

**HONG KONG BAR ASSOCIATION'S COMMENTS ON
THE PROPOSAL TO PROVIDE THE COURT WITH A STATUTORY
DISCRETIONARY POWER TO ORDER RETURN OF DEPOSITS TO
PURCHASERS IN APPROPRIATE CIRCUMSTANCES**

The case for the need of such power

1. It is understood that on a few occasions, Godfrey J. had lamented openly in his judgments that there was no power on the part of the Courts in Hong Kong to give relief to the purchaser to order the refund of the deposit to him (see e.g. **Wu Wing Kuen v Leung Kwai Lin** [1999] 4 HKC565 at 576E). In many of these hard cases, the purchaser thought that the title offered to him by the vendor was not a good title, and therefore refused to complete. On the other hand the vendor insisted that the title offered was good and would seek to forfeit the deposit when the purchaser failed to complete on the date of completion. The parties thus litigated. If it turned out that the Court considered that the title offered was in fact good, the inevitable result was that the purchaser would lose the deposit.

2. It is thought that this situation is harsh on the purchaser particularly in the context of the current conveyancing practice in Hong Kong. In most of the cases for sale of land in Hong Kong, the date for completion would not be long. In the cases of sale of completed domestic flats, it would usually be a period of one month to 6 weeks from the time of the contract only. Even in cases where there is a long completion period, the usual practice of the mortgagee banks of the vendors is that they would not release the title deeds to the purchasers' solicitors until about a month before the contractual completion date. Hence by the time when the parties had crystallized their position over the requisitions, there would be very little time left before completion for their differences to be determined by the Court. In practice, it is hardly possible to have the matter resolved by a vendor and purchaser's summons before the contractual date for completion without any extension of time agreed to by the parties. This is particularly so in the context of the Hong Kong Rules of Supreme Court which do not make any provision for the

use of the expedited form of originating summons for vendor and purchaser's summons. The consequence is that unless the parties agreed to the abridgement of time, there is no hope that a vendor and purchaser's summons could be heard and determined within a month. In a rising market, the vendor has every incentive to seek to forfeit the deposit and to refuse to agree to any extension of time for completion or any abridgement of time in litigation. The reason is obvious – there would be very little down side risk on the part of the vendor in taking such course. If the purchaser should succeed in a case where there is no defect in title, in a rising market, the likely result would be that the purchaser would want specific performance, and the vendor would only be liable to assign the property to the purchaser on specific performance. The damages which the purchaser could get in addition to specific performance would be the loss due to the delay in completion which is usually the rental value of the property between the original completion date and the date of the eventual assignment in pursuance of the Court's order for specific performance. Against that, the purchaser would have to give credit for the interest on the balance of the purchaser price during this same period. In a case where there is a defect in title, the purchaser may still elect to complete in a rising market if the defect is curable. Even in the case where the defect is such that it is not curable and the purchaser has elected to rescind, the only consequence to the vendor is the refund of the deposit received by him together with interest and cost. If on the other hand the vendor should succeed, then the vendor would be able to get the benefit of the forfeiture of the deposit, (if that does not exceed 10% of the price) and meanwhile, the vendor would also get the benefit of the increase in value of the property in the rising market.

3. It is thought that in such cases, where the deposit forfeited appears to be a windfall for the vendor, there should be power on the part of the Court to order the refund of the deposit, leaving the vendor to prove his actual loss and to recover his actual loss from the purchaser.

The case against the provision of such power

4. In a falling market such as the position since October 1997, the trend

is the reverse. It was the case of the speculator purchasers who tried every means of getting out of the contractual obligation. The existence of the power of the Court to order the repayment of the deposit would certainly give them hope to litigate on any flimsy ground. If the Court is given a general discretion to order the refund of the deposit, then if the purchaser should ask for the exercise of such power, the case could not be disposed of by a summary process and it is almost inevitable that the action must be tried before the Court could decide whether such discretionary power should be exercised. This was what happened in **Universal Corp. v Five Ways Properties Ltd.** [1979] 1 All E.R. 552, where the Court held that the matter should go to trial even though it was a plain case that the purchaser failed to complete because of his own financial reasons.

5. As it is now increasingly common that people would use limited companies to acquire properties, the down side risk for purchasers to embark on unmeritorious litigation in practical term would be limited to his own cost only. Questions of liability for damages and costs payable to the other side were wholly academic, although in the case of costs, it would be possible for the vendor, faced with a corporate purchaser without any real assets, to ask for security for cost.

6. Indeed the inducement of the hope that the Court could grant a refund of the deposit would be there even though the market was not a falling market.

The legislative provision in Hong Kong & England

7. In England, when 1925 legislation made provisions for the speedy determination of dispute by vendor and purchaser's summons, there are express provisions for the Court to order the return of the deposit. Section 49 of the Law of Property Act 1925 provides :

“49. (1) A vendor or purchaser of any interest in land, or their representatives respectively, may apply in a summary way to the court, in respect of any question

arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the court may make such order upon the application as to the court may appear just, and may order how the by whom all or any of the costs of and incident to the application are to be borne and paid.

(2) *Where the court refuses to grant specific performance of a contract, or in an action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit.*

(3) This section applies to a contract for the sale or exchange of any interest of land.”

8. In Hong Kong, section 12 of the Conveyancing and Property Ordinance makes provisions for the vendor and purchaser’s summons procedure. However, as has been pointed out earlier, there is nothing in section 12 to indicate that the matter could be decided in a summary way and there is nothing in the Rules of Supreme Court to enable the expedited procedure to be used for the determination of questions raised in the vendor and purchaser’s summons. Furthermore, while there is little doubt that section 12 of the CPO is modeled on section 49 of the LPA, there is a deliberate omission of the power to order the refund of the deposit provided in section 49(2) of the LPA. It must therefore be thought by the previous legislature that there ought not to be such power on the part of the Courts in Hong Kong.

9. It is notable that in England, the authorities established that :

- (a) such power is exercisable for the return of the whole deposit but not part (**James Macara Ltd. v Barclay** [1944] 1 All E.R. 31).

- (b) The exercise of such power is not confined to cases where the vendor's conduct was unconscionable but "was exercisable on wider grounds, including a general consideration of the conduct of the parties, the gravity of the matters in question and also the amount at stake." (**Schindler v Pigault** (1975) 119 SJ 273).
- (c) It is not necessary that the conduct of the vendor should be open to criticism in some way. The power was designed to do justice between the parties, and the word "justice" was to be used in a wide sense, indicating that the repayment must be ordered in any circumstances which make this the fairest course between the 2 parties (**Universal Corporation v Five Ways Properties Ltd.** [1979] 1 All E.R. 552).
- (d) Repayment had been ordered in cases where the vendor managed to resell at a profit leaving the vendor to prove and claim the actual loss. (**Dimsdale Development (South East) Ltd. v De Haan** (1983) 47 P & CR 1).
- (e) Repayment was declined in a case of sale of commercial property where the Court took the view that the purchaser was an experienced property dealer and was well aware of the function of the deposit (**Safehaven Investments Inc. v Springbok Ltd.** (1995) 71 P & CR 59).
- (f) It is probable that it is possible to contract out of the power under section 49(2) (see the view of the editors of **Emmet on Title para 7.028**).

Evaluation

10. It is a matter of public policy as to whether the Court should interfere with the contractual arrangement between the parties. The power to be given to the Court to order the repayment of deposit is only relevant in cases where the purchaser is in breach of the contract so that under the terms of the contract or as a matter of implied terms or under the common law, the vendor is entitled to forfeit the deposit paid by the purchaser. In the case of the contract being terminated as a result of the vendor's breach, there is no need to have any legislative provision to enable the Court to order the repayment of the deposit, because under the existing law, the purchaser would be entitled to the repayment of the deposit. Likewise in cases where the contract was terminated without the fault of either party, e.g. in the case of frustration of contract, there is again no necessity in making any legislative provision to enable the Court to order the repayment of the deposit. Thus any power provided by legislation to enable the Court to order the repayment of the deposit should be viewed as an interference with the parties' freedom of contract. It is a matter of public policy as to whether this should be done.

11. The traditional view of the law is that the Court should not interfere with the bargain freely entered into between the parties, and the contractual rights of the parties are to be respected. It is never the duty or function of the Court to rewrite the terms of the contract between the parties. Thus it is settled law that the Court would not imply a term into any contract between the parties simply because it is reasonable to do so, because if this is done, the Court is re-writing the contract of the parties.

12. As it has been pointed out above, during the years when there was a rapid rise in the property prices in Hong Kong, there were certainly many hard cases

where because of some errors of the judgment on the part of the purchasers' solicitors in advising on the merit of the title to the property, many purchasers lost their deposits through no fault of their own. In those years, the temptation of having a quick profit was great for the vendors. Many vendors were induced to take a very hard line in standing on their contractual rights.

13. One possible reason for there being a legislative provision in England to enable the Court to order the repayment of the deposit was that the question of title to property in England was often thought to be a difficult one. Indeed, the common belief is that there is nothing as a perfect title in unregistered land in England. Thus it may be thought that it is necessary to provide the Court with the power to order the repayment of the deposit in suitable cases.

14. By contrast, the title to land in Hong Kong is relatively simple. Cases of real difficulties of title problem seldom arise.

15. As it has been pointed out above, in the case of a falling market, cases of oppression by vendor hardly occur. Thus the need of such legislative provision is less urgent today than say 3 years ago. Furthermore, in the light of the probable law reform in introducing registered title, the number of hard cases of loss of deposit because of some doubtful title problems should be ruled out when registered title is introduced.

16. The Court has always the power to set aside a transaction entered into as a result of an unconscionable bargain. There is really no need to have the proposed legislative provision for the protection of the weak.

17. It has to be pointed out that the law is that the Court will view a contractual provision for the forfeiture of a deposit in excess of the conventional sum of 10% of the price as prima facie a penalty. The consequence is that since the Court will not allow the imposition of a penalty, the whole amount of the "deposit" would be ordered to be repaid leaving the vendor to recover from the purchaser his actual loss (see **Workers Trust & Merchant Bank Ltd. v Dojap Investments**

[1993] AC 573). [N.B. this is the prevailing view of the law, however there was some doubt expressed by Cheung J. as to whether the Court would have any power to order the repayment to the purchaser of anything in excess of the 10% in the event that the Court should take the view that the forfeiture of the whole deposit would amount to a penalty (see **Green Park Properties Ltd. v Dorku Ltd.** [2000] 2 HKLRD 400, 428)]. In the light of this, the prevailing practice is that the contracts of sale of land would usually only provide for either 10% deposit or if the deposit is to be more than 10%, then the right to forfeit (without showing any loss) is to be limited to only 10% of the price. Thus in practical terms, the lack of power on the part of the Court to order the repayment of the deposit in cases where the purchaser is at fault would really mean that the purchaser would suffer the “unjustified” loss of 10% of the price only. Of course, the law would allow the innocent vendor to show and recover all his actual loss regardless of the amount and in the case of the falling market in the past 2 years, the vendor’s loss could be as much as some 60% of the price of the property. In many instances, the deposit paid could hardly be sufficient to cover the actual loss. In these cases, it is difficult to see why the Court should order the repayment of the deposit even assuming that it has the power to do so.

18. If, as is the position in England, very broad power is given to the Court to order the repayment of deposit without in any way giving the Court any legislative guidelines as to how the power should be exercised, then there would have the down side effect of introducing an element of uncertainty in sale and purchase of land. Is the law to be that there should be a distinction between the rights of a purchaser in a domestic sale and a commercial sale? Is the law to be that a person with very little means should receive extra protection of an imprudent purchase than someone who could well afford the loss of the deposit?

19. The existence of such power (whether with or without any guidelines for its exercise) would certainly encourage purchasers to litigate for the recovery of the deposit. Generally when the purchaser seeks to recover the deposit, he would at the same time ask for a declaration of a lien on the property for the recovery of the deposit. It is not sure whether a lien is available in cases where the

only ground for the recovery of the deposit is the exercise of such discretionary power on the part of the Court. We are inclined to the view that he would not. However, in practical terms, once the purchaser has decided to litigate, it is unlikely that he would simply be relying on the discretionary power of the Court. It is likely that no matter how flimsy his case is, he would seek to say that there is a contractual ground for which he could recover. In such case, in practical terms, his claim for a lien could not be struck out. This would mean that meanwhile unless a special arrangement is worked out (usually by an arrangement for the amount of the lien claimed to be paid into Court or to be stake-held), the vendor is prevented from reselling his property until the determination of the litigation. In any event, the vendor has very little redress for the loss of use of his money. The vendor's cause of action for an unjustifiable registration of a lien claim against his property is an action on slander on title, which requires the proof of actual malice. In practical terms, it is very difficult to prove actual malice.

20. On the whole, we do not consider that it would be desirable to introduce such power on the part of the Court to order the repayment of the deposit.

Dated this 19th day of February 2001.