

**LETTERHEAD OF OFFICE OF AUDREY EU, LEGISLATIVE COUNCIL
MEMBER**

20th February 2001

Miss Margaret Ng
Chairman
Administration of Justice and Legal Services Panel
Legislative Council
8 Jackson Road
Hong Kong

Dear Madam Chairman,

Re: Paper on proposed amendment to the Conveyancing and
Property Ordinance (Cap.219) to enable a court to order
Repayment of any deposit

I refer to the above proposal which will be discussed at the AJLS Panel meeting today.

I have reservations on the proposal for reasons below.

1. The court already has the power to grant relief against forfeiture of the deposit in cases of fraud, accident, surprise or mistake (see para.5 of the paper). In other words, the court already has the power to return the deposit (or part thereof) in order to do justice in those circumstances.
2. Sometimes, if the transaction falls through because of the fault of the purchaser's solicitor, the purchaser can sue his solicitor for negligence and recover the deposit paid.
3. The injustice has been somewhat mitigated since the English case of **Workers Trust** where the court tries to limit the forfeitable deposit to the conventional sum of 10% of the purchase price. This case has been followed in Hong Kong.
4. Whilst the above points cannot help the unfortunate purchaser in **Wu Wing Kuen** as mentioned in the paper, a decision to give the court a *blanket* discretion to order the return of the deposit should be balanced against the considerations in points 5 to 8 below.
5. I agree with the reasons given in paragraph 25 of the paper against the proposal.
6. In addition, no consideration has been given to the benefit the purchaser gained by paying the deposit or to the detriment suffered by the vendor in receiving this

deposit. The deposit is paid for the commitment from the vendor to hold the property for the purchaser. The property is tied up for the period from the sale and purchase to the time of completion. The vendor cannot sell to another/different purchaser at a higher price. The vendor suffers a loss of opportunity. But, in reality, it is difficult for the vendor to prove this loss of opportunity (that he could have sold at a higher price to some other party). It is difficult to adduce hypothetical evidence and the court often ignores this factor. This factor is also ignored in the paper. Thus it is not quite fair to regard deposits retained by vendor as a "windfall". By the time the dispute arises, the vendor has already given consideration for the receipt of the deposit by holding the property for the purchaser and not being able to sell at a better price.

7. I would also like to emphasize the importance of the certainty of contract. From a selfish point of view, it may be good for lawyers to encourage more uncertainty and thus more litigation. But this is highly undesirable from public interest of view. I commend the following passage from one of our Court of Final Appeal Judges Lord Hoffmann in **Union Eagle** for consideration.

*"The boundaries of the equitable jurisdiction to relieve against contractual penalties and forfeitures are in some places imprecise. But their Lordships do not think that it is necessary in this case to draw them more exactly because they agree with Litton VP that the facts lie well beyond the reach of the doctrine. The notion that the court's jurisdiction to grant relief is "unlimited and unfettered" (per Lord Simon of Glaisdale in *Shiloh Spinners Ltd. v. Harding* [1973] AC 691, 726) was rejected as a 'beguiling heresy' by the House of Lords in *The Scaptrade* (*Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana* [1983] 2 AC 694, 700). It is worth pausing to notice why it continues to beguile and why it is a heresy. It has the obvious merit of allowing the court to impose what it considers to be a fair solution in the individual case. The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalizations are founded not merely upon authority (see Lord Radcliffe in *Campbell Discount Co. Ltd. v. Bridge* [1962] AC 600, 626) but also upon practical considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be 'unconscionable' is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the*

case."

8. It is easy to include a provision giving the court the power to do justice in individual cases. But in real life, justice to one party can also do injustice to the other party. There are often practical difficulties in doing justice in situations relating to the sale and purchase of land. For example when should justice be measured? At the time of the breach, or at the time of judgment? Please note that cases once started may take 2 – 3 years to come to judgment. Meanwhile the property market may have undergone several ups and downs. The situation can be complicated by the vendor having or not having sold the property for all sorts of personal or commercial reasons. What was thought to be a "windfall" at some stage may not be a "windfall" at another stage depending on whether the vendor may or may not have sold or on the unpredictable movement of the market. There is also the vexed question: to what extent should the court look into the motives of the party in determining injustice? At the moment, the court does not look into motives. But the situation may not be so clear if the court is given a blanket discretion to do justice. For example in Union Eagle, the purchaser's solicitors was 10 minutes late in tendering the cheque. Clearly the vendor suffered no loss, but since time was of the essence (an express term of such contracts) the court refused to grant relief. Does the proposal mean that in future, if the vendor's motive is to take advantage of a rising market, he should return the deposit? And what if the market has dropped but the vendor did not want to sell to this purchaser for some other reason? Should the court look into the merits of such reasons? ^{or motives} There is also the question of uncertainty. How much delay will be acceptable – 10 minutes, 1 day, 2 days? If the purchaser is merely being late, why is the offer of interest not sufficient? If the vendor refuses to accept late tender coupled with interest payment, will it be considered "just" or "unjust" for the vendor to retain the forfeited deposit?

The above are just some considerations for caution. Since the whole law may well be changed with the passage of the Land Titles Bill, it may well be advisable to leave this area of the law alone. I note that the Law Society has found this to be a difficult matter as the advantages may be outweighed by the disadvantages.

The administration wishes to follow equivalent provisions in England and Australia. I would caution that the Hong Kong property market is very different from England or Australia. It may be better for Hong Kong to have a more restrictive provision where the considerations for the exercise of discretion to do justice are clearly specified.

Yours sincerely,



Audrey Eu