

The form of the relevant sale and purchase agreement which must be followed strictly without any variations is provided as follows:

- Schedule G for land and building such as landed property; and
- Schedule H for sub-divided building such as apartments or condominiums.

Whereas, for shop offices and shop lots, there is no necessity to follow the standard sale and purchase agreement as provided under either schedule G or H.

- For those agreements governed by schedule G or H, the release of the loan which is done progressively, must follow strictly the schedule provided under the Third Schedule of the HDA. For instance, the first progressive release of 10% of the purchase price as provided under the Third Schedule must be for foundation works only and not for earth works.

On the other hand, in respect to the financing of shop offices and shop lots, since the HDA has no application, and hence the Third Schedule has no application at all, the first progressive release of the 10% of the purchase price need not necessarily be for foundation works only. It could instead be for earth works undertaken.

From the financing aspects, it is important that the loan be released progressively in accordance with the respective schedule of payments, whether they are governed by the HDA or not. In addition, there must also be proper presentation of the certificate either by the developer's architect and engineer certifying the various stages of completion. Under clause 4(2) of the standard sale and purchase agreement as provided under schedule G or H, the certificate by the architect or the engineer shall be proof of the fact that the works undertaken therein have been completed.

2.14 Documentation of the Deed of Assignment

Not all properties in Malaysia are issued with separate documents of title. These include both landed and sub-divided properties, either residential or commercial, such as shop offices or shop lots in shopping complexes. In the event that a financial institution finances the purchase of such properties, the documentation of the loan and security is as follows:

(a) A Loan Agreement cum Assignment

This is usually taken in a first-party situation where both the purchaser and borrower are the same.

(b) A Loan Agreement and a Deed of Assignment

This is taken in a third-party situation where the purchaser and the borrower are different.

(c) Power of Attorney

The main function of an assignment is to secure the financier's interest. In the case of default by the assignor, the assignee may enforce the remedies that can be made available to him.

The effect of an assignment generally depends on whether the assignment in question is an assignment (by way of charge) or an absolute assignment. An assignment (by way of charge) does not absolutely transfer the property to the assignee/financier as stated in the case of *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62. It only gives a right to payment out of the property, without transferring the property.

On the other hand, an absolute assignment will serve as a security for the loan granted to the assignor/purchaser/borrower, who will occupy the property as a bare licensee of the end financier. All the rights, title and interests of the purchaser/borrower/assignor in the property provided for under the Sale and Purchase Agreement will be assigned absolutely in favour of the end-financier.

2.14.1 Procedures to adopt to reduce or eliminate risks

It is to be appreciated that since there is no issue document of title, it is impossible to conduct any title searches at the land registry. There is the initial uncertainty whether the property had already been assigned.

However, if the following procedures are adopted strictly, the risks of any fraud can be reduced, or even eliminated:

(a) Documentation of the loan agreement-cum-assignment

The developer shall no longer be required to give consent to any assignment either for a sub-sale and the financing of such sub-sale. Instead, express notice in writing must be given to the developer of any such assignment. Upon such notice received by the developer, the assignment shall be deemed effectual in law to pass and transfer the proprietary right, interest, chose in action and all legal and other remedies for the same to the assignee. However, the notice must be given in the following manner:

Every such notice shall be delivered by the assignor or his solicitors to the housing developer. It shall be accompanied by:

- A duly stamped sale and purchase agreement between the assignor and the new purchaser;

- Duly executed Deed of Assignment and the relevant letter of undertaking to deliver the Deed of Assignment within 14 days after it has been stamped; and
- Full payment of all sums and outgoings due to the developer under the sale and purchase agreement.

The developer is now required by law to keep and maintain an up-to-date, proper and accurate register of all purchasers of the housing accommodation until the separate or strata titles for all the housing accommodation have been issued and registered in the names of all the purchasers.

Upon payment of a fee not exceeding RM50, the developer shall provide upon request, to the purchaser, his solicitors or his financiers, all necessary and accurate information of the records in the register, such as:

- Full particulars of the housing accommodation;
- Postal address of the housing accommodation;
- The current purchaser of the housing accommodation;
- The current chargee or assignee; and
- The total amount due to the developer.

(b) Obtain original copy of the Sale and Purchase Agreement

The bank must also require the borrower to surrender his original copy of the Sale and Purchase Agreement signed with the developer.

In the absence of the issue document of title, the original copy of the Sale and Purchase Agreement will be proof of his title and interest over the property in question.

The bank's suspicion ought to be aroused if the borrower cannot furnish his original copy of the Sale and Purchase Agreement unless this can be satisfactorily explained. Notwithstanding any satisfactory explanation for not being able to furnish the original Sale and Purchase Agreement,

prudence will dictate that the bank must further require the following:

- A statutory declaration from the borrower that the original copy of the sale and purchase agreement is either lost or misplaced, and/or
- A police report be lodged.

Unless the original copy of the Sale and Purchase Agreement is actually lost or misplaced, the borrower will not normally provide either the statutory declaration or the police report since any false information provided therein will constitute a serious criminal offence, punishable with either a fine or imprisonment, or both.

(c) Ensure the lodgement of a private caveat against the master title

A private caveat must also be lodged against the master title unless there is a prior arrangement with the developer that the private caveat is not necessary.

The purpose of the private caveat is to prevent the developer from fraudulently dealing with the property in a manner prejudicial to the interests of the purchasers and end-financiers.

This can happen if the bridging loan has been settled by the developer and they unscrupulously create another charge on the master title to secure fresh facilities.

As a result of the Federal Court's decision in *Chor Phaik Har v Farlim Properties Sdn. Bhd* [1994] 3 MLJ 345 it is now not in dispute that such a private caveat can be lodged against the master title. This is so notwithstanding that the bank's interest in the land is only confined to a portion thereof.

However, the lodgement of a private caveat may also entail certain practical difficulties on the part of the developer. The presence of private caveats certainly will not facilitate the process of sub-division of the master title.

Most developers will not proceed to apply for sub-division. The reason being, if any such private caveats are not removed, they will appear in all the individual titles after

the sub-division. This will incur the wrath of innocent individual purchasers and end- financiers. They will not be able to transfer or charge or deal with the property unless these private caveats are removed. The number of private caveats could be in the hundreds, depending on the size of the project launched by the developer.

Faced with potential multiple law suits, developers understandably will not proceed to apply for sub-division unless all the private caveats are first removed. The cost of removing all the private caveats appearing on all the sub-divided titles is usually prohibitive.

The undertakings from some end-financiers to withdraw their private caveats upon proof that the developer is genuinely applying for sub-division may not be helpful. This is because not all developers will give such an undertaking. Moreover, there are no restrictions on the number of subsequent sub-sales. The moment one private caveat is removed, another will be lodged if there is a sub-sale since such sub-sale will also similarly be financed by a bank or any financial institutions.

This is one of the primary reasons as to why the process of sub-division of the master title is always protracted. It may sometimes take years for the individual titles to be issued.

The only practical solution lies with the developer. They can impose a prohibition against the lodgement of private caveats either in their consent to any assignment or under the Deed of Mutual Covenant.

2.14.2 Execution of the Deed of Receipt and Reassignment

In the event the loan is either fully settled and the assigned property is redeemed, the Deed of Receipt and Reassignment must be executed for the purpose of revoking the power of attorney which was earlier registered in the High Court. Stamp duty payable on the Deed of Receipt and Reassignment is similar as in the case of a discharge of charge.

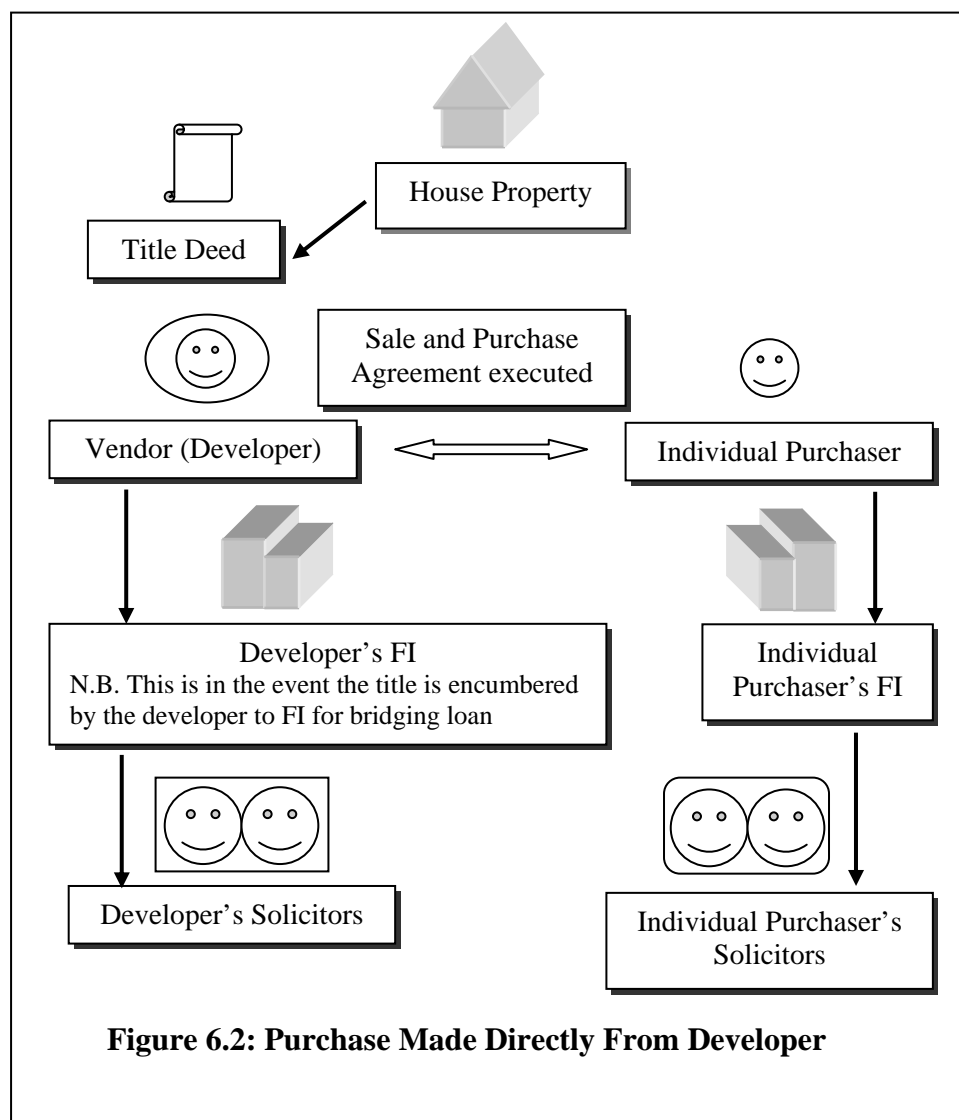
There is no procedure available for the creation of a “second legal assignment” unlike a charge. This is because an assignment, when created, is absolute in nature, and the owner of the land is left with no further interest in the land, which could be the subject of a “second assignment”.

Only a Supplementary Loan Agreement is required to be signed by the assignor to secure any additional facilities. The Supplementary Loan Agreement will include a declaration that the additional facilities shall also be secured by the existing assignment.

2.15 Documentation Process

2.15.1 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