

立法會
Legislative Council

LC Paper No. CB(2)1699/99-00
(These minutes have been
seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Tuesday, 15 February 2000 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon Mrs Miriam LAU Kin-ye, JP
Hon Mr Ambrose LAU Hon-chuen, JP

Members Absent : Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP

Public Officers Attending : Item III

Mrs Carrie YAU
Director of Administration

Ms Rosanna LAW
Assistant Director of Administration

Mr David LEUNG
Assistant Judiciary Administrator
(Secretary of the Working Group)

Item IV

Mr Stephen Kai-yi WONG
Deputy Solicitor General

Ms Agnes CHEUNG
Senior Government Counsel

**Attendance by :
Invitation**

Item III

Hong Kong Family Law Association

Mr Robin EGERTON

Hong Kong International Arbitration Centre

Mr Colin J WALL
Chairman of the Hong Kong Mediation Council

Mrs Robyn HOOWORTH

Item IV

Law Society of Hong Kong

Mr Anthony CHOW, President

Mr John MORGANS

Mr Peter AHERNE

Mr Patrick MOSS

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

Action
Column

I. Confirmation of minutes of meeting
(LC Paper No. CB(2)1077/99-00)

The minutes of the meeting held on 16 November 1999 were confirmed.

II. Items for discussion at the next meeting

(LC Paper No. CB(2)1045/99-00(01))

2. Members agreed that the following items should be discussed at the next regular meeting to be held on 21 March 2000 -

- (a) Prosecutions conducted by staff of law enforcement departments;
- (b) Rule of law and judicial independence; and
- (c) Section 2GG of the Arbitration Ordinance.

Improved mechanism for enforcing defaulted alimony payments

(item 9 of LC Paper No. CB(2)1045/99-00(01))

3. Members noted that the Administration would brief the Panel on Home Affairs on issues relating to this item in March/April 2000. After discussion, members agreed that this Panel should be invited to attend the meeting when the issue was discussed by the Panel on Home Affairs.

III. Mediation as an alternative dispute resolution mechanism

(LC Paper Nos. CB(2)1045/99-00(02) & (03) and 1088/99-00(01))

4. At the invitation of the Chairman, Assistant Judiciary Administrator (AJA) briefed members on the major recommendations of the Working Group to Consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong as follows -

- (a) The Pilot Scheme was intended to run for three years to test the effectiveness of mediation in resolving matrimonial disputes in Hong Kong;
- (b) A Steering Committee to be set up to oversee the implementation and evaluation of the Scheme;
- (c) A Mediation Co-ordinator to be appointed to publicize and co-ordinate the provision of mediation services;
- (d) Applicants for the services to be given a choice of family mediators from the Social Welfare Department, non-governmental organizations

and mediators in private practice, to try out different means of providing the services. Participation in the Pilot Scheme would be entirely on a voluntary basis; and

- (e) An independent research team to be commissioned to evaluate the effectiveness of the Pilot Scheme.

AJA further advised that the Steering Committee, since its inception in October 1999, had met three times to discuss various matters relating to the implementation of the Pilot Scheme, including the Practice Directions on the Scheme, allocation of fund for the provision of mediation services and the selection of the research team for the evaluation of the Scheme. Furthermore, the Mediation Co-ordinator's Office was set up in the Family Court premises in June 1999 to carry out the necessary preparatory work, such as finalizing the case referral mechanism and the procedural guidelines and the production of necessary publicity materials. It was expected that the Pilot Scheme would be commenced before the end of the current financial year.

Adm 5. In response to the Chairman, AJA undertook to provide the membership of the Steering Committee for the Panel's information.

6. Mrs Miriam LAU noted that the Working Group recommended that there should be a lead-in period of six months before the commencement of the Pilot Scheme. She asked what concrete measures were in hand to promote the awareness and understanding of mediation services amongst relevant sectors of the community and members of the public.

7. AJA replied that the Working Group was well aware that a proper understanding of mediation in family law litigation was vital to the success of the Pilot Scheme. Following the establishment of the Mediation Co-ordinator's Office in June 1999, the Mediation Co-ordinator was in the process of formulating publicity strategy and preparing publicity materials to enhance public awareness. Publicity activities included, among others, preparation of an information leaflet, video presentations and radio announcements on mediation. As soon as the Scheme was launched, seminars and information sessions would be provided to applicants and interested parties to explain the process of mediation, and suitable cases would be referred to accredited family mediators in the Social Welfare Department, the non-government agencies as well as mediators in private practice. Furthermore, lawyers would be obliged, through the issue of a Practice Direction by the Chief Justice, to advise their clients of the choice of mediation and how it might assist in the proceedings, and to give to their clients the information leaflet prepared by the Mediation Co-ordinator. The staff of the Family Court Registry would advise those acting in person accordingly. Other social welfare agencies and relevant government Departments would also be distributing the information leaflet to their clients.

Adm 8. AJA agreed to provide copies of the information leaflet for members'

reference.

9. Members enquired about the merits of family mediation and the level of success of using mediation in resolving matrimonial disputes. Mrs Robyn HOOWORTH advised that mediation being a non-adversarial approach to resolving disputes minimized the trauma on the parties involved in a marriage breakdown. It was effective to help bring about improvements to the present relationship between the disputing couples as well as their future relationship as co-parents which would impact on the welfare of the children. If an amicable settlement could be reached, there would be marked savings in terms of time and litigation costs. Furthermore, the parties concerned were more likely to comply with the settlement reached as a win-win solution, being one which they had voluntarily and actively participated in and mutually agreed upon. Mrs HOOWORTH added that as demonstrated by experience, re-litigation rates under mediation were lower than that under a litigation process. This was probably due to the fact that family mediation was essentially a problem-solving process under which the parties could learn how to resolve future conflicts when circumstances changed.

10. Mrs Robyn HOOWORTH further advised that the Hong Kong Catholic Marriage Advisory Council had been running a family mediation service for five to seven years. The success rate, which ranged from 65 - 85%, compared favourably with statistics from overseas.

11. On the question of how measures were undertaken to ensure sufficient supply of trained mediators, Mrs Robyn HOOWORTH informed the meeting that the Hong Kong Mediation Council through the Hong Kong International Arbitration Centre (HKIAC) had since 1994 trained well over 100 mediators, who were lawyers, social workers, counsellors and psychologists etc. Currently, a programme was being run for the training of another 25 lawyers in family mediation. There were now 46 accredited family mediators in the government, the non-government and private sectors under an accreditation programme, who had undergone comprehensive training and live supervision in all aspects of mediation in family disputes, financial disputes as well as custody and access arrangements for children. The accreditation standards were in line with those adopted for overseas institutions. The standards of the trainees were monitored by way of imposing some pre-requisite requirements which had to be satisfied before a person was admitted for training. These included a degree in either law or social work or psychology and a minimum of three years' working experience in the area of family law or family welfare or, in the absence of a relevant degree, extensive practical experience in the field of family law or welfare. She added that HKIAC also invited from time to time overseas trainers to come to Hong Kong to share experience with local trainers so that the training provided could take into account not just the local situation but also other intrinsic issues which had been dealt with in other countries. HKIAC also assisted in organizing family mediation programmes in the local universities and some post-secondary institutions. At present, one university was offering a post-graduate diploma course on alternative

dispute resolution. The universities were beginning to take an active interest in this particular area, and it was expected that some degree courses specifically on mediation would be offered in the near future.

12. The Chairman asked how mediation compared with litigation in terms of achieving a result, given that mediation could be unsuccessful, whereas there was bound to be a resolution under litigation in the form of an order.

13. Mr Robin EGERTON said that a major attraction of mediation was that it was effective in identifying issues at the early stages which might be settled amicably through an agreement with the advice and assistance of a professional mediator. Very often agreements reached in mediation were approved by the courts in the form of an enforceable order. Therefore, mediation was seen as a useful option within the entire system for resolving family disputes. He advised that at present, in the majority of cases, disputes involving finances and maintenance were settled by way of agreement between the parties.

14. Mrs Robyn HOOWORTH pointed out that mediation differed from a court process in dealing with matters involved in a family dispute, for example, alimony or spousal support for the children, in that mediation not only looked at the substantive and procedural issues but also the psychological and emotional aspects of the dispute. All too often, it was the latter issues which a court process failed to address that led to non-compliance and re-litigation. She added that experience of mediators showed that in many cases both parties went into mediation initially holding a very positional attitude and not preparing to "budge". Yet, in the course of discussing face-to-face in mediation, the parties became more appreciative of the underlying needs and concerns of each other and eventually came up with some mutually acceptable arrangements with which they were willing to comply.

15. Mr Albert HO asked whether it was desirable to introduce a process of mandatory mediation for resolving family disputes. He also suggested that the use of mediation as an alternative dispute resolving measure could be extended to deal with other types of disputes such as neighbourhood or building management disputes.

16. Mrs Robyn HOOWORTH and Mr Robin EGERTON responded that a mandatory scheme appeared to work against the basic philosophy of family mediation, i.e. to provide disputing parties who shared a desire to resolve their differences with the opportunity to participate voluntarily in a process in which they could ultimately work out for themselves an enduring solution with the help of a facilitator. An alternative process that was forced upon them was unlikely to have the same satisfactory result when it came to enforceability of a settlement. According to overseas experience, although mediation had been made mandatory in some areas, most countries resisted introducing a compulsory process for family mediation.

17. Mr Colin WALL supplemented that mediation was being used as the initial tier

of dispute resolution for disputes arising from public works contracts. However, mediation in such cases was still a non-binding process.

18. Director of Administration advised that apart from the current Pilot Scheme which was about to be launched, the effectiveness of which had yet to be fully assessed, the Administration had no plans to further extend the scope of mediation services to other types of disputes. Yet, the Administration welcomed any views to be given on this issue.

19. Mrs Miriam LAU pointed out that the Legal Aid Ordinance did not apply to mediation cases. She asked whether mediation sessions conducted under the Pilot Scheme could be provided free of charge to encourage more disputing parties to try the services. AJA responded that the proposal was being actively considered by the Working Group, subject to the finalization of the funding arrangements.

IV. Court's power under section 13(1) of the Conveyancing and Property Ordinance (Cap. 219)

(LC Paper Nos. CB(2)819/99-00(02) & (03) and 1088/99-00(02))

20. The Chairman informed members that this item arose from a recent press reporting on a Court of Appeal case (Wu Wing Kuen v Leung Kwai Lin Cindy, CACV 240/1999). The Court ruled that, by virtue of the construction of section 13 of the Conveyancing and Property Ordinance (CPO), the plaintiff purchasers concerned were not entitled to rescind the contract because the vendor was able to produce secondary evidence of proof of title to the property, though not the primary evidence of the original power of attorney. However, Godfrey J.A. expressed regret at the purchasers having their deposit forfeited in this case, as the requisitions for proof of title were rightly raised. Since the Court had no power to order return of the deposit under the existing law, Godfrey J.A. urged that a power similar to that conferred on the courts in the UK under section 49(2) of the Law of Property Act 1925 (LPA) be incorporated in local legislation so that justice could be done to the purchasers in similar cases. Section 49(2) of LPA contained the following provision -

"Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of the deposit;"

21. At the invitation of the Chairman, Deputy Solicitor General (DSG) elaborated on the Administration's preliminary views on the issue as follows -

- (a) The proposal involved matters relating to freedom and sanctity of contract and possible interference with contractual rights. In considering the issue, one should have regard to the purpose of requiring a deposit to be made in conveyancing transactions, i.e. to

guarantee the performance of a contract, as well as the contractual remedies that could be specifically provided for under a contract. Given the absence of a general statutory power to interfere with a contractual right, the Administration was cautious about introducing a special discretionary power of the courts which applied only to conveyancing practices. This could possibly lead to a proliferation of litigation and defaulting purchasers abusing such power;

- (b) Regarding the scope of legislation, the Administration noted that the power under section 49(2) of LPA appeared to be wider than that envisaged by Godfrey J.A. As it presently stood, the power to order the return of the purchaser's deposit under section 49(2) of LPA could be exercised by the courts even in circumstances where the purchaser was at fault. The Administration considered that an alternative approach might be a thorough review of the existing evidential rules, particularly in relation to acceptance of secondary evidence; and
- (c) The Administration was also concerned about the significant impact of the proposed power of the courts on general conveyancing practices. This could be a subject justifying a law reform exercise to be conducted by the Law Reform Commission. The Administration would consult all relevant parties before deciding on the way forward.

22. In response to the Chairman, Mr Anthony CHOW advised that members of the Law Society's Property Committee were not unanimous in considering the issue. He said that the Committee was initially of the view that cases similar to the case under reference did not frequently happen and that they did not justify a change in the law. However, the Committee came to recognize that there were valid arguments in support of legislative change to deal with situations in which the absence of a provision similar to section 49(2) of LPA could produce a grossly unfair result. The Law Society was currently reviewing the issue particularly in the light of a research paper prepared by Mr John MORGANS, Chairman of the Property Committee of the Law Society (LC Paper No. CB(2)1088/99-00(02)).

23. At the invitation of the Chairman, Mr John MORGANS briefed members on his paper which summarized the arguments for and factors militating against the introduction of legislative amendments along the lines of section 49(2) of LPA. Mr MORGANS also elaborated on an additional point not included in his paper. He said that a unique feature of the conveyancing system in Hong Kong was that very often a transaction was preceded by the signing of a provisional sale and purchase agreement at an estate agent's office. At that early stage, both parties were unlikely to have the benefit of legal advice. However, by virtue of that agreement, both the purchaser and the vendor had already assumed a binding obligation. It was conceivable that the purchaser could later find himself in an unduly restrictive situation where he could not rescind the contract and recover his deposit in the event that the vendor was only able

to produce secondary evidence of a document of title. Mr MORGANS said that this distinct aspect of Hong Kong's conveyancing practice could present a supportive argument for legislative changes for the protection of the purchasers.

24. Regarding practices in overseas countries, Mr John MORGANS advised that Australia adopted a parallel provision of section 49(2) of LPA. Section 55 of the New South Wales Conveyancing Act 1919 contained provisions which specifically provided that a purchaser was entitled to recover his deposit by reason of a defect in the vendor's title which had not been disclosed in the contract, and to be relieved from all liability under the contract whether at law or in equity.

25. Mr Albert HO expressed the view that it was open to argument as to whether injustice had been done to the purchasers in the case under reference. He said that under the common law system, it was not infrequent that litigants lost in their case because they had failed to seek proper legal advice, or because the law was ambiguous or uncertain about certain issues. As a result, people "learned the lesson" through the bitter consequences. He said that similar situations did not only come about in conveyancing transactions but also in other litigation cases as well.

26. Mrs Miriam LAU said that in dealing with provisions in CPO, solicitors were often faced with issues on which there was no proper legal authority or judicial decisions providing a clear interpretation. In the particular case in question, it was difficult for the solicitor advising the purchaser on title to decide whether secondary evidence was good enough as evidence of title. There was no suggestion that the solicitor was at fault in advising the purchasers on requisitions concerning proof of title, as it had been held by the learned Recorder of the Court of First Instance that the requisitions were rightly raised. She added that a purchaser should respect the sanctity of a contract on the basis of the existence of a good title. However, in this case, there was no sufficient authority to establish a good title until after the Court had made its ruling. Mrs LAU opined that with the provision of a discretionary power for the Court to return the purchaser's deposit and by relying on the good judgment of the Court to exercise such power only in deserving cases, a more equitable protection of the purchasers could be achieved.

27. Mr Martin LEE agreed with Mrs Miriam LAU. He expressed the view that in Hong Kong the law seemed to be protecting the interests of the great developers more than that of the ordinary small buyers. Moreover, in view of the frenzy which time and again was experienced in the local property market, a legislative amendment in the direction of the UK model was worthy of consideration. It was also consistent with the approach to safeguard the interests of the general consumers. He enquired whether the system in UK had been working satisfactorily there.

28. Mr John MORGANS responded that the discretionary power under section 49(2) of LPA had been in existence for a long time in UK. The exercise of such power had been sought from time to time and he was not aware of any major controversy or

public pronouncement in UK that such power had been abused or misused.

29. The Chairman opined that CPO was in essence a transplantation of LPA, except that the provisions in section 49(2) of the latter had been left out. In her opinion, the absence of such provisions from CPO could hamper the Court from doing justice in certain cases. She enquired about the reason for the omission.

30. Mr Peter AHERNE informed members that he was a former member of a drafting committee engaged in the preparation of CPO. He said that in the process of comparing relevant legislation, the view had been adopted that issues which were not relevant to the local context should not be included in the Ordinance. He said that section 49(2) of LPA might have been briefly looked at in terms of how it was then used in UK.

31. Mr Anthony CHOW said that the conveyancing practices and market conditions in UK were different from that in Hong Kong. In the local market which featured a heavy speculative element, cases involving a challenge of title arose mainly in the secondary market which did not concern the property developers. Furthermore, property title in UK was more certain under a different system of title registration. These inherent differences might limit the usefulness of a comparison between the systems operating in UK and Hong Kong.

32. DSG assured members that in conducting the review, the Administration was committed to protecting the interests of the purchasers and vendors alike. This accounted for the need for a wide-ranging consultation with all relevant parties, including the Consumers Council and the legal profession, to arrive at a balanced view on the issues concerned.

33. The Chairman requested the Administration to revert to the Panel as soon as it had come up with any recommendation on the issue for further discussion.

34. The meeting ended at 6:40 pm.