

**THE HONG KONG CONVEYANCING &
PROPERTY LAW ASSOCIATION LIMITED**

Registered Address: S. H. LEUNG & CO.

Room 502, Aon China Building, 29 Queen's Road Central, Hong Kong

Tel: 2166 9721

Fax: 2810 6911

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By email

**Bills Committee on
Residential Properties (First-hand Sales) Bill**

Chairman: Hon CHAN Kam-lam, SBS, JP

Members: Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP, Hon LEE Cheuk-yan, Hon James TO Kun-sun, Hon Miriam LAU Kin-ye, GBS, JP, Hon Abraham SHEK Lai-him, SBS, JP, Hon Audrey EU Yuet-mee, SC, JP, Hon Vincent FANG Kang, SBS, JP, Hon LEE Wing-tat, Dr Hon Joseph LEE Kok-long, SBS, JP, Hon Ronny TONG Ka-wah, SC, Prof Hon Patrick LAU Sau-shing, SBS, JP, Hon Starry LEE Wai-king, JP, Hon Paul CHAN Mo-po, MH, JP, Hon WONG Kwok-kin, BBS, Hon IP Kwok-him, GBS, JP, Hon Mrs Regina IP LAU Suk-ye, GBS, JP, Hon Alan LEONG Kah-kit, SC, Hon Tanya CHAN, Miss Becky YU – Clerk, Miss Kitty CHENG – Legal Adviser

**Dr Hon Margaret NG
Representative of the Legal Functional Constituency**

Dear Honourable Members of the Legislative Council,

Re: Residential Properties (First-hand Sales) Bill ("the Bill")

CB(1) 1641/11-12(06)

We refer to our submissions on the Bill dated 16 April 2012 (attached for your easy reference) and understand that the Bill is scheduled for Second Reading on 27 June 2012. Having reviewed the Administration's response to various submissions and the Committee Stage Amendments, we note that most of our recommendations have not been addressed to. We consider that certain areas warrant re-consideration to ensure that we have a good legislation to regulate first-hand sales of new residential flats. It is therefore with some urgency that we write in the hope that you would kindly look into such areas for the purpose of the Second Reading. We highlight these below in order of Clause numbering in the Bill (with cross reference to respective Paragraphs in our said submissions in brackets).

Application of this Ordinance

- 1. Clause 10(3) and (4) - A development would be exempted from the legislation where 95% or more of the new flats there have been leased out**

for at least 36 months. The public and all buyers of those flats are not protected and may still be given Gross Floor Area instead of saleable area amongst other problems. Since there is already exemption for sale of units to sitting tenants of at least one year in Clause 56, **we propose that the exemption under Clause 10(3) and (4) which materially affects the general public be scrapped. (Paragraph 6)**

2. **Clause 10(5)** – To avoid creating preferential treatment for the New Territories, **we propose granting exemption to single buildings situated in other parts of Hong Kong SAR** similar to those of the New Territories Exempted Houses. *(Paragraph 9)*
3. **Clause 10(6)** – **We propose that HOS (Home Ownership Scheme) flats be brought into the legislation without exemption** as there are no convincing reasons why purchasers of HOS flats should not be entitled to the same protection of the law. *(Paragraph 11)*

Sales brochure

4. **Clauses 20(3) and 23(9)** - We noted that the provisions required to be contained in preliminary agreement and agreements under Schedules 4, 5, 6 and 7 make no reference to the sales brochure which formed such integral part of the legislation. On further reading of the Bill, we note that **Clause 20(3)** (*'The sales brochure for the development must state that there may be future changes to the development and the surrounding areas.'*) and **new Clause 23(9)** (*'In this section, a reference to the sales brochure for the development is a reference to the sales brochure for the development printed, or examined under section 16A(1), within the previous 6 months.'*). **However beautifully written in accordance with the legislation, sales brochures appear to have extremely limited validity of 6 months.** This, together with the fact that the obligation to adhere to the sales brochure is not mentioned at all in Schedules 4, 5, 6 and 7, seriously restricts the effectiveness of the sales brochure in the regulation of first-hand sales. **We had recommended that these Schedules should contain a declaration and warranty by the vendor that all information as set out in the sales brochure are and will be true and accurate before and after completion of the sale and purchase, unless beyond the control of the vendor or, for changes to draft DMC under the consent scheme, with the Lands Department's approval and consent. (Paragraph 65 & 66).** **We do not see why most, if not all, the factual matters in the sales brochure cannot stand the test of time by a commitment from the owner.**

Preliminary Agreement and Agreement

5. **Clauses 48 and 49 (Deposit and execution)** - A preliminary deposit of 5% of the purchase price (say \$300,000 for a \$6-million flat) is payable on entering into preliminary agreement. This is forfeited if the purchaser does not within 5 working days (as now amended) enter into formal agreement due to whatever reason (including bad weather, personal accidents). The court has no power to grant relief and the buyer will lose that 5%. **We had recommended that: (a) the preliminary deposit be fixed at 1% of the purchase price. (Paragraph 29); (b) if the purchaser does not enter into an ASP in the stipulated period, the**

vendor, before exercising its right of forfeiture, should give a written notice to the purchaser informing him that the vendor will terminate the preliminary agreement with the effects in Clause 49(2) so that the purchaser has time to seek redress in certain exceptional circumstances. *(Paragraph 33)*; and **(c) in appropriate exceptional circumstances**, where the purchaser fails to sign the ASP within the stipulated period, **there should be automatic extension of time, or at least, the court should be allowed to give relief** against the undesirable consequences of Clause 49(2). Exceptional circumstances are those situations beyond the purchaser's control, e.g. Typhoon Signal No.8 or above; Black Rainstorm Warning Signal, personal accident or death etc. *(Paragraph 34)*. **Without these safeguards, grave hardship may be unnecessarily created in certain exceptional circumstances and put the public at the mercy of developers.**

6. **Clauses 50, 50A, 50B and 50C ('Certain provisions')** – Despite the amendments, Clause 50B(2) still retain the original Clause 50(8) of the Bill, which gives rise to the strange situation such that if a preliminary agreement or agreement for sale and purchase does **not** contain a provision set out in the relevant Schedule, such provision cannot prevail over any term inconsistent with it as contained in the preliminary agreement or agreement. **We had recommended that the relevant mandatory provisions in Schedule 4, 5, 6 or 7 be by law implied in preliminary agreements and agreements for sale and purchase covered by this legislation. (Paragraph 38).** If the difficulty is that certain provisions in Schedule 4, 5, 6 or 7 require input of additional information or deletion as appropriate and cannot be blindly implied, **we propose that Clauses 50, 50A, 50B and 50C be amended to include a corresponding prohibition against insertion of provisions inconsistent with the relevant mandatory provisions in Schedule 4, 5, 6 or 7 for better protection to the public.**
7. **Criminal liability for Advertisement etc (Clauses 60, 65 and 66)** – Although the Administration says that these Clauses does not intend to catch professionals for their mere negligence or mistake, **the Clauses on the face put solicitors high on the agenda for being charged with being 'reckless as to whether, the information is false or misleading'** in relation to advertisements and/or dissemination of information that is likely to induce another person to purchase any specified residential property (Clauses 60 and 66), and making a 'reckless misrepresentation for the purpose of inducing another person to purchase any specified residential property' (Clause 65). **We had recommended a general exemption of solicitors, whether acting for the vendor or for the purchaser, from such criminal liability. (Paragraph 47).** Despite our submissions, the threat of such criminal charges remains for solicitors in the honest discharge of their duties in providing legal services. To make matters worse, the **new Clause 65A creates civil liability** for reckless misrepresentation which catches solicitors for similar reasons. **Such scheme distracts from the prime focus of regulating owners in their first-hand sale of residential properties and unreasonably puts threat of criminal and civil liability on solicitors who are putting through the legal documentation for vendors and purchasers. We do not wish to see charges or claims laid or made against solicitors for providing legal services for vendors and purchasers in first-hand sales or**

solicitors refraining from taking up such conveyancing work.

8. **Summary quick relief - We had recommended that the Bill should provide a method of summary quick relief to those purchasers against the relevant offending developer vendor for the loss and damages they suffered. (Paragraph 68).** We understand that the Administration considers that the Consumer Council, the Consumer Legal Action Fund, and the expansion of the Supplementary Legal Aid Scheme will help such buyers on civil proceedings against the vendors. However, we still believe that the poor buyers should not be asked to take out time-consuming legal proceedings to recover his loss upon the vendor's conviction under the law.

9. **Missing Crown Lease or Grant in New Territories – Amended Clause 10 of Schedule 4 and similar amended provisions in Schedules 5, 6 and 7 provide to the effect that *'Without prejudice to Sections 13 and 13A of the Conveyancing and Property Ordinance (Cap. 219), the Vendor shall not restrict the Purchaser's right to raise requisition or objection in respect of titles.'* These amendments do not address the problem of missing Crown Lease or Grant in New Territories, but immediately take away the right to the respective properties. We propose that short of a complete removal of the Clause in the respective Schedules, an exception be created for the situation of missing Crown Lease or Grant in New Territories, until the Government offers a solution to rectify the problem. (Paragraphs 58 – 60).**

We thank you for your time and patience in going through our further submissions in this letter and would be immensely grateful if you would kindly consider the same in your address at the Second Reading. If you need clarifications, please feel free to let us know.

If, in the interest of time, the Bill is passed without the chance for Members to sufficiently address the above problems, kindly consider this letter as our standing request and consider urging the Administration to undertake to conduct further consultation and/or review of the legislation and related subsidiary legislation before its operation commences. We would also like to be consulted then and reserve our rights to make further submissions.

Yours sincerely,



Anthony Shin

President

The Hong Kong Conveyancing & Property Law Association Limited

Correspondence address: Herbert Tsoi & Partners, Room 2008, Melbourne Plaza, 33 Queen's Road Central, Hong Kong. Direct line: (852) 3973-9973. Email: anthony.shin@htp.com.hk