

**For information on
20 June 2000**

**LegCo Panel on Administration of Justice and Legal Services
Section 13(1) of the Conveyancing and
Property Ordinance (the “Ordinance”)**

Background

The Court’s power under section 13(1) of the Conveyancing and Property Ordinance was discussed in the meeting of the AJLS Panel on 15 February 2000.

2. The Administration provided a preliminary oral response on 15 February 2000 and undertook to conduct a consultation exercise and report back to the Panel.

Parties consulted

3. The following organizations were consulted on the proposal to give the court discretionary powers to return deposits, similar to that conferred on the courts in the UK under section 49(2) of the Law of Property Act 1925 (LPA)-

- (a) The Judiciary;
- (b) The Law Society;
- (c) The Bar Association;
- (d) The Real Estate Developers Association of Hong Kong;
- (e) The Consumer Council;
- (f) The City University of Hong Kong;
- (g) The Hongkong Conveyancing & Property Law Association Limited;
- (h) The Director of Lands; and
- (i) The Secretary for Planning and Lands.

4. As at the date of this paper, all but the City University of Hong Kong have reverted with their comments, summaries of which are set out below.

The Administration’s view

5. The consultation has shown that the proposal to adopt in Hong Kong an equivalent of section 49(2) of the LPA is a complex and controversial matter on which opinions are divided. Whether the court should (if at all) be given an unfettered discretion or a qualified discretion is one area of complexity. Issues

such as statutory interference in the freedom of contract, the competing rights of purchasers and vendors, and the certainty of property transactions are others.

6. The property market is an important element of the Hong Kong economy. Any changes to it must be carefully studied. The steps involved in conveyancing transactions in Hong Kong are different to those in the UK and it may be technically more complicated to implement the proposed changes than merely to transplant the UK provisions to Hong Kong.

7. The results of the initial consultation do not seem to point to a simple legislative reform addressing the problem, but reveal other important and controversial issues relating to the local conveyancing system and practice.

8. In view of the complex issues involved and the controversial initial responses revealed by our recent consultation exercise, and the possibly far-reaching implications for the local conveyancing practice, the Administration will continue to research the issues and will consider whether a reference should be made to the Law Reform Commission, as suggested by some of the respondents.

Summaries of initial responses

Judiciary

9. The Judiciary is of the view that this is a policy matter and declined to take part in the policy formulation process as a matter of principle.

Director of Lands

10. The Department has no plans for reform but would be willing to participate in a working group, if any, on issues that may arise from consideration of the proposed amendments.

Secretary for Planning and Lands

11. There are no existing plans to conduct reform in this area.

The Law Society

12. The matter has been considered by the Property Committee of the Law Society on more than one occasion and also by the Council.

13. In both the Property Committee and the Council, after lengthy debate,

there was no consensus as to whether a change should be effected to provide the court with a discretion to order a return of the deposit to the purchaser.

14. Members are of the view that there are compelling arguments both for and against the proposal.

The Consumer Council

15. The Council supports giving the court a power to return the deposit to a purchaser under special circumstances where it will cause injustice for the purchaser to lose his deposit through no fault of his own.

16. It is also suggested that the court's discretion should be qualified and the circumstances under which the discretion should not be exercised should be specified.

17. The Council indicated that it lacks the resources to explore exhaustively all the circumstances that warrant the exercise of such a power by the court.

The Real Estate Developers Association of Hong Kong

18. The Association expressed concern that the proposed granting of discretionary power to the courts would jeopardise the sanctity of contract and lead to much frivolous and unmeritorious litigation instigated by parties trying to renege on signed agreements.

19. It also takes the view that it is common for vendors to simultaneously be purchasers in a second transaction and would rely on the deposit from the sale to, in turn, complete the purchase. Should the deposit of the first transaction be ordered to be returned to the purchaser upon non-completion through no fault of the vendor, the vendor could face financial difficulties in completing the second transaction as a purchaser, and may even suffer the loss of his deposit on the second transaction.

20. Furthermore, the passing of the Land Titles Bill may remove the grey area created by section 13 of the Conveyancing and Property Ordinance. The status quo should be maintained in the meantime.

The Hong Kong Conveyancing and Property Law Association Limited and its President Mr. Leung Siu Hon

Views of the Association

21. The Directors of the Association are unable to reach a consensus on whether there is a need to amend the legislation to enable the court to, of its own motion, order repayment of deposits to purchasers.

Personal views of the President of the Association, Mr. Leung Siu Hon

22. Mr. Leung is of the opinion that the Court should be given the power to order refund of deposits in cases where the transactions fall through because of the complexity of the law; where the purchaser has come with clean hands; or where the vendor has resold the property at a gain; and in other cases following the factors, if any, to be laid down in the Ordinance.

23. He however suggests that the court should not have power to overrule express conditions of sale (for example, time of the essence clause) as it is unfair to the vendor.

24. The Australian provisions (section 55 of the New South Wales Conveyancing Act 1919) should not be followed but the factors set out in *Gogard Pty Ltd v. Satnaq Limited* (1999) NSWSC 1283 (23rd December 1999) should be weighed in determining whether relief should be granted.

Judith Sihombing, Associate Professor in Law, The University of Hong Kong

25. Professor Sihombing cautions that the exercise of discretion can be an unruly machine. Statutory provisions may not be the universal solution even though the results of similar legislation, in other jurisdictions, tend to be acceptable generally.

26. One problem with the proposed amendment is that there is no way to legislate for the manner in which a judge is to, or should, exercise discretion. Another problem is that the proposed amendment does not really address an incidental problem in the Hong Kong situation, namely the use of Provisional Agreement (PA) in transactions.

27. Professor Sihombing suggests that the best solution may be a two-prong approach – to legislate to allow the exercise of discretion in appropriate cases, and to review the effect of PA.

28. Other alternatives include : -

- i) to legislate for the availability of a remedy such as restitution based on unconscionability thereby expanding contractual principles. This would be possible by extending the equitable jurisdiction where there is “fraud, mistake, accident or surprise” to cover those situations described as unconscionable, or as “sharp practices” in

Hong Kong;

- ii) to adopt the concept in New Equity, which is being developed in a line of Australian and New Zealand authorities, but Professor Sihombing has cautioned that it is probably too giant a step to take at one stroke.

29. It is also suggested that in conjunction with the introduction of the Land Titles Bill, there could be a wholesale review of the conveyancing contract and practice to eliminate those traditional, rigorous and sometimes harsh doctrines and rules which Hong Kong conveyancing has inherited from the English real property law, bearing in mind the local circumstances and practices.

The Hong Kong Bar Association

30. While it is accepted that any attempt to interfere with the freedom of contract, upon which the survival of the Hong Kong economy depends, should be taken with care, and 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.

31. Although situations where the purchaser is in default and yet deserves to recover are likely to be rare or unusual, they are not impossible.

32. An amendment 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 would not address or address fully all the possible scenarios of unfair forfeiture of deposit in land-related transactions .

33. The common law rule against penalties or the court's overriding equitable jurisdiction to grant relief against forfeiture may not, 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.

34. There is, therefore, a case for Hong Kong to adopt section 49(2) of the Law of Property Act 1925 to complete the range of remedies dispensable by the local court in cases arising from a sale or exchange of an interest in land. The qualification of the jurisdiction and discretion, other than with reference to what the court may think fit, is not recommended. The court is always at liberty to dismiss unmeritorious claims.

Department of Justice
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