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PRIVATE LEASE APARTMENT - A BETTER POTENTIAL THROUGH BUILD-THEN-SELL APPROACH

Ainur Zaireen Zainudin^{1*}, Norhafiza Abdullah², Norhidayah Md Yunus³, Salfarina Samsudin⁴, Nur Emma Mustaffa⁵, Siti Radiaton Adawiyah Zakaria⁶, Fatin Afiqah Md Azmi⁷, Aminah Mohsin⁸ & Noorfajri Ismail⁹

^{1 2 3 4 5 6 7 8} *Fakulti Alam Bina dan Ukur,*
UNIVERSITI TEKNOLOGI MALAYSIA
⁹ *Fakulti Syariah dan Undang-Undang,*
UNIVERSITI SAINS ISLAM MALAYSIA

Abstract

Private lease apartment is considerably a new option for residential properties in Malaysia's housing market. However, its emergence is not without issue as it was claimed to bring more benefits to the land owners than to the buyers who became the properties' lessees. Therefore, the aim of this paper is twofold: to examine the disadvantages of buying an apartment through private lease, and to study the potential of the build-then-sell approach as possible solution to secure buyer's interest. Based on a case study approach, the collected primary and secondary data were descriptively analysed and discussed how the build then sell approach may potentially improve the private lease apartment delivery.

Keyword: Apartment, strata scheme, lease, build then sell

¹ Corresponding author: ainurzaireen@utm.my

INTRODUCTION

The development of apartments has been booming in Malaysia since 1980s, introduced in order to overcome land shortage especially in the main cities of the country such as in Kuala Lumpur and Penang (Zainudin, 2016). In the country, apartments are typically housing accommodation with strata ownership since the Strata Titles Act 1985 (Act 318) came into force on 1st June 1985 that enables a separate title to be granted for each individually owned unit in high-rise residential building like apartments. Accordingly, Act 318 has become the main legislation that regulating the buildings' subdivision process. Later, in 2007, Act 318 has been amended to also enable subdivision of land for similar strata ownership concept.

The development of high-rise residential buildings is also guided by the National Land Code (Act 828) together with other laws including the Housing Development (Control and Licensing) Act 1966 (Act 118), Town and Country Planning Act 1976 (Act 172), Street, Drainage and Building Act 1974 (Act 133), Local Government Act 1976 (Act 171) and Road Transport Act 1987; providing the rules and regulations relating with the planning, development process, properties' dealings and registration matters. Zainal et al. (2022) stated that the development process of private lease apartment has no difference with the process of developing non-private lease apartment. This is due to the fact that the private lease only exists when a lease is registered onto a strata title. Under the Torren's System that is adopted in Malaysia, one's interest in land vests and divest only upon registration and registration constitutes the final stages of any dealings (Hussin and Pardi, 2003). No interest in land will be transferred or created until the instruments affecting these dealings have been duly registered.

Even though the concept of private lease apartment or strata title leasing was first introduced in Penang in the late 1980s, the concept becomes popular in Malaysia only recently when the 'Medini private lease schemes' are built in Johor (Zainal et. al., 2002). However, Zainudin et al., (2022) in their study found that the management of private lease apartments in Medini are still under the Joint Management Body's (JMB) management period. As under Act 757, JMB is the management body established under Section 17 in the absence of the strata title. This situation put the interest of the lessees in the private lease apartments in question. Due to the fact that under the law, the interest of a lessee will only be created until the instrument affecting the lease is registered, thus this study sees that the build-then-sell (BTS) approach may become a potential solution to benefit the lessees better. Basically, BTS is a housing delivery approach that sells completed residential properties, with clear property title. Based on this concept, thus this paper aims to examine the disadvantages of buying an apartment unit through private lease and to study the potential of the BTS approach as possible solution to secure buyer's interest.

Accordingly, the primary and secondary data were collected using the case study approach. The private lease apartment that are built in Medini, Johor has been selected as the case study. Interviews were conducted with the respective officers representing both the state and federal authorities related with strata scheme development and strata title registration, officer from the Commissioner of Building (COB) office, the land owner as well as property management agent. The collected primary data were then analysed using the descriptive analysis approach. Meanwhile, secondary data were collected from various sources including from previous research reports, related acts, and the Sale & Purchase Agreement (SPA); which were then analyzed using the content analysis approach.

The presentation of this paper is organized to have three sections further. It will first discuss the advantages and disadvantages of housing delivery approaches that are practised in Malaysia. The discussion is mainly based on the analysis made to various secondary sources. Its main objective is to give the understanding as well as to elicit the advantages that the BTS may offer to safeguard house buyers' rights, focusing mainly to the importance of the strata title. This is followed by the elaboration and discussion about the private lease apartment in the chosen case study. This section resulted from data collected from secondary and primary sources. The main purpose of this section is to elaborate the mechanism used in building up the private lease apartment in the case study area and to highlight the issues brought by this kind of housing development. Finally, this paper concludes the way how the BTS may lead to the betterment of the private lease apartment delivery in Malaysia.

HOUSING DELIVERY IN MALAYSIA: THE ADVANTAGES OF THE BUILD THEN SELL APPROACH

In Malaysia, the 'build-then-sell' (BTS) housing delivery approach refers to the selling of the completed residential properties (Mohd Fauzi et.al, 2012). This delivery approach was first proposed in the country in 1981 by the The Federation of Malaysian Consumer Associations (FOMCA) as a solution to many housing delivery problems, particularly to protect the house buyers from the unscrupulous developers of the sell-then-build (STB) housing project.

The STB is a housing delivery approach that allows developers to sell houses before completion or before they are even built (Yusof, 2013), which has become a norm in Malaysia since private developers became actively involved in providing mass housing in major cities in the country (Yusof et.al., 2007).

For decades, this approach is more popular among housing developers as it allows developers to obtain money both from the house buyers and the bank before the housing project begins on site. Under this approach, buyers would refer to developer's brochure for information on house specifications and floor plans

(Yusof, 2013). Those who eventually decide to buy will initially pay 10% of the price of the house when the Sale & Purchase Agreement (SPA) is signed. The SPA is a contract to construct and deliver a house to a buyer, according to predetermined terms and conditions (Yok, 1997). The remaining 90% of the house price is payable in stages, in accordance with the progress of the construction works. Usually, the remaining 90% of the house price is funded by financial institution that providing housing loan or end-financing to house buyers. If the loan application is successful, the house buyer will start servicing the loan interest and paying the loan instalment when the financial institution starts releasing the money to the developer's development account. Yusof (2013) claims that in this sense, a developer would relatively need little capital to start a housing project. And, the success of the housing project through the STB approach would be highly depending on the credibility of developers and the certifying professionals that involved throughout the housing development process.

Unfortunately, the country's bad experience of having many abandoned housing projects during the economic recession in the 1980s and early 1990s proved that the developers have taken advantage of the STB delivery approach, which had caused the house buyers to still pay the instalment of their end-financing loan to the bank for their unfinished houses. It was reported that between 1990 and 2002, there are 80,070 house buyers became victims of abandoned housing projects which involved 544 private housing projects in the country (Ibrahim et. al, 2014).

Therefore, the BTS has been proposed by the government as an alternative of housing delivery approach alongside the STB in a way to protect the house buyers' rights. Ibrahim et.al. (2014) explains that the fundamental concept of the BTS approach is that the construction costs are borne by the housing developers which require sufficient capital to start the projects as well as depending on their own creditworthiness to apply loans from the financial institutions; and, the housing projects must be completed before the housing developers begin the selling activity. Two models of BTS were proposed by the government, as shown in the following Table 1.

Table 1: Two models of BTS Approach

100% BTS	10:90 BTS
<ul style="list-style-type: none"> • The selling of houses begins after the housing units have been completed and the certificate of completion and compliance (CCC) have been issued. • Buyers pay 10% of the purchase price upon signing the SPA and then pay the balance within three months. • Interested buyers could inspect houses before committing to a purchase. • Buyers can move in once payment has been settled. 	<ul style="list-style-type: none"> • House buyers sign the SPA before houses are completed with 10% down payment. • The down payment is placed in a fidelity fund pursuant to the Legal Profession Act 1976 – the developer has no access to that fund until proper proof has been provided that a clear title for the property can be given. • The remaining 90% of the house price is payable upon completion of the house and the issuance of the CCC within 90 days.

Source: Yusof (2013)

Based on the above two models, it can be concluded that BTS approach may greatly reduce house buyers’ financial burden. They do not have to worry about paying the bank loan during the construction stage or even if the project might not be completed on time. Besides, the BTS approach may enhance the developers’ integrity to provide housing that is high in quality to deal with buyers’ preferences in purchasing houses with the lowest defect issue.

Most importantly, the BTS approach provides greater assurance to house buyers particularly through the 10:90 BTS model. As shown in Table 1, the developer would have no access to the fidelity fund where the down payment made by buyers is placed, until a clear title is issued for the property. Property title is crucially important in a property purchase as a legal proof of property ownership. Hussin and Pardi (2003) explained that in the absence of the relevant title being issued, the SPA as provided under Schedule H of Housing Developers Act (Regulation 11(1)) together with the Deed of Mutual Covenant (DMC) is executed in lieu of Memorandum of Transfer (the Form 14A as provided under the National Land Code 1965 (Act 828)). Meanwhile, for the purpose of finance, banking legal system requires the Loan Agreement cum Assignment (LACA) to be executed in lieu of Charge Documents (the Form 16A as provided under the Act 828). Even so, Hussin and Pardi further emphasized that this process of execution of the LACA is not provided in any Statute. Therefore, the documentation depends highly on the discretion of each financial institution concerned which may cause even lengthy procedures for property ownership transfer either from the developer to the house buyer or in the sub-sale

transaction. They added that it would be more complicated when it involves strata properties that are sold without the strata title. The issues, among others are:

- i) No security of ownership - A purchaser of a unit or parcel in subdivided building without the strata title would not have the rights to indefeasibility of title provided under the Act 828. Prior to the issuance of strata title, the unit owner's sole proof of ownership is only in the SPA. Therefore, the owner has only a contractual right to the property, solely based on the SPA.
- ii) The welfare of the strata properties buyers depends heavily on the developer because in the absence of strata title, the developers are still the legal owners of the land on which the buildings stand. Again, the buyers' rights are not protected under the strata laws.
- iii) The property ownership transfer would be lengthier because in the absence of strata titles, consent for sub-sales is always required from the developer.
- iv) The property ownership transfer would be lengthier when the developer goes bankrupt because the properties would go to the Official Assignee or the Receiver. All administration matters including the application for strata titles will be under the responsibility of the Official Assignee. The consent for sub-sales of property will have to be obtained from the Official Assignee too.
- v) Developers would need to hold longer responsibility to manage the strata scheme until the Management Corporation can officially be established.

The Act 318 has been amended several times since it was first enacted. The various amendments among others were aimed at further improving the procedures and the processing of applications for the subdivision of buildings and lands. Since the delay of strata titles registration and issuance has been the common issue in Malaysia, thus under the Strata Title Act (Amendment) 2013 (Act A1450), the land owner who build a strata scheme is required to deliver vacant possession to strata properties buyers together with the strata title. This amendment which came into force in the country since 1st June 2015 was made purposely to further safeguard the buyers' rights.

In Malaysia, vacant possession of a purchased residential property will be delivered to purchaser upon the completion of the property's development. The development is declared as completed when the CCC is issued by the respective authority to the developer. Under the Act A1450, the issuance of strata titles together with the delivery of vacant possession is believed to be possible especially through the provision of Section 8(1)(a) Act A1450, which stipulates

that the period within which the requirements of application for certificate of proposed strata plan (as provisioned under Section 8A(1) Act A1450) shall be complied with is:

“in the case where the sale of, or agreement to sell, any parcel of the building of the first of such sales or agreements takes place and the document that certifies the super structure stage is issued after the commencement of this Act, the period is three months from the date of issuance of the document that certifies the super structure stage”.

Super structure stage refers to the stage upon the completion of building works as duly certified in accordance with the relevant by-laws made under the Street, Drainage and Building Act 1974 (Act 133). It covers the stage that when all walls that are necessary for the measurement of all parcels are completed, besides the accessory parcels and common property that are needed to be shown on the strata plan.

According to Zana et al. (2018), the latest provision on the application of strata title procedure would solve the late issuance of strata title and to prevent project abandonment by developer. The new process and procedure may possibly guarantee the title to be delivered to purchaser at the stage of vacant possession delivery; means, upon the completion of the building development. As such, it is expected that the future buyers' and owners' interest can be better protected. In fact, formation of MC can be done earlier upon the opening of strata register at the land office, which may lessen the developer's burden on the strata scheme's managerial matters.

PRIVATE LEASE APARTMENT IN THE CASE STUDY

Private lease apartment refers to a scheme of strata buildings transacted by real estate industry players in Malaysia using the private lease mechanism (Zainudin et.al., 2022). Section 221(1) Act 828 provisions the proprietor of any alienated land may grant leases of the whole or any part of it to other party. Provided that any lease that granted shall be for a term exceeding three years (Section 221(2) Act 828), the maximum terms for which any lease may be granted are as follows (Section 221(3) Act 828):

- (a) 99 years if it relates to the whole of any alienated land
- (b) 30 years if it relates to a part only thereof.

Nevertheless, Zainal et al. (2022) states that there was no provision under the Act 828 that precisely defining the process of strata title leasing. But, since the Act 318 is to be read and construed with Act 828; thus, registering a lease on the land title shall too be applied to the strata title. As provided under Act 828, a private lease should be registered using Form 15A (for the first private lease), and 15B for registering a sub-private lease.

And, it is also important for us to understand that, the law in Malaysia provides that the private lease is a holding of interest only, not the ownership of property as enjoyed by the state leaseholder, even though both are subject to a holding period. However, once the private lease is registered at the land office, the lessee will thereby enjoy an indefeasible interest under the law too. Section 232 of Act 828 provides that the lessee is allowed to occupy and enjoy the leased property without interference from the lessor. In addition, the lessee may also transfer the lease interest, charge, sub-lease the property with written permission from the lessor. The transfer of lease interest must be done using Form 14A of Act 828. With the transfer, the interest of any lease holder must be vested in the transferee upon the registration of the transfer of the private lease (Section 219 of Act 828).

In this sense, it seems that subdivision of building may not be needed because the ownership of land and building erected on it remain held by the land owner. But, without the building subdivision, the private lease on the apartment units will only be as a lease of part of land, so the holding period must be between three to 30 years only. In the case of apartments in Medini, the private leases of the apartment units are sold for a maximum period of up to 99 years. Accordingly, the building subdivision exercise has to be conducted so that strata title for each of the apartment unit can be issued and to enable the lease term to be given up to 99 years.

The land owner of where the private lease apartments are built in the case study area explained that the development of Medini is based on land development model using private lease mechanism. This model is selected purposely to encourage more foreign investment in that area without giving up land ownership to foreigners. Therefore, the development in Medini would only involve enjoyment of interest that not amounting to transfer of ownership. This lease interest remains until the lease term ends. Overall, there are 27 private lease apartments built in Medini. The development of these apartments started with the land owner granted private lease to property developer for 99 years. The registration of the private lease on the respective land (registration of Form 15A) has clearly given (as stipulated in the lease agreement between the land owner and the developer) the developer the right to develop the apartment and to sell the apartment units through private lease mechanism too (the lease period that will be given to the buyer is based on the remaining period of the 99 years that first

obtained by developer from the land owner). The apartments are built and delivered using the STB delivery approach. In addition, as stated in the lease agreement between the land owner and developer, the developer is required to apply for building subdivision for the strata properties to be issued with strata title each.

In the lease dealing, SPA between the developer and house buyer is signed by both parties, with consent from the land owner. At this stage, no Form 15A was registered in regards with the purchased property. All the house buyer's rights and responsibilities are listed down in the SPA. In the absence of strata title, Deed of Mutual Covenant (DMC) is also executed and signed between both parties to bind the buyer referring to matters related to the management of the strata scheme.

In the meantime, the law does not prevent the house buyer to obtain housing loan from the bank for the purchase of the property on a private lease basis. At this stage, the vacant possession of the property is handed over to the house buyer without the strata title, thus the Loan Agreement Cum Assignment is executed to replace Form 16A of Act 828.

The state authority explained that during the process of building subdivision, private lease granted to developer remains on the master title (land title). When the strata titles are registered, the lease on land will be moved to every strata title, makes the developer as lessee of each apartment unit. At the same time, land owner remains as the owner of land and all apartment units. The lease interest held by the developer will then be transferred to each house buyer through the execution of Form 14A of Act 828. So, with the transfer, the house buyer has then become the registered lessee to the said property. From the interview with the COB, we were told that none of the management of the apartments have been handed over by JMB to MC. The managerial matters are still under the responsibilities of JMB, without active involvement of land owner.

CONCLUSION

In the absence of strata title for each unit in the private lease apartment, the house buyers' interest depends solely on the SPA and DMC. The consequences are clear. The house buyer will not get the indefeasible interest under the law as the developer remains as the registered lessee to the land. It is even worse if both the SPA and DMC have gone missing. Therefore, house buyers are exposed to various risks. In fact, they have to undergo a lengthier process in sub-sale transaction.

Accordingly, these risks can potentially be avoided if the private lease apartments are delivered through the BTS approach. As mentioned, the house ownership is guaranteed under the BTS because the vacant possession of the property is delivered together with the strata title. This is due to the fact that the

property is purchased after the building is completed. The same benefit is applied in buying a private lease of completed strata property. It assures the registration of Form 15A for the respective unit. Besides, the lease interest will right away be endorsed in the strata title. By this way, the house buyers' lease interest will be better protected by the law.

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