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15 March, 2002

Ms. Bernice Wong
Assistant Legal Adviser,
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Urgent By Fax: 2877 5029

Dear Ms. Wong,

Statute Law (Miscellaneous Provisions) Bill 2001

I refer to your letter of 11 March 2002 raising questions relating to the above Bill. Our reply is set out below.

Part III Compensation Order

1. *On comparing the proposed section 73(3) to (5) of the Criminal Procedure Ordinance (Cap. 221) with the repealed section 72, it is noted that :*

(a) the proposed section 73(3) extends the order to money taken from a person so convicted on his arrest, being taken into custody or his surrender to custody;

(b) section 73(4) excludes the application of subsection (3) to any money that is a first charge for the benefit of the Director of Legal Aid within the meaning of section 18A(1) of the Legal Aid Ordinance (Cap. 91).

Paragraph 5 of the LegCo Brief states that amendment is required to clarify the mechanism for enforcing compensation orders. Please explain the policy for the above differences between the proposed mechanism and that provided in the repealed section 72.

Section 72 of the Criminal Procedure Ordinance (Cap. 221) was repealed upon the coming into force of the Costs in Criminal Cases Ordinance (Cap. 492). However, section 73 of the Criminal Procedure Ordinance makes reference to the repealed section 72 in relation to the mechanism to enforce compensation orders. Section 73 therefore needs to be amended. The amendment proposals are based on the existing mechanism for enforcing compensation orders under section 14 of the Costs in Criminal Cases Ordinance. The mechanism for enforcing compensation orders under the repealed section 72 of the Criminal Procedure Ordinance no longer exists.

2. *There is no explanation why 17 February 1997 is selected as the commencement date for section 7. The Costs in Criminal Cases Ordinance (Cap. 492) commenced on 17 January 1997.*

The commencement date for section 7 should be 17 January 1997.

Part V **Marital rape and related sexual offences**

3. *It would be helpful if the Administration could explain why no amendment to sections 123, 125, 118A and 122 is necessary, in particular, why section 122(3) need not be amended in manner similar to the proposed amendments to sections 124 and 146.*

A separate reply to these questions was sent under cover of our letter dated 15 March 2002.

Part VII **Power of Court to order repayment of deposit**

4. *The proposed section 12(1A) of the Conveyancing and Property Ordinance (Cap. 219) specifies that the court may, if it thinks fit, order the repayment of any deposit where it refuses to grant specific performance of a contract or in any action for the return of a deposit. Would a specific provision override a general provision so that section 12(1) cannot be relied on for the court to award interest or to declare and enforce a lien on the property?*

The existing section 12(1) of the Conveyancing and Property Ordinance (Cap. 219) follows the lines of section 49(1) of the UK Law of Property Act 1925. Section 49(1) of the Act replaces section 9 of the Vendor and Purchaser Act 1874. A copy of the replaced section 9 of the Vendor and Purchaser Act 1874 is enclosed as Annex A.

In re Hargreaves and Thompson's Contract (1886) 32 Ch D 454, it was

held by Cotton, LJ at page 456 in the Court of Appeal when interpreting section 9 of the Vendor and Purchaser Act 1874 that -

“...There is no doubt about the power, which we have already exercised by our decision, to determine whether the requisitions are answered or not, and if there are other questions specified here we have to decide those. But we are also to make such order on the application as shall appear to the Court or Judge just. Now, in my opinion, although the Court is not in the position in which it would be if it had the litigants before it in an action properly brought according to the established practice of the Court, still there is authority given us not only to decide the questions asked, but to make an order which would be just, as the natural consequence of what we have decided. Although no doubt interest cannot be given on the deposit except by way of damages, ... yet there are damages which, without any special case being made, would be awarded, and properly awarded, either by a Judge or by a jury in a case where the vendor could not make a good title to that which he had purported to sell. And, in my opinion, this Act of Parliament authorises us not only to make an order for a return of the deposit, but to give in addition that which without any special circumstances and under ordinary circumstances would be the consequence if an action had been brought to recover damages. In doing so we are not treating it as an action for damages, because, in my opinion, we could not go into any special case which the purchaser might make to get extraordinary damages or special damages, but can only give damages which naturally flow as the right of the purchaser from the order that we have made declaring that the vendors have not made a good title.

Therefore, the proper order here I think will be this : After the declaration as to title which we have made, we shall make an order on the vendors to return the deposit with interest at £4 per cent from the time when the deposit was paid, ... the amount of the costs to be ascertained by the Judge in Chambers if the parties should differ.”

The Administration, accordingly, considers that the court can rely on section 12(1) to, inter alia, award interest under the proposed section 12(1A).

5. *When rejecting the suggestion for a transitional provision, the Administration should explain in more detail why the court will have the power to order the return of deposit in an application made prior to the commencement of the amendment. Does the Administration consider that such power of the court a procedural rule?*

Since section 12(1A) confers a power on the court, it is arguably not a procedural rule in the classic sense. It would not, however, alter any substantive right acquired under existing law. The court already has an equitable power to order the return of a deposit, which section 12(1A) will merely supplement. Where court proceedings are current (so that the court has not given judgment prior to the commencement of the amendment), the court will be entitled to exercise its discretion to order the return of a deposit under the new statutory power.

Part IX **The Hong Kong Examination Authority**

6. *If the change of name of the Hong Kong Examinations Authority would not affect its subsisting rights and obligations, would the same principle apply to change of name of the Secretary?*

A transitional provision in relation to the change of job title of “Secretary” to “Secretary General” is not a legal requirement for the continuance of subsisting rights and liabilities. It was added to avoid doubt and in particular to provide a convenient means to achieve consistency in the usage of terms in subsisting instruments and proceedings.

Part X **Non-immunity clauses**

7. *Please explain in greater detail why section 2 of Schedule 1 to the Occupational Deafness (Compensation) Ordinance (Cap. 469) need not be amended at this stage. Has review of that Ordinance commenced and when would it be completed?*

Amendment will be made by way of a CSA.

8. *Since the amendments in Part X do not have retrospective effect, please clarify whether the word “Crown” would be construed according to section 2 of Schedule 8 to the Interpretation and General Clauses Ordinance (Cap. 1) on and after 1 July 1997.*

A separate reply will be sent when we have obtained further advice.

Part XIV **Legal Practitioners**

9. *If the policy intent is to allow flexibility in the choice of the Tribunal Convenor, would the Administration explain why the flexibility is not extended to the choice of members of the Tribunal? Has the Administration considered the alternative whereby the choice of the*

Tribunal Convenor is restricted to the solicitors on the Solicitors Disciplinary Tribunal Panel but the appointment of members of the Tribunal is not?

It is envisaged that the position of the Tribunal Convenor may evolve into a full-time job depending on the change to the workload brought about by the introduction of the fixed penalty system. If it indeed becomes a full-time job, it may be difficult to recruit a suitable solicitor from the Panel, who is able and willing to give up his current practice to devote his full time to the job as a Tribunal Convenor.

This concern does not exist in respect of members of the Tribunal because it is not anticipated that the nature of their appointment may change. Their appointment to a Tribunal remains on a case-by-case basis in accordance with section 9B of the Legal Practitioners Ordinance.

In view of the reason for removing the restriction of the choice of Tribunal Convenor from the Panel, the alternative of restricting the choice of the Tribunal Convenor to a Panel member but extending the choice of members of the Tribunal beyond the Panel instead is not considered appropriate because of the need for a pool of people who are able to devote the necessary time to the appointment.

2. The Chinese text of this letter will be forwarded to you at a later stage.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

Encl.

c.c. Miss Monica Law, SALD
Mr Gavin Shiu, SGC
Miss Doris Lo, GC

Annex A

588 [37 & 38 V. c. 78.] Vendor and Purchaser (E. I.) [A.D. 1874.]

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

[Ss. 3, 6 rep. 56 & 57 Vict. c. 53. s. 51. S. 4 rep. 44 & 45 Vict. c. 41. s. 30 (2). Ss. 5, 7 rep. as to E. 38 & 39 Vict. c. 87. ss. 48, 129; as to I. 44 & 45 Vict. c. 41. s. 78.]

Non-registration of will in Middlesex, &c. cured in certain cases.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract,) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

Extent of Act.

10. This Act shall not apply to Scotland, and may be cited as "The Vendor and Purchaser Act, 1874."

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