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PROTECTING HOUSE BUYERS AGAINST LATE DELIVERY OF VACANT POSSESSION: A CASE OF MALAYSIA

Abstract

One of the main duties of the housing developer in Malaysia is to complete the construction of the house on time. Schedules G and H of the Housing Development (Control and Licensing) Act 1966 provides that the period of completion and handing over vacant possession for landed property is 24 months and for sub-divided building is 36 months. However in practice, some buyers did not get the keys to their houses on time as a delay in completion of project has become common phenomenon in the housing industry. Unlike other construction projects, any problems with housing project will affect many people due to the significant nature of housing project to public at large. A delay in delivering the house to the anxious buyer may mean delaying his right to one of human basic needs. A late delivery may also cause financial, social and emotional problems to the buyers just like abandoned projects but perhaps with less degree of hardship since finally they got keys to the house. Adopting a qualitative research methodology of content analysis and a case study, this paper aims to examine the adequacy of law and housing policy in Malaysia in ensuring the residential houses to be completed on time as delay may lead to more serious problem of abandonment of the project. The study also explores house buyers' experiences with regard to the problems of late delivery including various issues and challenges faced by them in claiming damages for late delivery of vacant possession. The findings revealed that lack of enforcement of housing law and policy as one of contributing factors of project delay and the house buyers are not adequately protected under the existing law and practices. Ultimately, the study provides insights to practitioners and policy makers on further improvements of the law and policy to minimize or prevent the delay in completing the housing project as well as to protect house buyers' interests in the case of late delivery of vacant possession in the housing market in Malaysia.

Keywords: House buyer, late delivery, vacant possession, legal protection

Introduction

One of the main duties of the housing developer in Malaysia is to complete the construction of the house and hand over vacant possession to buyers within 24 months for landed property and 36 months for sub-divided building. Schedules G and H of the Housing Development (Control and Licensing) Act 1966 (HDA) provides that “the delivery of vacant possession by the vendor shall be supported by a certificate of completion and compliance (CCC) certifying that the said building is safe and fit for occupation and includes the handing over of the keys of the parcel to the purchaser”. This legislative measure is aimed to ensure the residential houses to be completed on time as delay may lead to more serious problem of abandonment of the project. Despite the existence of strict legal rule and monitoring by relevant agencies, the delays in the housing projects continue to occur. In many instances buyers are force to accept the fact that it is 'better late than never'. Most of the housing problems presently faced by consumers are a result of the system of 'sell then build' (BTS) that has been commonly practiced in Malaysia for more than four decades (Yusof et al., 2007). Under the system buyers need to sign the sale and purchase agreement first together with the payment of 10 percent of the price of the house. It is then followed by periodic payments in accordance with construction progress. The system provides no opportunity for the buyers to examine the house and monitor the progress and it thus exposes and increases their vulnerability to abandonment of project, poor house quality and late delivery of vacant possession.

The seriousness of the delay problem can be seen from the statistic of housing projects that have been classified as ‘problematic’ by the Ministry of Urban Wellbeing, Housing and Local Government (MUWHLG) and cases filed in the Tribunal for Homebuyer Claims. In the course of monitoring housing development in Malaysia, the MUWHLG classifies problematic projects into ‘delay project’ and ‘sick project’. Delay project is defined as the project that experiences delay in construction period of 10% to 30% behind the work scheduled. Whereas ‘sick project is the project that experiencing delay in construction period of more than 30% behind the work scheduled or the project that has failed to be completed on time. Table 1 shows the latest statistic of the housing projects by private developers that have been categorized by the Ministry as ‘problematic’ due to delay in construction period. There are currently a total number of 60 projects delay and 225 sick projects throughout Peninsular Malaysia. The highest number of sick projects is recorded in the state of Selangor and followed by Perak, Johor and Kelantan.

Table 1: Statistic of problematic private housing development projects (as February 2014)

No	States	Delay project	Sick project
1	Perlis	1	0
2	Kedah	11	14
3	Pulau Pinang	2	12
4	Perak	0	51

5	Selangor	18	72
6	Federal Territory	6	3
7	Negeri Sembilan	1	10
8	Melaka	0	2
9	Johor	19	28
10	Pahang	1	10
11	Terengganu	0	10
12	Kelantan	1	13
Total		60	225

Source: Official Portal of the National Housing Department of Malaysia

The amendment of the HDA in 2002 has provided for the establishment of Tribunal for Homebuyers Claim (THC) to resolve complaints on housing-related problems. As shown in Table 2, there are 16,252 cases filed in the THC since 2006 until 2011 and almost 90% of the cases were claims for the late delivery compensation (known as LAD).

Table 2 – Statistic of LAD cases in the Tribunal for Homebuyer Claims 2006-2011

Year	Number of cases	LAD cases	Percentage (%)
2006	3,821	3,711	97.1
2007	3,299	2,911	88.2
2008	2,488	2,258	90.8
2009	1,990	1,793	90.1
2010	1,747	1,620	92.7
2011	2,907	2,285	78.6
Total	16,252	14,578	89.7

Source: The Tribunal for Homebuyer Claims

Various studies have identified late delivery as one of major sources of house buyers' dissatisfaction in Malaysia (Khalid, 2010, A.Mustafa et al, 2012). In fact a delay in delivering the house to the anxious buyer may mean delaying his right to one of human basic needs. A late delivery may also cause financial, social and emotional problems to the buyers just like abandoned projects but perhaps with less degree of hardship since finally they got keys to the house. Thus this paper aims to examine the adequacy of law and housing policy in Malaysia in ensuring the residential houses to be completed on time and to analyse the adequacy of the existing legal protection to the victim of late delivery. It first provides a discussion on causes of the housing delay that attributable to law, policy and procedure. This is then followed by a report of in-depth interviews on four consumers from two housing projects which illustrates different

consumer experiences dealing with late delivery of their dream houses. The rest of the paper devotes to the discussion on legal protection to Malaysian house buyers and how the problem of delay can be minimized or prevented all together via changes in law, policy and practices.

Causes of the Delay from Legal and Policy Perspective

In the context of construction of housing project, delay means a time overrun beyond the date stipulated in the standard sale and purchase agreement between developers and purchasers. It refers to the time during which some procedure or part of the construction project has been extended or not performed due to various an unexpected problems which may happen at different stages of construction process and may be caused by different players in the industry. Thus, the causes of delay can be analysed from three broad inter-related categories, namely, nature or type of problems (problem-based), stages of construction process (phase-based) and parties responsible in causing the delay (parties or institutional-based). Since the study focuses on the causes of delay connected to legal and policy issues, phases-based and parties-based approaches have been utilized.

Identification of the factors that contributed to the causes of construction delays has been studied by numerous researchers in Malaysia and other jurisdictions (e.g. Sambasivan and Soon 2007; Alaghbari et al 2007). Although most of the studies only deal with general construction delay, some common causes of delay have been clearly identified. However each study has come out with different ranking of factors that contributed to the delay. The most relevant and recent journal article by Ramanathan et al (2012) is quite an illuminating specimen which shed light on various causes of project delays. The researchers in their article have identified 113 distinct factors of construction delay which subsequently classified into 18 groups after reviewing 41 research studies on the topic around the world. These 18 categories or groups are; (1) Finance-related; (2) Project-related; (3) Project Attributes; (4) Owner/Client; (5) Contractor; (6) Consultant; (7) Design-related; (8) Coordination; (9) Materials; (10) Plant/Equipment; (11) Labour/Manpower; (12) Environment; (13) Contract-related; (14) Contractual relationships; (15) External; (16) Changes; (17) Scheduling & Controlling; and (18) Governmental relationship.

Based on a comparative analysis of various findings of previous studies, the top five causes of project delays identified by the researchers are due to owner, contractor, design related and plant/equipment, labour and consultants and contractual relationships. Nonetheless the researchers conclude that 'it would appear that the groups and factors causing delays are country, location and project specific and that there are no root causes that can be generalized' (Ramanathan, C et al p.48). It is argued that out of 18 groups of causes of delay, four of them are directly related to policy, law and procedure, namely; contract-related, contractual relationship, government relationship and labour or manpower. Legal and policy issues can also be inferred from several factors in the list of 113 causes of delay. These include long waiting time for plan approval, poor site management and supervision, delay in work approval, fraudulent practices and kickbacks, traffic control regulations practiced at site and inadequate control procedures. It is

reasonably clear that there are several well recognized factors connected to law and policy that can be linked to project delay. It may happen at different phase of construction process and may be caused by different players in the industry. Table 3 provides the summary of legal-related causes of delay.

Table 3: Causes of delay related to law and policy

STAGES	PARTIES	CAUSES OF DELAY
Pre-construction	Developers	<ul style="list-style-type: none"> • Problem with land title • Dispute with land owner • Started the project before getting certain approvals
	Government agencies	<ul style="list-style-type: none"> • Delay in land approval • Delay in plan approval • Easy approval of housing licence
Construction	Developers	<ul style="list-style-type: none"> • Financial problem • Construction disputes – consultant, contractors etc. • Non-compliance with the Regulations and plan approval
	Contractors	<ul style="list-style-type: none"> • EOT • Shortage of workers • Shortage of materials • Defective workmanship
	Government agencies	<ul style="list-style-type: none"> • Variation of conditions for planning permission and plan’s approval • Lack of monitoring and enforcement • Policy on bridging loan • Policy on 30% low cost houses
Post-construction	Government agencies	<ul style="list-style-type: none"> • Variation of conditions for the CCC approval • Difficulties of getting the CCC

Effects of Late Delivery to House Buyers

A random study among 406 of victims of late delivery in Klang Valley, the central heart of Malaysia reveals that the most significant effect of the late delivery is the burden imposed on consumers to pay for the rent and loan simultaneously (66.3%). This has the potential to generate other problems, such as failure to meet the current rental obligations (62.6%) and financial problems for other purposes (59.1%). Some respondents (42.6%) claim that they had problem with the payment of quit rent and land tax. Late delivery has also caused problems relating to workplace (22.9%) and children’s schools (14.8%) (Naemah at el, 2014). In furtherance of the research objective to examine house buyers’ experiences with regard to the problems of late delivery, in-depth interviews have been conducted on four consumers from two housing projects

who suffered the most from the problem of late delivery. The following two (2) projects are selected for the purposes of the case study and the justification for selection appears respectively in the table below:

	Housing Project and Developer	Justification for Selection
1.	Taman Lestari Puchong, Seri Kembangan, Selangor. (Developer: Talam Corporation and later taken over by IJM Corporation)	The purchasers formed an action committee and used various avenues including political pressure and legal action to resolve the problem of late delivery and at last received their houses.
2.	Taman Desa Gemilang, Sungai Pusu, Gombak, Selangor. (Developer: Koperasi Kakitangan Malaysia Airports Berhad (KOMAB))	A distinct mixture of experiences of those who sued for late delivery, those who terminated the sale and purchase agreement and claimed their deposit but never got it, those who went to the Tribunal for Housebuyers, those who got their houses but had to deal with CCC problems, etc.

Case study 1 - Taman Lestari Putra

Two respondents were interviewed for this case study namely, ‘first respondent’¹ and ‘second respondent’.² Both are in their early forties. The respondents were chosen because they were both affected purchasers of residential property in the housing development known as Taman Lestari Putra in Seri Kembangan. The first respondent bought a house in the first phase and the second respondent bought a house in the second phase. The developer was Lestari Puchong Sdn. Bhd., formerly, a subsidiary of Talam Corporation. The development is within the local authority area of Majlis Perbandaran Subang Jaya. The project was stalled for 5 years.

Respondent 1

According to the first respondent, when he first heard about the development, it was said to be like a new ‘Subang Jaya’ – aiming to be a new township with multiple types of developments including residential, commercial and institutions. The house that he bought is within an area known as Lestari Putra that is located next to Equine Park and Puncak Jalil in Seri Kembangan, Selangor. He decided to purchase a house in the said development (his first property purchase) because it was affordable for a landed property (i.e. double story terrace house with 4 bedrooms and 3 bathrooms) and he intended to stay there with his family. He knew that the developer had a record of stalled/ abandoned projects in Bukit Beruntung and in fact a friend had warned him about buying a house in the Lestari Putra project. However, he still decided to proceed with the purchase because he believed that the developer had probably improved on their performance

¹ Interview conducted on 26th January 2014 at 2.30 pm.

² Interview conducted on 28th January 2014 at 1.00 pm.

and would not make the same mistake twice. This belief was further reinforced when he visited Equine Park and Puncak Jalil, two other projects by Talam Corporation, and saw that the projects were going on. The first respondent paid the deposit and signed the sale and purchase agreement in 2003. He was supposed to have received the key in 2005 and was never informed of the delay.

The first respondent and a few other affected buyers began gathering contact details of all buyers that they met there at the site and started calling everyone. They then created an informal 'victims committee' where the first respondent was elected as Chairman. The respondent and his group began taking action as soon as they knew about the delay. The actions taken by the committee included picketing at the developer's office, calling the media to cover the pickets and voicing out their dissatisfaction as well as meeting with relevant ministry officials. The committee realised that they needed a bigger number of affected buyers for their complaints to be addressed effectively and taken seriously by the authorities. So they gathered more members as time went by. They met up with government officials from the opposition as well as government officials from the ruling coalition. The situation was just right because both the opposition and the ruling coalition wanted to show that they were able to help the victims.

There were heated arguments and exchange of words during tripartite meetings between the 'victims' (affected purchasers), developer and authorities. Some of them shouted 'corruption', 'misuse of power', etc. by the authorities and demanded for those responsible for the sufferings of victims to be jailed. They received the keys to their houses 8 years after signing the Sale and Purchase Agreement. The project was completed by the same developer. However, none of the affected purchasers received compensation for the delay which they rightfully deserved according to the sale and purchase agreement. They had also teamed up and went to the Housing Tribunal together. They won the case and the Tribunal awarded to each victim MYR50,000 to be paid by the developer as compensation. They have not received a single cent until today.

Respondent 2

The second respondent, purchased a double storey terrace corner unit and signed the sale and purchase agreement in January 2004 and paid 15% as deposit. He was attracted to the advertisement of the project in the newspaper and decided to buy the house as his second property because the house design was acceptable and the price was slightly above RM200,000. He said he knew the developer, Talam Corporation, had previously ran into some problems but at the time the project was launched, it had managed to complete several housing projects in Puchong area and so thought at that time the developer's performance was improving. The project was supposed to be completed in 2006. Similar to the first respondent, the second respondent was also not not informed by anyone about the delay in the project. He visited the site and observed that the construction proceeded as planned during the 1st year. However during the 2nd year, all work stopped and there was no further progress. He then contacted the developer, both through phone calls and by visiting the office, and enquired about the reason for the delay.

According to the second respondent, the developer kept giving excuses including lack of funds and he was told that the project would resume soon.

In 2007 when he saw that there was still no progress on the project site, he began contacting other purchasers and formed a committee where he became the secretary-general. The action committee picketed at the project site and filed a complaint with the Ministry of Housing and Local Government. They also formed a website for all affected purchasers and gathered almost 300 affected purchasers. The Ministry then arranged for monthly meetings between the affected purchasers and the developer. The actions taken by this committee included the following:

- (a) Forming an Action Committee
- (b) Forming a website for affected buyers
- (c) Picketing
- (d) Lodging complaints with Ministry of Housing
- (e) Lodging a case with the Tribunal of Homebuyer Claims and obtained award of RM50,000 in 2012 to be paid by the developer for each buyer but that award was never honoured by the developer.

The second respondent is of the opinion that the Tribunal has in fact cheated them by having power to make an award but not having power to enforce it. The second respondent was finally given the keys to his house in 2011. According to him, very few of them have taken legal action for late delivery against the developer. He has also learnt that there is provision in the Housing Development Act for the Minister to convict and jail the errant developer but the Minister does not do this. According to him, the problem is therefore on effective enforcement of the law.

Case Study 2 - Desa Gemilang Gombak

Two respondents were interviewed for this case study, namely, 'third respondent'³ and 'fourth respondent'.⁴ Both are in their early forties and academic staff of the International Islamic University. The respondents were chosen because they were both affected purchasers of residential property in the housing development known as Desa Gemilang in Mukim Setapak, Daerah Gombak. The third and fourth respondent has different experiences and problems of buying the house which were originated from the issue of late delivery. The developer was Koperasi Kakitangan Malaysia Airport and the contractor was Renown Structure Sdn.Bhd. The development is within the local authority area of Majlis Perbandaran Selayang. The project was stalled for 2 years.

Respondent 3

She attracted to buy a double story terrace house in Desa Gemilang project because it is near to her workplace and the price was reasonable (RM150k). Furthermore the project was promoted by the IIUM Koperasi to its members including the respondent. For the same reason, the

³ Interview conducted on 26th December 2012 at 10.30 am.

⁴ Interview conducted on 3rd January 2014 at 2.00 pm.

respondent did not make any effort to find out more about the developer. The respondent signed the S&P on the 27.2.2002 and paid RM15,500 (10% of the total purchase price). According to the agreement, vacant possession of the house was to be handed over to the respondent within 36 months (17.12.2005).⁵ The respondent bank's subsequently released another 10% to the developer. On 5.1.2005 the developer wrote letters to the respondent and other purchasers requesting extension of time of completion and demanded the respondent not to claim LAD. The developer claimed that the project had been delayed due to construction problems. The respondent visited the project sites and found that her house had not yet been built. There was no assurance from the developer on the new date of completion.

An action committee was immediately formed and they consulted a lawyer on the matter. After several discussions, the respondent and 65 other purchasers decided to object to the request of the developer and to maintain their rights to claim liquidated damages. In other words they agreed to the late completion of the project provided the developer paid them the LAD. However to respondent surprise, on 15.2.2005, the respondent received a notice of termination of the S&P from the developer on the ground of *force majeure*. The respondent subsequently came to know that her house had been sold to a new purchaser (higher price RM190k). Upon further investigation, the Action Committee discovered that the S&P with the new buyer were dated on 31. 10.2002. The same lawyer who prepared and acted for the first agreement with them was also acted for the second agreement with new buyers.

The respondent and other affected buyers then commenced action vide Shah Alam High Court (Originating summon No.MT4-24-1280-2005) to challenge the termination and prayed for specific performance and an injunction. In addition to court case and several unsuccessful discussions with the developer, the committee (in which the respondent had actively participated) had also taken the following actions:

- (a) picketed at the project site and called TV3 to broadcast the event
- (b) lodged police report on allegation of fraud
- (c) reported the matter to the Chief Minister of Selangor
- (d) filed complaint to the Public Complaints Bureau
- (e) filed complaints to the Ministry of Housing and Local Government
- (f) reported the matter to the Cooperatives Commission
- (g) lodged complaints with the House Buyer Association
- (h) lodged complaints with the Tribunal of Homebuyer Claims
- (i) lodged complaints for misconduct against the lawyer with the Bar Council (the lawyer was subsequently found guilty and was struck off the Roll for misconduct.)

On 2.3.2009 the respondents obtained all the prayers sought for and a declaration that the termination of their S&P were null and void. However since the houses had been sold to *bona fide* purchasers, the Court could not grant specific performance requesting the developer to return

⁵ Note – The Housing Development Act was not yet amended to include the Cooperative at that point of time.

the houses to the respondents. However the Court ordered the developer to refund all the monies paid for the property to the respondents. Nonetheless after more than eight years of fighting for their rights they have not received a single cent until today.

Respondent 4

The second respondent, purchased a double storey terrace corner and signed the sale and purchase agreement in February 2002 and paid 10% as deposit. He was attracted to the advertisement of the project by the IIUM Koperasi. Besides it was near to the University and the price was reasonable and affordable. However the respondent admitted that the decision to buy a house in Desa Gemilang was a 'hasty decision' because he actually had no idea the exact location of the project and the reputation of the developer. According to the agreement, vacant possession of the house was to be handed over to the respondent within 36 months (17.12.2005).

In August 2002 the respondent left to United Kingdom to further his doctoral studies. He was there until August 2007. He admitted that he had no idea what was going on with the project and could not be bothered to know because he wanted to concentrate on his study. Nevertheless towards the end of his study, the respondent made several phone calls from UK asking the developer about the status of his house. He was informed that his name was in the list and the house was still there. He came back to Malaysia in August 2007 and received a key to the house and immediately moved in October 2007. The respondent decided not to file any claim for LAD with the Housing Tribunal after learning from other purchasers' experience that 'it was just a waste of time'. They won the case but they have not received a single cent until today.

Furthermore he has other serious matters to handle with regards to the housing project as a whole. He is currently a legal advisor for Desa Gemilang Residents' Association. The houses were handed over to the purchasers without the CCC and no application has ever been made by the developer because they had failed to comply with housing regulations and plan approval including conversion of land and to build a retaining wall as required by the local authority. Basically all the facilities in this project have not been transferred to the relevant authorities. As a result the purchasers have to face a lot of problems. For example in October 2013, water supply to their houses was disconnected by the water supply operator (SYABAS) because the developer failed to pay the outstanding water bill.

The findings reveal different sufferings that purchasers had gone through to get keys to their houses and challenges in claiming compensation for late delivery. The issue of late delivery has also caused a group of purchasers to lose their dreamed houses.

Legal Protection to House Buyers

According to clause 20(2) of Schedule G and clause 26(1) of Schedule H of the HDA, the buyer is entitled to claim for Liquidated Ascertained Damages (LAD) for the delay in completion. It is a statutory remedy to compensate the buyer for the failure of the developer to fulfill his obligation under the agreement to hand over vacant possession on a specific date (Meng, 2007).

The LAD should be calculated from day to day at the rate of 10% per annum of the purchase price. Being a statutory remedy, LAD is mandatory in nature and its calculation is fixed. In *Brisdale Resources Sdn Bhd v Law Kim*⁶, it was held that the agreed liquidated damages for late delivery of vacant possession as contained in clause 22 of the sale and purchase agreement was a mandatory provision. Therefore, the plaintiff needs not prove his losses pursuant to section 75 of the Contracts Act 1950 as usually required in most contractual claims. In addition, no excuses can be accepted for the delay as illustrated in the case of *Tang Kam Thai & Ors v Langkah Cergas Sdn Bhd & Ors*.⁷ Despite admitting that there was a delay, the developers in this case contended that the delay was caused by factors beyond their control which include *inter alia*, changes made by the planning authorities. However the court held that this was a matter for the defendant, as a developer of the said properties to deal with. This responsibility cannot be passed onto the purchasers as an excuse for the payment of liquidated damages.

Similarly, in *Tai Kim Yew & Ors v Sentul Raya Sdn Bhd*,⁸ a group of purchasers claimed LAD against the defendant for the delay in the delivery of vacant possession. The defendant, *inter alia*, argued that there was a frustration of the contract due to the defendant's dire financial position brought about by the 1997-1998 national economic crisis which was beyond its control. However this contention was rejected by the court on the ground that the S&P is not an ordinary contract since all the terms and conditions are actually imposed by law upon the parties. As such the Contract Act has no relevance in this regards. The court also stresses that the phrase 'shall pay immediately' in clauses 22(2) and 24(2) of the agreement means that the right to be paid LAD is automatic once there was delay by the developer to hand over possession or to complete the common facilities. In other words, in cases of subdivided building, the purchaser is not only entitled to claim LAD for the unit of his/her house but also LAD for late delivery of common facilities.⁹

In addition to LAD, a buyer may also terminate the sale and purchase agreement. Although this right is not expressly stated in the standard contract of sale, the entitlement is derived from the basic principle of contract law. As time is of the essence of the contract, any failure to perform an obligation timely as stipulated by one party will entitle the other party to either treat the contract as repudiated or terminate the contract. In *Tan Yang Long & Anor v Newacres Sdn Bhd*,¹⁰ the court held that the purchaser can terminate the contract of sale and demand the refund of all monies paid since the vacant possession was not delivered on the scheduled date. Similarly, in *Diong Tieow Hong & Anor v Amalan Tepat Sdn Bhd*¹¹, it was decided that the house purchasers who cancelled the sale and purchase agreement due to delay in completion of

⁶ [2004] 6 MLJ 76.

⁷ [2005] 7 MLJ 605.

⁸ [2004] 4 MLJ 227.

⁹ See *Diong Tieow Hong & Anor v Amalan Tepat Sdn Bhd* [2008] 3 MLJ 411; *Hariram A/L Jayaram & Ors v Sentul Raya Sdn Bhd* [2003] 1 MLJ 22.

¹⁰ [1992] 1 MLJ 262.

¹¹ [2008] 3 MLJ 411.

the houses are entitled to ask for refund of all monies paid and claim LAD up to the date of the termination.

Thus it is crystal clear that the right to be paid LAD is automatic once there was a delay by the developer to hand over possession. The developer must pay the LAD to the purchaser at once, without further ado, once there was a late completion of housing project. In fact there is no obligation on the part of the purchaser to give notice to the developer about his intention to claim LAD. However in real practice, claiming the LAD is not as simple as it supposed to be since most of the time the developer refuses to pay the LAD for various reasons. Thus a claim for LAD needs to be filed in the court or the Tribunal for Homebuyer Claims (THC). Nonetheless there are limitations and challenges in filing cases under the existing redress mechanisms (Naemah et al, 2014). Furthermore, winning the case does not guarantee that the buyer will receive the compensation as illustrated in the case study above.

The jurisdiction of the THC is limited to a claim that is based on a cause of action arising from a sale and purchase agreement entered into between the house buyer and the licensed housing developer. Consequently unlicensed developers and other parties in the construction industry such as contractors, engineers and architects cannot be sued in the THC. Any claims against other than the developer need to be filed in the ordinary court based on breach of duty under the law of torts.¹² The THC's jurisdiction is also restricted to claims the amount of which does not exceed RM50,000. In view of present market value of houses in Malaysia, this limitation may deprive many victims of late delivery of vacant possession to claim their right in the Tribunal. Another major drawback of the Tribunal is that it has no power to enforce the awards. The enforcement of the award is the responsibility of the winning party.¹³ Consequently in cases where the respondent fails to comply with the award, the claimant himself would have to go to the ordinary court for execution of the order. In practical reality, this causes difficulty to consumers since the execution procedure under the Subordinate Courts Rules 1980 is not a simple process.

As a result some consumers never obtained their compensation at all. In addition, just like other inferior courts or quasi-judicial bodies, the awards of the THC may be subject to judicial review on question of law. This procedure has been used by developers to challenge the Tribunal's findings. On the other hand consumers who are dragged into the process may not be able to defend themselves without assistance from lawyers or consumer associations. For the same reason judicial review will not be used by consumers although there are instances where the Tribunal's awards were not in their favour. Above all, litigation in court is not only expensive but time-consuming, worrisome and complex. As a 'non-litigious society', majority of Malaysian consumers would try to avoid dealings with lawyers and legal proceedings. Thus despite the courts' sympathetic judgement and constructive interpretation of housing law in favour of purchasers,

¹² For example in *Hor Wei Kheng & Anor Tam Mui Ee v Rakyat Corporation Snd Bhd & Ors* [2010] MLJU 321, the 2nd and 3rd defendants (the architects) were held 30% liable for causing the delay to deliver the vacant possession on time.

¹³ Section 16AC(b) of the HDA.

the ordinary court system is not a right and practical place to seek justice for majority consumers. It may only be used as a last resort.

Solving the Problem of Late Delivery

It is reasonably clear that late delivery has raised many consumer protection issues in this country. Thus the best solution to avoid the problem is by preventing or at least minimizing the occurrence of late completion. On this point, there have been serious efforts to replace the present system of 'sell then build' with 'build then sell' system as practiced in many developed countries such as Australia and UK. The introduction of Schedule I and J in the HDA (Amendment 2007) may be seen as the first step under the law to promote the 'build then sell' concept (Sufian and Sapian, 2009). Under this scheme, a buyer would pay 10 per cent down payment for a house and the rest after the project is completed. There would be no issue of late delivery since the developer will strive very hard to complete the house on time to get full payment as well as profit from the project. Furthermore any delay in the project will not have serious effect on purchasers since only small portion of payment has been made and they can simply cancel the agreement in the event of breach of contract by the developer for its failure to deliver the vacant possession according to the schedule.

While waiting for 'build then sell' scheme to be fully implemented in Malaysia, there is a need to improve the present construction processes which contributed to the delay. It has been argued that the developers and relevant government agencies are the main bodies responsible for causing the delay and subsequent abandonment of project (Nuarrul Hilal, 2009). Relevant authorities involved in housing development especially the MUWHLG and local authority contribute to the project delay due to delay in granting approval, lack of enforcement and monitoring and unreasonable variation of conditions for planning permission and plan's approval in the course of construction of project. Despite the introduction of new system of certification through the Certificate of Completion and Compliance (CCC) in 2007, which has replaced the Certificate of Fitness for Occupation (CF), the problem of red tape and delays in issuance of the CCC remain an issue in construction industry (Zhin, 2013). In this respect a 'delay' may be seen as a 'contagious diseases' which finally affected so many people.

From consumers' point of view, LAD is to compensate their financial, social and emotional problems while patiently waiting for keys to their houses. Thus there must be effective mechanism for immediate and automatic payment of LAD. It is proposed that some percentage of money in the developer's housing development account which is monitored by the MUWHLG to be reserved for LAD. Alternatively, since the damages by way of setting off has been recognized by the court, it should be considered as practical solution to solve the problem of claiming LAD by making it as part of compulsory procedure in handling over vacant possession. Amendment to the law is required for effective implementation of the proposals. In addition it is perhaps timely for housing industry in Malaysia to consider the introduction of home warranty insurance which among the coverage is the payment of LAD. With regards to purchasers' right

to terminate the contract of sale, it has been proposed that such right to be expressly stated in the standard sale and purchase agreement (Meng, 2007). At the same time some form of incentives should be provided for developers who have successfully completed their housing projects early or on time. This may encourage them to be more efficient, creative and innovative in avoiding or solving the problem of delay.

Conclusion

The issue of late and delay is a reflection of inefficiency in housing industry. It has a negative implication on business reputation of all parties involved in construction industry – developers, contractors, consultants etc. But the ultimate victim of delay is the end-user of the construction product, i.e. the purchaser. It is thus fair and reasonable principle of law that the victim of late delivery of vacant possession to be awarded with automatic and fixed calculation of compensation. Under the existing housing law and policy, all relevant bodies and agencies have been conferred with wide and adequate power to ensure timely completion of housing projects. However to what extent this power has been exercised in favour of house buyers is highly questionable. It can safely be said that the main concern of house buyer protection in Malaysia right now is not so much whether there is adequate legal protection, but more on the issues of implementation and enforcement. The problem is hopefully solved or minimized with full implementation of ‘build then sell’ scheme in the near future.

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