

LEGAL ISSUES

Sales & Purchase Agreements

Are you asking the right questions?

So you've found the perfect property. It is a nice 3-bedroom villa with a private pool and glorious sea views in a convenient location. This property may represent an investment into a holiday home, an Asian home-base or simply a wonderful place to retire.

The price, you realize happily, represents great value when compared to real estate in your home country. The unit is currently available off the plan at a significant discount and the developer warns that the units could sell out at any day. Taking all things into consideration, you decide to go ahead and reserve a unit. What happens next?

Mr. Desmond Hughes, Partner of Belmont Limcharoen (Phuket) advised that, as an initial step, buyers should ask the developer for a verified title opinion which they should then take to their lawyer. This may create a little seller-buyer tension, but due diligence into title search can prevent much heartache later on if there are any title issues at play. A title search can be disclosed to an outside party upon request and it is highly recommended that buyers avoid handing over any monies until their lawyer has conducted due diligence into title and even reviewed the contracts to check they are commercially acceptable.

Once the deposit agreement is signed and the deposit paid, the next step is signing sales and purchase agreements. A sales and purchase agreement is basically an accord between the buyer and the seller stipulating that the buyer agrees to either;

- 1) lease the land and building upon it from the developer for a set period of time i.e. 30-years,
- 2) buy the freehold title of the land and building upon it through an established Thai company, or
- 3) buy freehold title of a condominium

From the sellers point of view he is agreeing to a number of actions, primarily handing over the leasehold or freehold title of the land and the completed building by a specified time. Once the agreement has been signed, both parties are legally bound to fulfill their contractual requirements and for this reason it is always preferable to have expert legal counsel in your corner. The contracts may have been written more to the developer's liking with formal jargon and intimidating terminology. Mr. Hughes said, "Don't be intimidated. As lawyers, when we look at legal documents we ask simple questions. Who, what, when, where, why and how; these are a lawyers best tools."

A first time buyer may be presented with a suite of contracts at this stage of the process. Purchase of land title, construction and post-completion estate management, are the usual three, but some developers, due to the make-up of their companies, require you to sign numerous contracts that are applicable to different off-shore entities for various stages of the construction. Mr. Hughes suggests you first ask “who?” Exactly who is the developer? Who are these off-shore companies that will receive my money? If you are presented with many contracts involving many companies, ask to see all the accounting records and corporate documents of each company to be sure that all of them are legitimate. The buyer’s lawyer needs to request these accounts on a confidential basis and if a shelf company is detected, the lawyer will ask for a guarantee from the developer to assure all of its contractual obligations will be fulfilled. It is important to realize that it is completely legal and commonplace for development companies to have numerous off-shore entities for tax purposes and buyers shouldn’t be scared-off by this.

The next question to ask is “what?” What are the contracts committing me and the developer to? Some developers give all the details up front, for example, building specifications, previous plans and designs, build area in square metres, precise area of land etc. For obvious reasons, lawyers prefer these detailed contracts as generally they provide more protection for the buyer. Some developments promise full chanote title (this is the highest grade of land title). Other titles are less defined, for example the Nor Sor 3 Kor which is commonly tradable for Thai companies. There is always an element of risk when land title is upgraded, that physical access may be compromised. Access needs to be registered by way of servitude that runs with the specified land title. If the developer has not subdivided or the land is being leased to the buyer and others, there should be shared servitude and only leased access rights.

“When?” generally refers to payment schedules and finish dates. When will lease title be registered? When will freehold title be registered to my Thai company? When will construction be complete? What happens if the developer fails to finish, or register the lease on time? Most developers don’t like to give clear finish dates as in this regard they are at the mercy of the various contractors they have employed to get the construction done. Mr. Hughes said, “This is a big issue for buyers and mostly they are very patient but when the construction is running very late, they usually want a full refund or at least some compensation. If, for example, a buyer is renting a villa while construction is being done on his own villa, a month or two extra won’t really be a problem. But five, six, twelve months amounts to lot of rent that the buyer technically wouldn’t have to be paying if the construction had been finished on time. Reasonable developers provide a daily penalty if the project is unfinished by the agreed date. Some won’t offer any penalty because it depends on the contractor’s agreement.”

Buyers should also be aware of what payments are due in relation to the distinct construction achievements. Who decides that the construction phase has been

successfully achieved; the buyer or the developer? Mr. Hughes advised, "All payments in relation to construction should be subject to inspection. Good developers send photos, quantity surveyor's reports etc. Some buyers appoint a personal project manager to supervise all the construction milestones. Basically they pay him a rate relative to the specific payment and he ensures that the construction has been completed in accordance with the buyer's wishes."

The question of "where?" relates to the buyer's location. Where is the buyer and can he deal with everything from wherever that may be? Mr. Hughes assures that, "Yes. Almost all stages can be done from outside Thailand. Buyers can nominate power of attorney, set up a Thai company, communicate regarding contracts; generally when it comes to the mechanics of the deal, it can all be done using modern telecommunications. Only immigration issues require personal visits."

"Why?" Buyers should be asking this question throughout the entire buying process. Why are there so many contracts? Why can't I get freehold title? Why can't I get a refund if something goes wrong? Mr. Hughes said most people start with the question of "why do the contracts have to be signed within two weeks of paying the deposit?" The answer to this is that in most cases the developers don't want to give the buyer too much time to change their minds.

"How?" It is important to know how the estate will be managed once the construction has been completed and owners take up residence. Will the development company stay on and manage the estate? Or will the development company contract this out to a professional management company? Who makes the estate rules? Who governs said rules?

During the construction phase, who pays for the introduction of common areas? Sometimes the developer pays for this as incentive for the buyers and sometimes these are paid for through a sinking fund. If you are required to invest into a sinking fund, how will the money be used? Mr. Hughes advised that amounts should be scaled according to the progress of the common areas. In addition, how will the costs of maintaining common areas be covered, once the sinking fund has been expended? In most cases the owner is required to pay yearly estate management fees.

Who, what, when, where, why and how? Finding answers to these six questions and their subsequent questions will help keep buyers well informed and confident of every stage of the buying process for invaluable peace of mind.