

# Chapter 6 – Security and Support

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## Learning Objectives

What you should achieve after completing this chapter:

- Understand the legal documentation framework and be able to complete all required documents in line with national and state laws;
- Be able to prepare loan documents efficiently, accurately and professionally;
- Know what is needed to comply with current regulations and the individual FIs policies;
- Be able to explain to the borrower on how the documentation works;
- Be able to instruct solicitors to prepare the proper documentation;
- Know the documentation to propose in lending against land, shares, fixed deposits and unit trusts; and
- Be able to take the opportunity to market new loans on completion of a loan close out.

## 1. Introduction

Securities documentation is the process of preparing loan papers, obtaining the necessary signatures, examining executed documents for accuracy and registering collateral documents with the proper authorities. Failure to properly document can leave the financial institution (FI) exposed to lawsuits, loan losses, and costly compliance violation penalties. Errors can also lead to loss of consumer confidence in the FI. To the lender, security acts as the support in case the primary source of repayment fails. The higher the risk, the more the need for securities support. Whilst taking securities comes along with collateral based lending, it may not be possible to obtain security in all cases. The financier should however endeavour to secure acceptable security to mitigate the risk of the credit.

In Malaysia, the trend to give unsecured credit to the consumer became popular in the 1980s with credit card companies offering RM2,000 unsecured credit. This was followed by financial institutions giving personal loans up to RM10,000 with the support of third party personal guarantees.

Documentation varies for the type of loans. The common securities taken in consumer credit are:

- Land;
- Fixed deposits;
- Shares; and
- Unit trusts.

In addition, a financier may also ask for supporting documents like:

- Guarantees; and
- Life policies.

The financier should have a good working knowledge of each of the securities and supporting documents namely:

- Laws relating to the securities;
- Documentation procedures; and
- Realising the security (How to sell the securities to offset the debt).

The procedures at FIs explain the requirements for:

- Loan applications;
- Loan agreements;
- Security documents;

- Support documents; and
- Insurance cover.

The financier has to make sure that the documents are completed and executed ensuring:

- all appropriate sections are filled in;
- accurate numbers are entered and added correctly;
- collateral description is correct;
- all necessary signatures are obtained where required; and
- signers' identities are verified.

Whilst, a good portion of securities documentation especially land is entrusted to solicitors, the responsibility of getting the documentation complete and in order should not be shifted solely to the solicitors. It is vital for the financier to be able to give specific instructions and also be able to check on the work of the solicitor. This saves time and rework.

## 2. Land

### 2.1 Land law – National Land Code 1965, Sarawak Land Code, Sabah Land Ordinance

The laws relating to land in Malaysia are the:

- (i) National Land Code 1965, which covers Peninsula Malaysia;
- (ii) Sarawak Land Code; and
- (iii) Sabah Land Ordinance.

### 2.2 Registration system and its effect

The important aspect of the National Land Code and, Sabah and Sarawak Land Ordinance is in its registration. Once a charge is executed by the chargor and chargee, registration of the charge document confers indefeasibility of title or interest. This means that no other persons can have a better interest on the property. Exceptions to indefeasibility are: fraud and misrepresentation, registration obtained by forgery and titles obtained unlawfully. Therefore, the moment the charge document is signed, it has to be sent for stamping and registration. Any other subsequent registration will rank next in priority and the law regards the chargee in this case as having only equitable interest.

Example: Ms Norashikin Kassim wants to borrow RM100,000 from Bank AFTA.

Ms Norashikin Kassim (chargor) signs a charge document for a property for RM100,000 in favour of the bank. Bank AFTA signs on the same document as (chargee). Bank AFTA fails to register the document at the land office but disburses the loan. Ms Norashikin Kassim also borrows RM100,000 from Bank Bumithai.

Ms Norashikin Kassim also signs a charge document for the same property in favour of Bank Bumithai for RM50,000. Bank Bumithai signs as (chargee) and registers the charge document. Therefore, Bank Bumithai gets first priority over the property.

The effect of registration is also seen in the purchase of a house. Registration of the transfer of a property can only be effected when full payment is received. Therefore, it would be prudent for purchasers who pay the 10% deposit to lodge a private caveat. This is to prevent the vendor from selling the property to another person at a higher price.

## **2.3 Alienation of land – freehold land, leasehold land, tenancies, Malay reserved land, customary and native land**

### **2.3.1 Alienation of land**

Under the National Land Code, all land belongs to the state. Any person interested in acquiring and owning land may apply to the state authority for state land. The state authority after due consideration grants the title to the applicant. This is referred to as alienation of land. The land granted by the state comprises freehold land, leasehold land, tenancies, Malay reserved land, customary land and native land.

The financier must be conversant with the different types of land on whether he can accept it as security.

### **2.3.2 Freehold land**

Generally referred to as *grant in perpetuity* or *freehold title*. The land vests in the individual and successors in title for an indefinite period. (The term “Grant” is loosely used colloquially in many local languages to mean a title deed whether freehold or leasehold. To the lender, the term “Grant” should mean a freehold title.)

### **2.3.3 Leasehold land**

Generally referred to as a leasehold title the land vests in the individual and successors in title for periods normally ranging from 30 years, 60 years or 99 years. Under the National Land Code, the maximum tenor that the state can grant the lease is 99

years. It is a practice of some financial institutions to accept leasehold property with a balance lease period of not less than 20 years provided that it does not exceed the repayment period.

#### **2.3.4 Quit rent**

As all land belongs to the state, the alienation of the land whether as freehold or leasehold comes with a consideration of the payment of annual rent called quit rent. This is payable to the state.

The financier is to be aware that failure by the landowner to pay quit rent within a reasonable period of time will result in forfeiture of the land. Any charge against it will also extinguish.

#### **2.3.5 Tenancies**

A tenancy is the letting of land for a term less than three years in Peninsula Malaysia whereas in Sabah and Sarawak it is to let for a period not exceeding one year. Tenancies need not be registered.

(**Note:** In common usage, the term ‘rent’ is used interchangeably to mean ‘leases’ as well as ‘tenancies’.)

#### **2.3.6 Malay reserved land**

To protect the interest of the Malays, states ruled by Malays rulers reserved land only for Malays. It is land that can be transacted only between Malays. If the land is under Malay reserved status, but existing ownership is under a non-Malay, it can still be transacted among the non-Malay. But once it is sold to a Malay, it becomes Malay reserved land and a non-Malay will not be able to transact it. For example, land in Kedah and Kelantan.

#### **2.3.7 Customary land**

To protect the interest of the Malays, in the Straits Settlements, i.e. Penang and Malacca, the states reserved land called customary land. The land can only be transacted between Malays.

#### **2.3.8 Native land**

**Native land** applies to land in Sabah and Sarawak that can be transacted between Natives. Here again, the purpose is to protect the interest of the natives. In Sarawak alone, 80% of the land is reserved for the natives.

## 2.4 Forms of title – final title, qualified titles, grants, state leases

Basically there are two types of land titles: **final title** and **qualified title**. Under the National Land Code, a **final title** confers on the person or body concerned a title to land, which shall be indefeasible, and in cases where final title cannot be issued, a **qualified title** will confer similar rights as the final title except that the boundaries are provisional and that there can be no subdivisions or partitions. Qualified titles (Q.T.) are referred to as *Hakmilik Sementara* (H.S.) in Malay.

Both final and qualified titles may be registered at the Registry of the State or the Land Office. A Registry title is registered by the Registrar of titles in the Registry of the State. There is one Registry in each state located mostly at the state capital, whilst a Land Office Title is registered by the Collector of Land Revenue at the Land Office of the district, of which there is one in each district. The collector is the local registering authority.

### 2.4.1 Leases and sub-leases

A lease is the letting of land for a term exceeding three years in Peninsula Malaysia whereas in Sabah and Sarawak it is referred to as sub-lease and is let for a period exceeding one year. Only registered leases and subleases are legally valid.

A lease may be defined as an interest in land granted by the lessor, whether he is the owner of the land or not to a lessee for a certain period.

### 2.4.2 Temporary Occupation Licence (TOL)

A licence does not confer an interest on the land, It is normally granted for one year and generally renewed every year. Temporary Occupation Licences are commonly issued to vegetable growers in Cameron Highlands.

## 2.5 Conditions and restriction on titles and land use

### 2.5.1 Conditions of land use

All alienated lands are subject to conditions limiting them to one of the following categories of land use:

- (a) Agriculture;
- (b) Residential and commercial buildings; and
- (c) Industrial.

The financier should be cognizant of the fact that land designated for one use cannot be used for another purpose unless the state authority's approval for conversion has been obtained. Further, conversion of land can be costly, e.g. some agricultural lands need to be raised to a certain level to qualify for residential purposes.

## 2.6 Dealings – transfer, charges, assignments and liens

### 2.6.1 Transfer

Transfer of land is referred to in Section 241 of the National Land Code. The person transferring the land is referred to as the *transferor* while the person to whom it is transferred is referred to as the *transferee*. The transfer is done by a memorandum of transfer.

### 2.6.2 Charge

A charge as provided in section 5 of the National Land Code is a transaction whereby the registered proprietor (owner) of a land or a lease conveys it as security to another for repayment of a debt or any sum other than debt or the payment of any annuity or other periodic sum.

The owner of the land or lease is called the chargor and the person to whom it is conveyed to (normally the financial institution) is called the chargee.

(**Note:** The word 'charge' is used in the context of the National Land Code. The word 'mortgage', used interchangeably, applies to English Land Law which is not applicable on Malaysia.)

### 2.6.3 Assignment

An assignment is a contract in writing whereby the assignor assigns all his rights, title and interest in the property (e.g. an apartment in a condominium or a shop-lot in a commercial complex or an office lot in a block or a parcel of land where the issue document of title is not available) to the assignee as security for a loan granted by the financier to the borrower.

Three documents are taken:

- (1) **Deed of assignment** – The instrument creating the assignment.
- (2) **Loan agreement** – The document that states the terms and conditions of the loan.

- (3) **Deed of power of attorney** – The power to sell, assign, lease, deal with and take possession of the property.

The above three documents are sometimes made into a single document called **loan agreement cum assignment**.

#### **2.6.4 Types of assignment**

A first party loan agreement is created where the assignor is also the borrower. Where the assignor and borrower are different parties, a third party loan agreement cum assignment is prepared.

#### **2.6.5 Lien**

A lien is defined as a right to retain possession. In the case of a lien on land, it is created by a lienholder's caveat, which is provided for in section 281 of the National Land Code.

There is no provision for a lienholder's caveat in the Sarawak Land Code, and Sabah Land Ordinance. A lienholder's caveat is another method of obtaining security on the land. However, it can only be used if there is an issue of title.

### **2.7 Types of charges – 1st party, 3rd party**

Where the chargor is the borrower, a first party charge is created. However, where the chargor and borrower are different parties, a third party charge is created.

### **2.8 Land searches**

Prior to creating a legal charge, it is important to conduct a search at the relevant land office. The purpose is to:

- (1) Determine the registered owner of the land;
- (2) Ascertain the registered interests in the land;
- (3) Look for restrictions in interest and conditions affecting the document of title to the land, e.g. land restricted to industrial use when the loan is for housing; and
- (4) To ensure that the land is free from encumbrances, e.g. other charges and caveats. There is no government restriction endorsed on the title. E.g. the government's intention to build a highway. There is no prohibitory order endorsed. If the consent of the state authority is required to transfer the property, such a letter of consent must be obtained.

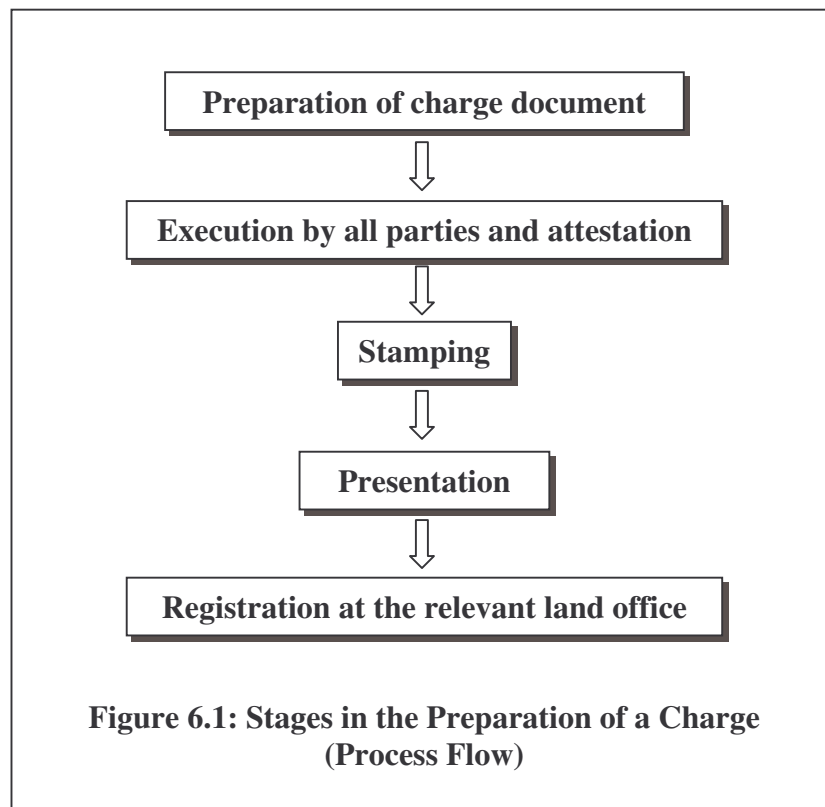
## 2.9 Bankruptcy search

A bankruptcy search is conducted to determine whether the client is a bankrupt. Though the law does not prohibit the bankrupt from transacting or charging the land to the financial institution, it becomes a criminal offence if he does not surrender the land to the official assignee.

The lender's view is that once a person is declared a bankrupt, his ability to repay becomes questionable.

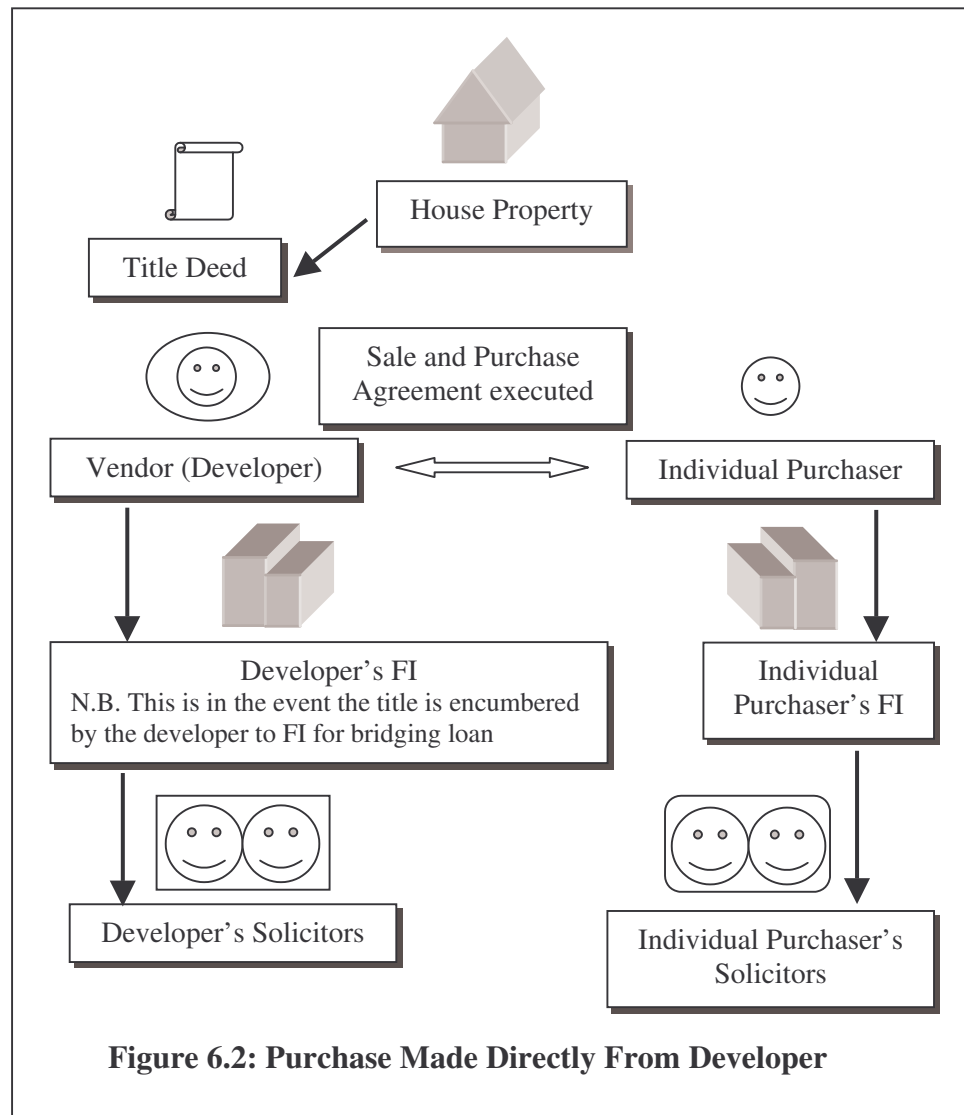
## 2.10 Documentation of a charge – memorandum of charge, execution and attestation, stamping, presentation for registration

### Stages in the Preparation of a Charge (Process Flow)



## 2.11 Documentation for land with individual title (charge document)

### (a) Purchase made directly from developer



**Scenario: An individual purchaser has been approved a loan of RM100,000 to purchase a house from a developer and the house has been issued with individual title deeds**

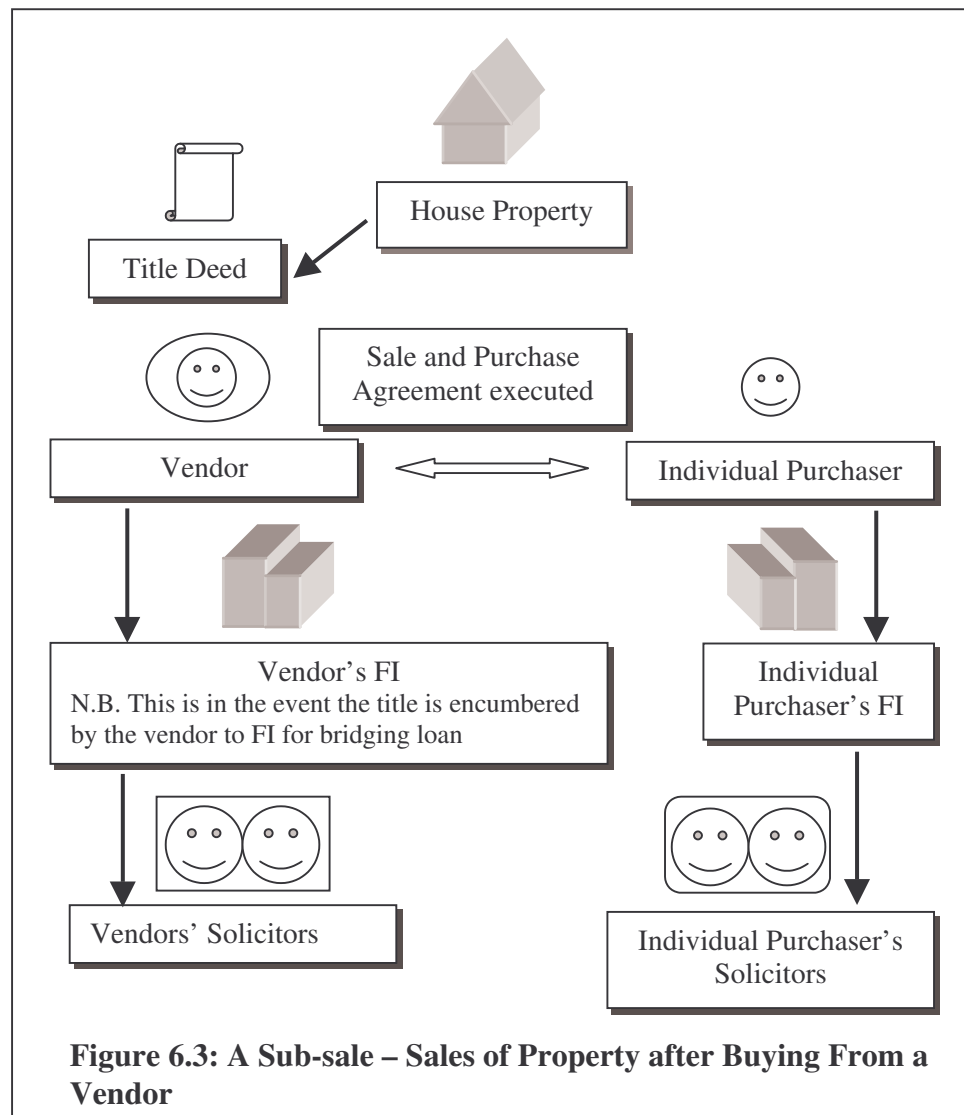
#### Process flow

1. Signing of sale and purchase agreement (SPA) between developer and purchaser.
2. Purchaser applies for loan from FI and gets approval.

3. Purchaser accepts letter of offer
  - The security documentation mentioned in the letter of offer. A registered first charge for RM100,000 on residential property also known as 88 Jalan Belimbing, Taman Zas, Perak. The freehold title particulars are Lot No. 666, Mukim of Manjoi, H.S. (D) No 123456 Daerah Ipoh, Perak.
4. FI's solicitors prepare a charge document and Purchaser's solicitors lodge a private caveat (this is to prevent the developer or vendor from sub-sale transaction from fraudulently selling to another person at a higher price. It is the purchaser on the advice of his solicitor who will lodge the private caveat on the property.).
5. Purchaser's FI's solicitors get undertaking from the developer's solicitors to:
  - Forward the title together with the registerable memorandum of transfer to the Purchaser's FI;
  - Refund the loan amount in the event the transfer cannot be effected or Certificate of Fitness cannot be issued
  - Refund of the loan amount in the event the project is abandoned and cannot be completed; and
  - Obtain a letter of undertaking cum redemption from the developer's FI.
6. Execution of the charge document by Purchaser (Chargor), FI's Power of Attorney Holders (Chargee) and attestation by solicitors.
7. Stamping for a charge document is *ad valorem*.
8. Purchaser's FI's solicitor will conduct a land search to ensure there are no encumbrances and lodge a private caveat for cases if there is a redemption sum to be paid to the Developer's FI.
9. Purchaser's FI's solicitors to issue a legal opinion and inform the FI to release redemption amount to the Developer's FI. After full redemption, presentation of memorandum of transfer and charge at the relevant land office for registration.
10. Subsequent release against the architect's certificate and developer's billings.

11. Registration of memorandum of transfer and charge and simultaneous withdrawal of private caveat at the relevant land office.
12. Purchaser's FI's solicitors to make a search to confirm that there are no encumbrances on the land.
13. Purchaser's FI's solicitors to issue a legal opinion and inform the FI to release the loan to developers.

**(b) A sub-sale (Subsequent sale – refers to sales of property after buying from a vendor)**



**Scenario: An individual purchases a house from an individual vendor. He has been approved a loan of RM80,000. The house has an individual title deed which is charged to the vendor's FI**

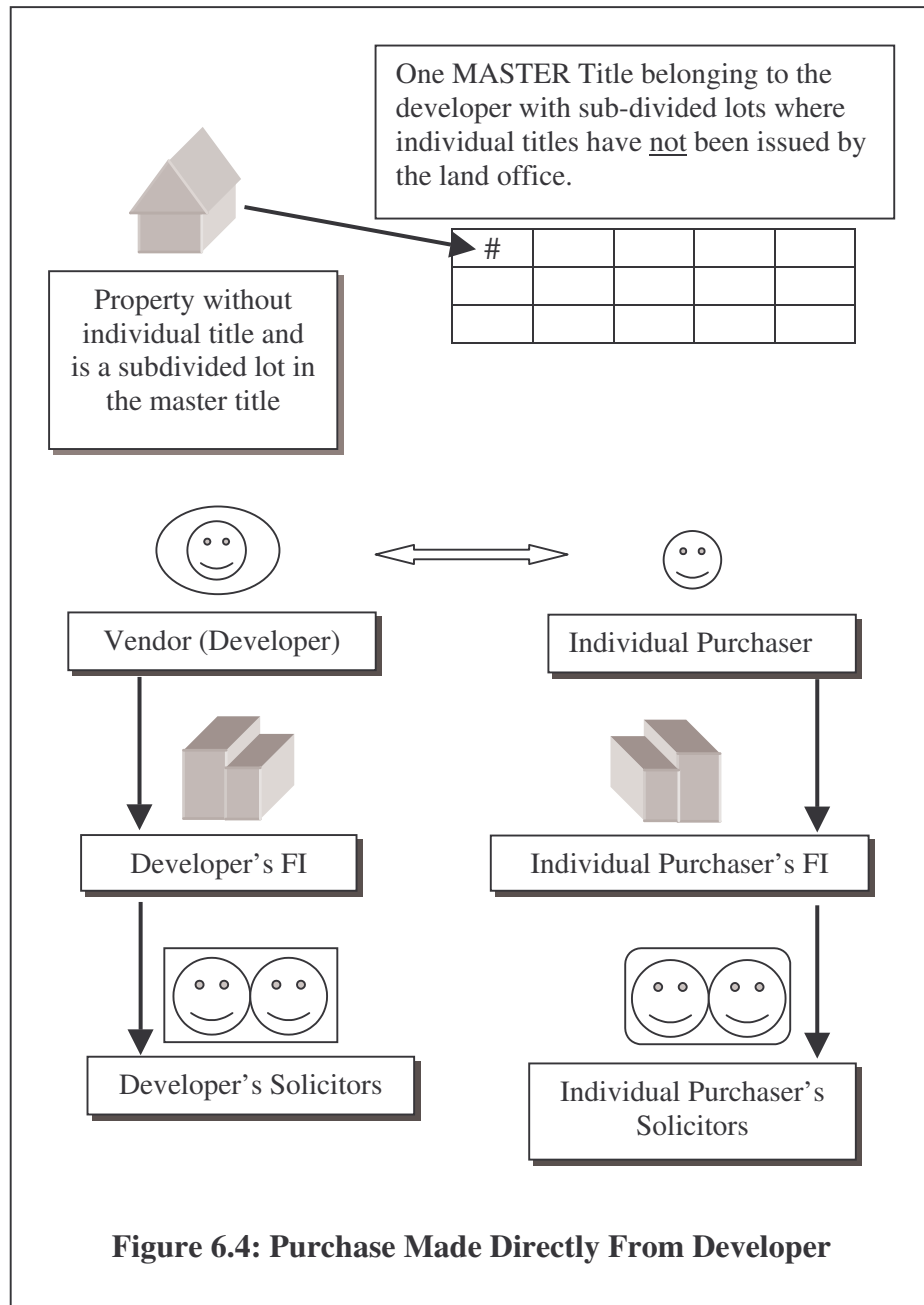
### **Process flow**

1. Signing of sale and purchase agreement between vendor and purchaser.
2. Purchaser applies for loan from the FI and gets approval.
3. Purchaser accepts letter of offer
  - The security documentation mentioned in the letter of offer is a registered first charge for RM80,000 on residential property 58 Perajurit, Taman Ipoh Mali, Perak. The leasehold title particulars are Lot No 786, Mukim of Pulai, H.S. (D) No 80091 Daerah Gersang, Perak.
4. Purchaser's FI's solicitors prepare a charge document and the purchaser, on the advice of his solicitor, lodges a private caveat (to prevent the vendor from fraudulently selling to another person at a higher price).
5. Purchaser's FI's solicitors to get undertaking from vendor/vendor's solicitors to:
  - Forward the title together with the registrable memorandum of transfer to the purchaser's solicitor;
  - A redemption statement cum letter of undertaking from the vendor's FI to forward the duly executed discharge of charge, title and charge upon receipt of redemption sum and to refund the redemption sum in the event the discharge of charge is rejected for registration for any reason whatsoever; and
  - Refund the loan's amount in the event the transfer cannot be effected.
6. Execution of the charge document by Purchaser (Chargor), FI's Power of Attorney holders (Chargee) and attestation by solicitors.
7. Stamping for a charge is done *ad valorem*.

8. The Purchaser's solicitor will conduct a land search to ensure there are no encumbrances and lodge a private caveat for cases where there is a redemption sum to be paid to the vendor's FI.
9. FI's solicitors to issue a legal opinion and inform the FI to release redemption amount to the vendor direct.
10. Upon receipt of the title, charge and discharge of charge from the vendor's FI, to present the memorandum of transfer and charge at the relevant land office for registration.
11. The FI's solicitors to get the undertaking from vendor's solicitor as stakeholders.
12. Registration of memorandum of transfer and charge and simultaneous withdrawal of private caveat at the relevant land office.
13. FI's solicitors to make a search to confirm that there are no encumbrances on the land.
14. FI's solicitors to issue a legal opinion.
15. FI to release the loan to vendor.

**2.12 Documentation for land without individual title (assignment)**

**(a) Purchase made directly from developer**



The security taken by the financier in this case would normally be by way of an assignment of the rights and interest of the purchaser/borrower who is the owner/beneficial owner of the property under the sale and purchase agreement. The purchaser/borrower who assigns the property is called the **assignor**, whilst the financier who accepts the assignment is called the **assignee**.

It must be borne in mind that the rights of the financier (assignee) are unlike the indefeasible rights of a chargee under the National Land Code.

**Scenario:**

**An individual purchases a house from a developer for RM150,000 where the houses have not been issued with individual title deeds.**

**Process**

1. Signing of sale and purchase agreement between developer and purchaser.
2. Purchaser applies for loan from FI and gets approval.
3. Purchaser accepts letter of offer
  - The security documentation mentioned in the letter of offer is a loan agreement cum assignment for RM 80,000 on residential property at 10 Jalan Pipit, Taman Taiping, Perak. The title particulars are Lot No 963 under master title H.S.(D) 65444 Mukim of Larut, Perak.
4. Purchaser's FI's solicitors prepare a loan agreement cum assignment.
5. Purchaser to deliver the original sale and purchase agreement.
6. Purchaser's FI's solicitors to get undertaking from the developer to forward:
  - consent to the creation of the assignment of all assignor's rights, title and interest in the assigned property and under the sale and purchase agreement in favour of the assignee.
  - an undertaking to deliver to the assignee the individual issue/strata document of title to the assigned property upon its issuance thereof, together with a duly stamped and

registrable memorandum of transfer and other relevant documents pertaining thereof.

- an undertaking not to further encumber the master title to the land without the prior consent of the assignee.
- an undertaking to refund to the assignee all monies, progressive releases and all whatsoever monies released to the assignee in the event that:
  - the memorandum of transfer in respect of the assigned property in favour of the assignor is rejected for registration by the relevant land authority for any reason whatsoever;
  - the construction of the assigned property is not completed as stipulated in the sale and purchase agreement;
  - the deed of assignment cannot be perfected due to any reasons whatsoever; and
  - the certificate of fitness of occupation in respect of the assigned property cannot be issued by the relevant authority for any reasons whatsoever.
- a guarantee to complete the construction of the assigned property until the issuance of individual issue/strata document of title.
- consent to the lodgement of a private caveat against the individual issue/strata document of title to the assigned property, which although has been issued but for some reason, is not available.
- letter of undertaking from the developer to deliver a registerable MOA in the event the title is issued.
- letter of undertaking from the SPA solicitors to deliver the individual title upon issuance.
- letter of undertaking cum redemption from the vendor's FI duly executed R & R with all other relevant security documents upon receipt of redemption sum and to refund in the event the R & R cannot be perfected for any reason whatsoever.
- letter of disclaimer from the developer's bridging financier to exclude the lot financed in the event of foreclosure proceedings if the master title is encumbered.

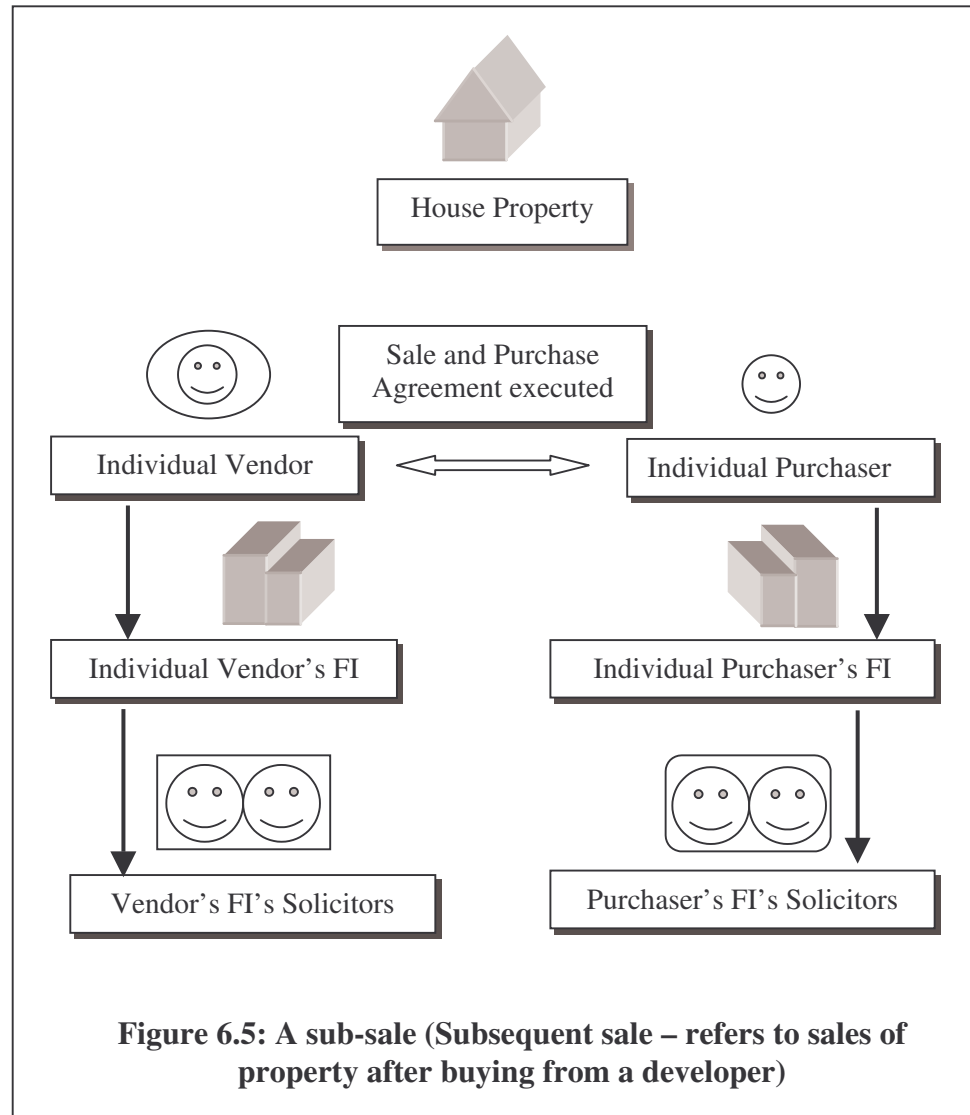
**(b) When the master title is charged to another bank (say Bank AFTA) as security**

Here, the assignee's solicitors would request an undertaking from the developer's FI (chargee for the developer) by securing the following documents:

- (i) An undertaking to inform the assignee in the event of foreclosure proceedings or other legal proceedings are instituted by the chargee (Bank AFTA) in respect of the master title to the land;
- (ii) An undertaking to exclude their rights, title and interest in the assigned property before the issuance of an individual/strata document of title to the assigned property in the event of any foreclosure proceedings or other legal proceedings are instituted by the chargee in respect of the master title;
- (iii) A declaration to have no further rights, title and interest in the assigned property;
- (iv) An undertaking to execute a discharge of charge over the assigned property upon the issuance of an individual issue/strata document of title by the relevant authority to enable the assignee to take a first legal charge;
- (v) An undertaking to refund to the assignee all monies so released by the assignee to the chargee in the event that the discharge of charge is rejected for registration by the land authority for whatsoever reasons; and
- (vi) An undertaking from the purchaser's solicitors a letter of undertaking to the effect that the solicitors undertake to deliver to the assignee or the assignee's solicitors a duly adjudicated and stamped memorandum of transfer to the assigned property together with the required registration fees upon the issuance of an individual title/strata document of title.

It must be borne in mind that every loan transaction may be different. The financier may have to secure additional documents as the need arises.

(c) **A sub-sale (Subsequent sale – refers to sales of property after buying from a developer)**



**Scenario**

An individual purchases a house from an individual vendor for RM110,000 where the house has not been issued with an individual title deed

**Process flow**

1. Signing of sale and purchase agreement between vendor and purchaser.

2. Purchaser applies for loan from FI and gets approval.
3. Purchaser accepts letter of offer.
  - The security documentation mentioned in the letter of offer is a loan agreement cum assignment for RM110,000 on residential property at 14 Jalan Valentine, Taman Romantica, Perak. The title particulars are Lot No. 69 under master title H.S. (D) 1245 Mukim of Lenggong, Perak.
4. Purchaser's FI's solicitors prepare a Loan Agreement Cum Assignment.
5. Purchaser's FI's solicitors to get undertaking from vendor's solicitors to undertake to forward original sale and purchase agreement between
  - Vendor and Developer; and
  - Receipt and reassignment from the vendor's bank.
6. Execution of the LACA by Purchaser's, FI's Power of Attorney holders (Assignee) and witnessed by solicitor.
7. Stamping for an assignment is on *ad valorem* basis.
8. FI's solicitors to issue a legal opinion and inform FI to release the progressive payments to vendor direct.

**(c) Original sale and purchase agreement**

In the absence of the issue/strata title, the original sale and purchase agreement represents the title to the property. The financier (assignee) must be in possession of the original sale and purchase agreement.

**2.13 Discharge of security for land with individual title**

The discharge of a charge is done by the charge in a prescribed form when the debt owed to the chargee has been fully settled. The discharge takes effect only upon registration of the form.

**2.14 Discharge of security – land without title – receipt and reassignment**

**Receipt and reassignment**

Upon full settlement of the outstanding sums, the assignee executes a Receipt and Re-assignment in favour of the assignor whereby the property in question is reassigned to the assignor and thereafter the assignor is free to deal with the property as he pleases.

### 3. Fixed Deposit

#### Process flow

Facts: The individual borrower wishes to apply for an overdraft against his fixed deposit.

#### 3.1 Memorandum of deposit

The borrower executes a memorandum of deposit of the fixed deposit and discharges the original fixed deposit receipt in favour of the financial institution.

#### 3.2 The letter of set-off

In the place of a memorandum of deposit a letter of set-off is executed to allow the Financial Institution to set off the proceeds of the fixed deposit to the loan account in the event of default.

#### 3.3 Lien on fixed deposit

The financial institution places a lien on the fixed deposit by stamping the words 'under lien' on the fixed deposit instrument and placing a condition code in the computer system.

#### 3.4 Stamping

Stamping for a memorandum of deposit is *ad valorem*. The letter of set off invites a stamp duty of RM10.

#### 3.5 Realisation of the security

In the event of default, the fixed deposit is cancelled and the proceeds are applied to set off the loan amount outstanding.

#### 3.6 Releasing the security

If the debt is duly settled, the lien on the fixed deposit is cancelled, the condition code removed and the memorandum of fixed deposit cancelled. The original fixed deposit receipt is delivered to the borrower.

### 4. Shares

#### Process flow

Facts: The individual borrower wishes to apply for an overdraft against his shares held in CDS account (share account held with the Malaysian Central Depository Sdn Bhd).

#### **4.1 Memorandum of deposit**

The client executes a memorandum of deposit of the shares.

A power of attorney to sell the shares on behalf of the borrower in the event the borrower defaults.

#### **4.2 Transfer forms – under CDS and non-CDS**

Transfer form to be executed by the borrower. The transferee to be stated as the financial institution's nominee company.

#### **4.3 Registration of shares under bank's nominee company**

The transfer will be processed by the nominee company, which will send the transfer documents to the appropriate company registrar. The client's respective shares in the CDS account will be transferred to the CDS account of the nominee company. Upon transfer, the FI can consider it to be a legal mortgagee of the shares.

#### **4.4 Dividends, bonus issues and rights issues**

Dividends and bonus issues are credited to the CDS accounts of the borrower with the nominee company. Rights issues allotted are advised to the borrower for his disposal.

#### **4.5 Stamping**

Stamping for a memorandum of deposit is *ad valorem*. Power of attorney invites a stamp duty of RM10.

#### **4.6 Realisation of the security**

When there is a default in the overdraft, the FI will dispose of the shares in the open market after giving due notice to the borrower.

#### **4.7 Releasing the security**

The first step the financier will take will be to demand repayment from the borrower. Upon default, the financier can start the realisation process. As the financier is the registered owner, it sells the shares to the authorised broker.

For shares that have been transferred to the nominee's name, the nominee company will have to execute a stock transfer form showing the borrower as transferee. This will be sent to the company's registrar who will transfer the shares to the borrower's CDS account. The memorandum of deposit is to be cancelled.

## 5. Unit Trusts

### Process flow

Facts: An individual borrower wishes to apply for an overdraft against his unit trusts held in his account with the Trustee of a listed unit trust.

#### 5.1 Memorandum of deposit

The borrower executes a memorandum of deposit of the shares. A power of attorney is also executed to sell the unit trusts on behalf of the borrower.

#### 5.2 Transfer forms

Transfer form to be executed by the borrower. The transferee to be stated as the Financial Institution's Nominee company'. An endorsement is made in the certificate of the unit held with the trustee of the unit trust.

#### 5.3 Dividends and additional units

Dividends and profits in the form of additional units are credited to the unit trust account held with the trustee.

#### 5.4 Realisation of the security

The first step the financier will take will be to demand repayment from the borrower. Upon default, the financier can start the realisation process. As the financier is the registered owner, it sells the unit trusts to the authorised broker. The lender's authorised company has to sign the transfer form.

The sale proceeds will be credited to the borrower's account under advice. Any surplus will be paid to the borrower and the account closed.

#### 5.5 Releasing the security

On default, the financier can start the realisation process. As the financier is the registered owner, it can sell the units to the authorised broker.

For units that have been transferred to the nominee's name, the nominee company will have to execute a transfer form showing the borrower as transferee. This will be sent to the company's registrar who will transfer the units to the borrowers and cancel the endorsement. The memorandum of deposit is to be cancelled.

## 6. Support Documents

The financial institution may require the client to provide additional support for the loans granted. The may be in the form of:

### 6.1 Guarantees

A guarantee is a promise to pay the financier in the event the borrower fails to pay.

The primary liability still lies with the borrower. Thus, only if the monies cannot be recovered from the borrower, the financier will take action to recover from the guarantor. To circumvent this, lenders (co-operatives banks) have been wise to take a letter from the guarantor prior to the disbursement of the loan, agreeing to a deduction in this salary or account of a certain sum in the event of default by the borrower.

**Scenario: An individual borrower is required to provide a guarantor to secure a car loan**

#### Process flow

The guarantor to sign a guarantee form preferably in the presence of the solicitor who is required to explain the purpose of the guarantee.

#### 6.1.1 Stamping

Nominal stamping fee is charged

#### 6.1.2 Realisation of the guarantee

If the loan is at default, the financial institution will demand the monies from the guarantor after exhausting action against the borrower. If the guarantor fails to pay, legal action will be instituted.

#### 6.1.3 Releasing the guarantee

If the debt is settled, the FI will cancel the guarantee and inform the guarantor.

### 6.2 Life policies

#### (a) Endowment policy

This constitutes the majority of life policies, which customers take out and as a consequence bankers take as security.

**(b) Whole life policy**

Although these may be taken out with or without profits, they only provide for payment upon the assured's death.

**(Note:** The term 'assurance' is generally used where 'life policies' are concerned. This is because death is assured. The term 'insurance' is used for non-life policies like, car insurance. The reason being you are insured against a possible loss.)

**Process flow**

Scenario: A borrower wishes to apply for a loan secured by his Life assurance policy.

**6.2.1 Process**

The documentation is by way of legal assignment. This can be done by endorsement on the policy or by way of an absolute deed of assignment.

**6.2.2 Deposit of the original life policy**

The financier has to establish the surrender value from the assurance company and determine if this is adequate for the loan.

**6.2.3 Stamping**

Stamping for an assignment is on an *ad valorem basis*. The financier to notify the insurance company of the assignment. A notification of the assignment is to enable the financier to sue in his own name, have a prior claim on the policy monies, and ensure that the monies are paid to the financier on maturity.

**6.2.4 Realisation of the policy**

If the borrower is at default, the Financial Institution will surrender the policy to the assurance company with an undertaking from the insurance company to forward insurance monies to the account of the client. The FI will discharge the assignment to the assurance company.

**6.2.5 Releasing the policy**

If the debt is settled, the FI will discharge the assignment and release the policy to the borrower.

**Practice Questions**

1. What is the effect of registering a charge document?
2. What are the different types of land that can be accepted as security?
3. What instructions would you give a solicitor preparing documentation for a housing loan where the property has been issued with a title deed?
4. What documents would you propose to obtain from a developer in financing a housing loan where the property has not been issued with a title deed?
5. What is the purpose of conducting a land search and bankruptcy search?
6. Explain the process of how you take documentation for finance against shares including what to do when releasing the documents on settlement of the debt.