

## **THE HONG KONG HOUSING AUTHORITY**

### **Memorandum for the Home Ownership Committee**

#### **Legal Costs and Conveyancing Arrangement for Home Ownership Scheme Conveyancing**

#### **PURPOSE**

To inform Members of the effects of the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 on the current conveyancing arrangement for Home Ownership Scheme (HOS) and to seek their approval on paying legal costs as a result of the change in legislation.

#### **BACKGROUND**

##### **Sale of HOS Flats**

2. Under the current arrangement, solicitors appointed by the Housing Authority (HA) for handling HOS conveyancing are acting for HA only.

3. Unlike ordinary project conveyancing, under Rule 5C of the Solicitors Practice Rules (**Appendix A**), joint legal representation is not permissible for HOS projects since the sale of HOS flats does not come within the exemption provided under Rule 5C(2) (commonly known as the “Consent Scheme”) and Rule 5C(3) (commonly known as the “Non-consent Scheme”). Purchasers of HOS flats may appoint their own solicitors, and if they do not, they will attend the office of HA’s appointed solicitors for execution of the assignments and other relevant documents. The appointed solicitors will interpret and witness the execution of the documents and attend stamping and registration of the assignments for the purchasers even though they are not acting for the latter.

4. In the past, purchasers of HOS flats were required under the terms of the Agreement for Sale and Purchase to bear the legal costs of HA in respect of sale of the flats whether or not they chose to instruct their own solicitors to act for them. In other words, HA did not need to pay any legal costs for HOS conveyancing.

### **Sale of Private Sector Participation Scheme (PSPS) Flats**

5. Purchasers of PSPS flats may choose their own solicitors. Since PSPS projects comes within the Consent Scheme, if the purchasers do not appoint their own solicitors, the solicitors appointed by the PSPS developer will act for both parties.

6. In the past, purchasers of PSPS flats were required under the terms of the Agreement for Sale and Purchase to pay the legal costs of the PSPS developer, whether they instruct their own solicitors to act for them.

### **CHANGE IN LEGISLATION**

7. Section 14 of the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (**Appendix B**), which came into effect on 8 August 1997, amended the Conveyancing and Property Ordinance by adding to it a new Section 34A which provides that in any agreement for sale and purchase executed after the amendment any provision that requires the purchasers to pay the costs of the vendor in preparing, completing, stamping and registering the agreement and any instrument which gives effect to the agreement shall be void in the following circumstances -

- (a) for a flat in an uncompleted development or for a flat in a completed development where the vendor is the developer and no assignment of the flat has been executed; and
- (b) where the vendor and purchaser have separate legal representation.

8. As a result of the above legislative change, purchasers of HOS flats (including units in buildings under construction and units in completed buildings that have never been sold) choosing to have separate legal representation could not be required to pay the legal costs of HA. This new requirement has begun to apply to the sale of HOS Phase 19A and the relevant Agreements for Sale and Purchase have been amended in line with the new requirement, but purchasers of resale flats is not affected by the legislative change.

## **IMPACTS ON THE AUTHORITY**

### **New flats for sale in main exercises**

9. In view of the legislative change, HA will need to pay its own costs in the sale of HOS if the purchasers choose to have separate legal representation. It is expected that more purchasers will now elect to appoint their own solicitors. If a purchaser chooses not to have separate legal representation, current practice will continue, i.e., the purchaser will attend the office of the HA's solicitor for execution of the assignment and other documents, and will bear the legal costs.

10. For the sale of flats under PSPS, if the purchasers choose to have separate legal representation, the PSPS developer being also the vendor, will need to pay his own legal costs. If the purchasers do not appoint their own solicitors, the solicitors appointed by the PSPS developer will act for both parties and the legal costs will be paid by the purchasers.

### **Resale Flats**

11. For resale flats (including both HOS and PSPS flats), HA may continue to adopt the existing practice of requiring purchasers to pay its legal costs irrespective of whether the purchasers shall have separate legal representation. However, this will result in inconsistent practice on the same subject and is against the spirit of encouraging separate legal representation behind the new legislation. It is suggested to adopt the same practice as for the sale of new flats, i.e. not to request the purchaser to bear the HA's legal costs in case of separate legal representation.

## **Sale of Flats under the Tenants Purchase Scheme (TPS)**

12. Since flats to be sold under TPS are flats in a completed development in respect of which HA is the developer and no assignment of the flat has been executed, the provisions of Section 14 of the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 are also applicable. Similarly, HA has to pay its own costs if the purchasers choose to have separate legal representation and it is suggested that same practice be adopted for the sale and resale of TPS flats.

## **REVIEW OF LEGAL COSTS**

13. In the light of the legislative change, steps are being taken for a review of the current fee arrangement with a view to achieve financial saving for HA. As the current fee charging system is an arrangement reached with the Law Society, HA has begun negotiating with the Law Society in a bid to establishing a reasonable level of remuneration commensurate with the services required. The latest proposal by the Law Society on the revised fee arrangement is at **Appendix C**.

14. A review on the current system of appointment of HOS panel solicitors and the option of procuring the service of solicitors firms by other means, including tendering and fee proposals from solicitors firms, is also under consideration. As it will take some time to finalise the operational and implementation details, it is suggested that in the meantime, as an interim arrangement, the current rate of charges (at 50% of the scale costs) (**Appendix D**) should continued to be adopted for the legal costs payable by HA for the sale of HOS and TPS flats.

## **REVIEW OF THE CURRENT CONVEYANCING ARRANGEMENT**

15. The current conveyancing arrangement for the sale of HOS flats as set out in paragraphs 3 and 4 above is considered unsatisfactory for the following reasons :-

- (a) The purchasers can complete the transaction without having to appoint their own solicitors. As joint representation is not allowed, HA's appointed solicitors cannot act for the purchasers. The purchasers are therefore not legally represented and will not receive legal advice on the legal documents including the Deed of Mutual Covenants.
- (b) Although HA's appointed solicitors are acting for HA only, they have to attend to the purchasers and provide some services to them. This together with the fact that the purchasers are paying the legal costs, will make the purchasers think that HA's appointed solicitors are also acting for them. They will feel aggrieved if they know that neither the appointed solicitors are acting for them nor have any contractual obligations towards them.

16. It is suggested that the conveyancing arrangement for the sale of HOS flats and TPS flats in general shall be in line with the sale of flats in PSPS and the private sector and that each party must have its own legal representation. This can be achieved :-

- (a) by setting a requirement for the purchasers to have mandatory separate legal representation;
- (b) by bringing the sale of HOS flats and TPS flats in line with the Consent Scheme;
- (c) by applying for a special waiver from the Law Society under Rule 6 of the Solicitors Practice Rule (**Appendix A**) to waive the application of Rule 5C(3) & (4) to the sale of HOS and TPS flats.

17. It is noted that there are operational difficulties in bringing the sale of HOS flats and TPS flats in line with the Consent Scheme (**Appendix D**). Nevertheless, the Department will examine the various options under paragraph 16.

## **RECOMMENDATIONS**

18. It is recommended for Members' approval that :
- (a) HA shall be responsible for payment of its own legal costs for the sale of flats under HOS and TPS if the purchasers shall have separate legal representation (paragraphs 9 and 12);
  - (b) Purchasers of resale flats shall not be required to pay HA's legal costs if they choose to have separate legal representation (paragraphs 11 and 12); and
  - (c) As an interim arrangement, the existing rate of charges at 50% of the scale costs be adopted for the sale of HOS and TPS flats (paragraph 14).

## **DISCUSSION**

19. At the next meeting of the Home Ownership Committee on 12 February 1998, Members will be asked to approve the recommendations in paragraph 18.

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