



## DEVELOPER LIABILITY FOR SICK AND ABANDONED PROJECTS UNDER THE HDA

----- Authored by the Conveyancing Team of Miranda & Samuel -----

As of 31st August 2023, there are currently a total of 112 'sick' or abandoned private housing projects worth RM12.98 billion involving 23,912 housing units and affecting 13,854 house buyers.

'Sick' housing projects are defined as those that have been delayed by more than 30% of their scheduled progress stated in the Sale and Purchase Agreement ('SPA'). A housing project is considered abandoned if the project is not completed by the developer within or beyond the stipulated time in the SPA and there is no significant construction activity that took place at the construction site for a continuous period of six (6) months. Thus, it should be noted that if the housing developer has not been wound up and the housing project is still ongoing despite at a slow pace, it is not considered an abandoned project but only a delayed project where the developer is required to pay Liquidated Ascertained Damages ('LAD') if it is unable to deliver the vacant possession of the property within the stipulated time.

'Sick' housing projects or abandoned housing projects usually happen in the Sell-then-Build system where the housing developers build a property and begin the sales of the property before the housing project construction is completed. While giving the buyers rebates, discounts and early bird rates to attract them to buy this yet-to-be-completed housing project, this system also benefits the developers especially developers with limited cash flow to assist or fund their development of the housing project. However, what if the housing developer is unable to complete the project and out of no choice but to abandon or cause to be abandoned a housing development? What consequences would be faced by the developer?

### Consequences

#### **1. The purchasers are allowed to request a full refund from the housing developer.**

According to section 8A of the Housing Developers Act 1966 (HDA), the purchaser is entitled to terminate the SPA entered with the housing developer provided that:

- (a) the developer has failed to carry out or delays or suspends or ceases to work for a continuous period of six (6) months after the execution of the SPA;
- (b) the purchaser has obtained the written consent from the end financier; and
- (c) certification from the Controller that the developer has refused to carry out or delayed or suspended or ceased work at least for a continuous period of six months after the execution of the SPA.

Thus, if the purchasers choose to terminate the SPA, the developer would be legally bound to refund the full amount of monies received free of any interest to the purchaser within thirty (30) days from the date of termination of the agreement. Failure to do so would result in the developer committing an offence under Section 8A (5) of the HDA and upon conviction, be liable to a fine not less than RM50,000.00 but not exceeding RM250,000.00 and a further fine not exceeding RM5,000 for each day the offence continues.

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## 2. The housing developer can get prosecuted.

Section 18A of the Housing Development (Control and Licensing) Act 1966 ('HDA 1966') states that "any licensed housing developer who abandons or causes to be abandoned a housing development or any phase of a housing development which the licensed housing developer is engaged in, carries on, undertakes or causes to be undertaken shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than two hundred and fifty thousand ringgit but which shall not exceed five hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both." The Minister of Housing Development may further give directions such as directing another company to assume control and carry on the business of the developer in order to safeguard the interests of the homebuyers (Section 12 of the HDA 1966).

## 3. The possibility that the housing developer may be forced into liquidation.

When a housing developer abandons its property due to financial trouble, there is a high probability that the developer company may be wound up. It is a process in which the company is brought to an end. A liquidator will then be appointed by the court to take control of the developer company's assets, this includes the management of the developer on the abandoned development. Depending on the circumstances, the liquidator may raise funds or charge a further cost to the purchasers or secure an alternative developer to complete the project. Winding-up proceedings can be extremely damaging to the developer's reputation and business even if the proceeding is unsuccessful. More often than not, the presentation of a winding-up petition may result in the termination of contracts and the revocation of banking facilities for the company.

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Although abandonment may be due to various reasons such as economic conditions, unfavourable policies, lack of study or marketing problems, research indicates that financial problems are usually the main cause of abandoned housing projects. Financial problems can arise due to mismanagement of the project such as inaccurate market research may result in inaccurate forecast of demand and supply of certain properties eventually making fewer sales for the projects. This in turn may cause problems in the bridging loan as financial institutions (usually) require the developers to secure approximately 80% sales from the total of their project (depending on the strength of the developer and the types of guarantees provided).

'Sick' or abandoned projects is a complex problem that has far reaching consequences for the purchasers, developers, the key individuals behind the development company. The Ministry of Local Government Development (KPKT) relies on, among others, the provisions of the HDA, to attempt to limit the problem by rehabilitation and redevelopment of projects.

There has been significant progress in this regard. A total of 351 sick and abandoned housing projects, with a gross development value (GDV) of RM32.87 billion, have been completed and restored by the Ministry of Local Government Development (KPKT) throughout one year of the Madani Government's administration.

Based on the 2023 KPKT Report Card, a total of 43,738 private housing units were involved, and successfully restored by the Task Force on Sick and Abandoned Private Housing Projects (TFST) as of Oct 31.

According to the report card, RM1 billion is allocated through Budget 2024, to encourage reputable developers to restore sick and abandoned private housing projects which have been identified.

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