

Letterhead of HONG KONG BAR ASSOCIATION

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By fax and by delivery
(fax: 2869-0720)

5th May 2000

Mr. Stephen Kai-yi Wong
Deputy Solicitor General
Legal Policy Division
Department of Justice
4/F High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Mr. Wong,

Re: S.13, Conveyancing and Property Ordinance (Cap. 219)

Thank you for your letter on 2nd March 2000 seeking the Bar's views on the above Consultation Paper. Enclosed please find the Bar's comments thereon for your consideration.

Yours sincerely,

Ronny Tong, S.C.
Chairman

Encl.
/al

**HONG KONG BAR ASSOCIATION
COMMENTS ON
S.13, CONVEYANCING AND PROPERTY ORDINANCE (CAP.219)**

1. The Hong Kong Bar Association is asked by the Department of Justice ("DOJ") to express views on the question whether the court in Hong Kong should be given a discretionary power similar to that of the court in England and Wales under s.49(2) of the Law of Property Act 1925 ("the Act").

THE COMMON LAW REGARDING REPAYMENT OF DEPOSITS

2. At law, a vendor is only liable to return the deposit if the purchaser can show a case for rescission of the contract. This is so even though the vendor, while not in breach of the contract, is for one reason or another unable to obtain specific performance of the contract.

Re Scott and Alvarez's Contract, Scott v. Alvarez [1895] 2 Ch 603, per Lindley L.J. at 612 & Lopes L.J. at 615

Beyfus v. Lodge [1925] 1 Ch 351, per Russell J. at 358-61.

LEGISLATIVE INTERVENTION IN ENGLAND & WALES

3. s.49(2) of the Act reads as follows:

"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 any deposit."

History of application

4. To use the words of Megarry J. (as he then was) in Schindler v. Pigault (1975) 30 P&CR 328 at 336, s.49(2) was "remarkably quiescent" in the first 50 years of its life.
5. Further, the decisions in the handful of cases in which the court ordered vendors who were not in breach of contracts to return deposits to purchasers reported in this earlier period (e.g. Charles Hunt, Limited v. Palmer [1931] 2 Ch 287, per Clauson J. at 293 and Finkielkraut v. Monohan [1949] 2 All ER 234, per Danckwerts J. at 237H-238A) were not reasoned.

6. In consequence, there was, until the mid to late 1970's, considerable uncertainty surrounding the scope of s.49(2), the nature of the jurisdiction conferred by it and the circumstances that would justify the court in exercising the power thereunder.

Principles established by cases since 1975

Scope

7. It is now clear that s.49(2) provides a statutory jurisdictional basis for a purchaser of any interest in land (whether by sale or exchange) who does not claim rescission of the contract or is unable to establish a sufficient case for it because he is himself in default, to nevertheless recover his deposit by suing for its return and making out a proper case under the subsection. This jurisdiction is not confined to the case where the vendor could, but has not, sued for specific performance. See, e.g.,
Schindler v. Pigault, at 336
Universal Corporation v. Five Ways Properties Limited (1979) 34 P&CR 687, per Buckley L.J. at 690 (disapproving Walton J.'s restrictive construction at first instance)
Dimsdale Developments (South East) Ltd. v. De Haan (1983) 38 P&CR 1, per Mr. Gerald Godfrey, Q.C. sitting as a deputy High Court judge (as he then was) at 11

Nature

8. The jurisdiction is discretionary.

Circumstances justifying an order for or refusal to order repayment of a deposit

9. The exercise of this discretion does not depend upon the vendor having acted inequitably/unconscionably. The discretion to order or refuse repayment of the deposit is unqualified by any language of the subsection. Any attempts to impose limits on its operation would be unjustified and unjustifiable. As in the case of any other discretionary powers, that under s.49(2) must be exercised judiciously and with regard to all relevant considerations. See, again, Buckley L.J.'s criticism of Walton J.'s restrictive approach at first instance in Universal Corporation, at 690.
10. Megarry J. said *obiter* in Schindler v. Pigault (at p.336) that this discretionary remedy was available where justice required it to mitigate the vendor's right at law to forfeit the deposit. This generous approach was indorsed by Buckley L.J. in

Universal Corporation (at p.691). Buckley L.J. further took the word "justice" to be used in a wide sense, indicating that repayment must be ordered in any circumstances which made this the fairest course between the 2 parties.

11. In face of these broad statements, there is an understandable reluctance to formulate over-precise principles governing the exercise of this discretion. It also follows that the grounds upon which the repayment of a deposit may be ordered would never be closed.
12. By way of illustration of the operation of the subsection in England and Wales, the following factors have been given weight or said to be material:
 - (1) the terms of the contract into which the parties have chosen to enter
Universal Corporation (in which the parties expressly agreed that the purchaser's deposit may be forfeited unless the court otherwise directed)
Safehaven Investments Inc. v. Springbok Limited (1996) 71 P&CR 59, per Jonathan Sumption, Q.C. sitting as a Deputy High Court Judge at 70
 - (2) the purpose of the deposit
Safehaven Investments Inc. v. Springbok Limited, at 70 & 71
 - (3) the conduct of the parties and especially that of the applicant purchaser, e.g. whether he was unable to complete as a result of some unforeseen mishap or technical difficulty or chose not to complete in a falling market or because he had second thoughts about the bargain
Schindler v. Pigault, at 336
Universal Corporation (in which the purchaser had difficulties in obtaining permission to remit funds from Nigeria to complete following an unforeseen change in Nigerian exchange control law)
Safehaven Investments Inc. v. Springbok Limited, at 71
 - (4) the gravity of the matters in question
Schindler v. Pigault, at 336
 - (5) the amounts at stake
Schindler v. Pigault, at 336

- (6) whether the vendor has suffered substantial loss and damage in excess of the deposit forfeited

Safehaven Investments Inc. v. Springbok Limited, at 71-2

Dimsdale Developments (South East) Ltd. v. De Haan (in which the vendor had been able to resell at a substantial profit)

Limitations

13. s.49(2) does not exclude the right of the vendor who had been ordered to repay the deposit to claim damages.

Universal Corporation, per Buckley L.J. at 692

Dimsdale Developments (South East) Ltd. v. De Haan (in which the discretion was exercised in favour of the purchaser subject to its submitting either to a deduction of £6,500 from the deposit to cover the abortive costs which the vendor had incurred in the first sale or to an inquiry as to damages)

14. Secondly, it appears that the jurisdiction under s.49(2) can be excluded by agreement. In this regard, in Michael Richards Properties Ltd. v. Corporation of Wardens of St. Saviour's, Southwark [1975] 3 All ER 416, Goff J. (as he then was) said (at p.425) that where the parties had purported to agree to exclude the jurisdiction 'the court should not lightly go behind their agreement', but did not hold that the jurisdiction was in fact excluded. See also the *dicta* of Mr. Timothy Lloyd, Q.C. sitting as a deputy High Court judge in Country and Metropolitan Homes Surrey Ltd. v. Topclaim Ltd. [1996] Ch 307 at 316A-B.

CASE FOR ENACTING S.49(2) IN HK

15. Hong Kong has adopted s.49(1) of the Act, thereby making available the vendor and purchaser summons procedure.
16. The subsection with which we are presently concerned was, however, omitted from even the Conveyancing and Property Bill 1983 gazetted for consultation on 29 July 1983.
17. In Hong Kong, subject to the common law rule against penalties and the court's overriding equitable jurisdiction to grant relief against forfeiture, vendor and purchaser of an interest in land are presently free to provide (and most, if not all,

contracts for the sale of land provide) for the forfeiture of deposit by the vendor in the event of a refusal or failure to complete by the purchaser unless the non-completion is due to the vendor's own default.

18. While it is accepted that any attempt to interfere with the freedom of contract, upon which the Hong Kong economy depends to thrive, should be proceeded with carefully with thorough and mature regard to all relevant considerations, the sanctity of contract should not of itself be a reason for not addressing an actual or perceived potential injustice, certainly not by a sophisticated jurisdiction which Hong Kong is or ought to be.
19. In this connection, it is perceived that situations where the purchaser is in default and yet deserves to recover his deposit, though likely to be rare/unusual, are not impossible. For a recent illustration, one need only refer to Wu Wing Kuen v. Leung Kwai Lin [1999] 3 HKLRD 738. In that case, the purchasers did not complete upon legal advice that secondary evidence produced by the vendors of lost documents of title was insufficient proof of title. They were denied their deposits despite the fact that on the confusing state of the authorities prevailing at the time of the transactions, their legal advisors had no choice but to advise them that acceptance of secondary evidence may affect the title. It is difficult to quarrel with Godfrey J.A.'s outrage at the unfair prejudice to these purchasers (which became very public and which prompted the present debate).
20. Given that land in Hong Kong is actively traded in as another commodity and the market is pervaded by a cut-throat atmosphere, especially in a rising market, the situation before the court in Wu Wing Kuen is unlikely to be the only one crying for a return of the deposit to the purchaser. An amendment of s.13 of the Conveyancing and Property Ordinance, Chapter 219 to codify the principles regarding the admissibility of secondary evidence of lost title deeds and documents in proof of title and the quality of such evidence now clarified by the Court of Appeal in Wu Wing Kuen, as suggested in DOJ's list of issues, would, therefore, not address or fully address all the possible scenarios of unfair forfeiture of deposit in land-related transactions, not even those arising from the unsettled state of authorities on other aspects of conveyancing law.
21. Nor would the common law rule against penalties or the court's overriding equitable jurisdiction to grant relief against forfeiture (mentioned in DOJ's list of

issues), in the absence of special circumstances, be of any use to mitigate the injustice of unfair forfeiture of deposit where what is involved is the conventional 10% deposit. See, e.g. Workers Trust and Merchant Bank Ltd. v. Dojap Investment Ltd. [1993] AC 573 and China Pride Investment Ltd. v. Silverpole Ltd. [1995] 1 HKLR 48.

22. On these premises, it is submitted that there is a case for Hong Kong to adopt s.49(2) of the Act to complete the range of remedies dispensable by the local court in cases arising from a sale or exchange of an interest in land.
23. Further, in light of the many unforeseen/unforeseeable facts and circumstances that may render a forfeiture of deposit unfair/unjust, to give the court the necessary flexibility to deal with all such situations effectively, as in the case in England and Wales, the qualification of the jurisdiction/discretion, other than with reference to what the court may think fit, is not recommended.
24. The initial uncertainty that some may fear would associate with the creation of such an unfettered jurisdiction/discretion and the difficulties caused thereby to practitioners prior to the development of case laws on the exercise of the jurisdiction/discretion (referred to in DOJ's list of issues) is, it is submitted, more theoretical than real. This is not the first, and will not be the last, time the legislature entrusts the court with a discretionary power. In this particular instance, a similar provision has been in force in England and Wales for three quarters of a century. Certainly, the body of case law on s.49(2) of the Act would provide sufficient guidance to the legal profession in Hong Kong.
25. If the English authorities are properly drawn upon, it is also unlikely that a purchaser in a falling market would be unintentionally encouraged to renege on his commitment to purchase. See, e.g. the dismissal of the unmeritorious claims in Behzadi v. Shaftesbury Hotels Ltd. (1990) 62 P&CR 163
Safehaven Investments Inc. v. Springbok Limited

5th May 2000