsory, and no statutory builder registration procedures. However, the non-statutory “Buildmark” housing development insurance scheme run by the National House Building Council (“NHBC”) a private association, covers approximately 90% of new

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29 The National House Building Council (“NHBC”) was originally set up as the National House Builders Registration Council (“NHBRC”) in the United Kingdom in 1936. The name changed in 1973. As a registered house-builder under the voluntary scheme, houses were inspected during building, buyers were covered by a two year warranty against major defects, and against the insolvency of the builder. By 1963, 26% of all housing was built by Registered House-builders. In 1964 and 1965 changes were introduced including the extension of the warranty to 10 years. 1967 saw the upgrading of the NHBRC’s standards, particularly in the provisions of power outlets, kitchen design and space heating, drawing on the recommendations of the Parker Morris Committee. By the end of 1970, 92% of new homes were built by NHBRC members. Under the Building Act 1984 the NHBC set up a subsidiary company (NHBC Building Control Services Ltd) to become an approved inspector for verifying that buildings were built in accordance with the UK’s national building regulations. See Wikipedia, the free encyclopedia, “National House Building Council,” http://en.wikipedia.org/wiki/National_House_Building_Council (accessed April 1, 2012), National House Building Council, “Insolvent builders and developers, NHBC arrangements for insolvency practitioners,” www.nhbc.co.uk/Builders/Builderregistration/Insolvencypractitioners/ (accessed April 1, 2012) and National House Building Council, NHBC Annual Review 2010 (accessed April 1, 2012); available from www.nhbc.co.uk/NHBCPublications/LiteratureLibrary/AnnualReviews/filedownload,42212,en.pdf.
homes built for sale. This insurance covers major defects and against the insolvency of the builder, i.e. when the housing projects are abandoned, this insurance can cover the cost of rehabilitation.

The two major providers of building warranty inspection and insurance for new homes and housing developments are the NHBC and Zurich Municipal Insurance. The Federation for Master Builders also provides a scheme, but it is used mainly for alterations and additions rather than new builds. The NHBC is the non-government setter and inspector of standards for the new homes industry in the United Kingdom. In 1985, NHBC became an approved inspector under the Building Act 1985 and in 1997 the licence was derestricted to cover any developments in the United Kingdom. The NHBC also provides a regulatory system which works by registering house builders. Over 18,000 house builders who construct approximately 85% of the new homes built each year in the UK are registered with the NHBC. Builders who apply for registration undergo a technical and financial vetting system and approximately 10% of applications are rejected as a result. Non-compliance with NHBC Rules or Standards can lead to investigation and ultimately deletion from the Register.

Another reason as to why housing development insurance is required for all new houses is that it is a standard requirement of the lending institutions in the UK that new residential properties are protected by insurance. Without such insurance the property will become un-mortgageable and its future marketability adversely affected. As in the normal circumstances

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32 Grant Thornton Mason Hayes+Curran, supra, n 30.
33 Ibid.
34 Ibid.
35 Ibid.
36 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.
40 Abbey, Robert and Richards, Mark, supra, n 31, pp 370, 372–373.
41 Ibid.
purchasers need to get a loan from financial institutions to purchase houses and then in turn the houses would be mortgaged to the financial institutions as security, it follows that the houses need to be insured in order to be saleable and mortgageable.\textsuperscript{42} Thus, to avoid any possible of un-saleable houses, it becomes indispensable that the builders/developers need to possess housing development insurance for the houses, be it duly completed or pending completion houses.

**Findings**

It is opined that the CVA as recommended by the CLRC is insufficient to face the insolvency problems of abandoned housing projects of the insolvent housing developer companies, especially for carrying out rehabilitation effectively and paying compensation to the aggrieved purchasers. The authors are of this view based on the following grounds:

(a) Insofar as the CVA scheme proposed by CLRC is concerned, the recommendations have not provided the measures and remedies in the protection of the aggrieved purchasers' rights (public interest) throughout the abandonment period.

(b) There is no mention about the duties of these parties to comply with the statutory and legal obligations imposed by the Housing Development (Control and Licensing) Act 1966 ("Act 118") and its regulations, the Street, Drainage and Building Act 1974 ("SDBA"), the Uniform Building By-Law 1984 ("UBBL"), the Town and Country Planning Act 1976 ("TCPA"), other building and planning laws 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 these powerful parties at the expense of the purchasers' rights.

(c) The qualified insolvency practitioner in the CVA, in the course of CVA administration, is not answerable to the MWHLC/Housing Controller, planning authority, building authority and land authority. On the other hand, he is obliged to accede to the demands and subject to the consent of the creditors of the company thus marginalising the interests of the aggrieved purchasers and the MWHLC/Housing Controller.

(d) If in the opinion of these parties (the qualified insolvency practitioner and the creditors) the purported rehabilitation plan is not feasible to their benefits, the qualified insolvency practitioner may not carry out the rehabilitation. The incapability of these parties to carry out rehabilitation and protect the interests of the aggrieved purchasers may be due to problems of insufficient funds to finance the rehabilitation coupled with the unsettled problems, complications and troubles that plague the abandoned housing projects which ultimately affect the projects'
potential to be effectively rehabilitated in the protection of the rights of the aggrieved purchasers.

(e) It is opined that if abandoned housing projects occurred in the UK, the insolvency approach—UK CVA law and practice—may not also fully protect the interests of the purchasers for instance, for enabling rehabilitation of the abandoned housing project left by the insolvent ailing residential developer companies. This is because a UK CVA serves to protect the interests of the creditors, i.e. they are creditors-centric, not the customers and purchasers.

(f) Nonetheless, the problem of abandoned housing projects in the UK is resolved by the concept of housing delivery that is applicable there. They apply "full build then sell" and "buying new homes off plan" or "selling off plan" concepts of housing development. Under the two latter concepts, the purchasers are required to pay 10% of the purchase price and the balance 90% shall be paid on the duly completion of the house. The purchasers in the substantial majority of housing development projects are also protected with the home warranty insurance/housing development insurance subscribed by the housing developer companies and/or the purchasers themselves to cover them against any problems if abandonment occurs. Thus the aggrieved purchaser can apply to the UK CVA administrator or the court to compel the administrator to carry out rehabilitation of the abandoned housing projects supported by home warranty insurance and/or to pay damages/compensation on the ground of contract and equity as enshrined in the terms of the contract of sale executed between the insolvent housing developer company and the purchasers.

(g) It is opined that, provided that the insolvent housing developer company is in possession of housing development insurance/home warranty insurance, the aggrieved purchasers in abandoned housing projects in the UK may be marginalised and their abandoned housing projects may be stalled forever without any rehabilitation and they may not get compensation and damages through a UK CVA.

(h) It is opined bearing on the above discussion, that the position in the UK is better than the position in Malaysia in dealing with the problems of abandoned housing projects and in protection of the aggrieved purchasers.

(i) It is proposed that a special rehabilitation of abandoned housing projects legal regime be provided in the Housing Development (Control and Licensing) Act 1966 (Act 118) to deal with the rehabilitation of abandoned housing projects and providing equitable remedies to the aggrieved purchasers in abandoned housing projects, including when the insolvency housing developer companies are subject to CVA administration.
The functions, duties, liabilities and responsibilities of the recommended CVA must also be subject to the proposed special rehabilitation scheme provision in Act 118. This is to provide sufficient protection and freedom to the rehabilitation manager appointed under the proposed special rehabilitation of abandoned housing projects scheme in Act 118 to duly carry out the statutory rehabilitation effectively against any interference or legal or non-legal actions by the qualified insolvency practitioner, creditors and the like.

Recommendations and conclusion

It is the view of the authors that the insolvency approach via CVA administration as recommended by the CLRC in Malaysia tends to be a creditors-centric approach. The result is that if the insolvent housing developer companies which are subject to CVA abandon their housing projects, the aggrieved purchasers may not get any or full protection under the said insolvency approach, which is detrimental to their rights and interests. It is submitted that, a special rehabilitation legal regime and the requirement that the applicant developer to possess housing development insurance, be introduced in the Housing Development (Control and Licensing) 1966 (Act 118) and the corresponding housing legislation in Sabah and Sarawak (East Malaysia), to protect the rights and interests of the aggrieved purchasers in abandoned housing projects, particularly when the insolvent housing developer companies enter CVA administration. The purpose of imposing this insurance is to protect the interests of the purchasers when the housing projects carried out by the insolvent housing developer companies are abandoned. This protection may serve as a supporting monetary means to fund the rehabilitation of the abandoned housing projects. The following provisions are proposed to be inserted in Act 118.

**HOUSING DEVELOPMENT (REHABILITATION OF ABANDONED HOUSING PROJECT) REGULATIONS**

In the exercise of the powers conferred by section 24 of the HOUSING DEVELOPMENT (CONTROL AND LICENCING) ACT 1966, the Minister makes the following regulations:

**Citation and Commencement**

These regulations may be cited as the Housing Development (Rehabilitation of Abandoned Housing Project) Regulations.

**Interpretation**

"Completion of the rehabilitation" means when the rehabilitated project has been duly commenced in accordance with the specifications, plans and laws, Certificate of Completion and Compliance has been obtained from
the principal submitting person, the rehabilitated unit and the title to the unit are ready for delivery of vacant possession and transfer to purchaser on the required settlement of the purchase price.

"Development period" means the period within which a developer shall have to complete the development of the purported housing project, either in 24 or 36 months, as the case may be, in accordance with the terms of the statutory standard sale and purchase agreement(s) entered into with the purchaser(s).

"Incapable Developer" means the incapable developer which is defined under section 3 of the Act.

"Insurance" means scheme of housing development insurance approved by the Controller for the purpose of the grant of a housing developer's licence, pursuant to section 6(1)(h) of the Act, viz to cover all losses and damages for non-compliance, defective and sub-standard works, abandonment and to cover the costs of carrying out any rehabilitation of the purported housing development project due to disappearance, insolvency, death and inability of the developer.

"Parties to the rehabilitation" means the purchasers, the previous defaulting developer and its directors, the rehabilitating party, the technical agencies, the appropriate authority, the Financiers, the lender bank, the consultants, the contractors and other persons incidentally involved directly or indirectly in the opinion of the Controller.

"Regulation 1989" means the HOUSING DEVELOPMENT (CONTROL AND LICENSING) Regulations 1989.

"Regulation 1991" means the HOUSING DEVELOPMENT (HOUSING DEVELOPMENT ACCOUNT) Regulations 1991.

"Rehabilitation Manager" means any person deemed fit by the Controller to carry out the rehabilitation of the abandoned housing project.

"Statutory Standard Sale and Purchase Agreement" means the sale and purchase of housing unit agreement either in Schedule G or Schedule H or Schedule I or Schedule J of the Regulations 1989.

"The Act" means the HOUSING DEVELOPMENT (CONTROL AND LICENSING) ACT 1966 (Act 118).

Regulation 1:

On the expiry of the development period, yet the purported housing project is still not completed, or in respect of the incapable developer, during the development period, in the opinion of the Controller that the developer is not able to duly complete or carry out the development of the project, the
Controller may issue a request notice to the said developer to complete the same and notify him that in the event the purported development still cannot be completed within another one year from the date of the notice, or in respect of the incapable developer, on the expiry of the development period, the project shall be deemed an abandoned housing project and forthwith, shall be vested in the hands of the Controller for rehabilitation purpose.

Regulation 2:

For the purpose of carrying out any rehabilitation of the abandoned housing project, on the expiry of the extended one year period, or in respect of the incapable developer, on the expiry of the development period, as mentioned in Regulation 1 of these Regulations, and after notification for the taking over of the project from the developer and published it in the Gazette, the Housing Controller may appoint any rehabilitating party to undertake the rehabilitation of the said project.

Regulation 3:

The rehabilitation manager shall first use the purchasers’ available funds still available in the hands of the Financiers or in the Housing Development Account for meeting the costs of rehabilitation.

Regulation 4:

The withdrawal of the moneys from the Housing Development Account by the rehabilitating party, shall be subject to the provisions in Regulation 1991.

Regulation 5:

Only if the available funds in the hands of the Financiers and the moneys in the Housing Development Account are not enough to meet the rehabilitation costs, shall then the rehabilitating party invoke the insurance coverage in respect of the housing development project, to cover the shortfall until completion.

Regulations 6:

The insurance moneys shall also be deposited into the Housing Development Account and the withdrawal shall be subject to the provisions in Regulation 1991.

Regulation 7:

The rehabilitation carried out by the rehabilitation manager shall be subject to terms and conditions of the Controller, the Act and its regulations and the statutory standard sale and purchase agreement between the purchasers and the previous defaulting developer executed earlier insofar as the Controller deems expedient and necessary.
Regulation 8:
No person shall take any action whatsoever against the rehabilitation manager and the project under rehabilitation, pending completion thereof.

Regulation 9:
The rehabilitation shall be completed as soon as practicable and the rehabilitation manager shall observe and comply with the provisions in the Act and its regulations unless exempted in writing by the Controller insofar as the Controller deems necessary and expedient in the interest of the public.

Regulation 10:
Parties to the rehabilitation shall render necessary cooperation warranting the completion of the purported rehabilitation.

Regulation 11:
Any person who contravenes any provision under these Regulations shall be guilty of an offence and shall, on conviction, be liable to punishments pursuant to section 21 of the Act.

Regulation 12:
Nothing in this regulation shall prejudice and bar the rights of the purchasers to invoke the provisions in the Act and its regulations against the incapable developer.

To accommodate with the above discussion, necessities and tally with the issues in dealing with abandoned housing projects, it is submitted that the definition of “Abandoned Housing Project”, should be adopted in Act 118, as follows:

Addition to section 3 of Act 118:

“Abandoned Housing Project” means any housing development project where the developer fails to complete it within one year after the request notice to complete has been served by the Controller to the said developer or in respect of the incapable developer, after the expiry of the period within which a developer shall have to complete the construction of the project either in 24 or 36 months, as the case may be, in accordance with regulations made controlling the rehabilitation of abandoned housing projects.

“Incable Developer” means any developer who is in the opinion of the Controller, on whatever reasons, is not able to duly complete or carry out the construction of the purported housing development project during the period within which a developer shall have to complete the construction of the project either in 24 or 36 months, as the case may be.
For the purpose of rehabilitating abandoned housing projects, it is proposed that, once a housing project falls under the definition of abandoned housing project, the Minister of Urban Wellbeing, Housing and Local Government shall order that such a project be rehabilitated pursuant to the regulations relating to abandoned housing projects. It is proposed this power be provided in s 11(1)(cb), as follows:

Additional section 11(1)(cb) of Act 118:

...direct that, once any housing project has become an abandoned housing project, the project so abandoned shall be subject to rehabilitation in accordance with the regulations made under this Act.

It is also proposed that, one of the conditions for the applicant developer to obtain a housing developer’s licence is to possess a housing development insurance (or home warranty insurance). With this requirement, the purchasers' interests are protected against any abandonment and its ensuing consequences, losses and other kinds of housing problems. The insurance could also cover any shortfall in the costs for carrying out any rehabilitation and thus ensuring the project could be duly completed and finally could protect the purchasers' rights. The proposed provision is as follows:

Additional section 6(1)(j) of Act 118

6. Conditions or restrictions for the grant of a licence

(1) Subject to the exercise of power of waiver by the Minister under subsection (2), the licence applied for under section 5 shall not be granted—

(a) ...; or
(b) ...;
(c) ...;
(d) ...;
(e) ...;
(f) ...;
(g) ...;
(h) ...;
(i) ...; and,
(j) if the applicant developer is not in possession of a valid housing

development insurance, approved by the Controller, to cover all losses and damages for non-compliance, defective and sub-standard works, abandonment and to cover the costs for carrying out any rehabilitation of the purported housing development project due to disappearance, insolvency, death and inability of the developer.

The above proposed provisions will smooth the rehabilitation administration. These proposed legal provisions can protect the interests of the purchasers and other stakeholders in abandoned housing projects, whose housing developer companies are subject to CVA administration, for example by allowing rehabilitation to be duly carried out.

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