**Letterhead of DEPARTMENT OF JUSTICE Legal Policy Division**

LC Paper No. CB(2)51/00-01(01)

Our Ref.: LP 518/00
Your Ref.:
Tel. No.: 2867 4752

**13 October 2000**

Legislative Council Secretariat,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.
(Attn: Mrs Percy Ma)

Dear Mrs Ma,

**Consultation on Section 13**
**of the Conveyancing and Property Ordinance (Cap. 219)**
**Meeting of Legislative Council Panel on Administration of**
**Justice and Legal Services on 17 October 2000**

I refer to our telephone discussions in which you requested an update of the progress of consultation by this department on the above matter.

At issue is a proposal by the Chairman of the Panel, the Hon Ms Margaret Ng, that section 13 of the Conveyancing and Property Ordinance (Cap. 219) be amended to incorporate a power of the court to order the vendor to return the deposit to the purchaser. Such power would be similar to that under section 49(2) of the Law of Property Act 1925 (UK) which provides -

> "(2) Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit."

The consultation to date has been by way of two standard letters sent to consultees on 2 March 2000 and 1 August 2000 respectively. Copies of these letters and the responses received are attached in chronological order (with index).

As many wide and complex questions have been raised in the correspondence, the department has yet to reach a considered view in this matter. However, a brief outline of the main points which have emerged in consultation is set out below.

**Letter issued on 2 March 2000**

This letter essentially requested comments on the proposal to amend section 13 in accordance with the judgment of Godfrey JA in Wong Wing Kuen v Leung Kwai Lin Cindy [1999] 4 HKC 565.

The Bar Association (5 May 2000) and the Consumer Council (10 May 2000) favour the proposed amendment. The Law Society (3 May 2000) advised that after lengthy debate in its Property Committee and Council, the Society could not reach a consensus and members considered that there were compelling arguments both for and against the proposal. A law professor of the University of Hong Kong (25 April 2000) suggested in extensive submissions that there may also be problems with the Provisional Agreement.

**Letter issued on 1 August 2000**

Following further discussion of this matter by the Panel, the views of consultees were sought on associated issues centring on whether there should be a standard form of Provisional Agreement and whether there should be a "cooling-off period" for the enforcement of a Provisional Agreement.

The Law Society (11 August 2000) reiterated its view stated in a letter dated 19 June 2000 to the Panel that the issues are complex and relate not only to the deposit but also to existing market practices, and that an in-depth examination of all the problems of the existing system is required.

The Real Estate Developers Association of Hong Kong (28 August 2000) considers that it is unlikely that a standard form Provisional Agreement could cater for all situations and that a "cooling-off period" would remove the certainty of an otherwise binding contract. Similar views were expressed by the Bar Association (10 October 2000).

The Consumer Council (12 September 2000) is of the view that a standard Provisional Agreement would provide additional protection to the parties. Provisional Agreements adopted by different estate agents are not uniform although their main provisions are essentially the same. The Council has yet to reach a view on whether there should be a "cooling-off period".

A law professor of the City University of Hong Kong (10 August 2000) is of the view that legislation equivalent to section 49(2) of the Law of Property Act would enable Hong Kong courts to do justice where there is some merit in the purchaser's case, particularly when time is of the essence and the purchaser is inadvertently slightly late. The professor does not favour the

introduction of a standard form Provisional Agreement or a "cooling-off period" on the ground that it would interfere with the freedom of vendors and purchasers to negotiate the terms on which they buy and sell.

With warmest regards,

Yours sincerely,

(Stephen Kai-yi Wong)
Deputy Solicitor General

#25444

**Consultation on section 13 of the**
**Conveyancing and Property Ordinance (Cap. 219)**

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#25452

**Letterhead of DEPARTMENT OF JUSTICE Legal Policy Division**

**Annex I**

Our Ref.: LP 518/00
Your Ref.:
Tel. No.: 2867 4752 2 March 2000

**By Hand**

Professor Albert Chen
Dean, Faculty of Law
University of Hong Kong
Pakfulam Road
Hong Kong

Dear

**S. 13, Conveyancing and Property Ordinance (Cap.219)**

As you are probably aware, Godfrey, JA in Wu Wing-kuen v. Leung Kwai-lin, Cindy CACV 240/1999 held that the court has no power under section 13, CAPO, to order the return of the deposit to the purchaser even though this had been lost through no fault of his own.

Sharing Mr. Recorder Tang's regret in the court below, Godfrey, JA observed:

> ".....Section 49(2) of the Law of Property Act, 1925 gives the court such a power in England and Wales. I have previously urged the incorporation of such a power in local legislation, but my urgings have fallen on deaf ears. Once again, I commend it to the legislature here to confer such a power on the court. This would enable the court to do justice in cases like the present, in which the system operates unfairly against purchasers. The courts need to be able to stem the flood of cases in Hong Kong in which vendors are able to achieve windfall profits at their purchasers' expense.

The sooner something is done about this disgrace, the better." (at p. 10S-p. 11E)

The obita above caused concern in the media (copy press report dated 24 November 1999 enclosed) which is now followed up by the Hon. Margaret Ng, the Chairman of the LegCo Panel on Administration of Justice and Legal Services. She advocates that the local court be given a discretionary power similar to that of the court in England under section 49(2) of the 1925 Act (copy provision attached).

Against this background, I write to consult you and members of the University on the issues arising out of Godfrey, JA's judgment. I enclose a list of issues which you may find helpful in your deliberation. Your insights on these and any other issues would be very much appreciated.

The Administration intends to revert to the LegCo Panel by the end of April this year. Should you have any queries, please contact me or Ms Agnes Cheung, Senior Government Counsel (Tel No : 2867 4903).

Many thanks for your assistance,

Yours sincerely,

(Stephen Kai-yi Wong)
Deputy Solicitor General

Encl.

i) copy judgment CACV 240/1999
ii) copy judgment MP 646/1999
iii) newspaper clipping dated 24 November 1999
iv) section 49, Law of Property Act 1925
v) list of issues

#12920

**Appendix 1**

**MEMO**

| | |
|---|---|
| From: Judiciary Administrator | To: Department of Justice |
| Ref: | (Attn: Mr Stephen Wong Kai-yi) |
| Tel.No. 2123 0018 fax:2123 0028 (Open&Con) | Your Ref.: LP518/00 |
| Date: 20 March, 2000 | dated: 2 March 2000 |

**S.13, Conveyancing and Property Ordinance (CAPO)(Cap.219)**

Thank you for your above-quoted memo.

2. We are aware of the remarks made by Godfrey, JA in respect of the current lack of discretionary power by the court under section 13, CAPO, to order the return of the deposit to the purchaser even though this had been lost through no fault of his own.

3. We are however mindful of the position that it is up to the Government to decide whether legislative amendments should be introduced to give the local court a discretionary power similar to that of the Court of England under Section 49(2) of the 1925 Act. In short, this is a policy matter for the Government.

4. We are advised that in considering the above policy matters, you have come up with a number of issues which require further study. We note that all these issues may be relevant to the policy formulation process.

5. As far as the Judiciary is concerned, we consider it not appropriate to take part in the policy formulation process of such legislative proposal as a matter of principle. In the circumstances that you consider your proposal may impact on any aspects of the court operation and would like to seek our views on those operational aspects, we would be happy to share our observations with you. But I presume that we could only do so upon receipt of specific legislative proposals from your end.

(Miss Emma Lau)
for Judiciary Administrator

**Letterhead of THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG**

**Appendix 2**

27 March 2000

Mr. Stephen Kai-yi Wong
Deputy Solicitor General
Department of Justice
Legal Policy Division
4/F High Block
Queensway Government Offices
66 Queensway
Hong Kong

**S.13, Conveyancing and Property Ordinance (Cap.219)**

Thank you for your letter of 2 March 2000, in which you sought our views on whether the Court should be conferred with a discretionary power to order the repayment of deposit to purchasers.

We are concerned that such discretionary power, if given to the Court, would shake the sanctity of contract, one of the cornerstones of our economy, as the Court could then nullify a contract based on sympathy or any other grounds it may consider valid, despite the provisions of the contract itself. This could lead to a large number of frivolous and unmeritorius litigation in an attempt by the contracting parties to renege on signed agreements.

While the discretionary power sought was intended to enable the Court to "stem the flood of cases in Hong Kong in which vendors are able to achieve windfall profits at their purchasers' expense", one must not lose sight of the fact that a vendor could as well be a purchaser of another property simultaneously in a chain of transactions, which is fairly common in the local property market. Should the deposit of the first transaction be ordered to be returned to the purchaser through no fault of the vendor's, the vendor could face financial difficulties in completing the second transaction as a purchaser, and may even suffer the loss of his deposit on the second transaction.

With the passing of the Land Titles Bill which we understand is now under drafting, a land titles system will be set up to guarantee the indefeasibility and certainty of land titles, and the grey area created by s. 13 of the Conveyancing and Property Ordinance will be removed, once and for all. In the meantime, we believe the status quo should be maintained.

Yours sincerely,

Louis Loong
Secretary General

# Faculty of Law

4/f KK Leung Building, Pokfulam Road, Hong Kong


25TH April 2000

Mr Stephen Kai-yi Wong
Deputy Solicitor General
Department of Justice
Legal Policy Division
4/F High Block
Queensway Government Offices
66 Queensway
HONG KONG

W 29/4.

Mrs. A. Chang. 8/5/2000

Could I now have an update of the Consultation and an indication as to when we could receive to Leg Co.? plea fw.

Section 13, *Conveyancing and Property Ordinance*

Dear Mr Wong

(23) of Pt I.

I refer to you letter dated 2 March 2000 send to Professor Albert Chen on the above-captioned topic.

I am enclosing a comment on the matters referred to therein. Also enclosed is a copy of a submission I made to the Law Reform Commission in March 1997.

Please let me know if I can be of assistance in this matter.

Yours sincerely,

Judith Sihombing

Judith Sihombing
Associate Professor in Law

Telephone (852) 2859 2951 Fax (852) 2559 3543

# RECOVERY OF DEPOSIT BY PURCHASER

**Judith Sihombing**
**Faculty of Law**
**University of Hong Kong**

## INTRODUCTION

**1. Changes in the law to enable the purchaser to recover the deposit where the vendor is unable to show good title but where he is not treated as having breached the contract, can be achieved by:**

**a. amendment to section 12 of the the Conveyancing and Property Ordinance to give the court discretion to allow recovery in such cases along the lines of section 49(2) of the *Law of Property Act* 1925. This does require the exercise of discretion and this can be an unruly machine. The legislation may not be the universal solution even though the results, on the whole, in other jurisdictions which are subject to similar legislation, tend to be acceptable. This would permit the court to decide when and in what circumstances to allow recovery taking into account the terms of the contract, and the events which have occurred.**

**One problem of course is that there is no way to legislate for the manner in which a judge is to, or should, exercise discretion.**

**Another problem with this solution is that it does not really address an incidental problem in the current situation, namely that of the Provisional Agreement [PA].**

**A combined attack -- legislation to allow the exercise of discretion in appropriate cases, and re-examination of the effect of the PA --- may be the best solution.**

**or**

**b. legislating for the availability of a remedy such as restitution based on unconscionability thereby expanding contractual principles. This would be possible by the extension of the equitable jurisdiction where there is 'fraud, mistake, accident or surprise' to cover those situations described as unconscionable, or as it has been described in Hong Kong as 'sharp practices' [*China Pride Investment Ltd v Silverpole Ltd* [1995] 1 HKLR 56, Nazareth JA at 64].**

**[I note the details of a paper I sent to the Law Reform Commission on 6 March 1997 on this point]. The *Unconscionable Contracts Ordinance* might be the starting point for such legislation, or indeed the *Trade Practices Act* which was influential in the terms of that ordinance.**

**or**

**c. leaving the question to the courts to deal with by way of relief against forfeiture [already recognisable as a remedy, even to the extent of being granted by way of specific performance] or restitution, as unjust enrichment, so as to prevent the vendor from obtaining a windfall: *Tinsley v Milligan* [1993] 3 All ER 65. This would be the New Equity in practice.**

**It would then be hoped that this approach would eliminate the problems of the decision *in Want v Stallibrass*, the absence of legislation similar to section 49 (2), the constant references to problems with the PA, and some hesitancy on whether the modern New Equity is applicable in Hong Kong, all of which combine to make possible the situation referred to in the judgments in *Wu Wing Kuen v Leung Kwai Lin Cindy* (1999) CACV 240/99.**

**The Privy Council decision in the New Zealand case of *AG of HK v Reid* [1994] 1 All ER 1 certainly resulted from the application of the New Equity permitting the overruling of *Lister & Co v Stubbs* (1890) 45 Ch D 1. In that case it could be said that the end justified the means.**

**This approach [which seems to be horridly complicated] would need**

**i. some relaxation of parts of the decision in *Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 HKC 173, and adoption of the type of principles relied upon in *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd* [1997] 3 HKC 440. There may not be universal acceptance of the form of estoppel and restitution in that latter case. It also would require the overruling of *Steedman v Drinkle* [1916] 1 AC 275, adoption of *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319, and relaxation of the essential time stipulation rule currently in vogue in relation to land contracts. Thus the view that 'there is no elasticity in punctuality' [*World Ford Development Ltd v Ip Ming Wai* [1993] 1 HKC 98, Litton JA (as he then was) at 109] would need revision.**

**ii. wholesale adoption of the New Equity of the High Court of Australia or of the Supreme Court of Canada [see comments of the House of Lords in *Kleinwort Benson v Lincoln LBC* [1998] 1 Lloyds LR 318 [a 3:2 decision] in finally accepting the Australian principles on**

**restitution in the recovery of money paid under mistake, and a general endorsement of the Australian form of restitution etc].**

**iii. as a matter of justice and fairness --- the complementary overruling of the decision in *Bain v Fothergill* (1874) LR 7HL 158.**

**iv. overruling the rule in *Want v Stallibrass* (1873) LR 8 Exch 175.**

**v. treating the PA as some form of pre-emption or such interest. Perhaps the PA could be treated instead as a preliminary agreement of short duration which binds the parties to enter into a formal Sale and Purchase Agreement [SPA] within a specific time limit on consultation with their respective solicitors. The SPA would then need to consider the vendor's obligations in relation to title.**

**This third alternative would not function fairly and justly unless all five aspects were adopted. This may well be too giant a step at one stroke. It would need a concentrated and common acceptance of this solution.**

**2. Maybe the easiest and most acceptable way is for something to be done about the PA. This form of binding contract, when prepared as at present, has few supporters. Perhaps the solution should be combined with an examination of other aspects of the conveyancing contract which cause concern to many: essentiality of time.**

**But the problem with these band-aid solutions is that it is hard to know where to stop. Thus if the PA is no longer to function, on its own power, as a binding and enforceable contract for the sale and purchase of land then the SPA would need amendment**

**i. to declare that time stipulations are not of the essence:**

**ii. to require that the appropriate Conditions from Part A of the Second Schedule of the Conveyancing and Property Ordinance are incorporated into the SPA in such a way as not to militate against the purchaser's right to recover the deposit where the vendor's title is uncertain, or defective as well as where it is wholly bad: and**

**iii. to deny freedom of contract to the parties in respect of this particular matter.**

**Such steps would be difficult to legislate for precisely and appropriately in the circumstances sought to be dealt with in this particular type of case.**

**3. It may well that this is currently a good time to deal with this when there is a possibility of the introduction of Land Titles. In the jurisdictions legislation similar to**

**section 49(2) prevails; and there the Torrens system of title by registration, rather than the deeds system, applies. Regardless of the fact that obviously conveyancing practice there differs from that in Hong Kong, there is one factor of distinction in the conveyancing contract itself which is not essentially pertinent to a registration of title system. That distinction relates to the time for performance of obligations, in particular, completion of the contract. Time is *not* of the essence generally in the Australian Torrens contract for the sale and purchase of land: cf *Imperial Bros P/L v Ronim P/L* [1998] QCA 444, a decision of the Court of Appeal, Queensland, which followed *Union Eagle* and applied the rigid Hong Kong approach because of the terms of the contract.**

**By contrast, under the Malaysian Torrens, the solution to this problem is contained in section 75 of the *Contracts Act* but in a totally different way by treating agreed sum clauses as penalties, thereby entitling the purchaser to seek relief against the penalty.**

**Thus in conjunction with the introduction of Land Titles, there could be a wholesale review of the conveyancing contract and practice to eliminate those traditional, rigorous and sometimes harsh, doctrines and rules which Hong Kong conveyancing has inherited from the English real property law even though 'local circumstances' and practice may be different to those influential in the development of these doctrines and rules.**

## THE PA, THE SPA AND THE RECOVERY OF THE DEPOSIT

### *4. The deposit*

**The deposit under a contract for the sale and purchase of land is an earnest of performance by the purchaser. As such its recovery is usually accorded different consideration than other sums of money sought to be recovered by the payer: see for example *David Securities Pty Ltd v CBA* (1992) 66 ALJ 768, and now *Kleinwort Benson v Lincoln BC* [1998] 1 Lloyds LR 318 on the recovery of money paid under mistake.**

**5. Pursuant to conveyancing practice, the recovery of the deposit, where the vendor fails to show good title, is restricted in several cases. The reason behind this special treatment and seeming bias in favour of the vendor, is said to result from the difficulties and uncertainties of English real property law. This leads to the conclusion that the parties to the contract for the sale and purchase of land are taken to contract on the basis that the purchaser has limited remedies. Thus contractual remedies and principles are modified because of conveyancing difficulties. The rationale for the special treatment may not be as valid now as it was when the rules were being developed at end of eighteenth and in early nineteenth centuries to make fairer some of the complexities of the deeds system: see for example *Flight v Booth* (1834) 1 Bing NC 370. This traditional approach has been modified in England, and several other jurisdictions, by legislation: see for example**

**section 49(2) *Law of Property Act* 1925 (Eng): section 49(2) *Property Law Act* 1928 (Vic): cf effect of section 55 *Conveyancing Act* 1901 (NSW). This legislation is based, for the most part, on section 9 of the Vendor and Purchaser Act of 1874 which provided for the forerunner of the vendor-purchaser Summons which is now provided for, albeit with amendment, in section 12 of the *Conveyancing and Property Ordinance.***

**6. In Hong Kong the old rule, favouring the vendor, is applied without any statutory amelioration. There is no equivalent to section 49(2) in Hong Kong. This fact is the cause of the current discussion on the ambit of the vendor-purchaser summons. The rationale for the old rule may not now be acceptable, especially where relief by way of restitution may offer a solution may be fairer and easier to administer than legislation along the lines of section 49(2). Of course, this would mean that the Hong Kong courts were prepared to adopt the overseas developments in the New Equity.**

***7. Three conveyancing factors***

**At present, the ability of the purchaser to recover the deposit paid under a contract for the sale and purchase of land depends on the circumstances in which the claim is being made. In seeking to determine the purchaser's right to do so, there are three conveyancing factors which seem to be constants:**

**a. *the PA on a secondary sale*: Because the purchaser invariably executes a binding and enforceable contract prior to consulting a solicitor, he is bound to a contract which is said to be one-sided in favour of the vendor. This contract has been prepared by an estate agent, who is agent for both the purchaser and the vendor, but who would seem to favour the interests of the vendor. Further the terms of the contract are frequently contradictory. Matters of concern include**

**i. the effect of variation in the terms of the SPA which replaces the PA when the purchaser and vendor have consulted their respective solicitors:**

**ii. title problems: for example clauses in the legally enforceable and binding PA which may provide that:**

**1. the purchaser is deemed to have accepted title on the execution of the PA, thereby depriving him of any relief where the vendor's title is defective, aliter perhaps where the title is 'wholly bad': or**
**2. the purchaser has only a limited time in which to present requisitions/objections on title [and this time may pass before the purchaser has seen the title deeds]; this tyoe of clause**

**amends Condition 7(1) of Part A, Second Schedule, CPO by reducing the time mentioned therein.**

3. **the purchaser may have foregone the right to relief on the vendor's failure to make good title.**

**b.** ***the deposit*: A deposit is usually considered to be an amount representing 10% of the purchase price paid at the time of entry into the contract either in one sum or in more than one instalment around about that time *Silverpole Ltd v China Pride Investment Ltd* [1994] 2 HKC 341. Except in rare cases, anything in excess of 10% makes the whole sum a penalty and then different consideration arise.**

**The deposit is a matter for the common law. In the types of cases under consideration, including those where the vendor is being refused specific performance of the contract because his title is defective or where the purchaser is seeking a declaration that he was entitled to refuse to complete, the court has no jurisdiction to then consider the refund of the deposit to the purchaser. This is because Equity has no role in such an action. Even though the purchaser may have a defence to the vendor's action in specific performance, yet he will be bound at law by the contract, and so the deposit has been validly obtained by the vendor; and he retains it as the cost of the purchaser's broken promise to perform. To recover it would require the purchaser to show that the vendor has breached the contract; and even then the question will be a matter for the common law court in considering the question of damages and compensation.**

**The Court of equity does intervene in one situation concerning the deposit. It will do so if it feels able to grant relief against its forfeiture. To do this does require a court prepared to follow the New equity by treating the vendor's behaviour as unconscionable, or by raising an estoppel against him.**

**c.** ***the contract*: Most SPAs will include terms implied by reference to the usual categories of implied terms, as well as incorporated statutory terms. The incorporated statutory terms are found in Part A of the second Schedule to the *Conveyancing and Property Ordinance* [CPO] which can be incorporated as modified, or disregarded altogether dependent on the terms of the contract. Three relevant clauses are**

i. **Condition 3: the purchaser takes the land as he finds it in relation to its physical condition: the caveat emptor rule. This relieves the vendor from liability for latent and patent defects in the physical quality of the land, but not in respect of defects in title. Sometimes the boundary between quality and title defects is obscure. Where the vendor deliberately misdescribed the property he may be liable under the *Misrepresentation***

***Ordinance*. Generally, however, Condition 3 denies the purchaser any remedy no matter the physical state of the land.**

ii. **Condition 6: under which the purchaser is not able to rescind where the vendor has misdescribed the property unless his misdescription is substantial or material: *Flight v Booth* (1834) 1 Bing NC 370. If the misdescription is not substantial or materials then the purchaser may be entitled to compensation but will not be able to avoid the contract; and**

iii. **Condition 7(1): under which the purchaser must deliver requisitions on title to the vendor 'as soon as practicable after delivery of the title deeds, and at least 14 days before completion'. Condition 7(2) enables the purchaser to rescind the contract if the vendor is unable or unwilling to comply with the requisitions or where his title is defective: *Bain v Fothergill* (1874) LR 7 HL 158.**

**As general rule if the purchaser does not deliver requisitions within the stipulated time, he is not taken to have waived his right to avoid the contract if the vendor's title is wholly bad but he may be so considered where the defect is not of that nature.**

**THE *WANT v STALLIBRASS* (1873) LR 8 Exch 175 RULE**

**8. This rule provides that:**

**where a clause of the contract has provided that requisitions have to be presented to the vendor within a stipulated time, and on failure to do so the objections to title are deemed to have been waived, because time is of the essence, then the purchaser who has failed to observe this clause, is unable to recover the deposit even if the vendor's title is defective, and even if the vendor is refused specific performance of the contract.**

**9. The rule is predicated on the principle that the vendor is *not in breach*, but holds under an unenforceable contract. Consequently, the purchaser is unable to recover the deposit because its recovery would be equivalent to damages on breach, and without a breach there can be no damages.**

**10. The rule is modified where the vendor's title is 'wholly bad' on the basis that the vendor is in breach of an implied stipulation, usually thought to be applicable to contracts for the sale of land unless expressly excused, to the effect that he will show good title; this stipulation is an essential part of the contract and its performance by the vendor is the prerequisite condition for the purchaser's liability under the contract.**

**11. It is the *Want v Stallibrass* rule which has been modified by legislation such as section 49 (2) of the Law of Property Act 1925. Until the rule is abolished or modified in Hong Kong, it influences the rights of the purchaser in respect of the vendor's obligations where his title is defective.**

**12. The operation of the rule can be complicated by determining the meaning of a 'defective' or 'doubtful title'. The rule probably applies only where the title is defective, rather than wholly bad. How 'bad' must the vendor's title be to avoid the rule? Perhaps the defect must be 'incurable'. If the title is 'wholly bad' the vendor will be treated as being in breach of the implied obligation to show and make good title.**

**13. The rule has an inherent contradiction. On the one hand, the purchaser who has failed to observe timeously, or at all, the right to requisition, and so has lost his right to complain about the title; yet on the other hand the vendor who fails to observe the implied stipulation of good title can avoid some consequences of this failure. He cannot obtain specific performance but he gets to keep the deposit. The vendor is not treated as being in breach [despite his failure to show a good title] unless he expressly or implication contracted to give good title. It is this one-sided result which inferentially was considered in the two cases which have precipitated this discussion: *Wu Wing Kuen v Leung Kwai Lin Cindy* (1999) CACV 240/99.**

**14. These were not cases in which the vendor was seeking specific performance; instead the purchasers were apparently seeking declaration under section 12 CPO, vendor-purchaser summons, that they were right to refuse to complete the contracts and were entitled to return on the deposits. Probably the purchasers were seeking those declarations by claiming that the answers to requisitions were inadequate. However, this does not seem to emerge from the judgments.**

**15. The claims of the purchasers seemed to be based on the fact that there was only merely secondary evidence of title, which the purchasers doubted was sufficient within the terms of section 13, CPO.**

**In CACV 273/99 the purchasers had questioned whether the failure of the vendor to produce the original of an agreement (for the grant of a Government lease, dated 1889) was overcome by the production of secondary evidence as to the proof of the agreement. The Court of Appeal held that the purchaser had been bound to accept the secondary evidence. Consequently, the purchaser lost the deposit even though the vendor's title was to some extent defective.**

**In CACV 40/99 the vendor had sought to present secondary evidence of the contents and due execution of a power of attorney which had been used in the execution of an assignment, which assignment was part of the chain of title. The Court of Appeal held that although secondary evidence was allowed in such cases, the particular secondary evidence here was insufficient to prove due execution of the**

**power of attorney. Accordingly, the purchaser had rightly not proceeded to complete the contract. One presumes that the consequence would be that the vendor would be in breach of his contractual obligations relating to title, and the purchaser could recover the deposit [and perhaps other sums, dependent on the terms of the contract and whether or not *Bain v Fothergill* operates].**

**16. The consequence of the *Want v Stallibrass* rule is that:**

**a. the contract cannot be enforced in equity:**
**b. the vendor is *not in breach:***
**c. the deposit cannot be repaid:**
**d. the purchaser gets nothing [unless he proceeds to take the limited title shown by the vendor]; and**
**e. failing the purchaser proceeding, the vendor keeps the land and the deposit.**

**Unless the purchaser can show that the deposit is a penalty, nothing can be done to assist him. In modern terminology the vendor would get a 'windfall'.**

**17. There are two variations on the *Want v Stallibrass* rule which have the effect of totally altering it by treating the *vendor as being in breach*. This occurs where**

**a. the purchaser, bound by a clause requiring the presentation of requisitions/objections within a specific time, fails to observe that clause, but the vendor's title is *wholly bad*, the purchaser is able to recover the deposit despite his own failure. In this case the purchaser is saved by the fact that the implied stipulation on the part of the vendor that he will show good title operates against him to release the purchaser from his obligations under the contract and, by then treating the contract as rescinded the purchaser is able to recover the deposit. As it used to be said, the purchaser could sue on indebitatus assumpsit to recover it**

**In modern terms this would be treated as a trigger for relief by way of restitution based on a total failure of consideration on the vendor's party. But what degree of defect in title will cause this variation to apply rather than the general rule? In *Want v Stallibrass* the words 'incurable object to title' were used.**

**The consequence of this variation is that**

**i.. the vendor is in breach:**
**ii. the purchaser who formerly would have needed to show this breach, and sue in indebitatus assumpsit, can now rely on restitution:**
**iii. the vendor keeps the land; and**
**iv. the purchaser walks away with the deposit, but not necessarily expenses.**

**b. The second variation is that established in *Flight v Booth* 1 Bing NC 370. Under this rule the purchaser will not be able to rescind if bound by a clause in the terms of Condition 6, limiting the purchaser's right to rescind in cases of errors, omissions and misdescriptions unless the misdescription is substantial or material. Where the exception applies the purchaser will be entitled to**

**i. recovery of the deposit:**
**ii. expenses of investigation of title:**
**iii. costs:**

**but *not damages: Bain v Fothergill* (1874) LR 7 HL 158 unless the exceptions to the principle, derived from this decision, operate.**

**Thus the underlying principle, to the effect that the difficulty in establishing title because of complexities of English conveyancing, is used to excuse even the vendor's breach where the state of his title is in question and he is able to show that he was not fraudulent, or otherwise within the exceptions to *Bain v Fothergill.***

**18. Logically the introduction of something along the lines of section 49 (2) should be the cause of abolishing the rule in *Bain v Fothergill* something which other jurisdictions have already achieved]. The archaic problems which produced *Want v Stallibrass* have eased and relief [albeit within the discretion of the court] where the vendor is considered not to be in breach should complement the right of the purchaser to damages, thereby upsetting *Bain v Fothergill*. where the failure to award damages would be 'unconscionable'.**

***19*. The rule will apply even in a jurisdiction which provides for a system of registration of title although with some modification. Unlike the deeds system there is no need to go back in time, beyond the last entry on the register of registration of a dealing, to establish title. It might be thought that the vendor would then be rigorously bound by the contract. However, it would seem that the purchaser will only be able to recover the deposit where the title is 'incurably' defective: *Re Roe and Eddy's Contract* [1933] VLR 427. This would mean that the purchaser's failure to requisition would not necessarily lose him the right to a refund where the vendor's title is 'wholly bad'.**

**SECTION 49 (2) OF THE LAW OF PROPERTY ACT 1925 [Eng]
AND EQUIVALENT LEGISLATION: SEE FOR EXAMPLE
SECTION 49 (2) PROPERTY LAW ACT 1928 (Vic): SECTION 55
CONVEYANCING ACT 1919 (NSW).**

**20. Section 49 (2) (Vic) [and see the same numbered section in (Eng), and the terms of section 55 (2A) (NSW) provides that**

> **Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the Court may, if it thinks fit, order the repayment of any deposit.**

**In considering the operation of its discretion the court is to have regard to**

- **a. the gravity of the matters in question:**
- **b. the amounts at stake: and**
- **c. any exceptional circumstances justifying the exercise of the discretion;**

**so that if the court considers that the fairest course is to order the refund of the deposit, then that order will be made: *Poort v Development Underwriting* [1976] VR 775.**

**21. The immediate effect of the refund would be that the purchaser is discharged from his common law obligations under the contract so that the refund is the same as the court ordering rescission of the contract: *Re Hargraves and Thompson's Contract* (1886) 32 Ch D 454.**

**22. In recent decisions, the effect of section 49 (2) has been described as being**

> **designed to provide relief to a defaulting party to recover the deposit forfeited in circumstances where it would be fair and equitable to do so.**
>
> **In my opinion the width of the sub-section is such that the court could order the return of a deposit even though there was a default on the part of the purchaser. It seems to me that that was the object of enacting the sub-section. In other words, the sub-section was to overcome the full rigours of the common law. [*Bantick v Boss Properties Pty Ltd* [2000] VSW 121, Gillard J at paras 227: 228]**

**RELIEF IN EQUITY**

**23. The developments in the High Court of Australia in expanding equity into a New Equity took part from the earlier 1980s in particular when relief against forfeiture of monetary payments [rather than the more usual, and stricter English approach of relief for proprietary interests in land only] has been given to even defaulting purchasers. Much of what has been decided may not represent anything new in equitable jurisprudence because equity has had jurisdiction to relieve against 'fraud, mistake, accident, surprise or some other element'. However usually such relief was on more recognisable grounds such as where a payment was treated as a penalty. The new developments have extended relief to cases where the conduct of the defendant has been considered to be unconscionable or inequitable. Although not**

**so clearly identified as such in all cases, the court is really seeking to prevent unjust enrichment.**

**24. The first step in this process may well have been that taken in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 where an unconscionable bargain was set aside; this involved something broader than undue influence because of the presence of the unconscionable aspect of the transaction. In *Legione v Hateley* (1983 57 ALJR 292 it was thought that relief against forfeiture of the deposit [and other payments] could be granted by way of specific performance even to the defaulting purchaser where that purchaser had breached an essential time stipulation. To do this the court was required to ignore *Steedman v Drinkle* [1916] 1 AC 275, which hitherto had bound the High Court, and to adopt a more ad hoc manner of dispensing justice: see *Stern v McArthur* (1988) 81 ALR 463: *Kilmer v British Columbia Orchard* [1913] AC 319.**

**25. In conveyancing the consequence of these developments is that the courts will grant relief against forfeiture of the deposit even where the purchaser is in breach of the contract, and where that breach is repudiation rather than a simple breach.**

**26. The choice of remedies available to this new equity were exapnded by the decision in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 where the decision of the High Court was more far-reaching than simply deciding that an ultra vires contract is no barrier to restitutionary relief where the defendant had received and retained a benefit under that contract. This was merely an illustration of unjust enrichment being overcome in the new form of restitution, and became the starting point for relief especially in conveyancing situations. It was in *Pavey* that Deane J described unjust enrichment as**

> **a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case. [at 256-257]**

**27. Finally, *David Securities Pty Ltd v CBA* (1992) 66 ALJ 768 relying on the modern unifying remedy of restitution, enabled the abolition of the rule, in force since 1802, that there was a distinction between the right to recover money paid under mistake of fact [recoverable] and mistake of law [not recoverable]. *David Securities* adopted the restitution of *Pavey's* case to disregard the distinction, thereby returning to the pre-1802 position, and further it permitted the defence of 'change of position' to operate where necessary in such cases. The House of Lords in *Kleinwort Benson v Lincoln LBC* finally accepted the Australian decision, and the prominence to be given restitution, in 1998.**

**28. One factor of interest in the restitution cases is that it would seem to be immaterial that the plaintiff is himself in breach of an obligation.**

**29. Restitution requires a trigger beyond unconscionability: *Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 HKC 173 [PC]. That factor was found by the majority judgment *in Pacific South (Asia) Holdings Ltd v Million Unity International Ltd* [1997] 3 HKC 440 as estoppel -- albeit in a negative form as an obligation to undeceive the plaintiff.**

**30. When considering the application of *Want v Stallibrass* situation it was said that the old position may have been that where the title was 'wholly bad' then the purchaser could seek to sue in indebitatus assumpsit for recovery of the deposit. The modern version of this is probably restitution based on 'total failure of consideration'. Thus where the vendor has failed to provide *any title at all,* the purchaser would be able to show that the contract is totally ineffective so that restitution is the only conscionable remedy: *Fibrosa Spolka Akcyjina v Fairbarin Lawson Combe Barbour Ltd* [1943] AC 32: *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457: *Goss v Chilcott* [1997] 2 All ER 110.**

**DISCRETION**

**31. The use of discretion can be blamed for two problems**

**a. an over eagerness to grant relief in cases where the remedy perhaps should not be available. and**

**b. individual, in personam justice is given at the expense of certainty.**

**Many of the decisions since the 1980s, especially from the High Court of Australia, might well be considered to have transgressed and been the source of concern in relation to these two problems.**

**32. In relation to a., it is to be remembered that the overriding obligation of a court of equity is to prevent equitable fraud [an elusive and difficult to define concept]. Further equity has inherent jurisdiction where there is 'fraud, mistake, accident or surprise'. The New Equity puts this on a clear footing by referring to 'unconscionability' which causes the court to act. This would seem to extend the instances of equitable relief but all would be justifiable in light of prevention of unconscionability.**

**As Lord Denning Mr observed in *Hill v CA Parsons & Co Ltd* [1971] 3 All ER 1348, at 1351, in reversing the lower court's refusal of an injunction:**

> **The judge said that he felt constrained by the law to refuse an Injunction. But that is too narrow a view of the principles of law. He has overlooked the fundamental principle that, whenever a man has a right, the law should give a**

**remedy. The Latin maxim is *ubi jus ibi remedium*. This principle enables us to step over the trip-wires of previous cases and to bring the law into accord with the needs of today.**

**33. Certainty may well be lost but the exercise of the discretion would be in the interests of two parties to a particular contract, rather than the stating of a general rule.**

**EXPANSION OF EQUITY**

Sent to the Law Reform Commission via the Faculty's representative, Professor Yash Ghai

1. There are several areas of contract, property law, and Equity [general principles and Trusts] where overseas courts [in particular Australia, but also Malaysia, Singapore, Canada, and New Zealand] are expanding the principles of equitable relief in its availability, and its contents. In the field of contract and property there are probably four main forms of this new equity, namely promissory estoppel, unconscionable bargains, reclassification of the contract, and relief against forfeiture.

   See eg the Singapore decision in *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 738 lead the Privy Council in *AG v Reid* into abolishing *Lister v Stubbs*. This involved an intricate application of what could be called new equity.

2. *Promissory estoppel*: where it is used not only as a shield for the variation or waiver of a pre-existing contractual obligation, but also as a sword to prevent one party denying the existence of the contract. As a sword it would seem to act as a factor in establishing evidence of intention to create legal relations, **albeit** in a negative form.

   This has meant that the role of promissory estoppel, as consideration for forebearance of existing contractual obligations in the modern form established in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, has been altered radically.

   In Australian courts this re-interpretation is generally rationalised as being a re-emergence of inherent equitable principles which requires the court to act to prevent equitable fraud [*Earl of Chesterfield* (1751) 28 ER 82].

   *Walton's Stores (Interstate) Ltd v Maher* (1988) 62 ALJR 110.

   A more formal example of *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 promissory estoppel, in its correct form as consideration on the waiver of existing contractual rights, was found in *Legione v Hateley* (1982) 152 CLR 406 [where however the statement was inadequate to function as a representation]

   *AG v Humphrey's Estates* [1987] 2 WLR 343 where estoppel was sought to be used to get over the problem that negotiations were 'subject to contract'; the Government wanted to avoid this condition and say that a contract had been formed: this failed because of the absence of the 3 requirements of representation, reliance, and detriment.

   *Humphreys Estate* was then referred to in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387
   *Tin Shui Wai Development LTd v AG* (1989) Const List NO 5/87

2. *Unconscionable bargains:* where the court will refuse to enforce a contract against a party with a disability where he has been victim of 'unconscionable conduct': *Commercial Bank of Australia v Amadio* (1981) 151 CLR 442.

3. *Relief against forfeiture* NOT under the contract BUT under general principles of the new equity.

   *Foran v Wight* (1989) 64 ALJR 1

4. *Reclassifying the nature of the contract* thereby enabling equitable relief. In *Stern v McArthur* the contract for the sale of land was reclassified as a mortgage [because the purchaser was in possession paying the purchase price in instalments] whereby the vendor as mortgagee was financing the purchase.

5. Despite the abundance of equity in Australian courts, Brennan J in *Stern v McArthur* (1988) 81 ALR 463, at 472, noted that 'the concept of unconscionability is not a charter for judicial reformation of contracts'. However, this admonition does not seem to have slowed down the impact of equity: *FAC v Makucha Developments* (1993) 115 ALR 679.

6. It should be noted that the unsuccessful English equivalent to the generous Australian approach of alleviating unconscionable bargains, was that of 'inequality of bargaining power': *Schroeder Music Publishing Co Ltd v Macaulay* [1971] 1 WLR 1308: *Clifford Davis Management Ltd v W E A Records Ltd* [1975] 1 WLR 61. But there was no great success with this as the foundation of a general, un-disciplined, 'Chancellor's foot' justification for equity. Perhaps this is because 'inequality of bargaining power' was too closely linked to equitable defences, such as undue influence, and what was needed was simply a broad illustration of equity 'in action'.

7. Isolated instances in England of what may be termed the new equity were found in cases such as *Spiro v Lintern* [1973 3 All ER 319 where some sort of estoppel was used, and *Harvela v Royal Trust of Canada* [1986] AC 207 where reliance was important in formation of the contract

8. In Hong Kong there has been a steady stream of decisions in Hong Kong which have mentioned, referred to, sought to apply, or merely remarked on, the Australian developments:

   *Union Eagle Ltd v Golden Achievement Ltd* [1996] 1 HKC 349: *Lai Kam Hon v Wong Lun Hing* [1994] 2 HKC 320:
   *Dawson Enterprises Ltd v Talisteam Ltd* [1994] 2 HKC 327: *Lee Kenny v Wong Kwok Yan* [1994] 2 HKC 309:
   *China Pride Investment Ltd v Silverpole Ltd* [1994] 2 HKC 341:
   *Tsai Chuen Kwong v Chow Kam Chuen* (1995) HCA No A6005/93: *Gladflow Ltd v Grandland Development Ltd* [1993] 2 HKLR 494.
   *Gladflow Limited v Grandland Development Limited* [1993] 2 HKLR 494
   *Ananda Non-Ferrous Metals Ltd v China Resources Metal and Minerals Co Ltd* [1994] 2 HKC 309:
   *Wong Kwok Yan v Lee Kenny* [1994] 1 HKC 204

**CURRENT HONG KONG PRACTICE ON REPUDIATION AND THE FORFEITURE OF THE DEPOSIT**

1. The majority of Sale and Purchase Agreements of land in Hong Kong provide both that time is of the essence for the performance of obligations, and that on the purchaser's failure to perform timeously the vendor can forfeit the deposit. Related to this are questions of whether the breach amounts to repudiation, whether there can be relief against forfeiture of the deposit, and what constitutes a deposit.

2. The *general* rule would seem to be

   a. a deposit of 10% of the purchase price is not a penalty:

   b. If time is of the essence, failure to perform on the due date constitutes repudiation so long as the obligation being breached is classified as a breach 'going to the root' of the contract, or as an 'essential' term: then

   c. under contractual principles, there is no right of relief against forfeiture.

   *Lee Gee Kee v Chong Kai Tai* [1996] 1 HKC 105:
   cf *Health Link Investment Ltd v Pacific Hawk Investment Ltd* [1995] 1 HKC 249.

3. Unless the deposit is treated as a penalty, the court cannot grant relief *under the contract* from its forfeiture.

4. Failure to comply with the essential time stipulations is treated as a repudiatory breach; on the appropriate response by the innocent party [ie, acceptance of that repudiation] the innocent party can terminate the contract and seek relief. The appropriate remedy normally would be specific performance, unless this would be futile.

   Current difficulties with the interpretation of 'repudiation' are not relevant here.

5. The repudiating party will lose all right to sue and will be liable at least for damages: *Stickney v Keeble* [1915] AC 386.

6. The question of the essentiality of time in the performance of obligations is linked to the requirement of being 'ready, willing and able' in a somewhat circuitous manner; if the obligation is not performed on time, then the defaulting party is not entitled to pursue any remedies due to the fact that he was not ready, willing and able to perform an essential term of the contract, namely that of performance on the exact day and time expressed in the contract.

7. In *Steedman v Drinkle* (1916) 114 LT 248 Lord Haldane said

   > Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or

by implication waived the provision made, the jurisdiction will again attach.

cf: *Kilmer v British Columbia Orchard* [1913] AC 319 where the court allowed relief against forfeiture on the basis that the deposit in that case was a penalty.

*Ip Ming Wai v World Ford Development Limited* [1993] 1 HKC 98

8. The Australian courts consider that it might be unconscionable to deny relief to the purchaser in all cases. Consequently relief against forfeiture has been granted

   a. on traditional equitable principles of relief because of 'fraud, surprise and mistake': and

   b. on newer interpretation of the role of Equity acting to prevent equitable fraud. This extended the grounds for relief to those involving unconscionable conduct on the part of the vendor.

**THE NEW AUSTRALIAN EQUITABLE APPROACH TO RELIEF AGAINST FORFEITURE OF A DEPOSIT WHICH IS *NOT* A PENALTY**

1. Whether or not time is of the essence, and even though the defaulting purchaser may have not been 'ready willing and able' to perform his contract, he still may be able to recover the forfeited deposit on equitable grounds.

2. It would seem that where there has been a breach by the purchaser which would otherwise on traditional grounds be treated as repudiation, then one may ignore this traditional effect because ultimately the court might be convinced to grant relief against forfeiture to the purchaser. Thus two steps are being taken for one. Where the purchaser is not 'ready willing and able' to perform his obligations on the due date, then he will be disentitled from seeking specific performance under the contract because this failure represents a discretionary bar to relief; further he will be disentitled to relief against the forfeiture: *Steedman v Drinkle* [1916] AC 275.

   *But* the purchaser may then ask the court to grant relief against forfeiture of the deposit; he may say that the vendor's conduct was such that the purchaser had no course of action but to repudiate, or he may say that it is unconscionable for forfeiture to occur.

   For example, prior to *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2 All ER 370 the purchaser may have complained that a deposit of 10% was too high and forfeiture represented a penalty.

   Interpretation of the term 'unconscionable' is difficult and no general rule can be discerned from the cases: *Foran v Wight* (1989) 64 ALR 1.

   *Lee Gee Kee v Chong Kai Tai* (1995) CA No 109/95

3. The Hong Kong courts, although whilst in some cases not enthusiastically accepting the new Australian equity and still more in others following strict common law principles,

have generally said that it can apply in appropriate circumstances.

a. *Health Link Investment Ltd v Pacific Hawk Investment Ltd* [1995] 1 HKC 249 where relief against forfeiture was granted, not on grounds of 'unconscionability' but presumably on a strict, contractual interpretation of the actions of the vendor in varying time for performance of these two obligations.

*b.* *World Ford Development Ltd v Ip Ming Wai* [1993] 1 HKC 98 where Litton JA observed that '[g]enerally speaking, there is no elasticity in punctuality' [at 108]: Bokhary JA said that essential time stipulations 'must be respected if people are to know where they stand' [at 109].

*c.* *Keung Shiu Tang v DH Shuttlecocks Ltd* [1994] 1 HKC 286 Godfrey JA said that if 'one party makes demands ... which are so unreasonable that he must be demonstrating an intention no longer to be bound by the contract ... he may well be held to have repudiated it' [at 291].

*d.* *Cheung Yun-ho v Wong Kwan-cheung* [1995] 2 HKLR 90, Godfrey JA referred to behaviour of the vendor as that by which 'the purchasers are placed in an impossible position' [at 93] with the consequence that it was the vendor not the purchaser who really repudiated the contract.

e. *Gladflow Limited v Grandland Development Limited* [1993] 2 HKC 494 the purchaser's solicitor claimed that someone in the vendor's solicitor's office had agreed to extension of time for completion; thus the vendor was estopped from relying on the strict terms of the contract. Godfrey J [as he then was] said that had there been an extension, the court would have two questions to answer. First, could relief against forfeiture of the deposit be granted; and second, if so ought the court then order specific performance? His Lordship found that there had been no promissory estoppel on the part of the vendor.

In the course of his judgment he noted the 'controversial decisions' of *Legione* and *Stern v Mc Arthur*. However, as there was no 'unconscionable' conduct on the part of the vendor, then the decisions were of no help to the purchaser. He also referred to the *Kilmer* and the *Steedman v Drinkle* cases but without distinguishing them. He noted that the *Kilmer* allowed relief against forfeiture of all instalments of the purchaser price; he would categorise the forfeiture clause in the instant case as penal. But by reference to *Steedman*, his Lordship felt constrained against allowing relief where the plaintiff had breached an essential time stipulation.

f. *Link Brain Ltd v Fujian Finance Co Ltd* [1990] 2 HKLR 353, the court enforced the general rule that where a party breaches an express time stipulation he is unable to seek specific relief.

g. *Ng Chek-kok v Kiu Wai-ming* [1992] 1 HKLR 5 the purchaser tried to show that the forfeiture of the deposit would be improper and that relief should be given. However,

The courts have been disposed to grant relief from forfeiture clauses regarded as creating penalties which it would be unconscionable to retain) in cases where a purchaser has contracted to purchase land by instalments under an agreement making time of the essence and the vendor has rescinded the contract and forfeited one or more earlier instalment payments upon default by the purchaser in respect of an subsequent payment of an instalment: see *Kilmer v British Columbia Orchard Lands* [1913] AC 319; *Steedman v Drinkle* [1916] AC 275. ...

Where however a vendor exercises a right to forfeit a deposit (which is an earnest of the performance of the contract by the purchaser) upon the default of a purchaser the forfeiture is not a penalty and its retention has been said to be liquidated damages...

Assuming, without deciding, that this court does have jurisdiction in equity to grant relief in respect of the forfeiture which the purchaser has incurred in the present case, we declined to do so. We can see nothing unconscionable in the vendor's conduct. [at 16-17]

h. All members of the court of appeal in *China Pride Investment Ltd v Silverpole Ltd* [1995] 1 HKLR accepted the principles established in the decisions of *Legione* and *Stern.* In his judgment Godfrey JA noted

> if the failure of the purchaser to complete at the date and at the fixed time for completion is attributable, or partly attributable, to the conduct of the vendor, the vendor will not be allowed to rely on the purchaser's default as justification for calling off the contract and forfeiting the purchaser's deposit.
>
> (These are simple applications of the ordinary law of contract to agreements for the sale and purchase of land. But there is a wider rule, of equity, that, if in any particular case it was unconscionable conduct on the part of the vendor, given all the circumstances, for the vendor to have called off the contract and forfeited the purchaser's deposit, the purchaser may be granted relief from the forfeiture. [at 61].
>
> Nazareth JA said it was unnecessary to 'specify or formulate the precise basis upon which the effect of the vendor's conduct is to be placed' [at 64]. Relief would result because time was no longer of the essence because of the vendor's conduct or because
>
> > the circumstances of the unconscionable conduct being exceptional .. or special, such as 'fraud' or 'sharp practice' [at 64].
>
> Penlington JA based his judgment on finding that the deposit probably would have been a penalty.

4. Often the question can be disposed of without the need to consider equity, by finding that there had not been repudiation, or that there was no binding contract.

*Lee Gee Kee v Chong Kai Tai* (1995) CA No 109/95

5. In *Union Eagle v Golden Achievement* completion [for which time was of the essence on the part of both parties] was due at 5pm. The purchaser was late. At 5.01pm the vendor's solicitor telephoned the purchaser's solicitor and said that 'the vendor reserves his rights'. At 5.10pm the purchaser tendered the balance of the purchase money. The vendor's solicitor refused to accept it. At 5.11pm the vendor's solicitor advised the purchaser's solicitor that the vendor had accepted the repudiation.

The Majority [Litton VP and Ching JA] held that the communication at 5.01pm did not act to waive the essentiality of time because 'the purchaser was in default and the vendor considered its position and then exercised its contractual rights' [at 12].

On the other hand, in the opinion of Godfrey JA, there was no acceptance of the repudiation until **after** the tender of the balance of the purchase price and at that time [5.11pm] the purchaser was no longer in default. In his Lordship's opinion the statement 'the vendor reserves his rights' meant continuance not determination of the contract; and because it was a minor breach it did not constitute repudiation as 'the vendor has suffered no prejudice whatever by reason of the purchaser's few minutes delay' [at 21]. His Lordship continued

> How can it be considered just, or equitable, to allow the vendor to forfeit the purchaser's equitable interest in the property, and its deposit.. passes may comprehension. In my judgment, the case cries out for the intervention of equity, to restrain the vendor from acting in this way, and to compel performance of the contract.
>
> This is an exceptional case. At least, I hope it is. If it is the common practice of vendors to seek to take advantage of a few minutes' delay by solicitors (or their messengers) to call off the bargains they have made with their purchasers, then it is past high time that [sic] for this court to step in to put a stop to it. [at 21]

The case went on appeal to the Privy Council which found no reason to grant relief [3 February 1997]. The Judicial Committee supported *Steedman v Drinkle*

In the course of the judgment, the Judical Committee noted that

> it is not necessary to consider these Australian developments further because they provide no help for the purchaser in this case. [p6 pf the transcript]

and

> It remains for consideration on some future occasion as to whether the way to deal with the problems which have arisen in such cases is by relaxing the principle in Steedman v Drinkle .. as the Australian courts have done, or by

development of the law of restitution and estoppel. [Lord Hoffman p 6 of the transcript].

**THE PROBLEM FOR HONG KONG IN RELATION TO CONTRACTS FOR THE SALE OF LAND**

1. The difficulty for us in Hong Kong is now at this time -- with limited assess to the Privy Council -- to work out whether we will follow the Australian courts or whether we will retain the strictness of *Steedman v Drinkle.* We do not have a great deal of time to play around with the various possibilities. If the Australian approach is appropriate, then we should endorse it; if it is not then we must find our own formula.

   But because much of Equity is *ad hoc*, it would be useful to offer guidance on what is the acceptable approach in HK.

2. *Legione v Hateley* (1983) 57 ALJR 292 referred to *Steedman v Drinkle* and *Brickles v Snell.* In their joint judgment, Gibbs CJ and Murphy J, noted that the purchasers had an equitable interest in the land on entry into the contract, and that it was that interest which would be forfeited. The justification also rested on inherent equitable principles of relief against a penalty. The court was able to equate relief against the forfeiture of money payments (which incidentally resulted in the loss of the equitable interest) with relief against the enforcement of a penalty clause in a contract. Thus

   > A court of equity will grant specific performance notwithstanding a failure to make a payment within the time specified by the contract if there is nothing to render such an order inequitable. The fact that time for the performance of the stipulated obligation is of the essence of the contract generally makes the grant of specific performance inequitable in such a case. However, if it is just to relieve against the forfeiture which is incurred when the vendor retains payments already made under the contract, it is difficult to see why it should be unjust to relieve the purchaser against the forfeiture of the interest in the property that results in exactly the same circumstances. No doubt where the parties have chosen to make time of the essence of the contract the grant of relief against forfeiture as a preliminary to an order for specific performance will be exceptional. Nevertheless on principle we can see no reason why such an order should not be made if it will not cause injustice but will on the contrary prevent injustice. If relief against the forfeiture is granted, the objection to the grant of specific performance is removed. [at 300]

   Their Lordships added that the Privy Council decisions of *Steedman v Drinkle* [1916] 1 AC 275 and *Brickles v Snell* [1916] 2 AC 599 were to different effect. These cases decided that specific performance, even by way of relief against forfeiture, is

   > never ordered when a stipulation as to time, which is of the essence of the contract, has not been observed. However ... the Privy Council in *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319 had ordered specific performance of a contract by way of relief against forfeiture at the suit of the purchaser, notwithstanding that the vendor had elected to treat the contract as at

> an end.... the contract containing a provision that time was to be of the essence. [Mason and Deane JJ at 305]

In preferring the approach of *Kilmer* to that of the strict and inflexible rule of *Steedman* and *Brickles,* Mason and Deane JJ said that the

> preferable course is to adjust the availability of the remedy so that it becomes an effective instrument in situations in which it is necessary to relieve against forfeiture of the purchaser's interest under a contract for sale. The rule would then be expressed by saying that it is only in exceptional circumstances that specific performance will be granted at the instance of a purchaser who is in breach of an essential condition.
>
> Whether the exceptional circumstances exist in a given case hinges on the existence of unconscionable conduct. It is impossible to define ... exclusively all the situation which may give rise to unconscionable conduct....None the less it may be said that where the conduct of the vendor, though not creating an estoppel or waiver, has effectively caused or contributed to the purchaser's breach of contract there is ground for exercising the jurisdiction to relieve. And if it also appears that the object of the rescission is not to safeguard the vendor from adverse consequences which he many suffer as a result of the contract remaining on foot, but merely to take unconscientious advantage of the benefits which will fortuitously accrue to him on forfeiture of the purchaser's interest under the contract, there will be even stronger ground for the exercise of the jurisdiction. [at 309]

3. In *Gladflow Limited v Grandland Development Limited* [1993] 2 HKLR 494 the purchaser's solicitor claimed that someone in the vendor's solicitor's office had agreed to extension of time for completion; thus the vendor was estopped from relying on the strict terms of the contract. Mr Justice Godfrey said that had there been an extension, the the court would have two questions to answer. First, could relief against forfeiture of the deposit be granted; and second, if so ought the court then order specific performance?

   His Lordship found that there had been no promissory estoppel on the part of the vendor. In the course of his judgment he noted the 'controversial decisions' of *Legione* and *Stern v Mc Arthur*. However, as there was no 'unconscionable' conduct on the part of the vendor, then the decisions were of no help to the purchaser. He also referred to the *Kilmer* and the *Steedman v Drinkle* cases but without distinguishing them. He noted that the *Kilmer* allowed relief against forfeiture of all instalments of the purchaser price; he would categorise the forfeiture clause in the instant case as penal. But by reference to *Steedman*, his Lordship felt constrained against allowing relief where the plaintiff had breached an essential time stipulation.

   *Link Brain Ltd v Fujian Finance Co Ltd* [1990] 2 HKLR 353

4. In *Ng Chek-kok v Kiu Wai-ming* [1992] 1 HKLR 5 the Court of Appeal said

> The courts have been disposed to grant relief from forfeiture clauses regarded as creating penalties which it would be unconscionable to retain) in cases where a purchaser has contracted to purchase land by instalments under an agreement making time of the essence and the vendor has rescinded the contract and forfeited one or more earlier instalment payments upon default by the purchaser in respect of an subsequent payment of an instalment: see *Kilmer v British Columbia Orchard Lands* [1913] AC 319; *Steedman v Drinkle* [1916] AC 275. ...
>
> Where however a vendor exercises a right to forfeit a deposit (which is an earnest of the performance of the contract by the purchaser) upon the default of a purchaser the forfeiture is not a penalty and its retention has been said to be liquidated damages...
>
> Assuming, without deciding, that this court does have jurisdiction in equity to grant relief in respect of the forfeiture which the purchaser has incurred in the present case, we declined to do so. We can see nothing unconscionable in the vendor's conduct. [at 16-17]

5. All members of the court of appeal in *China Pride Investment Ltd v Silverpole Ltd* [1995] 1 HKLR accepted the principles established in the decisions of *Legione* and *Stern*.

**THE SOLUTION?**

1. Whilst this area is not the usual one considered by the Law Reform Committee, it is of importance, not only in the fields of contract and property, but also generally. It should be noted that recently it could be said that the House of Lords and the Privy Council have made contradictory judgments on several points [contradicting themselves as well as the other court] on subjects such as

   > the issue of damages where no loss has been suffered [*Linden Gardens*]:
   > the nature of the interest of the payer where the contract is illegal or where there is payment under mistake [*Westdeutsche: AG v Reid: Re Goldcorp*]:
   > accessory liability for the other-fashioned knowing assistance and knowing receipt [*Royal Brunei Airlines*]:
   > and many more.

   In many cases these decisions the guiding force could be said to be 'restitution' in the new sense of avoidance of unjust enrichment.

   Associated with the developments of equity in the contract and property field has also been that of restitution in the area of Recovery of money paid under mistake, and the changes to traditional principles achieved there.

   *David Securities*

*Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 221
*ANZ v Westpac* (1988) 164 CLR 662

The effect on illegality is also undergoing a renaissance.

2. We have been urged by Lord Hoffman to ignore the Australian decisions on relief against forfeiture through Equity rather than through the contract, and instead resort to restitution and estoppel. But is this the new restitution and the new estoppel of the **Australian** courts, or is it something less with all the uncertainties of the older forms of quasi-contract, quantum meruit, and such oddities?

3. If the developments in the fiduciary obligation are anything to rely upon, then the restitution and estoppel **must** be that of the new equity.

4. One question then is:

> Do we follow the Australian generous, expanding and one must say exciting, equity?
> Or do we follow *Steedman v Drinkle* and allow the contract to prevail regardless of the surrounding circumstances?
> Or do we take the road of 'restitution and estoppel'? If the latter do we follow the flamboyant Australian approach or the more subdued English approach?

5. The other question must then be:

> In what circumstances will the court find that restitution or estoppel enable it to grant relief against the express terms of the contract -- and of the general principles of law?

Judith Sihombing
6 March 1997

**Appendix 4**

**THE HONGKONG CONVEYANCING AND PROPERTY LAW ASSOCIATION LIMITED**
**C/o S.H. Leung**
**Room 502, Aon China Building, No.29 Queen's Road, Central, Hong Kong**
**Tel: 28101606 Fax: 28106911**

Our Ref. SHL/LOL
Your Ref. LP 518/00 2 May 2000

Mr. Stephen Kai-yi Wong,
Deputy Solicitor General,
Department of Justice,
Legal Policy Division, **BY FAX AND BY HAND**
4th Floor, High Block,
Queensway Government Offices,
66 Queensway,
Hong Kong.

Dear Mr. Wong,

Re: Legislation to Empower Courts to Order Return of Deposits to Purchasers

I thank you for your letter of 9th March 2000.

Directors of our Association have not reached a consensus on whether there was a need to amend the legislation to enable the Court of its own motion to order repayment of deposits to purchasers.

Mr. John Morgans of Messrs. Baker & Mckenzie, the Chairman of the Property Committee of the Law Society had given a lengthy summary of the law and the reasons for and against the change of the law and I am most grateful to him for such summary from which I form my personal opinion. Mr. John Morgans might have informed his views to you through the Law Society.

My personal opinion is that the Court should be given the power to order refund deposit to cases owing to the complexity of the law i.e. Ip Foo Keung Michael and Chan Ling Wen Elaine v Chan Pak Kai (Civil Appeal No.273 of 1999) and Wu Wing Kuen v Leung Kwai Lin Cindy (Civil Appeal No.240 of 1999) or cases where the Purchaser had come with clean hands as in the case of Universal Corporation v Five

Ways Properties (1979) 1 ALL E.R. 522 or where the Vendor has resold the property at a gain as in Dimsdale Development (South East) v. De Haan (1983) 47P & C.R.1 and other cases following the factors (if any) to be laid down by the Ordinance in determining whether the relief should be granted.

However, it is submitted that the Court should not exercise its discretion in cases similar to the case of Charles Hunt Limited v Palmer (1931) 2 Ch 287 because the Court overruled the express condition of sale and it is unfair to the Vendor. In Hong Kong, purchasers usually sign in the Estate Agency's office a so called preliminary agreement or provisional agreement without knowing exactly what its contents mean and without knowing the risk involved. Furthermore, unlike the agreements for sale and purchase in England, nearly every agreement for sale and purchase contains a provision that time shall be of the essence. Purchasers in Hong Kong should be educated and encouraged not to sign any document to purchase land in a hurry and to consider the risk of agreeing to the provision that time is of the essence. (Although I must say, this may never been achieved in Hong Kong) If purchasers have chosen to accept the title and agree that time shall be of the essence, it is only fair that they should lose the deposit.

As far as Section 55 of the New South Wales Conveyancing Act 1919, it is submitted that we should not follow for the following reasons:-
Owing to the complicity of the law in Hong Kong :-

1. Section 55(1) imposes the obligation for the Vendor to return the deposit and release the purchaser from all liability in cases where the conditions therein set out unless the contract discloses such defect and contains a stipulation precluding the purchaser from objection thereto. However, what if a defect? The law is complicated and even learned judges have different opinions. If the Solicitors acting for the Vendors honestly believe that there is no defect and therefore does not disclose in the contract, he may be blamed by his client for failure so to do. This will increase the claim against Solicitors and increase litigation unnecessarily. If the Australian rule is adopted, whenever there is a defect in the Vendor's title and the Vendor does not disclose the defect in the contract or such contract does not contain a stipulation precluding the purchaser from objecting thereto, the Purchaser would be entitled to recover the deposit and be relieved from all liability, this is most unfair to the Vendor because in Hong Kong, even Solicitors for the Vendor discovers the defect, they would not be able to insert a provision in the agreement precluding the Purchaser from objecting thereto because in the usual case, there is no such provision in the preliminary agreement.
2. The Australian rule relieves the purchaser from any liability under the contract whether at law or in equity. In the case of Dimsdale Development (South East) v De Haan (1983) 47 P & C.R.1, if the Australian law were to apply, the learned judge would be forced to relieve the purchasers from damages and the Vendor could be treated unfairly because there was no reason why the purchasers would not pay damages to the Vendor for loses occasioned by the purchaser's breach of contract.

However, I welcome the factors to be weighed in determining whether relief should be granted as set out in the Australian case of Gogard Pty Ltd v Satnaq Limited (1999) NSWSC 1283 (23rd December 1999)

Yours sincerely,

LEUNG SIU HON
PRESIDENT
LOL/HKCPADisk2

**Appendix 5**

**Letterhead of THE LAW SOCIETY OF HONG KONG**

Our Ref : SG/PA/1271
Your Ref : LP 518/00
Direct Line :

3rd May 2000

Mr. Stephen K. Y. Wong,
Deputy Solicitor General,
Department of Justice,
4th Floor, High Block,
Queensway Government Offices,
66 Queensway,
Hong Kong.

Dear Stephen,

**S.13, Conveyancing and Property Ordinance (Cap. 219)**

I refer to your letter dated 2nd March since which time this matter has been considered by the Property Committee of the Law Society on more than one occasion and yesterday 2nd May at a meeting of the Council.

In both the Property Committee and the Council after lengthy debate there was no consensus as to whether a change should be effected to provide the court with a discretion to order a return of the deposit to the purchaser. Members were of the view that there were compelling arguments both for and against the proposal and were unable to agree unconditionally that there should be legislative amendment.

This may well be an issue that might be referred to the Law Reform Commission in view of the strong arguments both for and against the amendment.

Yours sincerely,

Patrick Moss
Secretary General

PM/ff

**Appendix 6**

**Letterhead of HONG KONG BAR ASSOCIATION**

By fax and by delivery
(fax: 2869-0720)

5th May 2000

Mr. Stephen Kai-yi Wong
Deputy Solicitor General
Legal Policy Division
Department of Justice
4/F High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Mr. Wong,

**Re: S.13, Conveyancing and Property Ordinance (Cap.219)**

Thank you for your letter on 2nd March 2000 seeking the Bar's views on the above Consultation Paper. Enclosed please find the Bar's comments thereon for your consideration.

Yours sincerely,

Ronny Tong, S.C.
Chairman

Encl.
/al

**HONG KONG BAR ASSOCIATION**
**COMMENTS ON**
**S.13, CONVEYANCING AND PROPERTY ORDINANCE (CAP.219)**

1. The Hong Kong Bar Association is asked by the Department of Justice ("DOJ") to express views on the question whether the court in Hong Kong should be given a discretionary power similar to that of the court in England and Wales under s.49(2) of the Law of Property Act 1925 ("the Act").

## THE COMMON LAW REGARDING REPAYMENT OF DEPOSITS

2. At law, a vendor is only liable to return the deposit if the purchaser can show a case for rescission of the contract. This is so even though the vendor, while not in breach of the contract, is for one reason or another unable to obtain specific performance of the contract.

   Re Scott and Alvarez's Contract, Scott v. Alvarez [1895] 2 Ch 603, per Lindley L.J. at 612 & Lopes L.J. at 615
   Beyfus v. Lodge [1925] 1 Ch 351, per Russell J. at 358-61.

## LEGISLATIVE INTERVENTION IN ENGLAND & WALES

3. s.49(2) of the Act reads as follows:

   *"Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit."*

### History of application

4. To use the words of Megarry J. (as he then was) in Schindler v. Pigault (1975) 30 P&CR 328 at 336, s.49(2) was "remarkably quiescent" in the first 50 years of its life.

5. Further, the decisions in the handful of cases in which the court ordered vendors who were not in breach of contracts to return deposits to purchasers reported in this earlier period (e.g. Charles Hunt, Limited v. Palmer [1931] 2 Ch 287, per Clauson J. at 293 and Finkielkraut v. Monohan [1949] 2 All ER 234, per Danckwerts J. at 237H-238A) were not reasoned.

6. In consequence, there was, until the mid to late 1970's, considerable uncertainty surrounding the scope of s.49(2), the nature of the jurisdiction conferred by it and the circumstances that would justify the court in exercising the power thereunder.

**Principles established by cases since 1975**

Scope

7. It is now clear that s.49(2) provides a statutory jurisdictional basis for a purchaser of any interest in land (whether by sale or exchange) who does not claim rescission of the contract or is unable to establish a sufficient case for it because he is himself in default, to nevertheless recover his deposit by suing for its return and making out a proper case under the subsection. This jurisdiction is not confined to the case where the vendor could, but has not, sued for specific performance. See, e.g.,

> Schindler v. Pigault, at 336
> Universal Corporation v. Five Ways Properties Limited (1979) 34 P&CR 687, per Buckley L..J. at 690 (disapproving Walton J.'s restrictive construction at first instance)
> Dimsdale Developments (South East) Ltd. v. De Haan (1983) 38 P&CR 1, per Mr. Gerald Godfrey, Q.C. sitting as a deputy High Court judge (as he then was) at 11

Nature

8. The jurisdiction is discretionary.

Circumstances justifying an order for or refusal to order repayment of a deposit

9. The exercise of this discretion does not depend upon the vendor having acted inequitably/unconscionably. The discretion to order or refuse repayment of the deposit is unqualified by any language of the subsection. Any attempts to impose limits on its operation would be unjustified and unjustifiable. As in the case of any other discretionary powers, that under s.49(2) must be exercised judiciously and with regard to all relevant considerations. See, again, Buckley L.J.'s criticism of Walton J.'s restrictive approach at first instance in Universal Corporation, at 690.

10. Megarry J. said *obiter* in Schindler v. Pigault (at p.336) that this discretionary remedy was available where justice required it to mitigate the vendor's right at law to forfeit the deposit. This generous approach was indorsed by Buckley L.J. in

Universal Corporation (at p.691). Buckley L.J. further took the word "justice" to be used in a wide sense, indicating that repayment must be ordered in any circumstances which made this the fairest course between the 2 parties.

11. In face of these broad statements, there is an understandable reluctance to formulate over-precise principles governing the exercise of this discretion. It also follows that the grounds upon which the repayment of a deposit may be ordered would never be closed.

12. By way of illustration of the operation of the subsection in England and Wales, the following factors have been given weight or said to be material:

(1) the terms of the contract into which the parties have chosen to enter

Universal Corporation (in which the parties expressly agreed that the purchaser's deposit may be forfeited unless the court otherwise directed)

Safehaven Investments Inc. v. Springbok Limited (1996) 71 P&CR 59, per Jonathan Sumption, Q.C. sitting as a Deputy High Court Judge at 70

(2) the purpose of the deposit

Safehaven Investments Inc. v. Springbok Limited, at 70 & 71

(3) the conduct of the parties and especially that of the applicant purchaser, e.g. whether he was unable to complete as a result of some unforeseen mishap or technical difficulty or chose not to complete in a falling market or because he had second thoughts about the bargain

Schindler v. Pigault, at 336

Universal Corporation (in which the purchaser had difficulties in obtaining permission to remit funds from Nigeria to complete following an unforeseen change in Nigerian exchange control law)

Safehaven Investments Inc. v. Springbok Limited, at 71

(4) the gravity of the matters in question

Schindler v. Pigault, at 336

(5) the amounts at stake

Schindler v. Pigault, at 336

(6) whether the vendor has suffered substantial loss and damage in excess of the deposit forfeited

Safehaven Investments Inc. v. Springbok Limited, at 71-2

Dimsdale Developments (South East) Ltd. v. De Haan (in which the vendor had been able to resell at a substantial profit)

Limitations

13. s.49(2) does not exclude the right of the vendor who had been ordered to repay the deposit to claim damages.

Universal Corporation, per Buckley L.J. at 692

Dimsdale Developments (South East) Ltd. v. De Haan (in which the discretion was exercised in favour of the purchaser subject to its submitting either to a deduction of £6,500 from the deposit to cover the abortive costs which the vendor had incurred in the first sale or to an inquiry as to damages)

14. Secondly, it appears that the jurisdiction under s.49(2) can be excluded by agreement. In this regard, in Michael Richards Properties Ltd. v. Corporation of Wardens of St. Saviour's, Southwark [1975] 3 All ER 416, Goff J. (as he then was) said (at p.425) that where the parties had purported to agree to exclude the jurisdiction 'the court should not lightly go behind their agreement', but did not hold that the jurisdiction was in fact excluded. See also the *dicta* of Mr. Timothy Lloyd, Q.C. sitting as a deputy High Court judge in Country and Metropolitan Homes Surrey Ltd. v. Topclaim Ltd. [1996] Ch 307 at 316A-B.

**CASE FOR ENACTING S.49(2) IN HK**

15. Hong Kong has adopted s.49(1) of the Act, thereby making available the vendor and purchaser summons procedure.

16. The subsection with which we are presently concerned was, however, omitted from even the Conveyancing and Property Bill 1983 gazetted for consultation on 29 July 1983.

17. In Hong Kong, subject to the common law rule against penalties and the court's overriding equitable jurisdiction to grant relief against forfeiture, vendor and purchaser of an interest in land are presently free to provide (and most, if not all,

contracts for the sale of land provide) for the forfeiture of deposit by the vendor in the event of a refusal or failure to complete by the purchaser unless the non-completion is due to the vendor's own default.

18. While it is accepted that any attempt to interfere with the freedom of contract, upon which the Hong Kong economy depends to strive, should be proceeded with carefully with thorough and mature regard to all relevant considerations, the sanctity of contract should not of itself be a reason for not addressing an actual or perceived potential injustice, certainly not by a sophisticated jurisdiction which Hong Kong is or ought to be.

19. In this connection, it is perceived that situations where the purchaser is in default and yet deserves to recover his deposit, though likely to be rare/unusual, are not impossible. For a recent illustration, one need only refer to Wu Wing Kuen v. Leung Kwai Lin [1999] 3 HKLRD 738. In that case, the purchasers did not complete upon legal advice that secondary evidence produced by the vendors of lost documents of title was insufficient proof of title. They were denied their deposits despite the fact that on the confusing state of the authorities prevailing at the time of the transactions, their legal advisors had no choice but to advise them that acceptance of secondary evidence may affect the title. It is difficult to quarrel with Godfrey J.A.'s outrage at the unfair prejudice to these purchasers (which became very public and which prompted the present debate).

20. Given that land in Hong Kong is actively traded in as another commodity and the market is pervaded by a cut-throat atmosphere, especially in a rising market, the situation before the court in Wu Wing Kuen is unlikely to be the only one crying for a return of the deposit to the purchaser. An amendment of s.13 of the Conveyancing and Property Ordinance, Chapter 219 to codify the principles regarding the admissibility of secondary evidence of lost title deeds and documents in proof of title and the quality of such evidence now clarified by the Court of Appeal in Wu Wing Kuen, as suggested in DOJ's list of issues, would, therefore, not address or fully address all the possible scenarios of unfair forfeiture of deposit in land-related transactions, not even those arising from the unsettled state of authorities on other aspects of conveyancing law.

21. Nor would the common law rule against penalties or the court's overriding equitable jurisdiction to grant relief against forfeiture (mentioned in DOJ's list of

issues), in the absence of special circumstances, be of any use to mitigate the injustice of unfair forfeiture of deposit where what is involved is the conventional 10% deposit. See, e.g. Workers Trust and Merchant Bank Ltd. v. Dojap Investment Ltd. [1993] AC 573 and China Pride Investment Ltd. v. Silverpole Ltd. [1995] 1 HKLR 48.

22. On these premises, it is submitted that there is a case for Hong Kong to adopt s.49(2) of the Act to complete the range of remedies dispensable by the local court in cases arising from a sale or exchange of an interest in land.

23. Further, in light of the many unforeseen/unforeseeable facts and circumstances that may render a forfeiture of deposit unfair/unjust, to give the court the necessary flexibility to deal with all such situations effectively, as in the case in England and Wales, the qualification of the jurisdiction/discretion, other than with reference to what the court may think fit, is not recommended.

24. The initial uncertainty that some may fear would associate with the creation of such an unfettered jurisdiction/discretion and the difficulties caused thereby to practitioners prior to the development of case laws on the exercise of the jurisdiction/discretion (referred to in DOJ's list of issues) is, it is submitted, more theoretical than real. This is not the first, and will not be the last, time the legislature entrusts the court with a discretionary power. In this particular instance, a similar provision has been in force in England and Wales for three quarters of a century. Certainly, the body of case law on s.49(2) of the Act would provide sufficient guidance to the legal profession in Hong Kong.

25. If the English authorities are properly drawn upon, it is also unlikely that a purchaser in a falling market would be unintentionally encouraged to renege on his commitment to purchase. See, e.g. the dismissal of the unmeritorious claims in

Behzadi v. Shaftesbury Hotels Ltd. (1990) 62 P&CR 163
Safehaven Investments Inc. v. Springbok Limited

5th May 2000

**Annex II**

**Letterhead of DEPARTMENT OF JUSTICE Legal Policy Division**

Our Ref.: LP/518/00 II

Your Ref:

Tel. No.: 2867 4903

1 August, 2000

Mr Patrick Moss
Secretary General
The Law Society of Hong Kong
3/F Wing On House
71 Des Voeux Road
Central
Hong Kong

via Mr. Michael Scott, DSG(A)(Ag.)

Dear Mr Moss,

**Section 13 of the Conveyancing and Property Ordinance (Cap.219)**

Thank you for your response to our previous request for comments on proposed amendments to the captioned section. Your views were most helpful and have also been reflected to the LegCo Panel on Administration of Justice and Legal Services.

In the course of discussion of the matter by the Panel, other issues have been identified and we now write to seek you views on these.

It was suggested that the proposed discretionary power to be given to the court would only assist in exceptional circumstances and would not go to the root of the problem which, it was suggested, was the execution of Provisional Sales and Purchase Agreements ("Provisional Agreements") at a time when there may be no separate representation by real estate agents, and no independent legal advice available prior to execution.

With the foregoing scenario as a background, it would be appreciated if you could let us have your views on the following:-

(1) whether there should be a standard form Provisional Agreement that each real estate agent must use;

(2) whether the Provisional Agreement(s) presently adopted by the majority of real estate agents are, in substance, standard forms;

(3) whether there should be a "cooling-off period" for enforcement of Provisional Agreements; and

(4) whether your members could assist with providing their views on which are the most "problematic" clauses that are commonly included in Provisional Agreements.

Your response by the end of August 2000 would greatly assist the Administration in deciding on the way forward in relation to the captioned matter and we look forward to receiving the same.

Yours sincerely,

(Miss Agnes Cheung)
Senior Government Counsel
Legal Policy Division

#22212 v.1

**Appendix 7**

**Letterhead of CONSUMER COUNCIL**

YOUR REF.: LP 518/00
OUR REF.: (LAD) CE:629-00

10 May, 2000

Mr. Stephen Kai-yi Wong
Deputy Solicitor General
Legal Policy Division
Department of Justice
4/F High Block
Queensway Government Offices
66 Queensway
Hong Kong

**Re: S.13 Conveyancing and Property Ordinance (Cap.219)**

We refer to your letter of 2 March 2000.

The Council's Legal Protection Committee looked into the matter. We support giving the court power to order return of deposit to a purchaser under special circumstances where it will cause injustice for the purchaser to lose his deposit through no fault of his own. It is conceivable that in conveyancing and property transactions, title uncertainty will exist outside the scope of admissibility and/or adequacy of secondary evidence and we feel that a discretion couched in such terms as "the court may as it sees fit ..." or "the court may, where good cause is shown, ..." and properly exercised will help where existing redress mechanism cannot do justice to the parties in dispute. We believe that if a claim is grounded on doubt on title which is sustainable in law, the exercise of the relevant court power should not upset the sanctity of contract.

We are however mindful that the existence of a discretion may unintentionally encourage unmeritorious claims. To discourage litigation for this reason, we suggest that the discretion to be given may be a fettered one with the circumstances under which the discretion should not be exercised to be specified for reference by prospective litigants. This will also add certainty to property transactions. In our first example above, for instance, it may be qualified that "where there is uncertainty as to title and the

purchaser has acted with diligence, the court may as it sees fit ..." Or the second example may be expanded to read, "the court may, where good cause is shown, ... provided that xxx will not be considered good cause." We are limited by resource constraints to explore exhaustively all the circumstances which warrant the exercise of such power by the court.

The Council therefore would not object asking the Law Reform Commission to consider the issue in greater depth including circumstances when return of deposits are justifiable and the appropriate model of the discretionary power to be adopted in Hong Kong.

I apologize for the time taken for our reply.

Mrs. CHAN Wong Shui
Chief Executive

CWS/RW/rl

**Appendix 8**

**Letterhead of City University of Hong Kong**

10 August 2000

Miss Agnes Cheung School of Law
Senior Government Counsel
Legal Policy Division
Department of Justice
4/F, High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Agnes

**Section 13 Conveyancing and Property Ordinance**

I spoke to Stephen Wong on the telephone on Monday morning. Since then David Smith has passed to me your letter of 1 August to which I am responding. I have the following comments:

1. I enclose a short article that I have written on time stipulations in contracts for the sale of land, the court's equitable jurisdiction to grant relief to a purchaser who is late for completion and s 49(2). Briefly, my views are that s 49(2) of the English Law of Property Act gives the court a discretionary power to return the deposit to a purchaser in cases in which the purchaser is technically in breach of contract. My research into the English cases on s 49(2) reveals that in a number of cases in which the court has been asked to exercise its discretion under the section, the purchaser has been late for completion. There are also numerous Hong Kong cases in which purchasers have forfeited their deposits after paying either the balance of purchase price or a further deposit after the time stipulated in the contract for payment. I have therefore reached the conclusion that legislation equivalent to s 49(2) would have its greatest impact in Hong Kong in cases when time is of the essence and the purchaser is inadvertently slightly late. In such circumstances legislation equivalent to s 49(2) would enable Hong Kong courts to do justice when there is some merit in the purchaser's case. For example, s 49(2) may have assisted the purchaser in *Union Eagle*.

2. As you know, the latest call by Godfrey JA for legislation equivalent to s 49(2) was made in the context of two cases (*Wu Wing Kuen v Leung Kwai Lin Cindy* and *Ip Foo Keung Michael v Chan Pak Wai*) in which there was a dispute as to whether s 13 of the Conveyancing and Property Ordinance permitted the vendor to show title using secondary evidence. The dispute arose because there was considerable conflicting case authority on the matter. Hence the purchaser lost the deposit and the property because he was misled by judicial authority. Section 49(2) would have enabled the courts in Hong Kong to do justice in these cases. However, in my opinion the root of the problem in those two cases was:

.../2

(i) the conflicting case authorities; and

(ii) the system of proving and investigating title in Hong Kong.

Hopefully the latter problem will be alleviated when title registration is introduced in Hong Kong. Nevertheless title registration might initially give rise to new problems.

3. I note that it has been suggested that the root of the problem lies in provisional agreements for sale and purchase. The connection between such agreements and the above two cases is not explained.

If it is thought that the problems that arose in *Wu Wing Kuen and Ip Foo Keung* would be reduced by regulating provisional agreements, presumably one of the arguments would be that vendors and purchasers should have an opportunity to settle their differences on title before they bind themselves to sell or to buy. A cooling off period might have the effect of enabling them to do this.

An alternative viewpoint might be that problems are likely to arise in relation to provisional agreements because most provisional agreements require the vendor to give and show good title. Arguably if vendors received legal advice before entering into a provisional agreement, their title obligations could, when necessary, be modified in the contract. It is clear, however, from case law that there are numerous situations in which a vendor's title obligations should have been modified in the contract, but were not. For this reason, I would not anticipate that all title disputes would be resolved before the end of any cooling off period after a provisional agreement is signed.

Yet a further viewpoint might be that there should be a standard form provisional agreement in which the vendor's title obligations are modified. Clearly this would be undesirable from the point of view of purchasers who, as you point out, frequently sign up without legal advice and before investigating title.

My initial reactions to the suggestions that have been made are therefore that the problems that arose in *Wu Wing Kuen and Ip Foo Keung* were due to the difficulty of proving and investigating title. I am also of the opinion that those problems might be alleviated by introducing a cooling off period for enforcement of preliminary agreements. If, however, title differences are not settled before the end of the cooling off period, the same problems would resurface after the formal agreement is signed. I am not sure that the problems could be alleviated by introducing a standard form of provisional agreement.

.../3

4. In general, and quite apart from the above, I am not in favour of introducing a standard form of provisional agreement or a compulsory cooling off period, because to do so would be to interfere with the freedom of vendors and purchasers to negotiate the terms on which they buy and sell.

I should point out that the comments I make in paragraphs 3 and 4 are my initial reactions to your questions and I will give these matters further consideration. I am currently gathering material for the purposes of considering whether solicitors in Hong Kong should draft some standard conditions of sale for formal agreements. Standard conditions are used both in England and Australia. However, I believe that any such conditions should not be mandatory.

I would be interested in carrying out further research into these matters or joining in any discussions. I would also be interested to hear exactly how it is anticipated that a standard form provisional agreement would remedy the problems that arose in the two cases mentioned above. I shall be away from 12 August and will return on 7 September.

Yours sincerely

Myrette Fok
Associate Professor
*(Telephone Number: 2788-7638)*
*(E-mail Address: lwmfok@cityu.edu.hk)*

MF/pc

cc: Mr David Smith (Acting Dean, School of Law, City University of Hong Kong)

# Tough on Purchasers?

**Myrette Fok, Associate Professor, School of Law, City University of Hong Kong**

The contract stated that time was of the essence and that completion would take place by 5 p.m. on the completion date. The messenger of the purchaser's solicitor arrived with the balance of purchase price at the vendor's solicitor's office at 5.10 p.m. The vendor refused to accept late tender of the balance of purchase price, rescinded the contract and the purchaser forfeited the 10% deposit of HK$420,000 that he had paid.

These are the facts of *Union Eagle Ltd v Golden Achievement Ltd.*[1] The purchaser sought equitable relief from forfeiture of his interest under the contract and specific performance. He was unsuccessful. In the rising property market of 1991, the vendor would undoubtedly have been able to sell the property at a higher price. Hence he would have suffered no loss, but rather would have made a windfall profit from the purchaser's inadvertent delay.[2] From the purchaser's point of view the consequences seem out of all proportion to his fault.

This article considers the *Union Eagle* decision in the light of the recent decision in *Speedy Rich (Asia) Limited v Leung Pui Shu and Ho Yuen Yeuk*[3] and discusses whether legislation should be enacted in Hong Kong giving the court discretionary power to order the return of the deposit when one party to a contract for the sale of land is technically in breach of contract.

## *The court's equitable jurisdiction to grant relief from forfeiture in cases of late payment*

The Court of Appeal in *Union Eagle* recognised the court's well established inherent equitable jurisdiction to grant relief in cases of late payment of money where there is oppressive conduct that causes or contributes to the delay.[4] The Court of Appeal and the Privy Council, however, took the view that the facts of the case were 'well beyond the reach of the doctrine'. The appellant in *Union Eagle* tried unsuccessfully, both in the Court of Appeal and before the Privy Council, to argue for a broader equitable principle that relief from forfeiture should be granted in any case where it would be unconscionable for a vendor to terminate a contract for the sale of land. In his dissenting judgment in the Court of Appeal Godfrey JA accepted this argument. In his words:

'I would frame the question thus: the question in any particular case, is whether, in purporting to terminate the contract, and forfeiting the purchaser's equitable interest in the land and the purchaser's deposit, the vendor, by insisting on his strict legal rights, has acted unconscionably.'

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1 [1996] 1 HKC 349 CA [1997] 1 HKC 173 PC (called *Union Eagle* in this article).

2 No reason for the delay was given. See the report of the decision at first instance [1995] 2 HKC 225.

3 (1999) HCt unrep HCA 3623/1997 (called *Speedy Rich* in this article).

4 For examples see *Lee Kenny v Wong Kwok Yan* [1994] 2 HKC 341 where the vendor's solicitor's failure to deliver a draft agreement within a reasonable time was held to have contributed to the purchaser's delay in signing the agreement. See also *China Pride Investment Ltd v Silverpole Ltd* [1994] 2 HKC 341 where the vendor's delay in delivering a draft mortgage was held to have contributed to the purchaser's delay in completing. See also *Ng Chek Kok v Kiu Wai Ming* [1992] 1 HKLR 5 CA in which the Court of Appeal refers to trickiness or sharp practice as justifying equitable relief, although there was none in that case.

This broad view of the court's equitable jurisdiction was firmly rejected by Litton VP and Ching JA in the Court of Appeal and by the Privy Council. In *Union Eagle* the Court of Appeal sought to identify the circumstances in which it would consider exercising its equitable discretion to grant relief from forfeiture. The circumstances would include waiver or express or implied variation of the terms of the contract or conduct giving rise to an estoppel or circumstances in which the conduct of one party has contributed to the delay or where there is fraud, accident, mistake or surprise. It is not clear that the Privy Council agreed with this formulation but what is clear is that the Privy Council circumscribed the court's equitable jurisdiction to grant relief.[5] Speaking for the Board in the Privy Council, Lord Hoffmann rejected the existence of an unlimited equitable jurisdiction to grant relief from forfeiture of the purchaser's equitable interest in land in cases where time has expressly been made of the essence. His Lordship considered that the existence of an 'undefined discretion' to grant relief on the basis of unconscionability would have a destabilising effect on commerce: the vendor must be able to know with reasonable certainty whether or not he can re-sell his land and the mere existence of an 'undefined discretion' to relieve would enable 'litigation to be employed as a negotiating tactic'. Pointing out that the vendor had not known for 5 years whether or not he could re-sell his flat, Lord Hoffmann said the case 'shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene'.

Accordingly Godfrey JA's legitimate concerns that the particular circumstances of *Union Eagle* cried out for equitable intervention were not accepted. The circumstances giving rise to those concerns were that the breach was trivial, that it was inadvertent, that the consequences to the purchaser were out of proportion to the breach, that the vendor was not prejudiced and that he would most likely end up with a profit.

***Speedy Rich (Asia) Limited v Leung Pui Shu and Ho Yuen Yeuk***

The recent Court of First Instance decision in *Speedy Rich* provides an example of circumstances that justify the grant of equitable relief to a purchaser who is out of time. Significantly, *Speedy Rich* has attracted considerable attention for its criticism of the vendors' solicitor who reacted promptly to a purchaser's failure to deliver the balance of purchase price on time.[6] Interestingly the decisions of the Court of Appeal and Privy Council in *Union Eagle* were not mentioned in the judgment of Seagrott J in *Speedy Rich*. This point raises several interesting questions: first were the *Union Eagle* decisions cited to the judge? If not why not? And, more generally, what does the absence of discussion of this recent controversial Privy Council decision say about the continuing authority of Privy Council decisions in Hong Kong's new legal order? Interesting as these questions are, they are not the focus of this article. Rather it is Seagrott J's decision to grant relief to a late purchaser which demands immediate attention.

The contract in *Speedy Rich* provided that completion was due to take place by 1 p.m. on 7 April 1997.[7] The contract expressly entitled the purchaser to inspect the property on the

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5 The Privy Council decision in *Union Eagle* left open the possibility of relief based on restitution or estoppel. The courts in Australia may relieve against forfeiture of a purchaser's equitable interest under a contract even where he has breached an essential time obligation. See *Legione v Hateley* (1983) 57 ALJR 292.

6 In his decision, Seagrott J does not say that the contract made time of the essence although the decision suggests that this was the case.

7 The Privy Council decision in *Union Eagle* was handed down on 3 February 1997.

completion date before completion took place. But as a result of circumstances beyond the purchaser's control, he was unable to inspect the property before the stipulated time for completion.[8] Accordingly, the solicitors for the vendors and purchaser agreed arrangements over the telephone for the purchaser to inspect later in the day (by 7 p.m.). They agreed that the purchaser's solicitor would deliver the purchase money beforehand and collect the keys so that the inspection could take place. It was also agreed that the vendors' solicitor would hold the purchase money as stakeholder until the purchaser's inspection. By agreeing these arrangements, the purchaser accommodated the vendor by not insisting on inspecting the property before paying the purchase money. These arrangements, were confirmed in a fax sent by the vendors' solicitor to the purchaser's solicitor at 12.49 p.m., just 11 minutes before the contractual time for completion.

In one of several telephone conversations between the solicitors for the vendors and purchaser on the morning of completion, the purchaser's solicitor suggested that completion should take place at 3 p.m. that day. The vendors' solicitor did not expressly agree or disagree with this suggestion but did say that things should be done 'according to the contract'. Although the arrangements for inspection and stakeholding the purchase money were confirmed in writing by the 12.49 p.m. fax, Seagrott J's decision suggests that the fax did not say exactly when the purchase money should be paid. In any event the purchase money was not paid by 1 p.m. and at 1.15 p.m. the vendors' solicitor notified the purchaser's solicitor by fax that the vendors had rescinded the contract and therefore forfeited the deposit on account of the purchaser's lateness.

In giving judgment for the purchaser, Seagrott J found that the contract was varied by the 12.49 p.m. fax. The fax is not set out in the judgment leaving it open to question whether there was a clear and unequivocal variation of the time for payment of the purchase money and what was the new time for payment.[9] In any event, Seagrott J also found that the vendors had waived their right to rescind and were estopped from relying on the strict terms of the contract by their solicitor's representations made on the morning of completion and in the 12.49 p.m. fax.

An additional ground on which Seagrott J gives judgment for the purchaser is that it would be unconscionable to permit the vendor to rescind in these circumstances. In Seagrott J's words:

'Even if I had been unable to find that there had been a clear unequivocal agreement or representation, and I was simply thrown back on Miss Yu's own evidence with the documentary evidence, it would be entirely unconscionable to permit the vendors to rescind. There was a trap and Miss Yu knew it ... She expected him to appear at about 3 p.m. with all the essential material with which to complete.'

The 'trap', if there was a trap, appears to be not a single act but rather an agreement to vary some of the terms of the contract and silence on the exact time when the purchase money had to be paid which gave rise to the purchaser believing that the vendors would not insist on the

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8 The evidence showed that there was a dispute between the vendor and the purchaser as to the reason why arrangements for the inspection fell through. Seagrott J made no finding on this point.

9 See *Wellfit Investments Ltd v Poly Commence Ltd* [1997] 2 HKC 237 PC in which the Privy Council held that any variation had to be clear, unambiguous and unequivocal and that on the facts it was almost impossible to accept that an uncertain time for completion was being substituted for a fixed time for completion for which time was of the essence.

purchase money being paid by 1 p.m. The variations to the contract were the revised arrangements for the purchaser to inspect the flat including the arrangements for collecting the keys and the agreement that the vendors' solicitor would hold the purchase money as stakeholders until the inspection. These arrangements, according to Seagrott J, made adherence to the 1 p.m. deadline unnecessary. Other events which misled the purchaser's solicitor were the proximity of the 12.49 p.m. fax to the completion deadline and the failure of the vendors' solicitor to say precisely when the purchase money should be paid. Even if there were no trap, these events would cause the court to exercise its equitable jurisdiction on the basis of estoppel alone if the purchaser could show that he relied on them to his detriment. Clearly the purchaser in *Speedy Rich* was able to show detrimental reliance.

The decision in *Speedy Rich* may, however, give Hong Kong conveyancers some cause for concern in the light of what Seagrott J says about unconscionablity. The vendors' solicitor is criticised for 'watching the clock with an eager tactical eye' and for her swift action after the 1p.m. deadline had passed. In Seagrott J's words: 'As soon as she saw 1p.m. pass she was swiftly in action to take advantage of the trap and impose forfeiture'. It may be asked why not? Surely the decision in *Union Eagle* confirms that vendors can clock watch and take swift advantage of any delay?[10] The reality of conveyancing in Hong Kong is that the market is subject to wild fluctuations that make it profitable for vendors and sometimes purchasers to take tactical advantages. Their legal representatives must be ready to react accordingly. Moreover Seagrott J draws important inferences from the proximity of the 12.49 p.m. fax to the contractual time for completion. The proximity was, in his view, curious if the 1 p.m. deadline had been unequivocally accepted. In practice, however, last minute correspondence is common particularly given modern methods of communication.

The evidence in *Speedy Rich* certainly indicates that the deadline for completion had become unclear. The vendors' solicitor had stated that things should be done 'according to the contract'. In normal circumstances, this would indicate that a request for a variation of the contract had been denied. Equally, however, matters were not generally proceeding in accordance with the contract. In particular the purchaser was not able to inspect the property before paying the purchase money. In this context the purchaser was misled as to the time for completion following written confirmation in the fax concerning the arrangements for collecting the keys and inspection by the purchaser.

Albeit in the absence of any reference to it, the *Speedy Rich* decision adheres closely to the boundaries of the court's equitable jurisdiction to grant relief set out in the Court of Appeal decision in *Union Eagle*. Even if it does not mark any new development, the decision does provide an example of circumstances justifying equitable intervention in favour of a purchaser who breaches a time condition and demonstrates the Hong Kong court's readiness to exercise its equitable jurisdiction in appropriate circumstances.

***Legislative provision enabling the court to order the return of the deposit***

The plaintiff purchaser in *Speedy Rich* issued a writ on 9 April 1997 claiming specific performance. Later the claim was changed to an action for the return of the deposit. Seagrott J states that the change in the claim is of 'no consequence' leaving it to be assumed that he

[10] The evidence in *Union Eagle* showed that the solicitor for the vendor and several of his firm's employees set their watches before the time for completion. See also *Ocean Force Enterprises Ltd v Chun Sau Wan and Others* (1999) HCt unrep HCA 3571/97 in which the precise time of delivery of the balance of purchase price was in dispute.

would have been prepared to grant specific performance to the purchaser. As it is, Seagrott J ordered the return of the deposit.

In England the purchaser in *Speedy Rich* might have been able to recover the deposit by an alternative route. By s 49(2) of the English Law of Property Act 1925 jurisdiction is conferred on the court as follows:

Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit.

There have been calls from the judiciary for a similar legislative provision in Hong Kong.[11] The most recent call was made by Recorder Robert Tang QC in *Wu Wing Kuen v Leung Kwai Lin Cindy*[12] and by Godfrey JA when the case went to appeal. The case concerned a dispute about the sufficiency of secondary evidence to prove title under s 13 of the Conveyancing and Property Ordinance Cap 219. The dispute arose as a result of conflicting authorities on the question.[13] In giving his decision Recorder Tang said:

'I have come to this conclusion with regret. That is because the consequence is that the purchaser plaintiff will not be able to recover the deposit paid. On the existing state of authorities, the Plaintiff's legal advisers had no choice but to advise the Plaintiff that acceptance of secondary evidence may affect the title. As it is, I have come to a contrary decision. I hope this judgment will explain to the Plaintiff how the law on the subject is uncertain. Unfortunately, it will provide little consolation to the Plaintiff that although the requisitions were rightly raised, he should have to bear the consequences of an adverse decision by me.'

Godfrey JA, on appeal, shared this regret and recommended the legislature to confer on the court the power contained in section 49(2) of the Law of Property Act. His Lordship said:

'This would enable the court to do justice in cases like the present, in which the system operates unfairly against purchasers. The courts need to be able to stem the flood of cases in Hong Kong in which vendors are able to achieve windfall profits at their purchasers' expense. The sooner something is done about this disgrace the better.'

Section 49(2) was enacted in England to redress injustice in situations in which the purchaser was bound by the terms of his contract to accept property or title to property that differed substantially from his expectations. In these circumstances the court would not award specific performance to the vendor; but the purchaser, being technically in breach of contract, would be unable to recover his deposit.[14] There seemed, however, to be some doubt as to whether the court could exercise its discretion in favour of a defaulting purchaser until *Universal Corporation v Five Ways Properties Ltd*[15] when the Court of Appeal settled the

11 Godfrey J, as he then was, called for such a provision in *Gladflow Ltd v Grandland Development Ltd* [1993] 2 HKLR 494 in which the purchaser failed to pay a further deposit on the due date. The purchaser's action for specific performance and return of the deposit was unsuccessful.

12 [1999] 3 HKC 310 and [1999] 4 HKC 565 CA (called *Wu Wing Kuen* in this article). Two appeals on the point were heard together before the Court of Appeal. The other is *Ip Foo Keung Michael v Chan Pak Wai*.

13 Recorder Tang found six cases for secondary evidence of title documents being admissible and six against.

14 See *Scott v Alvarez* [1895] 2 Ch 603 and *Beyfus v Lodge* [1925] Ch 350. The contract usually provides expressly for forfeiture of the deposit in case of breach by the purchaser. If it does not, it appears that the vendor can still forfeit the deposit when the purchaser is in default: *Hall v Burnell* [1911] 2 Ch 551.

15 [1979] 1 All ER 552 (called *Universal Corporation* in this article).

matter. If a provision similar to s49(2) were enacted in Hong Kong therefore, the courts would have a discretion to order the return of the deposit to the purchaser in *Wu Wing Kuen*, who was technically in breach of contract. Such a provision would also, as has been said, give the purchaser in *Speedy Rich* an alternative means of recovering the deposit. The question to be asked is whether the purchaser in *Union Eagle* would have been able to recover the deposit under s49(2) despite breaching an essential time obligation in the contract.

The English authorities give some direction on the answer to this question. In *Universal Corporation* Buckley J described s49(2) as a discretionary jurisdiction exercisable 'in any case which makes this the fairest course between two parties', but said that the discretion must be 'exercised judicially and with regard to all relevant considerations including the very important consideration of the terms of the contract into which the parties have chosen to enter'. Eveleigh J in *Universal Corporation* was 'not wholly confident of the jurisdiction of the judge under s 49(2)' but agreed that there was a triable issue. Power for the court to exercise its discretion under s 49(2) does not appear to be confined to cases where the vendor's conduct has been unconscionable or where the vendor's conduct has caused or contributed to the breach by the purchaser.[16]

Of particular interest is the English decision of Gerald Godfrey QC, then sitting as a deputy High Court judge, in *Dimsdale Developments (South East) Ltd v de Haan*.[17] Reluctantly applying the decision in *Universal Corporation*, Godfrey QC decided that the justice of the case demanded that the deposit be returned to the purchasers because the vendors had made a profit on re-sale, although he required the purchaser to submit to a deduction to cover the vendor's losses, the purchasers having put the vendor to 'considerable trouble and worry' on account of their delay.[18] More recently in *Safehaven Investments Inc v Springbok Ltd*[19], Jonathan Sumption QC sitting as a deputy judge in the High Court, declined to order the return of a deposit to a purchaser on the grounds that the purchaser was 'an experienced property dealer who was aware of the function of a deposit and the risks of losing it' and that the purchaser's failure to complete was not 'a failure of performance but a repudiation'.

Taking into account Buckley J's broad statement of principle in *Universal Corporation*, and the application of that principle in later decisions on s 49(2), there is every reason to think that the court in *Union Eagle* would have exercised its discretion and returned the deposit to the purchaser.

A limited version of s 49(2) was enacted in the Conveyancing Act 1919 of New South Wales providing a discretionary power for the court to return the deposit in any case in which the court refuses to order specific performance by reason of a defect in title.[20] Such a provision would have effect in any case in which a purchaser is barred from raising requisitions by an exclusion clause or a time limit in the contract. This does not, however, appear to be a

16 See *Schindler v Pigault* (1975) 30 P&CR 328 in which Megarry J expressed the view that the statutory discretion was not confined to cases in which one party's conduct was unconscionable but was exercisable on wider grounds after considering the conduct of the parties, the gravity of the matters in question and the amount at stake. Megarry J's wide view was approved by Buckley LJ in *Universal Corporation* n 15

17 (1983) EGLR 1

18 Similarly in *Maktoum v South Lodge Flats* (1980) The Times 22 April a substantial deposit was returned to a purchaser on the basis that this was the fairest course in all the circumstances when re-sale at a profit was possible.

19 (1995) 71 P&CR 59.

20 An additional provision similar in terms to s 49(2) was introduced in 1930.

problem in practice. Many vendors and purchasers are bound by the terms of a preliminary agreement prepared by an estate agent under which the vendor has an implied obligation to give and show good title and in which the purchaser is not excluded from raising requisitions. Furthermore time limits on raising requisitions do not bar requisitions on matters going to the root of title unless the requisitions could have been raised within the time limit on the title deeds supplied to a purchaser.[21]

Only a wider discretionary power would therefore appear to have any impact in Hong Kong. Moreover it appears from the English decisions on s 49(2) and Hong Kong case law that such a power would have the greatest impact in cases in which the purchaser breaches an essential time condition.[22] It is important at this point to mention a significant difference between Hong Kong and English conveyancing practice. In England time is frequently not of the essence in conveyancing transactions. Consequently in a number of cases in which s 49(2) has been considered, the contractual completion date has passed and the vendor has served the purchaser with notice to complete making time of the essence.[23] Hong Kong conveyancing practice is considerably tougher on purchasers: in most cases the contract provides expressly that time is of the essence. Accordingly, equity's jurisdiction to grant relief from forfeiture is limited when the purchaser breaches an essential time condition, and there is no statutory provision giving the court a discretion to return the deposit to a purchaser who is technically in breach. Taking all of these factors into account, it is clear that in a rising market, there is nothing to stop a vendor in Hong Kong from taking advantage of a trivial delay by a purchaser even when he has suffered no loss.

The obvious answer to the problem of timing is for purchasers to contract expressly that time is not of the essence. In a buyers' market this might be possible, but the change could dramatically prejudice the speed and efficiency of conveyancing in Hong Kong.[24] Furthermore, in a rising market vendors are unlikely to accept such a term.

There is no doubt that if legislation similar to s 49(2) is enacted in Hong Kong, it will give rise to litigation, particularly given the breadth of the principle stated by Buckley LJ in *Universal Corporation*. Arguably, however, current practice in Hong Kong also gives rise to litigation because it allows no room for error by the purchaser. In light of Hong Kong conveyancing practice it may be that a statutory provision in terms similar to those of s 49(2) would be appropriate in Hong Kong. It is not certain that such a provision would have worked for the purchaser in *Union Eagle* but it would not create the same uncertainties that were objectionable to the Privy Council because the provision distinguishes between the right to the deposit and the right to the land. Hence even with s 49(2), the vendor in *Union Eagle*

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21 See *Gold Check Investments Ltd v Star Investment Ltd (1992) HCt unrep MP No 592/92* in which the purchaser was allowed to raise a requisition on the Government lease out of time and *Tread East Ltd v Hillier Development Ltd* [1993] 1 HKC 285 in which the purchaser was not allowed to raise a requisition out of time because the requisition could have been raised within the time limit from title deeds supplied to the purchaser.

22 The purchaser was late in *Cole v Rose* [1978] 3 All ER 1121 and *Universal Corporation* n 15. Cases in Hong Kong in which the purchaser was late include *Lee Kenny v Wong Kwok Yan, China Pride Investments Ltd v Silverpole* and *Ng Chek Kok v Kiu Wai Ming* n 4. See also *Speedy Rich, Gladflow v Grandland* n 11 and *Wellfit Investments Ltd v Poly Commence Ltd* n 9. Cheng J who heard *Union Eagle* at first instance said 'This is yet another litigation in which the purchaser of a property failed to tender to the vendor the balance of the purchase prince within the time stipulated in the contract of sale.'

23 See *Schindler v Pigault* n 16, *Cole v Rose* n 22 and *Universal Corporation* n 15.

24 See *Edward Wong Finance Ltd v Johnson Stokes & Master* [1984] 2 WLR 1 where it was said in evidence that Hong Kong conveyancing is completed speedily and that speed is highly praised by lawyers and their clients in Hong Kong.

would have been free to resell the flat at one minute past 5 p.m. The provision would however, deter vendors from taking advantage of trivial breaches by their purchasers and would enable the courts to do justice between vendor and purchaser in a wider variety of situations, for example in *Wu Wing Kuen*. Section 49(2) does not preclude a vendor from seeking damages from a purchaser in the normal way if he has suffered loss.

It is not clear whether the parties can contract out of s 49(2).[25] Without a restriction on contracting out, such a provision would likely prove to be meaningless in Hong Kong.

***Conclusion***

Legislation in similar terms to s 49(2) of the Law of Property Act 1925 would open the door for the courts in Hong Kong to exercise a discretion to return a deposit to a purchaser who is late for completion on wide grounds, including grounds that the vendor has suffered no loss and that the purchaser's delay was inadvertent. A legislative provision would not necessarily have the effect of changing the outcome in the circumstances that existed in *Union Eagle* but such a provision could deter vendors from taking advantage of trivial breaches by their purchasers. In the light of conveyancing practice in Hong Kong in which time is usually expressly made of the essence and in the light of the volatile Hong Kong market, such a provision could have a positive impact.

A provision equivalent to s 49(2) would also have enabled the court to do justice to the purchaser in *Wu Wing Kuen*. The problem in that case, however, lies in the complexity of proving title in Hong Kong. As to that matter, legislative attention to the introduction of registered title is urgently needed.

[25] See *Maktoum v South Lodge Flats Ltd* n 18 and Country and *Metropolitan Homes Surrey Ltd v Topclaim Ltd* [1996] 3 WLR 525 in which contracting out of s 49(2) is considered. Interestingly there is no suggestion in either case that contracting out is not possible.

(33)

THE LAW SOCIETY OF HONG KONG
香港律師會

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BY FAX

11 August, 2000

8/11/2000

Miss Agnes Cheung
Senior Government Counsel
Legal Policy Division
Department of Justice
4/F High Block
Queensway Government Offices
66 Queensway, Hong Kong

Dear Miss Cheung,

**Re: Section 13 of the Conveyancing and Property Ordinance (Cap.219)**

I refer to your letter addressed to the Secretary General dated 1 August 2000 and I have been asked to send a reply on his behalf. (27)

The Law Society has provided its views on this issue and I would point out that in letter our letter dated 19 June 2000 to the Panel, the Law Society stated that the matter is one "of some complexity". (13)

It is quite clear that a review on the deposit does not go to the "root of the problem".

In your letter you sought the Society's views on 4 questions in relation to the execution of provisional sale and purchase agreements. This matter was considered and discussed by the Law Society's Property Committee and it was agreed that the questions are all inter-related not only with the deposit but also with existing "market practices". The issue is complex and a piece-meal approach is simply not an appropriate way to deal with the topic.

We re-iterate our view that it would be appropriate to refer the matter to the Law Reform Commission for an in depth examination of all of the problems with the existing system.

Yours sincerely,

Joyce Wong

Joyce Wong
Director of Practitioners Affairs
e-mail: dpa@hklawsoc.org.hk

cc Mr. Patrick Moss

**Appendix 10**

**Letterhead of THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG**

28 August 2000 Ref: LP/518/00 II

Miss Agnes Cheung
Senior Government Counsel
Legal Policy Division
Department of Justice
4/F, High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Miss Cheung

**Section 13 of the Conveyancing and Property Ordinance (Cap.219)**

We refer to your letter of 1 August 2000 and are pleased to offer our comments on the various issues you raised regarding provisional sales and purchase agreements.

1. *Whether there should be a standard form of provisional agreement that each real estate agent must use?*
   It is unlikely that one standard form could cater for all development projects which invariably would have conditions that are peculiar to their respective situations.

2. *Whether the provisional agreement(s) presently adopted by the majority of real estate agents, are in substance, standard forms?*
   Presently there is not a single standard form of provisional agreement generally adopted by our members. Regarding forms being used by real estate agents, I would suggest that the Estate Agents Authority would be a more appropriate source of information.

3. *Whether there should be a cooling-off period for enforcement of provisional agreements?*
   As a matter of principle we are not in favour of the provision of a cooling-off period as it will remove the certainty of an otherwise binding contract.

4. *Whether your members could assist with providing their views on which are the most problematic clauses that are commonly included in provisional agreements?*
Our members have encountered little problem with their provisional agreements which terms have been vetted by their legal advisers and withstood the test of time. We have also heard of little complaints or disputes from consumers.

We hope you would find the above information useful and should you require any further details, please contact the undersigned.

Yours sincerely

Louis Loong
Secretary General

c.c. Mr. Stewart Leung, Vice Chairman

**Appendix 11**

**Letterhead of CONSUMER COUNCIL**

BY FAX & BY POST
(Fax No. 2869 0720)

YOUR REF. LP/518/00 II
OUR REF. CC401/227/2000

12 September, 2000

Miss Agnes Cheung
Senior Government Counsel
Legal Policy Division
4/F High Block Queensway Government Offices
66 Queensway
Hong Kong

Dear Miss Cheung,

**Re: Section 13 of the Conveyancing & Property Ordinance (Cap.219)**

Thank you for your letter of 1 August, 2000.

In response to the questions you have posed, we have the following comments:

1) A well-drafted standard Provisional Agreement would provide the parties concerned with additional protection;

2) Provisional Agreements adopted by estate agents are NOT uniform and different estate agents have different forms of provisional agreements, though their main items are essentially the same;

3) This Council is still deliberating whether there should be a "cooling-off period" for the enforcement of Provisional Agreements and we shall let you know our recommendation as soon as possible;

4) The following areas would cause the most problems in Provisional Agreements:-

   a) The estate agent being a party to the contract.
   b) Clauses related to the physical properties of flats.
   c) Clauses related to illegal sub-structure and physical defects of the property.
   d) Clauses related to titles with financial charge or legal charge.
   e) Clauses related to the fact that bank has taken over the properties due to the non-payment of mortgage installment.

(f) Clauses related to "negative assets" whereby the mortgagors are not in a financial position to repay the full amount to the mortgagee banks after selling the mortgaged flats.

(g) Clauses related to legal advice.

(h) Clauses related to contract subject to finance.

Thank you for your attention and we shall revert to you regarding point 3) above as soon as possible.

Yours sincerely,

(CHAN Wing-kai)
for Chief Executive
Consumer Council

CWK/FL/rl

**Appendix 12**

**MEMO**

| | |
|---|---|
| *From* Secretary for Housing | *To* Secretary for Justice |
| *Ref.* in HB 9/7/27 V | *(Attn:* Miss Agnes CHEUNG |
| *Tel. No.* 2509 0322 | *Your Ref.* *in* LP 518/00 II |
| *Fax. No.* 2509 3770 | *dated* *Fax. No.* |
| *Date* 12 September 2000 | *Total Pages* |

**Sections 13 of the Conveyancing and Property Ordinance (Cap. 219)**

We spoke.

2. I attach a self-explanatory memo from the Land Registry and should be grateful if you would note their interest in issue concerning the "cooling off period for home purchases".

3. I understand that you have consulted the Estate Agents Authority on the same subject. I would appreciate if I would be kept informed of further development.

(Paul P T LEE)
for Secretary for Housing

c.c. Land Registrar (Attn : Mrs Alice LEE)

**MEMO**

**MEMO**

| | |
|---|---|
| *From* Land Registrar | *To* Secretary for Housing |
| *Ref.* (69) in LR/HQ/101/64/1 | *(Attn:* Mr. Paul P T LEE ) |
| *Tel. No.* 2867 8002 | *Your Ref.* ____ *in* ____ |
| *Fax. No.* 2810 4561 | *dated* ____ *Fax. No.* 2509 3770 |
| *Date* 7 September 2000 | *Total Pages* ____ |

**Cooling-off Period for Home Purchases**

I refer to an article in the South China Morning Post on the captioned subject, copy attached for your reference.

2. The subject is of interest to me and which may affect my workload. I shall be grateful to be informed of the development and be consulted on the matter.

(Mrs Alice LEE)
Registry Manager
for Land Registrar

# Cooling-off plan fails to impress

South China Morning Post 30 August 2000

## Fears of abuse and unfairness raised

Proposals to introduce a cooling-off period for home purchases have met strong resistance from industry players concerned about possible abuses by speculators and unfairness to vendors.

The Department of Justice is consulting with the property industry and other groups on the idea of imposing a cooling-off period that allows homebuyers to rescind agreements within a short period.

However, estate agents generally expressed strong reservations, saying such a period would be used by speculators to juggle Hong Kong's volatile property market conditions.

The Justice Department also seeks opinions on the question of standardising provisional agreements for sale and purchase, a contract prepared by estate agents for clients before a formal agreement is prepared by lawyers.

Industry response to these suggestions has been mixed, although mostly negative.

A cooling-off period is a provision adopted by some other countries. It allows buyers to quit within several days without responsibility after signing provisional agreements with vendors.

Society of Hong Kong Real Estate Agents president Alex Tang said the provision allowing purchasers to quit was unfair to vendors. It was not suitable in Hong Kong's fast-changing property market, he said.

The provision would create difficulties in transactions involving sale of one property to finance purchases of bigger flats, he said.

Mr Tang pointed out the provision had not been adopted in all foreign countries. Even in those countries that had, there were various versions, with some applying only to new property sales while others restrict the provision to lower-end transactions.

Midland Realty executive director Victor Cheung said that in a volatile market such as Hong Kong, the period could be used for speculation. He said a speculator could buy a unit several days before a land auction and wait for the result before deciding whether to quit.

He said that in other countries vendors and purchasers were represented by different agents, probably creating a communication problem which prompted the need for a cooling-off period. Hong Kong's transactions largely were facilitated by single agents, which ensured better communication.

Under the consent scheme for new home sales, a purchaser has about three working days to get out of the transaction after signing with the developer, provided he forfeits 5 per cent of the purchase price.

Benjamin Ng, president of International Hung Hsing Property Agency, which is involved mainly in Canadian property brokerage, supported the cooling-off period, which Canada has adopted.

He said the provision was to protect consumers from psychological interference and advertising lures by vendors and agents. A cooling-off period should be applied in a mature society. Mr Ng

He claimed changes in market factors within the cooling period should be considered by buyers as home purchase was a long-term investment.

An Estate Agents Authority spokesman said the authority, as a middleman, was collecting opinions from agents for the Department of Justice. The authority also would formulate a view itself through its practice committee.

Consumer Council deputy chief executive Li Kai-ming said the cooling-off period deserved study but the council had not yet formulated its view.

He admitted the provision would protect purchasers but maybe not vendors, and both were consumers in the market.

Mr Li said the council had long supported standardising provisional agreement in principle, saying consumers had not been guided by their lawyers before signing contracts that were legally binding. Some particular issues, such as the refund of a deposit, should be addressed by a standard form, he said.

Mr Cheung, of Midland Realty, also believed a standardised provisional agreement would be more convenient and protect both customers and agents.

Centaline Property Agency managing director Shih Wing-ching opposed standardisation, saying a capitalist society should allow the freedom to enter into contracts. Terms within the contracts should be the response to market conditions rather than rigid rules.

He urged authorities to solve existing problems through consumer education instead of ad-

**Appendix 13**

**Letterhead of HONG KONG BAR ASSOCIATION**

By fax and by delivery
(Fax: 2869-0720)

Your Ref: LP/518/00 II

10th October 2000

Legal Policy Division
Department of Justice
4/F High Block
Queensway Government Offices
66 Queensway
Hong Kong

Attn: Miss Agnes Cheung
Senior Government Counsel

Dear Sirs,

**Re: Section 13 of the Conveyancing and Property Ordinance (Cap. 219) - Provisional Agreements**

Thank you for your letter on 1st August 2000 seeking the Bar's views on the above captioned subject. Enclosed please find the Bar's comments thereon for your consideration.

Yours sincerely,

Clive Grossman, S.C.
Council Member

Encl.

/al

*Please Address All Correspondence to the Bar Secretarial.*

**HONG KONG BAR ASSOCIATION**
**FURTHER COMMENTS ON**
**S.13. CONVEYANCING AND PROPERTY ORDINANCE (CAP.219)**
**("the Ordinance")**

1. The Hong Kong Bar Association is asked by the Department of Justice ("DOJ") to express views on the form, terms and legal effect of provisional agreements used in Hong Kong for the sale and purchase of real property.

## A TYPICAL TRANSACTION FOR THE SALE AND PURCHASE OF LAND IN HONG KONG

2. In Hong Kong, in terms of formalities, a typical transaction for the sale and purchase of land can be divided into the following 3 stages:

   (1) the execution of a **tripartite** Provisional Agreement for Sale and Purchase ("the Provisional Agreement") between
   (1) the vendor;
   (2) the purchaser; and
   (3) **the estate agent** who introduces the vendor and purchaser on the estate agent's pre-printed form;

   (2) the supersedence of the Provisional Agreement by a Formal Agreement for Sale and Purchase ("the Formal Agreement") which is, by convention, drafted by the vendor's solicitors and amended and approved by the purchaser's solicitors;

   (3) the execution of an Assignment by the vendor.

## FORM OF THE PROVISIONAL AGREEMENT

3. Although there is a variety of forms in use, it is observed that the majority of estate agents in Hong Kong, especially large ones, do adopt provisional agreements (written in both English and Chinese) that are similar in terms dealing with the following:
   (1) the parties;
   (2) the premises;
   (3) the price and payment (usually in 3 instalments: initial deposit upon signing of the Provisional Agreement, further deposit upon the signing of a formal agreement on a specified date and balance on completion);
   (4) completion date;
   (5) sale free from encumbrances;
   (6) whether it is a sale with vacant possession or subject to existing tenancy;
   (7) whether the vendor is selling as confirmor;
   (8) incidence of legal costs and stamp duty;
   (9) forfeiture of deposit by the vendor upon default by the purchaser;
   (10) repayment of the initial deposit, payment of liquidated damages equivalent to the amount of the initial deposit and reimbursement of the stamp duty by the vendor

on his failure to complete;

(11) abandonment of claim for further damages or specific performance;

(12) agent's commission and compensation to agent in the event of non-completion;

(13) sale on an "as is" basis;

(14) supersedence of all prior negotiations, representations, understandings and agreements;

(15) whether the sale includes any chattels, furniture and fittings;

(16) whether the transaction relates to residential or non-residential premises within the meaning of s.29A(1) of the Stamp Duty Ordinance; and

(17) precedence of the English version in case of ambiguities.

4. In light of the aforesaid, it is felt that the problem associated with the practice of signing the Provisional Agreement is not so much whether there should be a standard form for such agreement but the adequacy of the form that is in popular use and what such form omits.

## LEGAL EFFECT OF THE PROVISIONAL AGREEMENT

5. Other than the case of Yeung Siu Hong v. Chan Siu Mee Sandie [1992] 2 HKC 559, it has been held time and again by the court of Hong Kong that the Provisional Agreement takes effect as an **immediately** binding contract, the terms of that contract (unless and until supplemented by the Formal Agreement) being those settled by the Provisional Agreement and, otherwise, those implied by law. See the cases cited in *Betty M. Ho, Hong Kong Contract Law, 2nd Edition, pp.38-9, footnotes 179, 180 & 181*.

6. This construction gives effect or is perceived to give effect to the intention of the parties :see, e.g., Mak Lai Man v. Lam Siu Yui Peter [1993] 1 HKC 452, per Godfrey J. (who also decided but did not follow Yeung Siu Hong v. Chan Siu Mee Sandie which he distinguished on the facts) at 459F.

7. In this regard, while there is much truth in the observation made by Godfrey J. in Man Sun Finance (International) Corp. v. Lee Ming Ching Stephen [1993] 1 HKC 113 at 122D-I that the Provisional Agreement is intended by the estate agent to secure his commission, the vendor and purchaser's concurrent intention to obtain a contract of immediate legal effect must not be overlooked. The provisions for the payment of an initial deposit upon the signing of the Provisional Agreement and for the forfeiture of such deposit or the payment of compensation equivalent in amount to such deposit (as the case may be) in the event of default are consistent only with such an intention. The creation of an immediately binding agreement for sale and purchase would be a particularly important concern (though not necessarily to both parties) in a fluctuating market.

8. If the expression "cooling-off period" in question (3) of DOJ's letter dated 1 August 2000 is used to refer to an option to the parties to the Provisional Agreement to back out of the same within a specified period of time without further ado, the proposal to impose such

a "cooling off" period is, with respect, of doubtful merits and should be considered with great caution and hesitation, especially in a volatile market like Hong Kong.

9. It is submitted that not only would such legislative intervention defeat what in most cases is the obvious intention of the parties, there does not appear to be any or any equitable basis for such intervention. This is particularly so if one bears in mind the danger of abuse in a rising of falling market.

10. The fact that the Provisional Agreement is usually entered into before the parties seek legal advice has not been overlooked. However, while the lack of legal advice may result in the parties signing an agreement that is not as comprehensive as it should have been, such disadvantage does not go to the wisdom of the transaction itself.

11. In this context, it should be noted that parties themselves often agree to a "cooling off" period **but at a fixed penalty** by submitting to provisions excluding their common law rights to claim specific performance and/or unliquidated damages after forfeiting the initial deposit or after compensating the purchaser with an amount equivalent to the initial deposit, as the case may be. See, e.g. Man Sun Finance (International) Corp. v. Lee Ming Ching Stephen.

## "PROBLEM CLAUSES" OF THE PROVISIONAL AGREEMENT

12. Although a number of the common terms of the Provisional Agreement identified in §3 hereinabove (e.g. the qualified option to back out, the exchusion of the right to specific performance and/or unliquidated damages, etc,) have generated a fair amount of disputes regarding their scope and effect, other than the exception mentioned in §§13 to 15 hereinbelow, none of these terms give rise to any or any real or significant issues that are not more or less settled after a few precedents.

13. The provision for the making of a formal agreement, however, continues to pose problems. Godfrey J. had this to say about such term in Man Sun Finance (International) Corp v. Lee Ming Ching Stephen at 124C-H,

> *I do not know how the parties would react if they were told that the signing of the formal sale and purchase agreement was a pure formality to which they were not entitled and which could safety be ignored."*

14. On a proper analysis,
    (1) If the Formal Agreement is intended to incorporate only the terms already expressly agreed in and/or otherwise incorporated and/or implied by law into the Provisional Agreement, the agreement to enter into the Formal Agreement is superfluous.

    (2) If the Formal Agreement is intended to incorporate further and/or other terms not already expressly agreed in and/or otherwise incorporated and/or implied by law

into the Provisional Agreement, the agreement to enter into the Formal Agreement is an agreement to agree and/or negotiate and is, as a matter of law, void for uncertainty and unenforceable.

15. As a matter of case law,

(1) If negotiations on the contents of the Formal Contract break down because of one party resists a term which reproduces or properly reflects what has already been expressly included and impliedly agreed in the Provisional Agreement, the other party can fall back on and enforce the Provisional Agreement.

(2) If negotiations on the contents of the Formal Contract break down because of one party pushes for a term entirely beyond what has already been expressly included or impliedly agreed in the Provisional Agreement, such continued insistence constitutes a repudiation of the Provisional Agreement.

See, e.g. Link Brain Ltd. v. Fujian Finance Co. Ltd. [1992] 2 HKLR 353 (CA) and Chu Wing Ning v. Ngan Hing Cheung, unrep., HCA No.9409 of 1991, Deputy Judge Ribeiro (as he then was) on 6 November 1992.

16. One comes back to the question of what should have been but is not included in the Provisional Agreement, i.e. the adequacy of the Provisional Agreement in the form commonly in use.

17. One way of mitigating the problems arising from the need to negotiate for further and/or extra terms that merits further deliberation is to prescribe for a fuller form for the Provisional Agreement which is to be used at the stage where the parties are unrepresented legally.

18. A useful starting point would be the covenants and conditions set out in Part A of the Second Schedule to the Ordinance which may be incorporated by reference under s.36. It is noted that the bulk of these covenants and conditions are invariably included in the Formal Agreement in identical or similar terms but they rarely appear in the Provisional Agreement.

10th October 2000.

**Appendix 14**

**Letterhead of ESTATE AGENTS AUTHORITY**

11th October 2000

Miss Agnes Cheung
Senior Crown Counsel
Legal Policy Division
Department of Justice
4/F High Block
Queensway Government Offices
66 Queensway Hong Kong

Dear Miss Cheung,

**Re: Standard Form Provisional Agreement for Sale and Purchase**

Reference is made to your recent consultation exercise on the captioned subject.

As you are no doubt aware, the Estate Agents Ordinance (Cap.511) is primarily concerned with the relationship between estate agents and their clients and sales and purchase agreements, being between vendors and purchasers, generally fall outside of the purview of the Estate Agents Authority. However, we are aware of the far and wide implications that the issues raised in the consultation may have on the practice of estate agency as well as on consumer protection, and the Authority deems it appropriate for these to be studied in greater depth before furnishing you with its views. In the meantime we have pleasure in forwarding the following representations which have been received from trade associations and individual companies:

1. Letter jointly submitted by five Trade Associations on 27th September 2000
2. Letter from the Property Agencies Association Limited dated 1st September 2000
3. Letter from the Society of Hong Kong Real Estate Agents Limited dated 30th August 2000
4. Letter jointly submitted by the New Territories Estate Agency Association and the New Territories Licensed Estate Agents Association dated 28th August 2000
5. Letter from Midland Realty (International) Limited dated 6th September 2000
6. Letter from Fortune Realty Company Limited dated 31st August 2000

Please do not hesitate to call the undersigned at 2598 9562 should there be anything that requires clarification.

Yours sincerely,

Andrew K C Kwong
Director of Services

**Letterhead of SOCIETY OF HONG KONG REAL ESTATE AGENTS LTD**

August 30, 2000

**Estate Agents Authority**
**(Attn.: Mr Andrew Kwong Kwong-ching)**
Rooms 1701-1707A,
Dah Sing Financial Centre
108 Gloucester Road
Wanchai, Hong Kong
Dear Mr. Kwong,

**Re: Standard Preliminary Agreement and Cooling-off Period**

We received your letter dated August 10,2000 on August 15,2000 and regret that we were only given two weeks to return our written comments. Nevertheless, our Society managed to hold our council meeting on August 25,2000 and would like to submit the following comments:-

1. Standard Preliminary Agreement

About the existing preliminary agreement of purchase and sale (Agreement), we would like to state that we consulted both the Law Society and the Consumer Council before we finalized the existing Agreement. Our members are receptive to it and have been using it for years without difficulty. With respect of the "problems" mentioned in your letter, our Society welcomes further discussion if the EAA would kindly indicate the problems identified.

2. Cooling-off period

Our Society has tentatively studied several cases in overseas property markets in relation to the cooling-off period. We found that the cooling-off period is not a common practice and is not applied in all types of properties in each and every country.

Our Society believe that the property market in Hong Kong is distinctive and not in parallel with overseas markets. We have reasons to believe that the cooling-off period would pose difficulties to the developers, vendors, purchasers etc. in planning their next move, thus it would retard the real estate transaction.

Our Society looks forward to further discussion if EAA could kindly furnish us with more supporting data and a reasonable length of period.

Thank you for your attention and look forward to further discussion with the Authority.

Yours faithfully,

Alex Tang
President

**Letterhead of NEW TERRITORIES ESTATE AGENCY ASSOCIATION**
**&**
**NEW TERRITORIES LICENSED ESTATE AGENTS ASSOCIATION**

Our ref.: NTEAA/1cm/028/00
Your ref.:

28 August 2000

ESTATE AGENTS AUTHORITY
Liaison Section,
Rms. 1701-1707A, Dah Sing Financial Ctr., By fax 2598 9596 & by hand
108 Gloucester Road,
Wanchai, Hong Kong.

Attn.: Mr. KWONG, Kwong-ching

Dear Sirs,

Re: Preliminary Agreement for Sale and Purchase

We refer to your letter dated 10 August 2000.

We are of the opinion that it is a must to make appropriate amendment to the existing Estate Agency Ordinance.

However, regarding the drafting of the Preliminary Agreement, we opine as follows:-

1. It is a necessity to furnish the trade and the public with a standard prescribed Preliminary Agreement for Sale and Purchase so as to avoid the mal-practice of the agents and the unnecessary arguments.

   However, before drafting and completing such an Agreement, the Authority shall accumulate sufficient supportive consultation.

...../P.2

2. Presently, the frequently and mostly arbitrating part of most of the existing Preliminary Agreement is the Clause concerning the indemnity upon the bleaching party who needs to indemnify not only the vendor's agent, but also the purchaser's agent even after the bleaching party has fully indemnified the preliminary downpayment money.

   Nevertheless, the future consultative conference shall bring out the equilibrium of the deal.

3. We object to imitate the U.S. or Canadian mode of 'duty-free' period of executing the relevant Preliminary Agreement on the account that the trade convention of Hong Kong is totally unlike the one of the U.S.or Canada, where their trade liquidity is not as booming and 'forcing' as Hong Kong.

   Obviously there are still lots of opinion to flood in soon. We propose we shall have a conference organized to allow the representatives of the other 4 trade associations to voice and conclude a benchmark of drafting the relevant Agreement.

Yours faithfully,

LIU Chi-ming,
President