

立法會 *Legislative Council*

LC Paper No. LS 125/99-00

Paper for the LegCo Panel on Housing and LegCo Panel on Planning, Lands and Works

Site settlement in housing estates in Tseung Kwan O

At the joint Panel meeting on 6 December 1999, Members requested the Legal Service Division to advise on the allocation of risk in cases involving residual settlement and unusual settlement.

Types of settlement

2. According to the paper prepared by the Territory Development Department in December 1999 (LC Paper No. CB(1)501/99-00(01)), residual settlement is a result of reclamation. An average settlement of about 300 mm is expected one year after completion of reclamation. The settlement recorded at Tseung Kwan O is more than that amount and the Department is investigating the causes of the unusual settlement.

Agreement and Conditions of Sale

3. The Administration has provided us with one set of Agreement and Conditions of Sale relating to TKOTL No. 50 (Beverly Garden)("Agreement and Conditions of Sale"), and a specific provision ("Specific Provision") for residual settlement extracted from the Agreement and Conditions of Sale of TKOTL No. 61. We are given to understand that the Agreement and Conditions of Sale is a standard form adopted by the Government in granting land in Tseung Kwan O, and the Specific Provision has recently been added as one of the Conditions of Sale in certain grants in Tseung Kwan O.

Residual settlement

A. Claim against the Government

4. Clause 8 of the Conditions of Sale (see Annex A) sets out an express acknowledgement on the part of the Purchaser, an exclusion of warranty by the Government and an indemnity by the Purchaser. In particular, Members may note that the Purchaser acknowledges :

- (a) that the Government shall be under no liability to the Purchaser for any loss or damage arising in connection with the purchase of the lot and its subsequent development;

- (b) that he has purchased the lot based on his own evaluation of land records and has satisfied himself as to the state and condition of the lot;
- (c) that he takes the lot, whether on, above or below the surface of the ground in the existing state and condition;
- (d) that he shall not be entitled to revoke the Agreement or entitled to compensation or a deduction in the sale price should he subsequently determine that the lot is not fit for the purposes for which he purchased.

5. For the purpose of Clause 8, "Purchaser" is defined to include his successors, assigns, mortgagees, tenants or other occupier of the lot whether lawful or otherwise. Hence, this Clause runs with the land and binds not only the Developer, but also owners of units of building developed on the lot as well as their mortgagees, tenants and occupiers.

6. The legal effect of this Clause is to endorse the "caveat emptor" or "buyer beware" principle. There is no implied term in the Agreement and Conditions of Sale that the lot is fit for its intended purpose and a Purchaser within the definition of Clause 8 ("the Purchaser") must take care to inspect the lot. Although the Clause does not specify that the lot is reclaimed land, the Purchaser has been warned to conduct his own evaluation of land records and satisfy himself as to the state and condition of the lot. If he omits to do so, he cannot complain afterwards that he has no knowledge that the lot is reclaimed land.

7. It may be argued that residual settlement is latent defect that would not be revealed by any inquiry which the Purchaser is in a position to make before entering into a contract for purchase. However, prima facie the rule "caveat emptor" applies to latent defects of quality or other matters which affect the value of the lot sold. The Government, even if it is aware of any such matters, is under no general obligation to disclose them. There is no implied warranty that land agreed to be sold is of any particular quality or suitable for any particular purpose.

8. In this connection, the Control of Exemption Ordinance (Cap. 71) does not apply to any contract relating to the creation or transfer of an interest in land. Since residual settlement is a direct result of reclamation, we hold the view that should the Purchaser sue the Government for breach of contract in respect of any loss or damage that he may suffer as a result of or arising from residual settlement, the Government may invoke Clause 8 of the Agreement and Conditions of Sale.

B. Claim against the Developer

9. Under Clause 29, Clause 30 and Appendix A of the Agreement and Conditions of Sale (see Annex B), there would be a defects liability period of 1 year and a scheduled defects liability period of 5 years commencing immediately after the expiry of the first-mentioned period. Subject to the terms of these clauses, the Developer shall at his own expense execute works and make good defects including settlements as the Director of Housing ("the Director") may require. Upon the failure of the Developer to comply with the Director's requirements, the Director may carry out such works and demand the Developer to pay for the costs thereof and a sum equivalent to 20% of such costs by way of administrative fee.

10. If the relevant Agreement and Conditions of Sale contains the Specific Provision (see Clause 63 at Annex C), the Developer is required to submit a monitoring plan for residual settlement of the lot for 10 years. The Developer would be responsible for the implementation of such monitoring plan and is liable to make good defects caused by residual settlement as the Director of Housing may require during the 10-year period in accordance with the terms set out in Clause 63.

Unusual settlement

11. Since the Territorial Development Department has not completed its investigations into the cause of the unusual settlement, we propose to deal with the topic in general terms.

A. Claim in tort for negligence

12. It is possible for those who have been affected by settlement to claim damages in tort for negligence if it could be established that a person owes a duty of care towards them and such person is in breach of this duty.

13. Section 31 of the Limitation Ordinance (Cap. 347) (Annex D) provides a special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual. An action shall not be brought after the expiration of 6 years from the date on which the case of action accrued, or 3 years from the date of knowledge, if that period expires later. Date of knowledge means the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

B. Claim against the Government

14. If it could be proved that there are contributing factors other than reclamation that attribute to unusual settlement and that the Government is in its public capacity liable, it is doubtful whether the Government may exclude its

liability by virtue of the provisions in the Agreement and Conditions of Sale, which are contractual by nature and bind the Government in its private capacity as a lessor.

15. The exclusion of warranty and liability must also be considered according to its actual wording. It must clearly extend to the exact contingency or loss which has occurred. Furthermore, the principle of construction contra proferentem applies. Since the Government bears the burden of proving that the case falls within the provision, it is likely any doubt or ambiguity will be resolved against it in favour of the other party. Secondly, as a matter of general principle, in situations of ambiguity the words of the document are to be construed more strongly against the party who prepared the document (i.e. the Government in this case) and who is seeking to rely on them.

16. If a claim is based on an alleged breach of statutory duty by the Government, it should be noted that under section 37 of the Buildings Ordinance (Cap. 123) (Annex E), the liability of the Government in respect of any matter or thing done by the Building Authority or by any public officer under that Ordinance is excluded.

C. Claim against the Developer

17. References to the term "settlement" in Clause 29, Clause 30 and Appendix A of the Agreement and Conditions of Sale are not qualified. It may be argued that the Developer has the obligation to make good unusual settlement during the defects liability period of 1 year and the scheduled defect liability period of 5 years subject to the terms therein contained. In contrast, the Specific Provision is restricted to "residual settlement" as a result of newly reclaimed land and clearly would not apply to unusual settlement.

18. A developer owes a duty of care in negligence with regard to defects created by him, but the potential liability extends only to damage causing physical injury to persons or damage to other property. In applying this principle, the House of Lords decided in 1990 that the loss in carrying out remedial work was not recoverable because at the time the work was carried out, the building was not unsafe by reason of defective construction.

Conclusion

19. We hope Members will find the above analysis useful. Members are advised that those affected by residual or unusual settlement should seek their own independent legal advice.

Encl.

Prepared by
The Legal Service Division
Legislative Council Secretariat
25 April 2000