



Legal Clinic: Questions and answers on Thailand property legal issues

BY DESMOND HUGES AND CHRISTIAN GLANVILLE

Wrongful termination

Q. I have entered into a set of contracts for purchase of a property and can generally see that the developer has adhered to its obligations. Unfortunately, the exchange rate is currently working against the currency I planned to use to finance my acquisition. I see that there is a refund provision in the contracts I have signed, but this is only triggered by a material breach by the developer. Is there any way I can obtain my monies back using the refund clause or by terminating the contracts? What could happen if I terminated, the developer disagreed, and I simply stopped payments? - *David Crest, England*

A. Without reading the specific contracts, it still appears from your question that the matter you are considering could constitute 'wrongful termination' of the contract. By attempting to terminate either without cause, or with a spurious cause unrelated to the reasons for your desire to terminate, then you actually risk: forfeiture of the monies paid to date; demobilization costs which the developer may seek to impose upon you; allegations that quality defects are related, in the future, to your delay to pay now; claims for compensation for damages from the developer (especially if there are financial penalties from contracts with sub-contractors). The most appropriate strategy appears to actually disclose frankly the amount of losses you estimate you may incur under the unfavourable current exchange rates, and work with the developer on a revised payment schedule if this is feasible. Developers may be able to slow down work in a more planned, organized fashion for your specific property, if they have notice of your issues and should therefore not react aggressively to a genuine disclosure of financial concern. It will be more difficult for a developer when your unit is part of a building block, and completion of payments in relation to your unit also assist with the next milestone progression of construction for other units in the same building, such as a condominium. Wrongful termination of a contract could not only cost you monies spent to date, but may result in additional charges and therefore any form of notice or communication relating to delayed payments or breach of obligations should be vetted by a lawyer.



IS THERE ANY WAY I CAN OBTAIN MY MONIES BACK USING THE REFUND CLAUSE OR BY TERMINATING THE CONTRACTS?

Q. I have bought a property, which originally I intended to place into a rental pool. I am now concerned that the number of rentals might not meet my expectations, and I do not have a rental guarantee in my favour. Unfortunately, in my contract, there is a 12 month notice period to leave the rental pool, but I have just been contacted by a friend who will gladly rent the property for 8 months at quite a high rental thereby securing the property for more than enough time to cover maintenance costs and a profit. As there is no rental guarantee, can I force early termination of the rental agreement so I can take the private rental? - *Rob Bouvoir, Kuwait*

A. The consequences of your proposed wrongful termination of a rental pool agreement, if such an agreement requires a twelve month notice period for termination, could span beyond that of simply denying the rental pool operator the rental commission fee on your unit. Your withdrawal could detrimentally impact upon the whole rental scheme, and the cost synergies of operating a rental program with a certain minimum number of units. Therefore, your liability and risk as a result of your carrying out a wrongful termination would be wider than you might first contemplate. In such circumstances, if you have completely lost confidence in the rental operator's ability to secure even close to the length of time of rental currently commercially available to you, is to make an offer to 'purchase' your way

out of the contract. This is far preferable and less inflammatory than a wrongful termination, and furthermore, won't involve the potentially large litigation costs associated with a dispute over such matters.

Q. I have commissioned an architect to design my dream villa, and paid a small deposit. The contract was unusually in my favour, in that the balance of the payment was due upon completion of the designs 'to my satisfaction'. I actually don't like the final design very much at all, and don't see why I should pay the balance at all to the architect. Although a significant amount of time has been spent, I should like to terminate our agreement and walk away. Is this feasible? Are there any risks involved? - *Sebastian Garcia, Monaco*

A. The contract with the architect should relate to the service provided and therefore is a 'service' contract based on professional services. If the contract is fixed fee or based on time, there is a clear opportunity to debate whether time has been well spent on a matter, or whether the fixed fee is justified by quality. However, simply terminating your arrangement and 'walking away' from the arrangement is most likely in the circumstances you describe, wrongful termination. If there is a large balance due, it is far more likely that the architect will take legal action against you, and if the quality is good and in accordance with the design brief or can be proved to be so, then you will be in a weak position in court or at arbitration, wherever the proceedings may be. Therefore, you should approach the architect openly, and explain that you feel on reflection the fee was too high, or that you are genuinely dissatisfied. Adopting the more ruthless method you propose could backfire in a costly and damaging manner.

This legal clinic was co-written by Desmond Hughes (Partner) and Christian Glanville (General Manager) based in the Phuket and Koh Samui offices of Belmont Limcharoen respectively, which has also offices in Bangkok and with a new office in Ho Chi Minh City, Vietnam, opening soon. www.belmontlimcharoen.com. Put your own legal questions to Desmond@law@property-report.com.