

The form of the 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 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.

## **11. Enforcement of a Charge**

In the event of any default under the charge, the remedy of the chargee is to foreclose the charged property by obtaining an order for sale. The sale is by public auction.

### **11.1 Foreclosure proceedings**

Under the provisions of the National Land Code, foreclosure proceedings are commenced as follows:

- In the High Court where the land in question is held under a Registry Title. This is required under section 256. The procedure is by way of an Originating Summons filed in the High Court; or
- In the Land Office where the land is situated if the land in question is held under a land office title. This is required under section 260. The application for an order for sale is by Form 16G.

The most convenient way to determine whether the land in question is held under a registry or land office title is to check on the rubber stamp used when the charge was registered. If the land is held under a registry title, the rubber stamp used would be that of the “Pendaftar”. On the other hand, if the land is a land office title, the rubber stamp of the “Pentadbir” would be used instead.

Before the commencement of any foreclosure proceeding by the bank, it is mandatory that either Form 16D or 16E be served on the chargor. This statutory notice is required to enable the chargor to remedy the default under the charge.

Pursuant to section 254(1)(b) of the National Land Code 1965, the notice in Form 16D must require the chargor to remedy the breach within one month of the date which the notice is served, or such alternative period as may be specified in the charge annexure. In other words, if the charge annexure specifies a period of seven days for the chargor to remedy the breach, it would be sufficient if seven days are given to the chargor. However, if the charge is silent on the duration of the notice, then it is mandatory that a notice of one month must be given.

(It is to be noted that the case of *Mohamed Khalid bin Farzalur Rahaman & Anor v Citibank Berhad & Anor* which requires a notice of one month to be given in Form 16D in all cases has been overruled on appeal, and accordingly, is no longer good law.)

Once the property is sold by auction, the purchaser shall be required to pay a deposit of 10% of the reserved price. It is to be paid to the chargee and is to be credited into the account of the chargor. The balance of the purchase price must be settled within 120 days from the date of the sale, failing which the deposit is to be forfeited to the chargee (see the amended section 257 (1)(f) and (g); and section 263 (2)(f) & (g) of the National Land Code 1965). The forfeited deposit shall be used by the chargor to pay in, the following order of priority:

- i. the quit rent to the State Authority and other outgoings;
- ii. expenses incurred in making and effecting the order for sale;
- iii. the amount due under the charge at the time of the sale;
- iv. any annuity or other periodic sums falling due; and
- v. any amount due to subsequent charges (if any) in the order of their priority.

Under the section 259 (3A) and section 265 (3A) of the National Land Code 1965, the chargee bank shall now be entitled to receive the balance

of the purchase price directly from the purchaser. The previous practice where the purchase price was paid through the High Court or the Land Office has now ceased.

It is to be noted that an order for the sale made by the Land Administrator may be postponed only once for a period not exceeding 3 months.

Once an order for sale has been granted, the land must be sold by public auction under the directions of the Court of the Land Administrator. Any purported sale by private treaty is prohibited.

### **11.2 Foreclosure proceedings in Sabah and Sarawak**

Foreclosure proceedings in Sabah and Sarawak are different. In Sabah, an application for an order for sale must be made only to the Collector of Land Revenue at the Land Office. On the other hand, in Sarawak, the order for sale can only be granted by the High Court.

### **11.3 Practical issues in foreclosure of charged property**

- (a) The whole process of foreclosure either in the High Court or the land office is normally protracted. Delays and postponements are frequent especially when the chargor cannot be served personally with the cause papers.
- (b) In respect to foreclosure in the land office, the prevailing practice which requires the personal presence of the bank's representatives or any persons or body appointed by the bank at the enquiry has now been changed. Under the amended section 262(1) of the National Land Code 1965, apart from the chargor or chargee, any authorised person appointed by the chargor or chargee is entitled to be heard, or to adduce evidence at any inquiry. In other words, the bank's solicitors, if duly appointed, can now appear at the enquiry. Such authorised person may also apply for a postponement, or change of venue of any proposed inquiry, or to receive any notice of cancellation, postponement or change of venue.
- (c) Under the amended section 265 of the National Land Code 1965, the reserved price to be fixed for any second or subsequent public auction may either be at the same reserve price or at a new reserve price. However, appropriate notice has to be given to the chargor.

Accordingly, a higher reserve price may be fixed for such second or subsequent public auction if there was an appreciation of the market price of the property.

By the virtue of the amended provisions of section 265 of the National Land Code 1965, the Supreme Court decision in *Rakyat*

*Merchant Bankers Bhd v NKM Properties Sdn Bhd* [1992] 2 MLJ 349 which held that the reserve price to be fixed for any second or subsequent auction must either be the same or at a reduced price is therefore, no longer good law.

- (d) The purchaser is required to pay a 10% deposit of the reserve price at the time of the sale. The said deposit of 10% is then paid to the chargee and forthwith credited into the account of the chargor.

The balance of the purchase price must then be settled within 120 days from the date of the sale. No extension of that date shall be allowed. If purchase price is not paid in full within the stipulated time, the deposit will be forfeited to the chargee.

- (e) Under section 264A of the National Land Code 1965, the chargee may apply for a postponement of an order for sale by the Land Administrator but only with the consent of the chargor. The application for postponement of an order for sale by public auction must be made at least 7 days before date of sale.

In addition, an order for sale by the Land Administrator may be postponed only once for a period not exceeding three months.

- (f) All interest accruing after the date of auction shall cease to be payable under the charge. Any claims for such arrears in interest must be made against the borrower or chargor personally under a civil claim.

## 12. Documentation of an 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.

### **12.1 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 the 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.

**(d) 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.

### **13. Enforcement of the Assignment**

The Federal Court in *Phileo Allied Bank (Malaysia) Bhd v Bupinder Singh Avatar Singh & Another* has now allowed the bank to dispose of the property either by public auction or private treaty without the necessity for an order of sale from the court. This is done pursuant to the powers of sale and the power of the attorney provided for under the Loan Agreement cum Assignment.