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18 May 2005

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By Post & By Fax 2103 5024

Dear Sirs,

Kowloon Inland Lot No. 11076 : Hunghom Peninsula

The responses of Government to your letter dated 24 March 2005 and to the extracts from the Opinion of Mr Jonathan Sumption QC provided with your letter dated 13 April 2005 are as follows.

In your letter dated 24 March 2005 you argue that your client is not obliged to comply with the Master Layout Plan ("MLP") so far as the floor efficiency ratios or the number, size or layout of individual units because of the deletion of Special Conditions 6(c) and (d) by the modification dated 26 February 2004.

Special Conditions 6(c) and (d) were deleted as they are spent of effect. Special Condition 6(c) required the Purchaser to develop the lot by building and completing not less than 2,450 and not more than 2,600 residential flats with saleable areas as stipulated in that Special Conditions. Special Condition 6(d) stipulated the efficiency ratio of each and every floor. That your client has done that required by Special Conditions (6)(c) and (d) is evidenced by the Occupation Permit dated 6 August 2002 and the Certificate of Compliance dated 2 November 2002. In short, Special Conditions (6)(c) and (d) were historic and hence deleted as redundant.

Special Conditions (6)(c) and (d) relate to **development** of the Lot. Development of the Lot has been completed. By General Condition 7(a) of the Conditions of Sale for the Lot, the Purchaser is obliged to "maintain all buildings in accordance with any approved building plans without variation or modification thereto" The approved building plans referred to in the General Condition include the MLP submitted by your client together with its tender for the Lot. By Special Condition 3(a) of the Conditions of Sale no alteration to the MLP shall be made without the prior written consent of the Director of Lands.

Although the requirements in Special Condition (3)(a) have been met, this Special Condition was not deleted by the modification dated 24 February 2004 as Special Condition 3(a) is relevant to Special Condition 11(a) which stipulates that the Lot shall not be developed or redeveloped except in accordance with the MLPs and Approved Landscaping Proposals. Retention of Special Condition (3)(a) puts it beyond doubt that the MLP referred to in Special Condition (11)(a) is the MLP referred to in Special Condition (3)(a).

It follows from the above that in carrying out refurbishment your client is obliged to comply with the MLP. As the MLP contains a typical floor layout plan and plans for the 1st to 7th Floors showing the flats and their internal layout, refurbishment deviating from those plans is not permitted by the Conditions of Sale.

Special Condition (3)(a) is in its entirety spent of effect as the obligations contained in Special Condition (3)(a) relate to the development of the lot. With development of the Lot having been completed as evidenced by the issue of the Occupation Permit and Certificate of Compliance, Special Condition (3)(a) is historic and spent of effect. Further, as the power to consent to amendments is contained in Special Condition (3)(a) and is stated to be as to "alterations to the proposals" in the MLPs and the statements required to be submitted by the Tender Notice, the power to consent to alterations must be only as to proposals as to development. The development having been completed, the power to consent to alterations also falls away. As Special Condition (3)(a) refers only to amendments necessary for development of the lot and not to amendments to allow for alterations following development, it follows that alterations such as the combining of two or more flats into one require a lease modification.

Even if the power of the Director in Special Condition (3)(a) to consent to alterations would allow him to consent to alterations to the MLP to allow for, for example, the combining of two or more flats into one, the Director has no obligation to consent to such alterations and, if he is minded to consent, he may include conditions including the payment of premium.

Turning now to the extracts from the Opinion of Mr Sumption. As to [1] I refer you to what I have stated above. Mr Sumption's view as to the intention of deletion is not correct. Special Condition 6(c) and (d) were deleted because they were spent of effect. As to [2] it is not Government's position that the refurbishments would constitute redevelopment. We agree with Mr Sumption's view that Special Condition (11)(a) applies to further development of the Lot and that there can be no alteration of an existing structure different from that shown on the MLP. We would go further and maintain that there can be no alteration of any building different from that shown on the MLP.

It is our position that the deletions referred to by Mr Sumption do not have the effect contended by him. It is our position that the "upgrading" proposed by your client is not permitted by the Conditions.

Further, and irrespective of Special Conditions (6)(c) and (d) being spent of effect, in determining the intention of the parties to the modification, the Court would construe the Conditions as modified as a whole. In so doing, the Court would undoubtedly conclude that the primary objective of the modification dated 26 February 2004 was to free your client from the restrictions of the PSPS scheme by releasing your client from the obligation to sell residential units only to purchasers nominated by the Director of Housing.

It cannot be said to be necessary for the achievement of this objective that your client should be free to change the sizes or layouts of the flats, or otherwise depart from the MLP. It follows that your client will not be able to rely on an argument to the effect the deletion of SC 6(c) must have been intended to alter the original MLP. In other words, it is not open to your client to argue that the construction contended for by it must be correct because any other construction would defeat the main object of the contract.

I also invite your client to look at the matter in this way. In construing the Conditions (as modified) as a whole, the Court would be guided first and foremost by the natural and ordinary meaning of the words used and, in case of doubt, will seek to arrive at the construction which is best suited to achieving the main object of the contract.

Approaching the matter on that basis the Court would greatly influenced by the fact that the parties did not see fit to delete or expunge any of the Conditions that make reference to the approved plans and the MLP. The general scheme imposed by SC 6(a) & (b), SC 11(a), para 3(d) of the Tender Notice and General Condition 7(a) has been left intact notwithstanding the numerous references to the original MLP and approved plans. As has already been noted, the approved plans contain details of all the internal and external dimensions of the units to be built. If the parties had intended these restrictions to be lifted, it would have been a simple matter to spell this out, or revise the Conditions by further deletion by way of modification to make this clear.

Not only did no such process of deletion take place but, on the contrary, the revised SC 6(a) as contained in the First Schedule to the Modification Letter expressly retains references to the MLP etc above, thereby expressly retaining those restrictions. This makes it clear that the parties did not intend your client to be free to build, redevelop or upgrade the buildings otherwise than in accordance with the approved plans.

I note that the position taken by your client is consistent with the position of Government as set out in this letter, as evidenced by

- (a) subsequent to the mediation the requests for modifications additional to those provided for in the modification upon which the mediation proceeded and the execution of the modification notwithstanding Government not agreeing the requests for additional modifications; and
- (b) the submission in March 2005 of a revised MLP not showing any external or internal walls etc on the floor plans.

As to [4] and [5] in Mr Sumption's Opinion, I confirm that the Director would not seek the payment of a premium for giving his approval under Special Condition (69)(a). This is because the mediation proceeded on the basis that your client would be permitted to build recreational facilities as evidenced by Special Condition (69)(a) being in the modification upon which the mediation proceeded and on which modification agreement was reached as to premium. Further, and, in any event, the Director accepts that in giving approvals such as that in Special Condition (69)(a), the issue of premium does not arise. However, in giving his consent to alterations under Special Condition (3)(a) premium would have been chargeable and, indeed, is chargeable if the Director were to be persuaded that his power to consent to alterations remains.

It follows that Government is not persuaded that refurbishment as proposed by your client is permitted by the Conditions. However, if you have any counterarguments to those set out in this letter, Government would be prepared to consider them.

Yours faithfully,



(A.L. Robertson)
Assistant Director/Legal
for Director of Lands

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