



Attitudes of Sub-Sale Home Buyers and Vendors in the 21st Century: Legal implications

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Abstract

This article analyses the legal implications of sub-sale house buyers and sellers' attitudes as illustrated in judicial cases from Malaysia, Australia and the United States. The cases demonstrate that purchasers still sleep on their legal duty to conduct a pre-purchase inspection. On the other hand, vendors often conceal the defects in the property and refuse to rectify the defects. This article recommends that consumer education is vital to protect the rights of purchasers and to uplift the vendors' ethical values of in a sale and purchase of the sub-sale house. It is also suggested that the jurisdiction of the Tribunal for Consumer Claims or the Tribunal for Homebuyer Claims be considered to be expanded to hear disputes arising from the purchase of houses from the sub-sale market.

Keywords: fraud; inspection; home buyer; vendor

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1.0 Introduction

In the 21st Century, a house is no longer seen merely as a roof over one's head. People view it as a home, a place of comfort, and security. A house epitomizes family, stability, and wealth (Reuschke & Houston, 2016). However, due to modest income of the majority, they need to opt for affordable houses without compromising on the quality of the property (Zinas & Jusan, 2017). In realisation of the challenging economic situation and weak consumer sentiment in the real property market, it is no surprise that house buyers bought houses from the second-hand market. Among the benefits of buying from the secondary market are huge discounts and readily-available accommodation and facilities. Besides, most second-hand houses are situated in matured towns. Therefore, they have no problem with getting access to public amenities. Investors who buy from the sub-sale market can also rent them because there is growing demand for lease and tenancy (Sun Daily 2017).

Despite the attractive pricing and the above benefits, those who are considering second-hand houses need to be mindful on some matters before signing the sale and purchase agreement (hereinafter referred to as the SPA). First, there is no explicit law to govern the SPA transaction apart from the traditional law of contract, unlike the purchase of a house from a developer, which is regulated by the Housing and Development (Control and Licensing) Act 1966 (hereinafter referred to as the HAD). The contract for the purchase of new properties from the housing developers are standardised, but the terms of the sub-sale agreement may vary (Sim 2012). Second, the HAD also establishes the Tribunal for Homebuyers Claim with the jurisdiction to hear disputes between a house buyer and the developer, including on matters on the defect in the house (Sufian & Rahman 2008). By contrast, buyers of the sub-sale houses cannot file a claim against the vendor to the Tribunal because the Tribunal's jurisdiction is restricted to disputes between a housing developer and purchaser only.

Third, the "caveat emptor" doctrine obligates the buyer to make a thorough inspection and to blame himself if a defect is found due to his carelessness, in the absence of fraud or misrepresentation by the vendor. Meanwhile, the "as is, where is" clause in the SPA stipulates that the property is sold based on its conditions and the purchaser is ready to accept it "with all faults" (Amstrong & Block, 2007). The combined effect of "caveat emptor doctrine and "as is" clause causes great anguish and nightmare to the buyer of a defective house.

As there is lack of protection for the purchasers of sub-sale houses in Malaysia, this paper aims to examine the behaviour of vendors and purchasers in the 21st Century indirectly through the judicial decisions in Malaysia, Australia, and the United States regarding property disputes due to defective conditions. This article aims to compare the legal implications of the cases on the consumer protection in the selected jurisdictions.

2.0 Literature Review

There is literature that discusses the problems in buying houses from the sub-sale market. Firstly, buyers undertake limited pre-purchase information search including even when they buy expensive goods (Beatty & Smith, 1987; Ozanne et al., 1992) such as the house (Koklic

& Vida, 2009). Secondly, there is a widespread concern not only about the quality of construction of many of houses and apartments but also about the exposure to prohibitively expensive repairs of those who have had the misfortune to become the owners of houses or apartments that are fundamentally defective (Hume 2011).

Thirdly, literature also indicates that the application of "caveat emptor" doctrine and "as is" clause is very disadvantageous to the house purchasers. This is because, in absence of misrepresentation or fraud, the purchaser is not entitled to claim for damages for a defect that could be discoverable upon a reasonable inspection (Amstrong & Block, 2007; Shaharudin, 2013). Past literature also illustrates that buyers rarely hire valuers to conduct appraisals and building inspectors to provide an objective report as to the conditions of the property (Ani et al., 2016).

Another issue concerning the purchase of sub-sale property in Malaysia as highlighted by literature is the non-application of the Housing Developers (Control and Licensing) Act 1966 (Sim, 2012). Consequently, the Tribunal for Homebuyers Claim does not have jurisdiction over disputes arising from sale and purchase of property from the sub-sale market. Besides, literature also emphasizes that the Consumer Protection Act 1999 explicitly excludes the jurisdiction of the Tribunal for Consumer Claims to hear and determine cases in which its subject matter is about land – including real properties (Zakuan et al., 2012).

As shown above, although various literature has addressed the problems circulating the purchase of sub-sale houses, there is a lack of analysis of judicial decisions and its legal implications towards buyers and purchasers. There is also lack of comparative study of court cases in the area of sub-sale properties. Therefore, this article aims to fill in the gap in the current literature on the issue of the attitudes of home buyers and vendors by scrutinising landmark cases in selected jurisdictions.

3.0 Methodology

This research primarily employs comparative study of case reports on sub-sale of houses in Malaysia, Australia, and the United States. The comparative analysis is used to study the legislative texts, legal doctrines, and jurisprudence between local laws and foreign jurisdictions. A comparative study is essential to stimulate understanding on the legal development and implication of the vendor and purchaser behaviour in the purchase of sub-sale houses transaction. This study chooses Australia and the United States as the point of reference due to the rapid legal development and judicial activism in both jurisdictions in the area of house buyer's protection and consumer rights.

A library-based methodology is used to complete this study. This involves a significant amount of reading and analysis of textbooks, journal articles, and conference papers. A search on several law databases such as LexisNexis, CLJ Law, LawNet, and Westlaw have also been conducted. The combination of the comparative study and library-based methodology has enabled a thorough analysis of legal position on the buyer's and seller's behaviour in the transaction of sub-sale properties in the selected jurisdictions.

4.0 Results and Discussion

The comparative analysis of court cases from Malaysia, Australia and the United States are compartmentalised into several themes; namely the purchaser's recklessness in pre-purchase inspection, purchaser's failure to engage professional opinion, seller's misrepresentation and wilful concealment, and non-rectification of defects.

4.1 Buyer's carelessness on inspection

The doctrine of "caveat emptor" imposes the duty on the customer to inspect the property to ensure that it fits his intended purpose. Nevertheless, illustration from decided cases shows the carelessness of the purchasers as they signed the SPA without first inspecting the properties.

In Malaysia, the case of *Wei Tah Construction (B) Co Sdn Bhd & Anor v Law Wun Ing* [1981] 2 MLJ 147 illustrates that some buyers personally chose not to inspect the property and handed over the duty to the lawyers. The dispute, in this case, was on the description of the property "near Sibu airport". In dismissing the plaintiff's claim, the Court observed that the defect was a patent one and should be discoverable had the plaintiff inspect it. The legal implication, in this case, was that the contract could not be avoided despite the property not fitting the plaintiff's purpose.

Another Malaysian case of *Wong Soon Hoo dan Satu Lagi lwn Sumbangan Daya Sdn Bhd* [2010] 9 MLJ 559 illustrates that purchasers sometimes were misled by the advertisement and decided to buy a house purely on the representation in the advertisement. In this case, the dispute was on the number of bathrooms that the plaintiffs claimed were different from what has been advertised. In rejecting their suit, the Court held that there were two separate occasions where the plaintiffs could inspect the property, but they decided not to do so. Hence, the court held that the "caveat emptor" doctrine does not protect the purchasers who were indolent and negligent.

Unlike Malaysia, the law on vendor disclosure has developed in the United States and Australia (Tasmania, South Australia, Australian Capital Territory) thus offering more protection to the buyers. In the Californian case of *Easton v Stassburger* (1984) 152 Cal. App. 3d 90, the Court declared that the broker must disclose to a buyer material defects known to the broker but unknown to and unobservable by the buyer. Similarly, in Australia, in the case of *Demagogue Pty Ltd v Ramensky* [1992] FCA 557, it was held that failure to disclose the existence of a road licence required for access to the property entitled the purchaser to damages. In Supreme Court of Western Australia, in the case of *Franich v Swannell* (1993) 10 WAR 459, the Court held that failure to disclose the existence of termite damage or current infestations where this information was known to the seller enabled the purchaser to claim for damages. Though some parts of Australia and United States impose a positive duty on the vendor to make disclosure on the defects of the property, and maybe seen as a positive measure to safeguard the homebuyers, however, homebuyers must also be obliged to take care of their interest by conducting necessary checks and this should be viewed as empowering homebuyers. It is feared that carelessness of homebuyers (as illustrated by in the Malaysian case) in conducting necessary inspection may be a continuing trend of homebuyers had the law impose too strict a duty of disclosure on the vendors.

4.2 Non-engagement of professional opinion by buyers

In Malaysia, many consumers are under the mistaken opinion that the certificate of completion and compliance is conclusive evidence that the property is in good condition. In fact, the certificate only ensures compliance with building regulations (Chang, 2012). There is an absence of law to oblige the purchaser to hire a valuer or building surveyor to investigate and report on the property condition, and it is also not a common practice among buyers of sub-sale houses in Malaysia.

In the case of *Karupannan a/l Chellapan v Chong Lee Chin* [2000] MLJU 438, the buyer did not arrange a surveyor to determine the boundary of the sub-sale building. The purchaser blamed the buyer for misrepresenting him about the boundary. The Court decided in favour of the seller and emphasized that there is no fiduciary relationship between a buyer and a seller. The Court further observed that as a businessman, the buyer should have hired a surveyor to determine the boundary of the said building.

In jurisdictions like Australia and the United States, engagement of home inspector or surveyor to check the house before purchase is a common practice. Hence, should there be any defect but it was not discovered by the inspector or surveyor, he can be sued for professional negligence. For instance, in the case of *David Finch & Shirley Finch v Inspetech* 229 W. Va. 147; 727 S.E.2d 823; 2012, the Court held that the inspector was negligent in failing to comply with the standard of conduct for failing to discover the water damage.

4.3 Vendor's concealment and misrepresentation

As many buyers search for cheap houses, they are often trapped into buying a substandard or defective house (Elias, 2003). A study on low-cost houses in Klang Valley (Abdul-Rahman et al. 2012) found that those houses suffer from cracking of external walls, which affects the water pipes, causing leaks, and allowing this, plus rainfall, to cause increased dampness in the walls. That study infers that the common causes of these defects may be poor workmanship, low-grade materials, and poor supervision and monitoring exercises.

The legal implication of "as is" clause in Malaysia is that the property is bought on its current condition. In *Hadland Arthur John and Anor v Audra Elaine Gomez* [2009] MLJU 736, it was held that the clause excludes any warranty or condition as to the state and condition of the property and also, in consequence, its fitness for habitation. The plaintiffs were not entitled to rescind the contract. Concealment and misrepresentation can only be a grounds to repudiate the contract when the defect cannot be reasonably discovered through inspection.

In Australia and the United States, courts began to impose liability to the vendor who misrepresents to the buyer as to the condition of the property. In *Engelhart v. Kramer* 570 N.W. 2d 550 (1997), the seller placed panelling over large cracks in the walls four days before putting the property for sale. The court said this is an extremely suspicious action and leads to the conclusion that the only motive for the behaviour was to cover up a defect.

4.4 Non-rectification of defect

Another issue in relation to purchasing of houses in the sub-sale market is the failure and

refusal of the vendor to rectify defects. In Malaysia, the law primarily focuses on the quality of newly completed buildings. Lack of attention is given to the degree of rectification that needs to be done after the completion of work (Sani et al., 2017).

In the American case of *Nichols v Petroff* 2005-Ohio-481, the court held that the vendor could not rely on the doctrine of "caveat emptor" as a shield for failing to rectify water leakage problem that was latent or not discoverable through a purchaser's reasonable inspection. Similarly, in the Australian case of *Franich v Swannell* (1993) 10 WAR 459, the Court held that failure to disclose the existence of termite damage or current infestations where this information was known to the seller enabled the purchaser to claim for damages.

5.0 Conclusion

The cases above leads to a single conclusion that many buyers still sleep on their duty to inspect the house and the importance of engaging a surveyor or building inspector. The Malaysian cases illustrate the stringent application of the doctrine of "caveat emptor" and "as is where is" clause which appears to be favouring with the vendor in many instances and does little to protect consumer rights. It is in contrast with the judicial activism in the United States and Australia, which often decides in favour of the buyers as a result of the availability of the laws on vendor disclosure.

This article recommends that consumer education is vital to influence the better involvement of sub-sale home buyers in their property purchase and increase the vendors' ethical values in a sale and purchase of the sub-sale house. It is also suggested that the jurisdiction of the Tribunal for Consumer Claims or the Tribunal for Homebuyer Claims be considered to be expanded to hear disputes arising from the purchase of houses from the sub-sale market.

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