

Chapter 10 – Property Financing

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Learning Objectives

What you should achieve after completing this chapter:

- Be able to understand the different purposes of residential financing;
- Understand the risks of residential and non-residential financing;
- Understand the risks associated with disbursement of loans;
- Understand how loans and overdrafts are packaged residential and non-residential units and
- Obtain an insight into the future of housing.

1. Residential

1.1 Introduction

The term residential property covers any building designed for human dwelling. As most residential dwellings are built on land, the term landed property is used. Where the structures are built above the land like flats and apartments, they are termed non-landed properties or multi-storey buildings.

1.2 Housing Industry History and Developments

Since its infancy about 30 over years ago, the property development industry in Malaysia has progressed and developed into a modern and advanced sector of the economy. Over the last three decades, the scope of development projects undertaken by developers has increased to encompass traditional housing projects to condominiums, townships, towering commercial complexes, shopping malls, state-of-the-art golf courses, hospitals, theme parks and industrial estates.

The First Malaysia Plan was implemented in 1966 with the initial objective being to provide housing as a component of social services. It was during this time that the first formal and structured housing programmes were undertaken to provide low-cost housing to meet the needs of the poor.

Over the years, housing programmes have focused on the eradication of poverty and restructuring of society through promoting integration of the various ethnic communities in Malaysia. As such, the role of private sector developers became more significant and resulted in the formation of a Consultative Committee on Housing and Construction between the public and private sectors.

The Housing Developers' Association (HDA), as the Association was known then, was approached by the Government to help with public housing programmes. Its members responded positively to the challenge by setting up HDA Perumahan Berhad in 1975 and successfully completed its pilot project of 696 units of low-cost houses in Cheras, Kuala Lumpur in 1977.

As population growth increased, housing programmes in urban areas were further accelerated with particular emphasis given to low-cost housing in subsequent Malaysia Plans. With the collapse of commodity prices and the economic slowdown that followed in the mid-1980s, the Government intensified efforts to boost the flailing economy through promoting of

capital-intensive and export-oriented industries as well as the relaxation of regulations for foreign purchasers.

The industry started to gain momentum again as the economy began to bounce back in the early 90s, a period which also saw a growing maturity in terms of new building concepts, quality and a wider range of products coming on-stream. During this particular period of the Sixth Malaysia Plan (1991-1995), private developers were successful in implementing and achieving the target of 217,000 units of low cost houses.

The Asian financial crisis that hit the region in 1997 spurred various government measures to counter the effects of recession. One of these was the effort to reduce the property overhang via the Home Ownership Campaigns I & II. The success of these two campaigns helped reduce the oversupply and revived the property sector.

With parallel advancements in the telecommunications and modern transportation systems, the growth of urban and rural boundaries have expanded dramatically such that property developments are no longer centralised in one specific area. New townships have emerged that did not exist before.

2. Landed Property

Land containing structures built on the land is generally termed improved property and can be classified under landed property.

This covers single storey, double storey, detached houses (the commonly used term from the Hindi language is bungalow) and semidetached houses. While landed property is often more expensive than non-landed ones, the aesthetic value usually justifies the little extras.

3. Non-Landed Property

When a town house, flat, apartment or condominium is built on the land, a strata title is issued to each unit. This title is a subdivided title in the Strata Title Act. As the title to the units is above the land, the property is considered non-landed property.

Definitions of a townhouse, flat, apartment or condominium vary with each developer. These are terms used by developers based on the different facilities offered (security, maintenance, and swimming pools). The housing ministry has not defined such terms to date.

Generally, the term **townhouse** refers to a house built above another house.

A **flat** is a multi-storey building, which houses many residential units usually provided with basic facilities such as lifts and maintenance services.

An **apartment** is a flat with extra facilities like security services.

A **condominium** is a higher end multi-storey flat with security services, and other facilities like swimming pools, gymnasiums, squash courts, games rooms, community halls, etc.

The younger generation may find non-landed property such as flats, condominiums and apartments, service apartments, holiday apartments and weekend resorts appealing. Paying a monthly maintenance fee entitles the buyer to enjoy facilities like a swimming pool, a gymnasium, tennis or squash courts and the like.

Prior to issue of strata titles, maintenance fees are paid to the developer who also sets up a sinking fund to meet unforeseen situations like a burst water tank. Once the strata title is issued, the maintenance is handled by a management corporation appointed by the owners.

4. Recreational Property

These are lakeside resorts, golf courses, seaside property and amusement centres.

5. Gated Communities: The Future of Housing

With the introduction of the Strata Titles Act 1985, not only was the subdivision of buildings enabled, but more importantly, it also legislated:

- (i) the creation of common property, i.e. common ownership of a part of the development;
- (ii) the creation of a Management Corporation (or Body Corporate) to own, manage and maintain the common property;
- (iii) the requirement of service charges and sinking funds to fund the Management Corporation's operations; and
- (iv) Remedies to the Management Corporation to secure the collection of service charges and sinking fund charges.

With this legislation in place, urban dwelling Malaysians were introduced to lifestyle features not previously seen before, such as:

- Private security;
- Privately managed and maintained common areas, commonly at standards higher than that available from public services as provided by the local government; and

- Common private recreational facilities, such as a Clubhouse with private sports facilities, and well-tended, landscaped gardens.

The introduction of these private residential facilities and services into the traditional landed housing development is what defines the concept of a **Gated Community**.

Within the context of a landed development, the provision of these private residential facilities and services allows the opportunity to introduce superior infrastructure, landscaping, and facilities to the open spaces for enjoyment of the residents' enjoyment. All these factors contribute towards a better and more harmonious living environment for residents.

6. Types of Residential Financing

Loans are offered for residential property to:

- Purchase from individual vendors and developers;
- Refinance after the initial loan has been settled or partially settled;
- Reduce total interest costs where the initial loan was obtained at a higher cost;
- Reduce monthly repayment where the initial loan was obtained at a higher quantum of monthly repayment due to a shorter loan tenor; and/or
- Provide the opportunity to borrow more where the initial loan amount was low.

Bankers who provide bridging loans to the developers also arrange to finance the houses purchased by the prospective buyers. This is termed "end financing".

7. Features and Benefits

(a) Term loan

A facility with regular predetermined monthly instalments. Instalments are fixed for period of time, say 30 years. Instalment payment consists of the principal plus interest.

In the event there is a change in the interest rate, the quantum of instalments will be effected to reflect the prevailing rate. If the instalments remain unchanged, the tenor of the loan will instead be adjusted depending on the direction of the change in interest rate.

(b) Overdraft facility

A facility with a credit line granted based on predetermined limit. No fixed monthly instalments. It allows flexibility to repay the loan anytime and freedom to re-use the money. Interest is calculated based on daily outstanding balance. Interest charged is generally higher than the term loan.

(c) Term loan and overdraft combined

A facility that combines a term loan and an overdraft, for example, 70% as term loan and 30% as overdraft. Regular loan instalment on the term loan portion is required.

(d) Flexibility on loan repayment**(i) Daily rests vs. monthly rests**

Financial institutions may charge interest either on daily rests or monthly rests depending upon the products offered. In the case of daily rests, the loan interest is calculated on a daily basis, while in the case of monthly rests, interest is calculated once a month based on the previous month's balance. Under both types of loan, the principal sum immediately reduces every time a loan instalment is made during the initial years.

(ii) Graduated repayment scheme

A graduated repayment scheme allows lower instalment payments at the beginning of the loan but this will gradually increase over time. This type of payment scheme will help house buyers to reduce the burden of loan repayment for the initial years and allow them to allocate more money for other purposes. Over time, as earnings of house buyers' increase, their repayment capabilities will also increase thus allowing higher repayment instalments at a later stage.

A graduated repayment scheme is also suitable for a house buyer who wishes to purchase a more expensive house but is restricted by his/her current repayment capability.

(iii) Pre-payment flexibility

Different financial institutions may have different terms and conditions imposed on pre-payments. Flexibility to make pre-payments and paying interest on a daily rest basis may help save considerable interest charges. It is also possible to start repayment of the loan during the construction of the house. However, in

today's housing loan market, where interest rates are generally lower in the first year and sometimes in the second year, the borrowers are not likely to repay early. In fact, they may even take advantage of the cash-flow from this loan to settle more expensive loans elsewhere. What is important is to make prompt monthly repayments.

(iv) Partial pre-payment of the outstanding loan

Many borrowers find it useful to shorten the loan tenor by making partial pre-payments with surplus savings or annual bonuses. Partial pre-payments can be of any amount. However, some financial institutions may impose restrictions on the amount to be pre-paid and on the frequency of pre-payment while others may impose a penalty.

(v) Early termination penalty

Financial institutions may impose a penalty on full repayment of loan. Generally, the penalty imposed can either be an X% flat interest on the outstanding loan or an 'x' number of months' of interest (e.g. 1 month's interest). This is because when a loan is granted for a certain term, the financial institution would expect the loan to be repaid over the period agreed and has planned their cash flow on this basis. An early termination of the loan would therefore disrupt the financial institution's cash flow planning. As such, some financial institutions do not charge a penalty if sufficient notice is given (as stated in the terms and conditions of the loan) or if the settlement is made after the required minimum period to maintain the loan with the financial institution has lapsed.

(e) Insurance

An important factor in insurance is that it gives the financier support in the form of financial security if an unfortunate event should occur.

There are two types of insurance to consider:

- (1) **The House Owner/Fire Insurance policy**
This policy provides coverage for your property against natural disasters such as flood, fire, riot, strike and malicious damage.

For properties with strata titles such as apartments or condominiums, insurance cover is provided by the Management Corporation (MC) on the entire building. A sub-certificate of the Master Policy issued by the insurance company from the MC must be kept with the financial institution. The rights of the owner of

the condominium under the policy are to be assigned to the financial institution.

(2) **The Mortgage Life Assurance or Mortgage Reducing Term Assurance (MRTA)**

This type of policy is designed to provide for settlement of the outstanding balance of the housing loan with the financial institution, in the event of total permanent disability or death of the borrower. The settlement sum will be subject to the terms of the insurance policy taken such as the level of cover, e.g. where a 50%-50% policy was taken for joint borrowers, conditions to apply in the event of arrears in repayments and interest rate coverage.

The MRTA provides protection to both the Financier and the borrower. The beneficiary of the policy is the financier.

Premiums can usually be included in the loan amount, and the repayment period of the premium is usually spread over the loan tenor. Financial institutions generally prefer the premium to be only incurred once, so that there are no monthly or yearly premiums to be paid subsequently. However, they may consider monthly or yearly payments of premium. In the event of early termination of housing loan, the owner will generally have the option to request for a refund of the premium for the balance of the unexpired period or to continue the insurance coverage.

8. Risks of Residential Financing

(a) Credit risk

The most common risk in residential financing is the inability of the borrower to service the loan.

Poor maintenance of multi-storey buildings may affect the marketability and hence, the security value of the property

(b) Developer risks

(i) Risk of incomplete construction

Incomplete construction can be due to structural defaults, natural impediments, internal company problems, cost overruns construction delays, underestimation of project and bureaucratic delays.

(ii) **Financial failure**
Financial failure of the developer can be due to cost exceeding the sale price, poor demand, inability to achieve breakeven sales (although this can be mitigated by imposing a breakeven pre-sale condition), oversupply situation, a completed project does not receive market acceptance.

(iii) **Fraud**
The developer's duty is to deliver strata titles issued by the land office to the bank when the property is assigned to the bank. Instead, some developers use it to obtain finance or sometimes to sell to unsuspecting buyers.

(c) Legal problems

Fault in legal documentation

(d) General terms and conditions

- Tiered rates or fixed term rates are offered for the younger generation with low starting salaries.
- High start loans are designed to maximise the advantage of double income (husband and wife).
- Certain low cost home loans securitised under CAGAMAS require owner occupancy. As such, it is not meant to be rented out.
- Cost of solicitors fees are waived for low cost homes.

(e) Fixed / term loan and overdraft portion

Traditionally, residential financing had been offered by way of fixed/term loans. With the needs of the consumer especially businessmen, whose incomes vary according to their business, residential financing was packaged as either part loan with part overdraft or a fully overdraft facility.

The overdraft facility is designed with the overdraft limit reducing monthly. Businessmen take advantage of this facility as they are charged interest according to the facility utilised. They also have the option to redraw the excess paid down.

Example: Overdraft for housing limit is RM90,000 with a monthly reduction of RM1,000 as repayment.

On 1/1/2004, the overdraft was drawdown at RM90,000 to purchase the property. Interest is charged on RM90,000.

On 1/2/2004, the limit was reduced to RM89,000. The borrower has now to pay RM1,000 to reduce the outstanding to RM89,000. The borrower pays RM1,000. Interest is charged on RM89,000.

On 1/3/2004, the limit was reduced to RM88,000. The borrower has now to pay RM1,000 to reduce the outstanding to RM88,000. Instead, the borrower pays RM10,000. The outstanding stands reduced to RM79,000. Interest is charged on RM79,000.

At this point, the borrower has the option to withdraw RM9,000 (RM88,000 minus RM79,000) if he needs it.

In a term loan, the repayment is fixed with monthly payments until full settlement and cannot be operated as an overdraft.

(f) Consideration for end financing (EF)

(i) Risk profile of developers

A developer should be properly evaluated for his reputation, financial capability, experience and past performance.

Some developers with low capital are unable to complete projects due to financial constraints. A developer with adequate funds is able to withstand cost overruns in the project. Development costs incurred by the developer are treated in their balance sheets as current assets (houses). This gives a false impression to the bankers that the developer is liquid. Developers' accounts can sometimes contain high liabilities. Developers under pressure may utilise funds for construction to settle liabilities.

Undeveloped lands are treated as fixed assets when in actual fact they can be worthless for housing.

(ii) Risks associated with the project / developer / type of development

- **Demand for type of properties.** This is dependent on the location, pricing and quality of work.
- **Risk of incomplete construction.** This can be due to structural faults, cost overruns, construction delays and underestimated project delays.
- **Risks of financial failure** due to non-acceptance by the market
- Fault in legal documentation.

- Unexpected increase in raw materials, costs overruns or labour shortage.

(iii) Projects under joint venture between land owner and developer

Generally, some small-scale developers do not have land banks and neither do they have the capital to purchase land. They as such seek landowners and enter into a joint venture agreement to develop the land. The projects can be state joint venture projects or private projects. In privatised projects the landowner is given completed houses to the value of the agreed price of the property.

This arrangement is also employed by ‘fly by night’ developers. Once a joint venture agreement is signed with the land owner and finance approved, the developer absconds at the point where he has made a reasonable profit leaving the project abandoned.

(iv) Properties under Housing Developer’s Act (HDA) and non-HDA Properties

Housing development is governed by the Housing Developers Acts. The Housing Developer Act (Control and License) 1966 (Act 118) was enforced on Aug 29, 1969 while the Housing Developers Regulations came into force on April 1989. Amendments to the Act are attached:

- Housing Developers (Control and Licensing) (Amendment) Regulations 2002;
- Housing Developers (Housing Development Account) (Amendment) Regulations 2002;
- Housing Development (The Tribunal For Homebuyer Claims) Regulations 2002; and
- Housing Development (Compounding of Offences) Regulations 2002.

The objectives of the Act are to:

- provide for the control and licensing of housing development in Peninsula Malaysia and for matters connected therewith; and
- define the role of housing developers.

The Act defines development as the business of developing more than four units of housing accommodation. A person who constructs only four units of housing accommodation is not governed by the Act.

A developer who builds only commercial units such as shops or offices or factories will not be subject to the Act. However, if the units constructed comprise partly shops or offices and partly residential units, the Act will apply.

The Act does not apply to any society registered or incorporated to housing projects undertaken by cooperative societies, statutory bodies or agencies of the Federal or State Government.

The Act stipulates it is mandatory for a housing developer to be in possession of a valid license before he undertakes any housing development.

Every licensed developer shall open and maintain a 'Housing Development Account' (HDA) with a bank or finance company for each housing development project undertaken by the licensed developer.

The developer is required to pay into the account all purchase monies received by the developer from the sale of the houses or any other sum or sums of money, which may be required by the regulations. These include progress payments towards the purchase price.

The Act is only applicable in Peninsular Malaysia. Accordingly, the schedule of progressive release of the loan under the Third Schedule has no application in Sabah and Sarawak.

(v) Duty of the developer after signing the SPA

After the unit is picked and the purchase firmed up on the dotted line, most buyers go home happy and content with the thought that their chosen homes would be delivered to them within the specified time frame.

The processes after the signing of the sale and purchase agreement (SPA) are often a blur to most buyers. These can be classified into two categories. One relates to land matters while the other relates to the provision of facilities and services.

The land-related responsibilities are:

- The developer is required to use his own money when applying and seeking approval for the demarcation of boundaries for land that will be sold to buyers;

- To take the necessary actions to obtain separate land ownership titles or transfer of titles within 21 days after the house buyers have settled all the payments.
- The developer is also required to complete the documentation for the legal transfer of the property and register the property under the buyer's name or beneficiaries.
- To ensure that the land sold is free from any encumbrances and conditions, regardless of whether they are clearly stated or otherwise on the day the sale and purchase agreement is signed.
- The developer is also not allowed to impose any encumbrances on the land without the buyer's approval. This is besides ensuring that the property is free from any encumbrances.

The responsibilities related to facilities and services are:

- Using their own funds, developers are required to build infrastructure such as roads, inner link roads, sewage, drainage, irrigation or sewage plants for the housing estate as required by the local authority;
- Provide maintenance services such as garbage disposal, cleaning of public drains and grass-cutting in reserved land from the day the buyers take vacant possession of the units until the task is taken over by the local authority;
- Using their own funds, developers are required to provide the installations for the supply of electricity, water, sewage and gas piping and telephone cables.
- The developer is also required to pay the penalty and absorb losses suffered as a result of any violation of rules and regulations.
- With their own money, to apply for the Certificate of Fitness for Occupancy (CFO) from the local authority.

Developers who fail to comply with the terms and conditions stipulated in the sale and purchase agreement will have to:

- pay compensation to the house buyers on a daily basis of 10% per annum on the cost of the house if they fail to deliver the vacant possession with electricity and water supply besides other installations, after the date agreed to in the SPA; and/or
- rectify the defects and problems within 18 months of the defect liability period from the date of vacant delivery.

On the other hand, the developer has the right to:

- impose interests charges on late payment based on 10% annually if a buyer fails to settle the payment within 14 days after receiving the notice of payment; and/or
- terminate the sale and purchase agreement if the buyer fails to settle the progress payment within 28 days.

(vi) Properties under non-HDA

This refers to properties which are purchased from individuals or developers without a licence. Hence, they do not come under the Housing Developers Act (HDA). As such, the terms and conditions under the sale and purchase agreement can be the terms as decided between vendor and buyer.

The general terms that are crucial to the financier are:

- The expiry date for the buyer to arrange for financing if the purchase is partly by way loan; and
- The instructions for disbursement of the loan.

(vii) Progress update of projects under EF line and abandoned projects

Bank Negara Malaysia has a rehabilitation fund to rehabilitate housing projects that have been abandoned. Where a financial institution has given out loans under end financing and the project is abandoned, due consideration should be given to the borrower. This is because the borrower/buyer is deprived of housing. As a result, he will have to incur additional expenses like renting premises. To ease his burden, an interest moratorium is considered.

(viii) Interest moratorium for abandoned projects

Financial institutions have different policies for the rehabilitation of housing loans where the project has been abandoned. Though the borrower is liable to pay the interest during progressive releases, consideration is given to his plight and therefore the monthly interest payment is deferred or postponed. This is termed as *moratorium*.

In the case of delayed projects, the buyer can seek compensation from the developer on interest payments for late completion.

(g) Contractor's all risk

This is a policy taken by the developer. The policy indemnifies the insured against loss or damage to the construction works, construction plant and equipment. The insured's legal liability as a result of injuries or death to third parties and loss or damage to the property of third parties caused during the execution of the works is also covered.

Where the developer fails to take out such a policy or fails to renew, any damages incurred would result in the project being stalled.

**(i) Regulations affecting housing development
(standard as well as non-standard SPA)**

The rules and responsibilities of the house buyers can be divided into four categories. They are:

- (1) The survey stage;
- (2) When the sale and purchase agreement is signed;
- (3) After signing of the SPA; and
- (4) When the buyers take vacant possession (or delivery of the keys).

Survey stage

Before making any decision to purchase a house, the buyer should determine the financial strength and capability of the housing developer. He is advised to visit the developer's office to ascertain whether the developer has a valid housing developer's license, as well as permits for advertisements and sale from the Ministry of Housing and Local Government.

When signing the SPA

Before signing the SPA, the buyer is advised to read and understand its contents. If he has difficulty understanding, he should approach the developer or the lawyer for an explanation.

To protect his interests and rights, the buyer can appoint his own lawyer. The developer cannot force buyers to use the services of lawyers that he has appointed or recommended.

The SPA is a standardised agreement. It can be checked in Schedule G or H of the Housing Developer (Control and Licensing) Regulations 1989. Before signing the SPA, the buyer is advised to take note of the following matters:

- Lot number, land area, location, price of the house and its specifications; and

- Completion period (24 months for landed properties and 36 months for subdivided properties).

The buyer has the right to seek compensation if the developer fails to hand over vacant possession of the property after 24 or 36 months.

The developer has the right to ask for interest from the buyer who fails to settle or is late in making the progressive payment within the 21 days of the stipulated period.

For sub-divided properties, the developer asks the buyers to sign the deed of mutual covenant. The buyer is advised to read and understand its contents. If the buyers do not understand it, he can refer to the developer or his appointed lawyer for an explanation.

The buyer should only sign the SPA and pay 10% deposit when he is satisfied that all requirements are met. He must ensure that the date of the receipt tallies with the date the SPA was signed. The receipt is an official document that can be used as evidence.

The rights of the house buyer in the SPA

The sale and purchase agreement (SPA) is a legal document, signed and agreed to by both the developer who has agreed to sell the house and the land and house buyer who has agreed to purchase the property in accordance with the terms specified.

The SPA is standardised. Each developer has to adhere to it as stipulated in Rule 11 of the Housing Developer' Regulations (Control and Licensing) 1989.

Violation of the regulation is a serious offence. The developer can be fined RM5,000 or be sentenced to three years imprisonment or both.

The Housing Developers' Regulations (Control and Licensing) 1989 has allocated two types of SPA – schedule G is for house and land purchase and schedule H for sub-divided buildings.

If the developer is not bound by the regulations, he can use the SPA to serve his own purposes. For instance, housing projects that are developed by cooperatives or government agencies, or other properties such as commercial buildings and shop lots. Buyers should note several important matters in the SPA. These are the:

- preamble;

- land conditions and encumbrances;
- price and payment schedule; and
- loan.

The preamble

The developer's preamble needs to state the following:

- developer's license number, advertising and sales permit number;
- owner's details;
- PT number, division, mukim, district, state and hectare;
- developer's name and address; and
- lot size for sale.

Buyer's duty

After signing the sale and purchase agreement (SPA), buyers have to realise that they are now potential legal owners of the property and will have to settle all the necessary payments required of them. Here is a list of items buyers need to pay:

- A registration fee for the agreement and transfer of ownership;
- Stamp duty; and
- Legal fees.

It is also a provision of the SPA that the buyers must settle the work progress payments as stipulated in Schedule Three. In addition there are other payments that need to be borne by the buyer. These payments can be divided into five categories:

(a) **COMPULSORY PAYMENTS** for:

- Land premium;
- Assessment; and
- Other charges related to the land.

(b) **PAYMENTS** to be incurred after the buyer take vacant possession of the property. These can be classified as follows:

- **Maintenance service fees:** The payment covers service charges for garbage collection, cleaning of public drains and grass cutting on road reserve areas that

have been provided by the developer. These services have to be paid by the buyer until such services are taken over by the local authority. The payment has to be made within seven days from the day notice is served by the developer. If the buyer fails to meet the deadline, he will have to pay interest charges at a rate of 10% per year, from the expiry date of the notice.

- Infrastructure and maintenance fees: The payment includes maintenance expenditure and the cost of up keeping the facilities provided but does not include road reserve, vacant land, power, sub-station and sewerage.
 - Sub-divided buildings: The buyer is responsible for paying a certain amount for maintenance services and taking care of the common properties before the setting up of a management body under the Strata Ownership Act 1985.
 - The total payment that has to be paid is based on the number of units.
- (c) **INSURANCE.** The buyer is also required to pay an insurance premium to insure his building against losses caused by fire and other forms of disaster. For sub-divided buildings, the premium sum is determined by the number of units. The payment has to be made within seven days from the notification date. In the case of late payment, a 10% interest per annum will be imposed effective from the expiry date of the notice served.
- (d) **UTILITIES.** The buyer is also responsible for the down payment that needs to be paid to install the meters for water, electricity and gas within 14 days from the time the notice is served. Late payment will result in interest being imposed at 10% per annum starting immediately from the expiry date of the notice.
- (e) **IF THE BUYER** agrees with the developer to do some renovation work on the house that he has bought, he also has to absorb the cost for the additional work. Payment for this also has to be settled within 14 days from the date notice is received, otherwise it will attract a 10% per annum interest charge. The buyer however, is not responsible for the following:

- Additional costs incurred for the replacement or use of construction material that have been agreed upon in the SPA except for what has been agreed upon by the buyer.
- Any losses suffered by the developer due to amendments to the existing laws such as those related to legal fees and additional taxes or payments imposed on the developer.

Land conditions and encumbrances

The developer agrees to sell the property free from any encumbrances such as conditions for agricultural, industrial or building. The buyer thus has to ensure that the land status has been transferred to the housing category and is free from any conditions or restrictions the day he signs the SPA.

Apart from that, the developer cannot impose any encumbrances on the land concerned after the agreement has been signed, without prior approval from the buyer. In other words, the developer has to ensure that the property is free from any encumbrances before handing over vacant possession to the buyer.

Price and payment schedule

The price is stated in the SPA while the payment schedule for the work in progress is fixed under schedule 3 of the SPA. The buyer's payment schedule to the developer is as follows:

THIRD SCHEDULE (SCHEDULE G)

(Clause 4(1))

SCHEDULE OF PAYMENT OF PURCHASE PRICE

(for land and building)

<i>Instalments Payable</i>	<i>%</i>
1. Immediately upon the signing of this Agreement	10
2. Within twenty-one (21) working days after receipt by the Purchaser of the Vendor's written notice of the completion of:	
(a) the foundation and footing works of the said Building;	10
(b) the reinforced concrete framework of the said Building	15
(c) the walls of the said Building with door and window frames placed in position	10
(d) the roofing, electrical wiring, plumbing (without fittings), gas piping (if any) and internal telephone trunking and cabling (if any) to the said Building	10

(e) the internal and external plastering of the said Building	10
(f) the sewerage works serving the said Building	5
(g) the drains serving the said Building	5
(h) the roads serving the said Building	5
3. On the date the Purchaser takes vacant possession of the said Building with water and electricity supply ready for connection	12.5
4. Within twenty-one (21) working days after receipt by the Purchaser or the Purchaser's solicitors of the separate document of title to the said Lot together with a valid and registrable Memorandum of Transfer to the Purchaser duly executed by the Vendor or on the date the Purchaser takes vacant possession of the said Building, whichever is later	2.5
5. On the date the Purchaser takes vacant possession of the said Building as in item 3 and to be held by the Vendor's solicitor as stakeholder for payment to the Vendor as follows:	5
(a) 2.5 per centum (2.5%) at the expiry of six (6) months after the date the Purchaser takes vacant possession of the said Building.	
(b) 2.5 per centum (2.5%) at the expiry of eighteen (18) months after the date the Purchaser takes vacant possession of the said Building	
Total ...	100

THIRD SCHEDULE (SCHEDULE H)

(Clause 4(1))

SCHEDULE OF PAYMENT OF PURCHASE PRICE

(for building intended for subdivision)

<i>Instalments Payable</i>	<i>%</i>
1. Immediately upon the signing of this Agreement	10
2. Within twenty-one (21) days after receipt by the Purchaser of the Vendor's written notice of the completion of:	
(a) the work below ground level including piling and foundation of the said Building comprising the said Parcel	10
(b) the reinforced concrete framework of the said Parcel	15
(c) the walls of the said Parcel with door and window frames placed in position	10

(d) the roofing/ceiling, electrical wiring, plumbing (without fittings), gas piping (if any) and internal telephone trunking and cabling to the said Parcel	10
(e) the internal and external plastering of the said Parcel	10
(f) the sewerage works serving the said Building	5
(g) the drains serving the said Building	5
(h) the roads serving the said Building	5
3. On the date the Purchaser takes possession of the said Parcel with water and electricity supply ready for connection to the said Parcel	12.5
4. Within twenty-one (21) working days after receipt by the Purchaser of the written confirmation of the Vendor's submission to and acceptance by the Appropriate Authority of the application for subdivision of the said Building	2.5
5. On the date the Purchaser takes vacant possession of the said Parcel as in item (3) and to be held by the Vendor's solicitor as stakeholder for payment to the Vendor as follows:	5
(a) 2.5 per centum (2.5%) at the expiry of six months after handing over of vacant possession	
(b) 2.5 per centum (2.5%) at the expiry of eighteen (18) months after the date the Purchaser takes vacant possession of the said Building	
Total ...	100

Handover of vacant possession

The handover of vacant possession is also referred to as the delivery of keys. It is allowed only after the following conditions are met:

- The developer's architect has certified that the building has been completed according to specifications and connected with water and electricity supply.
- The developer has applied and certified that Form E (Article 25 of the Uniform Building By-law 1984) has been sent to the local authority for the issuance of a Certificate of Fitness for occupancy purposes.
- The house buyer has made all the necessary payments, paid according to Clause 4 (1) Schedule Three and all other payments stipulated in the SPA.
- The buyer has implemented and adhered to all the terms and conditions on his part.

After receiving the notice for vacant possession from the developer, the buyer has to take delivery of the keys within 14 days. He should make the utmost of this opportunity to conduct an inspection of the building or house with the developer and putting down all the defects in writing to the latter.

The buyer is advised to make a copy of the defects that he has listed for future reference. If the house buyer is unable to take possession of the keys within the required time given, the keys are considered taken.

Should any break-in occur after the 14 days the buyer will be held responsible. The types of defects that are commonly reported are:

- Defects caused by shoddy workmanship.
- Use of inferior quality building materials.
- The building did not follow the specifications in the SPA.
- The property was not built according to plan.

Matters stated in SPA that have been approved or amended by the relevant authorities.

- The buyer has an 18-month warranty period to lodge any complaints after receiving the keys.
- The developer is required to rectify the defects within 30 days from the time they receive the complaint.
- If the defects are not rectified within the stipulated period, the buyer must notify the developer of the cost required to rectify the defects.
- He is advised to send a written notice by registered mail or to go through the developer's solicitor.
- If the developer fails to take any action after 14 days from the time the notice is served on the cost involved, the buyer has the right to get his money reimbursed from the developer through the 5% deduction stated in Schedule Three Article 4 (1) of the SPA that is held by the developer's solicitor.
- The buyer has the right to claim for compensation if the developer fails to deliver the vacant possession as stated in the SPA.
- The calculation is based on 10% of the house price per annum. Total of delayed days x cost of house x 10% divided by 365 days. For example, if the total number of days delayed is 240 days and the price of the house is RM185,000, the calculation is as follows:
 $240 \times 185,000 \times 10\% \text{ divided by } 365 \text{ days} = \text{RM}12,164.38.$

- For subdivided properties, the developer is responsible to provide the facilities such as parking bays, corridor lights and a multi-purpose hall.
- If the developer fails to provide such facilities within the stipulated time, he has to pay compensation to the buyer as spelt out in the SPA Article 24 (2) Schedule H.

The calculation is worked out as follows:

Total number of delayed days x 20% x last purchase price x 10% divided by 365 days.

If the delay is 90 days and the house price is RM25,000: $90 \times 20\% \times 5,000 \times 10\%$ divided by 365 days is RM24.68, the amount that the developer is required to pay the owner.

- If the developer refuses to pay compensation, the buyers can seek the services of a lawyer and file the case in court.
- However, if the claim is less than RM5,000, he can make small claims by filling up Form 164 at the magistrate court.
- He is advised not to rectify the defects or make any renovations to the house or building before the CF is issued.

(h) Application of credit considerations

The financier should exercise caution when financing a unit, which is sold say, twelve months after the launch. The rationale is that there is no demand for the house and the unsuspecting buyer is unaware of the real reason. The value of the property may be actually lower than the original launch price.

Example: A property is sold at RM100,000 at the launch. After 12 months, the houses are completed. Many units are still not sold. Potential buyers become aware that a large cement factory will be located nearby. The dust from the factory will make living conditions unbearable. As a result, the demand for the property drops. The market value may be around RM80,000. The unsuspecting buyer buys it for RM100,000. The bank would then be financing for RM100,000 against a market value of RM80,000.

Conversely, the demand for the property rise because of many other factors. The developer can then raise the price higher than the launch price.

For the above two scenarios, it would be prudent for the banker to insist on a valuation report to ascertain the current market value.

In the case of a sub-sale, the financier should be concerned with:

- whether the documentation can be completed and the facility disbursed before the expiry date in the sale and purchase agreement; and/or
- the instructions for disbursement of the loan. The instructions as contained in the sale and purchase agreement are to be strictly followed.

Rights and duties of the borrower and financial institution

Both borrower and financial institution have certain rights and duties during the course of the loan. Some of the more important ones include:

(i) Rights

Borrower

- Right to have access to all information that would affect the borrowing decision.
- Right to be treated professionally, courteously and without prejudice.
- Right to be consulted on changes to the terms and conditions of your loan.
- Right to have accurate information on a regular basis on your loan account.
- Right to enforce legal action in the event of a breach of contract.

Financial institution

- Right to have full relevant disclosure of information on borrower's credit standing.
- Right to correct and truthful information on the borrower.
- Right to timely repayment of interest/ instalments of the loan.
- Right to enforce legal action in the event of default/breach of contract.

(ii) Duties

Borrower

- To read and understand all terms and conditions of the loan.
- To observe the terms and conditions of the loan at all times
- To enquire and get clarification on all aspects of the loan to their satisfaction.

- To make prompt payment on the fees, charges, interest and instalments of the loan.

Financial institution

- To discharge borrowers' obligations as described in the loan agreement.
- To consult borrowers on any changes made to the terms and conditions, fees charged and other relevant information.
- To attend to all queries made by borrower
A Loan Officer can provide invaluable assistance, and clarify issues, which you are unsure. Take the time to discuss your housing loan questions with a loan officer at length so that you can choose a loan facility that best suits your needs.

(i) Mode of disbursement

(i) Risks associated with the disbursement of loans upon completion

- Inspection of the property before construction, during construction and after construction is to be conducted.
- In the case of properties without titles, the disbursement is made against the developers undertaking to deliver the title when issued. Fraudulent developers will even raise funds using the issued titles causing double financing on a single property.
- Monies due to the financier not returned when transfer cannot be effected
- Funds could be disbursed but Certificate of Fitness not issued

(ii) Risks associated with the disbursement of loans upon commencement

(a) Site visits

Despite architect's certificate being forwarded, errors to the certification can occur.

For example, a certificate meant for lot No. 3 is given to lot No. 5. To verify the architect's certificate, a site inspection needs to be conducted. Photographs should be taken and kept as records for further verification by the borrower.

(b) House built on the wrong piece of land

The house could have been built on the wrong piece of land. Prior to construction, a piece of house property may just be part of a large tract of vacant land. A house, for which the FI has financed and is holding a charge on another plot of land, can be constructed on a wrong plot of land.

When in doubt, a surveyor's report can be called for.

(c) Wrong persons being paid

In the case of properties without titles, the disbursement is made against the developers undertaking to deliver the title when issued instead of the vendor's solicitors. Fraudulent developers will even raise funds using the issued titles.

Even upon death of the borrower during construction, the bank must disburse loans against the architect's certificate.

(iii) Risks of incomplete construction

- This can be due to structural faults and cost overruns.
- Disbursements made against errors in architect's certificate, e.g. Lot number.
- Wrong borrower's account is disbursed. This will result in an interest claim against the bank.
- The master title is encumbered.

9. Summary

It is said that 80% of an individual's assets are in real estate. It is a large market where the financier has to position himself to capture a share. The term residential property covers any building designed for human dwelling. As most residential dwellings are built on land, the term landed property is used. Where the structures are built above the land like flats and apartments, they are termed non-landed properties or multi storey buildings. The financier has to be aware of the credit considerations and the risks involved in financing landed and non-landed property.

Please see Appendix 1 (at the end of this chapter) for amendments to the Housing Developers Act.

10. Non-Residential

10.1 Introduction

Non-residential property is usually purchased for occupancy or for investment. The primary motivations for investing in real estate income property are to earn a competitive profit on the capital invested and to preserve the capital invested.

Non-residential properties have the potential of high profits. One reason for this is that developers are able to negotiate low prices for the land and create a high value investment.

The term non-residential property covers property that is not for residential use. These include:

- **Commercial property** comprises shopping complexes, office blocks, hotels and shop lots.
- **Agricultural land** is land used for agricultural purposes like the growing of crops. The owner of the land is allowed to build one house on agricultural land.
- **Industrial property** comprises manufacturing facilities like factories, warehouses, industrial parks and estates.

11. Types of Non-Residential Financing

Shop house – This is a spill over of the yesteryears where a shop owner resides above his shop, which was at the ground level.

Shop lots – these are units of shops in a shopping complex.

Office block – an entire unit of buildings meant for office use.

Industrial lots – these are lots of land developed for the purpose of industry.

Factory lots – these are lots of land and factory buildings. A common standard factory lot comprises flatted factories built in industrial zones.

12. Features and Benefits

(a) Term loan

- A facility with regular predetermined monthly instalments. Instalment payment is fixed for period of time, for example, 15 years.

- Instalment payments consist of the loan amount plus the interest.

(b) Overdraft facility

- A facility with a credit line granted based on a predetermined limit.
- No fixed monthly instalments as interest is calculated based on daily outstanding balance.
- Allows flexibility to repay the loan anytime and freedom to re-use the money.
- Interest charged is generally higher than that for a term loan.

(c) Term loan and overdraft combined

- A facility that combines a term loan and an overdraft. For example, 70% as term loan and 30% as overdraft.
- Requires regular loan instalments on the term loan portion.

(d) Flexibility on the repayment of overdraft portion

Daily rests vs. monthly rests

Financial institutions may charge interest either on daily rests or monthly rests depending upon the products offered. In the case of daily rests, the loan interest is calculated on a daily basis, while in the case of monthly rests, interest is calculated once a month based on the previous month's balance. Under both types of loans, the principal sum immediately reduces every time a loan instalment is made during the initial years.

(e) Risks of non-residential financing

In the case of office property, the source of repayment is not easy to identify. For shopping complexes, the anchor tenant is the main draw of traffic. A unpopular anchor tenant will not create a strong demand for the property. The track record of the developer is important to maintain stability of the project.

(f) Risk of incomplete construction

Structural defaults, natural impediments, internal company problems, and cost overruns, construction delays, underestimation of project and bureaucratic delays.

(g) Financial failure

Costs exceeding the sale price, poor demand, unable to achieve breakeven sales, oversupply situation and completed project does not receive market acceptance.

(h) Legal problems

Faults in legal documentation.

(i) General terms and conditions

- Repayments are designed to repay the loan as soon as possible.
- Low start loans are offered to utilise future increases in income.
- High start loans are designed to maximise the advantage of existing double incomes.

(j) Fixed / term loan and overdraft portion

Due to the needs of the consumer, especially businessmen, whose incomes vary according to their business, residential financing is packaged either as part loan with part overdraft or fully overdraft facility.

The overdraft facility is designed with the overdraft limit reducing monthly. Businessmen take advantage of this facility as they are charged interest according to the facility utilised.

(k) Consideration for end financing (EF)**(i) Risk profile of developers**

The track record of the developer is important to maintain stability of the project.

Developers carry high liabilities in their books and show underdeveloped land as assets. Uncompleted houses are shown as current assets to give an impression of high liquidity.

Whether the developer can complete the project on time is a major factor and delay costs can erode the company's profits.

For subdivided properties, the developer is responsible for providing facilities such as parking bays, corridor lights and a multi-purpose hall. If the developer fails to provide such facilities within the stipulated time, he has to pay the buyer compensation as spelt out in the SPA Article 24 (2) Schedule H.

(ii) Risk associated with the project / developer / type of development

- Demand for the units. This is dependent on the location, pricing and quality of work.
- Whether the developer can complete the project on time is a major factor and delay costs can erode the company's profits.
- Unexpected increase in the cost of raw materials, cost overruns or labour shortage.

(iii) Projects under joint venture between land owner and developer

Generally, developers are in the business of developing land and do not have land banks. Neither do they have the capital to purchase the lands. Therefore, they seek landowners and enter into a joint venture agreement to develop the land. The landowner is given completed units to the value of the agreed price of the property.

The risk here is that developers, who do not have funds to meet contingencies, often abandon the projects.

(iv) Progress update of projects under EF line and abandoned projects

Bank Negara Malaysia has a rehabilitation fund to rehabilitate projects that have been abandoned. Whilst the Central Bank provides funds to rehabilitate abandoned projects, the financial institution has to do its part to assist the borrowers involved. The borrowers will have to incur additional expenses like renting alternative office premises. To ease their burden, an interest moratorium is considered.

(v) Interest moratorium for abandoned projects

Financial institutions have different policies for the rehabilitation of non-residential loans where the project has been abandoned.

Though the borrower is liable to pay the interest during the progressive releases, consideration is given to his plight and therefore the monthly interest payment is deferred or postponed. This is termed "*moratorium*".

In the case of delayed projects, the buyer can seek compensation in interest payments from the developer for late completion.

(l) Contractor's all risk

This is a policy taken by the developer. The policy indemnifies the insured against loss or damage to the construction works, construction plant and equipment. The insured's legal liability as a result of third party injuries or death and loss or damage to third party property arising during the execution of the works is also covered.

Where the developer fails to take out or renew such a policy, any damages incurred would result in the project being stalled.

(m) Nature of sale and purchase agreement

A developer who builds only commercial units such as shops or offices or factories will not be subject to the HDA. However, if the units constructed comprise partly of shops or offices and partly of residential units, the Act will apply. Therefore under the Act, the SPA must follow the Act.

In a sub-sale, the terms agreed upon by the vendor and buyer will be binding. Here again, the two important factors in the SPA are:

- The expiry date by which the buyer has to arrange for financing if the purchase is partly by way loan; and
- The instructions for disbursement of the loan.

(n) Application of credit considerations**(i) Commercial and Retail Analysis**

These are factors that have an impact on the rental and the property values. What will be the layout of the commercial space? In other words: what will be the mix of retail and office space? Retail: Anchored and Unanchored.

Market Conditions

How do market conditions impact financing? To what extent is the depreciation of the commercial loans a write-off against initial rental income?

Market trends can affect the financing. The following are some factors.

- A. Cyclical nature caused by:
1. Supply and demand seldom in balance
 2. Long lead time needed for construction
 3. Large projects size

4. Lack of perfect market information and financing alternatives
5. Economic cycle factors and affect real estate markets

B. Supply adjusts slowly

C. Few buyers and sellers at one time

1. Transaction prices may differ from market value
2. Individual buyers may influence price

(ii) Project Development

What is the construction schedule and what are materials needed? Some projects like condominiums can take up to 36 months for completion. Ability to service interest is a factor to be considered.

13. Summary

Non-residential property is usually purchased for occupancy or for investment. The primary motivations for investing in real estate income property are to earn a competitive profit on and preserve the capital invested. Non-residential properties have the potential of high profits. The source of repayment is difficult to determine. Developers and construction risks are considerations the financier has to consider.

Appendix 1

Amendments to the Housing Developers Act

Housing Developers (Control and Licensing) (Amendment) Regulations 2002
Housing Developers (Housing Development Account) (Amendment) Regulations 2002
Housing Development (The Tribunal For Homebuyer Claims) Regulations 2002
Housing Development (Compounding of Offences) Regulations 2002

Background

The Housing Developers (Control and Licensing) (Amendment) Act 2002 which was gazetted on 31 January 2002 came into operation on 1 December 2002. With that, the Housing Developers (Control and Licensing) Act 1966 will now be known as the Housing Development (Control and Licensing) Act 1966 (“the Act”).

Together with the Amendment Act 2002, the following regulations also came into operation on 1 December 2002:

- (1) The Housing Developers (Control and Licensing) (Amendment) Regulations 2002 which seek to amend the provisions of Housing Developers (Control and Licensing) Regulations 1989 including the statutory sale and purchase agreements as set out in Schedule G (for landed properties) and Schedule H (for sub-divided buildings such as apartment/condominium unites) of the 1989 Regulations. After 1 December 2002, the 1989 Regulations will be known as Housing Development (Control and Licensing) Regulations 1989 (“HDA Regulations”).
- (2) The Housing Developers (Housing Development Account) (Amendment) Regulations 2002 will amend the provisions of the Housing Developers (Housing Development Account) Regulations 1991 which will be known as the Housing Development (Housing Development Account) Regulations 1991 after 1 December 2002 (“HDA Account Regulations”).
- (3) The Housing Development (The Tribunal For Homebuyer Claims) Regulations 2002 which set out the procedures for the administration of the Tribunal for Homebuyer Claims set up under the Act.

- (4) The Housing Development (Compounding of Offences) Regulations 2002 will stipulate that certain offences under the Act may be compounded by the Controller of Housing (“Controller”).
- (5) Applications to renew the housing developer’s license or the advertisement and sale permit have to be made 60 days before their expiry.
- (6) Other amendments include requiring the developer to provide more particulars when applying or renewing the license and permit under the HDA Regulations. For example, the developer when applying for the housing developer’s license is now required, among other things, to provide an estimated statement of projected cash flow and the latest form of annual returns to the Controller.

With these amendments, we wish to draw the attention of all the parties including the developer and his solicitors, architects, engineers and quantity surveyors and all those who aid, abet, counsel, procure or command the commission of the above offences that the penalty for contravening the HDA Regulations is a fine not exceeding RM5,000 or to a term of imprisonment not exceeding 3 years or to both upon conviction.

Housing Developers (Control and Licensing) (Amendment) Regulations 2002

The main amendments are as follows:

- (1) A housing developer is not required to follow the statutory Schedule G or H sale and purchase agreement if at the time of the contract of sale, the certificate of fitness for occupation (“CFO”) for the property has been issued and a certified true copy of which has been given to the purchaser.

This is to encourage the “build then sell” concept, which will prevent innocent purchasers becoming victims of abandoned projects if more developers would adopt this concept by selling completed properties together with CFO.

- (2) A purchaser’s solicitor shall be entitled to a complete set of the contract of sale including the original and duplicate copies and all annexures free of charge from the developer subject to the undertaking of the purchaser’s solicitor to return the said documents intact in the event the contract of sale is not executed by the purchaser within 14 days from the date of receipt of such documents unless otherwise agreed by the developer.

This new regulation is to prevent the developer or his solicitor from withholding the pre-printed sale and purchase agreements from the purchaser or his solicitor unless the latter has paid certain fees. It also recognises the right of a purchaser to independent legal representation, that is, to have his own choice of lawyer representing him.

- (3) As regards the sale of a property to which no separate or strata title has been issued at the time of the sale, the developer can only impose an administrative fee or any fee by whatever name called not exceeding 0.5% of the purchase price or RM500, whichever is the lower for giving its consent to an assignment, that is, for a purchaser or subsequent purchaser to resell the property. However, the developer cannot impose any fee at all for giving his consent if the assignment is for the purpose of securing financing in whole or in part for the purchase of the property. This regulation cannot be excluded by any agreement.

This partly confirms the 1992 High Court decision of Justice Datuk Mohamed Dzaidin (as the Chief Justice then was) in *Lim Seang Mee v Keepahead Holdings Sdn Bhd* which was later upheld by the Supreme Court that a fair reasonable amount for endorsing the deed of assignment would be a sum of RM500. It also makes it an offence if any developer imposes a higher fee for giving his consent for the sale or if the developer imposes any fee in any amount at all for giving his consent to a purchaser for the purpose of obtaining financing.

- (4) any advertisement and sale must be in accordance with the advertisement and sale permit as approved by the Controller. When applying for the permit, if the developer supplies any misleading statement, false representation or description of the particulars or information in the Controller of Housing ("Controller") Act.

The Housing Development (Compounding of Offences) Regulations 2002 will stipulate that certain offences under the Act may be compounded by the Controller of Housing ("Controller").

Housing Developers (Housing Development Account) (Amendment) Regulations 2002

There are substantial amendments to the Housing Developers (Housing Development Account) Regulations 1991. The HDA Account Regulations govern the operation and management of a housing development account, which every licensed housing developer is required to open under the Act within 14 days after the issuance of the housing developer's license.

Exemption

The developer is exempted from the HDA Account Regulations, that is, to open and maintain a HDA Account if at the time of the sale, CFO for the property has already been issued and a certified true copy has also been given to the purchaser. Again, this is to promote the "build then sell" concept.

Opening of the HDA Account

Within 14 days after being informed by the purchaser of the name and address of his financier, the developer has to notify the purchaser's financier of the name and address of the bank in which the HDA Account is kept and its account number.

Deposit made by the developer

The sum of RM200,000, which the developer is, required to deposit with the Controller when applying for the housing developer's license can be made by way of

- (a) Cash;
- (b) bank guarantee; or
- (c) having a balance of RM200,000.00 at any one time in the HDA Account.

Deposit of all monies paid by purchaser

The developer is required within 2 banking days after the payment is made in cash, to issue a statement to the purchaser that such payment has been credited into the HDA Account.

Purchaser's financier to pay direct into the HDA Account

A new regulation 4A has been inserted to require the purchaser's financier to deposit, within 21 working days after receiving invoice sent by the developer in respect of the progressive payments relating to the purchase of the property by the purchaser, directly any payment made into the HDA Account with a statement to the developer and the purchaser that such payment has been made. Further, any payment to the developer's solicitor as the stakeholder shall be paid directly to the solicitor with a statement to the developer and the purchaser that such payment has been made.

Withdrawals of monies from the HDA Account

The main amendments are as follows:

- (a) The payment of legal fees in respect of the sale and purchase agreement of the housing accommodation will no longer be an item which justifies a withdrawal of any money from the HDA Account.
- (b) Withdrawals of monies from the HDA Account for the cost of carrying out soil investigations; earthworks; foundation works; building works; external works; site and boundary survey for each lot; infrastructure works; relocation of squatters; works related to infrastructure preparation instructed by the appropriate authorities; and other works have to be in proportion to the housing accommodations that have been approved under the developer's license.
- (c) Monies in the HDA Account may also be withdrawn for the purpose of meeting:
 - (i) any cost and expense incurred by persons specified by the Minister in carrying out the Minister's direction or decision under section 11(1A) of the Act;
 - (ii) the payment of any liquidated damages pursuant to the housing development;
 - (iii) the payment of any defect, shrinkage or other fault pertaining to the project during the defect liability period.

Conditions for withdrawal of monies from HDA Account.

Whenever the developer makes a claim from the HDA Account, a copy of the notice of claim shall concurrently be submitted to the Controller.

Withdrawal of surplus monies from HDA Account

The developer can only withdraw any surplus monies in the HDA Account after:

- (a) the issuance of the CFO for the housing development;
- (b) the approval of the Controller; and
- (c) deducting the:
 - (i) the amount required to complete the housing development and the sale and purchase under all the sale and purchase agreements in respect of the housing development;

- (ii) 10% of the amount referred to in paragraph (i) for contingencies and inflation;
- (iii) all the claims on liquidated damages that have been settled.

Withdrawal on furnishing of banker's guarantee

Regulation 10 is deleted and this means the developer can no longer withdraw monies in the HDA Account by furnishing to the Controller a banker's guarantee for such amount.

Withdrawal of all monies in HDA Account

Regulation 11 has been amended to provide that withdrawal of all monies remaining in the HDA Account now require the approval of the Controller. Previously, the developer could withdraw all the monies in the HDA Account without any approval from any authority when the housing development has been completed and the solicitor for the developer has certified that the obligations of the developer in respect of transfer of title under all the sale and purchase agreements in that housing development have been fulfilled.

Controller may use money in the HDA Account

The new Regulation 11A entitles the Controller to use the monies in the HDA Account to ensure the completion of the development if he is satisfied that the development of a housing development is detrimental to the interest of the purchasers.

Auditor to make annual report

The new Regulations 12A and 12B provide that every auditor of a developer shall, within 6 months after the close of the financial year of such developer, make an annual report to the Controller as to the HDA Account and shall state in every such report whether or not in his opinion:

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

Further, the auditor is required to immediately lodge a report to the Controller together with a full statement and relevant documents if he found any fraudulent act or misappropriation of money in the HDA Account and the auditor is bound to supply any information or document if requested by the Controller.

Penalty

The new Regulation 13A stipulates that any person who contravenes any provision under the HDA Account Regulations shall on conviction be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding 3 years or to both. In our opinion, “person” here includes the auditor, the purchaser’s financier and the banks, which permit withdrawals of monies from the HDA Account in breach of the HDA Account Regulations.

Housing Development (The Tribunal for Homebuyer Claims) Regulations 2002

The Tribunal Regulations set out detailed but simple procedures for a homebuyer to file a claim against the developer. In order to preserve uniformity of laws, the procedures are almost similar to that of the Consumer Claims Tribunal established under the Consumer Protection Act 1999. The main points to note are these:

Jurisdiction

The Tribunal will hear only claims brought by a homebuyer. A developer is not entitled to institute or file any claim in the Tribunal, but he can raise a counter-claim when responding to the claim filed by the homebuyer. The Tribunal will still hear the counter-claim even if the homebuyer’s original claim is later withdrawn or struck out.

The Tribunal should always attempt to assist the disputing parties to negotiate for a settlement before it proceeds to determine the dispute unless it is not appropriate for the Tribunal to do so or the parties are unable to reach an agreed settlement.

The Tribunal only hears a claim where the total amount in respect of which an award of the Tribunal is sought does not exceed RM25,000 unless the parties agree in writing that the Tribunal shall hear the claim in excess of the amount. However, the agreement must be entered into before the claim is lodged or if the claim has been lodged, at any time before the Tribunal has recorded an agreed settlement of the claim. Otherwise, the homebuyer should file his claim in excess of RM25,000 at the Sessions Court.

The claim must be based on a cause of action arising out of the sale and purchase agreement or a previous dealing between the homebuyer and the developer no later than 12 months from the date of issuance of the CFO for the property or the expiry date of the defects liability period as set out in the sale and purchase agreement.

Homebuyer

A “homebuyer” is a purchaser who has bought a property or has a dealing with a licensed housing developer including the second purchaser who has bought the property from the first purchaser. In other words, the Tribunal will not hear any third or subsequent purchaser of the property.

Legal representation

Unlike the Tribunal for Consumer Claims where legal representation is absolutely disallowed, lawyers are allowed in the Tribunal if in the opinion of the Tribunal the matter in question involves complex issues of law and the party will suffer severe financial hardship if he is not represented by a lawyer provided that if one party is allowed to be represented by a lawyer then the other party shall also be so entitled.

Housing Development (Compounding of Offences) Regulations 2002

These regulations provide that the Controller may compound certain minor offences under the Act or any officer authorised by the Controller. The offer to compound an offence is for a period of 14 days, and if full payment of the sum offered is made on or before the expiry of 14 days, no further proceedings shall be taken against such person. Otherwise, prosecution will be instituted without further notice.

Source: The National House Buyers Association (www.hba.org.my)

Practice Questions

1. Describe what are landed property and non-landed properties
2. What are the different purposes of residential financing?
3. What is the operational procedure for an overdraft for housing?
4. What are the risks of residential financing?
5. What are the problems you can anticipate when a developer enters into a joint venture agreement with a land owner?
6. When will a developer be required to have a license to develop property?
7. What are two areas in a SPA under a sub sale a banker needs to be concerned with?
8. What are the risks associated with the disbursement of loans upon completion of a housing project?
9. What do you understand by the term non-residential financing?
10. Explain how term loans and overdrafts are packaged to finance non-residential property.
11. What are the risks of non-residential financing?
12. What is the risk profile of a developer?
13. What can a banker do to assist the borrower whose property has been abandoned by the developer?
14. What are the market conditions that affect the non-residential market?