



Legal Clinic: questions and answers on Thailand property legal issues

BY DESMOND HUGHES & INGO MULLER

Rental Guarantees

Q. I have seen the marketing materials for a unit I am interested in acquiring and it refers to a 'rental guarantee of 6% per annum'. I haven't received the contracts yet, but have been asked to place a deposit, is there anything I should think about, legally, which might assist me in questions I should put to the developer before signing a reservation agreement? - *James Blackwall, Heswall, Cheshire, UK*

A. Before you make a decision based on the marketing material, you should take your time, and review carefully the terms and conditions of the 'guarantee'. The principal questions you should ask are:

- Is the guarantee net of all taxes?
- Are there any expenses that I am liable for which will eventually come out of the guarantee revenue?
- Which entity is offering the guarantee? Is it credible and financially supported? What would be my remedy if the guarantee were broken?
- What are the usage restrictions connected with the guarantee?
- Will you be penalized for terminating the arrangement?
- If you exceed your personal usage entitlement, do you still get preferential rates for usage?
- Are there any "blackout dates" – do they fit with your anticipated visiting times: Lunar New Year; Christmas and New Year, etc.
- What is the % measured against – is it the total monies you spend on the unit, or is a different formula applied if special payment terms are involved?
- Is the guarantee assignable so that when you re-sell the unit, the purchaser will obtain the benefit of the guarantee?

Q. I entered into a contract to receive a guaranteed rental income, but the project in which I bought is not yet complete, so the developer is not receiving monies by way of income from rentals nor distributing any monies under the guarantee. What are my rights? Can I take action against the guarantor? - *Nicholas Jegou, France*

A. If the rental guarantee was linked to the timing of the actual operation of the resort, then the developer may be legitimately entitled to delay payments. If there is a strong delivery or timing



provision, then you may be entitled to claim for the monies you haven't been paid, plus, if the default provisions were appropriately drafted- interest and expenses on unclaimed sums. If you have lost on usage rights, then you may, if the original agreement covered this point adequately, be entitled to alternative but equivalent standard accommodation. If you were expecting to receive an amount above the minimum guarantee, then the 'loss' you may have suffered will be difficult to prove. To procure efficient and speedy settlement, you could attempt to claim for travel expenses, and some other concessions based on the lost income. It would be unusual for a developer to allow a third party event such as late delivery by sub-contractors to result in

large financial losses on the guarantee, so in practical terms you will be fortunate if you are entitled to some remedies for later delivery impacting on the guarantee. If you look at the investment in comparison to a 'to-be-listed' Stock Exchange product, then you would not expect to receive benefits of your investment until after the listing. Similarly, in relation to a property investment, you would expect the property and resort to be complete to maximize the income for all investors. Therefore, you should also have considered this risk at the outset if the investment was made in an off-the-plan project.

Q. I am attracted to the rental guarantee offered to me, but I think I will start to spend an increasing amount of time in Thailand as I approach retirement, are there any special factors I should consider before signing the purchase contracts and guarantee agreement? - *Terry Chivers, Pattaya*

A. The main provisions to examine are the 'opt-out' provisions from the rental scheme. If the developers aim is to secure as many entrants into the scheme as possible, it may actually become commercially unattractive for you to privately use the unit. If you were to live in a resort, the day-to-day costs could be a lot higher than standard private use. Therefore, you should analyse what the effects of using the unit privately from the outset would be. In relation to exit, you need to ensure that you will be paid your guaranteed income up to the date of exit, but you will most likely be required to provide a 'season's worth' of notice, sometimes a whole year, prior to exit from the rental scheme. If you intend to 'convert' to private use, then you should pay particular attention to where the management services for common areas, but also the private areas will be supplied from. You may want to ensure that as a private user you will still be allowed items such as private pool maintenance, maid and cleaning services and security, albeit with an appropriate cost attached to the same. These matters ought to be dealt with in the contractual documents.

This legal clinic was co-written by Desmond Hughes (Partner) and Ingo Muller (Senior Associate) based in the Phuket offices of Belmont Limcharoen which has also offices in Bangkok and Koh Samui. www.belmontlimcharoen.com