

Residential Properties (First-hand Sales) Bill

**Administration's Response to the Letter of 6 June 2012
from the Law Society of Hong Kong**

The Administration's responses to the letter of 6 June 2012 from the Law Society of Hong Kong (the Law Society) are set out below.

The need for a mechanism to grant exemptions from the requirement on a case-by-case basis.

2. As set out in our previous response to the deputations' submission (LC Paper No. CB(1) 1936/11-12(02), the objective of the proposed legislation is to enhance market transparency and consumer protection. It is very important that the law should be clear and without ambiguity, and that any exemptions to be considered have to be fair and measurable in an objective manner, and the types of exemptions should be clearly set out in the Bill. Exemptions on a case by case basis in the light of individual circumstances will not be practicable for implementation, and will undermine the effectiveness of the legislation.

3. Along the above principles, and having taken into account the various special circumstances which the Law Society has drawn to our attention, we have already proposed Committee Stage Amendments (CSAs) to the Bill to cater for those circumstances as far as practicable. For example:

- (a) we have proposed CSAs to exempt the sale of first-hand residential properties among immediate family members, and the sale of first-hand residential properties between a body corporate and an associate corporation or a holding company of the body corporate, from the requirements on sales brochures, price lists, show flats, viewing of properties in a completed development or phase, sales arrangements, and the mandatory provisions for Preliminary Agreement for Sale and Purchase and Agreement for Sale and Purchase;

- (b) we have proposed CSAs to provide five working days, instead of three working days as originally proposed in the Bill, for a purchaser to sign an ASP after signing the PASP;
- (c) we have proposed CSAs to enable vendor, after signing the ASP on a specified residential property, to revise the price if the price revision is due to alteration of the approved building plans which leads to changes in the measurements of the property, changes in the terms of payment as set out in the price list, and the availability of any gift, financial advantage or benefit as set out in the price list; and
- (d) we have proposed CSAs to allow vendors to also provide in the sales brochure information which is required by the Director of Lands to be set out in the sales brochure as a condition for the granting of pre-sale consent for Consent Scheme projects.

General exemption for solicitors and other professionals

4. Under the Bill, for most of the offences relating to the contravention of the requirements in Part 2, including those on sales brochure, price list, show flats for uncompleted residential properties, viewing of property in completed development or phase, sales arrangements, and 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).

5. For offences relating to advertisement, misrepresentation and the dissemination of false or misleading information, any person (not just the “vendor” as defined under the Bill) who contravenes the requirements on advertisement, and any person who makes misrepresentation, or disseminates false or misleading information which is likely to induce another person to purchase a specified residential property commits an offence.

6. As explained in our previous response to the deputations' submission (LC Paper No. CB(1) 1936/11-12(02), according to the current drafting of clause 66 of the Bill, the prosecution will need to prove that the person knows that, or is reckless as to whether, the information is false or misleading as to a material fact. According to the test of recklessness in Sin Kam Wah & Another v. HKSAR (FACC 14/2004), the prosecution had to prove that "the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk", and "[c]onversely, a defendant could not be regarded as culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions".

7. As for the commission of an offence due to the mistake of a third party or accident or some other cause beyond a person's control, it is fact sensitive and no general exemption should be granted. The clause does not intend to catch professional for their mere negligence or mistake. We do not see the need to create additional defence provisions exclusively for professionals.

8. The Law Society is concerned that professionals may be held criminally liable for their negligence or mistakes in view of section 89 of the Criminal Procedures Ordinance (Cap. 221)¹. As explained in our previous response to the deputations' submission (LC Paper No. CB(1) 1936/11-12(02), the offence under section 89 of Cap. 221 requires the proof of an accessory's intent to aid, abet, counsel or procure the commission of an offence by the principal offender. Where the principal offence is of strict liability, there were rulings in other jurisdictions that negligence or recklessness was not regarded as sufficient mens rea for complicity. The offence of aiding and abetting is not intended to catch professionals who by mere negligence or mistake in giving advice aided and abetted the principal in committing a strict liability offence. This contrasts in the situation where an accessory does not actually desire to

¹ Section 89 of Cap. 221 states that "Any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence".

assist or encourage the commission of an offence by the principal offender but knows that his actions are extremely likely or virtually certain to have that result, then the accessory may have the requisite intent to aid and abet. Therefore, we cannot just give a blanket exemption to professionals.

9. The Law Society asked for sight of the Administration's response to the Bills Committee on the Law Society's view that there is a need for mens rea/knowledge of the inaccuracy before imprisonment is imposed. Our written response on this to the Bills Committee is set out in paragraph 11 to 13 of LC Paper No. CB(1) 2066/11-12(03) which can be viewed via the following link-

<http://www.legco.gov.hk/yr11-12/english/bc/bc04/papers/bc040531cb1-2066-3-e.pdf>.

Change in sales price when the payment terms have been altered

10. As mentioned in paragraph 3(c) above, we have proposed CSAs to enable vendors, after signing the ASP on a specified residential property, to revise the price if the price revision is due to (i) alteration of the approved building plans which leads to changes in the measurements of the property; (ii) changes in the terms of payment as set out in the price list², and (iii) the availability of any gift, financial advantage or benefit as set out in the price list.

11. We see the need to ring fence the circumstances for allowing price variation after the signing of the ASP. Otherwise, it may create loophole for vendors to mark up the prices in the price list but sell the properties at reduced prices after the signing of the ASP.

² Clause 28(5) of the Bill requires that a price list must set out the terms of payment, the basis on which any discount on the price is available, and any gift, or any financial advantage or benefit, to be made available in connection with the purchase of a specified residential property in the development.

Exemption arrangements under the Bill

12. We propose in the Bill to exempt the sale of one single house which has been issued with a certificate of exemption under the Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121). If the development involves the sale of more than one NTEH, no exemption will be granted.

13. As set out in our written response to deputations' submissions (LC Paper No. CB(1) 1936/11-12(02)), we are concerned that extending the exemption to cover non-NTEH single houses may lead to possible abuse. We are therefore of the view that the proposed exemption should be limited to the sale of just one single NTEH.

Street number

14. As set out in our previous response to the deputations' submission (LC Paper No. CB(1) 1936/11-12(02)), it is quite rare in the past that street number was not yet available before the printing of sales brochure. Upon the issue of the consents to commence building works, vendors may apply in writing to Rating and Valuation Department (RVD) for allocation of building numbers. RVD will normally allocate the building number within one month from application. Vendors should act in good time to submit applications to the RVD.

15. In the circumstances where only "provisional street number" is available at the date of printing the sales brochure, the vendor should provide the "provisional street number" in the sales brochure. In the unlikely event that even the provisional street number is not available before the date of printing the sales brochure, the vendor should state in the sale brochure that the information is not yet available. In both cases, bearing in mind that we have proposed CSAs that the sales brochure being made public in relation to a sale has to be the one which is printed/updated/examined within the past three months, vendors should update the information on street number in the sales brochure when such information becomes available at the time of any examination of the sales brochure

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