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THE LEGALITY OF A PRIVATE LEASE SCHEME: PULL THE WOOL OVER THE PURCHASER'S EYES?

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Abstract

The developer transferred a 99-year lease to the purchasers in a PLS instead of transferring the property ownership. Upon lease expiry, the property shall be reverted to the owner. In Malaysia, the Housing Development (Control & Licensing) Act 1966 (HDA 1966) regulates that a developer must transfer property ownership to the purchasers. "Build and lease" under the PLS does not comply with the law. This article is a conceptual paper that employs doctrinal research to analyse the legal position of property sale under a PLS and examine its compatibility with the existing law. The Courts' decisions on cases related to a PLS property are analysed to determine the PLS's implication on the purchasers' interest. Ultimately, to safeguard the purchasers, the amendment of the laws is recommended as a legal platform to legitimise the PLS.

Keywords: Private Lease Scheme, freehold land, lessee, ownership, housing accommodations

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INTRODUCTION

A Private Lease Scheme (PLS) was first introduced in 2012 by Iskandar Investment Berhad, a developer that built Medini in Johor Bahru, Johore, a housing accommodation including stratified property (Mohsin 2020). The PLS was initially introduced to prevent foreigners from owning too much land in the state of Johor (Siang 2015). It may be viable to curb the influx of foreign ownership. However, if the scheme's introduction is incorporated into the NLC, it shall apply to all land situated in West Malaysia. As seen by Datuk Chang Kim Loong, the National House Buyers' Association president, the PLS Scheme will only assist the landowners, and no ownership will be granted to the buyers (Loong 2020, Eva 2018). The buyers will forever be lessees, and upon the expiry of the lease, their fate is left to the mercy of the landowner/Lessor (Hussin 2016).

In 2018, the Director-General of Lands and Mines, Putrajaya, intended to support the motion to introduce PLS to the NLC. The proposal introduced a new chapter, 'Register of Private Lease' with '*Sijil Pajakan Persendirian*' in the NLC and the STA. However, the proposal was heavily criticised. In October 2018, Dr A Xavier from the Ministry of Water, Land and Natural Resources replied to a question in Parliament that the public has criticised the introduction of PLS. The Ministry has decided to abandon the Scheme of a PLS. (Parliament, 2019).

The HDA governs that the Sale and Purchase Agreement (SPA) between developer and purchaser is statutorily prescribed under the Housing Development (Control and Licensing) Regulations 1989 (Regulations 1989) either schedule G, H, I or J. In *Sentul Raya Sdn Bhd v Hariram Jayaram & Ors and Other Appeals [2008] 4 CLJ 618*, the judge viewed the regulated contract provided under Regulations 1989 as a construction contract prescribed explicitly by statute where compliance is mandatory. Relating to the purchaser's rights, (Zolkafli et al. 2014) states that the purchasers are entitled to ownership of the property guaranteed under the regulated contract provided by Regulations 1989. In *Economy Development Sdn Bhd v Robert Geoffrey Gooch & Anor [2016] 1 CLJ 893*, the Court decided that the provisions in the SPA are not merely contractual but are in effect statutory provisions. Any collateral contract to exist alongside the SPA violates the law that renders the contract void. In the case of *Loh Tina*, it was held that compliance with Regulation 11(1) of Housing Developers (Control & Licensing) Regulations 1989 (Regulations 1989) in any SPA is clearly and manifestly mandatory. There should be no waiver or modification of any of the provisions of the contract of sale unless there is a certificate in writing granted by the Controller. The Court of Appeal held that HDA was mainly structured to shield unsuspecting purchasers against unscrupulous developers, and the deviation from the regulated contract shall be rendered void. Therefore, it is crucial to analyse the implementation of PLS in Malaysia and how it has affected the rights of purchasers or correctly termed

lessee. In the context of discussions in this paper, when the term "purchaser" is used, it is referred to as "lessee".

RESEARCH BACKGROUND

A lease is defined under Section 5 of the NLC as a registered lease or sublease of alienated land. From this definition, for a lease agreement to be enforceable, it must be registered following the provision of the NLC. The lease transaction shall comply with Chapter 15 of the NLC. The lease period is for a term exceeding three years as according to Section 221 of the NLC. The maximum lease term is subjected to subsection 3 of the provision, which provides 99 years if it is over the whole land lease. Section 221(3)(b) of the NLC only allows a maximum of 30 years over part of the land. Section 228 (1) of the NLC provides that the lessor's discretion to grant the extension upon application for extension is made by the Lessee before the expiry of the lease.

The issue of whether a lease could become a subject matter of transfer is answered under Section 214(1)(c) of the NLC. Under this provision, a lease shall be capable of transfer. However, the transfer of a lease shall be subject to subsection 2(c) of Section 214 of the NLC, which stipulates that the transfer of a lease is subject to the express or implied provisions of the lease. The parties have agreed upon the express provisions of the lease upon entering into the Lease Agreement. At the same time, the implied provisions of the lease are stipulated from Section 230 until 233 of the NLC.

It must be clearly distinguished between the dealings known as a lease under the NLC and the concept of a Private Lease Scheme (PLS). (Salleh, 2010) defines a lease as a conveyance by which a land proprietor grants another person an interest in his land. (Judith, 2019) explains that a lease involves two transactions:

- a. A contract creating an in-personam (personal) or non-proprietary right that may need the protection of section 206(3) of the NLC; and
- b. An interest in land that gives a legal estate in the land upon registration of a lease for a term above three years.

Briefly, under the lease, both parties have a mutual interest in agreeing to more than three years to enable the Lessee to have interest in land exclusively throughout the lease term. Upon lease registration, the Lessee shall obtain an indefeasible interest under section 340(1) of the NLC. The Lease Agreement is prepared and perfected according to the Law of Contract and Form 15A, a statutory form for registering a lease under the NLC. Preparation and execution of a Lease Agreement will not confer any indefeasible interest over the property until the statutory form is presented for registration at the Land Authority. Most importantly, the Lessee knows from the commencement of the Lease Agreement

that upon expiration of the lease, he has to vacate and hand over the land to the Lessor.

The innovation by the developers inventing a lease sale over the property sold to buyers under the PLS in a strict interpretation under the NLC means a transfer of a Lease that it obtains from the registered owner of the land (Lessor) to the purchasers of the housing project. The developer shall prepare the regulated sale and purchase agreement under the HDA and a Form 14A to transfer the lease from the developer to the purchasers. If not adequately communicated and explained to the purchasers, the meeting of mind under the sale of the property will not be mutual. On the one hand, the developer knows that as a Lessee, over the land it intends to sell to the purchasers is only a transfer of the said lease because the developer's status is only a lessee, not the registered proprietor of the land. On the other hand, the purchasers may get the impression that upon signing the sale and purchase agreement with the developer, they will be vested with the ownership of the said property. Little that they know, their status is only as a Lessee, not as the proprietor of the property that they purchased.

From the above explanation, both situations evolve around an assignment of a lease. However, a Lease under the NLC is conferred upon registration of a lease instrument Form 15A under the NLC. The PLS uses Form 14A to transfer the lease from the developer to the purchasers. The innovation of the PLS is somehow valid and enforceable under the NLC because the Lessee can transfer a lease to another third-party subject to a specific condition provided under the NLC. Section 214(1)(c) of the NLC stipulates that a lease of an alienated land is capable of being transferred. In a nutshell, a PLS is a transfer of a lease from the developer to the purchasers. It is valid and enforceable under the NLC. However, the purchasers should be well-informed from the commencement of the sale that their status remains as a Lessee throughout the 99-year lease since the developer is only a Lessee and not the registered proprietor of the said property.

As the vendor in the sale of the residential building, a developer is regulated by the Housing Development (Control & Licensing) Act 1966 (HDA). The HDA is a comprehensive law governing the housing industry. Parliament passed it with three objectives – one, to check abuses of the then-infant housing industry; two, to regulate the activities of housing developers; and three, to protect house buyers. (Salleh 2001). The HDA imposes on the developers to use the regulated sale, and purchase agreements called Schedule G, H, I and J under the Housing (Control and Licensing) Regulations 1989. For example, under the Schedule H, it is stipulated and to be complied with verbatim by the developer, the developer is required under clause 11(1) to, at its own cost and expense and as expeditiously as possible, apply for subdivision of the said Building to obtain the issue of a separate strata title to the said Parcel under the Strata Titles Act 1985 (STA). It is further required under clause 11(2) that upon the issuance of

the strata title to the said Parcel and subject to the payment of the purchase price by the Purchaser to the Vendor following sub-clause 4(1) and the observance of all the terms and conditions herein provided, the Vendor shall, within twenty-one (21) days, execute a valid and registrable memorandum of transfer of the said Parcel to the Purchaser, his heir or nominee or lawful assign, as the case may be. The developer is NOT allowed to contract out from Schedule H as provided under Regulation 11(1) of the Housing Developers (Control and Licensing) Regulations 1989. A contract of sale and purchase of a housing accommodation together with the subdivided land shall be in the form prescribed in Schedule G. Where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H. Thus, the primary duty of the developer under the HDA is to sell the property to the purchasers, apply for the subdivided title and upon issuance shall transfer the same to the purchasers. Nowhere in the provisions of the HDA allow the developer to transfer a lease to the purchasers.

In addition to the above, in the 2015 amendment of the Strata Titles Act 1985(STA), a duty is imposed on the developer to apply for the issuance of a strata title within three months after completion of the superstructure stage. The original proprietor should apply for subdivision of the Building to the land office. Such duty is crucial because the failure of the original proprietor to comply with these new requirements would constitute an offence and be liable for a fine of not less than RM10,000 and not more than RM100,000 and/or imprisonment not exceeding three years. There is also a further fine of between RM100 to RM1000 for every day the offence continues. Applying for a subdivided title and transferring it to the purchasers is the prime duty of a developer. A developer under the PLS is only the Lessee. Therefore, transferring a lease to the purchasers inevitably does not align with the duty imposed on the developer under the HDA and STA.

Accordingly, the purchasers who purchased their houses under PLS have indicated dissatisfaction with the scheme by filing court claims against the developers. In *Loh Tina & 6 Ors v Kemuning Setia Sdn Bhd & 5 Ors (and Another Appeal)* [2020] 7 CLJ 720, the purchasers entered Schedule G of the Regulations 1989 for a sale of a property to be built on freehold land. However, some of the provisions were amended without the approval of the Controller of Housing.

The developer contemplated that the Purchasers knew the purchased unit would be of a private leasehold interest under a PLS and not a transfer of ownership. The developer argued that the Purchasers knew that the SPA signed by them was effectively for a 99-year lease with an extension for the second period of a 99-year lease. On the other hand, the Purchasers clarified that they had realised subsequently the material changes made onto the SPA that did not conform with the Schedule G. They then argued that the transfer should be of

freehold interest into their names as what was statutorily provided under Schedule G, rather than a leasehold interest.

It was held by the Court of Appeal that by virtue of Regulation 11(1) of the Regulations 1989, the general rule is embedded in the HDA whereby there shall be no waiver or modification of any of the provisions in the Schedule G unless a certificate in writing had been issued and granted by the Housing Controller as provided under Regulation 11(3) of the Regulations 1989. Suppose it was subsequently discovered that a developer had deviated from the prescribed Schedule G. In that case, the Purchasers are entitled to enforce their rights as if the SPA they had signed had been in its prescribed form without any amendments or modification. The Court of Appeal ordered that the houses and the developer execute and register the Memorandum of Transfer in favour of the Purchasers, as envisioned by the prescribed Schedule G under the HDA.

In *Wong Hang Foh & Ors v Tropika Istimewa Development Sdn Bhd* (KL High Court Civil Suit No: WA-22NCVC-120-03/2018), the Court decided that the developer had misrepresented the purchasers for transferring a lease instead of a strata title. As the proprietor, Iskandar Investment Bhd had granted the developer a lease on the land for 99 years commencing from April 15, 2013, and expiring on April 14, 2112.

Instead of entering into a sale agreement as provided under Schedule H of the Regulations 1989, the developer and the purchasers entered into a Lease Purchase Agreement dated October 18 2012. The parties have agreed to perfect a lease transfer upon issuing strata titles. The developer was also granted a right to develop the land as a stratified housing development to be delivered within 48 months from the date of the agreement. Whereas the developer should deliver within 36 months from the date of the agreement as stipulated under Schedule G of the Regulations.

The purchasers claimed that the deviation from Schedule h in the terms and conditions stated in the sale agreement amounted to false misrepresentation by the developer. In addition, the developer has failed to comply with existing laws, namely the HDA, Regulations 1989, Strata Titles Act 1985 and NLC. The misrepresentation includes the purchasers registering as the lease's lessee over the strata parcel.

As a result of the misrepresentation by the developer, the plaintiffs incurred losses and damages, which the defendant is liable to pay to the plaintiffs. The developer's amendments that are inconsistent with the terms and conditions as found in the Regulations 1989 shall be invalid and shall not be binding on the plaintiffs.

The trial judge decided that the developer had misrepresented to the purchasers (107 purchasers) that they were entering a Sales and Purchase Agreement (SPA) to purchase the property and not the purchase of the lease. The Judge also granted a declaration sought by the plaintiffs that the sales and

purchase agreement is invalid and contravened the HDA, Regulations 1989, NLC and STA. He also allowed the plaintiffs' relief that the defendant is required to comply and shall be bound by the terms and conditions as prescribed in Schedule H of the Regulations 1989. The developer is ordered to affect a transfer of the purchased parcels in favour of the purchasers and shall pay the plaintiffs Liquidated Ascertained Damages (LAD) for the late delivery of vacant possession. This case is significant in highlighting the primary obligations of the developers under the HDA relating to the sale of residential properties (Abu Bakar 2021). The developer shall comply with obligations imposed by the HDA and not deviate from the Regulations 1989 (Abu Bakar 2021).

METHODOLOGY

This is a conceptual paper that invokes a doctrinal (or "black letter") methodology that refers to a way of conducting research which is usually thought of as "typical legal research". A doctrinal research approach will focus on case law, statutes and other legal sources. It differs from other methodologies in looking at the law within itself. A purely doctrinal approach does not attempt to look at the effect of the law or how it is applied. Instead, it examines law as a written body of principles which can be discerned and analysed using only legal sources. The cases related to the PLS are reviewed to ascertain whether the purchasers who purchased their houses are safeguarded.

RESEARCH QUESTIONS

1. Is the PLS compatible with the existing law that regulates the sale of property by the developers in the housing industry?
2. Whether the PLS safeguard the purchaser's interest?

RESEARCH OBJECTIVES

1. To research the compatibility of the existing legal framework with the sale of property under the PLS.
2. To investigate whether the purchaser's interest is protected under the PLS.

FINDINGS AND DISCUSSIONS

The mechanism of a PLS is based on a lease transfer by a lessee. The land in question must be a freehold land tenure to create a 99-year lease over the land in question. The developer could own the land intended for development, where the developer itself will be the lessor. The developer entered into a lease transaction with the registered proprietor in another situation. The lease shall comply with Chapter 15 of the NLC. The registered proprietor shall grant a 99-year lease to the developer. The developer will become the master lease concessionaries, apply for a subdivision of the land, develop a housing project, and later sell the subdivided plot to the purchasers. Instead of selling the unit and transferring

ownership of the subdivided plot, the developer shall transfer a lease to the end purchaser.

The agreement is a sale of a 99-year lease to the purchasers. The sale agreement shall stipulate the right to renew the lease to avoid disputes. The lessee shall apply for the renewal to the lessor, and it is at the liberty of the lessor to grant renewal of the lease. It should be noted that the renewal is subject to a consideration that the lessee must provide. As a lessee, the end purchaser's right over the land only concerns the Building.

In contrast, under Malaysian land law, it is only a creation of interest in land or possessory rights, not land ownership. The legal implication from the PLS is that the purchaser's interest in the property shall diminish as it is nearing the expiry of the lease. Inevitably, the property's value shall depreciate towards the expiry of the lease.

The theory of property promulgated by John Locke (1632-1704) conceptualised the idea of property as private ownership, independent of Government, derived from labour improving upon nature; thus, by the expenses, the labourer becomes entitled to its proceeds. Property rights are based on utility and efficiency, where they should be allocated to maximise utility regarding the use, possession, transfer and other rights on utilisation of the property. Secondly, to maximise efficiency regarding the use, possession, transfer, and other property rights. Protecting the property is one of the most important constitutional rights that create security at par with citizenship in a state. Protecting property rights inadvertently enables the accumulation of wealth and the achievement of prosperity that provides social and economic stability. It will assist in building society and reflect the rule of law if individuals respect property rights. Besides building the society, property rights function as the ultimate determinant of security of tenure that must be recognised, enforced and guaranteed by the states. Thus, by giving a lesser interest to the purchasers, the PLS fails to safeguard the purchaser's interest and does not align with the theory of property introduced by John Locke.

SUGGESTIONS AND RECOMMENDATIONS

The development of a legal framework is necessary to validate the PLS because the concept is novel and neither the HDA, NLC nor the STA contain provisions that permit the scheme. Without the statute, the PLS is incompatible with the current legal system governing the developers' sales of housing accommodations to buyers. The HDA was put into place to safeguard purchasers' interests from any duplicitous behaviour on the part of developers. As a result, the law is set up to ensure that the developer, who is the vendor, must apply for the issuing of a separate deed of title (for a landed property) and the strata title titles (for high rise and gated property). Additionally, the developer is required to give the buyers the title. The HDA, NLC, and STA govern requests for separate issue documents of

title in the ultimatum. If the developers do not fulfil their obligation satisfactorily, they could face penalties under the law. According to (Nurudin AR et al. 2015 and Nurul Sal Shalbila 2020), the government's policy and regulatory adjustments in the housing sector must be accepted because of their crucial role in the industry's competitive housing industry, especially in the development of stratified properties.

Schedule G and H for landed property and under-construction high-rise structures are the regulated sale agreements that developers should employ and are mainly provided for in Regulations 1989. A completed building on landed property is covered by Schedule I, and a completed high-rise building is covered by Schedule J. According to a firm ruling by the Court of Appeal in *Loh Tina*, changing the standard statutory form of a SPA in Schedule G without a certificate from the Controller approving the change would be illegal and render the transaction void. These four schedules indicate that the sale of housing accommodations and transfer of the property, as mentioned earlier, upon issuance of a separate issue document of titles are the only purposes for which they are included.

PLS requires a specific kind of regulated agreement with distinct responsibilities and obligations for the developers because it is based on a lease-purchase agreement, which represents a lease transfer rather than ownership. The lease-purchase agreement's terms and conditions should specify the rights, liabilities, and duties of both the purchasers and the developers. As a result, the Regulations 1989 should include a new schedule known as a "Lease Purchase Agreement."

The NLC's lease provisions deal with the transfer of ownership of the land from the lessor to the lessee. Sections 230 and 231 of the NLC provision for implicit lease agreements. (Sihombing 2019) emphasises that after a lease has been created and registered with the NLC, the lessee's interests are safeguarded against third parties. Section 340(1) of the NLC guarantees indefeasibility of interest.

A Lease Purchase Agreement under the PLS needs a detailed covenant on the rights of the Lessee to have an extension of another 99-year lease. It shall provide the right to transfer the leased unit. Since these provisions are necessary for a PLS, additional covenants for a lessee under a PLS Scheme should be added to the NLC. Lease Purchase Agreements tailored for a PLS reflect specific lease transactions that should be incorporated into the NLC to protect the purchasers' interest in PLS. The purchasers of the housing accommodations intention are to have exclusive enjoyment of the home that they purchased, and this should be reflected in the transactions. They should be made aware that the lease will expire, and the option is given to renew for another 99 years, subject to a payment agreed by the parties.

In order to further strengthen the Lessee's position under the PLS, a Certificate of Lease is proposed upon registration of the lease, specifically for a lease derived from a PLS Scheme. A Certificate of Lease shall incorporate covenants attached to the certificate indicating that the lease is created and registered by the purchasers of a PLS.

Section 11 of the HDA provides the duty of the government as the Controller to safeguard the interest of the purchaser. For instance, under this provision, when a Minister has reasonable inference that a licensed housing developer cannot meet its obligation, he may, without prejudice to the generality of the powers of the Minister, give directions under section 12. This directive is to safeguard the interests of the purchasers by directing the licensed housing developer to take such steps as he may consider necessary to rectify any matter or circumstance. The Minister may also direct a person to be appointed to advise a licensed housing developer in the conduct of his business. He may also direct a company to assume control and carry on the business of the housing developer upon such terms. Therefore, it is recommended that Section 11 of the HDA be amended to broaden the scope of a controller to protect the interests of lessees under the PLS. It is necessary to ensure that the purchaser's rights under the PLS will be better secured against any dispute.

CONCLUSION

Since the HDA governs the relationship between the Developers and the buyer, a compatible legal framework is essential to the legalisation of the PLS. According to the law, the developer's primary responsibility is to apply for the subdivision of a separate issue document of title and transfer it when the strata title is issued. As a result, a PLS's Lease Purchase Agreement only granted the buyer the rights of a Lessee. As a result, a developer misrepresents the purchaser by using the PLS when marketing residential units. The PLS is not well-suited to the rights under the legal framework unless the current laws are amended.

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PAPER CONTRIBUTION TO RELATED FIELD OF STUDY

This study addresses the legal implication of a PLS in light of the existing legal framework for the sale of property by developers. The suggestions in this research may assist the policymaker in providing a secure system of purchasing property from developers.

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