



Legal Clinic: Questions and Answers on Thailand Property Legal Issues

BY DESMOND HUGES AND CHRISTIAN GLANVILLE

# Agency and commissions

**Q.** I have operated a real estate agency in Phuket for a few years and have now noticed that some of my referrals have resulted in non-payment and circumvention of my entitlement to commissions. What rights do I have under law to pursue an unpaid but due commission. Are there any practical steps I can take to assist with protecting commissions?  
- Jason Warren, Phuket

**A.** If your agency has legal status in Thailand – i.e. is a properly incorporated agency, then it would, under a contract, have a right to sue for enforcement. The remedies available would depend on a successful action, evidencing that the breach had occurred, and quantifying the loss of the 'commission'. Any ambiguity in the commission agreement would work against you if such a matter proceeded to court, and therefore agency agreements should be drafted carefully, but also vetted to ensure compliance with Thai law.

An international agency or commission agreement will not apply in the same way in Thailand than in another jurisdiction. In order to avoid non-payment of commissions, aside from the reputational risk that a developer takes by non-payment, you can take a series of practical measures within your business to deal with payments. Where monies are being transferred from overseas, you could secure an agreement that monies are deposited in an overseas escrow account, pending transfer into Thailand for completion, and that your commission is taken directly out of the escrow upon instructions by the purchaser to remit. If you think about this in advance, then when you request that a developer will forward a reservation agreement to your client to sign, you can propose an amendment to the reservation agreement stipulating that your commission will be deducted from the sale and purchase proceeds. Escrow Law exists in Thailand now, but the licenses and other procedures are still awaiting completion of actions by the authorities. Furthermore, large banks may not possess the facilities or flexibility to deal with multiple medium sized transactions. This remains to be seen. You should have in place a properly enforceable set of terms and conditions of agency under the laws of the Kingdom of Thailand in respect of commissions earned and paid in this jurisdiction, and in respect of commissions outside of the Kingdom of Thailand, an enforceable set of agreements.

**IF COMMISSION DUE IS NOT PAID, THE TRANSACTION COULD BECOME SUBJECT TO LITIGATION**



**Q.** I am a buyer who viewed a project under construction in Thailand 10 months ago, with an agent. The agent showed me around, and actually spent the best part of a week introducing me to properties, and providing me with market information. I didn't sign any document with the agent, and I elected to wait, come back and think again. Now I intend to proceed, but the developer has indicated that I don't need to inform the agent, and that I will get a better purchase price, if I don't. What is my legal position in this situation? I don't want to get caught in the middle of a dispute. - Mike Swenson, Cincinnati

**A.** At the point that you met with the agent, you should have been asked to sign an agreement with the agent, such as a non-circumvention agreement. If you were not, then the agent will have made a mistake in its contractual arrangements with you. In relation to the agent's arrangements with the developer, if you are aware that the agent ought to be paid a commission on the sale of a unit to you, then you should not participate in the circumvention. It is not fair for a developer to attempt to financially penalize a buyer as an inducement to circumvent a commission payment. If the correct agreements are in place between agent and developer, then if you proceed with your sale and the agent discovers the circumvention, then if the commission is high enough to justify litigation; the agent has 'clean hands'; and the relationship of trust between agent

and developer has been broken, then it could be that your transaction becomes the subject of litigation. Responsible developers tend to avoid circumvention of the very source of business from which they derive a sale. Please note however, that not all commission arrangements are clear cut. For example, if commission applies to only Phase I of a project, and you buy in Phase II, then of course – no commission would be payable to the agent in such circumstances.

**Q.** I have entered into a transaction which is connected to receipt of commission payment being received. I am concerned that if my commission is late or not paid, I will be in default on my transaction. What can I do to protect my position – would I be able to sue the party that owes me commission if my transaction falls through? - Annie Drowley, Scotland

**A.** The ideal way of dealing with this matter would have been to link the two transactions as being conditional on the performance on the first commission contract which would include mention of the transaction contemplated in the commission contract, so it is clear the entity or person owing the commission knows you are relying upon it for business reasons known and disclosed. If for commercial reasons, disclosure of the related transaction is not practical or possible, then at least the transaction itself should have as a condition precedent, the receipt by you of the commission. If for any reason the commission is not paid, then your obligations should be capable of being terminated without further loss or liability, or an extension granted. In the transaction itself, the party being aware that you are relying on a third party payment, may allow you to negotiate at least a little movement on timing. Market pressures will dictate how much, and this will impact on the strength of the protection which may be secured through negotiation in the contract.

This legal clinic was co-written by Desmond Hughes (Partner) and Christian Glanville (Partner) based in the Phuket and Koh Samui offices of Limcharoen Hughes & Glanville (formerly known as Belmont Limcharoen) respectively, which has also offices in Bangkok and with a new office in Ho Chi Minh City, Vietnam, opening soon. [www.limcharoen.com](http://www.limcharoen.com)