

OPINION

Our opinion has been sought by the National Housing Development Authority (*hereinafter referred to as "NHDA"*) with regard to the Redevelopment of Bambalapitiya Flats.

We have been briefed by Mr Danushka Jayalath, legal officer, the sequence of events occurred in this regard. Furthermore, we perused the files bearing number AB 6/2/1/1/300/108, A10 6/2/1/1/300/108 vol 11-vol1, A11 6/2/1/1/300/108-vol111 maintained by NHDA and several documents of the Commercial High Court case bearing number CHC 389/2019/MR on the Redevelopment of Bambalapitiya Flats.

BACKGROUND

The Apartment complex which is known as "Bambalapitiya Flats", was built by the Department of Commissioner of National Housing in early 1960 for the middle housing groups. The said complex consists of 259 condominium residential units and 10 condominium commercial units. Because of the proximity to the sea and age of the buildings, the status of Bambalapitiya Flats has deteriorated over the period and its structures have been corroded beyond reparation. Furthermore, the units of Bambalapitiya Flats spread across 10 acres and the land was underutilized. As a result, the Ministry of Housing and Construction developed a high-yielding project for the redevelopment of Bambalapitiya Flats (*hereinafter referred to as "redevelopment project"*) in the Year 2011.

After an investor roadshow organized by the Board of Investment (*hereinafter referred to as "BOI"*) in Singapore in the Year 2013, UTL Global Projects Ltd (*hereinafter referred to as "UTL"*) of Singapore in collaboration with Patel Engineering Projects of India submitted a proposal for the redevelopment project. In July 2014, Engineering Projects (India) Ltd (*hereinafter referred to as "EPL"*) which is a Company owned by

Government of India, was replaced as a partner by the consortium in the place of Patel Engineer Projects of India. The said consortium submitted its application to the BOI on 12th September 2014 for an investment of the USD 200 million. The Condominium Management Authority (*hereinafter referred to as "CMA"*) and the Management Corporation held a meeting on 24th December 2014 to inform the Government intention for the redevelopment project for the residents.

However, with the change of the Government in the Year 2015, the redevelopment project was suspended as per the cabinet decision dated 1st April 2015 considering the project as an "unsolicited project". A Cabinet sub-committee on Economic Affairs was appointed to review the "Unsolicited Project Proposals". After representations and submissions done by the BOI and the Developers, the Cabinet Committee on Economic Management (*hereinafter referred to as "CCEM"*) granted its approval to proceed with the redevelopment project and forwarded their recommendation to Cabinet of Ministers on 8th December 2015. Accordingly, the Cabinet of Ministers granted its approval on 2nd March 2016 for the redevelopment project. Furthermore, the Cabinet of Ministers appointed a Project Steering Committee for Re-Development of the Bambalapitiya Flats to guide and oversee the project.

The BOI entered into an Agreement with the consortium on 22nd June 2016. The Minister in charge of the subject matter submitted a Note to the Cabinet of Ministers dated 11th October 2016 seeking approvals for the following recommendations;

- A. Publishing a Gazette notification immediately under Section 10(B) (1) (c) of the Condominium Management Authority Law declaring that it is necessary to acquire this site,
- B. Declaration of the site of the "Bambalapitiya Flats", approximately 10 Acres in extent, as an 'Urban Development Site' under section 2 of the Urban Development Projects (Special Provisions) Act No 2 of 1980,
- C. Commencement of acquisition proceedings by the NHDA and the CMA after the declaration at (A) & (B) above,

- D. Requiring the Secretary, Ministry of Lands, Land Commissioner, Surveyor General and the Divisional Secretary to attach the highest priority to the acquisition under (C) above,
- E. Requiring the NHDA to enter into a PPP Development Agreement with the Developer early as some of the occupants have requested evidence of such agreement to ensure that their rights are safeguarded,
- F. Requiring the NHDA to sign an agreement with each owner of housing units, indicating the details of the relocation package.

The Cabinet of Ministers approved the aforesaid recommendations at the Cabinet meeting held on 29th November 2016:

The Minister of Housing and Construction informed to the Minister of Megapolis and Western Development to recommend to the President declaring the redevelopment area as an 'Urban Development Site' in terms of Section 2 of the Urban Development Projects (Special Provisions) Act No 02 of 1980. The Minister of Megapolis and Western Development as the Minister in charge of Urban Development forwarded the recommendation by a letter dated 28th April 2017 to His Excellency the President. However, the said declaration has not been published yet.

A status report dated 4th January 2017 on the financial feasibility and credentials of the investor was forwarded by the BOI before granting the approvals on 6th January 2017. As per the said report, the BOI satisfied with the financial capabilities of the Developer and granted investment approval.

The Minister of Housing and Construction as recommended by the CCEM on 22nd February 2017, sought approval to sign the agreement with the Developer by a Note to the Cabinet dated 28th February 2017 on the condition that within 4-6 weeks of signing the Public-Private Partnership Agreement (PPP Agreement), the Developer shall bring USD 10 million to the Country unless the agreement would become null and void. The Cabinet of Ministers approved the aforesaid Note to the Cabinet at Cabinet meeting held on 14th March 2017. Furthermore, the project steering

committee directed the NHDA to include 5 additional safeguards before the signing of the agreement by a letter dated 20th March 2017 and the same has been incorporated in the PPP Agreement.

Accordingly, the NHDA and the consortium comprises of UTL and EPL and City Square (Pvt) Ltd (*hereinafter referred to as "City Square"*) which was specially incorporated to execute the redevelopment project entered into the PPP Agreement on 18th May 2017. On the same day, the NHDA and the consortium also entered into a Memorandum of Understanding. The Condition on which the CCEM recommended to sign the PPP Agreement, has been included as a Recital (H) in the same.

RECITAL (H) OF THE PPP AGREEMENT

The Managing Director of City Square submitted a letter dated 30th June 2017 stating that they adhered to the said recital by remitting money to an account in People's Bank. As per the said letter, a sum of USD 10 million has been credited to a beneficiary account of Centennial Holdings which is a wholly subsidiary of UTL which was incorporated in Singapore to implement the redevelopment project through City Square. For further clarity, Centennial Holdings is a shareholder of City Square (*Vide letter 11th March 2016 issued by BOI*).

However, City Square issued a letter dated 5th September 2017 stating that although the sum of USD 10 million was remitted, due to certain compliance issues between banks, a delay had been caused crediting money to the account in Sri Lanka. Thus, City Square informed NHDA that they transferred a sum of USD 15 million as separate transactions to the different accounts maintained by their related companies and individual in different banks in Sri Lanka. As per the said letter, City Square claimed that the said amount was credited to Sri Lankan Accounts on 30th June 2017. Furthermore, City Square submitted a letter dated 18th December 2017 issued by Indian Bank sanctioning a sum of USD 11 million. It has been further stated that funds can be utilized on the signing of the agreements between NHDA and City Square.

However, the NHDA informed to the Cabinet of Ministers by the Cabinet Memorandum bearing number 06/2018 dated 29th March 2018 that the City Square continuously failed to comply with the Recital (H) of the PPP Agreement. As such, the Minister sought approval to call for a fresh expression of interest on the basis that the PPP Agreement as null and void. The Cabinet approved the said memorandum on 25th April 2018.

City Square submitted a letter dated 18th April 2018 stating that another sum of USD 10 million was credited to IIA Account number 050202000334 belonging to a company known as "Western Alliance International Ltd" on 20th March 2018. The said Western Alliance International Ltd issued a separate letter dated 4th April 2018 stating that the said sum was credited to the said account as an investment to the project of City Square.

The NHDA sought Attorney General advice by a letter dated 21st May 2018 about the termination of the PPP Agreement. However, the Attorney General advised as follows;

" However, the correspondence by the Developer sent with your letter dated 11th June 2018 indicates that there has been substantial compliance with the said Clause. You have not submitted materials which establish that you are satisfied as to the contrary. In the circumstances, the material provided to this Department does not appear to establish a breach of the clauses of the PPP Agreement"

The Attorney General further advised that before the termination of any agreement with City Square, the NHDA should satisfy itself that any clause of the agreement has been violated.

A meeting chaired by Honorable then Prime Minister held on 18th July 2018 and instructed the BOI to work as a mediator in facilitating to proceed with the agreement. Furthermore, the BOI gave an assurance by letter dated 17th July 2018 that BOI could facilitate for this company to implement the project once the land is released. In the meantime, City Square issued a letter dated 20th June 2018 requiring the NHDA to

publish the gazette notification in terms of section 2 of Urban Development Projects (Special Provisions) Act and thereafter, the publication of a Gazette notification under Section 10(B) (1) (c) of the Condominium Management Authority Law and other gazettes for the acquisition.

The NHDA sought another advice from the Attorney General in respect of the same issue. However, the Attorney General did not vary his previous advice and a letter was issued to that effect on 8th March 2019.

After the Board of Director's decision dated 13th March 2019, the NHDA issued a Notice of Termination dated 15th March 2019 in terms of clause 15.5 of the PPP Agreement together with a Report justifying the termination.

UTL and City Square filed an action in the Commercial High Court bearing number 389/2019/MR against the NHDA's decision to terminate the PPP Agreement on 15th March 2019. The Commercial High Court granted following enjoining orders which are as follows;

f) pending the constitution of a duly constituted Arbitral Tribunal, and the Plaintiffs making an application for appropriate interim relief before such Tribunal, obtaining an Order and enforcing the same, restraining the Defendant, its agents, servants and any other person acting under and/or through and/or on behalf of the Defendant from taking any action on the basis that the said Agreement 'P8' has become null and void and/or that the said Agreement 'P8' has been terminated;

g) pending the constitution of a duly constituted Arbitral Tribunal, and the Plaintiffs making an application for appropriate interim relief before such Tribunal, obtaining an Order and enforcing the same, restraining the Defendant, its agents, servants and any other person acting under and/or through and/or on behalf of the Defendant from dealing with any 3rd party in respect of the development or related activities of the property described in the Schedule to the Plaint;

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Presently, the said enjoining orders are in operation and as a result, the redevelopment project has come to a deadlock.

IS THE NOTICE OF TERMINATION LAWFUL AND/OR CORRECT?

A Notice of Termination can be issued in terms of clause 15.5 of the PPP Agreement after following the procedure stipulated in clause 15.3 of the PPP Agreement. As per the said clause, the Board of Directors by decision dated 13th March 2019, approved first to issue Notice of Default enabling the City Square to remedy his default and if he fails, issue Notice of Termination. However, NHDA instead of issuing the Notice of Default, issued the Notice of Termination at the very first instance. Thus, the NHDA has not followed proper procedure stipulated in clause 15.3 of the PPP Agreement. In the said circumstances, the issuance of the Notice of Termination dated 15th March 2019 is contrary to the Board decision and clause 15.3 of the PPP Agreement.

We observe that City Square presented written documents to established his compliance with the Recital (H). However, the NHDA has not diligently attended to verify the same in writing before issuing the Notice of Termination. We further noted that City Square had explained that the transaction made to the People's Bank was not credited to the local account due to the compliance issues between the Bank by a letter dated 5th September 2017. Although the NHDA was well possessed with such information, the NHDA took steps to seek verification from People's Bank by a letter dated 29th April 2019. Thus, the contents of the letter dated 30th April 2019 issued by People's Bank are not cogent evidence to justify the termination of the PPP Agreement. Apart from the above facts, the BOI has assured City Square's commitment towards the redevelopment project. As Attorney General advised, we are also in the opinion that strong materials are not before us to justify the termination.

City Square issued a Notice for an amicable settlement in terms of clause 16.1 of the PPP Agreement on 1st April 2019. In the said notice, City Square highlighted the

defectives contained in the Notice of Termination and demanded to comply with clause 16.1 of the PPP Agreement.

A recital only describes the background and scope of an agreement. Thus, it has a less binding effect on the parties. We observe that an operative clause has not been incorporated in the PPP Agreement to that effect. Furthermore, the term "the Developer to bring USD 10 million to the Country" in Recital (H) is vague and not precisely recognized the mode of bringing the money to the Country. As such, it leaves the parties to give different interpretations to the Recital (H). Thus, the justifications contained in the annexed Report is not sustainable.

The only defence would be that City Square failed to adhere to the Recital (H) within 4-6 weeks. Nevertheless, the procedural violation cannot be justified. In the aforesaid circumstances, we are in the opinion that the Notice of Termination dated 15th March 2019 is wrongful, incorrect and bad in law.

PROPOSAL FOR RE-COMMENCEMENT

We have been briefed by the NHDA that City Square has expressed their interest to proceed with the said redevelopment project. As per the correspondence between NHDA and City Square, it transpires that City Square demanded from the NHDA to complete.

- a. Declaration of the Bambalapitiya site under Section 2 of the Urban Development Project (Special Provision) Act;
- b. Publish a gazette notification under section 10B (1)(c) of the Condominium Management Authority Law declaring that it is necessary to acquire the condominium property identified as Bambalapitiya Flats', and as depicted in Plan No. 860 prepared by A.M.M.A Ubeysekera, Licensed Surveyor;
- c. Reach an agreement with the condominium owners regarding their relocation and their rental compensation during construction, and sign such agreement before the commencement of the project;

Proposal (a) and (b)

Although the Cabinet of Ministers decided to consider the PPP agreement as null and void, the directions were given to publish gazette notifications as described in A and B of Note to the Cabinet dated 11th October 2016. Furthermore, publishing the aforesaid gazette notifications has no bearing to the present litigation or suspension of the redevelopment project.

The Publication of the aforementioned gazette notifications is separate and independent from the acquisition process. The purpose of the said publication to put the stakeholders on notice that the site will utilize for a redevelopment project. Furthermore, the said publication would not impose any compulsion and/or obligation to go ahead of the redevelopment project with City Square. The publishing gazette notifications would encourage any other investor to consider this redevelopment project in future.

Thus, we advise the NHDA to take immediate steps to publish the gazette notifications under Section 2 of the Urban Development Project (Special Provision) Act and section 10B (1)(c) of the Condominium Management Authority Law.

Proposal (c)

In view of Clause 2.3 of the PPP Agreement, the NHDA is bound to acquire the properties before the Developer's obligation are fulfilled. It appears to us that the Developer is attempting to bypass Recital (H) and demanding the NHDA to perform its obligation. Such an attempt should not be permitted and it amounts to the repudiation of the contract by the Developer. We advise the NHDA to compel the Developer to perform the obligation contained in Recital (H) before the acquisition process is commenced

Before the occupants are vacated, the Developer has been placed under following obligation;

- I. to provide a Performance Bond of USD 4 million for the utilization for the first two years rental. The said performance bond will be submitted by the Developer from the date of execution of the lease agreement.
- II. to pay rentals until the handing over the relocation tower with Certificate of Conformity.
- III. to bring USD 40 million with confirmed funding for further USD 60 million for the project before NHDA vacates the occupants from the project land.

Thus, We advise the NHDA not to vacate any occupants until City Square complies with Clause 2.3 and Recital (H).

We observe that the PPP Agreement contains provisions that have to be taken timely manner. Having considered the aforesaid circumstances, we would advise the NHDA to enter into the following settlement terms in CHC 389/2019/MR as follows;

- I. The 1st Defendant agrees to withdraw the letter dated 15th March 2019 marked as P8,
- II. The 1st Defendant agrees to re-enforce the PPP Agreement with effect from a future date (i.e. "Appointed Date")
- III. The Plaintiff agrees to withdraw the action

The aforesaid settlement proposal will re-place the Developer under an obligation to bring money to the Country within 4-6 weeks from the effective date as provided in Recital (H).

The Cabinet of Ministers by its decision dated 25th April 2018, approved to call fresh expression of interest (EOI) on the basis that the PPP Agreement is null and void. In the said circumstances, we advise the NHDA to obtain cabinet approval to continue the redevelopment project with the same developer and for the aforesaid settlement and/or similar settlement before it is entered in the Court. If the Plaintiff is reluctant to any similar settlement, we would advise the NHDA to take immediate steps to vacate the enjoining and/or interim order.