



Second Submissions of The Law Society of Hong Kong on the Residential (First-hand Sales) Bill (“the Bill”)

The Law Society’s Property Committee has submitted its views on the Bill to the Bills Committee on 23 April 2012 and has reviewed the Administration’s Response to submissions made by deputations, including those made by the Law Society.

The Committee noted that the Administration is receptive of some of the concerns it raised and indicated that they would introduce CSAs to deal with such concerns. There are also concerns that the Administration indicated they would need further time to consider. We would like to be consulted on the CSAs to be introduced and reserve our rights to make further comments.

Pending sight of the CSAs, we would make the following comments on the Administration’s Response:

1. **Rigidity of the statutory regime and the need for a mechanism to grant exemptions from the requirements on a case-by-case basis**

In response to the Law Society’s concern, the Administration said that exemptions on a case by case basis in the light of individual circumstances would not be practicable for implementation, and would undermine the effectiveness of the legislation.

However, it should be noted that there are mechanisms in place at present for obtaining exemptions or waivers from the requirements under the Consent Scheme and Non-Consent Scheme in justifiable circumstances by making applications (through solicitors) to the Lands Department and the Law Society respectively. This system has been working well.

We have already highlighted the problems arising from the rigidity of the statutory requirements in our previous submissions. If the law to be passed is stated so rigidly as it now presents, there will be no way to obtain any exemption or waiver according to the special circumstances of the case in future (except by going through another legislative procedure). This is highly undesirable and may cause a lot of complaints or concerns by the public, the legal professional or other stakeholders when the new law comes into practical application.

We maintain that it is important for a mechanism to be provided in the Bill to allow exemptions or waivers to be granted and we suggest that this could be from the future Enforcement Authority. This would avoid any practical problems that may be encountered in conveyancing transactions in the future and makes sure that the legislative provisions will best suit the genuine needs of a particular project.

The manner of exercise of the discretion of the Enforcement Authority can be provided in the future Guidelines to be published by the Enforcement Authority after the new law is passed and when any practical difficulties or problems may then come to light, which can then be evaluated more appropriately and thoroughly.

The built-in statutory mechanism will have the advantage of making the new law more pragmatic and workable in reality.

2. General Exemption for Solicitors and other professionals

In response to the concern of the Law Society that solicitors may become criminally liable under the Bill for their mere negligence or mistake in giving advice or preparation of documents in conveyancing transactions, the Administration said that they do not see the need to create additional defence provisions exclusively for professions as the prosecution is required to prove either that the person “*knows*” that, or is “*reckless*” as to whether the information he disseminated is false or misleading.

Whilst the Administration mentioned that the Bill is not intended to catch professionals for their negligence or mistake, the Bill does not expressly state so. We have grave concern that short of any criminal intent, a solicitor should be held criminally liable for being “*reckless*” in giving advice. As we have previously mentioned and stressed to the Administration in joint meetings on the Bill, the consequences should be a civil rather than a criminal one. Otherwise, this will only inhibit conveyancing solicitors from freely giving proper legal advice to the parties for fear of being “*reckless*”.

We noted that the Bills Committee has requested the Administration to further elaborate on their response to the Law Society’s concern on the need for mens rea/knowledge of inaccuracy before imprisonment is imposed and will be interested to be informed of the Administration’s further response on this.

We maintain that there should be a general exemption for solicitors and their staff for their negligence or mistake and they should not be considered as aiding or abetting etc. the principal offence. This is a significant issue to the profession that we regret we cannot support the Bill unless this issue has been resolved.

3. Change in sales price when the payment terms have been altered

At a joint meeting with the Administration on the Bill, the Property Committee has raised concern on the position where supplemental agreements are executed to reflect any change in purchase price due to the subsequent change in payment terms for the subsequent availability of equitable mortgages (not reflected in the price list) or change

in floor areas due to change in building plans, etc. This is almost a daily occurrence and should be dealt with.

It appears that the Administration has not yet responded to this concern of the Committee. The Administration's Responses only deal with the situation where the vendor and purchaser may adopt other payments terms after signing of ASP so long as the new payment terms has been provided for in the price list. Other change of payment terms not provided for in the price list has not been dealt with.

The Administration should clarify how these circumstances should be handled under the Bill.

4. Exemption Arrangements under the Bill

The Administration proposes in the Bill to exempt the sale of one single New Territories Exempted House (NTEH) which has been issued with a certificate of exemption under the Buildings Ordinance (Application to the New Territories) Ordinance (Cap.121). However, it does not agree to our suggestion to extend the exemption to cover non-NTEH single house, the reason being that this "*may lead to possible abuse*".

The Committee, however, does not agree to the reasoning provided by the Administration. The value of houses which are non-NTEHs should be much higher than that of the NTEH ones and presumably buyers of non-NTEHs should have much better bargaining power than buyers of NTEHs. If NTEH is exempted, we cannot see why non-NTEH should not be exempted as well.

We maintain the view that if the Administration exempts NTEH, this exemption should also be extended to non-NTEH. The discrimination of non-NTEH single house against NTEH single house is illogical and unreasonable.

5. Street Number

We noted the Administration's reply that it is quite rare in the past that street number was not yet available before the printing of sales brochure. However, according to the experience of conveyancing practitioners, there are indeed cases where:-

- (i) the street number was actually not yet available and the property address to be stated at the Land Registry for the development is stated by the Land Registry as "*none*" and the memorial box prepared by the solicitors' firm for registration of documents will state "official address not yet known";
- (ii) only a provisional street number is allocated by RVD and this provisional street number may or may not be changed later; or
- (iii) the street numbers of the existing/previous old buildings erected on a number of the lots which are assembled for redevelopment of another bigger development will not be used and that a new street number will be allocated by RVD to the new building to be erected (especially for Non-Consent Scheme projects which can commence sale soon after consent to commence building work has been issued by the Building Authority).

The Administration should make appropriate amendments to the Bill to address the above situations.

**The Law Society of Hong Kong
The Property Committee
6 June 2012**