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Urgent by fax
8 May, 2002

Mr Paul Woo,
Clerk to Bills Committee,
Legislative Council Secretariat,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.
(Fax No.: 2509 9055)

Dear Mr Woo,

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001
Part VIII : Power of court to order repayment of deposit

Thank you for your letter dated 3 May 2002 in which you have requested the Administration to respond in writing to the Hon Audrey Eu's letter dated 2 May 2002 ("the letter") to the Chairman of the Bills Committee on Part VII of the Bill.

The Administration welcomes the support in the letter for the object of doing justice under the proposed amendment, and appreciates the concerns raised in respect of possible unfairness to the vendor and certainty of contract. However, it considers that it would not be desirable to limit the discretion of the court to return a deposit to the purchaser to cases where transactions have fallen through because of a dispute on title and excluding cases where transactions were not completed because the purchasers' solicitors' messengers were late in delivering the cheques.

Limitation of amendment to proof of title

Stonham Vendor and Purchaser, paragraphs 233-234, notes that at common law, where the vendor failed to disclose a defect in title, but had acted in good faith, the court would not order the return of the purchaser's deposit notwithstanding that the vendor was refused specific performance.

In New South Wales (Stonham, paragraph 235), this anomalous situation was provided for in section 55(1) of the Conveyancing Act 1919 (NSW) so that where specific performance is not enforced against the purchaser by reason of a defect in the vendor's title, the purchaser is entitled to recover his deposit and any instalments of purchase money he has paid.

Section 55(1), however, has no application where there is no defect in title, and specific performance is refused on other grounds (Stonham, paragraph 236). Accordingly, in 1930, a new section 55(2A) was added to provide that in every case where the court refuses to grant specific performance of a contract, or in a suit or proceeding for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit with or without any interest thereon.

The recognition that justice may need to be done between the parties in matters other than proof of title also forms the basis of Part VII of the Bill.

Unfairness to vendors

It is submitted that the provision is not unfair to vendors. The primary purpose of its introduction in NSW and the UK was to remove the difficulty of a purchaser who, though in a position successfully to resist specific performance in equity, was precluded at law from recovering his deposit (Stonham, paragraph 237). The provision does not diminish the rights of the vendor to seek specific performance against a purchaser who wishes to resile on the ground of an alleged default by the vendor.

Certainty and excluding lateness of purchaser's cheque

The Administration considers that the concerns regarding uncertainty in Union Eagle Ltd v Golden Achievements Ltd [1997] 1 HKC 173 relate primarily to the question of whether or not it would be appropriate to grant specific performance. It is after the court has refused to grant specific performance that there would be an issue of whether or not it would be fair in the circumstances to order the return of the deposit. In addition, Union Eagle did not rule out possible further development of the law in this area, such as in respect of the remedies of restitution and estoppel to prevent unjust enrichment. The proposed amendment represents a minor development of the law to achieve a similar purpose.

As noted in Kowalski “Good faith, greed and time of the essence” (2000) 30 HKLJ 476, 479, it is arguable that Union Eagle overstated the importance of certainty and time of the essence as well as the authority for not intervening. In the Administration’s view, questions such as how much delay is too much would be determined by the circumstances of the case. It is not expected that, for example, a court would necessarily order a return of deposit in the case of a ten-minute delay where the vendor had, say, advised the purchaser that the closing funds were urgently needed at 5:00 p.m. and he had suffered detriment because of the time breach. Further, since in time of the essence clauses it may be the day (rather than the exact minute) of completion that is important, it may only be in exceptional circumstances that a court would order a return of deposit in a case where the closing funds were not delivered on the specified day.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

c.c. D of J (Attn: Miss Monica Law
Miss Doris Lo)