

律政司
法律政策科
香港金鐘道 66 號
金鐘道政府合署高座 1 樓
圖文傳真：852-2180 9928



DEPARTMENT OF JUSTICE
Legal Policy Division

1/F., High Block
Queensway Government Offices
66 Queensway, Hong Kong

Fax: 852-2180 9928

本司檔號 Our Ref.: LP 518/00
來函檔號 Your Ref.:
電話號碼 Tel. No.: 2867 2157

By fax : 2509 9055

20 May, 2003

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

Dear Mrs Ma,

Panel on Administration of Justice and Legal Services
Outstanding item: Power of court to order repayment of
deposit to purchaser of property

A proposed amendment to the Conveyancing and Property Ordinance (Cap. 219) to give the court a statutory power to order a refund of a deposit in a property transaction was, at the request of the Bills Committee, withdrawn from the Statute Law (Miscellaneous Provisions) Bill 2001 (the Bill was enacted on 19 July 2002).

In the Second Reading Speech on the Bill, the Secretary for Justice noted that the Administration would nevertheless further explore the possibility of granting a more limited discretion to the court to order a return of deposit. At the moment, this item is listed as “to be advised” in the work programme of the Panel.

The Administration has reached the view that the item should not proceed. It appears that introducing a statutory discretion which is limited, for example, to proof of title cases may not be desirable since there are potentially many circumstances in which it might be considered unjust to permit the vendor to keep the purchaser's deposit. For example, in England, under section 49 of the Law of Property Act 1925, there is an unqualified discretion to order the return of the deposit where that is the fairest course between the two parties: Halsbury's Laws of England 4th Ed. Reissue, para. 246.

A further consideration is that a specifically-limited statutory discretion, through the appearance of codification, might, to the prejudice of purchasers, inhibit the incremental development of the existing equitable jurisdiction under which the court exercises a discretion whether or not to order a refund of deposit. For example, in *Union Eagle Ltd v Golden Achievements Ltd* [1997] 1 HKC 173 the Privy Council held that the wider equitable approach in Australia (permitting a repudiating purchaser to obtain relief against forfeiture of the deposit on the ground of unconscionability) could not be applied to "time of the essence" contracts in Hong Kong. Instead, it was suggested that relief could be based on estoppel or restitution.

However, in some subsequent cases the Hong Kong courts have taken a less rigid approach where the purchaser has been marginally late in completing or has refused to complete. In one case, the solicitors for each party had not synchronised their clocks so that it was uncertain whether the purchaser had in fact been late in delivering the cheques for completion (*Ocean Force Enterprises Limited v Chun Sau Wan & Grand Fully Holdings Limited* [1999] HCA No. 3157 of 1998). In another case, it was held that the purchaser's solicitor had acted with good faith and reasonable care regarding an option to withdraw on the ground of being "not satisfied" with the vendor's title. In such circumstances, the purchaser can withdraw and can recover the deposit (*Regal Success Venture Ltd v Jonlin Ltd* [2000] CACV No. 221 of 1999).

Further, recent English case law in particular indicates that the statutory discretion will be exercised only in exceptional circumstances where the purchaser has failed to perform (*Omar v El-Wakil* [2001] EWCA Civ 1090). The Hong Kong courts may not approach a similar statutory discretion here (were it to be introduced) materially differently than under the present equitable jurisdiction.

For all these reasons, the Administration does not propose to pursue this matter further at present.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General