

BEFORE THE
COMPETITION COMMISSION OF INDIA

Case No. 67/2010

Date of Order: -31.01.2012

1. M/s Magnolia Flat Owners Association
2. Mr. Rahul Kapoor - Informants

1. M/s DLF Universal Limited - Opposite Party-1
2. Haryana Urban Development Authority (HUDA) - Opposite Party-2
3. The Director Town and Country Planning, Haryana -Opposite Party-3

Order

This order relates to an information filed under section 19 (1) (a) of the Competition Act, 2002 (The Act) by Magnolia Flat Owners Association and Mr. Rahul Kapoor (collectively referred to as the informants) against DLF Universal Limited (Now DLF Limited), Haryana Urban Development Authority (HUDA) and The Director Town and Country Planning, Haryana (DTCP) (collectively referred to as the Opposite Parties). It has been alleged that DLF Limited (hereinafter referred to as DLF) has abused its dominant position and imposed unfair and discriminatory conditions against the apartment allottees in residential project "Magnolia", being developed by it at DLF City Phase-V, Gurgaon, Haryana. It has also been alleged that Haryana Urban Development Authority and Directorate of Town and Country Planning, Haryana, the other



two opposite parties have favoured DLF Limited while sanctioning additional floors over and above the plans sanctioned earlier.

2. The Commission, on earlier occasions, in the case of two other residential projects of DLF Limited, namely, Park Place (in Case No. 18 of 2010) and Belaire (in Case No. 19 of 2010), had held it to be dominant in the relevant market of provision of services for development of high-end residential units and imposed penalties besides directing the company to 'cease and desist' from imposing unfair and discriminatory conditions on apartment allottees. This order will dispose of the instant information filed against DLF in respect of its project, 'Magnolia' situated in the same geographic area as that of 'Belaire' and 'Park Place'.

3. The facts and allegations as per information, in brief, are as under;

3.1 The information brings out that sometime in August 2005, DLF invited applications for booking of apartments in the Group Housing Complex "Magnolia" consisting of 19 (Nineteen) multi-storied residential buildings of 17 (Seventeen) floors each in Phase-V in DLF City, Gurgaon, Haryana with a representation that the construction of the complex shall be completed and possession would be handed over within a period of 36 (Thirty Six) months from the date of the execution of the apartment buyer's agreement with the allottees subject to timely payment in accordance with the payment schedule as demanded by DLF and further with a provision, that if DLF fails to construct and complete the complex within the said time, it shall pay to the allottees, compensation at the rate of Rs. 5 per sq.ft. of the super area per month for the



period of delay. The payment plan was spread over a period of 2.5 years with 90% (Ninety Percent) of amount of sale consideration payable till December 2007 and the balance 10% (Ten Percent) on the receipt of occupation certificate by DLF from the authorities. Acting on the representations and promises by DLF, members of the informant association started booking their apartments in the complex from August-September 2005 onwards.

3.2 According to information, much before the sanction and approval of the building plans for the project, DLF amassed huge funds from the allottees as booking amounts. The construction of the project also commenced pending filing of application and approval of the building plans for the project. Apartment buyer's agreement was also executed by DLF within a few months of the allotment of the apartments. Irrespective of the fact that several clauses gave unbridled and arbitrary powers to DLF, a person desirous of booking an apartment had no escape but to accept all clauses and sign on the dotted lines.

3.3 The informants have submitted that in accordance with the application for allotment, in case an allottee does not execute, accept and return the standardized apartment buyer's agreement on the standard format prescribed by DLF, within a period of 30 (Thirty) days from the date of its dispatch, the allotment of the applicant, shall be treated as cancelled at the discretion of DLF and the earnest money deposited shall be forfeited. Till the date of the agreement two installments amounting to approximately Rs. 52 lac had already been paid to DLF by the allottees. However, DLF had still not made the application to DTCP for sanction of the building plan.



3.4 According to the informants, DLF applied for approval of building plans for the project through an application filed on 29.06.2006 followed by a letter dated 13.10.2006. This was almost 9 (Nine) months after the allotment of the apartments begun and by that time 5 (Five) installments against sale consideration in accordance with the payment schedule had already been collected by DLF from the allottees, amounting to approx Rs. 1 crore per allottee. DTCP, by its Memo dated 27.02.2007, almost 18 (Eighteen) months after commencement of the construction and 22 (Twenty Two) months after start of allotment of apartments to buyers, sanctioned the buildings plans and gave permission to DLF to commence construction subject to the provisions of Punjab Scheduled Road & controlled Area Restriction of Unregulated Development Act 1963, its rules and zoning plans framed thereunder.

3.5 According to the informants, in accordance with Clause 10.2 of the agreement, the possession of the apartments was to be handed over to the buyers within a period of 36 (Thirty Six) months from the date of execution of the agreement, unless there was any delay or failure due to reasons mentioned in Clauses 11.1, 11.3 and 39 of the agreement or due to failure of the apartment buyers to pay in time the price of the said apartment along with other charges and dues in accordance with the schedule of payment as per demands raised by DLF from time to time. In accordance there to, the possession of the apartments were to be handed over to the buyers latest by February 2009. Till date however, the complex has not been fully constructed and the apartments have not been handed over to the buyers. The informants have alleged that reason of delay cannot be attributed to the reasons mentioned in Clause 11.2, 11.3 or Clause 39 of the Agreement but is due to



outright abuse of the dominant position and misuse of the provisions of the agreement by DLF.

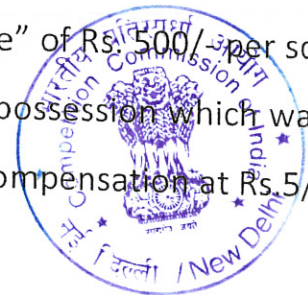
3.6 The informants have brought out that it is apparent from the terms of the agreement that DLF had represented that all layout and apartment plans annexed to the agreement were tentative and subject to approval of DTCP and any conditions, changes and directions imposed by the DTCP, while approving the proposed tentative layout plans would be binding on the apartment owners. Such a clause as incorporated in the agreement could only mean that DLF had till the date of the execution of the agreement not applied for necessary sanctions. Further DLF reserved its right to carry out such additions, alterations, deletions and modifications in the tentative building plans, floor plans as DLF might consider necessary or as directed by DTCP while sanctioning the plans. DLF also reserved the right to increase the proposed number of floors in the buildings and to seek necessary approval for the same.

3.7 On the date of the execution of the agreement, DLF had not even applied for the approval of the building plans and that is the reason they were addressed as "tentative". DLF misusing the provisions of the agreement wanted to construct additional floors and apartments once the project took off at the cost of and expense of the apartment buyers since by that time the buyers had paid 90% (Ninety Percent) of the sale consideration and were left with no option to exit whatsoever having put in huge investments in the project. Any objection to such additions of floors would have necessarily meant cancellation of the allotment under the provisions of the agreement.



3.8 The informants have also submitted that in total disregard to the rights of the members of the association, DLF after collecting 90% of the sales consideration from the buyers, and two months after the possession delivery date, by a letter dated 08.04.2009 submitted revised building plans for the project to DTCP for revision in the plans sanctioned on 27.02.2007 seeking approval for increase in the height of the towers and additions of floors to the existing 17 to 22 and 26 floors in different towers. This not only was an absolute unilateral decision but was highly arbitrary affecting the proprietary rights and ownership interests of the apartment owners in the super area, common areas and facilities besides delaying the time bound project and escalating the costs. DLF had no such right under the agreement to change the complete face of the project that too after the expiry of the possession date in terms of the agreement with the buyers.

3.9 According to the informants, even before the revised building plans were sanctioned, allowing DLF to increase the number of floors, by a letter dated July 16, 2009, DLF wrote to the allottees that it had originally conceptualized the project with taller heights, but some approvals related to taller heights got delayed. However, the construction commenced without wasting time. Subsequently the desired approval had been received for increase in height which had resulted in increase in area for sale and as such some of the benefits of such increase were being passed on to the existing customers. Accordingly DLF offered a special "Timely Payment Rebate" of Rs. 500/- per sq. ft. DLF admitted that there was a delay in handing over possession which was due in February 2009 and accordingly till July 2009, the compensation at Rs. 5/-



per sq. ft. was being paid. DLF further informed that permissive possession shall be offered in September 2010 and final possession by June 2011, a delay of 2 years and 4 months from the promised possession. Beyond June 2011, DLF offered increased compensation of Rs. 10/- per sq. ft. It is apparent that till the date of this letter DLF did not have the sanction of the revised plan from the authorities.

3.10 The informants have further brought out that DTCP through its Memo dated 22.09.2009 sanctioned and approved the revised building plans by allowing DLF to increase the number of floors in its building in the complex. DTCP was well aware that the said project had been sanctioned originally with 19 towers of 17 floors each, was much delayed and any such addition would violate the rights of the buyers in addition to further delaying the said project. The revision of plans and the entire change in the complexion of the complex was undertaken with the assistance of DTCP and HUDA and without intimation or show cause to the apartment allottees whose proprietary rights already stood crystallized in the complex.

3.11 According to the informants, the agreement executed with the buyers by DLF is an absolute abuse of the dominant position of DLF. The provisions of the said agreement impose direct and indirect unfair and discriminatory conditions in the purchase of the apartment and other services from DLF. There are misrepresentations and provisions which give DLF unfettered authority and power to violate the rights of the informants and other buyers. For instance, Recitals A to G, containing representations on behalf of the company clearly



indicate that DLF sold the apartments to the buyers and collected huge amounts of money on tentative plans which were subject to change at any stage by DLF without seeking consent of the apartment buyers. This is against the provisions of the Haryana Development and Regulation of Urban Areas Act, 1975 and the conditions of licence which restricts DLF to create any third party interests till approvals are accorded.

3.12 According to the informants, the tentative/proposed layout plans which is annexed as Annexure I-A to the agreement stifles the voice of the buyers by inserting the waiver clause that no consent of the apartment allottee is at all required, if any change or condition is imposed by DTCP while approving the layout plan. Further, in accordance with Clause 1.1, the apartment allottee is required to pay the sale consideration calculated on the basis of Super Area of the apartment and for undivided proportionate share in the land underneath the building on which the apartment is located. However, in accordance with Clause F, the area of 22.77 acres earmarked for the project could be reduced unilaterally by DLF. The informants have alleged that such final authority with DLF can be abused any time directly affecting the ownership and use rights of the buyers of the complex.

3.13 It has further been alleged by the informants that in Clause 3 and 4 of the agreement, DLF has authorised itself to retain the advance part payment towards the cost of the apartment made by the applicants to be treated as Earnest Money being 10% of the sale price for the entire duration of the



apartment on the pretext that the apartment allottee complies with the terms of the agreement. DLF has authorised itself to forfeit the said Earnest Money amount in the event of failure of the apartment allottee to perform its obligations under the application of allotment or the agreement not limited to events of default as described in Clause 12 of the agreement and further in the event that apartment allottee fails to sign and return the agreement in its original form within 30 days from the date of dispatch by the Company. The events listed under Clause 12 are totally discriminatory and give DLF a superior position and unfettered right and authority to forfeit the Earnest Money even for innocuous reasons. The agreement being totally biased in favour of DLF does not contain any proportionate liability clause to fasten commensurate penalty/damages on DLF for breach in discharge of its obligations.

3.14 According to the informants, under Clauses 1.7 and 1.9, the apartment owner is entitled to ownership right of his apartment and pro-rata ownership right of land beneath the building. Apart from the said rights the apartment owner under law is entitled to pro-rata right of common areas and facilities within the complex and proportionate share of club or the community building and other common facilities within the complex. However, contrary to this legal position, DLF has reserved to itself the right to modify the ratio.

3.15 It has also been brought out by the informants that under Clause 8, time has been made the essence with respect to the apartment allottee's obligations to pay the price of the said apartment in accordance with the schedule of payment as given in Annexure III along with other payments such as applicable



stamp duty. However, DLF has relieved itself from making time as the essence for the completion of construction and in fulfilling its obligations in respect of handing over the physical possession of the apartments and completion certificate to the apartment allottees.

3.16 According to the informants, unequal relationship and the plight of the apartment owners can well be visualized in Clauses 9.1 and 9.2 in the manner in which DLF has abused its dominant position. Since the agreement has been executed without approvals on the basis of tentative specifications, DLF has reserved a right to change at its sole option and discretion any apartment plan without the consent of the apartment allottees and without any time period. Not only DLF can change the construction of the building including plant and fixtures to be installed therein but has also reserved rights to make any such additions, alterations, deletions and modifications in the building plans, floor plans including the number of apartment floors as DLF may consider necessary or as is directed by any Competent Authority while sanctioning the building and layout plans or at any time thereafter till the grant of an occupation certificate. DLF may also increase the proposed number of floors in the said building without any objections to be raised by the apartment allottees.

3.17 The informants have submitted that DLF has totally misused these provisions in the agreement inasmuch as DLF has gone ahead to apply for additional floors much after the completion date for handing over possession had expired. Without passing any details to the apartment allottees, DLF has in some cases added 6 to 7 floors to various towers. In accordance with Clause 9.2, the only right given to the apartment allottees in case of alterations or



modifications is a right of receiving intimation from DLF in writing of the changes thereof and the resultant change in the Super Area of the said apartment. In the event that within a period of 30 days the apartment allottees refuse to give consent or object to such alterations or modifications then DLF shall at its sole option and discretion have the right to cancel the agreement without further notice and in such an event DLF shall refund the entire money received from the apartment allottee with interest at 9% per annum within 90 days from the date of intimation received by DLF from the apartment allottee and upon such refund, DLF shall be released and discharged from its obligations and liabilities under this agreement and can proceed to resell or deal with the said apartment in any manner whatsoever at its sole discretion. According to the informants, such restraining and unequal provisions of the agreement flow out of the abuse of dominant position by DLF.

3.18 The informants have also stated that as per information, rate of 9% payable to the apartment allottees in case of default is absolutely arbitrary as the rate of interest or penal interest in normal circumstances is as high as 18%, which is what DLF charges for delayed payments in accordance with Clause 35 of the agreement. Further, Clause 10.2 prescribes a period of 36 months from the date of execution of the agreement for handing over possession to the apartment allottees. The only exception to this period is delay in possession for reasons mentioned in Clauses 11.1, 11.2, 11.3 and in Clause 39 which refer to delays due to reasons beyond the control of the company. While DLF started collecting the sale consideration from the date of allotment, the agreement does not in any provision make DLF liable for attaining milestones



commensurate with the stage wise completion of the project prorated to installments demanded by DLF from the allottees. Such a clause has been totally misused by DLF as in spite of collecting 90% of the sale consideration from the allottees by December 2007, it failed to execute the project to be able to complete the construction before the possession date of February 2009. Further, without completing the facilities and construction, DLF has arbitrarily started writing to the apartment allottees to take over apartment for finishing interior works in accordance with the provisions of Clause 10.1.

3.19 According to the informants, even when proper safety procedures and facilities are not in place as most of the towers are under construction, DLF is arbitrarily handing over the apartments for carrying out interior fit out by the allottees within a period of 9 months from the date of the offer failing which DLF can charge penalty for non-completion or cancel the allotment and forfeit the earnest money with delayed payment interest for non-completion of interiors or resell or re-allot the apartments and refund the balance price paid by the allottees without any interest whatsoever after resale or allotment.

3.20 Further, irrespective of the condition of the construction in accordance with Clause 10.4, the allottee is forced to take over the possession of the apartment or face cancellation or pay compensation at Rs. 5.00 (Rupees Five) per sq. feet of the Super Area of the said apartment per month for the entire period of such delay at sole discretion of DLF, if it decides to condone the delay. DLF has also reserved with itself rights to withhold conveyance of the apartment till the entire penalty with overdue interest is fully paid by the apartment allottee. DLF is aware that the construction is not complete and



the site is not safe for the allottees and is writing to allottees to take over possession to save paying out agreed penalty in accordance with the agreement for delays on its part in handing over possession.

3.21 According to the informants, Clause 11.1 is another example as to how DLF being in a superior and dominant position has blackmailed the apartment allottees by taking their consent to even allow it to abandon the project. In accordance with this clause, DLF has authorized itself to treat allotment of the apartment as cancelled in the event that it abandons the project and further upon such cancellation shall refund the amount received from the allottees without any interest or compensation that too after deducting interest on delayed payments, and interest paid, due or payable.

3.22 The informants have brought out that as per Clauses 11.3 and 11.4, if for any reason other than force majeure, DLF fails to deliver possession to the apartment allottees within the prescribed period of 36 months, or within any extended period thereto under the agreement, the only right of the allottees is to give DLF a notice within 90 days for terminating the agreement. Upon receipt of such a notice DLF has authorised itself to sell or dispose of the apartment to any third party at a price to be determined by it without accounting for the sale proceeds to the apartment allottee. It is only upon realisation of the sale proceeds that DLF shall within 90 days refund without interest the balance amount after adjusting any interest due or payable and any amount of non-refundable nature payable by the allottees. Further, in the event that the apartment allottees do not give a notice of termination, DLF



shall be entitled to terminate the agreement and the apartment allottee shall be bound by the provisions of resale.

3.23 The informants have further submitted that under Clause 11.4, in consequence of DLF abandoning the scheme and not being able to give possession within the prescribed time, it shall be entitled to terminate the agreement whereupon its liability shall only be limited to the refund of the amount paid by the allottee with simple interest at 9% per annum for the period such amount was lying with it and it shall not be liable to pay any other compensation whatsoever. Clause 22 deals with the rights of DLF to make additional constructions or to put up additional structure in or upon the buildings or construct additional apartment buildings and/or structures anywhere in the said complex or land. According to the agreement such additional structures shall be the sole property of DLF and it shall be entitled to dispose it off in any way it chooses without any interference on the part of the allottees. Such a clause gives rights to DLF to start such additional construction at any time whatsoever without any right of the allottees to object.

3.24 As per information, Clauses 23 and 24 deal with the rights of DLF to raise finance from any financial institutions or banks by way of mortgage or otherwise against the allottees' apartment. In accordance with this clause, the financial institutions and banks shall always have the first lien/charge on the said apartment and all the dues and other sums payable by the apartment allottees in respect of any loan granted to DLF for the purpose of construction of the complex. In accordance with Clause 32, DLF has an unrestrained right to



amend the annexes attached to the agreement and to impose additional terms and conditions or to modify/amend/change the terms and conditions as stated in these annexes. Further it gives DLF a right to change all the annexes attached to the agreement at any time prior to the conveyance deed of the apartment as deemed necessary by it at its sole direction. This clause gives DLF an invincible position as it can abrogate all that has been promised to the apartment allottees by a single stroke. The annexes appended to the agreement describe and define carpet area, super area, common areas and facilities like club and also the nature of the equipment and fittings which DLF shall provide to the apartment allottees. The informants have alleged that if in exercise of the powers under this clause, DLF is permitted to unilaterally amend or change these annexes; nothing would survive so far as the rights of the apartment allottees are concerned.

3.25 According to the information, in accordance with Clause 35, the apartment allottee is liable to pay interest for any breach in making payments in accordance with the schedule of payments at the rate of 15% per annum for the first 90 days and thereafter for all periods of delay exceeding the first 90 days after the due date, a penal interest at 18% per annum. In comparison, DLF is only liable to pay penalty at Rs. 5.00 (Rupees Five) per square feet of the super area of the apartment per month for the period of any delay beyond 36 months for delivering possession under the agreement which approximately, is equivalent to 1% interest per annum. Further DLF will not pay out this penalty but will only adjust the same at the time of executing the Conveyance Deed in favour of the apartment allottees and not earlier. The informants have stated



that this is another glaring example of the arbitrary and unequal rights, obligations and liabilities of the two contracting parties under the agreement.

3.26 According to the informants, DLF has reserved unrestricted and unfettered authority in its favor in various clauses of the apartment buyers' agreement, thereby creating an absolute unequal relationship in between the two contracting parties in the agreement. The standardized apartment buyers' agreement directly and indirectly imposes unfair and discriminatory conditions which are detrimental to the lawful interest of the members of the informant association. Such unfair and discriminatory provisions have created series of adverse effects and ramifications on the rights of the apartment allottees, thus violating the provisions of section 4 of the Act.

3.27 The informants have additionally submitted that DTCP and HUDA have favored DLF while sanctioning additional floors to the already sanctioned plans. They have conveniently closed their eyes to the risk such addition would create to the structural design and stability of the buildings which were already under construction. Further, under the Haryana Urban Development Authority (Execution of Building) Regulation 1979, maximum Floor Area Ratio (FAR) allowed is 175% of the site area and population density is 100 to 300 persons per acre at the rate of five persons per dwelling unit. On the basis of the permissible FAR 175 %, the permissible FAR is 17,35,757 sq. ft. for a 22.77 acre land area. However, the total minimum constructed area for 593 units (as per the revised plans) with a minimum apartment size of 5825 sq. ft. comes to 34, 54, 225 sq. ft. which is almost double the permissible FAR. DLF has violated



this norm which can in fact put the whole project in jeopardy, thus risking the investment of the apartment allottees.

3.28 According to the informants, revised height of the buildings up to 22 to 26 floors poses grave threat to structural safety of the towers which have been structurally built on the basis of 17 (seventeen) floors design as initially sanctioned. As per the normal engineering rules the foundation of the building is laid out keeping in mind 25% safety norms which means if a building is to be constructed up to 17 floors the foundation work would be such that 25% more load can be sustained thereon. This 25% extra cushion is the only safety measure and is never utilized in making extra construction. DLF however, has increased the height up to 22 to 26 floors while the foundation laid out underneath the building is constructed to sustain the load of 17 floors only. The informants have submitted that this flagrant violation of safety measure brings the agreement within the mischief of misrepresentation, inducement and abuse of dominant position.

3.29 The informant has alleged that consequent to the abuse of dominant position by DLF not only the areas and facilities originally earmarked for the apartment allottees have been substantially compressed, but the project has also been abnormally delayed. The apartment allottees have suffered financial losses with their hard-earned money blocked and have to wait indefinitely for occupation of their respective apartments as a result of the revised project and addition of floors. Those who have borrowed money from banks and other lenders have to bear heavy EMI and interest burden. The apartment owners



cannot also deal with their apartments in the open market but can only surrender it back to DLF at prices dictated by them.

3.30 The informants have further alleged that the members of the association have made various representations to DLF but to no effect. The informants have brought all violations and abuse to the notice of DLF but have not been able to make DLF see reason and take corrective measures and compensate them for all the losses suffered by them due to the actions by DLF and its abuse of dominant position.

3.31 It has also been alleged that DLF has generated illegal profit at the expense of the members of informant association. DLF has illegally in the agreement vested the ownership of the common areas and community buildings in itself which is against the provisions of the Haryana Apartment Ownership Act, 1983 wherein the percentage of undivided interest in the common areas and facilities cannot be separate from the apartment to which it pertains and is deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned in the conveyance or any other instrument or agreement with any buyer of the apartment.

4. Prima Facie Opinion

4.1 The information was considered by the Commission in its various meetings and having found that there exists a *prima facie* case for causing investigation, the Commission passed order under section 26(1) directing the Director General to conduct investigation into the matter and submit a report.



5. Findings of DG

5.1 In the course of investigation, the DG obtained information from the Opposite Parties and the informants and also carried out analysis of data from various sources as regards relevant market and assessment of dominance in that market.

5.2 In order to inquire into allegations of abuse of dominance in the case, DG has followed the following steps:

- i) Relevant Market with reference to Relevant Product Market and Relevant Geographic Market in terms of section 19 (5) keeping in view the factors mentioned in section 19(6) and 19 (7) has been determined.
- ii) For determination of dominance of DLF in terms of explanation (a) to section 4 of the Competition Act, factors listed in section 19(4) have been looked into.
- iii) The allegations against DLF as mentioned in the information were looked into with reference to the provisions of section 4 (2) of the Act.

Determination of Relevant Market

5.3 DG has analyzed the relevant market for the purposes of the case in detail in his report. Noting that the value of apartment units in the case ranges from Rs. 2.7 crore to Rs.14 crore, DG has proceeded to delineate relevant market on the same lines as has been done in the case no. 18 and 19 of 2010. DG has determined relevant market in this case as services provided by developers and builders for construction of high end residential units in Gurgaon. The details as regards manner of determination of relevant market have been



brought out in detail in order in case no. 19 of 2010 and therefore the same are not discussed herein again.

5.4 DG has also done a detailed analysis of dominance of DLF and has come to a conclusion that it enjoys position of dominance in the aforesaid relevant market in terms of explanation (a) to section 4 read with section 19(4) of the Act. The analysis of dominance has been carried out on the same lines as in case no. 19 of 2010 and has been elaborately discussed in the order of Commission in the said case. As regards dominance of DLF in the relevant market, DG has inter-alia, concluded as under:

"...The above analysis of factors in section 19(4) establish that DLF group is not only enjoying the highest market share, but is also enjoying clear advantage over other players as far as size and resources and economic power is concerned. Its economies of scale, resources, and the fact of it being in business since last sixty years is also giving it a distinct advantage over the other players in the market. "

5.5 DG has also brought out that analysis of dominance in India does not lay emphasis upon a structural definition but behavioural one. The law implies that a firm because of its position of economic strength has a high degree of immunity from the normal disciplining forces of rivals' competitive reactions and consumer behaviour. DG has also brought out that in Hoffmann-La Roche, the Court of justice while defining a position of economic strength has ruled as under;



"such a position does not preclude some competition.... but enables the undertaking...if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

5.6 Further, DG has also relied upon ruling of The European Court of Justice in United Brands vs. Commission in which it has been stated that, "the dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers."

5.7 According to DG, what is significant in the rulings of European Courts is that the position of strength of presence of dominance does not preclude any competition but enables the undertaking, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

5.8 Taking into account the aforesaid, DG has stated that the arguments of DLF that there are a large number of players in the market and therefore, it cannot enjoy a position of dominance, does not hold good. According to DG, considering the fact that DLF commands substantially more market share than other players in the market, it is in a position to behave independent of the competitive forces.



5.9 DG has concluded that it is due to its market share combined with its size and resources and economic advantage over its competitors that DLF is not sufficiently constrained by other players operating in the market and has got a significant position of strength by virtue of which it can operate independently of competitive forces (restraints) and can also influence consumers in its favour in the relevant market in terms of explanation (a) to section 4 of the Act. DG has noted that its superior financial strength and resources are contributing factors to its dominant market position. Further the fact that DLF has developed its integrated townships in Gurgaon over huge piece of land acquired quite early, also gives it position of strength.

5.10 Taking into account all the factors under section 19(4) of the Act, DG has concluded that DLF Limited along with its subsidiaries DLF Home Developers Limited and DLF New Gurgaon Home Developers Private Limited is enjoying a position of dominance in terms of section 4 of the Act.

Abuse of Dominance

5.11 After finding that DLF enjoys a position of dominance, DG has proceeded to inquire into abuse as has been alleged in the information. In the process of inquiring into various elements of abuse, DG has discussed representative cases of some apartment-allottees, namely, Mr. Sanjeev Mittal and Satish Chander Mittal, Mr. Tarun Bakshi, Mr. Sanjay Kapoor and Seema Kapoor, M/s Crescent Real Estate Consultants Private Limited, Reet Mohinder Singh Ahluwalia, Ajay Kohli, Raman Mehta, M/s Hotel Hans Pvt. Ltd. Response from HUDA and DTCP was also called on the information in the instant case regarding the permissions and sanctions for the project.



5.12 Based upon the details gathered in course of proceedings, DG has reported that the applications were invited for allotments in the project in the year 2005 and buyer's agreements were signed in the year 2006 to the effect that possession would be handed within 36 months of the agreement.

5.13 DG has also brought out that allotment letters were issued and apartment buyers' agreements were signed even before the approval for the plan was accorded by Town Planner. Till the date of the agreement, two installments amounting to approximately Rs. 50 lac had already been paid to DLF by allottees. By that time, DLF had still not made the application to DTCP for sanction of the Building Plan. According to DG, Representations "B" and "C" of the apartment buyers agreement also bring out that neither on the date of announcing the scheme nor while executing the apartment buyer's agreement, DLF had got approval for the Layout Plan from the office of Director, Town & Country Planning, Haryana, Chandigarh.

5.14 DLF applied for approval of building plans for the project through an application filed on 29.06.2006 followed by a letter dated 13.10.2006. This was almost nine months after the allotment of the apartments was started by DLF. By that time five installments against sale consideration in accordance with the payment schedule had already been collected, amounting to approx Rs. 1 crore per allottee by DLF. DTCP, by its Memo dated 27.02.2007 almost after 2 years of application sanctioned the buildings plans and gave permission to DLF to commence construction subject to the provisions of Punjab Scheduled Road



& controlled Area Restriction of Unregulated Development Act 1963, its rules and zoning plans framed there under.

5.15 DG has brought out that approval letter dated 27.02.2007 by DTCP, which sanctioned building plan , inter-alia contained as under;

“No addition and alteration in the building plans / layout plans shall be made without prior approval of DTCP. Further only figured dimension shall be followed and in case of any variation in the plans, prior approval of DTCP shall be pre requisite. This sanction will be *void ab-initio*, if any of the condition mentioned above are not complied with”.

5.16 According to DG, thus, no change in original sanctioned plan was possible without obtaining approval of DTCP for the project. However, after collecting 90% of the sales consideration from the buyers, and two months after the original date of possession and delivery promised by the company, by a letter dated 08.04.2009, DLF submitted revised building plans for the project to DTCP seeking approval for increase in the height of the Towers and additions of floors to the existing 17 to 22 and 26 floors in different towers. Even before the revised building plans were sanctioned on 22.09.2009., allowing DLF to increase the number of floors , DLF by a letter dated July 16, 2009 wrote to the allottees that it had originally conceptualized the project with taller heights, but some approvals related to taller heights got delayed. However, it had commenced the construction without wasting time. Thus, before the revised approval was obtained, DLF had already commenced the construction for revised structure. The allottees who had applied in the year 2005 thinking that the project is of 17 floors were told in July 2009 that the project was being



revised, even when approval for the revised plan was given in September 2009.

5.17 According to DG, as per apartment buyer's agreements of 2006, the project was to be completed and handed over within 36 months of the agreement i.e. by the year 2009. Later on in 2009, DLF had informed the allottees that permissive possession shall be offered in September 2010 and final possession by June 2011, a delay of 2 years and 4 months from the promised possession. Beyond June 2011, DLF offered increased compensation of Rs. 10/- per sq. ft. However, till date final possession has not been handed over. Thus, there has been inordinate delay in handing over the possession to the allottees.

5.18 The report of DG has also brought out that due to change in number of floors, there has been change in FAR and Density per Acre also for the project. Once there have been violations on account of FAR and Density per acre, the buildings complex is bound to suffer from some other infirmities, including on account of amenities, facilities and common area than conceived originally. According to DG, the whole sequence of events gives an impression of misrepresentation and mis-declaration.

5.19 DG has concluded that in terms of section 4(2) (a) of the Act, the aforesaid conditions under which services have been provided by DLF are unfair.



5.20 DG has also reported that an analysis of terms and conditions of agreement with the buyers shows that the terms and conditions of provision of services are loaded heavily in favour of DLF Limited. The company has been able to impose the unfair conditions by abusing its dominant position through the agreements which have been executed with the allottees. DG has found these agreements unfair on many counts. Some of those unfair conditions mentioned in the buyer's agreement are as under:

- i) Company's Representations - Representations A, B, C, D, E, F, G.
- ii) Apartment Allottee's Representations - Representation J and K
- iii) Clauses 1.1, 1.5, 1.6, 1.7, 1.8, 1.9 relating to determination of, Carpet Area, Super Area etc.
- iv) Clauses 3 and 4 relating to amount paid by apartment allottee with application and Earnest Money.
- v) Clause 7 relating to adjustment / appropriation of payments
- vi) Clause 8 relating to payments in time
- vii) Clause 9.1 and Clause 9.2 relating to major alteration/modification
- viii) Clause 10.1 relating to permission to enter for carrying out interior works.
- ix) Clause 10.2 relating to schedule for possession of the said apartment
- x) Clause 10.3 relating to procedure for taking possession
- xi) Clause 10.4 relating to failure of apartment allottee to take possession
- xii) Clause 11.1 concerning delay due to reasons beyond the control of the company



xiii) Clause 11.3 Failure to deliver possession by the company: Remedy to apartment allottee

xiv) Clause 11.4(Failure to deliver possession: Remedy to the company

xv) Clause 12 (Events of defaults and consequences)

xvi) Clause 20 (Alteration of unsold units)

xvii) Clause 22 of the agreement relating to the right to make additional construction to the Company

xviii) Clauses 23 and 24 relating to company's right to raise finance

xix) Clause 32 of the agreement relating to the right to correct, modify, amend or change all the annexure attached to the agreement at sole discretion of the company.

5.21 DG has in addition also mentioned other clauses of the agreement like Clause 11.2 relating to failure to deliver possession due to Government Rules, Orders, Notifications, Clause 35 (waiver not a limitation to enforce) and clause 51 relating to arbitration to conclude that the conditions in the agreements are unfair.

5.22 After examining the clauses of the agreement in detail, DG has concluded that the unfair conditions through apartment buyers agreements have been imposed on account of the market power which DLF enjoys at present in the market. DG has also concluded that as per scheme of the Competition Act, 2002, once determination of dominance in relevant market is done, then the acts mentioned in section 4 (2) are to be looked into. In case the enterprises are found to be acting in violations of the acts mentioned in section 4 (2), the abuse of dominance is established. Here, the actions are to be proved and not that the actions also caused AAEC (appreciable adverse effect on competition),



since once violations are established; the abuse is also established, not requiring further establishment of AAEC in the market.

5.23 Notwithstanding above, DG has also brought out that competition in the market has also been adversely effected due to the abusive conduct of DLF. According to DG, it cannot be said that the exploitation of consumer biases, asymmetry of information, costly exit options, one sided agreement or conditions imposed on consumers affect the consumers only and not the competition, since due to these, static and dynamic competition is also affected at the market place. Misleading statements can harm consumers as well as the market place. In this regard, DG on the lines of investigation report in case no. 19 of 2010, inter-alia, has submitted as under:

"The way the company has not disclosed vital information or has kept the same in the thick complicated sets of documents (buyer's agreement); it gives rise to significant asymmetry of information. The covert promise of handing over possession within a given time which was never adhered to acted as barriers to the customers to go to any other builder given the brand name and brand value of DLF. Had the applicants known about the status of the clearances from the statutory authorities in advance, had the applicants known about the future plans of increase in number of floors, they might not have applied for purchase of a unit in the scheme. A costly exit scheme as in this case makes competition in the market restricted since the customers will not opt to exit and go for some others schemes looking at the costly proposition it involves. Significantly, in case of the Magnolia, the project was approved only on 27.02.2007 after the agreements were executed. There was an increase in



number of floors without informing the allottees. This mis-declaration not only affected consumers in the favour of the project but also acted as impediment towards free and fair competition; because through this statement many consumers who might have opted for other projects ultimately opted for booking in 'Magnolias'."

5.24 According to DG, not only market share, size, resources and its economic strength which gives DLF superior power over all its competitors, but the practices of the company also have led to committing behavioural biases by the consumers giving it market power and helping it to act without being restrained or constrained by the behaviour of the competitors.

6. After the report of DG was received under section 26(3) of the Act, the Commission forwarded it to the parties inviting their replies/objections.

Reply of the Opposite Parties and the Informants

6.1 DLF in its reply dated 27.09.2011 and 15.11.2011 submitted that the allegations and conclusions set out in the DG's Investigation report in the above matter are identical to those dealt with in case no. 19 and 18 of 2010 relating to "the Belaire" and "DLF Park Place", in which orders have already been passed by the Commission. It also requested to keep the matters in abeyance till the Competition Appellate Tribunal decides the Appeal filed by DLF in the matter of "Belaire" and "DLF Park Place.

6.2 The counsel of the informants vide its replies dated 30.11.2011 and 26.12.2011 submitted that they have no objection if orders on lines of case no.



18 and 19 of 2010 be passed in the present case also. The informants also brought out that they do not agree with the request of DLF that the present matter be kept in abeyance till the Competition Appellate Tribunal decides the Appeal filed by DLF in the matter of "Belaire" and "DLF Park Place".

6.3 The informants have brought out that in addition to the observations and directions of the Commission in the case of "Belaire" and "DLF Park Place" in orders dated 12.08.2011 and 29.08.2011 respectively, Clause 11.2 relating to failure to deliver possession due to Government Rules, Orders, Notifications etc., Clause 14.1 relating to maintenance of the said building / said complex/ said agreement, Clause 27 relating to Haryana Apartment Ownership Act, 1983, Clause 51 relating to dispute Resolution by Arbitration in the buyers agreement which have not been addressed previously in the said orders and the DG's Investigation Report dated 25.05.2011 in the present case must also be considered as abusive practice of the company.

6.4 The informants have also contested the claims of DLF that a number of advantages were given to the apartment allottees and that the specification of these building were upgraded without any extra charges including but not limited to air conditioning through chilled water pipes which have been upgraded to air conditions through VRV system at no extra cost. In this regard, the informants have submitted that submissions of the company on the issue is incorrect as the company has demanded huge amounts as a result of such upgradation from the allottees in spite of the fact that the air conditioning has already been paid for. The company has demanded huge amount for air conditioning work on the plea of the up gradation, although the specification



of semi furnished apartments clearly states that the air conditioning system will be fitted by the company and is included in the escalation free price of the apartment. Such demands are being made only because the company is in a superior and dominant position due to the terms of the agreement.

6.5 DLF vide replies dated 20.12.2011 and 28.12.2011 defended the clauses of the agreement pointed out by the informants. It has also been stated that certain clauses which were not even stated in the Information filed in the above case cannot be considered at this stage. With reference to allegations by the Informant with regard to demand for extra charges on 'air-conditioning', DLF has submitted that the above allegation is totally misconceived, incorrect and against the record. The standard layout consists of a set of two AHUs for flexibility of usage along with ducted distributions. Grills and diffusers are subject to interior design and false ceiling plans and the cost of the same is to the apartment owner's account. Cost of electrical etc. is also to the apartment owner's account.

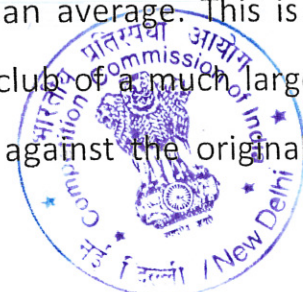
6.6 The package which has now been offered is for an upgraded distribution system using individual FCUs. The option offered includes all associated electrical costs as well as for the diffusers and grills. This upgraded option had several advantages like individual temperature control for all rooms, better acoustic isolation between rooms and independent fresh air system etc. For the air conditioning system which was specified in the agreement, no extra charge is being collected. Only if an allottee chooses to opt for the upgraded air conditioning system, the difference in cost is being charged. This option is



given for the benefit of the allottees and the allottees are free to decide whether they desire to have the upgraded air conditioning system.

6.7 DLF has also pointed out that various other advantages and benefits are being given voluntarily to the allottees of apartments without any addition cost. DLF had earlier communicated that possession for building nos. 1 & 2 would be handed over by June 2011 and for building nos. 3, 4 & 5 would be handed over by November 2011. It was committed that in case of any delay in possession beyond such period, the Compensation would be doubled for this delay from Rs. 5/- to Rs. 10/- per sq. ft. per month. Further, a timely payment rebate has also been offered on a voluntary basis so that the allottees who made timely payments, become entitled to a lump sum discount @ Rs. 500 to Rs. 1000/- per sq.ft. which is a substantial rebate ranging between Rs. 29,12,500/- to Rs. 98,00,000/- per unit.

6.8 An early payment rebate is being given to the allottees at applicable rates if payments are preponed, at varying rates from 8.5% to 11% depending upon the time of remittance. In addition, certain specifications regarding the buildings have also been improved and upgraded. For the project, "double glazing with thermal break, in external aluminum doors and windows" are being provided voluntarily without any extra costs. These are being imported from Europe at a very high price. In order to give such upgraded windows DLF would be incurring an additional cost of about Rs. 24 crore, thus providing up gradation of the value of about Rs.4 lacs per unit, on an average. This is a substantial benefit by up gradation in specifications. A club of a much larger size is now being provided of about 54,000 sq. ft. as against the originally



planned club house of 37,000 sq. ft. On account of this additional benefit, the company would be incurring an additional cost of approx. Rs. 30 crore i.e. about Rs. 5 lac per unit on proportionate basis.

6.9 The contention of DLF as regards relevant market, dominance, and abuse thereof with reference to the apartment buyer's agreement being same as in case no. 19 of 2010 and since they have been dealt with in detail in order passed in the aforesaid case, the Commission feels that there is no need to discuss them again in this order.

7. Issues for Determination

7.1 The Commission has given due consideration to the allegations made in the Information, the investigation report of the DG, submissions made by the parties concerned in the instant case along with submissions and opinions and analysis of experts relied upon by the OP in course of proceedings in case no. 19 of 2010 (as has been requested by the OP to consider them in this case as well). The Commission has also taken note of requests of DLF Limited that the matter be kept pending till the appeals in case of 'Belaire' and 'Park Place' are decided. However, the Commission observes that there is no stay on the inquiry proceedings in the case either by Tribunal or by any Court and therefore issues could be decided on merits.

7.2 The Commission finds that the issues arising from the facts of the instant cases are identical to those in case no. 19 as under:

Issue 1: *Do the provisions of Competition Act, 2002 apply to the facts and circumstances of the instant case?*



Issue 2: *What is the relevant market, in the context of section 4 read with section 2 (r), section 19 (5), section 19(6) and section 19(7) of the Competition Act, 2002?*

Issue 3: *Is DLF Limited dominant in the above relevant market, in the context of section 4 read with section 19 (4) of the Competition Act?*

Issue 4: *If DLF Limited is dominant in the relevant market, is there any abuse of its dominant position in the relevant market?*

7.3 The determination of the above issues by the Commission in case number 19 of 2010 (case of Beldaire) applies squarely to the facts and circumstances of the instant cases. The Commission holds that detailed reasoning and discussion on the above issues given in order dated 12.8.2011 in case no. 19 of 2010 apply to the cases under consideration in this order *mutatis mutandis* and are accordingly followed herein as well.

Issue 1

Do the provisions of Competition Act, 2002 apply to the facts and circumstances of the instant case?

7.4 Following order dated 12.8.2011 in case no. 19 of 2010, the Commission holds that the provisions of the Act apply squarely to the facts of the case.

Issue 2

What is the relevant market, in the context of section 4 read with section 2 (r), section 19 (5), section 19(6) and section 19(7) of the Competition Act, 2002?



7.5 On the lines of its order dated 12.8.2011 in case no. 19 of 2010, the Commission holds that the relevant product market in this case to be provision of services for “high-end” apartment units considering the cost of the apartments and a complex mix of factors for the reasons specified in the said order. Further, the relevant geographic market is also determined as Gurgaon, Haryana.

Issue 3

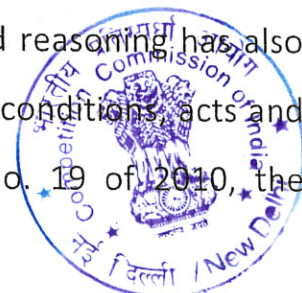
Is DLF Limited dominant in the above relevant market, in the context of section 4 read with section 19 (4) of the Competition Act?

7.6 The Commission has discussed this aspect in detail in the order in case no. 19 of 2010 dated 12.8.2011 and has held DLF Limited along with its subsidiaries, as dominant in the relevant market in the context of section 4 read with section 19(4) of the Act. Since the relevant market remains the same, the Commission finds no reason to depart from its previous determination in case no. 19 of 2010.

Issue 4

If DLF Limited is dominant in the relevant market, is there any abuse of its dominant position in the relevant market on its part?

7.7 The terms of agreement mentioned in apartment buyers agreement, acts and conduct of DLF Limited have been found to be abusive by the Commission in its order in case no. 19 of 2010. A detailed reasoning has also been given in the order on this issue. Since the terms and conditions, acts and conduct of DLF Limited in this case are akin to case no. 19 of 2010, the



Commission holds that the clauses, conditions of the agreements as indicated in paras 5.20 and 5.21 of this order containing the findings of DG, amount to abuse of dominance in the relevant market in the instant matter as well.

7.8 In view of foregoing, the Commission finds DLF Limited in contravention of section 4 (2) (a) (i) of the Act.

7.9 As regards clauses 11.2, 14.1, 27 and 51 referred to by the informant as not mentioned in the report of DG, the Commission notes that the report contains references to and discusses clause 11.2 and clause 51 as also mentioned in para 5.21 of this order to be abusive. Clause 11.2 stipulates that as a result of any law that may be passed by any Legislature or Rule, Regulation or Order or Notification that may be made and/or issued by the Government or any other Authority including a Municipal Authority, if the OP is unable to complete the construction of the project and does not succeed against such Rule, Regulation or Order or Notification, then the non – refundable money of the applicants shall not be paid back.

7.10 This clause when seen in the context that the instant project had commenced without all prior sanctions makes it clear that the OP had taken due precautions that in case of any adverse orders by the Government or any other authority, not the OP but the applicants/allottees would lose money in form of their non-refundable deposits, even if the onus of taking all due approvals and ensuring legality of the project was that of the OP. Further, clause 51 relating to dispute resolution by arbitration stipulates that such proceedings shall only be held at DLF City, Gurgaon, Haryana by a Sole Arbitrator who shall be appointed by the OP and whose decision shall be final



and binding upon the parties. It has also been stipulated that the arbitrator may be an employee or advocate or otherwise connected to the OP and the Apartment Allottees shall have no doubts as to the independence or impartiality of the said Arbitrator. The Commission holds that both these clauses are unfair and abusive.

7.11 As far as clause 14.1 is concerned, the Commission observes that it relates to maintenance of the building complex wherein it is mentioned that the OP may hand over the complex to the association of the apartment allottees for maintenance. Thus, the OP has kept the option on the issue of maintenance open. Further, clause 27 relates to need for adherence to the provisions of Haryana Apartment Ownership Act, 1983 by the allottees. The Commission observes that these clauses per se may not be said to be abusive.

8. In the facts and circumstances of the cases, the Commission has also examined the role of Opposite Parties 2 and 3, viz. HUDA and DTCP of Government of Haryana. On the lines of case no. 19 of 2010, the Commission notes that these are agencies or authorities of the State Government whose role is limited to granting various approvals to builders/developers. They are not providing any services of a commercial nature of the kind provided by the DLF group or its competitors. Thus their conduct does not come within the ambit of section 4 of the Act.



9. Order under section 27 of the Competition Act, 2002

9.1 The Commission has found DLF Limited to be in contravention of section 4 (2) (a) (i) of the Act. Para 5.20 and 5.21 of this order indicates various clauses of Buyers' Agreement imposed by DLF Limited on consumers/ buyers which have been held to be unfair by the DG and hence in contravention of section 4.

9.2 In view of the above and in exercise of powers under section 27 of the Act, the Commission directs DLF Limited offering services of building / developing:-

- a) to cease and desist from formulating and imposing such unfair conditions in its agreements with buyers in Gurgaon and;
- b) to suitably modify unfair conditions imposed on its buyers, within 3 months of the date of receipt of this order.

10. The Commission has already imposed penalty on DLF Limited in case no. 19 of 2010. Since the nature of contravention of provisions of section 4 is identical and its object and effect in the instant case emerges from the position of strength of DLF Limited in the same relevant market, the Commission feels that it will not be appropriate to separately impose penalty again in the instant case.



11. The Commission decides accordingly.

12. The Secretary is directed to convey this order to the concerned parties as per regulations.

Sd/-
Member (R)

Sd/-
Member (AG)

Sd/-
Member (GG)

Sd/-
Member (T)

Sd/-
Chairperson

Sd/-
Member (G)

Sd/-
Member (D)

Certified True Copy



S. P. Gahlaut
29/02/2012
S. P. GAHLAUT
ASSISTANT DIRECTOR
Competition Commission of India
New Delhi