



Legal Clinic: questions and answers on Thailand property legal issues

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Managing luxury property estates



Q. A large number of the properties I own for investment in the UK have owners' committees, but in the development I want to buy into in Phuket, the developer controls the appointment of the management entity from the outset and is retaining a large number of units for itself which presumably means more say for a developer than an individual owner. What legal issues should be considered to protect me and the development from abuse of process within the management control function of the estate? - *R. Fowler, Leeds, UK*

A. If you have bought the property for investment purposes, and the developer is retaining units, this is not necessarily simply so that the developer can control the management, although control can be a result of the retention. The developer may well retain units because it cannot sell that portion of stock, or more positively – because it believes the development will be successful and can capitalize on appreciation of the value and rental returns.

The developer should also want the estate to be well run, to hold value on its units. Legally, if the unit is in a condominium – there are provisions protecting the owners from one entity controlling the majority voting rights in the 'condominium juristic person'. Additionally, materials used prior to the sale of the condominium including marketing materials must now be retained under the revisions to the Condominium Act which are effective from 4th July 2008 so the developer must therefore be careful about the representations it makes on the management of the condominium. In respect of villa estates, the developer may have retained ownership of the internal roadways, access and common facilities. If the management company doesn't control this, then the developer can simply prevent the management company from utilizing the common areas and facilities in the event of a dispute. Therefore, you and your lawyers should check the master plan and rules and regulations carefully and compare this to legal controls in the estate, to ascertain who has control and under what circumstances the owners may prevent in practice any misuse of the control.

In managed estates in Thailand there will typically be a large number of absentee owners who may have bought for investment purposes but simply don't have time to attend management meetings and attend to administrative matters. Therefore, the constitution of the board of directors of the management company or the 'owners committee' should be reviewed carefully. Ideally, good corporate governance criteria should be applied to the constitution of the owners committee. If the villas in the estate are part of a mixed use development including a hotel, then it would be beneficial for the hotel to appoint two directors or representa-

tives onto the board or owners committee, the villa owners to appoint two directors or representative, and for a wholly independent director or representative to also be part of the constitution. It may seem overloaded in terms of detail – but with such a large number of owners away, this is a good system for monitoring the estate and also to report back to the owners on key issues that may come up in managed estates during the year.

Q. I am aware that most properties require maintenance once a year, and subject to climate and other extraneous factors, renovation work every five years as a minimum. The development I like has a fantastic design and is in a great location – facing the sea. From the cost estimates I have seen, I believe that the developer, who has not yet appointed a management company, has greatly underestimated the cost. This means a far less expensive outlay for me but what problems can it cause long term? What legal protections could be put in place to solve this issue? I really love the property and unless there is a big issue, will proceed to buy. - *Quentin Lockhart, UAE*

A. If there have been underestimations of maintenance costs, especially of a sea-facing property which will be subject in certain regions of Thailand to monsoon and strong rainy seasons and all year round heat, then there is likely to be the need for a readjustment of the property management fees and a use of the sinking fund earlier than purchasers expected. However, if the legal documentation and the method of management allow the owners to make the necessary adjustments with flexibility and in good time, then the initial underestimation can be remedied.

It is actually unhealthy for the owners to be locked into fixed rates, as inevitably, some owners will simply not care about the development in the same way you might, and if more than a few owners share this view, they could point to the legal documentation as a way of not paying. It is not clever to insist on a fixed price for matters which are actually

variable if the result is the quality of your estate and therefore your investment suffers. A review of the management agreement, and the provisions dealing with adjustments will show very quickly whether the correct administrative procedures are in place to cope with the necessary changes, updates and modifications and 'live' environment requires. You must ensure that you would, together with a number of other owners, be able to carry the weight in a management system to make a change to deal with such a problem.

Q. I have looked at 10 different developments as investment prospects, and each development has a different style of management, and a different contract. I am now confused as to what I should be looking for to ensure that I am protected. Are such contracts just meaningless precedents, or can I actually believe what the documents say is what will happen in practice in the development? - *Matthew Collins, Texas*

A. It is true that standard management agreements exist, and that the obligations existing in those agreements can become lost in the event that the agreement doesn't relate or correlate to the actual managed estate at all. It is normal for rules and regulations and management methods to be 'adapted' and changed over time. However, if a group of persons experienced in managing estates create a management agreement, it is normally of far better quality than a simple precedent. To select one example 'tell-tale' sign of thinking about what lies behind a clause in a management agreement, a good management agreement would deal with 'human resource' allocation to look after villas, guests who are renting in the villas and the training of such human resources. It would even deal with how a member of staff could be disciplined, re-assigned to a different position in the management company (out of the sight of the offended owner), or, for gross misconduct, how employment would be terminated. If the villa owners actually have an input on this, then the staff of the management company will be less likely to adapt an approach which is suited to only pleasing their direct employer, as opposed to also being obliged to please the property owners. There are a whole host of additional provisions that could be tailor-made to suit a project but which will be location and design specific.

This legal clinic was co-written by Desmond Hughes (Partner) and Ingo Müller (Senior Associate) based in the Phuket offices of Belmont Limcharoen which has also offices in Bangkok and Koh Samui with a new office in Ho Chi Minh City, Vietnam, opening soon. www.belmontlimcharoen.com