Residential Properties (First-hand Sales) Bill

Administration's Response to Issues Raised by Members at the Bills Committee Meeting held on 24 May 2012

At the meeting of the Bills Committee on the Residential Properties (First-hand Sales) Bill (the Bill) held on 24 May 2012, Members raised enquires on a number of issues relating to the Bill. The Administration's responses are set out below.

(1) To consider including a deeming provision in the Bill such that all the provisions required under Schedules 4 to 7 are deemed to apply regardless of whether these are set out in the Preliminary Agreement for Sale and Purchase (PASP)/Agreement for Sale and Purchase (ASP) or not. An alternative will be for the Administration to set out in a pro forma all the prescribed provisions.

2. We have further reviewed whether the "impliedly incorporated" approach should be adopted for Schedules 4 to 7 and suggest status quo. The reason is that in some provisions in Schedules 4 to 7, there are blanks to be filled in. If all of the mandatory provisions are impliedly incorporated as such, there will be incomplete provisions in the relevant agreement. Given that it is a criminal offence if any of the mandatory provisions required to be included in a Preliminary Agreement for Sale and Purchase (PASP) or an Agreement for Sale and Purchase (ASP) are missing in a PASP or ASP and the maximum penalty is a fine of $500,000, we consider the risk that vendors will deliberately omit any of the mandatory provisions in a PASP or an ASP to be low.

3. The legal effect of setting out the mandatory provisions in a pro forma will be similar to that of the current approach adopted in the Bill, i.e. if the pro forma is not used it will be a criminal offence subject to a fine. However, it will not be user-friendly to use a pro forma setting out all the mandatory provisions for a PASP and an ASP in our case, given that we do not expect and do not require that a PASP or an ASP have to follow a sequence of order for the mandatory provisions.

(2) To review the need for proposed section 10 of Schedule 4 lest this may allow a purchaser to rescind a PASP/ASP at any time (even just before the completion date) given the absence of a time limit for raising requisition or objection in respect of title under that section.

4. As explained in our response to the deputations' submissions, we have given careful consideration on whether we should include the clause that "the vendor shall not restrict the purchaser's right to raise requisition or objection in respect of titles" as one of the mandatory provisions in the PASP or ASP. We consider that if we do not require for such a mandatory provision in the PASP and the ASP, vendors may put in provisions to prohibit purchasers' right to raise requisition in sale and purchase agreements. We consider this not acceptable from and not in line with the perspective of protecting consumer interest.

5. Where an agreement for sale and purchase is silent as to the time within which requisitions have to be raised, there will be an implied term that they have to be raised within a reasonable time. Various factors are to be taken into account in determining what was a reasonable time, including the time when the title deeds were delivered to the purchaser, the scheduled time for completion, the conduct of the parties as regards the requisitions, and the reasons for making what was on its face a late requisition. In essence, it is a question of fact to be determined having regard to the circumstances of each case. The intention of section 10 of Schedule 4 is not to alter purchasers' position aforesaid. However, where a time period is prescribed within which requisitions have to be raised, even if a purchaser is able to establish that a requisition, which was raised within reasonable time having regards to the facts of his case, he would be barred to raise it with the vendor if it is outside the prescribed time period. Therefore, we consider that it is in purchasers' interest to have section 10 of Schedule 4 as currently drafted.

(3) To review the definition of "vendor" to ensure that the person responsible will be held liable for an offence he/she commits. To also review clause 7(2) to prevent circumvention through engagement of two or more persons to carry out the prescribed work.

6. Under the Bill, any person (not just the "vendor" as defined under the Bill) who contravenes the requirements on advertisement (Part 3 of the Bill), and any person who makes misrepresentation to induce, or disseminates false or misleading information which is likely to induce, another person to purchase a specified residential property (Part 4 of the Bill) commits an offence.

7. For offences relating to the contravention of the requirements on sales brochure, price list, show flats for uncompleted residential properties, viewing of property in completed development or phase, sales arrangements, PASP and ASP, the disclosure of transaction information, the criminal liability will go to the "vendor", which is defined to include the "owner" and the "person engaged by the owners to co-ordinate and supervise the process of designing, planning, constructing, fitting out, completing and marketing the development" (e.g. the developer in a joint venture). The definition of "vendor" in the Bill reflects the policy intention that both the owner and the developer (if the owner is not the developer) should be responsible for contravention of those requirements, as they should be the one who oversee and make final decision on the development, including the sales of the development, notwithstanding that they may commission various professional practitioners and relevant parties (e.g. designers, architects, surveyors, solicitors, and building contractors) to help out in the process.

8. It is not our policy intention that a person who is only responsible for a specific part of the development process, e.g. an architect responsible for the design of the development, will be held liable for the offences under the Bill relating to sales brochure, price list, show flats for uncompleted residential properties, viewing of property in completed development or phase, sales arrangements, PASP and ASP, and/or the disclosure of transaction information.

9. Some Members commented that there may be loophole for circumvention if the owner engages more than one person to supervise the process of designing, planning, constructing, fitting out, completing and marketing the development. The concern is that the persons involved in the work will not fall within the definition of "vendor" and will not be held criminally liable for the offences under Part 2 of the Bill, whereas the owner may make use of the defence provision in clause 67 of the Bill that he has taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence. As a result, no single person will be caught. We wish to point out that the defence provision in clause 67 of the Bill requires the person to prove that he has taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence. A defendant would have to establish that he has taken such "precautions" and "diligence' as an ordinary prudent and diligent person would take and exercise under the circumstances of the case. The defence would not be available to a defendant owner who merely establishes that he has engaged another person(s) to co-ordinate and supervise the process of designing, planning, constructing, fitting out, completing and marketing the development. Other circumstances of the case would also be relevant in deciding whether the owner has taken "reasonable precautions" and has exercised "due diligence" to avoid the commission of the offence. These circumstances include: whether the owner took steps to engage a responsible developer to co-ordinate and supervise the whole development process, whether the owner gave clear and correct instructions to the developer, whether the owner had any checking and reporting mechanism with the developer to ensure that those instructions were complied with, and whether the owner had any reason otherwise to believe that the instructions would not be complied with.

(4) To advise the initial ideas on allowing the inclusion of additional information other than that required under the Bill in the sales brochures.

10. Having considered Members' suggestions and the deputations' comments that the vendors should be required to provide in the sales brochure information that is specific to a development, we are drafting a Committee Stage Amendment (CSA) which requires the vendors to

disclose in the sales brochure specific information known to the vendor but is not generally known to the general public about a residential property in the development the fact of which is likely to materially affect the enjoyment of the residential property, and any specific information about the development the fact of which is likely to materially affect the enjoyment of any residential property in the development. We have to be very careful in drafting the CSA on this, lest it will defeat the purpose that sales brochure should not carry non-essential and promotional information.

(5) To further elaborate the Administration's response to The Law Society of Hong Kong's concern on the need for mens rea/knowledge of the inaccuracy before imprisonment is imposed.

11. Apart from the offences under Part 6 of the Bill which relate to investigation, imprisonment is only imposed under clause 20(5) of the Bill where information in sales brochure is not accurate in every material respect as required under clause 20(2), clauses 60, 65 and 66 where there is a commission of the offence of publication of an advertisement containing false or misleading information, misrepresentation or dissemination of false or misleading information.

12. In respect of the offence of publication of an advertisement containing false or misleading information, misrepresentation, and the dissemination of false or misleading information are serious offences, we consider that the penalty should include a fine and/or an imprisonment. For these offences, the prosecution will need to prove the relevant mens rea in respect of the offence. In particular, such as, for the purpose of the offence of publication of an advertisement containing false or misleading information under clause 60 of the Bill, it will need to prove that the person knows that, or is reckless as to whether, the information is false or misleading in a material particular.

13. On the offence under clause 20(5) of the Bill which relates to the requirement that information in sales brochure must be accurate in every material respect, since sales brochure is the most important source of property information to prospective purchasers, we consider that a

contravention of such requirement, whether or not it is intentional, may directly affect and potentially bring financial loss to prospective purchasers. The proposed penalty is therefore a fine and/or an imprisonment, with a view to achieving an effective deterrent effect and regardless of the vendor's intention to commit the offence. That said, the defence provision in clause 67 will apply.

Transport and Housing Bureau
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