

Letterhead of Margaret Ng

Mr. R.C. Allcock
Deputy Law Officer
Department of Justice
4/F High Block
Queensway Government Offices
Hong Kong

7 January, 2000

Dear Bob,

Re: Conveyancy and Property Ordinance (Cap. 219)

Following a press report dated 14th November 1999, (Headline *Judge berated LegCo for turning a deaf ear*) I looked up the judgment of Godfrey, J.A. in Wu Wing Kuen v Leung Kwai Lin Cindy, CACV 240/1999.

It was an appeal from the judgment from Mr. Recorder Tang SC in HCMP 646 of 1999. The issue was whether the purchaser (the Plaintiff) was entitled to rescind when, at the stage of showing title, the vendor was not able to produce the original power of attorney if the original document was lost, but there is sufficient secondary evidence, on a true construction of section 13(1) of the Conveyancing and Property Ordinance. The learned Recorder came to the conclusion that the purchaser was not entitled to rescind, with the consequence that he was not able to recover his deposit of \$113,000 paid to the vender.

However, the learned Recorder expressed regret on this consequence in the penultimate paragraph of his judgment:

"I have come to this conclusion with regret. That is because the consequence is that the purchaser plaintiff will not be able to recover the deposit paid. On the existing state of authorities, the Plaintiffs legal advisers had no choice but to advise the Plaintiff that acceptance of secondary evidence may affect the title. As it is, I have come to a contrary decision. I hope this judgment will explain to the Plaintiff how the law on the subject is uncertain. Unfortunately, it will provide little consolation to the Plaintiff that although the requisitions were rightly raised, he should have to bear the consequence of an adverse decision by me. I can only hope that the uncertainty will be cleared up by a higher court as soon as possible."

On appeal, the above conclusion in that case was upheld by Godfrey, J.A. At p.10Q - p.11E of his judgment, Godfrey, J.A. made the following comment which gave rise to the press report I have referred to above:

"For the reasons I have given, I would dismiss the appeal in the first case and allow the appeal in the second case. I would add only this; that I share the Recorder's regret that the purchasers in the first case have lost their deposit through no fault of their own. We cannot order that their deposit be returned to them; for we have no power to make such an order. Section 49(2) of the Law of Property Act, 1925 gives the court such a power in England and Wales. I have previously urged the incorporation of such a power in local legislation, but my urgings have fallen on deaf ears. Once again, I commend it to the legislature here to confer such a power on the court. This would enable the court to do justice in cases like the present, in which the system operates unfairly against purchasers. The courts need to be able to stem the flood of cases in Hong Kong in which vendors are able to achieve windfall profits at their purchasers' expense. The sooner something is done about this disgrace, the better."

The full judgments of the Court of First Instance and Court of Appeal are enclosed for your easy reference.

Having given careful thought to the judicial comments, I am of the view that the omission of such a provision from our legislation can hamper our courts from doing justice between the parties in certain cases. For example, where the forfeiture of a substantial deposit by a vendor amounts to unjust profiteering. It is unfair to purchasers — most often ordinary families to whom the sum means a great deal. I can think of no good reason why the courts should not be given a discretionary power similar to that of the courts in England and Wales under section 49(2) of the LPA.

I should be most obliged if you would let me know if any action is being taken by the administration in this regard. Subject to your reply, I shall put matter before the LegCo Panel on the Administration of Justice and Legal Services for discussion with a view to a future amendment in the CAPO.

I look forward to your early reply.

Yours sincerely,

Margaret Ng
Chairman, Panel on Administration of Justice
and Legal Services

c.c. Members of the LegCo Panel on the Administration of Justice and Legal Services