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19 May 2008

Miss Betty Ma
Clerk to Bills Committee
Legislative Council Building
8 Jackson Road
Central
Hong Kong

via Mr Michael Scott, SASG/GLP *mu 19/5*

Dear Miss Ma,

**Bills Committee on Statute Law
(Miscellaneous Provisions) Bill 2008**

At the second meeting of the Bills Committee held on 2 May 2008, a number of queries were raised regarding the amendments to the Conveyancing and Property Ordinance (Cap. 219). Our answer to the queries is as follows –

- (a) Review the drafting of the proposed new section 13A(1) of CPO in the light of the proposed drafting put forward by the Law Society of Hong Kong.
- (b) Consider whether the word "original" should be added to the proposed new section 13A(1).

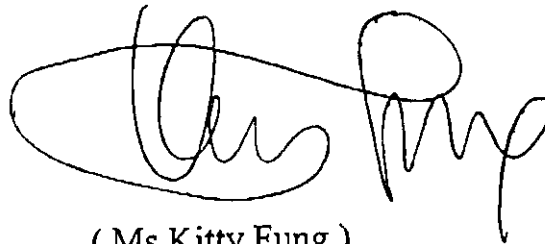
Having considered the views of the Bills Committee members, we have prepared a revised new section 13A to be introduced as Committee Stage Amendments. The Law Society has indicated its agreement to the revised new section 13A.

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- (c) Provide the Hong Kong Bar Association's written views on the drafting of the proposed amendments to CPO as well as views and comments received from consultees on the proposal, if any.

A paper is attached setting out and views and comments of the Bar Association and other consultees.

Yours sincerely,



(Ms Kitty Fung)
Senior Government Counsel
Legal Policy Division

Encl.

#341267

“13A. Delivery of original deeds or documents of title

(1) Unless the contrary intention is expressed, a purchaser of land shall be entitled to require the vendor to deliver to him, of land shall, for the purpose of giving title to that land, ~~deliver to the purchaser the~~ original of both of the following only –

- (a) if there is a Government lease that relates exclusively to the land, the lease; and
- (b) any document that relates exclusively to the land and is required to be produced by the vendor as proof of title to that land under section 13(1)(a) and (c).

(2) Subsection (1) does not affect any rule of common law under which the vendor may discharge his obligation to give title to that land otherwise than by delivering the Government lease or document to the purchaser.

(3) If the vendor is not required to deliver to the purchaser a document in giving title to that land, the purchaser has no proprietary right or ownership in the document.

(4) The fact that –

- (a) the vendor is not required to deliver to the purchaser a document in giving title to that land; and
- (b) the purchaser has no proprietary right or ownership in the document,

does not affect the right or interest of any other person in that land arising from the deposit of the document with that other person.”.

**Paper on responses from consultees
in relation to the proposed new section 13A**

In April 2006, the Administration published a consultation paper on the Law Society's proposal to amend section 13 of the Conveyancing and Property Ordinance ("CPO"). The consultation paper was circulated among various interest groups, including the Hong Kong Bar Association ("the Bar Association"), Consumer Council, The Hong Kong Monetary Authority, Hong Kong Association of Banks and Estate Agents Authority, the Real Estate Developers Association of Hong Kong, the Hong Kong Conveyancing & Property Law Association Limited and legal academics. The consultation paper was also uploaded on the Department of Justice's website.

2. When first consulted in 2006, the Bar Association raised concerns over some technical issues regarding the original draft provision. The draft provisions were revised further to these concerns and the Bar Association has confirmed that it has no objection to the proposed section 13A. A copy of the Bar's letter dated 28 April 2008 is at **Annex A**.

3. During consultation on the proposed amendments, comments were raised by other consultees. These comments have been carefully considered and taken into account before finalizing the provisions. Their comments and our responses are set out in the attached table at **Annex B**. Apart from the comments received, all other consultees expressed support for the proposal.

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Annex A



HONG KONG BAR ASSOCIATION

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Handwritten signature/initials

Copy by Fax
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Original by Hand

28 April 2008

Dear Ms. Fung,

Re: Statute Law (Miscellaneous Provisions) Bill 2008

Thank you for your letter dated 18 April 2008, which concerns the proposed section 13A of the Conveyancing and Property Ordinance. The Bar has previously expressed its views on this Bill. I am pleased to inform you that the Bar has no further comment on the latest draft as there does not appear to be any material changes to the last version commented on by the Bar. If I may, I only wish to add that it would be desirable to proceed with the enactment procedure as soon as possible.

Best Regards.

Yours sincerely,

Rimsky Yuen, S.C.
Chairman

c.c. Law Society of Hong Kong
(Mr. Lester Huang & Ms. Christine Chu)

Mr. Michael Scott, SASG/GLP
Ms. Stella Chan, GC/GLP

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- Deputy Hon. Secretary
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Mr. Stewart Wong 黃繼明
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Mr. [Name] [Name]

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Mr. Jenkin Suen 孫靖乾
Mr. Robin Egerton 艾家敦
Mr. Dennis Kwok 郭榮輝

Table of views of consultees and legal practitioners

Views of consultees and legal practitioners	The Administration's response to the comments
<p>(1) What, and how serious, is the "problem" sought to be addressed by the proposed legislative amendments?</p>	<p>(1) The Law Society confirmed that it was the experience of members of the Property Committee of the Law Society, who are all experienced practitioners in the conveyancing field, and many other conveyancing solicitors in Hong Kong, that the problem is indeed widespread.</p>
<p>(2) Whether the problem can be resolved by an appropriate express contractual provision in the sale and purchase contract, or by the vendor's solicitors perusing the title deeds and deciding what documents would and could be delivered to the purchaser prior to the parties entering into the sale and purchase contract?</p>	<p>(2) Theoretically, any vendor who does not have in his possession all the required original title deeds could (and should seek to) contract out of his legal obligation to give and make title by producing the original of all the deeds. His solicitors could peruse the documents beforehand and advise him to insist on the inclusion of appropriate contracting-out provisions in the sale and purchase contract.</p> <p>However, in reality, in most property transactions in the secondary market, the parties sign binding preliminary agreements at the estate agent's office before solicitors are engaged and have any opportunity to peruse the available title deeds. In practice, it is beyond the power of the vendor's solicitors to insist on the inclusion of appropriate contracting-out provisions in the formal sale and purchase contract.</p>

Views of consultees and legal practitioners	The Administration's response to the comments
	<p>Prior to consultation on the proposal, the Law Society had approached the Estate Agents Authority for support in recommending to their members the inclusion of a standard clause in preliminary agreements to address the perceived widespread problem. However, the Estate Agents Authority was not able or prepared to assist in this regard. In the circumstances, contracting-out is not a practicable solution in the majority of cases.</p>
(3) What are the possible effects on unwritten equities of third parties?	(3) The proposed subsection (4) of section 13A has dealt with this concern.
(4) Whether the problem can be resolved by means other than legislative amendments, e.g. by relying on the principle in <i>Re Halifax</i> ?	<p>(4) According to the principle laid down in <i>Re Halifax Commercial Banking Co and Wood</i> (1898) 79 LT 536, where a vendor is unable to produce a title document because it has been lost or destroyed, he may produce secondary evidence of its contents. To avail himself of this principle, the vendor is also required to produce a statutory declaration by the person who last had possession of the missing document to explain how it became lost.</p> <p>This, however, does not solve the present problem in many cases. Many present owners of properties do not possess old title deeds falling outside the statutory title period because the previous owners, following the established practice, did not</p>

Views of consultees and legal practitioners	The Administration's response to the comments
	<p>provide those documents to the current owners in the previous sale and purchase transactions. Quite possibly, the previous owners themselves received only incomplete title deeds.</p> <p>Given the frequency at which properties in Hong Kong change hands, it is obvious that the above is a common situation. The present owners, not being the persons who last had possession of the mission documents, are not in a position to make the necessary statutory declaration. It is also difficult for them to track down the earlier owners who last had the documents. Moreover, even if this could be done, the earlier owners have simply no incentive to help in providing a statutory declaration.</p> <p>Such an approach is impracticable in many cases for solving the present problem. Legislative amendments are therefore necessary.</p>
<p>(5) What are the possible effects of the new section 13A on the principle in <i>Re Halifax</i>; in particular whether it would have the effect of excluding the operation of the principle in <i>Re Halifax</i> in respect of those original documents which still require production under that section?</p>	<p>(5) The proposed amendments are intended to solve a specific problem, namely, the inability of vendors, through no fault of their own, to produce original title deeds predating the statutory period for giving and making title. There is no intention to exclude or vary in any way the application of the principle in <i>Re Halifax</i>. The continued applicability of that principle is expressly preserved by the last sentence of the</p>

Views of consultees and legal practitioners	The Administration's response to the comments
	proposed subsection (2) of section 13A.
<p>(6) One legal practitioner suggested that section 13 of the CPO should be amended to the effect that the purchaser cannot require a vendor to produce any documents (save and except the last assignment made in favour of the vendor) made before the date for the statutory commencement of title or make any requisitions in respect of such documents.</p>	<p>(6) We consider that such amendment would involve a fundamental change to the common law and present conveyancing practice. We see no justifiable reason for this.</p>
<p>(7) One legal practitioner suggested that the Government should recognize the usual conveyancing practice adopted by property developers, solicitors and property owners in Hong Kong during the last few decades and replace the original Government lease referred to in the proposed section 13A(1)(a) by either the original or a certified true copy of such Government lease.</p>	<p>(7) We consider that the purpose of the proposed amendments is to limit the vendor's duty to produce original title deeds relating exclusively to the property to a good root of title of at least 15 years prior to the date of the sale and purchase agreement. Wide consultation was conducted in April 2006 based on the present proposal. Any new proposal for further changes to the law which affect the fundamental obligation of the vendor to produce original title documents, such as the Government Lease, would have to be considered in detail and subjected to wide consultation. We do not wish to cause unnecessary delay to the enactment of the proposed amendment.</p>

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