

# Legal Clinic: questions and answers on Thailand property legal issues

This legal clinic is co-written by *Desmond Hughes* (Partner) and *Kris Limcharoen* (Partner) based in the Phuket, and Bangkok offices of Belmont Limcharoen respectively and now with a new office in Koh Samui. [www.belmontlimcharoen.com](http://www.belmontlimcharoen.com)



**Q. I plan to buy in a development where other buyers have already proceeded with their purchases and have placed deposits. Do I still need to take legal advice?**

Colin Cutcorners, Bangkok

**Answer:** The relationship between law firms and their clients is a 'private' relationship that generally other parties are not entitled to rely upon. Before proceeding with an investment into property, a land title search verifying the history of the land title and its legality should be conducted. If you elect to rely upon a third party report, or even the report of the seller or its legal advisers, then you must wholly accept the risks attached to dispensing with independent legal advice which in certain jurisdictions is mandatory and certainly is required by lending institutions to a high standard in developed jurisdictions. In relation to contracts, there are no 'standard' contracts which apply to sophisticated managed estates or developments which would be considered by international firms as covering all the necessary points to provide a reasonable amount of security and protection for a buyer. There is a body of consumer protection relating to real estate licensed developments and also in relation to condominiums. However, even regulated contracts can contain dilutions or ambiguities, and these should also be vetted for consistency between that which is being sold, the principles of the investment, and the wishes and expectations of you as the buyer.

**Q. I have narrowed my choice of prospective investments to two developments. I like both, and have received contracts relating to each. One set of contracts is far inferior to the other set. Does the use of inferior or substandard contracts by a developer correlate to the quality of the real estate product?** Timothy Typo, Trang

It would be unfair and contrived for a law firm to cast aspersions on a developer, solely due to the use of a substandard set of contracts. However, where a product is projected as being 'upscale'; 'high end' and of premium quality, it is reasonable to expect that a developer has paid proper and due attention to the quality of contracts, quality of tax advice and accounting advice it has received, and of course – the quality of its end product. The more 'rounded' and groomed a development is, it is reasonable to assume that the developer is more likely, although not guaranteed, to pay attention to the quality of its products.

Where an international firm has 'reviewed' another firm's contracts and the contracts have evolved with certain changes being incorporated into the latest versions, there cannot necessarily be an assumption that the reviewing law firm has 'endorsed' the contracts in any way. More often than not, the reviewing law firm may be instructed by a client to concede on certain points, or it may be that the risk profile of the client is such that it is not prepared to instruct its lawyers to be as diligent as possible on a review of contracts. It may even

be possible that a key investment issue is considered by the client as a worthwhile risk in respect of the value of the investment. It is not safe therefore to assume that contracts have ever evolved to an acceptable standard unless the entire history of the contract and negotiation is known by all, which is a remote possibility. In summary, an investment choice shouldn't be made on the perceived quality of contracts alone, but the preparedness of the developer, its abilities and experience will be reflected through marketing materials; legal documents; corporate structure; quality of advisers; amicability and receptiveness to constructive comments and realistic analysis of management requirements for the estate.

**Q. "When I purchased my off-the-plan property, I responded to the marketing materials which referred to a 'guaranteed 10% rental income guarantee. Now, after the property has completed, I am receiving less monies than I anticipated although the capital value of my property has increased. Should I attempt to take action against the seller for misrepresentation?"** Kakan Eatit, Kananchaburi

In most consumer related transactions, the 'buyer beware' principle applies. In relation to marketing and advertising, provided there is no deliberate misrepresentation, it is reasonable to expect a developer or manager of an estate to focus on the positive selling points of its rental income scheme. It really is up to the buy-

er to investigate investment returns fully prior to committing to a purchase. A rental income may be 'guaranteed' as a percentage, but what is the percentage applied against? What is deductible from the 10%? Is a 'cash call' possible so that profits from rental income may long term be absorbed by unexpected frequent requirements to maintain the property? A rental income return is not always a deception; it may be that the developer genuinely wants to provide value to its buyer clients to encourage further investments. However, the figures involved should be properly evaluated and reviewed. An astute investor will look at potential returns over the period it intends to hold the property and beyond so that 're-sale' value is taken into account.

A guaranteed rental income return will generally be expressed fully in a contract with terms and conditions. If there are a series of exclusions included in the terms and conditions expressing circumstances where the guarantee would not apply, the likelihood of the exclusion applying should be analysed. If you are still receiving a profit on an investment, and there has not been a deliberate and obvious deception inducing you to invest, then the commercial risks of expecting a rental income return will belong to you after you have acquired the property more than the developer or operator, although if the developer and operator are keen to maintain their reputation they will naturally be concerned with dissatisfied investors. P