

Land Office titles

- (1) Form 5De (Mukim Grant);
- (2) Form 5Ee (Mukim Lease);
- (3) Form 11Be (Qualified Title).

2.15.4 How entries in computer document of title to be dealt with

Each entry required to be made on the computer document of title will necessitate the issuance of a new computer document of title—the previous version of the computer document of title will be cancelled and destroyed (paragraphs 2 and 15(b)). An “entry” includes “any endorsement, memorial, note, correction, cancellation or deletion or any other entry thereon by use of a computer” (paragraph 1). Every new computer issue document of title prepared pursuant to paragraph 15 which is authenticated by the Registrar’s digital signature shall be conclusive evidence of the registration of the entry to which it refers and the effective time and date (paragraph 16(1)).

Instead of the Presentation Book under s 295 of the NLC, there will now be a Presentation Record (paragraph 12).

2.15.5 Private electronic searches under ELAS

The public will be able to conduct private searches under s 384 of the NLC by electronic means (paragraph 22(1)). The searches may be conducted at either the Registries or other places at such time as may be fixed by the State Director with the approval of the State Authority (paragraph 22(4)). This off-site access will help greatly if a search has to be conducted urgently or from a different state.

Chapter 3

Conveyancing Techniques

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3.1 OVERVIEW

Real property conveyancing is considered a mundane subject by many. At best, it takes on a supporting role to the other practice areas which are considered more lucrative or prestigious. “Low-end” conveyancing is usually undertaken by junior lawyers using in-house “standard” forms. The result is unfortunate—conveyancers spend disproportionate amount of time (and often unproductive work) in the negotiation process. Since each firm has its own in-house standard forms, the “correct way” of carrying out a conveyancing transaction or a particular stage of the transaction is often subjective. This is made worse by the fact that lawyers have not adopted a common set of rules on conveyancing similar to court rules or Land Office rules.

It has been judicially commented in fact that the practice of conveyancing work requires a high degree of skill and caution on the part of solicitors

for the purpose of protecting their clients' interest against possible fraud or forgery.¹

The concepts encountered in "low-end" conveyancing actually constitute good training for more complex work, whether within conveyancing or another branch of practice. Indeed, the principles used in conveyancing work are the same principles found in complex land transactions or banking or finance work which involve land as security. Issues relating to the execution of the NLC forms, the redemption of a property, the obtaining of undertakings from a financier or a developer or the giving of an undertaking by either of the contracting parties and the presentation of NLC forms at the Land Registries are equally applicable across all transactions involving land regardless of the monetary amount involved in the transaction or the size of the land. For example:

- (1) what are the stakeholders' responsibilities with regard to the executed documents or to the loan sum? Can a solicitor be a stakeholder of an executed document in the first place or is he an agent?
- (2) when should the MoT be stamped and forwarded to the purchaser's financier? What type of undertaking does the financier require from the vendor or is willing to give in exchange for the delivery of the issue document of title?
- (3) which of the parties allocated responsibilities caused the delay or the termination? How should interest or damages be calculated or apportioned? Will there be an escalation in the purchase price as a result?

A complex transaction which involves land, whether as a security or otherwise, will usually require some conveyancing techniques. Land still is the security preferred by many financiers.

This chapter seeks to provide some guidance on how to manage a conveyancing transaction from the start. With few exceptions, no attempt is made to distinguish between the role of a vendor's solicitor and a purchaser's solicitor nor is it the concern here to deal with professional rules (such as those relating to the Solicitors' Remuneration Order 2005) or professional ethics. Each party's solicitor will have to assess for herself or himself the steps to take to secure the client's interests and for her to comply with professional rules and etiquette.

¹ *Wong Kiong Hung & Anor v Chang Siew Lam* [2009] 3 CLJ 751, CA at 765, citing *Lai Foh & Sons Sdn Bhd v Skrine & Co* [2001] 3 CLJ 185.

3.2 TYPES OF SALE AND PURCHASE AGREEMENT

Most properties transacted in the open market were originally purchased from property developers. Property developers may be categorised into:

- (1) housing developers of "housing accommodation". They are governed by, among other legislation, the HDA and the HDR unless the number of units of "housing accommodation" to be constructed is fewer than five units.² The terms of the SPA are governed by statutory documents as set out in the HDR; and
- (2) non-housing developers of commercial and industrial properties. In recent years, agricultural lots with basic infrastructure such as road access have also been developed. There is no specific legislation which control the activities of these category of developers. The terms of the SPA in respect of non-housing properties are also not provided by any regulations such as the HDR. Accordingly, the terms of the SPA are negotiated between the parties but the non-housing developer usually has the stronger bargaining position.

The form of a SPA in a subsale³ is usually structured based on whether the property has an individual title issued or the property has yet to be issued an individual title. The terms of the two types of SPA differ substantially. Beneficial interest in a subsale of a property without individual title is conveyed using a sale assignment whereas title to a property with individual title is conveyed using a statutory form, namely, the MoT. The sale assignment is a contractual document which does not require registration with any public authority but will require notice to be given to a housing developer or, as the case may be, the endorsement of consent of the non-housing developer; in the case of the MoT, registration with the Land Registry is all-important. How these documents are to be stamped and thereafter perfected or registered require different processes which will be reflected in the terms of the subsale SPA.

Within either of the two types of SPA, there are of course different variations. These variations usually come about because of:

- (1) the peculiar facts of the transaction such as, for example, whether the property has been charged (or, in the case of a property without individual title, whether the beneficial rights have been assigned) or whether the land is subject to any restrictions-in-interest requiring the consent of the State Authority;

² See the definition of "housing development" in the HDA.

³ For the meaning of "subsale", see paragraph 7.2 (Meaning of subsale).

- (2) the viewpoint which the draftsman may adopt depending on whether he acts for the purchaser or the vendor.

Other than compliance with the Contracts Act in relation to illegal contracts and, in the case of a property with individual title, compliance with the NLC's requirements on forms and registration, the terms of a subsale SPA are freely negotiable and are ultimately construed on contractual principles.⁴ If the courts deem appropriate, equity or relevant legislation such as the Specific Relief Act 1950 will also be applied to resolve a dispute.

3.3 PROPERTIES WITH INDIVIDUAL TITLE DISTINGUISHED FROM PROPERTIES WITHOUT INDIVIDUAL TITLE

A convenient and useful starting point in conveyancing documentation is to categorise properties broadly into two types:

- (1) properties with individual title issued. This type of properties can be further categorised into:
- (a) land with individual titles which come under the NLC;
 - (b) parcels of building or subdivided parcels of land or land parcels⁵ with strata titles which come under the STA; and
- (2) properties without individual title issued (usually referred to by a lot or parcel number allocated to it by the developer pending subdivision of a master title or a high-rise building).

During documentation, searches are usually carried out on the NLC title or the strata title or, as the case may be, the master title. In relation to strata titles, searches may also be required to be carried out on the register document of title to the "lot" on which the building to be subdivided is sited because endorsements on the register document of title to the lot will also affect the strata titles and the common properties (s 15(2)(b)(i) and Form 3 of Schedule 1 to the STA).⁶ It is a mistake to rely solely on the results of the search into the strata title to determine the express conditions or the restrictions-in-interest affecting the building parcel or land parcel. Express conditions and restrictions-in-interest are in fact

⁴ See also paragraph 1.3 (Importance and impact of contract law).

⁵ The STA Amendment Act 2007 provides for issuance of strata title to "land parcels" (see s 6(1) of the STA).

⁶ For a further discussion on the pitfalls relating to searches on the strata titles, see paragraph 11.1 (Land searches).

endorsed on Form 3 in the relevant book of the strata register in respect of the lot on which the building is sited.⁷

3.4 TAKING CLIENT'S INSTRUCTIONS/INTERVIEW FORMS

The NLC defines a "purchaser" as a person or body who in good faith and for valuable consideration acquires title to, or any interest in land (s 5). He is also referred to as the "transferee" in the NLC where the context admits.⁸ A "vendor" is not defined in s 5 but the term "transferor" is used throughout Part 14 (Transfers) to refer to a person in the position of a vendor who intends to transfer alienated land to the "transferee".⁹

A client's statements should be corroborated by documentary evidence before being incorporated into the SPA. Similarly, information provided by or on behalf of the other side should not be accepted without verification.¹⁰

A practitioner may be sued for negligent misrepresentation by the opposite party for statements made in reliance on his own client's representation.¹¹ More specifically, the solicitor acting for a vendor should verify the bona fides of his client or else he may be held liable to the purchaser for breach of warranty of authority to act when the "vendor" turns out to be one who does not have title to the property. If the solicitor has been misled by his client and even though he may have acted in good faith, he will be liable to be sued by a third person who has been induced by his conduct to believe that he has the authority to act and who by acting upon such belief, has suffered loss in consequence of the absence of authority.¹²

Nevertheless, for the solicitor to be so liable, he should not merely have acted for the purported vendor who is a rogue but must have induced the purchaser to enter into the sale and purchase. Thus, where the purchaser has already agreed with the impostor vendor to enter into

⁷ Section 15(2)(b)(i) of the STA. The strata register is made up of a series of books. There is one book for each lot and one Form 3 for each book. See further paragraph 11.1.2 (Searches into strata titles).

⁸ For example, s 215(2) of the NLC.

⁹ *Ibid.* Both the terms are defined in s 414 in relation to "Registration of Statutory Vesting".

¹⁰ See *Anthony Ting Chio Pang v Wong Bing Seng* [1997] 2 CLJ 831 (a Sarawak case) where the purported owner of land used a report on a lost identity card to cheat the purchaser. The case is also notable because the legal assistant "as the solicitor in charge of the conveyancing" was found to be liable for the loss suffered by the purchaser (at 836). See also [2008] 1 LNS 704 on a related issue which mentioned that the appeal by the solicitor was rejected.

¹¹ *Lau Tek Sen @ Lau Seng Chong & 3 Ors v SK Song* [1995] 2 AMR 1225; [1995] 2 CLJ 425.

¹² *Ibid.*

the SPA before the appointment of the solicitor, the solicitor will not be liable for breach of warranty authority to act—the solicitor's only duty under the circumstance is confined merely to verifying the contents of the issue document of title and the vendor's identity card.¹³

The interview process should be treated as more than just a formality. It is often the case though that the lawyer commences work on the SPA or instructs his staff to prepare the firm's in-house "standard" SPA based just on the terms of the option to purchase.¹⁴ Meeting the client face-to-face provides one an opportunity to assess the personality of the client (of if a corporate client, the officer representing the client). As a general rule, a solicitor should not agree to act for a client unless she has met the client at least once.

The fact that the client did not ask for specific advice in writing from the solicitor will not absolve the solicitors from liability for negligent advice—the practitioner is expected to give complete advice to ensure that the transaction can be completed.¹⁵ The role of the practitioner at the interview should be less of passive fact recording and more of active probing of underlying facts which may affect the conveyancing process. The practitioner however should be wary of volunteering advice beyond what the client expects or has instructed. A suit for negligence may be founded on such volunteer advice.¹⁶

It is well established that a solicitor owes a duty to his client both in contract and in tort.¹⁷ Even if the solicitor is acting for the vendor (a developer), he should be particularly careful if the transaction is fraught with risks to the purchaser.¹⁸ It has also been said that a solicitor who has been retained by his client and whose fees and costs are paid by his client is in law and in fact the agent of the client.¹⁹

13 *Fullji Realty Sdn Bhd v Lim Yong Meng* [2007] 3 MLJ 39.

14 See Chapter 4: Options to Purchase/Sell.

15 *Megat Najmuddin bin Megat Khas & Ors v Perwira Habib Bank Malaysia Berhad* [2003] 4 MLJ 65, CA.

16 See *Megat Najmuddin* case, *ibid.*

17 For example, *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126 and *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359, CA. For English cases, see *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs and Kemp (a firm)* [1979] Ch 384 and *White & Anor v Jones & Anor* [1995] 2 AC 207; [1995] 1 All ER 691. Also *Dato' Leong Pow Kue & Ors v Gan Kim Sing & Ors* [1998] 7 MLJ 133, a case involving a solicitor's failure to conduct adequate searches. The question was asked and the answer given as follows: "What if the solicitor is in breach of his contractual duty to his client, or if that solicitor fails to use proper care and his client suffers a loss, would that solicitor be liable in damages? The answer is in the positive even if the claim in negligence is for purely financial loss."

18 *Loh Bee Tuan v Shing Yin Construction (Kota Kinabalu) Sdn Bhd & [2002] 2 MLJ 532*. The case involves a sale and purchase in Sabah but the principles are just as applicable in West Malaysia.

19 *Wong Kiong Hung & Anor v Chang Siew Lam* [2009] 3 CLJ 751, CA.

However, a solicitor is not guilty of negligence if he merely acted on his client's instructions in the reasonable belief as to its correctness.²⁰ The solicitor too would not be negligent if he had explained fully the legal position to his client and the client still instructed him to proceed.²¹ Thus, the importance of meeting and knowing your client.

A solicitor who acts for more than one party in the same transaction may bring on himself undesirable consequences.²²

Interview forms²³ serve the following purposes:

- (1) as a checklist of the information and documents required to be furnished by the client for input into the first draft SPA;
- (2) the recorded information will help the secretary to follow up on searches and getting up work as well as in the lodgment of relevant forms such as the CKHT forms.

The meeting with the client will also allow a practitioner to take clear and specific instructions. Terms as used by a client may have different meanings given to them by the practitioner. A dispute may arise over even a simple term such as "month"²⁴ or "day".²⁵ The dispute perhaps could have been avoided had the practitioner taken the extra step of clarifying the meaning of the term or ascertaining the intentions of the parties.

3.5 INITIAL PREPARATION/GETTING-UP

All aspects of the transaction should have been considered and all contingencies covered prior to the signing of the SPA. The success or failure of the SPA is easily proved, and quite speedily too, since most SPAs are supposed to conclude within a few months of signing. If one is acting for the vendor, the vendor expects to be paid the sum contracted for on completion. If one is acting for the purchaser, title should vest in

20 *Lewis v Collard* (1853) 14 CB 208 cited in the *Dato' Leong* case (supra n 17).

21 *Lee v Dixon* (1863) 3 F & F 744; 176 ER 341 cited in the *Dato' Leong* case (supra n 17).

22 *Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor; Dato' Au Development Sdn Bhd v Malayan United Finance Bhd & Anor* [1989] 3 MLJ 434. For an interesting case on the relationship between client and solicitor and the rules of practice etiquette in relation to acting for relatives, see *Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89.

23 See Schedule 1: Interview Forms.

24 See *Jeow Fong Mei v Chong Mee Yoke* [1996] 1 MLJ 387; [1996] 2 CLJ 23, CA.

25 See *Lim Yoh v Astana Strategi (M) Sdn Bhd & Anor* [1998] 3 MLJ 117 in relation to a completion date which falls on a Sunday which therefore should have been moved to the next working day.

the name of the purchaser in the manner as agreed. These are events which a non-legal person can understand and expect to happen. If a client has performed all that he is required contractually and still not obtain what has been bargained for, it will be difficult to rely on legal jargon to explain why the transaction has not turned out as envisaged.

By their nature and because of the deadlines to be met, the different stages making up a conveyancing transaction cannot be carried out sequentially. The different stages have to be done concurrently so that all the necessary information and documents will be available at the appropriate time when required. A prudent conveyancer will provide for sufficient leeway to cover unforeseen delays. The results of the concurrent tasks (some of which, for example, land searches, may have to be redone) should converge at the most critical point in the conveyancing process—the completion date when the client expects to be advised of the final outcome. Along the way toward completion, the client should be informed at all times of the latest status of the transaction.

An effective review of the facts will help you to determine the timeframe for completion and highlight to the client the possible difficulties that may be encountered subsequently. It is a good technique to inform the client in advance of possible difficulties—a client is not likely to be happy if he is informed of an issue which will cause delay only near completion when such an issue could have been discovered much earlier or disclosed to him earlier.

Since each state has its own Land Rules, a practitioner dealing with land outside of her “home” state where the Land Rules may differ should take extra caution. It will be prudent to either check the Land Rules of the state in which the property is sited or seek the advice of a practitioner who is familiar with the local practice. It may be disastrous to assume that the Land Rules or the customary practice of the “home” state are the same as those of the “outstation” state. Practical problems which may be encountered include the following:

- (1) the manner of marking or making deletions on an instrument of dealing or the attaching of continuation sheets will likely differ;
- (2) the amount of registration fees can differ substantially across the NLC states;²⁶

²⁶ The amount of registration fees payable on the Form 14A poses peculiar problems. A number of states such as Selangor, Penang, Perak, Pahang and Johor collect registration fees based on the amount of consideration stated in the Form 14A. However, not all the states set a maximum on the registration fees. The result is that the registration fee on a Form 14A may be substantially less in Selangor (which sets a maximum registration

Continued on next page

- (3) delay in the adjudication of stamp duty payable²⁷ and stamping of the MoT if, for example, the MoT after its submission has to be redirected to another valuation department which has the proper jurisdiction over the property;
- (4) the accompanying documents to the instrument of dealing. The practice varies widely among the Land Registries in the different NLC states. Most require copies of identity cards of the individuals involved and corporate documents (such as resolutions, Forms 24 (Return of allotment of shares) and 49 (Register of directors, etc.)²⁸ and the memorandum and articles of association) if the transaction involves a company. Others go to the extent of requiring a copy of the CCoM's printout of the official search results into a company to prove the directorship of the signatories who sign on behalf of the company.

All these sound routine to some and such tasks are usually left to either the conveyancing secretaries or the presentation clerks. Unfortunately, in the case of outstation presentation, correcting a mistake or forwarding a missing supporting document usually takes more than the normal time for local presentation and a deadline could well be missed.

3.6 SETTING UP PROCEDURAL CHECKLISTS

Upon a review of the facts, an appropriate procedural checklist should be drawn up.²⁹ This checklist should set out the documents and the procedural steps required for each stage of the transaction. Breaking up a transaction into “milestones” will usually make it more manageable. A stage in the transaction which is behind schedule can be expedited if discovered early before the delay gets out of control and impacts on the remaining stages.

Checklists however are not a substitute for the personal supervision of the transaction by the practitioner, given that even low-end conveyancing

fee of RM1,000) than in say, Johor (which does not set a maximum). The problem is compounded usually by the issue of penalty which may have been incurred on the Form 14A as a result of delays caused, for example, in the adjudication and stamping of the Form 14A or by factors beyond the control of the parties, such as delay by the present chargee of the land in delivering the discharge of charge (Form 16N) to be presented together with the Form 14A. See further paragraph 18.6.2 (Fees for registration of MoT).

²⁷ For the meaning of “adjudication”, see Chapter 12: Stamp Duty.

²⁸ The Form 49 is required to prove that the authorised signatories or witnesses to the affixing of the common seal (usually directors) have been duly appointed. See *KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* [1994] 2 MLJ 201. See also s 210(3) of the NLC.

²⁹ See Schedule 3: SPA Checklists for sample checklists.

- (1) gender terms;
- (2) singulars and plurals, including pronouns or references to a natural person.

This provision may also be specific, for example, in relation to computation of time, on how "day",¹⁵¹ "month"¹⁵² and "year" are to be construed and whether the calculation of a notice period is inclusive of the date of receipt of the notice.

In certain instances, the interpretation clause may also stipulate that the terms used will have the meaning given to them in specific statutes, such as the NLC or that the construction of terms not expressly defined should be made with reference to the Interpretation Act.

¹⁵¹ See *Lim Yoh v Astana Strategi (M) Sdn Bhd & Anor* [1998] 3 MLJ 117 for a case where the SPA did not provide that completion date which fell on a Sunday should have been moved to the next working day.

¹⁵² See *Jeow Fong Mei v Chong Mee Yoke* [1996] 1 MLJ 387.

Chapter 8

Terms of the SPA (II)

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This chapter discusses the completion process of a SPA.

8.1 PURCHASER'S RIGHT TO LODGE PRIVATE CAVEAT

If individual title is already issued to the property, the purchaser will be entitled to lodge her private caveat over the property upon the signing of the SPA and payment of the deposit. Her "registrable interest" would have arisen at this point.¹ For a conditional SPA, however, the registrable

¹ See s 323 and paragraph 17.4 (Time of lodgment of private caveat).

interest will arise only upon the fulfilment of the conditions precedent.² Similarly, if a property is subject to a restriction on transfer, then, the registrable interest will arise only after the parties have made a formal application for the consent to transfer from the State Authority and it will be only a matter of time before the consent will be obtained.³

What if the SPA does not provide expressly for the lodgment of the purchaser's private caveat? The purchaser should still have the right to lodge his caveat so long as he has a "registrable interest" since his right under s 323 of the NLC is a statutory right and does not arise merely by contract. Indeed, it was said:

the [purchaser] cannot claim title to or any registrable interest in the property in question merely on the strength of the sale agreement which is a non-statutory and non-registrable instrument, ...⁴

A more difficult issue involves the lodgment of a private caveat over part of land or interest in land. It is now settled that a private caveat may be lodged over part of land or interest in land.⁵ However, issues relating to the identification of the exact portion of the land or the interest in land and exact effect of the private caveat (and therefore the wording of the supporting statutory declaration) will require careful drafting.⁶ If the title to the affected portion of land or interest in land will be issued only in the distant future, the lapsing of the private caveat and the need to reodge will have to be considered. There is also the risk that the caveat may be accidentally endorsed on all the individual titles upon subdivision of the master land.⁷

The SPA—if there is an express provision that the purchaser is entitled to lodge her private caveat—will also contain an express obligation to withdraw her private caveat if the SPA is terminated subsequently. This involves clear terms as to who the stakeholder of the duly signed withdrawal forms (Form 19G) should be and his mandate to proceed with the withdrawal upon the occurrence of the event provided for.

2 *Niffira Pertama Sdn Bhd v Lembaga Kemajuan Johor Tenggara & Ors* [1990] 2 CLJ 648 and *Abdul Rahim v Vallapai Shaik* [1987] 2 CLJ 107, SC.

3 *Goo Hee Sing v Will Raja a/l Perumal & Anor* [1993] 2 AMR 44.

4 *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53, FC at 54.

5 See paragraph 17.5 (Right to caveat part of alienated land/interest in land).

6 See s 323(3)(b) and (c).

7 Sections 136(1)(e) and 137(1)(d) do not list the consent of the private caveator as one of the requirements for the approval of subdivision. The proprietor of the master land has no obligation to give notice to the purchaser for her to withdraw her private caveat. Contrast s 204C(2)(b) if the subdivision is carried out by way of surrender and realienation. See further paragraph 20.8.1 (Effect of subdivision under the NLC).

Unless extension of time has been granted to the purchaser, failure by the purchaser to complete will oblige her to withdraw her private caveat.⁸

A private caveat is an "encumbrance" within the meaning of the NLC provisions but one may still encounter disagreement on this point in negotiation. To avoid any dispute, the transfer should be "free from all encumbrances including private caveats save for the Purchaser's private caveat, if any ...".⁹

In the normal course of events, the purchaser's private caveat will be withdrawn at the time of presentation of the MoT for registration. An exception will be where the SPA is terminated early, in which case the purchaser is obliged to withdraw her private caveat if she is in default; conversely, if the vendor is in default or if the purchaser seeks specific performance, the validity of the private caveat in a dispute between the parties will then have to be resolved by the courts.¹⁰

The vendor as the proprietor is entitled to receive notification in Form 19A from the Registrar on the lodgment of the purchaser's private caveat.¹¹

8.2 ADJUDICATION AND STAMPING OF MOT OR SALE ASSIGNMENT

As a general rule, all documents have to be stamped within 30 days of their execution (usually evidenced by their dates) or within 30 days after it has been first received in Malaysia if it has been executed out of Malaysia.¹² In the case of the MoT or sale assignment, this document has to be submitted for adjudication within 30 days of its execution and dating. The person who makes such a submission for adjudication will be deemed by the Collector of Stamp Duty to have complied with s 47 with regard to the 30-day deadline.

Two dates are required to be shown on the MoT, namely, the date of signing by the vendor which may be different from the date when the purchaser signs on the MoT. The vendor's signing should pre-date the purchaser's signing or at least be on the same day, the reason being that unless the vendor has consented to the transfer, the purchaser will not be

8 *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212, PC.

9 *Lee Chin Cheng Dengkil Oil Palm v Kaplands Sdn Bhd* [2003] 1 MLJ 177, CA. See also paragraph 17.1 (Is a private caveat an encumbrance?).

10 See further paragraph 17.7 (Withdrawal or removal of private caveats).

11 Section 324(3) of the NLC. Only notice to the proprietor and not other interested parties such as the registered chargee or lessee is provided for under this section. Contrast s 321(2) in relation to a Registrar's caveat.

12 Section 47 of the Stamp Act.

in a position to receive the transfer or assignment. No such precaution is necessary for the sale assignment if only one date of execution is shown on this document. If the execution page provides for separate dates of execution by the vendor and the purchaser, then, the same precaution as in the case of the MoT will have to be taken for the sale assignment.

If the SPA is not subject to any condition precedent, the MoT will be dated almost immediately after the dating of the SPA and thereafter submitted for adjudication. This is to provide sufficient time for the valuation process and the issuance of the notice of stamp duty payable by the Collector. If however the SPA is a conditional SPA, then the discussion in paragraph 6.5.3 (Date of submission of MoT or the sale assignment for adjudication) will be relevant. If the SPA is conditional, the MoT should be submitted for adjudication only when the SPA becomes unconditional.

Under paragraph 5 of the Third Schedule to the Stamp Act, the stamp duty on the MoT or the sale assignment is payable by the purchaser¹³ and not the vendor. The estimated stamp duty amount should be deposited with the stakeholder *prior* to submission for adjudication of the documents for stamp duty payable. The reason is that s 40 of the Stamp Act requires the amount assessed to be paid within 14 days from the date of the notice of assessment issued by the Stamp Office or “within such further period ..., as the Collector when giving notice of assessment ... may specify”.¹⁴

8.3 UNDERTAKINGS

8.3.1 Vendor’s undertaking to refund purchaser’s loan

The vendor is usually required to give an undertaking to the purchaser’s financier to refund the purchaser’s loan which is paid to him upon presentation of the MoT but pending its registration in the unfortunate event that the registration of the MoT is subsequently rejected. The reason is that with the non-registration of the MoT, the financier’s charge will also not be registered.¹⁵

Unlike a sale and purchase in the form of Schedule G, H, I or J to the HDR where the developer is obliged statutorily to give the undertaking,¹⁶ the

¹³ The transferee (MoT) or assignee (sale assignment).

¹⁴ Extension of time of up to 30 days from the date of the notice of assessment will usually be granted in the notice itself.

¹⁵ On the time gap between presentation and registration, see Chapter 19: Presentation and Registration.

¹⁶ Clause 5(6) of Schedules G and H to the HDR.

vendor is not obliged to give this undertaking unless the SPA expressly provides for it. The alternative is for the financier to release the loan sum upon actual registration of the MoT and the financier’s charge; this approach however does not accord with the customary practice of releasing the loan sum upon presentation but prior to registration of the MoT.¹⁷

The negotiation on the form and wording of the undertaking may also be a time consuming process. The vendor will likely agree to a refund only if the non-registration is caused by him whereas the financier having been deprived of its security will want a refund no matter who caused the rejection. Add to this the problem relating to the nuances of certain of the words used in the undertaking such as “if the registration is rejected whether caused *directly or indirectly* by the vendor” and one should not be surprised to hear that SPAs have been aborted over this undertaking.

8.3.2 Financier’s undertaking to release the loan sum

This undertaking is the reverse side of an exchange of undertakings between the vendor and the purchaser’s financier—the other side being the vendor’s undertaking discussed just above.

If the purchaser has obtained a loan to part-finance her purchase of the property, the stamped MoT and the original issue document¹⁸ of title will have to be delivered to the financier. This is to enable it to present the MoT together with its charge over the property for registration simultaneously. How then is the vendor to safeguard his position? The vendor will agree to the release of the stamped MoT¹⁹ and the original issue document of title in reliance on the financier’s undertaking to release the loan sum upon the presentation of the MoT and its charge. The terms and conditions of the financier’s undertaking as such will be important.²⁰ Unless the SPA expressly provides for an unconditional

¹⁷ See paragraph 8.7.1 (Appointment of stakeholder to hold the balance of the purchase price).

¹⁸ If the property has been charged by the vendor, the original issue document of title will be obtained from the vendor’s financier upon redemption. See paragraph 8.6 (Redemption of the property). The manner of release of the loan sum will then be firstly, the payment of the redemption sum to obtain the original issue document of title and, secondly, the balance of the loan upon presentation of the MoT and the purchaser’s financier’s charge.

¹⁹ The stamped MoT will be delivered by the purchaser’s solicitors.

²⁰ For sample wording, see the following forms in Schedule 9: Sample letters and undertakings for end-financing:

- Form (14) (Financier’s undertaking to the vendor to release purchaser’s loan (property with individual title (not charged)); and
- Form (15) (Financier’s undertaking to the vendor to release purchaser’s loan (subsale: property without individual title—rights to principal SPA not assigned).

undertaking, the purchaser's obligation is to obtain only a conditional undertaking from her financier.²¹

If the property has been charged to the vendor's financier, the purchaser's financier's undertaking addressed to the vendor will not likely be relevant since the original title will not be in the vendor's custody. The process then will involve the exchange of confirmations and undertakings between the purchaser's financier and the vendor's financier which however will cover only the redemption sum. To take care of the remaining balance purchase price (after payment of the redemption sum), the SPA should provide that the stamped MoT is to be delivered by the purchaser's solicitors to and be accepted by the purchaser's financier on the stipulation that the loan will be released in the manner intended, namely, firstly, towards redemption and the balance (less the redemption sum) upon presentation of its charge.

8.3.3 Other undertakings

As a general rule, the undertakings between the parties should be incorporated into the SPA based on relevant facts which should all be disclosed prior to signing. Further undertakings may however be prompted by the discovery of new facts after the signing of the SPA. For example, the bankruptcy status of the vendor may still be in doubt or it is uncertain if a land acquisition notice has actually lapsed. The purchaser may request for additional confirmations and undertakings from the vendor in relation to these matters. These undertakings for practicality are usually issued in the form of letters addressed by the issuer directly to the other party.

The role of the solicitor in the conveyancing process other than providing legal advice to his client is restricted to that of a stakeholder or an agent in relation to the monies or documents involved. Neither solicitor acting for the parties should get involved in the transaction by providing any undertaking.

8.4 COMPLETION DOCUMENTS/DELIVERY TO FINANCIER/PRESENTATION OF DOCUMENTS

Completion is usually carried out by the delivery of the completion documents to either:

²¹ *Luwasa (Malaysia) Sdn Bhd v Ong Siew Oi* [2008] 6 AMR 309; [2009] 1 CLJ 774, CA in relation to a sale and purchase of a property without individual title.

- (1) the purchaser's solicitors; or
- (2) the purchaser's financier's solicitors.

The completion documents will be delivered in exchange for payment of the balance purchase price to the stakeholder. If the purchaser requires a loan, the documents are delivered to the purchaser's financier's solicitors pursuant to exchanges of confirmations and undertakings between the vendor's financier (if redemption is required) or the vendor (in the case of a property which is not encumbered), and the purchaser's financier.²²

The purchaser should also have paid the differential sum. This differential sum forms part of the balance purchase price and as such, should be held by the stakeholder. With the differential sum paid to the stakeholder and the financier's undertaking on the loan in his possession, the vendor has the assurance that the purchaser will have the means to complete the SPA if he releases the completion documents.²³ The differential sum will be released to the vendor upon the presentation of the MoT together with the loan sum.

The solicitors concerned will then attend to the presentation of the completion documents at the Land Registry. The completion documents will normally consist of the following:

- (1) the original issue document of title;
- (2) the duly stamped MoT;
- (3) payment receipts for current quit rent and assessment rates;
- (4) if the property is subject to any restrictions-in-interest, the approvals of the State Authority;
- (5) if the property is charged, the redemption documents.²⁴

If either or both of the parties are companies, their resolutions and constitutional documents evidencing their legal capacities will also have to be provided.

²² See paragraph 8.3 (Undertakings).

²³ See *Luwasa (Malaysia) Sdn Bhd v Ong Siew Oi* [2008] 6 AMR 309; [2009] 1 CLJ 774, CA.

²⁴ See paragraph 8.6 (Redemption of the property).

If the property is without individual title, the relevant documents will be:

- (1) the stamped sale assignment in place of the issue document of title and the stamped MoT; and
- (2) the stamped DRR in place of the discharge of charge.

The perfection and delivery of these two documents pose peculiar problems. The issues are highlighted in paragraphs 8.5 (Notice of sale assignment and obtaining of developer's consent) and 8.19.4 (Sale assignment).

8.5 NOTICE OF SALE ASSIGNMENT AND OBTAINING OF DEVELOPER'S CONSENT

In the case of a property without individual title, when should notice of the sale assignment be given to the developer under s 22D of the HDA or, in the case of non-housing property, when should the sale assignment be forwarded to the developer for endorsement of its consent?

The sale assignment can stand on its own as evidence of beneficial ownership—it does not require further registration at any public registry. From the vendor's point of view, the notice of the sale assignment should be given or the sale assignment should be forwarded to the developer for endorsement only upon payment of the full purchase price or upon receipt by the vendor of (1) the purchaser's financier's undertaking to pay the loan sum; and (2) the differential sum.

It is common however to have variations to this basic rule. For example, the purchaser may be allowed to give notice to or obtain the consent of the developer even before payment of the full purchase price provided that the purchaser's solicitors as stakeholder will not date the original sale assignment and submit it for adjudication of stamp duty payable until the purchaser's financier has given its undertaking on the loan and the differential sum has been paid by the purchaser. In any case, if the property has to be redeemed, the sale assignment will be dated only after the DRR from the vendor's financier is obtained.²⁵

²⁵ See further paragraph 8.19.4 (Sale assignment).

8.6 REDEMPTION OF THE PROPERTY

8.6.1 Vendor's right and obligation to redeem

What is commonly referred to in practice as the right of redemption has in fact been judicially called only the right to a discharge of charge. The equity of redemption is not applicable under the NLC:

To speak of the equity of redemption or the like of it in our situation under the Land Code is clearly technically and legally incorrect. The term so used in relation to a charge is not only a misnomer but nonsensical.²⁶

Neither the purchaser nor the vendor can therefore be said to have an equity of redemption.

It is the vendor (as chargor and borrower) and not the purchaser who has the contractual right to discharge the property upon repayment of the loan.²⁷ Such a right is derived from the terms of the charge entered into between the vendor and the chargee lender. Tender of payment should therefore be made through the vendor or his solicitors or, if by the purchaser's financier, be authorised by the vendor (usually when obtaining the redemption statement).

8.6.2 Delivery and contents of the redemption statement

Disagreement may arise over the contents of the redemption statement, especially in relation to the wording of the vendor's financier's undertaking to deliver the redemption documents.

If the purchaser intends to obtain a loan to complete the purchase, the redemption statement will have to be addressed to her financier. This is a requirement of the financier to prove privity in relation to the undertakings in the redemption statement. The request for the redemption statement however will likely have to be made through the vendor or his solicitors because of the confidentiality provisions in the Banking and Financial Institutions Act 1989.²⁸ The vendor may have to give his written consent to his financier for the issuance of the redemption statement to a third party such as the purchaser's financier.

The redemption provisions in the SPA should cover the duty of the vendor to:

²⁶ *Malayan United Finance Bhd v Tay Lay Soon* [1991] 1 MLJ 504, SC at 508, not following *Eng Ah Mooi & Ors v Oversea Chinese Banking Corporation Ltd* [1983] 1 MLJ 209, FC. Also *Filati Lastex Elastofibre (M) Sdn Bhd v Nikseng Development Sdn Bhd* [2009] 8 MLJ 374.

²⁷ *Tay Lay Soon* case, *ibid*.

²⁸ See ss 96 and 97 of the BAFIA.

- (1) obtain the redemption statement from his financier within reasonable time upon request by the purchaser or her financier;²⁹
- (2) top up the redemption sum if there is a shortfall; and
- (3) meet the deadline for the delivery of the redemption documents upon payment of the redemption sum.³⁰

How should extension of time be given if there is a delay in the issuance of the redemption statement or the delivery of the redemption documents? From the vendor's point of view, extension of time after the expiry of the time given by the purchaser to obtain the redemption statement will not be a fair solution if the delay takes place well within the completion period and will not prejudice the purchaser. At the same time, completion depends on the issuance of the redemption statement. A compromise may be the following:

Delivery of Redemption Statement by Vendor

Subject to the Purchaser having made the necessary request and providing to the Vendor the required information expeditiously without delay, any failure or undue delay by the Chargee in issuing the Redemption Statement shall not be attributed to the Purchaser and for this purpose, there shall be "failure or undue delay" by the Chargee if:

- (a) the Chargee fails to forward or delays in forwarding the Redemption Statement within seven (7) working days after request by the Purchaser or her solicitors ("Expected Redemption/Stmt Date"); and
- (b) the Redemption Statement is received by the Purchaser or her solicitors later than the date which is one (1) calendar month before the Completion Date;

and the Completion Period shall be deemed to have been extended with no interest payable for the period between the date immediately after the Expected Redemption/Stmt Date and the actual date of the Purchaser's or the Financier's receipt of the Redemption Statement.

In the above example, time will stop running if the vendor fails to deliver the redemption statement after seven working days but only if the delay

²⁹ See the Bar Council's Circular No 34/2009 dated February 11, 2009 and No 219/2009 dated July 23, 2009 in relation to the timeframe of seven to fourteen days for "Issuance of Redemption Statement and Release of Original Title of Property" by financial institutions. Bank Negara's ruling and guideline however is only directory. Any delay by the financier will likely bring censure by Bank Negara but will not help the purchaser unless the SPA expressly provides that any delay in the issuance of the redemption statement and the release of the redemption documents should be the responsibility of the vendor.

³⁰ See *ibid* and the technique used in paragraph 7.10.3 (Extension time arising from delays caused by third parties or the vendor).

falls within the third month (usually the last month or such other period to be negotiated) of the completion period, the rationale being that any delay which falls within the early part of the completion period will not jeopardise the purchaser's interest.³¹ Yet another alternative is to give the vendor a longer period of, say, 15 working days to obtain the redemption statement, so that for all intents and purposes, the expiry of this period will likely fall near the end of the second month of the completion period.³²

8.6.3 Shortfall in redemption sum/Vendor's delay or refusal to top up

In a falling property market where the current property price is low, it may sometimes happen that the redemption sum is more than the balance of the purchase price after payment of the deposit. This is usually caused by:

- (1) the vendor over-borrowing on the security of the property which was valued at the height of the market; and/or
- (2) the steep drop in the property market.

The SPA has to provide expressly that the vendor has to top up any shortfall in the balance purchase price to meet the redemption sum.³³ In certain situations, for example, where the purchase price runs into several millions and the drop in the market has been substantial, it may even be prudent to obtain the redemption statement before the release of the deposit sum.³⁴

The contractual safeguard is to provide:

- (1) a representation by the vendor in the SPA that the balance purchase price is sufficient to cover the redemption sum; and

³¹ The purchaser's solicitors or her financier's solicitors will still be attending to the MoT and the loan documents respectively during this period and it will not procedurally be possible for the purchaser to complete the SPA even if the redemption statement is made available then.

³² The request for the redemption statement should be made by the purchaser's financier's solicitors through the vendor's solicitors if the purchaser requires a loan. This can be done only after the loan is approved.

³³ See *Mukhtiar Singh all Amar Singh & Anor v Ngan Yip Bun & Anor* [1994] 3 CLJ 800 where the balance purchase price was insufficient for redemption of the property.

³⁴ It may be unwise to rely solely on the representation of the vendor that the amount owing under the land charge account is less than the balance purchase price. The chargee is entitled to consolidate all the accounts of the vendor held with the chargee. See *Public Finance Bhd v Hock Seng Housing Development Sdn Bhd (See Ha Chai & Ors, Interveners)* [1992] 1 MLJ 442 on the requirements for the consolidation of accounts.

NLC Forms and Forms of Assignment

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As has been pointed out elsewhere in this book,¹ for a system of registration such as the Torrens system to be effective, the form of the instruments of dealing should be certain and easy to understand and use. The prescribed form of the instruments of dealing are set out in Schedule 1 to the NLC. When these forms are used correctly, dealings in land will be expedited and the likelihood of rejection caused by errors in form-filling should be minimised. The Registrar may "publish such notes or directions as he may consider necessary or desirable for the guidance of persons and bodies using any of the said forms".²

As may be observed from a perusal of Schedule 1, each of the prescribed forms has been given a number and it covers the following essentials which together make up an instrument:

- (1) format of the form (including the heading to the form and the schedule of lands);

¹ See paragraph 1.6.1 (Objectives of the NLC).

² Section 376(2) of the NLC.

- (2) content;
- (3) execution;
- (4) attestation.

Each of the above form requirements is discussed further below. It is recommended however that the reader perused paragraphs 1–11A of Schedule 10 (Supplementary Provisions as to Forms and Procedure)³ which set out how:

- (1) a NLC form may be produced (paragraphs 3, 6, 7 and 9–11);
- (2) the form's blank spaces or entries are to be filled up (paragraphs 4, 8 and 8A);
- (3) the form's alternatives may be varied or deleted (paragraphs 2 and 11A); and
- (4) a signature is to be affixed (paragraphs 5 and 11).

Schedule 10 applies to all the forms "specified in the First Schedule in relation to a *dealing*" under the NLC.⁴ "Dealing" is commonly used in practice with an expanded but loose meaning to include even those forms which do not involve dealings. Thus, practitioners apply the supplementary provisions in Schedule 10 to forms such as, for example, an entry or withdrawal of private caveat which strictly does not come within the meaning of a "dealing".

16.1 FORM OF INSTRUMENTS OF DEALING

16.1.1 Types of forms

Every instrument effecting any dealing under the NLC shall be in such of the forms as set out in Schedule 1 to the NLC.⁵ Variations are allowed so long as the substance is not affected. All forms unless otherwise indicated will have the same heading and schedule as those set out in Form 13A. The attestation clause, which should be placed immediately after a signature,⁶ shall be in Form 13B. If the person attesting any execution has a seal of office, he shall authenticate his signature with his seal.⁷

³ See s 436 of the NLC.

⁴ For the meaning of "dealing", see paragraph 2.13.1 (Types of dealing).

⁵ Section 207(1).

⁶ Section 211(2).

⁷ Section 211(3).

The common forms used in conveyancing practice are the following:⁸

- (1) Form 14A (Transfer of land, share or lease);
- (2) Form 16A (Charge);
- (3) Form 16F (Certificate of sale by the court);
- (4) Form 16I (Certificate of sale by the Land Administrator);
- (5) Form 16N (Discharge of charge);
- (6) Form 19B (Application for entry of private caveat);
- (7) Form 19D (Application for entry of lien-holder's caveat).

They are used for both lands alienated under the NLC as well as for strata titles under the Strata Titles Act.⁹ For example, s 209(2) expressly provides that the NLC forms shall apply to "a parcel of a building held under subsidiary title". Various forms other than those listed above are also required; some are already provided for in Schedule 1 to the NLC but others have no particular form and have to be adopted with modifications.¹⁰ Examples of the latter forms will be the application for change of name of the proprietor and the withdrawal of lien-holder's caveat.

⁸ The forms listed in Schedule 1 which relate to dealings are:

- (1) Form 14A (Transfer of land, share in land or a lease);
- (2) Form 14B (Transfer of charge);
- (3) Form 15A (Lease of land);
- (4) Form 15B (Sublease of land);
- (5) Form 15C (Surrender of a lease);
- (6) Form 16A (Charge—to secure payment of a principal sum);
- (7) Form 16B (Charge—to secure payment of a periodic sum);
- (8) Form 16C (Postponement of a charge);
- (9) Form 16F (Certificate of sale by the court);
- (10) Form 16H (Order for sale at the instance of the chargee);
- (11) Form 16I (Certificate of sale by the Land Administrator);
- (12) Form 16N (Discharge of a charge);
- (13) Form 17A (Grant of easement);
- (14) Form 17B (Grant of a cross-easement (in respect of party-wall));
- (15) Form 17C (Release of easement);
- (16) Form 18A (Application for the cancellation of lease).

Form 13A (Heading and Schedule—For insertion in all forms of dealing) should also be noted.

⁹ The forms are also used for lands held under Malay Reservations. See paragraph 9.11 (Land in Malay Reservations).

¹⁰ See also Chapter 18: The State Land Rules in relation to forms prescribed by the Land Rules.

16.1.2 Form sizes

Requirement of form sizes are provided under paragraph 6 of Schedule 10 (Supplementary Provision as to Forms and Procedure) to the NLC.

The practice adopted by the Land Registries varies. What is certain though is that any dealing in land at *any* of the Land Registries must be in A3 size form.¹¹ Some Land Registries allow forms which do not effect dealings such as Form 19B (Application for Entry of Private Caveat) and Form 19G (Withdrawal of Private Caveat) to be in non-A3 size, usually A4 size; other Registries however may apply the same form requirements applicable to a dealing to all the forms regardless of the purpose. This confusion is compounded by the fact that a practitioner practising in one state may not know of the peculiar requirements of the Land Registries in other states. The requirements of Land Registries in other states in relation to form size (as well as the other issues on registration such as penalties for late presentation) should be ascertained early prior to preparation of the form.

As a general rule, A3 size forms is advisable unless the Land Rules expressly allow for a different size.

16.2 VARIATIONS TO THE NLC FORMS

The NLC forms are statutory forms and as such their format and mandatory wording can be amended only by legislation. The NLC however provides for limited insertion and/or variation to the wording of the NLC forms under:

- (1) the proviso to s 207(1) of the NLC;¹² and

11 See paragraphs 1 and 6 of Schedule 10 to the NLC. For the meaning of "dealing", see s 205 of the NLC and paragraph 2.13.1 (Types of dealing).

12 Section 207 (Form of instruments of dealing):

- (1) Every instrument effecting any dealing under this Act shall be in such of the forms in the First Schedule as is specified in relation to the dealing in question in the appropriate Part of this Division:
Provided that the form so specified for any dealing may, so long as the variation is not in a matter of substance, be used in any particular case with such adaptations, alterations or additions as may be rendered necessary by the character of the parties or other circumstances of the case.
- (2) The Headings and Schedules to be inserted in instruments of dealing as indicated by the relevant forms in the First Schedule shall, except where otherwise indicated in any particular form, be those shown in Form 13A.
- (3) The provisions of section 211 shall have effect with respect to the inclusion of attestation clauses in instruments of dealing, and the form of such clauses.

- (2) paragraph 3 of Schedule 10 to the NLC.¹³

One may make "adaptations, alterations or additions" to a form as may be necessary but only "so long as the variation is not in a matter of substance".¹⁴ The variations usually relate to the description of the consideration and the form of attestation. The Registrar is entitled to reject the form if there has been a substantial departure from the prescribed form.¹⁵ However certain parts of the form is mandatory. For example, the heading and schedule of lands must adhere to Form 13A.

Any amendments or variations in manuscript writing on a form shall be in permanent black or blue-black ink.¹⁶

16.3 CONTENTS

The contents of the forms may be summarised under the following headings:¹⁷

16.3.1 The parties

The requirements are set out in s 208. The full name and address should be set out. If a person dealing in land has an address outside the Federation, an address within the Federation for the service of notice should be included in the Schedule.¹⁸ "Federation" is defined as "Malaysia" in s 3 of the Interpretation Act. If the transfer of the land is to two or more persons or bodies as co-proprietors, the shares in which the land is to be held should be set out.¹⁹

If any form in Schedule 1 requires the name of a person to be stated, then, pursuant to s 436A(1), there shall be included:

13 For the text of paragraph 3 of Schedule 10, see paragraph 16.10 (Forms preprinted by the government printers/Forms prepared by the proprietor and other persons).

14 Section 62 (Deviation from forms) of the Interpretation Act is also instructive. The section reads as follows:

Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead.

15 *Perpetual Executors and Trustees Association of Aust Ltd v Hosken* (1912) 14 CLR 286 (High Court of Australia).

16 Paragraph 11 of Schedule 10.

17 See s 301(b)(i).

18 See s 207(1)(b) and Form 13A.

19 For a sample, see Schedule 5: Form (5) (Transfer of undivided share in property by transferor who presently holds the entire share) or Form (6) (Transfer of half undivided share by transferor who holds only a half undivided share).

- (1) in the case of a natural individual:
 - (a) a description of his citizenship; and
 - (b) the number of the identity card issued to him under the National Registration Act 1959, or where no such identity card has been issued to him, the description and number of his passport, or other official document of identity;
- (2) in the case of a company, corporation, society, association or other body:
 - (a) a statement as to its identity;
 - (b) the law under which it is constituted; and
 - (c) whether or not it is a foreign company as defined in s 433A.

Similarly, the name of any natural individual to be inserted in any of the forms in Schedule 1 shall be the name appearing on such person's identity card issued under the National Registration Act 1959 or, where no such identity card has been issued to him, the name appearing in his passport or any other official document of identity (s 436A(2)).

16.3.2 The lands

The land which is the subject matter of the dealing/endorsement should for obvious reasons be properly described (s 209(1)). The particulars are set out in the form of a schedule (Form 13A(2) of Schedule 1). The required particulars are:

- (1) the administrative area in which the land is situated;
- (2) the lot number of the land or, in the case of land held under qualified title, its Land Office number; and
- (3) the title number of the land.

If the transfer or charge relates to a strata title, then, the schedule shall describe the parcel "by reference to the administrative area of the lot of which it forms part and the parcel number and the title number of the parcel".²⁰

²⁰ Section 209(2).

If the transfer or charge is in respect of an undivided share or interest, the fractional value of the share should be stated under column (4) of the schedule in Form 13A(2). In addition, in relation to a transfer to two or more transferees, the transferee's shares have to be stated expressly in the Form 14A or else s 343(1) will apply to make their shares equal. In the case of a transfer by a co-proprietor of his undivided share to another co-proprietor or the other co-proprietors, the undivided share or the proportion of the undivided share transferred shall merge with the undivided share held by the transferee to form a single undivided share (s 217(2A)).

An instrument involving more than one piece of land should be effected by the same person or body in favour of the same person or body and be in respect of titles all kept in the same Land Registry or Land Office.²¹

A dealing may be subject to a lease or charge. If so, the registration particulars of the charge or lease has to be stated in either column (5) or (6).

16.3.3 The consideration

Once the parties and the subject matter (the lands) are ascertained and since the form, execution and attestation are fixed to a substantial extent by the Schedules 1, 5 and 10 respectively (discussed further below), it remains only to fill up the consideration clause to complete the Form 14A or Form 16A.

16.3.3(i) Consideration in a Form 14A

This portion is straightforward in a normal SPA of property with individual title. The consideration is usually stated as the purchase price paid or to be paid by the purchaser to the vendor.

However, transfers involving probate/letters of administration or subsales prior to issuance of individual title are more complicated. The NLC does not lay down precise rules as to how the consideration in these transfers are to be worded.

16.3.3(ii) Consideration in a Form 16A

Similarly, the consideration in the Form 16A may also require some variations if the financier requires an "all monies" charge or if a combination of facilities are involved.

²¹ Section 212. See further paragraph 19.7 (Batching of titles for presentation).

The consideration clause in a third party charge can also be complicated. A third party charge arises when A the proprietor of the property charges the property to B (the financier chargee) to secure a loan granted by B to C (the borrower). The charge is said to be for the benefit of C.

The outcome is that these variations may require some creativity from the conveyancer to put the intentions of the parties accurately in words.

A perusal of the following should give the reader a good idea on the wording required:

- (1) Schedule 5: Memorandum of Transfer (Form 14A)—The Different Variations; and
- (2) Schedule 11: Memorandum of Charge (Form 16A)—The Different Variations.

The parties to a charge may elect to include an annexure to the Form 16A. The annexure is expressly provided by the form itself and has been accepted by the court.²² The omission of an annexure will not defeat the charge; the implied provisions of ss 249–252 of the NLC will then apply to govern the rights and obligations of the parties.

16.4 EXECUTION

The method of execution should be in accordance with s 210(2) and (3), namely:

- (1) the execution by a natural person shall consist of his signing it or affixing his thumbprint; and
- (2) the execution of any such instrument by a corporation (whether aggregate or sole) shall be effected in such manner as is authorised by its constitution, or by any law for the time being in force. The Registrar will accept an instrument if it bears:
 - (a) the seal of such corporation; and
 - (b) a statement, signed by the secretary or other permanent officer thereof, or his deputy, and by a member of the board

²² The words “peruntukan-peruntukan yang dilampirkan di sini” means “upon the terms as annexed herein”. See *Letchumanan v Central Malaysian Finance Bhd* [1980] 2 MLJ 96, FC on judicial recognition of the annexure.

of directors, council or other governing body, to the effect that the seal was affixed in their presence.²³

Such an instrument shall, in favour of any purchaser, be deemed conclusively to have been duly executed by that corporation.

All signatures (not just by the parties but also by the witnesses) shall be in permanent black or blue-black ink.²⁴ It has been held however that a signature signed using a blue ball pen is not such a grave error so as to warrant a caveat to be rejected outright under s 298.²⁵ With regard to forged signatures in an instrument of dealing, see paragraph 1.6.2 (Indefeasibility of title).²⁶

16.5 ATTESTATION

The attestation clause shall be in Form 13B of Schedule 1. The attestation clause has to be placed immediately after the relevant execution.²⁷ If the person attesting any execution has a seal of office, he shall authenticate his signature with his seal.²⁸ An example of such a person with a seal will be a notary public.

A party's signature may be attested only by one of those persons described in Schedule 5 (Officers or Other Persons to Attest Executions of the Instruments effecting Dealings).²⁹

Common problems encountered include the following:

- (1) if the attestation is to be done overseas, especially where the country is not a Commonwealth country. If the execution takes place in a non-Commonwealth country, the signature may likely have to be attested by a diplomatic officer of Malaysia;³⁰
- (2) if the transferor/chargor does not understand Bahasa Malaysia (the language of the NLC forms) or the language of the underlying

²³ See further paragraph 7.13.2 (Execution and delivery of MoT) and *Island & Peninsular Development Ltd & Anor v Registrar Of Titles, Kedah* [1973] 2 MLJ 69.

²⁴ Paragraph 11 of Schedule 10.

²⁵ *Sandraksan all Retnasamy & Ors v Supia all Ratamsamy & Ors and Third Party* [1998] 1 LNS 491.

²⁶ See further the Addendum at the beginning of this book in relation to the landmark case of *Tan Ying Hong v Tan Sian San & 2 Ors* [2010] 1 AMR 557, FC.

²⁷ Section 211(2).

²⁸ Section 211(3).

²⁹ Section 211(2).

³⁰ Paragraph 1(10) of Schedule 5.

transaction which gives rise to the execution of the NLC form. In such instances, a statutory declaration or certificate of the transferor/chargor may have to be obtained to confirm that she fully understands the consequences of the signing;³¹

- (3) if the land to be charged is land in a Malay Reservation. The financier should be an approved chargee under the Second Schedule to the appropriate Malay Reservation Enactment or else the charge will be rejected for registration. Only the Land Administrator may attest the signatures in a MoT or MoC.³²

Any allegation by the chargor relating to the manner or form of attestation of the form will not defeat the registered charge so long as the chargor did in fact execute the charge and the contents of the charge are true.³³

Attestation by an advocate and solicitor requires his personal signature but the name of his law firm need not be stated nor is any proof of his qualification required.³⁴ This however opens the door to forgery of the signature of a solicitor.³⁵

16.6 PERSON CLAIMING INTEREST IS OUTSIDE MALAYSIA

A local address for service has to be stated in the schedule to a form if any person claiming interest under the form is resident outside Malaysia.³⁶ The intention is to facilitate the service of notices or documents by the

31 See also paragraph 3.11 (Where the other party is not represented).

32 Paragraph 3 of Schedule 5.

33 *Wee Huay Fong v Pentadbir Tanah, Klang & Anor* [2002] 3 MLJ 572.

34 To prove the bona fides of the signatory and to avoid any of the vitiating factors in s 340(2), some practitioners implement the following precautions:

- (i) a photocopy of the identity card of the signatory with his signature should be retained. The photocopy should be checked against the original;
- (ii) if the signatory is an attorney, a copy of the power of attorney duly certified by the court should be produced and kept. The particulars of the attorney set out in the power of attorney should be verified against the particulars in his/her identity card. For a case where a forged power of attorney was used to commit a fraud resulting in loss to the bank, see *Public Bank Bhd v Ng Yoon Lin* [2001] 5 MLJ 70. Also *Jamaliah bte Hj Mahsudi (suing on her own behalf and as administratrix of the estate of Salamah bte Hj Ali) & Ors v Sivam al l Munsamy & Anor* [1999] 5 MLJ 250;
- (iii) the signature should be dated the day of signing (see s 292(4)). If the signature has to be dated after the day of signing, there should be a subsequent confirmation that the signatory is not deceased on the day of dating (see s 292(4)).

35 The NLC states have adopted various methods to counter fraudulent dealings. The Malacca Land Registry, for example, has issued a directive which requires that the signature of an attesting lawyer in an instrument should be supported by a certified copy of her practising certificate. The effectiveness of the directive and whether it will in fact be implemented are yet to be seen.

36 See the explanatory notes in Form 13A(2) of Schedule 1 and s 207(2).

Registrar on, for example, a foreigner. Omission of a local address may likely cause the Registrar to suspend the registration of the instrument.³⁷

16.7 FITNESS FOR REGISTRATION; SUSPENSION VERSUS REJECTION³⁸

An instrument of dealing may not be fit for registration for any of the reasons set out in s 301. Non-compliance with form, content, execution and attestation requirements³⁹ would usually have been corrected prior to or at the time of presentation. A land search conducted immediately prior to presentation would have disclosed the following which will determine whether an instrument of dealing will likely be registered by disclosing:

- (1) any encumbrances which may affect the property including private caveats and charges; and
- (2) any express conditions and/or restrictions-in-interest.

"Fitness for registration" is determined by the Registrar under s 297 in accordance with Chapter 3 (ss 301–303). If any instrument is not fit for registration, the Registrar shall reject it forthwith unless the unfitness consists solely of a "formal defect or clerical error" (s 298(1)). If any instrument is unfit for registration solely by reason of a formal defect or clerical error or for any of the other defects described in s 298(2), the Registrar *shall* suspend the registration for such period, not exceeding 14 days to enable the defect or error to be rectified or the missing documents to be produced.⁴⁰

The treatment of a defective instrument by the Registrars may differ at the various Land Registries.⁴¹ Some go by the book and reject outright even obvious administrative mistake; others are more lenient and will only suspend the registration. The Registrar may also allow a compromise as, for example, when he requires a representation but agrees to waive the delayed registration fee.⁴² This inconsistent application of s 298 by the Registrar at different Land Registries may however defeat one of the objectives of the NLC "of ensuring uniformity of law and policy to make

37 Section 298(2)(a).

38 See also Chapter 19: Presentation and Registration.

39 Section 301(b)(i).

40 See *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53 for a case which touched on s 298.

41 See further the discussion in Chapter 19: Presentation and Registration.

42 See s 293(3).

a law with respect to ... registration of titles relating to land, transfer of land ... and other rights and interests in land".⁴³

Part 18 (Registration of Dealings) of the NLC provides a good checklist of the registration requirements. In particular, the following should be noted:

- (1) the death of the signatory does not affect the validity of the instrument.⁴⁴ However, it is likely that an instrument that is executed before the death of the person but dated after the death of the person, may be open to challenge. Accordingly, it is a good practice at least to check the whereabouts of the signatory if the instrument has to be dated after signing (in contrast to same day dating);
- (2) the fees to accompany the instruments to be presented.⁴⁵ An instrument has a validity period of three months after which delayed registration fee is payable.⁴⁶ However, the maximum fee payable shall not exceed five times the prescribed registration fee;
- (3) the instruments presented will be dealt with in order of their presentation;⁴⁷
- (4) all quit rents in respect of the property have to be paid.⁴⁸ Some Land Registries will also require proof of the assessment rates paid although assessment rates come under the jurisdiction of local authorities and not that of the Land Registries.⁴⁹

16.8 PRESENTATION AND REGISTRATION

See Chapter 19: Presentation and Registration for a detailed discussion.

⁴³ See paragraph 4 of the preamble to the NLC discussed in paragraph 1.5 (Cardinal features of the Torrens system).

⁴⁴ Section 292(4) reads: "The death of any person by or on behalf of whom any instrument of dealing has been executed shall not affect the validity thereof, and any such instrument may, accordingly, be presented for registration under this Part as if the death had not occurred."

⁴⁵ See s 293 (Fees to accompany instruments so presented).

⁴⁶ See s 293(2).

⁴⁷ Section 300.

⁴⁸ Section 301A.

⁴⁹ Section 127 (Power to impose rates) of the Local Government Act. Both bodies however come under the supervision of the State Authorities.

16.9 ERRORS IN FORMS AND RECTIFICATION⁵⁰

The Land Registries usually allow correction of errors of a clerical nature made by the parties to the instrument provided that the substance is not affected. Even so, one should not rely on the leniency of the Land Registries and allow improperly checked instruments to be presented.

Notwithstanding any error in an instrument of dealing, an oversight by the Registrar may result in the instrument being registered. The errors may be categorised into two types:

- (1) those caused by the party or parties to the instrument. Examples will be errors in the name or other identification details of the party or the property; and/or
- (2) those caused by the Registrar. An example is when the Registrar registers an instrument for registration without the consent of a party who has lodged a private caveat over the land.⁵¹

The Registrar has the discretion under s 380(1) to correct errors in a document of title or in the instrument of dealing itself. There are different decisions as to whether s 380(1) is restricted to item (2) above or covers both items. In *Island & Peninsular Development Ltd & Anor v Registrar of Titles, Kedah*,⁵² it was held that the Registrar is obliged to rectify only his errors under s 380 of the NLC and not those of the parties to the transaction. *Kuah Chiew Ann v Pendaftar Hakmilik Tanah Wilayah Persekutuan*⁵³ however gives a wider interpretation to the section to cover even an error made by the Registrar which resulted from a mistake by a party or its agent in the instrument of dealing.⁵⁴

Any correction of error shall be recorded in a "Correction Note-book".⁵⁵

16.10 FORMS PREPRINTED BY THE GOVERNMENT PRINTERS/ FORMS PREPARED BY THE PROPRIETOR AND OTHER PERSONS

The Registrar shall keep a printed supply of any of the forms set out in Schedule 1 which may be purchased by the public at a reasonable price.⁵⁶

⁵⁰ See also paragraphs 1.17 (Court relief), 19.10 (Errors in registration and rectification) and 19.11 (Appeals to the court to rectify the register).

⁵¹ See further paragraph 17.6 (Transfer registered in violation of private caveat lodged against the land).

⁵² [1973] 2 MLJ 69.

⁵³ [2000] 6 MLJ 127.

⁵⁴ See further paragraph 19.10 (Errors in registration and rectification).

⁵⁵ Section 380(4).

⁵⁶ Section 376(1).

Property Development

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21.1 INTRODUCTION

The statutory definitions of “development” and “planning permission” in relation to properties go beyond the ordinary meanings which are usually given them. “Development” as will be seen is not restricted to just the construction of new properties by licensed developers but includes “the making of any material change in the *use of any land or building* or any part thereof” by any person.¹ There are various situations in the practice of conveyancing when knowledge of property development will be a helpful tool. For example:

- (1) when one acts for a property developer. The SPA in respect of the land to be purchased for development will not only have to address issues under the NLC but also local by-laws governing land utilisation. Preliminary work after purchase of the land but prior to project launch will usually involve some legal advice on the type of approvals required from local authorities, especially in relation to the local plan and development plan;

¹ See the definition in the TCPA.

- (2) if the land to be purchased is for redevelopment though not necessarily for project development. For example, a purchaser may purchase a property with the intention of tearing down the existing building for reconstruction. For this, he will need planning approval from the local authorities;
- (3) if the property to be purchased is intended for a different category of use. For example, a common trend in overcrowded town centres is to purchase and convert residential buildings for commercial use. The issues here will involve not just the category of land use but also the purpose to which the *building* will be put. Land use comes under the purview of the NLC² but building use comes under the jurisdiction of the local authorities which are constituted under the Local Government Act 1976. The NLC may prescribe "building" as the category of land use but the actual purpose for which the building may be used has to be approved by the local authority.

In the situations above, some knowledge of property development may not just be an advantage but may be essential. The following summary serves to give an overview of the law and practice relating to property development in Malaysia.

21.2 RELEVANT LEGISLATION

In addition to the NLC and the STA, the three major statutes which govern property development are:

- (1) Local Government Act 1976 (Act 171);
- (2) Town and Country Planning Act 1976 (Act 172);
- (3) Street, Drainage and Building Act 1974 (Act 133).

As a general rule, the LGA and the TCPA deal with the macro issues, that is, the development and administration of the whole township. The SDBA deals with micro issues relating to the daily upkeep and maintenance of the township amenities such as sewers and drains,³ the addresses of buildings and houses,⁴ or even the width of a public road.⁵ Since planning permission is issued by a local authority,⁶ the three statutes make extensive reference to the role of the local authorities.

² See paragraph 2.3.4 (Categories of land use).

³ See s 50 of the SDBA.

⁴ Sections 29 (Names of streets) and 31 (Numbers on houses) of the SDBA.

⁵ See s 34 of the SDBA.

⁶ See paragraph 21.3 (Approvals by local authorities).

In certain provisions, there may be overlap. For example, both the TCPA (s 19) and the SDBA (s 70) provide for building permission or cover building/layout plans.

21.3 APPROVALS BY LOCAL AUTHORITIES

Other than approvals relating to land matters which come under the jurisdiction of the State Authority, the approvals relating to planning permission are issued by:

- (1) the local authorities⁷ (also referred to as local councils/municipalities) constituted under the LGA;⁸ or
- (2) in the case of towns which have been gazetted with city status, the authorities which have been constituted to administer and regulate the affairs within the city. In relation to Kuala Lumpur, the relevant body is Dewan Bandaraya Kuala Lumpur formed under the Federal Capital Act 1960 and in relation to Putrajaya, it is Perbadanan Putrajaya which was formed under the Perbadanan Putrajaya Act 1995.⁹

Each local authority or relevant body has its own procedures and application forms. The rules are set out in the by-laws governing the local authorities. The by-laws in turn are made either under the LGA or pursuant to the relevant governing legislation. As an example, the governing legislation applicable to Kuala Lumpur for purposes of planning is the Federal Territory (Planning) Act 1982 and not the LGA

⁷ Section 2 (Interpretation) of the LGA: "Local authority" means "any City Council, Municipal Council or District Council, as the case may be, and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under section 3 of the Federal Capital Act, 1960".

⁸ Section 3 (Declaration and determination of status of local authority areas) of the LGA: For the administration of local government under this Act, the State Authority, in consultation with the Minister and the Secretary of the Election Commission, may by notification in the Gazette—

- (a) declare any area in such State to be a local authority area;
- (b) assign a name to such local authority area;
- (c) define the boundaries of such local authority area; and
- (d) determine the status of the local authority for such local authority area and such status shall be that of a Municipal Council or a District Council.

Also s 8 (Administration of local authority areas) of the LGA:

The affairs of every local authority area shall be administered by a local authority established by and in accordance with this Act:

Provided that where in the application of this Act to the Federal Territory there is any conflict between the provisions of this Act and the Federal Capital Act 1960, or the regulations made thereunder, the provisions of the Federal Capital Act 1960, shall prevail.

⁹ Act 536.

or the TCPA.¹⁰ To give an idea of how these local authorities or bodies administer and regulate land utilisation in their jurisdiction, consider r 2 of the Planning (Development) Rules 1970 applicable to Kuala Lumpur:

2. Application for planning permission

- (1) Applications to the Authority for permission to develop land shall be made in any of the following forms of the First Schedule depending upon the intended use of the land:
 - (a) FORM 1A – application for permission to develop land for commercial/limited commercial use;
 - (b) FORM 1B – application for permission to develop land for residential use;
 - (c) FORM 1C – application for permission to develop land for industrial use;
 - (d) FORM 1D – application for permission to develop land for multi-use;
 - (e) FORM 1E – application for permission to develop land for educational use;
 - (f) FORM 1F – application for permission to develop land for institutional use;
 - (g) FORM 1G – application for permission to develop land for hotel;
 - (h) FORM 1H – application for permission to develop land for petrol filling and service station;
 - (i) FORM 1J – application for permission to develop land for any use other than those specified in paragraph 2(1) (a)–(h); and
 - (j) FORM 1K – application for permission to change the use of a building.

As can be observed, various permissions may be involved. Accordingly, various requirements under the relevant legislation or by-laws have to be considered lest the purpose of the purchase of the property is defeated if planning permission cannot be obtained in the end.¹¹

¹⁰ The TCPA applies to all the NLC states but does not apply to Kuala Lumpur.

¹¹ For a case on whether and how the planning authority is required to give reasons if he rejects an application, see *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur & Anor* [2005] 5 MLJ 633.

The submission of application and the obtaining of planning permission from the local authority is usually undertaken by the consultant architect/engineer or surveyor/valuer who advises the landowner on the land development.

21.4 LOCAL GOVERNMENT ACT

21.4.1 Scope of the LGA

The LGA provides for among others the following:

- (1) how local authorities are to be administered (Parts II to VI);
- (2) matters affecting the township as a whole, for example:
 - (a) public places (Part VII);
 - (b) pollution of streams (Part VIII);
 - (c) food, markets, sanitation and nuisances (Part IX). For example, even the control of breeding grounds for mosquitoes come within this part;¹²
 - (d) burial places (Part XI);
- (3) a local authority's power to impose and collect rates (Part XV).

From the above as well as the provisions of the SDBA (discussed below), it can be seen that local authorities are responsible for the maintenance of healthy and sanitary conditions to promote the well-being of the residents in a township. Another major objective of the LGA is that of revenue collection, especially in relation to assessment rates:

Section 127 (Power to impose rates)

The local authority may, with the approval of the State Authority, from time to time as is deemed necessary, impose either separately or as a consolidated rate, the annual rate or rates within a local authority area for the purposes of this Act or for other purposes which it is the duty of the local authority to perform under any other written law.

For this purpose, s 160 of the LGA provides that "it shall be the duty of the seller or transferor and the purchaser or transferee within three months

¹² See s 81(g) of the SDBA.

after such sale or transfer to give notice thereof to the local authority in Form I of the First Schedule". This is the form which a purchaser's solicitors will or should lodge after completion of the sale and purchase.¹³

The LGA does not deal with planning permission or development order¹⁴—rather it provides for the setting up of local authorities¹⁵ which in turn are conferred power by the TCPA¹⁶ to carry out, among others, these tasks.

The LGA applies to Kuala Lumpur but recognises that in a conflict between the LGA and the Federal Capital Act 1960, the provisions of the Federal Capital Act 1960 shall prevail.¹⁷

21.4.2 Executive councillors

Executive councillors of local authorities are not elected by the public but appointed by the State Authorities.¹⁸ The councillors decide all questions which come before any meeting of the local authority.¹⁹ As such, planning approvals relating to land use will also be decided by the councillors. The local authorities themselves fall under the jurisdiction of the Minister of Housing and Local Government. However, local authorities may have powers beyond those of government departments.²⁰ They may sue and be sued.²¹ They are also not the same as the Government of Malaysia.²²

13 See paragraph 11.11 (Filing of change of ownership with the local authorities).

14 A provision which deals with buildings is s 161 (Notice of New Buildings). Even so, this provision deals with "notice" rather than approvals (planning permission and development order) which come under the TCPA.

15 Sections 3 and 8 of the LGA. For the wording of these sections, see n 8 *supra*.

16 Section 5 of the TCPA; see also paragraph 21.5.2 (Local Authority acting as Local Planning Authority).

17 Section 8 of the LGA.

18 Section 10 (Councillors) of the LGA reads as follows:

- (1) The local authority shall consist of—
 - (a) the Mayor or President; and
 - (b) not less than eight and not more than twenty-four other Councillors ... to be appointed by the State Authority.

19 Section 26 of the LGA.

20 See *Muniandy all Subramaniam & Ors v Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor* [2003] 6 MLJ 177 for an interesting discussion on the actual status of local authorities. Also *Ganad Media Sdn Bhd v Dato' Bandar Kuala Lumpur (No 2)* [2002] 1 MLJ 508.

21 Section 13 (Local authorities to be corporations) of the LGA:

Every local authority shall be a body corporate and shall have perpetual succession and a common seal, which may be altered from time to time, and may sue and be sued, acquire, hold and sell property and generally do and perform such acts and things as bodies corporate may by law do and perform.

22 See *Government of Malaysia & Anor v Akasah bin Ahad* [1986] 1 MLJ 396, SC at 399.

21.4.3 Role of the State Authorities

In practice, it is the State Authority which will have control and supervision of the local authorities. Section 9(1) (Power of State Authority to issue directions) of the LGA provides that:

The State Authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the local authority by or under this Act in relation to matters which appear to the State Authority to affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions.

Thus, although a local authority is constituted as a separate entity with express authority to administer the affairs of the local authority area,²³ the State Authority nevertheless has the ultimate say on issues relating to both land and building use in all townships in a state.

21.5 TOWN AND COUNTRY PLANNING ACT

21.5.1 Scope of the TCPA

The TCPA is the principal piece of legislation on land development in Peninsular Malaysia. Notwithstanding that it deals with land use (which generally comes under the jurisdiction of the states), it is a federal statute made pursuant to Article 76(4) of the Federal Constitution. The purpose is to achieve "uniformity of law and policy" in relation to land matters among all the NLC states. The TCPA therefore gives the Federal Government a role in town and country planning.

The TCPA applies to Peninsular Malaysia but comes into operation in a state only by notification in the State Gazette.²⁴ It does not repeal the Federal Territory (Planning) Act 1982 (discussed above)²⁵ nor any of the legislation affecting towns which have been granted city status unless those legislation have been expressly repealed. As an example, Kuala Lumpur has its own Federal Territory (Planning) Act 1982 (FTPA) which has not been repealed. Accordingly, the TCPA does not apply to the Federal Territory of Kuala Lumpur. Since the two pieces of legislation mentioned serve the same function, several of the provisions in the TCPA have parallel provisions in the FTPA. For example, the FTPA also provides for the following:

23 See ss 8 and 13 of the LGA.

24 Section 1(1) and (2) of the TCPA.

25 Section 59 of the FTPA.