

**Court's power under section 12 of the
Conveyancing and Property Ordinance (Cap. 219)**

**The Administration's response to comments made by the
Bar Association in paper dated 19th (Document 1), by
the Hon. Audrey Eu, SC in letter dated 20th February 2001(Document 2)
and by the Law Society in letter dated 20th February 2001 (Document 3)**

Part A - Comments common to both Documents 1 and 2

Documents 1 (submitted by the Bar Association) and 2 (submitted by the Hon. Audrey Eu, SC) have the following common comments in support of their view that the courts of Hong Kong should not be conferred with a discretionary power to order the repayment of a purchaser's deposit similar to that provided in England and Wales under section 49(2) of the Law of Property Act 1925.

- (a) The occasions on which a purchaser may need to rely on the proposed discretion would be few (paragraphs 10, 14, 16 and 17 of Document 1, paragraphs 1 and 2 of Document 2). Vendors would only seek to terminate the contract and forfeit the deposit, hence subjecting purchasers to possible inequity, in rising markets (paragraphs 12 and 15 of Document 1). There is already clear law governing most situations.
- (b) Parties should enjoy freedom of contract and the courts should not intervene (paragraphs 10 and 11 of Document 1). It is important to have certainty of contract (paragraph 7 of Document 2).
- (c) The existence of such a discretionary power would encourage purchasers to litigate for the recovery of the deposit even on flimsy grounds (paragraphs 5, 6 and 19 of Document 1, paragraph 7 of Document 2).

Administration's response to Part A

- (a) Cases would be few

2. The Administration agrees that the cases in which it is appropriate for the courts to exercise the proposed discretion are likely to be few. As

noted in paragraph 26(1) of the Administration's submission made to the Panel for discussion on 20 February 2001 (the "Administration's submission"), there does not appear to have been a plethora of litigation in other jurisdictions where such provision has been introduced. Relief against forfeiture where the purchaser was at fault would only be granted in exceptional circumstances. If the property market in Hong Kong maintains its present relatively static condition, the incentive for vendors to take a hard line on completion of transactions would be further reduced.

3. However, the fact that the forfeiture of a deposit may create injustice in few cases is no reason to deny a remedy in these cases. In the Administration's view, the present law in Hong Kong regarding forfeiture of deposit does not deal satisfactorily with all situations in which injustice may occur. As noted in paragraphs 5, 6, 15 and 26(2) of the Administration's submission, the jurisdiction of equity to grant relief from forfeiture is limited and there is no statutory provision giving the court a discretion to return the deposit to a purchaser where that would cause no injustice but would, on the contrary, prevent injustice.

(b) Importance of freedom and certainty of contract

4. The exercise of the discretion would involve a consideration of the interests of achieving justice between two parties to a particular contract. It would not create any general rule preventing the forfeiture of deposits. Under such circumstances, the likely effect on the concepts of freedom and certainty of contract, if any, would be small. Those concepts are no longer considered absolute, and there are many situations in which a remedy is available to prevent an injustice being caused by these concepts. The rationale of conferring judicial discretions by statute arises from the principle of public policy that in some areas of law (including contract) the inflexible application of rigid rules is not always adequate to produce justice (Burrows Statute Law in New Zealand (1992), p. 246).

5. Further, it is worth noting that most of the statutory discretions that have been conferred in contract law are applicable when a contract has broken down (as would be the case under the proposed discretionary power where the

contract has been rescinded by the vendor because of the purchaser's fault) and certainty has thus been destroyed in any case: they are discretions to grant relief rather than discretions to vary the contract obligations (Burrows, p. 247).

6. One example of such a statutory discretion in Hong Kong is section 16 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) under which, in the case of a frustrated contract, the court may, if it thinks just in the circumstances, order a party who has received a valuable benefit under the contract to pay to the other party an amount reflecting the value of the benefit. The court may also allow a party who has incurred expenses before the discharge of the contract to retain or recover those expenses.

7. Similarly, under section 7 of the Control of Exemption Clauses Ordinance (Cap. 71), a contract term purporting to exclude negligence liability for financial loss or damage to property is subject to a requirement of reasonableness to be applied by the court. Further where a contract term purports to restrict negligence liability, a party's agreement to or awareness of it is not to be taken as indicating his voluntary acceptance of any risk.

(c) Purchasers encouraged to litigate even on flimsy grounds

8. As noted in paragraph 26(1) of the Administration's submission, the courts have shown that they are prepared to dismiss unmeritorious claims. The well-established English and Australian precedents would assist the Hong Kong courts in considering issues relating to the merits or otherwise of the claims. The existence of such a body of precedents would enable Hong Kong lawyers to advise their clients on the availability of arguable grounds for making claims. The Administration is of the view that practically speaking it is unlikely that parties would commence unnecessary legal action.

9. One could argue that any remedy in respect of injustice could be abused. But if one were to deny a remedy because of such a possibility, the courts could never do justice.

Part B - Comments in Document 1 only

10. The following comments were also included in Document 1 –
- (a) The fact that limited companies are often used to acquire properties would reduce purchasers' exposure to costs and encourage them to embark on unmeritorious litigation (paragraph 5).
 - (b) Since there is no summary procedure for property transaction-related cases in Hong Kong, litigation, especially where a lien on title is permitted in the meantime, would tie up the vendor's property and be unfair to him (paragraphs 4, 8 and 19).
 - (c) A discretionary power may be needed in the UK because the question of title to property there may be a difficult one whereas the same does not apply in Hong Kong (paragraphs 13 and 14).

Administration's response to Part B

- (a) Use of limited companies would encourage unmeritorious litigation

11. It is true that limited companies are commonly parties to many property transactions in Hong Kong. However, if the situation could be exploited in the form of unmeritorious litigation, these would already have occurred. For example, if a deposit is forfeited, the purchaser, could unmeritoriously seek equitable relief. Given this context, an increase in unmeritorious litigation is unlikely to occur.

- (b) Vendor's property may be tied up for some time

12. The contention that it is unnecessary and arguably unfair to tie up the vendor's title is a factor which the court would take into account with all other relevant factors. Furthermore, this would in any event occur where there is any dispute regarding the sale and purchase contract, and not necessarily because it was argued that the case is appropriate for the exercise of the proposed discretion. A case based solely on an unmeritorious ground is likely to be disposed of reasonably quickly.

(c) Title to property a difficult question in UK but not Hong Kong

13. As can be seen from the decision in the *Wu Wing Kuen* case, which identified another 12 cases where similar issues were involved, proof of title in the Hong Kong property market is not free of problems. In the Australian jurisdictions, where there is title registration, the courts have also been conferred with discretionary powers similar to those being proposed for the Hong Kong courts. In any event, as explained in paragraphs 11 to 15 of the Administration's submission, the problem is not limited to proof of title.

Part C - Comments in Document 2 only

144. The vendor has provided consideration for the deposit by losing the opportunity to sell the subject property from the time a provisional sales and purchase contract was entered into until the time of rescission or completion of the agreement and this should be taken into consideration (paragraph 6).

Administration's response to Part C

15. Where the market price has remained the same, the vendor could sell the property at no loss. His position would be the same as if the original transaction has been completed. Where the price has increased, the vendor would receive more from a subsequent sale. Where the price has dropped, the vendor will be entitled to claim for loss from the purchaser. The court, when deciding on the exercise, or otherwise, of the proposed discretionary power, will consider whether it would be unjust to require the vendor to return the deposit. The principal issue is not whether the vendor has supplied consideration for the deposit, but rather whether in all the circumstances of the case, it would be just or not for the vendor to retain the deposit or for the deposit to be returned to the purchaser.

Part D – Comments in Document 3

16. Document 3 (submitted by the Law Society) advises that the Administration's proposal is supported in principle subject to further review of the detailed provisions of the legislation and subject to the proposed discretionary power being narrowly drafted.

Administration's response to Part D

17. Pending consideration of any detailed amendments to the legislation that may be suggested, the Administration is of the view that the recommendation in paragraph 27 of its submissions should be retained. As noted in paragraph 26(3) of the Administration's submissions, there should be no specification of circumstances in which the discretion should not be exercised. The facts of each case which require appraisal by the court may be complex and individual (Burrows, p. 246). Nevertheless, the English and Australian case law cited in the Administration's submissions (for example, Gogard Pty, at paragraph 24) provides clear guidelines for the court to weigh in determining whether relief should be granted under the proposed discretionary power.

Conclusion

18. The Administration therefore remains of the view that –
- (a) a provision equivalent to section 49(2) of the Law of Property Act be introduced by way of amendment to section 12 of the Conveyancing and Property Ordinance; and
 - (b) such amendments include an express prohibition against contracting out of the provision.

Legal Policy Division
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