

Registrar

HCA 2761/2003

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 2761 OF 2003

專責委員會(2)文件編號 R54

SC(2) Paper No. R54

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)

AMENDED STATEMENT OF CLAIM

1. At all material times, the Plaintiff is a company incorporated by shares in Hong Kong with limited liability under the Companies Ordinance, Cap. 32, Laws of Hong Kong.
2. In around 1979, the Government of Hong Kong ("Government") established the Private Sector Participation Scheme ("PSPS Scheme") for the purpose of assisting Hong Kong residents who fulfilled certain financial criteria set down by the Hong Kong Housing Authority ("Housing Authority") under its statutory duty, to purchase their own homes at subsidized prices under the Home Ownership Scheme ("HOS").

3. The PSPS Scheme operated as follows:-

- (3.1) The Government invited tenders from proposed developers to lease a particular lot of land for a fixed term of years. Under the PSPS Scheme, the successful tenderer ("Developer") would contract to build and manage a residential estate conforming to certain prescribed conditions and specifications laid down by the Government in the contract.
- (3.2) The Housing Authority, also acting on behalf of the Government, would determine and nominate to whom the Developer could sell each residential unit and at what price. The Developer would nevertheless receive a fixed price as agreed in the contract.
- (3.3) The Developer was prohibited from selling any of the residential units on the open market, and could only sell to purchasers nominated by the Housing Authority.
- (3.4) The Developer was permitted under the contract to build certain units for commercial purposes ~~including and car parking spaces for sale or lease to owners of the residential units and to sell the same on the open market.~~ However, the market reality was that the selling price and/or rental of the commercial units and car parking spaces was obviously controlled by the price and level of occupation of the residential units.
- (3.5) Before the Developer could agree to assign or assign any of the residential units:-
 - (a) Pre-Sale Consent had to be granted by the Director of Lands; and
 - (b) The Housing Authority had to nominate a purchaser to purchase a specified residential unit from the Developer.

(3.6) The invariable practices that had always been observed under the PSPS Scheme ("PSPS Practice") (and which became and were implied terms of the Memorandum of Agreement as hereinafter pleaded) were that:-

- (a) All parties including the Government and the Housing Authority would endeavour to facilitate and cooperate to complete the entire development and sale of all the units without delay and as soon as reasonably possible;
- (b) No party would act deliberately in any way to thwart, obstruct, frustrate or delay the process and progress of either the development of the project or the sale of the units; and
- (c) The Director of Lands acting on behalf of the Government, would grant Pre-Sale Consent without delay and as soon as reasonably possible, and the Housing Authority, would use its utmost endeavours to nominate purchasers to purchase the residential units without delay and as soon as reasonably possible. Further, the grant of Pre-Sale Consent and the nomination of purchasers would be organised and completed well before the completion of construction, and before the granting of the Occupation Permit or Certificate of Compliance.
- (d) As far as the Plaintiff is aware, since the inception of the PSPS Scheme in around 1979 to 1999, the Housing Authority and/or the Government had never failed to make a nomination.

4. Pursuant to the PSPS Scheme, and on the basis of, and relying upon, and/or induced by the PSPS Practice pleaded above, the Plaintiff submitted a Form of Tender on 25th June 1999 ("Tender") to the Government of the Hong Kong Special Administrative Region (also referred to as the 2nd Defendant herein).

5. Under the terms of the said Tender, the Plaintiff tendered by way of premium for the grant of the lot of land at Kowloon Inland Lot No. 11076, Hung Hom Bay Reclamation Area, Kowloon ("Lot") at a premium of HK\$583 million, for a term of 50 years commencing from the date of the Memorandum of Agreement hereinafter referred to, subject to the General and Special Conditions of Sale annexed thereto.
6. In or about September 1999, the Tender was accepted by the 2nd Defendant. A Memorandum of Agreement dated 22nd October 1999 was thereupon executed between the Plaintiff of the one part and the Chief Executive ("Chief Executive") on behalf of the 2nd Defendant of the other part ("Memorandum of Agreement"), which the Plaintiff avers was subject to and so contained the Implied Terms (as hereinafter pleaded), as a matter of law, or as a matter of necessary implication in order to give business efficacy to the contract, under the Memorandum of Agreement.
7. After the execution of the Memorandum of Agreement and pursuant thereto, the Plaintiff became the Lessee of the Lot and duly proceeded to carry out the development of the project thereat known as the Hung Hom Peninsula ("Development") at the beginning of year 2000.
8. As both the 2nd Defendant and the 1st Defendant ("the Defendants") have been well aware at all material times, the Plaintiff was induced by, and relied upon the Defendants' conduct and representations under the PSPS Practice, and upon the Implied Terms (as hereinafter pleaded), as the basis to tender for the Lot and thereafter to enter into the Memorandum of Agreement with the 2nd Defendant, on which basis the Plaintiff had based its tender price and its critical calculations for the related financial arrangements for the Development. The Plaintiff repeats in particular that at all material times, and in accordance with the applicable contractual terms, the invariable practice as between the parties in order to fulfill the applicable contractual terms under the PSPS Practice and under the Implied Terms (as hereinafter pleaded) was that the 1st Defendant also on behalf of the 2nd Defendant would nominate home-owners to purchase the residential units well before the Development was completed.

9. The Plaintiff will refer to the Memorandum of Agreement at the trial hereof for its full terms, meaning and effect in conjunction with the Implied Terms therein arising, inter alia, from the PSPS Practice under the PSPS Scheme.
10. The Plaintiff avers in the premises that there was to be implied into the Memorandum of Agreement, as a matter of law and as a matter of necessary implication to give business efficacy to the said contract, (alternatively as a collateral contract between the Plaintiff and the 2nd Defendant) that the 2nd Defendant would observe and perform its part of the obligations as follows ("Implied Terms"):-
- (a) To cooperate with the Plaintiff to implement the said contracts and without delay to take all such steps as are reasonably necessary so to do including in particular to grant Pre-Sale Consent with reasonable dispatch after the Plaintiff's application (which as pleaded hereinafter, was made on 31st March 2000 but not granted until 20th November 2002).
 - (b) To observe and abide by the PSPS Practice under the PSPS Scheme which had hitherto been observed as between the Plaintiff and both Defendants, and not to resile from the PSPS Practice after it had been acted upon by the Plaintiff in entering into the contract under the Memorandum of Agreement herein, and/or the collateral contract, to the knowledge of the 2nd Defendant and/or the 1st Defendant (as subsequently happened in this case);
 - (c) To act reasonably and to exercise reasonable endeavours to procure and to ensure that the 1st Defendant timeously located and nominated suitable purchasers of the residential units;
 - (d) To cooperate with and assist the Plaintiff to sell the residential units to suitable nominated purchasers, by having nominated promptly and without delay suitable purchasers to buy the residential units developed

by the Plaintiff on the faith of the PSPS Practice, and thereby not to inhibit the optimum reasonably achievable cash flow to the Plaintiff arising from deposits received from and payments made upon completion of sale by suitable nominated purchasers;

(e) Not to allow, cause, procure or influence the 2nd Defendant's governmental departments or agencies or the 1st Defendant to thwart, obstruct, frustrate or delay the process and progress of either the development of the Development or the sale of the units, including in particular, to refrain from allowing, causing, procuring or influencing the Director of Lands, the 2nd Defendant's governmental departments or agencies, or the 1st Defendant to delay or obstruct the grant of Pre-Sale Consent to the Plaintiff in contravention of the PSPS Practice and beyond the ordinary course of events;

(f) To refrain from, or from allowing, such conduct as may be designed to, or would effectively result in, the thwarting, obstructing, frustrating or delaying of the process and progress of either the development of the Development or the sale of the units, whether by acting through its governmental departments or agencies or the 1st Defendant, or otherwise liaising or colluding or acting in concert with them to the said effect;

(g) To persuade and procure the 1st Defendant:

(i) to take such actions on its part as are needed for the proper fulfillment of the said contractual terms pleaded above; and

(ii) not to thwart, obstruct, frustrate or delay the sale of the residential units and nomination of purchasers.

11. The Plaintiff avers that the 1st Defendant as a joint contractor (as pleaded hereinbelow) or further and alternatively by reason of the collateral contract (as pleaded hereinbelow) was and is subject therein to like implied obligations,

mutantis mutandis, as are set out in Paragraph 10 above:

Particulars

- (a) The Memorandum of Agreement (and in particular the Special Conditions therein) imposes duties and obligations and confers rights upon the 1st Defendant, and certain applicable obligations of the 1st Defendant under the Memorandum of Agreement are to be specifically discharged through the Director of Housing;
- (b) Accordingly, by intervening in the implementation of the Memorandum of Agreement and taking upon itself the discharge of the corresponding obligations under the Memorandum of Agreement, as well as by the receipt of the corresponding rights thereunder, in return for the Plaintiff doing likewise, the 1st Defendant has thereby become bound by the terms of the said contract under the Memorandum of Agreement (including the obligations arising thereunder under the Implied Terms);
- (c) Further or alternatively, by reason of the matters aforesaid and the 1st Defendant's, said conduct, a collateral contract between the Plaintiff and the 1st Defendant upon the relevant terms of the Memorandum of Agreement (including the obligations arising thereunder the Implied Terms) thereby came into existence;
- (d) Further, in entering into the Memorandum of Agreement which purports to confer rights and impose obligations on, inter alia, both the 1st and 2nd Defendants, the 2nd Defendant acted for and on behalf of itself and of the 1st Defendant, and each was bound by the said contract under the Memorandum of Agreement (including the obligations arising thereunder under the Implied Terms);
- (e) Further or alternatively, the 1st Defendant was the agent of the 2nd Defendant for all purposes material to the contract under the

Memorandum of Agreement (including the obligations arising thereunder under the Implied Terms);

- (f) The 2nd Defendant was and is under an obligation, implied as a matter of necessary implication to give business efficacy to the aforesaid contracts, to persuade and procure and ensure that the 1st Defendant performed and observed all the obligations to be performed by the 1st Defendant under the contracts, including those in Paragraph 10 above;
 - (g) Insofar as breaches of the contract under the Memorandum of Agreement (including the obligations arising thereunder under the Implied Terms) are alleged herein against the 1st Defendant, the Plaintiff alleges that thereby for the reasons pleaded above the 2nd Defendant was also in breach of the said implied obligations;
 - (h) Unless the context must so exclude, all references in this pleading to things done by, or to be done by or represented or undertaken by the 1st Defendant, should be read as "by the 1st Defendant or by the 2nd Defendant or both of them jointly".
12. Further or alternatively, in the circumstances as hereinbefore pleaded, it was not in the contemplation of the parties, when the Memorandum of Agreement (including the implied obligations arising thereunder under the Implied Terms) was agreed upon and accepted, that the 1st Defendant would deliberately refrain, or be permitted to refrain, from nominating home-owners to purchase the residential units despite the subsequent completion by the Plaintiff of the Development. By reason of the aforesaid, the Defendants are estopped or otherwise precluded, equitably or otherwise, from attempting to force a completely different bargain on the Plaintiff by their unilateral and fundamental departure from the PSPS Practice, as hereinafter described.
13. In or about the beginning of 2000 in reliance upon the aforesaid the Plaintiff duly commenced construction work of the Development. During this material period, the 1st Defendant continuously pressed the Plaintiff hard to complete.

the Development on time, and the Plaintiff acted accordingly and thereby changed its position to its detriment by incurring further expense.

14. On 31st March 2000, the Plaintiff applied for Pre-Sale Consent in accordance with the PSPS Practice.
15. On 3rd September 2001, the 2nd Defendant, through its Chief Secretary for Administration, announced a suspension of sales of HOS flats by the 1st Defendant and the Hong Kong Housing Society ("the Moratorium"). This Moratorium was due to expire after 30th June 2002. At that time, according to the Plaintiff's Statement of Time of the Development, the development of the Development was not scheduled for completion until August, 2002.
16. On 5th June 2002, the 2nd Defendant's Chief Secretary for Administration, on behalf of the 2nd Defendant, announced and confirmed in a Statement that the Moratorium would cease to apply with effect from 1st July 2002 and that, after that date, the sale of HOS/PSPS flats would resume. It was announced in this Statement that two phases of HOS flats would be put on sale, namely Phase 24A and Phase 24B. 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 the market condition.
17. A site-specific list was attached to the said Statement by the Chief Secretary for Administration. However none of the 4,948 flats quota under the Phase 24A and Phase 24B sale programmes were allocated to the residential units in the Development. Accordingly the 2nd Defendant did not, and was not prepared to, procure the 1st Defendant to nominate, or ensure that it nominated, suitable purchasers of the residential units, and the 1st Defendant thereafter failed or refused to nominate, home-owners to purchase the residential units in the Development on a date earlier than April 2003.
18. Further it was, in effect, the admission or the admitted objective of the 2nd Defendant, and the effect of the aforesaid, that in breach of the terms of the said contracts pleaded above:-

- (a) the 2nd Defendant did not cooperate with the Plaintiff to implement the said contracts by granting Pre-Sale Consent with reasonable dispatch, but instead unreasonably delayed granting the same between the date of application on 31st March 2000 and of the grant of consent on 20th November 2002.
- (b) the 2nd Defendant would not and did not observe and abide by the PSPS Practice under the PSPS Scheme which had, as pleaded above, hitherto invariably been observed and became an implied term, and that the 2nd Defendant resiled from the PSPS Practice and breached the said implied term, notwithstanding that it had been acted upon by the Plaintiff in respect of the contract under the Memorandum of Agreement and/or the collateral contract herein to the knowledge of the 2nd Defendant and the 1st Defendant;
- (c) the 2nd Defendant did not act reasonably, nor exercise reasonable endeavours, to procure and to ensure that the 1st Defendant timeously to locate and nominate suitable purchasers of the residential units;
- (d) the 2nd Defendant did not cooperate with or assist the Plaintiff to sell the residential units to suitable purchasers, or to assist or procure the 1st Defendant to nominate promptly and without delay suitable purchasers to buy the residential units in the Development developed by the Plaintiff on the faith of the PSPS Practice (and the aforesaid Implied Terms);
- (e) the 2nd Defendant did not refrain from allowing, causing, procuring or influencing the 2nd Defendant's governmental departments or agencies, or the 1st Defendant, to thwart, obstruct, frustrate or delay the process and progress of either the development of the Development or the sale of the units, including in particular, the from allowing, causing, procuring or influencing the Director of Lands and/or the 1st Defendant to delay or obstruct the grant of Pre-Sale Consent to the

Plaintiff in contravention of the PSPS Practice and beyond the ordinary course of events;

- (f) the 2nd Defendant did not refrain from, or from allowing, such conduct as may be designed to, or would effectively result in, the thwarting, obstructing, frustrating or delaying of the process and progress of either the development of the Development or the sale of the units, whether by acting through its governmental departments or agencies or the 1st Defendant, or otherwise liaising or colluding or acting in concert with them to the said effect;
 - (g) the 2nd Defendant did not persuade or procure the 1st Defendant:
 - (i) to take such actions on its part (including, inter alia, the nomination of suitable purchasers) as ~~are~~ were needed for the proper fulfillment of the contractual terms; and
 - (ii) to refrain from thwarting, obstructing, frustrating or delaying the sale of residential units and the nomination of purchasers.
19. On 6th August 2002, the Occupation Permit for the Development was granted.
20. Despite the fact that Pre-Sale Consent was applied for as early as on 31st March 2000, contrary to the previous procedure and practice under the PSPS Scheme, it was not until over 2½ years later, on 20th November 2002, that the Director of Lands on behalf of the 2nd Defendant granted Pre-Sale Consent, which was almost 4 months after the units had been built.
21. On 21st November 2002, the Certificate of Compliance for the Development was granted. The Development, comprising 2,470 residential units of a total gross floor area of 144,299.926 square metres and commercial units of a total gross floor area of 3,733.124 square metres and 528 units of car parking spaces was completed.

22. ~~Around the middle of~~ In a press release issued by the 1st Defendant on 28th November 2002, the 2nd Defendant further changed its housing policies. The revised policies included suspension of ~~any~~ all further sale of PSPS flats.
23. ~~As at the date hereof,~~ Due to the aforesaid suspension of all further sale of PSPS flats, no nomination of suitable purchasers for the purchase of the residential units in the Development ~~has had or could have~~ been made (or procured to be made) by the Defendants or either of them, and accordingly no sale of any of the residential units or other units in the Development ~~has been, or could be,~~ had or could have been made by the Plaintiff.
24. By reason of the aforesaid, the 2nd Defendant, acting under the influence of or in concert with the 1st Defendant, has caused the grant of Pre-Sale Consent by the Director of Lands to be of no effect, and the sale of residential units in the Development and the nomination of purchasers in respect thereof and the sale of ~~other~~ commercial units and car parking spaces in the Development, to be thwarted, obstructed, frustrated or delayed. Alternatively, each of the Defendants has caused the grant of Pre-Sale Consent by the Director of Lands, and the sale of residential units in the Development and the nomination of purchasers in respect thereof and the sale of commercial units and car parking spaces in the Development, to be thwarted, obstructed, frustrated or delayed.
25. Further, by reason of the aforesaid, the Defendants and each of them have acted in wrongful breach of the contract under the Memorandum of Agreement (including the obligations arising thereunder under the Implied Terms) and/or in wrongful breach of the collateral contracts pleaded above.
26. Further or alternatively, each of the Defendants has entered upon a course of conduct which constituted the tort of procuring a breach of contract as against the Plaintiff, in that:-
- (a) Each of the Defendants possessed knowledge of ~~an~~ the then existing contract, namely, the contract under the Memorandum of Agreement (including the obligations arising thereunder under the Implied Terms),

and of the collateral contracts pleaded above; and

- (b) Each of the Defendants has interfered with the said ~~then~~ existing contracts by speaking, writing, or publishing words which communicated pressure or persuasion to others to breach the contracts, or has done acts inconsistent with the contractual obligations thereunder, thereby causing damage to the Plaintiff.

~~27. As a consequence of the 1st and/or 2nd Defendants' said conduct, the Plaintiff has suffered and continues to suffer loss and damages (which are still accruing and will require to be assessed) including but not limited to the following:~~

~~(27.1) Rates were payable and continue to be payable after the issuance of the Occupation Permit;~~

~~(27.2) The Plaintiff is responsible for the payment of Government rents, which would have been payable by the home owners if the residential units had been sold in accordance with the PSPS Practice;~~

~~(27.3) The Plaintiff has suffered and continues to suffer the loss of management fees, which would have been payable by the home owners if the residential units had been sold in accordance with the PSPS Practice;~~

~~(27.4) The Plaintiff has incurred and will have to continue to incur very substantial expenses for the regular maintenance of unoccupied idle units;~~

~~(27.5) The Plaintiff will have to incur additional and very substantial expenses for putting the unoccupied idle units into a saleable condition after a long period of non-occupation;~~

~~(27.6) The buildings will have aged in the meantime with a consequent fall in value of the residential and commercial units;~~

~~(27.7) The withholding of sale of the residential units in the Development has and will continue to severely handicap the marketability and sale opportunity of the commercial units and car parking spaces in the Development, and thereby result in grave loss of sale proceeds, rental income and management fees for the Plaintiff.~~

~~(27.8) The Plaintiff has incurred, and will continue to incur, financial charges and additional and very substantial interest due to the delay in the recovery of the capital expenditure invested by the Plaintiff in the Development.~~

~~28.27.~~ In a letter dated 20th May 2003 from the Plaintiff to each of the Defendants, the Plaintiff complained against the Defendants' wrongful conduct and the grave loss and damage which the Defendants' said conduct had caused to the Plaintiff.

~~29.28.~~ By a letter dated 12th June 2003 from the Secretary for Housing, Planning & Lands' Office of the 2nd Defendant, the Defendants replied and insisted that they would continue with such course of conduct without regard to the Plaintiff's complaint.

29. By an agreement in writing dated 26th January 2004 made between the Plaintiff and the Lands Department for and on behalf of the 2nd Defendant, the 2nd Defendant, in consideration of the Plaintiff's payment of an additional premium of HK\$864 million, agreed to further modify the General and Special Conditions of Sale annexed to the Memorandum of Agreement to the effect that, inter alia, the Plaintiff is free to dispose of the residential units and car parking spaces in the Development to any purchasers in the open market at any price fixed by the Plaintiff. The further modification as aforesaid was effected on 26th February 2004 upon the Plaintiff's payment of the agreed additional premium.

30. Prior to 26th February 2004, in breach of the express and/or Implied Terms of

the Memorandum of Agreement and/or the PSPS Practice, the Defendants or either of them had failed to make any nomination of purchasers to the residential units of the Development after the delayed grant of Pre-Sale Consent on 20 November 2002. As a result, no sale of the residential units of the Development had or could have been made by the Plaintiff and the Plaintiff thereby suffered loss and damage, to be assessed up to 26th February 2004, including but not limited to the following:-

(30.1) In respect of the residential units in the Development:

(a) rates and Government rents paid and/or payable by the Plaintiff;

(b) loss of management fees receivable by the Plaintiff; which would have been payable by the home-owners if the residential units had been sold in accordance with the PSPS Practice;

(30.2) In respect of the commercial units, car parking spaces and kindergarten in the Development:

(a) rates and Government rents paid and/or payable by the Plaintiff;

(b) loss of management fees receivable by the Plaintiff; which would have been payable by the purchasers and/or tenants of the said units in the Development;

(30.3) Estate and site management expenses and expenses for the regular maintenance and management of the unoccupied idle units;

(30.4) Expenses for insurance premium, legal and professional services, utilities and office overheads and supports;

(30.5) Expenses for putting the unoccupied idle units into a saleable condition after a long period of non-occupation;

(30.6) Loss of sale proceeds, fall in value and/or rental income in respect of the commercial units, car parking spaces and kindergarten in the

Development as a result of the withholding of sale of the residential units in the Development and aging of the buildings during the period of delay.

(30.7) Financial loss, cost and/or charges and additional interest caused by the delay in the sale or lease of the units in the Development and/or recovery of the capital expenditure invested by the Plaintiff in the Development.

~~30.31.~~ By reason of the aforesaid, the Plaintiff has suffered loss and damage which require to be assessed in manner as herein pleaded, and for which the 1st and 2nd Defendants are liable.

~~31.32.~~ The Plaintiff claims interest on damages pursuant to sections 48 and 49 of the High Court Ordinance.

AND THE PLAINTIFF CLAIMS:-

1. Damages to be assessed;
2. Such ancillary relief and appropriate declarations and orders as this Court may deem just or expedient to make;
3. Interest;
4. Costs;
5. Further and/or other relief.

~~Dated this 25th day of July 2003.~~

Dated this 15th day of September 2005.

~~John Griffiths S.C., C.M.G., Q.C.~~

~~Counsel for the Plaintiff~~

~~Rosaline Wong~~

~~Counsel for the Plaintiff~~

~~Cheung, Chan & Chung~~

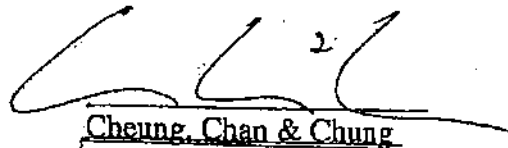
~~Solicitors for the Plaintiff~~

John Griffiths S.C., C.M.G., Q.C.

Counsel for the Plaintiff

Rosaline Wong

Counsel for the Plaintiff



Cheung, Chan & Chung

Solicitors for the Plaintiff

HCA 2761/2003
IN THE HIGH COURT OF THE
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COURT OF FIRST INSTANCE
CIVIL 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)

AMENDED STATEMENT OF CLAIM

~~Dated the 25th day of July 2003~~

~~Filed the 25th day of July 2003~~

Re-dated the 15th day of September 2005

Re-filed the 15th day of September 2005

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