

160-07)

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 2761 OF 2003

BETWEEN

FIRST STAR DEVELOPMENT LIMITED Plaintiff

and

THE HONG KONG HOUSING AUTHORITY 1st Defendant

THE SECRETARY FOR JUSTICE 2nd Defendant
(ON BEHALF OF THE GOVERNMENT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION)

DEFENCE OF THE 1ST DEFENDANT

1. Unless otherwise stated: -

- (i) references herein to paragraph numbers are to the paragraph numbers used in the Statement of Claim.
- (ii) the abbreviations adopted herein have the same meaning as those used in the Statement of Claim.

2. (i) Paragraph 1 is admitted.

(ii) Further, at all material times, the Plaintiff was a subsidiary of New

World Development Company Limited ("New World").

3. The 1st Defendant ("the Authority") is an independent statutory body which was established in 1973 under the Housing Ordinance (Cap. 283) ("the Ordinance") for the purpose of implementing and developing a public housing policy within the general housing framework for Hong Kong established from time to time by the 2nd Defendant.
4. (i) Section 6 of the Ordinance provides: -

"The Authority shall be a body corporate with perpetual succession and a common seal and, for the purposes of this Ordinance, with a capacity to acquire and hold land and to sue and be sued in the corporate name of the Authority."

(ii) It is thus averred that the 1st and 2nd Defendants are and were at all times separate and distinct legal entities.
5. The object and purpose of the Authority are specified in section 4(1) of the Ordinance which provides that: -

"The Authority shall exercise its powers and discharge its duties under this Ordinance so as to secure the provision of housing and such amenities ancillary thereto as the Authority thinks fit for such kinds or classes of persons as the Authority may, subject to the approval of the Chief Executive, determine."

6. The powers of the Authority are specified in section 4(2) of the Ordinance and such powers were given to the Authority to enable it to implement and develop a public housing policy within the general housing framework for Hong Kong established from time to time by the 2nd Defendant.
7. As to Paragraph 2: -
- (i) It is admitted that in 1977 the Government of Hong Kong introduced a housing policy which took effect in a scheme known as the Private Sector Participation Scheme ("the PSPS Scheme") the purpose of which was to supplement the amount of public housing available for sale to eligible Hong Kong citizens then provided under the existing Home Ownership Scheme ("HOS") in order to meet unsatisfied demand for such housing.
- (ii) (a) It is further averred that at all material times the purpose of the PSPS Scheme was to create an additional source of affordable subsidized public housing to enable lower to middle class citizens of Hong Kong to purchase their own residential units who could otherwise not afford to purchase flats of similar size and quality on the private residential market.
- (b) At all material times, it was not the policy of the 2nd Defendant nor within the contemplation of the Authority that the number of residential units to be sold under the PSPS Scheme would

deviate substantially from the level of demand for such housing.

(iii) Save as expressly admitted above, Paragraph 2 is denied.

8. As to Paragraph 3: -

(i) Paragraph 3.1 is admitted.

(ii) (a) Paragraph 3.2 is denied.

(b) The express provisions of the applicable Special Conditions of the Lease of the lot entered into between the Developer and the 2nd Defendant would govern the process of purchaser nomination.

(c) Further, it is averred that a central feature of the PSPS Scheme was that where no nomination or re-nomination of purchasers, as the case may be, has been made, the Developer would nevertheless be guaranteed that such flats would be purchased from the Developer after the expiry of a period of time and at a price both of which would be specified in the Special Conditions of the Lease. When the PSPS Scheme was first introduced, the Special Conditions of the Lease provided that such flats would be purchased by the 2nd Defendant and following the re-organisation of the Authority in April 1988, for tenders issued on or after November 1988, the Special

Conditions provided that such flats would be purchased by the Authority.

- (d) This feature of the PSPS Scheme was introduced and implemented so as to ensure that the Developer received a fixed income and to remove any doubt as to the return of the Developer on its investment in the development, and was expressly provided for in all PSPS Scheme Special Conditions.
- (iii) (a) Paragraph 3.3 is denied.
- (b) It is specifically denied that under the PSPS Scheme the Developer could only sell residential units to purchasers nominated by the Authority and the Authority here repeats Paragraph 8(ii) above.
- (iv) Save that it is admitted that the Developer would be permitted under the contract to build certain non-residential units including car parking spaces and, subject to the terms of the Special Conditions of the Lease, to sell such units on the open market, Paragraph 3.4 is not admitted.
- (v) Save that it is admitted that before the Developer could agree to assign or assign any of the residential units Pre-Sale Consent had to be granted by the Director of Lands, Paragraph 3.5 is denied and the Authority here repeats Paragraph 8(ii) above.

(vi) (a) Paragraph 3.6 is denied.

(b) It is averred that the practices in relation to each development sold under the PSPS Scheme inevitably varied depending upon the circumstances relating to the particular development in question. In particular, in relation to Paragraph 3.6(c), the timing of the grant of Pre-Sale Consent was dependent upon a number of factors, which are pleaded below.

9. Further, it is averred by the Authority that:-

- (i) In accordance with the general housing policy of the 2nd Defendant, the HOS and PSPS Scheme were created, and continued to operate at all material times, to provide subsidized public housing to enable lower to middle class citizens of Hong Kong to purchase their own residential units who could not otherwise afford to purchase such housing in the private residential market.
- (ii) The need to provide such subsidized public housing, and the extent of its provision, was directly affected by the level of demand for residential units, which in turn was affected by the economic conditions prevailing at any particular time in Hong Kong ("the Market Conditions").
- (iii) At all material times, if the need to provide such subsidized housing

was reduced or no longer in existence, there was a real prospect or likelihood that the number of flats sold under HOS and PSPS Schemes would be reduced or that the HOS and PSPS schemes would be temporarily or indefinitely discontinued as a result of a change in the general housing policy of the 2nd Defendant.

(iv) The Plaintiff knew or ought to have known of the existence of the matters referred to in sub-paragraphs (i) - (iii) hereinabove, *inter alia*, because of New World's involvement as a developer of previous PSPS projects.

(v) Thus, it is averred that, upon signing the Memorandum of Agreement, the Plaintiff voluntarily assumed and/or accepted the risk of the real prospect or likelihood that the number of purchasers nominated to purchase the flats sold under the PSPS Scheme would be reduced or that the PSPS Scheme would be temporarily or indefinitely discontinued as a result of a change in the Market Conditions and change in the general housing policy of the 2nd Defendant.

10. As to Paragraph 4: -

(i) It is admitted that the Plaintiff submitted a Form of Tender dated 25th June 1999 to the 2nd Defendant.

(ii) It is averred that this Form of Tender was submitted in response to the Tender Notice issued by the 2nd Defendant to which was annexed the

applicable General and Special Conditions of Sale ("GC" and "SC" respectively) in relation to the Lot.

(iii) Save as expressly admitted above, Paragraph 4 is denied.

11. Paragraph 5 is admitted.

12. As to Paragraph 6: -

(i) It is admitted that the Tender was accepted by the 2nd Defendant in or about September 1999.

(ii) (a) It is further admitted that a Memorandum of Agreement dated 22nd October 1999 was executed between the Plaintiff and the Chief Executive acting for and on behalf of the 2nd Defendant.

(b) The Authority was not a party to the said Memorandum of Agreement whether as joint contractor or otherwise.

(iii) Save as expressly admitted above, Paragraph 6 is denied.

13. As to Paragraph 7: -

(i) It is admitted that the Plaintiff became the Lessee of the Lot after the said Memorandum of Agreement was executed.

- (ii) It is admitted that after the Memorandum of Agreement was executed the Plaintiff commenced development of the project located on the Lot known as the Hunghom Peninsula.
 - (iii) Save as expressly admitted above, Paragraph 7 is denied.
- 14. Paragraph 8 is denied and the Authority here repeats Paragraph 9 above.
- 15. Save that it is denied that there were any "implied terms", the Authority makes no further admission to Paragraph 9 as the same is not a proper plea and is so lacking in particularity as to render it meaningless and liable to be struck out.
- 16. (i) Paragraph 10 is denied.
 - (ii) It is averred that none of the terms pleaded in sub-paragraphs 10 (a) to (g) were or could be implied into the Memorandum of Agreement whether as a matter of law, as a matter of necessary implication to give business efficacy to the said contract, or otherwise.
- 17. (i) (a) Paragraphs 11 (a) - (d) and 11 (f) - (h) are denied.
 - (b) It is specifically denied that the Authority was a joint contractor to the Memorandum of Agreement or that any collateral contract had been entered into between the Plaintiff and the Authority.

- (c) Save that it is admitted that the Authority, in exercising its powers of nomination of purchasers under Section 4 (ja) of the Ordinance, did so as agent for and on behalf of the 2nd Defendant, Paragraph 11(e) is denied.

 - (ii) In the alternative, if, which is denied, the terms pleaded in Paragraph 10, or any of them, were implied into the Memorandum of Agreement, it is averred that the Authority was not a party to the Memorandum of Agreement, whether as joint contractor or otherwise, and accordingly was not contractually bound by any such implied obligation(s).
18. (i) Paragraph 12 is denied.
- (ii) In the alternative, if, which is denied, the Authority was a joint contractor and/or that there was a collateral contract between the Plaintiff and the Authority, then it is averred that the Authority has acted in accordance with the GC and SC of the Lease.
19. As to Paragraph 13: -
- (i) It is admitted that the Plaintiff commenced construction work of the Development in or about the beginning of 2000.

 - (ii) Save as aforesaid Paragraph 13 is denied, and the Authority reserves

the right to plead further to the second sentence of Paragraph 13 once the same has been properly particularized.

20. As to Paragraph 14: -

- (i) It is admitted that on the 31st March 2000, the Plaintiff applied to the Director of Lands for Pre-Sale Consent pursuant to SC 27 of the Lease and enclosed a draft Deed of Mutual Covenant (“DMC”), draft Management Agreement (“MA”), and a draft Agreement for Sale and Purchase relating to the residential units (“ASP”) for approval.
- (ii) The decision as to whether Pre-Sale Consent was granted or refused to a particular developer is one that is made by the Director of Lands on behalf of the 2nd Defendant and is not a decision within the power of the Authority to make.
 - (a) In and about the proper exercise and discharge of its powers and duties under Section 4 of the Ordinance, the Authority has, at all times, endeavored to act in and protect the interests of the future owners of units in the PSPS development in question.
 - (b) In so doing it was the practice of the Authority under the PSPS Scheme to provide comments to the 2nd Defendant on the application for Pre-Sale Consent, and in particular the approval of the draft DMC, where requested by the 2nd Defendant and if necessary to do so in the circumstances.

(iv) Save as expressly admitted above, Paragraph 14 is denied.

21. (i) SC 27(b)(i) of the Lease provides that: -

"(b) The Purchaser may agree to assign or assign a unit or units but only:

(i) subject to Special Condition No. 6(e) hereof with the prior consent in writing of the Director and upon such conditions (including the payment of such fee) as he may impose or require".

- (ii) (a) In the premises, it is averred that the obtaining of Pre-Sale Consent from the Director of Lands was a condition precedent to the Plaintiff's right or entitlement to agree to assign or assign a unit or units in the Development.
- (b) It is further averred that at all times the burden was upon the Plaintiff to satisfy the requirements of the Director of Lands in order to obtain Pre-Sale Consent.
- (iii) (a) Further, under the PSPS Scheme, a draft Deed of Mutual Covenant ("DMC") is submitted for the approval of the Legal Advisory and Conveyancing Office ("LACO") acting for and on behalf of the 2nd Defendant.

- (b) It is necessary for the draft DMC to be approved by LACO before the Director of Lands can grant Pre-Sale Consent.
 - (c) It is averred that the burden lies upon the Developer to satisfy LACO that the draft DMC satisfies any applicable guidelines and/or memorandum established by LACO to govern the contents of DMCs.
22. (i) A DMC of a PSPS Development will provide, *inter alia*:-
- (a) for the rights and obligations of owners of units in the Development *inter se*;
 - (b) make provision for the management of the Development;
 - (c) delineate the scope of and allocate common expenditure between owners of units in the Development.
- (ii) In those circumstances, it is averred that:-
- (a) there is no fixed time for approval;
 - (b) the approval time for a draft DMC by LACO will necessarily vary for each development depending upon the circumstances of each case;

- (c) if the interests of future owners of units in the development are not adequately protected by the provisions of the draft DMC, the approval process will inevitably be prolonged in order to ensure that the DMC is modified accordingly.

23. As to Paragraph 15: -

- (i) (a) It is admitted that on 3rd September 2001, the 2nd Defendant, through its Chief Secretary for Administration ("the Chief Secretary"), announced a temporary moratorium ("the 1st Moratorium") on the sale of all HOS flats and all flats subsidized by the Housing Society until 30th June 2002 and that after the 1st Moratorium was lifted the sales of HOS flats would not exceed 9,000 units up to 2005-2006 in any event.

(b) Save as aforesaid, Paragraph 15 is not admitted.

- (ii) As part of the said announcement, the Chief Secretary made the following statement:-

"At the same time we are continuing to face a high level of completions of flats in the private sector and by the Housing Authority - about 90,000 flats in total during the two years 2001-2002 to 2002-2003. This over-supply simply reflects the much more bullish predictions of both the public and private sectors in the early and mid 1990s, which in turn led to large scale construction programmes".

- (iii) Thus, it is averred that the 1st Moratorium was prompted by the 2nd Defendant's perceived need to respond to the Market Conditions which had arisen in relation to the private sector residential market and the need to take a balanced view of market developments and changing patterns of housing demand, and the Authority here repeats Paragraph 9 above.

24. As to Paragraph 16: -

- (i) It is admitted that on 5th June 2002, the 2nd Defendant, through the Chief Secretary, announced that the 1st Moratorium would cease to apply with effect from 1st July 2002, and that, after that date, the sale of HOS flats would resume in a "*cautious and considered manner.*"
- (ii) It is further admitted that Chief Secretary also announced that two Phases of HOS flats would be put on sale, and that the first phase of about 2,400 flats would be sold in September 2002, while the second phase of about 2,500 flats would be sold in April 2003, subject to market conditions.
- (iii) Save as expressly admitted above, Paragraph 16 is denied.
- (iv) It is averred that the release of further HOS units in the future was subject to future market conditions and the Chief Secretary made the following statement on 5th June 2002 as part of the said

announcement: -

"It is too early to say what levels of sale and which sites will be sold by the Housing Authority in the remaining period up to 2005-2006. It is a difficult if not impossible task to forecast market developments in detail so far in advance, and the Housing Authority and the Government must both retain a degree of flexibility within the overall ceiling of 9,000 HOS sales a year".

25. As to Paragraph 17: -

- (i) It is admitted that a site-specific list was attached to the Statement made by the Chief Secretary on 5th June 2002 which list specified the number of flats, the development, and the anticipated sale date in relation to Phase 24A and Phase 24B.
- (ii) (a) It is further admitted that residential units in Hunghom Peninsula were not included in the site-specific list referred to immediately above for sale in Phase 24A or Phase 24B but this was a decision of the 2nd Defendant as announced by the Chief Secretary.
- (b) As at 5th June 2002, the Plaintiff had yet to obtain Pre-Sale Consent in respect of Hunghom Peninsula.
- (iii) (a) It is admitted that the 2nd Defendant did not instruct the

Authority to nominate suitable purchasers of the residential units in Hunghom Peninsula.

(b) While it is admitted that as a matter of fact, the Authority did not nominate suitable purchasers of the residential units in Hunghom Peninsula, it is denied that this amounted to a "failure" or "refusal" on the part of the Authority.

(c) The power of the Authority to nominate purchasers is exercised as an agent of the 2nd Defendant and the Authority repeats Paragraph 17(i)(c) of its Defence. Thus, any nomination made by the Authority would be inconsistent with the 1st Moratorium announced by the 2nd Defendant.

(iv) Save as aforesaid Paragraph 17 is denied.

26. It is further averred that the decision as to whether residential units within a particular project is included in a particular Phase for Sale in the HOS/PSPS Scheme is made based upon a number of considerations including, but not limited to, the following factors: -

(i) In order to be included in a Phase for Sale, the developer should have already obtained Pre-Sale Consent or should be likely to do so in the near future.

(ii) If the size of the PSPS development was large, then residential units in

such large developments would be released in successive Phases for Sale and it is averred that the Plaintiff, at all material times and specifically at the time that it submitted the Tender on 25th June 1999, well knew of such practice.

Particulars

- (a) In relation to the Cheerful Garden development, which comprised 1,870 residential units, it was divided for sale between Phases 15C and 16A, the application period for which was in December 1993 and April 1994, respectively.
- (b) In relation to the Harmony Garden development, which comprised 2,340 residential units, it was divided for sale between Phases 17B and 18A, the application period for which was in November 1995 and April 1996, respectively.
- (c) In relation to the Beverly Garden development, which comprised 3,966 residential units, it was divided for sale between Phases 19A and 19B, the application period for which was in June 1997 and October 1997, respectively.
- (d) In relation to the Charming Garden development, which comprised 3,908 residential units, it was divided for sale between Phases 19A and 19B, the application period for which was in June 1997 and October 1997, respectively.

- (iii) Inclusion also depended upon the level of demand for such housing from purchasers which varies according to the economic conditions prevailing in Hong Kong at the particular time.
- (iv) The number of other HOS/PSPS residential units ready for inclusion in a Phase for Sale was also a relevant factor so that if there were a substantial number of such units which were ready for inclusion, this would diminish the chances of any particular residential unit to be included.
- (v) It was the practice that residential units sold under a HOS/PSPS Phase for Sale would be geographically dispersed such that the units to be sold would not be overly concentrated in any one particular region or area in Hong Kong.
- (vi) The relative completion dates of HOS/PSPS developments was also a relevant factor in that it was more likely for a development which had already been completed or was near completion to be included in a HOS/PSPS Phase for Sale.
- (vii) The administrative resources available to the Authority at a particular time also placed a limit on the timing and size of a HOS/PSPS Phase for Sale.

27. Further, the fact that Pre-Sale Consent has been granted does not mean that

the units to which the consent applies will be included in the next HOS/PSPS Phase for Sale and it is averred that the Plaintiff knew or ought to have known of this at all material times.

Particulars

- (i) In relation to the Bauhinia Garden development, Pre-Sale Consent was granted on 7th October 1999, but units from that development were only included in Phase 22B (and not in Phases 21B or 22A), the application period for which started in January 2001.
 - (ii) In relation to the Aldrich Garden development, Pre-Sale Consent was granted on 14th December 1999, but units from that development were only included in Phase 22A (and not in Phase 21B), the application period for which started in May 2000.
 - (iii) The developer of the Aldrich Garden development was an associated company of the Plaintiff.
28. Paragraph 18 is denied insofar as it relates to the Authority and without prejudice to the generality of such denial, it is specifically denied that:-
- (i) the Authority ever or ever sought to thwart, obstruct, frustrate or delay the process and/or progress of either the Development or the sale of the units as alleged in sub-paragraph 18 (e);

- (ii) the Authority ever or ever sought to delay or obstruct the grant of Pre-Sale Consent to the Plaintiff as alleged in sub-paragraph 18 (e);
- (iii) the Authority ever liaised or colluded with the 2nd Defendant or any of its governmental departments or agencies to or to attempt to thwart, obstruct, frustrate or delay the process and/ or progress of either the development of the Development or the sale of the units as alleged in sub-paragraph 18 (f);
- (iv) the Authority ever or ever sought to thwart, obstruct, frustrate or delay the sale of the residential units and/or the nomination of purchasers.

29. Paragraph 19 is admitted.

30. As to paragraph 20: -

- (i) It is admitted that the Plaintiff had applied to the Director of Lands for Pre-Sale Consent on 31 March 2000.
- (ii) It is further admitted that the Director of Lands granted Pre-Sale Consent on 20 November 2002 and 27 November 2002 in relation to residential units and non-residential units, respectively.
- (iii) Save as aforesaid paragraph 20 is denied.

31. As to Paragraph 21: -

- (i) It is admitted that the Certificate of Compliance for the Development was granted on 21st November 2002.
- (ii) It is further admitted that the Development, comprising 2,470 residential units of a total gross floor area of 144,299.926 square metres and non-residential units and a kindergarten of a total gross floor area of 3,733.124 square metres and 528 units of car parking spaces was completed on 21st November 2002.
- (iii) Save as aforesaid Paragraph 21 is denied.

32. As to Paragraph 22: -

- (i) It is admitted that the 2nd Defendant, through the Secretary for Housing, Planning and Lands, made the following policy statement on 13th November 2002: -

"The overlap between HOS and private residential market [sic] is getting more serious amidst a gross imbalance between supply and demand and vicious price competition in the private residential market. The advantages and value of the HOS are gradually diminishing, so are its role and attractiveness. The subscription rate of HOS has also hit a record low. We therefore believe that Government should withdraw as speedily as possible from the

property market in order to redress the balance in the market. Government will therefore recommend to the Housing Authority that, except for a small number of unsold and returned flats which will be sold to Green Form applicants, the production and sale of HOS flats will cease indefinitely from 2003 onwards. For those HOS flats that are completed or under construction, these will be disposed of through market-friendly means".

- (ii) (a) It is averred that the above policy statement was made as a part of a number of specific policy proposals made by the 2nd Defendant to stabilize the property market in Hong Kong generally, having completed a comprehensive review of its housing, planning and lands policy.
- (b) The policy statement had also taken into account the diminishing demand in the affordable subsidized housing supplied under the HOS and PSPS Scheme.

(iii) The Authority here repeats Paragraph 3 above.

(iv) Save as aforesaid Paragraph 22 is denied.

33. As to Paragraph 23: -

- (i) It is admitted that as at the date hereof the Authority has yet to nominate purchasers for the purchase of residential units in the

Development and the Authority here repeats sub-paragraph 25 (iii) (b) above

- (ii) Save as aforesaid Paragraph 23 is denied.
- 34.
- (i) Paragraph 24 is denied.
 - (ii) The Authority has at all times acted expeditiously and without undue delay.
 - (iii) In particular, it is averred that the period of time taken by the Director of Lands to grant Pre-Sale Consent was affected by the time necessary to approve the draft DMC in respect of the Development.
 - (iv) The primary factors which necessitated the time that was taken to approve the DMC are pleaded in Paragraphs 35 to 38 below.
35. Between November 2001 and May 2002, the Plaintiff disputed with the Authority in relation to the proper demarcation and allocation of the operation and management costs of the 24-hour Pedestrian Walkway ("the Pedestrian Walkway") which the Plaintiff was required to construct under SC 18 of the Lease.

Particulars

- (i) (a) In November 2000, the Plaintiff had confirmed with the Monitoring Surveyor (i.e. HSBC Property (Asia) Limited) that

maintenance costs of the air-conditioning/ventilation systems for the Pedestrian Walkway would be borne by owners of non-residential units.

(b) Further, in about May 2001, the Plaintiff subsequently agreed with the Authority that the Pedestrian Walkway would be demarcated as a Commercial Common Area in the DMC, as a result of which the operational and management costs ("the O & M Costs") of the Pedestrian Walkway would be borne by the owners of non-residential units, namely the commercial unit owners and the kindergarten.

(ii) (a) In or about November 2001, the Plaintiff reneged upon its original position and insisted that the Pedestrian Walkway should be demarcated as a Development Common Area and that the O & M Costs of the Pedestrian Walkway should not solely be the responsibility of the owners of non-residential units.

(b) As a result, internal consultation was necessary between units and/or sections in the Authority, including, but not limited to, the Agency Management Unit, the Project Support Section, the PSPS and Tenants Purchase Scheme Section, and the Legal Advice Division of the Housing Department, together with LACO. This process required a substantial amount of time.

- (iii) Subsequently, in or about April 2002, LACO had no objection to demarcate the Pedestrian Walkway as part of the Development Common Area in the DMC. As a result, it was necessary for the allocation of the undivided shares in the DMC in relation to both the Commercial Common Area and the Development Common Area to be modified. In May 2002, the Authority had no further comment on LACO's view.
- (iv) Notwithstanding the above, the revised schedule of areas was not received from the Plaintiff until late June 2002. Thereafter, the revised schedule was vetted expeditiously and without undue delay.
36. Further, in or about June 2001, a dispute arose between the Plaintiff, the Authorised Person of the Project, and the Highways Department as to the proper allocation of the future maintenance of the lighting frames and, in or about January 2002, a dispute also arose between the aforesaid parties in relation to the Uninterrupted Power Supply room ("UPS Room") with the result that the approval of the DMC could not have been granted until these issues were resolved in or about November 2002.

Particulars

- (i) (a) In or about June 2001, after the lighting frames had been built by the Plaintiff, a dispute arose as to the proper party responsible for the maintenance of the lighting frames.

- (b) In or about January 2002, after the UPS Room had been built by the Plaintiff, a dispute arose as to the proper party responsible for maintenance of the UPS Room.
- (ii) The lighting frames are located below the elevated deck of the Development and support the lighting system which provides lighting to the Hung Hom Bypass, which does not form part of the Development. However, the Highways Department maintained that the lighting frames did not form part of the lighting system and refused to accept responsibility for the maintenance thereof.
- (iii) The sole purpose of the UPS Room was to control the lighting system of the Hung Hom Bypass. However, the Highways Department refused to accept responsibility for the maintenance of the UPS Room on the basis that it formed part of the structures supporting the elevated deck of the Development.
- (iv) In or about November 2002, and as a result of protracted negotiations, it was eventually agreed that the maintenance issues in relation to the lighting frame would be resolved by the Highways Department maintaining the detachable parts of the lighting frames, and the owners of units in the Development maintaining the remainder.
- (v) At about the same time, it was also agreed that the maintenance issue in relation to the UPS Room would be resolved by the Highways Department maintaining the equipment and installations contained

within the UPS Room, while the owners of units in the Development would maintain the external part of the UPS Room.

- (vi) In order to give effect to the above resolution, revisions to the submitted draft DMC were necessary. This process started in or about November 2002 and was carried out with expedition and/or with reasonable dispatch and without undue delay.

37. Moreover, in or about January 2002, disputes arose between the Plaintiff, the Authorized Person of the Project and the Highways Department as to the proper allocation of the maintenance fees of Footbridge Link PROP FB2 referred to in SC 18 of the Lease. As a result the approval of the DMC could not have been granted, until the resolution of this issue in November 2002.

Particulars

- (i) The proposed Footbridge Link PROP FB2 referred to in SC 18 was originally intended to be built outside the boundaries of Kowloon Inland Lot No. 11076. Accordingly, the maintenance responsibility for Footbridge Link PROP FB2 would be discharged by the Highways Department.
- (ii) After the completion of Footbridge Link PROP FB2, it was discovered that a portion of Footbridge Link PROP FB2 was built within the boundaries of Kowloon Inland Lot. No. 11076. The Highways Department accordingly refused to accept responsibility for

maintenance of that portion of Footbridge Link PROP FB2 that was built within the Lot.

(iii) After protracted negotiations, in or about November 2002, it was eventually agreed that the Highways Department would be responsible for the maintenance of the portion of Footbridge Link PROP FB2 built outside the boundaries of Kowloon Inland Lot No. 11076, whilst the owners of units in the Development would be responsible for the maintenance for the remainder of Footbridge Link PROP FB2.

(iv) In order to give effect to the above resolution, revisions to the submitted draft DMC were necessary. This process started in or about November 2002 and was carried out with expeditiously and/or with reasonable dispatch and without undue delay.

38. (i) In addition, on 24th June 2002 LACO required that the approval of the DMC of the Development should be in accordance with the most recent draft DMC Guidelines dated 21st February 2002 and such compliance required amendments and further vetting of the draft DMC.

(ii) The purpose of adopting the latest DMC Guidelines was to ensure that the DMC of the Development was consistent with the provisions of other PSPS developments.

39. (i) Paragraph 25 is denied.

- (ii) (a) It is averred that under SC 25(a), nominations may be made at any time during a period of 20 months from the date of Pre-Sale Consent, such that the latest date on which a nomination could be made is 20th July 2004.
- (b) Thus, the permissible nomination period has yet to expire, and in any event in accordance with SC 25(a)(iii) upon expiry of such a nomination period, SC 25(b) shall apply and the Plaintiff is precluded from making any claim or demand against the Authority.

40. (i) SC 25(a)(iii) provides that: -

"If the Hong Kong Housing Authority acting through the Director of Housing fails to make a nomination in respect of any unit in accordance with sub-clause (a)(i) of this Special Condition, or fails to make a further nomination in respect of any unit in accordance with sub-clause a(ii) of this Special Condition, sub-clause (b) of this Special Condition shall apply and in either event the Purchaser shall not make any claim or demand whatsoever, whether under these Conditions or common law, against the Government or the Hong Kong Housing Authority or the Director of Housing". (emphasis added)

(ii) SC 25(b) provides that: -

“ Any or all the units [sic] referred to shall be purchased by the Hong Kong Housing Authority or its nominee from the Purchaser at the price fixed therefor in accordance with Special Condition No. (27)(b)(iv) hereof”

(iii) (a) In the premises, the Special Conditions specify that in the event that a nomination of purchasers is not made then, upon the expiry of a 20-month period from the date of Pre-Sale Consent, the Authority or its nominee is obliged to purchase all units in respect of which no nomination has been made in accordance with the terms of SC 25(b).

(b) If, which is denied, the Authority was a joint contractor or entered into a collateral contract with the Plaintiff, it is specifically averred that the Authority cannot be liable in contract for a failure to make a nomination unless it fails to comply with SC 25(b), which can only arise after the said 20-month period.

41. (i) (a) Paragraph 26 is denied.

(b) It is specifically denied that the Authority has acted in breach of the Memorandum of Agreement as it was not a party to the said agreement or, in the alternative, if, which is denied, it was a party to the said agreement then it is averred that it has acted

consistently with the obligations arising thereunder.

(c) The Authority further denies that whether by its conduct, acts or omissions it caused or intended to cause or induced or intended to induce the 2nd Defendant to breach the Memorandum of Agreement.

(ii) (a) It is further averred that Paragraph 26(b) is so lacking in particulars such that the Authority is unable to plead more specifically thereto.

(b) In those circumstances, the Authority hereby reserves its right to strike out this pleading, or alternatively, to further plead to this allegation if and when adequate particulars are provided by the Plaintiff.

42. (i) Paragraph 27 is denied.

(ii) In the alternative, if, which is denied, the Authority has acted in breach of its duties in contract and/or tort whether as alleged or otherwise, the proper date of accrual of the right of the Plaintiff to claim damages in relation to a particular residential unit in the Development would be the date on which the sale of that particular unit would have reasonably occurred but for the breach of the Authority.

- (iii) It is averred that any damage suffered by the Plaintiff would be dependent upon the materialization of a number of contingencies and accordingly that its claim can only amount to a mere loss of chance. Such contingencies include, but are not limited to, the following: -
- (a) The date on which new HOS/PSPS Phase for Sale would commence.
 - (b) Even after the commencement of such a HOS/PSPS Phase for Sale, it would be uncertain as to whether the Development would have been included into the HOS/PSPS Phase for Sale.
 - (c) Even if the Development was included in a future HOS/PSPS Phase for Sale, it would be uncertain whether a particular residential unit of that Development would be included in that specific Phase. It was possible that only a portion of the units of the Development would be included in a Phase, in light of the practice of including units from different developments in one particular HOS/PSPS Phase for Sale.
 - (d) Even if a particular unit in the Development was included in a future HOS/PSPS Phase for Sale, there is no certainty that it would ultimately be selected by a purchaser.
 - (e) Even if a particular residential unit in the Development was included in a future HOS/PSPS Phase for Sale, it would be

uncertain as to whether a purchaser nominated by the Authority would be able to complete the conveyance.

43. As to Paragraph 28: -

(i) It is admitted that the Authority received a complaint letter dated 20th May 2003 from the Plaintiff, which was also addressed to the Chief Executive of the HKSAR, the Secretary for Housing, Planning & Lands, and the Lands Department.

(ii) Save as aforesaid, Paragraph 28 is denied.

44. As to Paragraph 29: -

(i) It is admitted that a letter dated 12th June 2003 from the Secretary for Housing, Planning and Lands' Office of the 2nd Defendant was sent to the Solicitors for the Plaintiff in reply to the letter dated 20th May 2003 referred to herein above.

(ii) Save as aforesaid, Paragraph 29 is denied.

45. Paragraph 30 is denied.

46. In the premises, the Authority denies that the Plaintiff is entitled to the relief sought, or any part thereof, for the reasons alleged or at all.

47. Save as hereinbefore expressly admitted or otherwise specifically pleaded to, the Authority denies each and every allegation set out in the Statement of Claim as if the same had been forth separately and traversed *seriatim*.

Dated this 2nd day of December 2003.

JOHN BLEACH, S.C.

JIN PAO

Counsel for the 1st Defendant

Johnson Stokes & Master

JOHNSON STOKES & MASTER

Solicitors for the 1st Defendant

HCA2761/2003

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 2761 OF 2003

BETWEEN

FIRST STAR DEVELOPMENT
LIMITED

Plaintiff

and

THE HONG KONG
HOUSING AUTHORITY

1st Defendant


THE SECRETARY FOR JUSTICE 2nd Defendant
(ON BEHALF OF THE GOVERNMENT
OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION)

DEFENCE OF THE 1ST DEFENDANT


Dated the 2nd day of December 2003
Filed the 2nd day of December 2003

Johnson Stokes & Master
Solicitors for the 1st Defendant
18/F, Prince's Building
10 Chater Road, Central
Hong Kong
Tel: 2843 2215
Fax: 2845-9121
Ref: MLL/DJAB/H152/03/6713866/6

We hereby consent to
this document being
filed out of time


Ms. Cheung, Chan & Chung
Solicitors for the Plaintiff

We hereby consent to
this document being
filed out of time


Gregory Payne
Government Counsel
for the 2nd Defendant