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RED FOCUS

Bankers' role in protecting house buyers



TRUSTEE: Bankers have a fiduciary duty to enquire, amongst others, on progress of construction and whether the project is passed off as commercial when it is in fact residential

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Malaysia is the only country in the world after Singapore to have a special legislation ensuring that housing developers should open and operate a housing development account so that the interest of house purchasers are protected. If this legislation were to be strictly followed, then abandonment of housing projects would be a bygone era because there is a strict withdrawal regime. Unfortunately, this is not the case sometimes.

Banks, which are intimately involved in the financing aspects of housing development have a duty to ensure that projects that are residential in nature are not passed off as commercial units.

A quick check that was done some months back during my training session with the Ministry of Housing and Local Government enforcement officers revealed that there are many projects that are being passed off as SOHOs (Small Office/Home Office) or SOFOs (Small Office/Flexible Office) which are in reality residential units which require a housing developer's license and consequently an opening of the housing development account. These were not complied with, yet the projects were fully funded by banks whose logos sometimes appear on their advertisements to lend credibility to the projects.

Banks' duty of care: In *Abdul Rahim bin Abdul Hamid and Ors v Perdana Merchant Bankers Berhad & Ors* [2006] 3 AMR 629; [2006] 3 CLJ 1 (FC), the court took the view that it is the implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in their dealings. To finance a project that should have been licensed but was not shows clear evidence of lack of skill and care.

In *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170 (SC) at 172, Salleh Abbas LP opined that the bank was holding the loan sum as trustee on behalf of the plaintiffs. As trustee, the bank has fiduciary obligations under section 2 of the Specific Relief Act 1950.

In *Ng Thiam Seng & Anor v AM Finance Berhad (formerly known as MBF Finance Berhad)* [2009] 4 AMR 808 (HC), the court reminded bankers that the duty to act in the best interest of the principal includes acting with diligence. The duty extends beyond sighting the architect's certificate certifying the stage of completion and paying the progressive payments to the developer.

It is therefore not open to the defence (bank) that it was under no obligation to keep vigil over the progress of the construction of the condominium or that it did not have any notice of the stages of its progress. (Retrial is pending in this case.)

In conclusion, bankers, in order to fulfill their fiduciary or trustee duty should familiarise themselves with the Housing Development Account Regulations 1991 governing withdrawals from

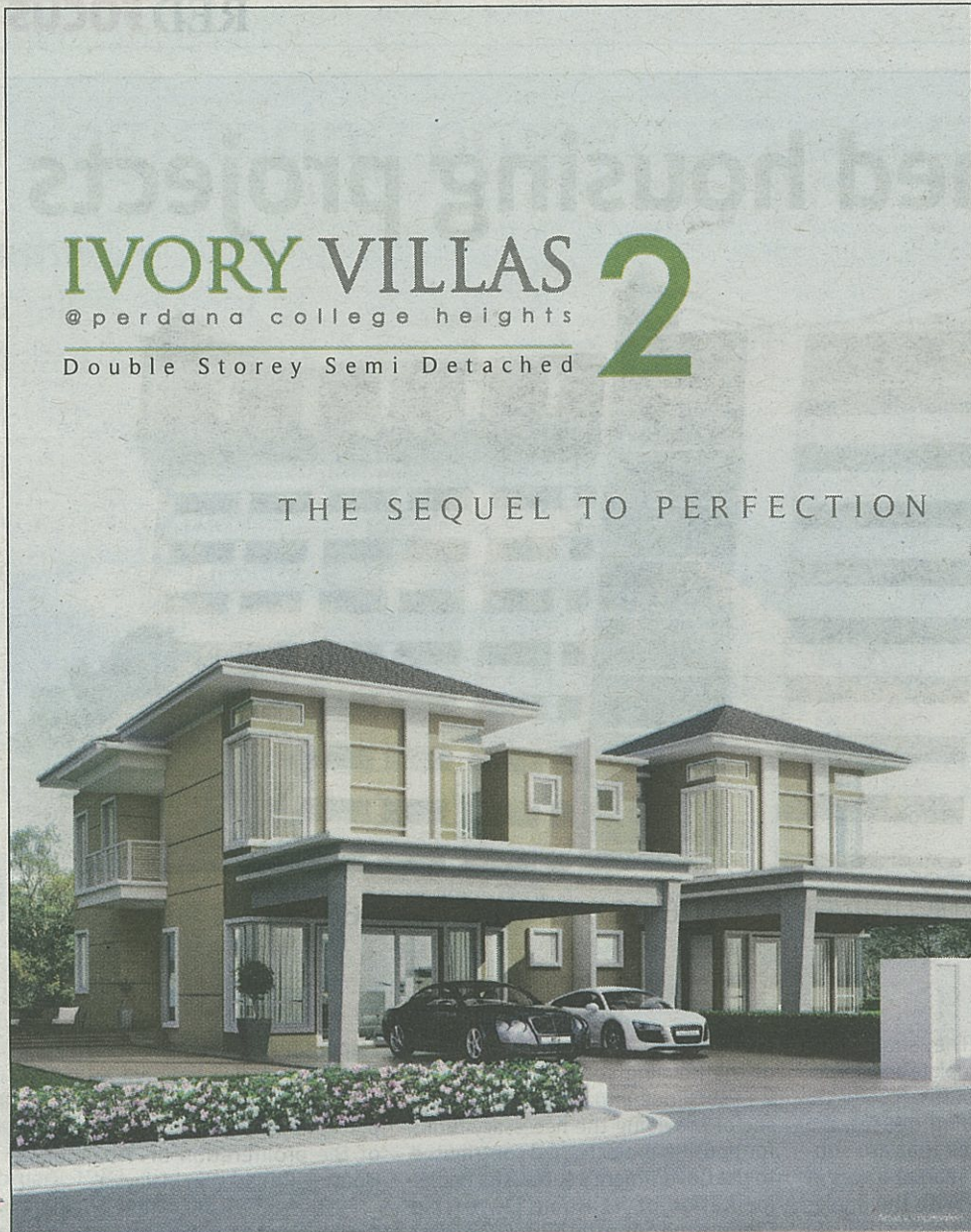
the housing development account. The withdrawals are strictly monitored.

Some permitted purposes for which monies in a housing development account may be withdrawn include the following:

- (a) the payment of all outgoings including quit rent, rates, taxes, assessments and other charges levied in respect of the land on which the housing development is carried out;
- (b) the payment of stamp duty payable on a charge, caveat, debenture, guarantee or memorandum of deposit of title to secure any loan for the construction of housing accommodation in the housing development;
- (c) the payment of legal fees in respect of a charge, caveat, debenture, guarantee or memorandum of deposit of title to secure any loan for the construction of the housing accommodation; and any other matters relating to the housing development;
- (d) the payment of insurance premiums and fees for architects, engineers, quantity surveyors and consultants, for the housing development;
- (e) the cost of carrying out soil investigations, earthworks, foundation works, building works, external works, site and boundary survey for each lot, infrastructure works, relocation of squatters, works related to infrastructure preparation instructed by the appropriate authorities and other works relating to the housing development in proportion to the housing accommodation that have been approved under the housing developer's licence;
- (f) the payment of monies for the contribution towards the supply of water and electricity to the relevant authority responsible for the supply of water and electricity;
- (g) any refund of the progress payment pursuant to the sale and purchase agreement of a housing accommodation in the housing development;
- (h) the payment of interest and such other charges to the banks or finance companies on any loan taken for the housing development;
- (i) the payment of any capital sum to redeem, in full or in part, the loan for the construction of housing accommodation;
- (j) any administrative expenses (including marketing and advertising expenses), to a maximum of 10 per cent of the total cost of construction;
- (k) the payment for tax imposed by the IRB; and
- (l) the payment of any liquidated damages, defect, shrinkage or other fault during the defect liability period.

If bankers and developers were to strictly comply with the permitted withdrawals, then unjust enrichment by some would come to an end and this social legislation would have played its meaningful role in ensuring protection for house buyers.

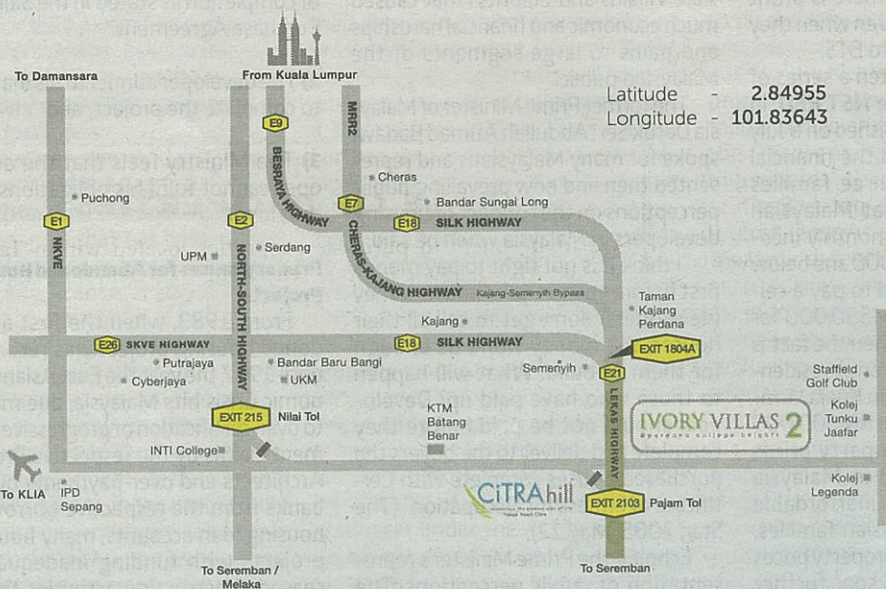
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