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6 June

2002
Mr. Paul Woo
Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Building
9055
8 Jackson Road
Central
Hong Kong

By Fax: 2509

Dear Mr. Woo,

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001

I refer to your letter dated 27 May 2002 raising questions in relation to Part VII of the Bill (Power of the Court to Order Repayment of Deposit). The Administration's replies are set out below.

A. Member's proposal

A member of the Bills Committee has proposed that in a case where the transaction has fallen through because of a genuine dispute regarding the title to the property, the court should be given a statutory power in circumstances where the title of the property is subsequently found good by the court and where the price of the property has dropped at the time of the proceedings to order (a) rescission of the contract or (b) extension of time to enable completion as an alternative to the proposal to allow the court the discretion to order the return of the deposit. The Administration is requested to respond to the member's proposal.

Rescission of Contract

The Administration considers that it would not do justice to the vendor to have the contract rescinded if the title to his property proves to be good. By producing a good title, the vendor has discharged his duty under section 13 of the Conveyancing and Property Ordinance (Cap. 219) relating to proof of title. He has a right under the sale and purchase contract to have the transaction completed in the time stipulated in the contract. The court's intervention under a statute to rescind the contract without good cause would restrict the vendor's right over his own property, including to dispose of it at his own free will, and would preclude the vendor from mitigating his loss by selling the property at the opportune moment when the market is falling. The Administration considers that it would be contrary to the principles of legal policy to penalize a party who is not at fault.

Extension of Completion Time

The Administration considers that it is unnecessary to provide expressly in the legislation to the effect that the court will order an extension of time to enable completion if a dispute on title is brought to the court for decision. The Administration is of the view that the parties to the proceedings, at their option, would usually apply to the court for an extension of time. This may especially be so at a time when the market is falling, and the vendor would be eager to realize his property at the earliest possible opportunity to minimise his loss. He would be ready to agree with the purchaser to have the completion time extended. The court will then allow the application for an extension of time if it thinks it just to do so. In the circumstances, the Administration considers that the court already has power to grant an extension of time should it be required.

The Administration's Opinion

The Administration considers that the member's proposal is not an alternative to, but rather concerns a matter that is separate from, the situation with which the amendment proposal set out in the Bill is concerned. It appears that the object or effect of the member's proposal would be to deal with a case concerning a dispute on title which is subsequently found good by the court while a contract is still subsisting. The object of the Administration's amendment proposal under the Bill is to enable the court to do justice as appropriate to the circumstances where the contract is at an end and the court has sufficient doubt about matters such as the vendor's title so that it will not order specific performance against the purchaser, but it is not able to find any breach of contract

on the part of the vendor. As noted in our consultation paper, however, under the principles relevant to the proposed amendment the court (recognising the need for certainty and that the deposit is an earnest of performance) will only exceptionally order a return of deposit to a purchaser who is in breach of contract.

B. Transitional provision

The Administration has been requested to explain the implications of having a transitional provision, or the absence of it, in relation to Part VII of the Bill.

The Administration has expressed its view vide its letter dated 16 May 2002 that the inclusion of a transitional provision will have the benefit of setting out in express terms that the court will be entitled to exercise its discretion to order the return of deposit while proceedings are current. It is in the interest of certainty that a transitional provision be included.

However, the absence of a transitional provision will not deprive the court of its power to exercise its discretion if judgment has not been given at the time the amendment proposals come into operation. The statutory power of the court to order a return of deposit will commence on the date on which the amendment proposals come into effect, and is independent of the date when the proceedings begin.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General