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30 April 2002

Mrs Percy Ma
Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

By Fax: 2509 9055

Dear Mrs Ma,

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001

I refer to your letter of 4 April 2002 seeking comments on questions asked by the Bills Committee regarding the proposed section 12(1A) of the Conveyancing and Property Ordinance (Cap. 219) (“the Ordinance”).

Part VII of the Bill (Power of Court to order Repayment of Deposit)

To advise whether proposed section 12(1A) of the CPO requires separate proceedings to be conducted for action for specific performance of a contract and action for the return of a deposit.

In the Administration’s view, a separate action for the return of a deposit is not required under section 12(1A) (as a matter of access to justice, however, there is no reason why a purchaser who does not wish to seek specific performance should not be entitled to claim the return of a deposit in a separate action). If the vendor institutes proceedings for specific performance of the sale and purchase contract, the purchaser may seek the return of the deposit in a counter-claim. A purchaser may also institute proceedings for specific performance or in the alternative, the return of the deposit. If the court refuses to grant specific performance, the court may exercise its discretion to order the return of the deposit.

In Charles Hunt Ltd v Palmer [1931] 2 Ch 287, for example, the vendor claimed specific performance of a contract for sale, and the purchaser counter-claimed for relief under section 49(2) of the Law of Property Act 1925. Clauson J

dismissed the claim, but, in the exercise of the discretionary power conferred by the subsection, declared that the purchaser was entitled to give a valid receipt for the deposit to the auctioneer, who held it. The Administration considers that it would be possible for claims by both the vendor and the purchaser to be dealt with in the same action under section 12(1A).

To advise whether an action for the return of a deposit brought by a purchaser would tie up the property so that the vendor would not be able to sell the property until the court has ruled on the case. At the meeting on 4 April 2002, Hon Audrey EU expressed the view that in seeking to recover the deposit, the purchaser would at the same time ask for a declaration of a lien on the property, thus preventing the vendor from selling the property.

In the view of the Administration, an action for the return of a deposit brought by a purchaser would not tie up the property any more than occurs under the present law where a purchaser brings an action for specific performance or in the alternative, the return of its deposit on the ground that it was entitled to relief from forfeiture on equitable grounds. The only factor which the proposed new (to Hong Kong) power would add is that it would enable the court to do justice between the parties in such actions in slightly wider circumstances than is allowed under the controversially strict approach to the equitable jurisdiction taken by the Privy Council in Union Eagle Ltd v Golden Achievement Ltd [1997] 1 HKC 173.

Both the vendor (in respect of unpaid purchase money) and the purchaser (in respect of any payment or part payment, e.g. a deposit, pending completion of a formal assignment or conveyance) have liens in property transactions (Bramwell Conveyancing in Hong Kong, p.145). These liens (rights to security for a debt) can, if necessary, be enforced by an order for sale by the court under its inherent jurisdiction. In practice, the answer to the question whether or not the property would be tied up would largely be dependent on how long the vendor or the purchaser, as the case may be, delays in settling the debt which the court finds to be owed to the other party. In the case of return of a deposit this should be a comparatively minor problem since the usual amount of a deposit is 10% of the purchase price and the vendor will receive a 10% deposit from the next purchaser.

To advise how the systems in Australia and the UK operate and whether the vendor's property would be tied up for some time.

The Australian and UK systems operate in essentially the same way as noted above in the answers to the first and second questions, including the absence of a significant (if any) likelihood that the vendor's property would be tied up for some time arising only because each system has a power equivalent to the proposed section 12(1A).

In Australia, the procedure for a purchaser to claim a lien for a deposit is codified under section 55(3) of the Conveyancing Act 1919(NSW) which provides that –

“On the application of the purchaser the Court may order payment under the section and declare and enforce a lien in respect thereof on the property the subject of the contract.”

In the UK, before the enactment of section 49(2) of the Law of Property Act 1925, the purchaser’s claim to a lien in appropriate circumstances was established in authorities such as Whitbread & Co. Ltd v Watt [1902] 1Ch 835, 838 (Vaughan Williams LJ) –

“The lien which a purchaser has for his deposit is not the result of any express contract; it is a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity.”

To advise whether the well-established English and Australian precedents would be applicable to the situation in Hong Kong, given the differences between the countries and Hong Kong in property market and conveyancing practices

The English and Australian precedents do not establish fixed principles that are to be applied irrespective of the circumstances of individual cases, including the context of the property market and conveyancing practices in Hong Kong. The principles emphasise that the jurisdiction may be exercised where the justice of the case requires. Therefore it would be proper for the court to take into account Hong Kong property market and conveyancing law and practices but nevertheless to order (or alternatively refuse to order) the return of the purchaser’s deposit should that be appropriate for the purpose of doing justice between the vendor and the purchaser in the circumstances of the particular case.

Further comments of the Hong Kong Bar Association (4 April 2002)

Accordingly, the Administration respectfully disagrees with the view expressed by the Bar that the way in which the proposed legislation works in other jurisdictions reveals that the proposed legislation is not supportable. The fact that the court has a wide discretion (as noted in the authorities cited, for example, in paragraphs 3 to 7 of the paper submitted by the Bar) merely reflects the potential variability of the legal and factual context of each case, it does not require the court mechanically to apply a guideline which was suitable in the different context of another case.

Stonham The Law of Vendor and Purchaser, p. 152, notes in respect of the NSW provision that –

“according to the ordinary principles relating to such unfettered discretions, [section 55(3)] involves a capacity to discriminate, permitting some latitude, according to the circumstances of the case, and so enables some personal contribution from the Court in the solution of the problem. ... the discretion must be exercised in accordance with the rules of reason and justice, and not arbitrarily or on vague or fanciful grounds, or according to mere private opinion or personal sympathy. A Court cannot properly order the return of a deposit where the contract is one enforceable against the purchaser, both at law and in equity. ... it does not necessarily follow that every ground for which the Equity Court refuses specific performance, is a proper case for the exercise of the discretion in favour of the purchaser; but it ought to be exercised in favour of the purchaser where considerations of justice and fairness require it.”

In the Bar’s view (paragraphs 17 to 27) there is no need for the proposed amendment since the rights of the parties crystallise on the termination of the contract and the amendment would introduce additional uncertainty and encourage unnecessary litigation. The Administration considers that, even under present law, the rights of the parties do not necessarily crystallise upon the termination of the contract (and the property may potentially be tied up) since the purchaser (or the vendor) is able to sue for specific performance or to seek relief from forfeiture of deposit on equitable grounds.

As noted above, the only additional factor which the proposed amendment would introduce is a slight but necessary enlargement of the ability of the court to do justice between the parties relating to the deposit. The Administration recognises that the object of the proposed amendment (as is the case in Australia and the UK) is to enable the court to weigh up the positions of both parties in cases of “injustice”, as opposed to “hard cases” (paragraph 20). It also considers that the court would recognise the special position of Hong Kong regarding the sale and purchase of landed property (paragraphs 21 and 24). Even in cases where specific performance might be refused on grounds of certainty of contract it does not follow that certainty would be jeopardised merely because the court may order the return of a deposit in those rare circumstances where it is just to do so.

Kowalski in “Good faith, greed and time of the essence” (2000) HKLJ Vol. 30, 475 (copied with our letter dated 26 March 2002) noted, p.481, that deciding legal cases involves more than simply applying strict rules without consideration of any other factors – if such is not the case the judiciary could be

replaced by a computer. He suggested (pp.483-488) that in the Union Eagle case the courts should have invoked the concepts of good faith, unconscionability, or *de minimis non curat lex*, among others, to order specific performance since the lateness (10 minutes) in tendering the purchase price was trivial and caused no damage. In such circumstances, as a matter of public policy, a strict interpretation of “time of the essence” does nothing more than promote and assist greed in business (p.487). It was inconceivable that the vendor would have taken such an avaricious position in a falling, or even stable, market where a replacement purchaser would not be easy to find.

The author (pp.488-489), proposed a test based on common sense, commercial decency and business efficiency for determining when the court may intervene on behalf of a breaching party despite time being made of the essence and without prejudice to certainty of contract, namely, where –

- (1) neither party had, prior to the closing dates advised the other of the exact closing time;
- (2) the time breach was unintentional or unavoidable;
- (3) the time breach was trivial or immaterial; and
- (4) the non-breaching party did not suffer any harm as a result of the time breach.

As noted in paragraph 13 of the Administration’s paper dated February 2001, Godfrey JA (dissenting) in Union Eagle in the Court of Appeal ([1996] 1 HKC 349, 361-362) observed that the vendor did not purport to terminate the agreement until after the purchaser had tendered the money; that the breach was slight, trivial and inadvertent; that the loss of the purchaser’s equitable interest and deposit would be out of all proportion to the injury to the vendor; that this would be a windfall to the vendor; and that the vendor had suffered no prejudice whatever by reason of the purchaser’s few minutes’ delay.

The Administration remains of the view that, in the interests of justice, it is reasonable and justifiable to introduce a power of the court to order the return of a deposit. Such power would have negligible implications for the certainty of contract since it operates only exceptionally in the situation where contractual relations have broken down and the question is not only whether the purchaser should lose his equitable interest in the property but also his deposit. Merely because property may be treated as a commercial commodity in Hong Kong does not obviate the overriding public interest for justice to be done where required in appropriate cases. Further, there is no reason to suppose that the courts of Hong Kong, as do their counterparts in Australia and the UK, would not appropriately control the grant or refusal of relief in accordance with the law

and practice of the local property market and the principles of fairness and reasonable business efficiency.

Letter dated 25 April 2002 from the Consumer Council

The Administration welcomes the continuing support of the Consumer Council for Part VII of the Bill. It particularly agrees with the view that the court would only exercise the power in cases where purchasers were genuinely aggrieved and that such power would not affect the sanctity of contract or the certainty of property transactions.

For the reasons noted above and in its papers of February 2001 (paragraphs 23 and 26(3)) and March 2001 (paragraph 12) the Administration considers that any tying up of the property would in any event be a function of there being a dispute regarding the sale and purchase contract, and not necessarily because it was argued that the case is appropriate for the exercise of the proposed discretion.

In this context, the Administration's view is that there is no practical requirement for the discretion to be fettered by the specification of circumstances in which it should not be exercised and to do so may perpetuate injustice. The courts have also recognised the requirement to do justice to both the vendor and the purchaser as appropriate to the circumstances of the case. In Lucas & Tait (Investments) Pty Ltd v Victoria Securities Ltd [1973] 2 NSWLR 268, 272, for example, Street CJ observed that it would not be right to impose a gloss on the scope of the discretion preventing a purchaser from recovering a deposit in any case where a vendor has rescinded because of a repudiation by a purchaser. Nevertheless, a vendor who forfeits a deposit in strict enforcement of his legal rights is not to be deprived of it under section 55(2A) is not to be deprived of it unless it is unjust and inequitable to permit him to retain it.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General