Neutral Citation Number: [2020] EWHC 1077 (Comm)

Case No: CL-2018-000117

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2020

Before :

CHRISTOPHER HANCOCK QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

YOO DESIGN SERVICES LIMITED	**Claimant**
- and -	
ILIV REALITY PTE LIMITED	**Defendant**

- -
- -

Jamie Riley QC and James McWilliams (instructed by **Metis Law LLP**) for the **Claimant**
Edmund Cullen QC (instructed by **Dentons UK and Middle East LLP**) for the **Defendants**

Hearing dates: 10th and 11th February 2020.

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10am 7th May 2020.

.....

CHRISTOPHER HANCOCK QC (SITTING AS A JUDGE OF THE HIGH COURT)

Christopher Hancock QC (sitting as a Judge of the High Court) :

Introduction and factual background.

1. This is the trial of preliminary issues in this matter, ordered by Cockerill J on 7 June 2019.

2. The issues are as follows:

   i) Whether the Defendant is under an implied obligation (as alleged in paragraph 9.1 of the Amended Particulars of Claim) to proceed with marketing the Apartments for sale with due diligence and expedition at all times and to ensure that its sole marketing agent continued to use its best endeavours to complete the sale of the Apartments under Sale and Purchase Agreements;

   ii) Whether the Defendant is under an implied obligation (as alleged in paragraph 9.2 of the Amended Particulars of Claim) to complete the sale of the Apartments within a reasonable time of the third quarter of 2008 and/or of completion of the development of the Apartments;

   iii) Whether the Defendant is under an implied obligation (as alleged in paragraph 9.3 of the Amended Particulars of Claim) to refrain from renting out the Apartments pending sale or from taking any other steps which would delay or undermine the sale of the Apartments; and

   iv) Whether the facts alleged in paragraphs 11 to 15 of the Amended Particulars of Claim (if proved) are capable of amounting to a breach of the express terms of the Agreement.

3. The factual background can be set out shortly.

4. The Claimant is part of a multi-national design business which has provided branded development services in residential, hotel and commercial projects across the globe. As I understand it, where developments are associated with the Yoo name, those developments command a premium on the basis that Yoo is a recognised luxury designer.

5. The Defendant is a property developer. In 2008, the Defendant was engaged in planning a large-scale high-value residential property development at 74 Grange Road, Singapore. It was intended to be a 16 storey building comprising 28 Apartments.

6. In late 2007/early 2008, the Defendant entered into discussions with the Claimant to incorporate the Claimant's branded designs into the development. This in due course resulted in the agreement of a Design and Services Agreement ("**DSA**") dated July 2008.

7. Under the DSA, the Claimant was to provide essentially two things:

   i) First, it granted a licence to the Defendant to apply its "*Concept*" (and associated designs, trade marks, etc.) to the development: see clause 2. The "*Concept*" is described in Appendix A to the DSA.

ii) Second, the Claimant agreed to provide design and other services as described at Appendices D and E to the DSA: see clause 3.

8. The payment provisions for the licence and design services were contained in clause 9 of the DSA, which provided as follows:

"*Clause 9.1: "In consideration for the sub licence of the Concept granted by Yoo and for the Services provided by Yoo, the Company shall pay to Yoo a Retainer fee ("the Retainer Fee") of One million six hundred thousand United States Dollars (US$1,600,000) based on an estimated gross development sales value of One hundred and fifty-eight million, seven hundred thousand Singapore Dollars (S$158,700,000)."*

Clause 9.2: "The Company shall pay the Retainer Fee [to the Claimant] in advance of Four Hundred and eighty thousand United States dollars (US$480,000) in 24 equal instalments of twenty thousand United States dollars (US$20,000) per calendar month payable by electronic transfer within fourteen (14) days of the execution of this Agreement and on each calendar month thereafter. (For the avoidance of doubt all fees are non-refundable under any circumstance and may not be offset against any claims, invoices and payments etc of any kind)."

Clause 9.3: "The Company shall in addition, pay up to 50% of the Retainer Fee, less payments already made under Clause 9.2 above to Yoo upon the signing of the Sale and Purchase Agreements of 50% of the Apartments in the Property."

Clause 9.4: "The balance of the Retainer Fee shall be paid to Yoo upon Legal Completion of the Apartments."

Clause 9.5: "In addition, Yoo shall receive an incentive fee (the "Incentive Fee") equal to 3% of the aggregate gross sales proceeds (as defined below) in excess of an average per square feet price of the saleable parts of the Project of Three thousand, six hundred Singapore dollars (S$3,600) per square foot . . . For the avoidance of doubt, Yoo shall be entitled to the Incentive Fee only if all the 28 Apartments in the Property are sold up to Legal Completion. The "Gross Sale Price" of a Yoo Apartment shall be gross sale price of the Apartment as sold to a bona fide arms length third party. It shall also exclude all furniture and fitting costs (if any) and shall be allocated on a good faith basis) levied in the sale of the Apartments".

Clause 9.6: "The Incentive Fee shall be paid to Yoo within two (2) months of the signing of the last Sale and Purchase Agreement of all 28 Apartments".

Clause 9.7: "In addition to the Retainer Fee and Incentive Fee stated above, the Company shall pay to Yoo a Commission of 1% of the Gross Sale Price for any Apartment, where Yoo introduces a purchaser, via its database databank, website, or other means . . . Such Commission shall be payable two (2) months after the signing of the Sale and Purchase Agreement for each Apartment".

9. In addition, the DSA contained the following provisions on which reliance is placed by the Claimants:

Clause 5.1 provides that: *"The Company warrants to Yoo as follows:… the execution and delivery of this agreement by it and the performance by it of its obligations will not*

result in the breach of the terms and conditions of or constitute a default under any agreement or undertaking to which the Company is a party or by which the Company may be bound, and does not breach any judgment, order, rule, regulation, injunction or decree of any court, or Government Agency applicable to it or by which it may be bound."

Clause 5.2 provides that: *"The Company shall grant access to Yoo or its duly appointed representative at any time before the sale of any Units in order that Yoo or its authorised representatives may inspect the same and to ensure that the Units comply with the above warranty and the other requirements of this Agreement."*

Clause 5.3 provides that: *"The Company undertakes that for so long as the Property or any of the Units remain owned by or on its behalf, it will ensure that the Property and the Units owned by it or on its behalf are retained in good repair and condition and they are consistent with the Requirements".*

Clause 8.1 provides that the Defendant shall *"proceed to develop the Project with all due diligence and expedition at all times and shall ensure that its Project Architects, and all other agents consultants contractors and advisers use their best endeavours to complete the Project within the anticipated development timetable".*

Clause 8.2 provides that: "*The Company undertakes to provide to Yoo a quarterly written sales and site progress report on or before the last day of each quarter in which the following will be reviewed in such detail as Yoo shall reasonably require…*

… 8.2.3 progress in the sales of the Units

8.2.4 progress of marketing and advertising the Units"

10. The Construction Start Date under the contract was 4th quarter 2008, with the estimated completion date being 4th quarter 2010. The approximate date for the marketing launch was 3rd quarter 2008. It will be clear from this that the original intention was that the units (or some of them) would be sold off plan during the course of construction.

11. In fact, none of the units have been sold. It is common ground that there has been a significant fall in the Singapore property market. The Defendants made two attempts to sell the units at values well below the originally anticipated value. That originally anticipated gross development value (or "GDV") was S$158,700,000. The later attempts to sell were at prices equivalent to GDVs of between S$128-134m (in August 2013) and S$110-120m (in April 2015), but no sales were achieved.

12. The only other factual matter that I need to make reference to is the existence of a set of laws in Singapore which are said by the Claimant to be relevant to its case, which require foreign developers to sell developments within a limited period of completion. Thus:

    i) Because the proposed Development was to be undertaken in Singapore, it is common ground between the parties that it was subject to an onerous statutory and regulatory regime contained within Singapore's Residential Property Act (Chapter 274, 2009 Revised Edition) ("**the RPA**") and the Housing Developer Rules made pursuant to section 22 of the Housing Developers (Control and

Licensing) Act (Chapter 130, 2008 Edition ("**the HDR**") (together, "**the Singaporean Regime**").

ii) In this case, as the Defendant (being a Singaporean entity owned by a foreign company) was a foreign housing developer for the purposes of the RPA, it was required to obtain an approval from the Controller of Residential Property in Singapore, commonly referred to as a qualifying certificate ("**QC**"). QCs are subject to restrictions imposed pursuant to section 31 of the RPA which will include:

a) an obligation on the developer to provide security for its obligations under the QC and RPA in the form of a Banker's Guarantee of at least 10% of the purchase price of the land on which the development was to be built ("**the Security Deposit**");

b) an obligation on the developer to complete the construction of the development and obtain a Temporary Occupation Permit ("**TOP**") or Certificate of Statutory Completion ("**CSC**") within a limited period of time from the date of the QC, ordinarily 6 years; and

c) an obligation to sell the properties comprised within the development within 2 years from the date of issue of the TOP or CSC, failing which it would risk forfeiture of its Security Deposit.

iii) Although it is possible for developers such as the Defendant to apply to extend the two year period in which they have to sell the properties comprised within the development following the grant of a TOP or CSC, the fees for so doing are substantial, being levied at 8% of the value of the land for the first year, 16% of the value of the land for the second year and 24% of the value of the land for third and subsequent years.

iv) Moreover, the effect of section 31(4) of the RPA is that the Defendant was prohibited as a foreign company from retaining any of the Apartments within the Development (whether to rent the same or otherwise) without applying to the Controller of Residential Property in Singapore for permission pursuant to section 25 of the RPA.

13. The Defendant accepts that it was at all material times aware of the Singaporean Regime but denies that the Claimant was so aware. However, it is the Claimant's case, supported by Mr Pang's evidence, that it was aware of the salient features of the Singaporean Regime.

14. In the event, the shares in the Defendant were sold to Singaporean investors. This had the result that the Singaporean regime no longer applied.

The law.

15. The legal principles which are relevant to the issues that I have to determine are not in dispute.

16. As to the construction of express terms, both parties rely on the authoritative statement of Lord Hodge in *Wood v Capita* [2017] AC 1173, 1179-80:

> *"10.The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds [1971] 1 WLR 1381 , 1383H–1385D and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989 , 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 , 912–913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.*
>
> *11.Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case [2011] 1 WLR 2900 , para 21f. In the Arnold case [2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury PSC, paras 13–14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 , paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.*
>
> *12.This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*

13.Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 All ER 571 , para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

17. As regards the implication of terms, both parties referred me to the statement of Lord Neuberger in in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 [2016] AC 742 at paras 15 to 31. As was made clear there:

i) Where, as here, one is dealing with the implication of a term into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made, a term will only be implied if it satisfies the test of business necessity.

ii) For the term to be implied (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

iii) It may be difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue because it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision or indeed the parties might suspect that they are unlikely to agree on what is to happen in a certain eventuality and may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur.

iv) It is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. It is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished

to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred.

v) A term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them.

vi) A term can only be implied if, without the term, the contract would lack commercial or practical coherence.

vii) The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.

18. I therefore approach the issues before me in the light of this guidance.

19. In addition, I was referred, at my request, to case law on the subject of whether a principal could be required to pay damages for preventing his agent from earning commission. The relevant case law is considered in *Bowstead on Agency* 21st ed, at Article 56, which states that:

"Agents' Remuneration Due Upon the Happening of an Event

(1)Where an agent is entitled to his remuneration upon the happening of a future event, his entitlement does not arise until that event has occurred.
(2)The event upon which the agent's entitlement to remuneration arises is to be ascertained from the terms of the agency contract.
(3)Where the event upon which the agent's entitlement to remuneration arises does not occur, the agent will not be entitled to receive remuneration on a quantum meruit unless provision for this is expressly made in the agency contract, or unless a term to such effect can be implied into the agency contract in order to give it business efficacy or otherwise to give effect to the intentions of the parties."

20. This Article, in my judgment, suggests again a twofold test:

i) First, it is necessary to determine on what event the relevant party's entitlement to be paid is dependent. This is a matter of construction of the contract.

ii) Secondly, where that event does not occur, it is necessary to ask whether there should be implied into the contract an entitlement to be paid some sum by way of quantum meruit.

Preliminary issue 4.

21. To reiterate, the wording of this issue is as follows:

"Whether the facts alleged in paragraphs 11 to 15 of the Amended Particulars of Claim (if proved) are capable of amounting to a breach of the express terms of the Agreement."

22. Although the last of the issues ordered, I deal with this issue first since both parties agreed that it was logically anterior to the issues relating to implied terms.

The parties' submissions.

23. Mr Riley QC submitted that, although not put in such terms, issue 4 in effect asks this Court to determine whether or not the Agreement can be construed as:

    i) imposing an obligation on the Defendant to proceed with the marketing of the Apartments for sale with due diligence and expedition ("**the Marketing Obligation**"), which obligation founds the breaches alleged at paras 11.1 to 11.4 of the Amended Particulars of Claim;

    ii) imposing an obligation on the Defendant to complete the sale of the Apartments within a reasonable time of the third quarter of 2008 and/or the completion of the development of the Apartments ("**the Sale Obligation**"), which obligation founds the breach alleged at paras 11.5 of the Amended Particulars of Claim; and

    iii) preventing the Defendant from renting out the Apartments ("**the Rental Prohibition**").

24. Starting therefore with Mr Riley's submissions in relation to the Marketing Obligation:

    i) The Defendant was required by clause 8.1 to "proceed to develop the Project with all due diligence and expedition at all times and shall ensure that its Project Architects, and all other agents consultants contractors and advisers use their best endeavours to complete the Project within the anticipated development timetable".

    ii) "*Project*" in this context must be construed as including the marketing of the Apartments for sale with due diligence and expedition given that:

        a) The definition of "*Project*" in Recital D is not confined to the construction phases of the Development. It simply refers to the "*residential development to be named, located at 74 Grange Road*".

        b) The Services that the Claimant was to provide under the Agreement, which necessarily must have formed part of the Project, included extensive obligations in Appendix E to assist the Defendant with the marketing and advertising of the Apartments. It makes no sense for those marketing and advertising services to be outwith the scope of the Project. If the Claimant's services in this regard fall within the scope of the Project then, necessarily the Defendant's marketing and advertising activities must also form part of the Project in circumstances where the Claimant's obligation was to assist the Defendant's efforts.

c) Inherent in an obligation to "develop" a project is the concept of an endpoint to that project towards which that party is to strive. In this case, the endpoint for the project can only sensibly be understood as the sale of the Apartments in circumstances where:

i) The ultimate purpose of the Agreement was to facilitate the sale by the Defendant of the Apartments (the Claimant's obligations and remuneration being directed to achieving such objective and it being the Defendant's *raison d'être* as a property developer). The Defendant rightly accepts this premise in its Defence, taking issue only with whether it was under an obligation to sell within a certain time and not the principle that it was intended that the Apartments be sold.

ii) The payment of the final 50% of the Claimant's Retainer Fee pursuant to clause 9.4 of the Agreement was only payable on *"Legal Completion of the Apartments"*, which definition required the sale of the Apartments.

iii) The Singaporean Regime would not permit the Defendant to retain ownership of the Apartments after their construction, Indeed, it would be fined in the event it did not sell the Apartments expeditiously. The completion of the Defendant's task as a property developer so far as those rules were concerned required not just the expeditious construction of the Apartments but also their sale within specified time periods. The Singaporean Regime is part of the factual background to which the Court can properly have regard in circumstances where:

(a) it is not in dispute that the Singaporean Regime was known to the Defendant;

(b) it was Mr Pang's evidence that the Claimant was aware of the salient features of the Singaporean Regime; and

(c) even if the Court were not satisfied on the evidence presently available that the Claimant was in fact aware of the Singaporean Regime at the time it entered into the Agreement, knowledge of that regime is on any view knowledge which was "*reasonably available"* to the parties: see *Challinor v Juliet Bellis* [2013] EWHC 347 (Ch) at paras 276 to 279 per Hildyard J.

d) Clause 8.2 of the Agreement which requires the Defendant to provide quarterly reports to the Claimant is plainly intended to enable the Claimant to verify that the Defendant is complying with its obligations under clause 8.1 to develop the Project with all due diligence and expedition, following on as it does immediately from clause 8.1 in the same clause 8 of the Agreement. Pursuant to clauses 8.2.3 and 8.2.4 respectively, the Defendant was required to provide quarterly reports as to its progress in sales of the Apartments and its progress in marketing

and advertising the Apartments. There is no reason why the Defendant would be under an obligation to provide such regular reports to the Claimant – and, moreover, reports on those matters in such detail as the Claimant required: see clause 8.2 – if its express obligation in clause 8.1 to "*develop the Project with all due diligence and expedition*" did not encompass the marketing of the Apartments for sale.

e) In circumstances where the only way the ultimate purpose of the Agreement – i.e. the sale of the Apartments – could be achieved was through the marketing and advertising of the Apartments for sale, and the Claimant was only to receive the vast majority of its remuneration under the Agreement upon sale of the Apartments, it would be nonsensical for the Defendant to be under an obligation to complete the building of the Apartments with all due diligence and expedition and to inform the Claimant of its progress in that regard but not to have to take such steps with regard to the final stage of the development, i.e. their marketing and sale.

25. Mr Riley went on to submit that to the extent that there is any doubt as to how "*Project*" should be construed, any such doubt should be resolved in favour of the construction proposed by the Claimant in circumstances where it is the construction most consistent with business common sense. That is because the only alternative construction is to read clause 8.1 as only requiring the Defendant to use such efforts up to the point of completion of the building works in respect of the Apartments. Such a construction would be commercially nonsensical when the ultimate objective of the Development to which the Agreement was directed was not merely the construction of the Apartments but their sale, that being where both the Claimant and Defendant would realise their income from the venture. There is no reason why the parties should have intended that the Defendant should be permitted to cease progressing the Development with due diligence and expedition prior to the stage at which they would each realise their returns.

26. If there was this obligation to market, the Claimant contended that it was beyond doubt that the matters set out at paras 11.1 to 11.4 of the Amended Particulars of Claim, if proved, would amount to a breach of the express terms of the Agreement. Thus:

i) The Defendant has only made two attempts to sell the Apartments in the near 12 years since the Agreement was entered into and the "Marketing Launch Date" from which its efforts were supposed to commence, as alleged at para. 11.1;

ii) it has not offered the Apartments to the wider public, as alleged at para. 11.2;

iii) it has chosen to rent the Apartments rather than market the same, as alleged at para. 11.3 and 12; and

iv) it has rejected the Claimant's offers of assistance with marketing the Apartments for sale, as alleged at para. 11.4.

27. Turning to the "Sale Obligation", then, as with the "Marketing Obligation", and for principally the same reasons, the Claimant submitted that the "Project" that clause 8.1

requires the Defendant to develop with all due diligence and expedition is not the mere construction of the Apartments but also their eventual sale. In support of that construction, the Claimant additionally relied on the following:

i) The Defendant's obligation pursuant to clause 9.1 was to pay the Claimant the Retainer Fee of US$1.6m in consideration for the provision by the Claimant of the Licence and the Services. That fee was not a performance related incentive fee – that was catered for elsewhere in the Agreement at clause 9.5 – but rather the Claimant's fixed 'base fee' and the Claimant's entitlement to be paid the same was unqualified. It is inherent in the ordinary meaning and concept of a 'Retainer Fee' that it should be paid in order for services to be secured.

ii) The purpose of this Agreement was for the Defendant's Development to be branded as a 'designed by Yoo' development and for it to benefit from the Claimant's interior designs such that the Apartments would sell swiftly and at a premium to that which they would otherwise achieve without the Claimant's involvement. The exploitation of that premium is necessarily premised on the Apartments being sold while the Claimant's design remained current, innovative and in accordance with customer expectation and tastes for properties of this kind.

iii) There is no difficulty that this obligation to complete the sale of the Apartments which clause 8.1 encompassed should be construed as requiring their sale within a reasonable time. That is because, as set out above, it is well established that where a contract does not expressly or by necessary implication fix any time for the performance of an obligation, it will be *implied* that it shall be performed within a reasonable period of time: see HHJ Davis-White QC (sitting as a Judge of the High Court) in *Sparks v Biden* [2017] EWHC 1994 (Ch) at para. 59, a decision in the analogous context of an overage agreement.

28. Again, it was the Claimant's contention that this construction accorded with business commonsense given that:

i) An obligation on the Defendant to complete the sale of the Apartments with all due diligence and expedition gives practical coherence and effect to the Agreement, ensuring that the joint venture to which the parties are working is completed timeously and the payment of the Claimant's Retainer Fee which the Defendant has an unqualified obligation to pay: see, in this regard, *Sparks*, supra, at para. 52.

ii) If the Defendant is right and the Agreement imposes no obligation to sell within any period then it must logically be the Defendant's case that if it so chose it would not have to sell the Apartments at all, i.e. that it could simply rent the same. That would have a number of highly implausible consequences which it cannot sensibly be said the parties would have intended. In particular:

a) The Claimant would have no entitlement to be paid the balance of its fixed Retainer Fee notwithstanding the fact that it had provided the Licence and the Services.

b) The Claimant would have no ability to earn the incentive fee or commission even if it had identified purchasers for all of the Apartments.

c) The Claimant would be required to continue to provide the Services to the Defendant indefinitely but without prospect of payment. Indeed, the Claimant could be required decades hence to provide marketing services in relation to the sale of the Apartments if and when the Defendant eventually did decide to sell.

d) The Defendant would be obliged to report quarterly to the Claimant on its progress in selling the Apartments and in marketing and advertising the Units for sale even though it had no such intention.

e) Even if the Apartments were rented out on long-term leases, the Defendant would be obliged to ensure that all of the Apartments were in a condition suitable for sale pursuant to clause 5.3 of the Agreement.

f) If the Defendant were to sell the Apartments at some very much later date, say decades later (by no means implausible given the time which has already passed), there was and is no mechanism by which the Claimant's Retainer Fee might be increased, for example, to take account of inflation. All that the Claimant would be entitled to is the Retainer Fee.

g) If the Apartments were only sold at a very much later date at the time of the Defendant's choosing, they would be sold as a branded 'designed by Yoo' development notwithstanding the fact that they had been designed decades earlier. The Agreement contains no provision for the Apartments to be redesigned.

29. The Claimant maintained that the mere fact that the Defendant might have to sell in a bad market did not militate against the Claimant's case because:

i) The fact that the market conditions as at the time construction was completed were not as advantageous as the Defendant might have hoped was an ordinary commercial risk inherent in the Agreement and in property development generally.

ii) This fact is not one which deprives the Agreement of practical coherence. It is a mere consequence and an unremarkable one at that. It is not something which drives or demands a particular construction of the Agreement.

iii) The parties knew that the Defendant would be <u>obliged</u> to sell the Apartments within a short time frame because of the Singaporean Regime irrespective of market conditions. The Defendant thus had no practical commercial choice as to when it sold the Apartments in any event.

30. As with the Marketing Obligation, if the Sale Obligation arises then there can be no doubt that the Defendant is in breach of the same in circumstances where:

i) it is common ground that the Defendant has not sold any of the Apartments in the nearly twelve years since the Agreement was signed; and

ii) it is no part of the Defendant's case that it is unable to sell the Apartments, rather it is the Defendant's case that it has chosen not to do so because market conditions are such that the Development would allegedly not be profitable for it were it to sell at prevailing market prices.

31. The final question in relation to this issue is whether the Defendant acted in breach of the express terms of the agreement in renting out the apartments. The Claimant submitted that there was such a breach:

i) Clause 5.2 of the Agreement expressly requires (a) the Defendant to grant the Claimant or its duly appointed representatives at any time before the sale of any Apartment access to that Apartment so as to inspect the same; and (b) the Defendant to immediately remedy any Apartment which does not comply with the requirements prescribed by the Agreement. Rental by the Defendant of the Apartments precludes the Claimant from exercising that unfettered right and prevents the Defendant from complying with its obligation to make good any Apartment which does not comply, a tenant not being obliged to grant such unfettered access or, indeed, access at all without permission. In this regard, it is to be noted that the Defendant has not pleaded that the law of Singapore with respect to the rights of tenants to restrict access differs in any material respects from English law on this point.

ii) If it is the case that clause 8.1 properly construed contains the Marketing Obligation and the Sale Obligation then it follows that for the Defendant to have rented out the Apartments would be for it to have acted in breach of that clause in circumstances where an Apartment which is rented out cannot be sold.

32. As the Defendant admits in these proceedings that it has rented out the Apartments the Claimant submitted that it follows that it is in breach of the express terms of the Agreement.

The Defendant's submissions.

33. The Defendant submitted that the Claimant's submissions sought to recast clauses 5.2 and 8.1 in such a way as to make them correspond, in effect, to its implied terms. However, the Defendant submitted, this attempt is hopeless – thus, for example, the express words of clause 5.2 confer a right upon the Claimant, not an obligation on the Defendant. The process of construction simply did not permit what amounted to a process of verbal contortion.

34. Similarly, clause 8.2 cannot possibly be construed as imposing an obligation to sell the Apartments within a reasonable time. The words used do not say that, or anything like it.

35. Thus, rather than re-writing the relevant clauses as the Claimant demands (no doubt recognising that without substantial revision of those clauses, its case is hopeless), the task for the Court is to assess whether the alleged breaches fall within either of the clauses.

36. As to the first of them – clause 5.2 - the alleged breach is said to consist of the renting out of the Apartments: see paragraph 11.3 of the Amended Particulars of Claim. However, there is no reason to think that the renting out of the Apartments would prevent the Defendant as landlord from procuring access for the Claimant. The Claimant's skeleton argument suggests that renting out would necessarily prevent compliance with clause 5.2. That is a non-sequitur. It will depend on the terms on which the Apartments are let out. It is commonplace for landlords to reserve rights to enter premises to inspect and carry out necessary works: see, e.g., *Barrett v Lounova (1982) Ltd* [1990] 1 Q.B. 348, where the landlord was entitled to access "*at all reasonable times and….for all reasonable purposes*".

37. In order to make good a claim for breach of clause 5.2, the Claimant would, as a minimum, have had to ask to be provided with access. It does not claim to have done so, and in any event, a breach of this clause could not possibly give rise to the losses claimed.

38. As to the second, the alleged breaches consist of (i) various alleged failures to market the Apartments, (ii) the renting out of the Apartments, (iii) the alleged rejection of the Claimant's offers of assistance and (iv) the alleged failure to sell the Apartments within a reasonable time.

39. None of these could be a breach of clause 8.1, a clause which is plainly directed towards the completion of the construction of the building. It refers expressly to an obligation to "*proceed to develop the Project*". This is clearly language that it is intended to describe the process of physical construction of the building (and the necessary preparatory steps). This is confirmed by the reference to "*the Project Architects, and all other agents, consultants and advisers*".

40. Moreover, *"the Project"* is defined as "*the residential development to be named, located at 74 Grange Road"*: see Recital D. This is clearly intended to mean the physical building that it is to be constructed/developed on the site. The Claimant's suggestion that this is intended also to embrace the marketing and sale of the development is an unnatural distortion.

41. At Appendix B it is described as "the general design of the building with approximately -- Units in accordance with the terms of this Agreement". That appendix then sets out an indicative development timetable which identifies the "Construction Start Date" followed by the "Estimated completion". It is plain that it is referring to completion of the construction (and the reference to "complete the Project" in clause 8.1 must mean the same).

42. The Claimant's contention that "*the Project*" embraces the marketing and sale of the Apartments is clearly unsound. The language of the DSA and the use of the verb "*develop*" in relation to it make it clear beyond doubt that it is referring to the physical construction. This language is simply inapt to cover marketing and sale. Even the Recitals to the LDSA show that "*development*" and the marketing of a development are different things: recital B refers to "*the building, renovation, and development of apartment buildings and the marketing thereof*". Marketing is not, as the Claimant contends, an aspect of "*development*": it is something that one does *to* a development.

43. By way of further illustration, the Defendant referred to clause 8.2, which imposes reporting obligations on the Defendant in relation to the "*Project*". However, the Defendant contended that the Claimant's case that this only makes sense if the "*Project*" also covers marketing and sale involved a non-sequitur. The fact that the Defendant might be obliged, e.g., to report on sales of Apartments (as one would expect given the structure of the payment obligations), tells one nothing about what is meant by the use of the word "*Project*". However, clause 8.2 is revealing about what the parties meant by "*the Project*" when one sees the aspects of "*the Project*" on which the Defendant was required to report under clause 8.2. That is to say, it was required to report on "*progress in the design of the Project*", "*progress in the construction of the Project*", "*financing of the Project"* and "*reasonable information on the local property market for properties or developments similar to the Project"*. Reading these references as, in effect, incorporating the marketing and sale of Apartments within "*the Project*" makes no sense. Confirmation of this is given (if it were needed) by the fact that clause 8.2.3 and 8.2.4 makes separate express provision for reporting on marketing and sales (without reference to "*the Project"*).

44. Moreover, clause 12.1 provides that the DSA remains in force until "the completion of the Project, settlement of the sales of all Yoo Units and the full payment of by the Company to Yoo of all the fees provided for in clause 9". Yet, if the Claimant were right, "the completion of the Project" could not occur until all the Apartments had been sold.

Discussion and conclusions

45. As I have noted above, Mr Riley argued that this issue could be restated as whether the agreement could be construed as imposing certain specific obligations, ie a marketing obligation, a sale obligation and a no rental obligation.

46. For my part, I cannot agree with Mr Riley's starting point, for a number of reasons:

    i) The preliminary issue that I am asked to determine is that which has been ordered by the Court. In effect, Mr Riley's submission is that I should redraft the issue, so as to ask whether the obligations he puts forward are, on a true construction of the agreement, part of the bargain.

    ii) This would also, in my judgment, involve the need to replead the case. In essence, what Mr Riley seeks to do is to start with the breach alleged, and then ask whether the contract can be construed as including (as a matter of construction) the terms he relies on, which are not then the actual express terms pleaded. In essence, this approach puts the cart before the horse, in my judgment.

    iii) The logic of Mr Riley's argument, it seems to me, is really that the terms put forward as implied terms form part of the express terms of the contract, properly construed.

47. Accordingly, I propose to address the issue in fact ordered, namely whether the pleaded facts are capable, if proved, of establishing a breach of the express terms relied on.

48. My starting point is the express terms of the agreement which, in my view, are relevant. In this regard, I start with the recitals to the agreement. Those recitals define the "Concept"[1] as the Licence to design and market residential developments incorporating certain intellectual property and proprietary elements conceived by Yoo; the "Project"[2], which is the residential development to be named and located at 74 Grange Road Singapore; the "Property", which is the building at which the Project is located; "Unit" which is defined as each and all of the residential units *within* the Project; "Yoo Units" which is defined as all the Units within the Project, and "Apartment" which means "Units". In addition, "Services" is defined as meaning "the Services in relation to the Project to be performed by Yoo described in clause 3 and Appendices A-E".

49. Clause 3 then sets out the Services to be provided by Yoo, which includes the marketing services described in Appendix E, and Yoo's obligations are further described in clause 4. I do not need to set out these clauses in detail.

50. Clause 8 sets out Iliv's obligations in relation to developing and reporting. I have set out the terms of these clauses above and I return to them below.

51. Clause 9 sets out the payment obligations. Again, I have set these out above.

52. I turn then to the Appendices.

    i) Appendix B sets out "The Project". It specifies that as "The general design of the building with approximately … Units in accordance with the terms of this Agreement and more specifically (but subject to change) as follows:…

        a) Project Address: 74 Grange Road Singapore…

        b) Approx number of units: 28

        c) Construction start date: 4th quarter 2008

        d) Estimated completion: 4th quarter 2010

        e) Marketing launch date: 3rd quarter 2008

        f) Estimated project GDV: S158,700,000.00

    ii) Appendix D set out the adaptation and design services as follows:

        a) Phase I: The Concept Schematic Design Phase

        b) Phase II: The Design Development Phase

        c) Phase III: The Construction Documents Phase

        d) Phase IV: The Construction Phase

[1] Further described in Appendix A to the DSA.
[2] Further described in Appendix B to the DSA, discussed below.

iii) Appendix E set out the Marketing Services to be provided under clause 3 by Yoo. That clause provides as follows:

"Yoo will provide Marketing and PR Services via assistance and coordination as follows:

- *Work with the Company to create a meaningful marketing plan and to maintain development of the plan as the Project progresses.*

- *Wholly associate the Yoo brand with the Project with a view to maximising the Project Profile for the ultimate benefit of the Company.*

- *Collaborate with the Company and its sole marketing agent in the State in the undertaking of a national and international direct marketing and awareness campaign in the promotion of the overall project.*

- *Organise a schedule of dedicated conference calls for quality control and problem solving purposes of various and all marketing issues as the Project progresses. The frequency of the diarised calls will vary along the Project term, but will be agreed with the Company.*

- *Supply content material for marketing collateral in the form of Yoo's databank of copyrighted images, quotes and other copy.*

- *Supply of historic press copy in digital format for optional display in marketing centres and other appropriate areas.*

- *Collaborate with the Company and its sole marketing agent in the State on all promotional and marketing elements considered necessary for the overall success of the Project Interiors in its entirety. These elements will include but are not limited to the following:*

    - *Site Presentation*

    - *Brochures and other printed promotional matter*

    - *Hoarding and signage*

    - *Advertising*

    - *Public relations*

    - *Web site*

    - *Community outreach*

- *Sales center presentation*
- *Virtual imagery*
- *Models*

- *Review and comment on all project sales and marketing material at every stage that the material is submitted to them.*

- *The development will be promoted as a "Yoo-Starck Concept" and/or "Yoo inspired by Starck" designed project in association with the Company's brand.*

- *Liaise with both the Project PR company approved by the Company and the Company to create a sustainable PR program with the locally appointed PR company.*

- *Distribute relevant brochures and promotional material to all Yoo projects within Yoo's portfolio for increased international exposure.*

- *Providing a CD/DVD specifically for the Property with Philippe Starck making reference to and being involved in the Property subject to the rights set out in this Agreement in relation to such CD/DVD"*

iv) Appendix F then set out details of the Incentive Fees.

53. These being the express terms of the agreement, the question is whether the breaches pleaded in paragraphs 11.1 to 11.5 are capable of constituting breaches of those express terms. I take each pleaded breach in turn.

54. First, the Claimant contended that there was a breach of clause 8.1 by reason of the fact that the Defendant only made two attempts to sell the Apartments. The logic of the Claimant's argument is that the clause requires the Company to develop the Project with all due diligence and expedition and shall ensure that all agents (including marketing agents) use best endeavours to complete the Project within the anticipated development timetable; that the Project for these purposes includes marketing and sale of the Units; and that there was at least arguably a breach of this clause by reason of the facts pleaded.

55. In my judgment, this confuses the completion of the project, which is covered by clause 8.1, and the marketing of the units within the project, which is not covered by any express clause. I reach this conclusion for the following reasons.

i) The contract makes a clear distinction between the obligation to complete the Project within the anticipated timescale, which in context must mean the timescale in Appendix B, and the obligation to market and sell the units within the project, which are differentiated from the Project itself.

ii) Whilst it is true that clause 8.2 imposes an obligation on the Defendant to report back as to the rate of sales, it does not impose any obligation on the company to sell at any particular rate. That is in my view unsurprising.

iii) In both the recitals and in clause 8.2, there is a clear distinction drawn between the Project and the units which form part of the Project. The Defendant's obligations relate to the Project; the rights of the Claimant relate to sale of the units.

iv) In my judgment, the decision of the House of Lords in the case of *Luxor v Cooper* [1941] AC 108 is applicable here. The right to commission is dependent on sale. If no such sale is made, then there cannot be a right to commission pursuant to the express terms of the contract; instead, the question must be whether such a right is to be implied.

v) Although this may be putting the same point in a different way, to say that there must be an obligation to sell because otherwise the commission that is dependent on a sale cannot be earnt is to put the cart before the horse. The party that is making the largest investment is the developer; the party whose interest is therefore the most significant is the developer; so to subjugate the interests of the developer to those of the provider of design and marketing services would be contrary to all business commonsense.

vi) Finally, I should deal with the argument which Mr Riley put forward, to the effect that any construction which meant that the Defendant would not have to market the units meant that the Claimant would be left owing obligations to assist with marketing for an indefinite period. I accept this; but the argument does not seem to me to prove anything. As and when the Defendant and its agent choose to market, then the Claimant may be called upon; but not before then.

56. Accordingly, in my judgment, there is clearly no breach of the express terms of clause 8.1 by virtue of the facts pleaded in paragraph 11.1.

57. The second breach alleged by the Claimant is a breach of clause 8.1 in failing to offer the apartments to the wider public within a reasonable period or at all. In my judgment, this adds nothing to the plea under paragraph 11.1. In my judgment, the express terms of the contract do not require sale within any particular period of time and thus do not require offer for sale either.

58. The third breach alleged by the Claimant is of clauses 5.2 and 8.1 in renting out the apartments rather than progressing with marketing those apartments. In my judgment, the allegation of a breach of clause 8.1 is simply duplicative of the first two breaches alleged. As to the alleged breach of clause 5.2, this allegation turned on the assertion that by renting the units, the Defendant had disabled itself from complying with its express obligation to allow access to the Claimant to the units, within clause 5.2. However, it was common ground that no request had been made for such access, which in my judgment is fatal to this allegation of <u>actual</u> breach.

59. Next, the Claimant asserts that there was a breach of clause 8.1 because the Defendant had rejected the Claimant's offers of assistance with marketing. Again, in my

judgment, since clause 8.1 does not impose obligations as to marketing, as opposed to completion of the development of the Project (ie building the block) this allegation cannot succeed.

60. Finally, the Claimant asserts that there was a breach of clause 8.1 in that the apartments were not sold within a reasonable time or at all. Again, it follows from what I have already said that, in my judgment, there was no obligation under clause 8.1 to sell at all, let alone sell within any set period of time. Instead, that clause had to do with the completion of the building programme, which is what the developer would have had most control over.

61. I therefore conclude that the matters set out in paragraph 11 of the Particulars of Claim are not capable of amounting to breaches of the *express* terms of the agreement relied on.

62. Before I leave this issue, however, I should make reference to the decision in *Sparks v Biden*, ref supra, to which reference was made by the Claimant.

63. The facts in that case were as follows:

i) The parties had entered into an option agreement, under which the buyer had an option to purchase certain land owned by the seller. The seller, as both parties knew, wished to use monies generated by the project to which I shall make reference, to provide retirement monies.

ii) That agreement required the buyer, within 3 years, to use all reasonable endeavours to procure planning permission for the development of eight buildings on the land – the project I have referred to. Once that planning permission had been obtained, the option could be exercised.

iii) Thereafter, if the planning permission was obtained and the option exercised, the buyer had, "as soon as practicable" to construct the buildings.

iv) The purchase price, after amendment, was £500,000. In addition, the seller was to receive 33% of the sale price of each property, net of the purchase price already received, but with a minimum overage of £1.2m (taking into account the £500,000 already received).

v) The buyer did not however sell the houses. He leased out seven of them, and used the last himself, maintaining that the time of sale was entirely a matter for his discretion.

64. The issue for the Court in that case was thus whether a term could be *implied* into that agreement requiring the buyer to sell the eight houses within a reasonable time of development. It was held that there was such an obligation. As such, in my judgment, its relevance is really in relation to the issues in this case relating to the implication of terms and not this issue 4. I will therefore deal with it further below.

Preliminary issue 1.

65. Again, for ease of reference, I set out this issue below:

> *"Whether the Defendant is under an implied obligation (as alleged in paragraph 9.1 of the Amended Particulars of Claim) to proceed with marketing the Apartments for sale with due diligence and expedition at all times and to ensure that its sole marketing agent continued to use its best endeavours to complete the sale of the Apartments under Sale and Purchase Agreements"*

66. The Claimant submitted that this term should be implied for the following reasons:

i) It is so obvious that it goes without saying. The ultimate purpose of the DSA was to enable the Defendant to sell the Apartments in the Development, from which sale both the Claimant and the Defendant would realise a return. Given that the parties on any view expressly intended that the Defendant should progress the construction of the Apartments with all due diligence and expedition, it follows that they must also have intended that the next stage of the Development – the marketing and advertising of the Apartments – should also proceed diligently and expeditiously in circumstances where:

a) irrespective of market conditions, the only plausible way the Apartments might eventually be sold – as it is not disputed the parties ultimately envisaged and intended – and the parties able to realise their return on the project is if they were marketed and advertised for sale;

b) there are no good reasons why the parties should have been in agreement that the construction phase of the Apartments should proceed with all due diligence and expedition but that, when it came to the marketing of the same, the Defendant should have been permitted not to exercise diligence or to act expeditiously: to suggest otherwise would be to conclude that the parties were indifferent to the process whereby they might ultimately realise their return on the Development;

c) the DSA itself contemplated that the marketing phase of the Development should in fact commence even before construction, the latter only being scheduled to commence in the fourth quarter of 2008 whereas the marketing launch was scheduled for the preceding quarter of that year;

d) the DSA required the Defendant to provide the Claimant with quarterly reports from its execution as to the progress of its sales, marketing and advertising efforts, which obligation – especially when coupled with the contractual timetable for the marketing launch – presupposes an ongoing marketing and advertising effort; and

e) the DSA at clause 26 prohibited the Claimant from marketing or promoting *any* residential or development or project in Singapore from the date of the DSA until the earlier of the sale of 23 of the Apartments or 31 March 2009 and, thereafter, from marketing or promoting a competing development in the same area of Singapore until the earlier of the sale of 23 Apartments or 30 June 2009: that prohibition plainly envisaged a substantial marketing campaign being conducted for the

Project from the date of the DSA onwards from which it was important the Claimant should not detract by involvement in a competing project.

ii) For essentially the same reasons, the proposed term is necessary to give business efficacy to the DSA, that is to say to give the DSA practical and commercial coherence. Without such an obligation:

a) The Defendant would not be obliged to bring about the ultimate objective to which the DSA is directed, i.e. the sale of the Apartments;

b) The Claimant would be left with an open-ended commitment to provide the Services to the Defendant, its obligation continuing while the Apartments remained unsold;

c) The Claimant would be required to provide marketing and advertising assistance to efforts that the Defendant was under no obligation to undertake; and

d) it would be highly unlikely that the Claimant would be paid its Retainer Fee within a reasonable period, the payment of the vast majority of which required the sale of the Apartments, which sale would not occur without the Defendant marketing the same for sale.

iii) The proposed term is reasonable and equitable. It does no more than impose exactly the same obligation as the Defendant on any view expressly assumed with respect to the – much more onerous and expensive – construction phase of the Development.

iv) The proposed term is clearly expressed.

v) The proposed term does not contradict any express term of the contract, nor does the Defendant suggest otherwise.

The Defendants' submissions.

67. The Defendants relied on the fact that the DSA was detailed and comprehensive; put forward by the Claimants; and negotiated with legal assistance over a lengthy period. They also relied on the entire agreement provisions in the contract (clauses 14.5 and 23). Although they accepted that such clauses such as these might not in fact be wholly effective to exclude implied terms: see *AXA Sun Life Services Plc v Campbell Martin Ltd* [2012] Bus. L.R. 203; *Exxonmobile Sales and Supply Corp v Texaco Ltd (The Helene Knutsen)* [2003] EWHC 1964 (Comm), [2003] 2 Lloyd's Rep. 686, they contended that clause 14.5 (together with clause 23) is, at the very least, strongly persuasive against the implication of any undertakings from either party other than those expressed.

68. They also argued that where the contract intended to impose obligations as to timing that was addressed by express provision. In particular, clause 8.1 provided expressly that the Defendant was to "*proceed to develop the Project with all due diligence and expedition and [to] ensure that its Project Architects, and all other agents, consultants*

and advisers use their respective best endeavours to complete the Project with the anticipated development timetable"

69. More specifically, in relation to the provisions of clause 9, they submitted that it is evident that the DSA had something of the nature of a profit-sharing enterprise. That is to say, by clause 9.3, the Claimant was to share in the 'upside' of any sales in excess of the anticipated GDV by way of the Incentive Fee. However, it is significant that there was an imbalance in favour of the Claimant in relation to the Retainer Fee: clause 9.1 expressed that the Retainer Fee was based on an estimated GDV of S$158,700,000, but the Retainer Fee was not to be reduced in the event that that estimated GDV was not achieved.

70. This, they said, must be also be seen in the context that the Defendant was engaged in a costly, lengthy and complicated development. Very large sums of money were being invested. It is inherent in the nature of such an investment that the market into which the Apartments were to be sold might fluctuate and thus the way in which they would be marketed, would be conditioned by any number of factors, including, most obviously the prevailing market conditions and/or an assessment of future market conditions. As a matter of commercial common sense, these are matters over which one would clearly expect the Defendant to retain absolute control and discretion. The Claimant's case is that the Defendant's freedom of action was curtailed by the need to pay its commission. Far from this being necessary to give business efficacy to the DSA, it was submitted that, on the face of it, it is a commercially absurd contention. The proposition is that the realisation of an investment with an estimated value of S$158,700,000 would be dictated by the terms of a contract with an interior designer for the payment of licence/design fees of a little over US$1 million (about S$1.4m).

71. For this reason, too, the Defendant contended, the Claimant's case does not even satisfy the first basic minimum requirement that an implied term be "*reasonable and equitable*".

72. As to the second and third requirements (that the term be necessary to give business efficacy to the contract and that it must be so obvious that it goes without saying), neither of these is satisfied. The DSA functions perfectly well without the alleged implied term. Had the alleged implied term been suggested, it would in all likelihood have been highly contentious and is wholly uncommercial. The fact is that this alleged implied term is capable of having a profound effect on the Defendant's position. If a reasonable person in the Defendant's position had been prepared to enter into discussions about it at all, it is far from clear what the upshot of any such discussion would have been. This first alleged implied term is thus hopelessly vague and also, quite unreasonably, entails an obligation on the Defendant to ensure that a third party used its best endeavours.

73. The Claimant's complaint is that it means that it is at risk of having to wait for payment. That should not be so surprising. As explained above, the DSA provided that the Claimant would share in any 'upside' by way of the Incentive Fee (which might in principle have arisen by virtue of a decision, e.g., to delay marketing). Although the Retainer Fee would not reduce in the event of the anticipated GDV being achieved, it is perfectly natural (and certainly not lacking in commercial coherence) that the Claimant might have to wait for the payment of the Retainer Fee while the Defendant

takes whatever steps it deems necessary to protect and enhance the value of its investment (part of which might, through the Incentive Fee, enure to the benefit of the Claimant).

74. To put the point another way, if the intention of the parties was that the Apartments had to be marketed immediately or within a reasonable time, even if it was against the wishes and interests of the Defendant, the natural expectation would be that the Claimant should have to share the 'downside' by a corresponding reduction in the Retainer Fee. That may well have been one of the demands that might have been made, had the Claimant sought the introduction of express provisions corresponding to the alleged implied term.

75. This must also be seen against the background that the risk of there being any substantial delay might well have been considered to be small, or at least tolerable, and therefore not requiring to be expressly addressed (as it would most obviously have been by the inclusion of a long-stop date on payment of the Retainer Fee). The Defendant's aim would have been to construct the development and market and sell the Apartments to its best advantage. There is no reason to think that that would not in itself have been sufficient 'comfort' for the Claimant and certainly a commercially coherent outcome, in circumstances where the question of whether and, if so, how the 'issue' should be expressly addressed was likely to have been contentious.

My conclusions.

76. I deal with this suggested implied term together with the second one, relating to the obligation to sell, below.

Preliminary issue 2.

77. Again, for ease of reference, I set out this issue below:

> *"Whether the Defendant is under an implied obligation (as alleged in paragraph 9.2 of the Amended Particulars of Claim) to complete the sale of the Apartments within a reasonable time of the third quarter of 2008 and/or of completion of the development of the Apartments"*

The Claimant's submissions.

78. The Claimants submits that this term should be implied for the following reasons:

    i) For essentially the same reasons as set out above in relation to the first implied term the proposed term reflects and gives effect to what can safely be presumed to be the parties' intentions when regard is had to the purpose of the DSA, its express terms and the context in which it was made. In that regard, it is significant to note that:

        a) The DSA envisaged and was directed entirely towards the sale of the Apartments. It neither contemplated nor provided for the Apartments to be rented.

b) The DSA was entered into against the backdrop of the Singaporean Regime which, as set out above, required the sale of the Apartments within a period of no more than two years following completion of construction.

c) Mr Pang's evidence at trial was that it was intended and understood that the Apartments be sold quickly – indeed, it is his evidence that it was the Defendant's very desire to achieve this aim that prompted their instruction of the Claimant on the Development. The Defendant has not adduced any evidence to gainsay that case or understanding.

d) The Claimant's Retainer Fee is not expressed as a function of the value of Apartment sales the Defendant might make but rather as a pre-determined, fixed figure payable irrespective of the sale price for the Apartments the Defendant might achieve. The parties thus clearly intended that it is a sum that the Claimant should be paid; but the vast majority of that fee could only be paid upon sale of the Apartments.

ii) The proposed term is necessary to give business efficacy to the DSA, again for the reasons already given in relation to the first implied term. Those reasons apply with even greater force in the case of the obligation to sell the Apartments within a reasonable time, however, in circumstances where, without such an obligation:

a) there is no means by which the Claimant can compel payment of its Retainer Fee;

b) the Claimant would be obliged to continue to provide the Services to the Defendant even if there was no prospect that it would be paid its Retainer Fee in the foreseeable future because the Defendant was not actively seeking to sell the Apartments;

c) the Defendant could receive the benefit of the Licence and the Services and rent the Apartments for profit without ever being obliged to pay the Claimant its agreed Retainer Fee; and

d) The Claimant would be deprived of its opportunity to earn additional sums in the form of the incentive fee and/or commission under the Agreement, both of which were predicated upon sales of ***all*** of the Apartments even if it had introduced purchasers for several Apartments who had purchased at a price significantly in excess of the target price per square foot.

iii) The proposed term is reasonable and equitable. It is not unreasonable still less inequitable that the Defendant should be required to sell the Apartments within a reasonable period of time in circumstances where the Defendant was already subject to such a requirement in the form of the Singaporean Regime and where the risk that market conditions might not be propitious when the time came to sell was inherent in the DSA and the Development in any event.

iv) The proposed term is clearly expressed.

v) The proposed term does not contradict any express term of the contract, nor does the Defendant suggest otherwise.

The Defendant's submissions.

79. The Defendant, in its submissions, did not differentiate between the various implied terms. Thus, the submissions that I have already set out, it said, were equally applicable to this term, and indeed more forcefully so.

80. The only *caveat* in this respect is that the Defendant submitted that the Singaporean regime, which was relied on by the Claimant, was irrelevant in this regard. It submitted as follows:

i) The relevance of the Singaporean law (as expressed in paragraph 2A of the Amended Reply) is said to be that that law required (i) the completion of the construction and the obtaining of a Temporary Occupation Permit ("**TOP**") or Certificate of Statutory Completion ("**CSC**") within a "limited period of time" (in fact 6 years) from the date of the Qualifying Certificate (ii) the sale of the Apartments within 2 years of the issue of the TOP or CSC (in default of which fees would be payable for extensions) and (iii) permission from the authorities to rent out the Apartments.

ii) All of these, it is said, provided a "*likely long-stop*" date for the completion and sale of the Apartments.

iii) It is hard to see any basis on which any of these lends any support to the implication of the alleged terms. They are entirely separate.

iv) In fact, the content of the Singaporean law (assuming it was known to the Claimant) tends to militate *against* the implication of the alleged terms. If, for all practical purposes, it was considered that the local legislation provided a *"likely long-stop"* for the sale of the Apartments (and thus the payment of the balance of the Retainer Fee), then there was all the more reason why the matter was not required to be dealt with in the DSA.

My conclusions on issues 1 and 2.

81. The reason why I deal with preliminary issues 1 and 2 together is because, in my judgment, they are inextricably interlinked. That is because, if there is in fact no obligation to sell within any particular time frame, it is difficult to see why there should be an obligation to market so as to achieve such sales.

82. I start with the question of whether any such implied terms are excluded by clauses 14.5 and 23.

i) Clause 14.5 provides that *"neither party gives any warranties or undertakings to the Company except as expressly set out in this Agreement, and all other warranties whether express or implied at law or otherwise are hereby excluded to the fullest extent permitted by law."*

ii) Clause 23 provides that *"This Agreement embodies the entire understanding between the parties and all prior agreements and statements, oral or written are merged into this agreement."*

83. I can deal briefly with clause 23. In my judgment, this does not assist the Defendants, essentially because, as the Court of Appeal held in *AXA Sun Life Services Plc v Campbell Martin Ltd* [2012] Bus LR 203, implied terms are part of the Agreement.

84. Clause 14.5 is a much more difficult clause, essentially because of the reference to neither party giving any warranties to the Company. In this case, of course, the implied warranties are said to be owed, not to the Company, but to Yoo. The Defendant argues that the clause must be read as excluding all warranties (in the sense of obligations) other than those expressly provided for in the contract by either party to the other. Those expressly provided for would then have to be read as a reference to clause 5, which deals with warranties and obligations, and provides that the Company warrants various matters (5.1), that the Company enters into obligations owed to Yoo (5.2 and 5.3), and that Yoo warrants various matters (5.4).

85. In my judgment, clause 14.5 is simply not clear enough to serve to exclude terms which would otherwise fall properly to be implied. I therefore reject the Defendant's argument premised on this clause, and turn to the positive question of whether terms should be implied.

86. As I have already noted, the law on the implication of terms was common ground and is as set out above. I therefore proceed to apply the tests set out in the BNP case.

87. I have come to the conclusion that there is in this agreement no implied obligation owed to Yoo to sell the units within any particular time frame. I have reached this conclusion for the following reasons:

i) I start from the fact that, as I have already concluded, the contract included no express time frame in this regard, although it did require the Defendant to complete the Project (ie the actual building) within a set time frame. It is perhaps unsurprising that the Defendant was prepared to accept responsibility for finishing the building (an obligation it had control over) but not selling (since that depended on third parties as well as the Defendant).

ii) I bear in mind also that it would have been perfectly possible for the parties to have included a long stop date in their contract, at which point the Claimant would have been entitled to their fee irrespective of sales of units. They did not however choose to structure their contract in this way.

iii) Next, there is the fact that the parties made very disparate contributions to the project, as the Defendant has emphasised. The suggestion that the Defendant should be obliged to sell against its wishes in a depressed climate in order to enable the Claimant to earn the balance of its fee, a fee which was, in the grand scheme of things, a relatively small proportion of the overall cost of the project, seems to me to be an unlikely one and certainly not necessary to give business efficacy to the contract.

iv) I also accept the point made by the Defendant that, if such a term were to be implied, one would expect that both parties would share in the downside following a sale at a lesser value. However, the size of the Claimant's entitlement would be in no way diminished in such a case; whilst a greater sale return does enure to the Claimant's advantage. For this reason, too, I take the view that it is unnecessary to imply a term that the units will be sold earlier rather than later to enable the Claimant to earn its fee.

v) Turning from business efficacy to the question of whether this term is so obvious that it goes without saying, I think it highly unlikely that the officious bystander would have been testily suppressed by both parties had the point been raised during contract negotiations. In fact, it seems very likely to me that there would have been heated dissension between the parties.

88. I need also however to continue the case of *Sparks v Biden*, ref supra, in this regard, where it was held that there was an implied obligation to sell within a reasonable time. In my judgment, any case on construction of an agreement cannot constitute a binding authority in relation to a later case. Each contract is different (save perhaps in the case of standard forms), and the factual matrix in each case will also be different.

89. However, in any event, there are in my view a number of points of clear distinction between that case and this one.

i) First, the seller was looking to the proceeds of the development to provide retirement income, as both parties knew. The seller therefore had a clear interest in those proceeds being realised as soon as possible. In the current case, whilst the Claimant would no doubt wish to obtain its share of the proceeds sooner rather than later, then there is not the same imperative as was the case in the *Sparks* case.

ii) Secondly, the sale of the properties in that case represented the last stage in a series of steps. At each earlier stage, an express time limit was stated. Thus, there was a time limit for obtaining planning permission; a consequent time limit on the exercise of the option; an express obligation to build as soon as practicable; and then to pay a share of the proceeds of sale of the properties, which could only be done if the properties were sold. Whilst there are obviously similarities between that case and the current one, the express contractual structure in *Sparks v Biden* was a very much more time limited one. As the Court observed, at paragraph 52, the entire point of the express obligations as to time in relation to obtaining planning permission and building the houses was to ensure that the ability to sell the houses and enable the seller to realise his right to overage would enure as rapidly as possible. That in turn suggested strongly that the houses should be sold as rapidly as possible.

iii) Thirdly, the disparity in the contributions and interests of the two parties that I have identified as a major reason for rejecting the implication in this case was not present in *Sparks v Biden*. The seller provided the entirety of the relevant land, and was to receive one third of the sale proceeds of each property. The exercise smacked of a joint venture, in which one party would not expect to have an unfettered discretion – which is what the buyer in that case was claiming.

90. For the above reasons, I have concluded that *Sparks v Biden* does not provide me with material assistance.

91. Accordingly, I conclude that the answer to preliminary issue 2 is no.

92. In the light of this conclusion, I turn to the question of whether there is an implied obligation to market the properties. I can answer this point relatively shortly. In my judgment, if there is no obligation to sell, the suggested obligation to market makes no real commercial sense at all. Marketing the units is the natural precursor to sale. If there is no actual *obligation* to sell the units within a reasonable time, as I have found, then there would be little point in implying an obligation to market the units. Far from being obvious or necessary, the implication of such a term would be counterintuitive. Marketing requires expenditure by the Defendant (and indeed, quite possibly by the Claimant). The justification for such expenditure would, in general, be that it is required in order to realise the value of the units via sale. However, if, as I have found, it is up to the Defendant to decide when to sell, then it must also be up to the Defendant to decide when and whether to incur the expense of marketing necessary to achieve such sales.

93. Accordingly, I would also answer Preliminary Issue 1 no.

Preliminary issue 3:

94. As will be recalled, this issue is as follows:

> *"Whether the Defendant is under an implied obligation (as alleged in paragraph 9.3 of the Amended Particulars of Claim) to refrain from renting out the Apartments pending sale or from taking any other steps which would delay or undermine the sale of the Apartments"*

The Claimant's submissions.

95. The Claimant submitted that this term should be implied for the following reasons:

i) The proposed term reflects and gives effect to what can safely be presumed to be the parties' intentions when regard is had to the purpose of the Agreement, its express terms and the context in which it was made in circumstances where:

a) The DSA did not envisage or contemplate that the Apartments might be rented out, making no provision for such. Instead, its provisions were directed entirely towards and by reference to the sale of the Apartments.

b) The rental of the Apartments is inconsistent with the sale of the same for the occupation of a luxury apartment by a tenant would, at the very least, likely hinder the sale of the same at the best possible price.

c) The rental of the Apartments would preclude the exercise by the Claimant of its unfettered right to inspect the same at any time pursuant to clause 5.2 of the DSA.

d) The rental of the Apartments to tenants would, at the very least, hinder if not preclude the compliance by the Defendant with its duty pursuant to clause 5.2 of the DSA to immediately remedy any deficiencies with the Apartments identified by the Claimant on an inspection and its duty pursuant to clause 5.3 of the DSA to ensure that the Apartments are until sale retained in good repair and in accordance with the contractual requirements.

e) The parties cannot have intended that the Defendant should be permitted to rent the Apartments and thereby avoid any obligation to pay the Claimant its full Retainer Fee for so long as it chose.

ii) For essentially the same reasons as given above, the proposed term is further and, in any event, necessary to give business efficacy to the Agreement. In particular, without such a term, the Defendant would be permitted to escape indefinitely its obligation to pay the Retainer Fee.

iii) The proposed term is reasonable and equitable given the consequences of the Defendant's being permitted to rent and in circumstances where, by reason of the Singaporean Regime, the Defendant would not have been permitted to retain the Apartments on a long-term basis to rent the same anyway. That it has been able to do so is only by virtue of the sale of the shares in the Defendant (as opposed to the Property) such that the Defendant is no longer treated as a foreign company and has avoided the strictures imposed on foreign developers under the Singaporean Regime.

iv) The proposed term is clearly expressed.

v) The proposed term does not contradict any express term of the contract, nor does the Defendant suggest otherwise.

The Defendant's submissions.

96. The Defendant's submissions were the same as recorded above, save that reliance was placed on the reference to the tenant in clause 5.2 as indicative of the possibility that the units would in fact be rented.

My conclusions.

97. For very much the same reasons as I have set out above in relation to the other implied terms put forward, I reject this suggested implied term.

i) I accept the Defendant's submission that the rental of the units is at the least consistent with the terms of clause 5.2, since it refers to the "use, marketing or sale" of the apartments, and the most obvious form of "use" other than marketing or sale in this connection seems to me to be rental.

ii) I do not accept the submission that the rental of a unit would of necessity make it impossible for the Defendant to comply with its obligation to allow the Claimant access to ensure compliance with clause 5.2. This would depend on the terms of the rental agreement, as the Defendant pointed out.

iii) Even if the rental of the unit might make it impossible for the Defendant to comply with clause 5.2, this is an entirely different question from whether rental was wholly prohibited because such rental might undermine the marketing or sale of the units. In truth, this is a submission which only has force if it be accepted that there was an obligation to market or sell within a particular period, a contention which I have rejected.

98. Again, therefore, I answer this preliminary issue 3 in the negative.

Conclusions.

99. My answers to the preliminary issues, as defined in paragraph 2, above, are:

i) No;

ii) No;

iii) No;

iv) No.