

**THE LAW REFORM COMMISSION
OF HONG KONG**

**REPORT ON
DESCRIPTION OF FLATS ON SALE
(TOPIC 32)**

APRIL 1995

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON DESCRIPTION OF FLATS ON SALE

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Introduction and Overview

Background

1. In any society, the purchase of a property is likely to be the most significant investment an individual would make. In Hong Kong, where property prices are among the highest in the world, this is particularly the case. The purchase of a flat in Hong Kong involves the individual in a heavy financial commitment and, in most cases, the shouldering of a mortgage burden which may last 10 to 20 years.

2. In recent years, because of spiralling property prices, people in Hong Kong have had to spend greater proportions of their household incomes on the monthly repayment of mortgage loans. According to a report issued by the Planning, Environment and Lands Branch in June 1994 entitled, *Report of the Task Force on Land Supply and Property Prices*, the ratio of average monthly repayment of mortgage loan to the median household income (or the “affordability index” as it is called) has risen markedly during the period from 1990 to the end of 1993. The affordability index rose from about 75 in 1990 to about 90 by the end of 1994.¹ The rise in the affordability index indicates that an average family in Hong Kong has to spend a much greater part of its income on repayment of mortgage loans.

3. Despite the great importance of property transactions to the average person, purchasers of flats in Hong Kong are often not provided with accurate and sufficient sales information. The problem is particularly acute in the sale of uncompleted flats. In such cases, purchasers do not have the chance to see the actual flats when they make the purchase. Although major developers usually put up mock-up flats, developers of small projects seldom if ever provide them.

4. The problems of inadequate and misleading sales information in the sale of uncompleted flats are many-fold. There is, for example, no standard definition of gross floor area. Different developers will, as a result, include different proportions of the common areas into the calculation of the gross floor area. The saleable area is not always shown in sales literature. There have been cases in which the actual size of the flats is much smaller than that which would be expected from the sales literature. There are recent newspaper reports of scores of “gnat-sized” flats, some of them no bigger than 100 square feet, which are about to be put on the market. In some of these flats, the toilet space is no larger than a metre by a metre.² Floor plans in the sales brochure often provide scanty or even incorrect information which gives purchasers little idea of the flats they are buying. Descriptions of fittings and finishes, location plans and layout plans are sketchy and sometimes misleading.

¹ See para. 2.4 and Annex B of, *Report of the Task Force on Land Supply and Property Prices*, Planning, Environment and Lands Branch, June 1994.

² See South China Morning Post and Eastern Express, both of 18 October 1994.

5. Many sales brochures do not contain a definite completion date and there are often complaints about delayed completion. Financing arrangements, supplementary charges on taking possession and charges on transfer of title are not always stated in sales literature. Purchasers cannot therefore properly budget for the property transaction. Although the Deed of Mutual Covenant is an important document governing the management of a multi-storey building, purchasers are not always informed of its terms in the sales literature. The terms of the Deed of Mutual Covenant are not always translated for the benefit of the vast majority of purchasers who read Chinese only. Conditions of the land lease are sometimes not stated and there have been complaints that people are misled into buying commercial or factory units for residential purposes.

6. These are but some of the many problems facing purchasers of uncompleted flats in Hong Kong. In view of the great financial commitment involved in the purchase of flats, we think it necessary that purchasers should be provided with adequate and accurate sales information, albeit at the expense of added cost and inconvenience to developers.

Terms of reference

7. In June 1992, the then Acting Attorney General and the Acting Chief Justice made the following reference to the Law Reform Commission:

"Should the law governing the protection of prospective purchasers and purchasers of uncompleted residential property in relation to inadequate or misleading sales information or particulars be changed and, if so, in what way?"

Sub-committee membership

8. In November 1992 the Law Reform Commission appointed a sub-committee under the chairmanship of Professor Derek Roebuck to consider the above terms of reference and to make proposals to the Law Reform Commission for reform. The membership of the sub-committee was:

Professor Derek Roebuck
(Chairman)

Dean of Faculty of Law,
City University of Hong Kong
Solicitor

Mr Tom Berry

Principal Solicitor,
Lands Department

Ms CHEUNG Siu-hing
(from 5.1.1993
to 1.12.1993)

Principal Assistant Secretary
(Lands),
Planning, Environment and Lands Branch,

Government Secretariat

Ms Audrey EU Yuet-mee, QC

Mr Andrew LEE King-fun

Principal Partner
Andrew LEE King-fun and Associates,
Architects

Mr Bowen LEUNG Po-wing
(up to 30.11.1992)

Deputy Secretary (Lands and Planning),
Planning, Environment and Lands Branch,
Government Secretariat

Mr Alasdair Morrison

Managing Director,
Jardine Matheson Limited

Mr Patrick Sheehan

Lecturer in Law,
University of Hong Kong,
Solicitor

Mr William SHIU Wai-chuen
(since 19.11.1993)

Principal Assistant Secretary
(Housing Policy),
Planning, Environment and Lands Branch,
Government Secretariat

Mr Marco WU Moon-hoi

Senior Assistant Director of Housing
Department

9. Mr Thomas LEUNG Moon-keung, Senior Crown Counsel, acted as the Secretary to the sub-committee.

Meetings

10. The sub-committee met for the first time on 11 December 1992 and, between then and 23 September 1994, held a total of 22 meetings.

Consultation

11. On 11 April 1994, the sub-committee issued their interim report in the form of a consultative document ("the Consultative Document"). In it the sub-committee set out their interim recommendations relating to the sales descriptions of uncompleted residential properties in Hong Kong. The purpose of circulating the Consultative Document was to

invite property developers, agents, lawyers, members of the public and other interested parties to express their views on the matters raised and interim recommendations made.

12. The consultative period ended on 30 June 1994. A list of those who commented is at Annex IV. The sub-committee considered all these comments and made a number of adjustments to their interim recommendations. The sub-committee endeavoured to balance the views of conflicting interests in arriving at their final recommendations, but their overriding objective was consumer protection. Although only some of the comments are highlighted in this report, the sub-committee had given all comments due and thorough consideration.

Scope of deliberations

13. As the sub-committee's terms of reference are confined to uncompleted residential property, they have not extended their deliberations to commercial or industrial buildings, nor residential properties which are completed at the time of sale.

14. It is however common to find buildings with mixed residential and commercial units in Hong Kong. The sub-committee have therefore also considered uncompleted units in such buildings, though they have directed their minds to the residential components only.

15. In the case of uncompleted residential properties, the principal sales descriptions are made through the issue of sales brochures and price lists. The sub-committee have therefore considered whether there is a need to improve the quality and reliability of sales brochures and price lists for the better protection of purchasers and, if so, what the best means are to achieve that aim.

16. In the course of their deliberations, the sub-committee have referred to various documents for factual background and helpful ideas, including a report published by the Consumer Council in October 1991, *A Study on the Disclosure of Information to Prospective Purchasers of Uncompleted Units* ("Consumer Council report").

Overseas uncompleted residential properties

17. The public comments on the Consultative Document indicated strong support for regulation of the sales descriptions of overseas uncompleted residential properties sold or advertised in Hong Kong. The sub-committee believe it is better to conclude their recommendations on sale of uncompleted residential properties in Hong Kong and then go on to consider overseas uncompleted residential properties which involve different, and more complicated, considerations.

Completed residential property and commercial premises

18. There was also wide support in the public responses for introducing control over the sales descriptions of completed residential property and commercial premises. The problems which arise are as well documented as those of uncompleted residential property. The Attorney General and Chief Justice will consider whether the sub-committee's existing terms of reference should be enlarged to allow the sub-committee to take on these additional areas.

Uncompleted residential property

19. The sub-committee's terms of reference refer to "uncompleted residential property".

20. We consider that it will suffice simply to define "uncompleted residential property" as residential units for which the Occupation Permit has yet to be issued by the Building Authority under the Buildings Ordinance (Cap. 123) or, in the case of the Housing Authority's Home Ownership Scheme, the completion certificate has yet to be issued by the Director of Housing. This definition covers properties which are in the Consent Scheme and also those which are not. (The Consent and Non-Consent Schemes are explained later in this chapter.)

21. On the other hand, there is no Occupation Permit for exempted houses in the New Territories. As most developments need an Occupation Permit, we hold the view that it will be best to adopt the Occupation Permit as the basis for our definition. Exempted houses should receive separate consideration.

Our recommendation on the definition of "uncompleted residential property"

22. **We recommend that "uncompleted residential property" should refer to residential units for which the Occupation Permit has yet to be issued by the Building Authority under the Buildings Ordinance or, in the case of the Housing Authority's Home Ownership Scheme, the completion certificate has yet to be issued by the Director of Housing. We further recommend that this definition should be suitably modified in the case of exempted houses in the New Territories.**

"Consent" and "Non-Consent" Schemes

23. There are two schemes for uncompleted buildings: the "Consent Scheme" and the "Non-Consent Scheme". As we shall make frequent references to these two schemes later in this report, it will be convenient to outline the schemes at this point.

(i) *Consent Scheme*

24. The Consent Scheme applies to the development of lots where the Government Leases stipulate that the prior consent of the Director of Lands must be obtained before the sale or other disposal of uncompleted units to a purchaser can be made. It also covers situations where an Exclusion Order made under the Landlord and Tenant (Consolidation) Ordinance (Cap. 7) contains clauses prohibiting the owners from entering into agreements for the sale of uncompleted units without the Director of Lands' prior consent.

25. The Consent Scheme previously administered by the Registrar General (Land Officer) is now the responsibility of the Legal Advisory and Conveyancing Office of the Lands Department following the dissolution of the Registrar General's Department and the transfer of its various functions to other Government officers. The rules for granting consent are set out in Legal Advisory and Conveyancing Office Circular Memoranda issued from time to time by the Director of Lands (or Land Office Circular Memoranda previously issued by the Registrar General). The conditions for granting consent can therefore be varied to meet changing needs to protect purchasers of uncompleted units.

(ii) *Non-Consent Scheme*

26. The Non-Consent Scheme refers to property developments where there are no lease conditions stipulating that prior consent of the Director of Lands is required for the sale of uncompleted units. In these cases, if the same solicitor acts for both the vendor and purchasers, the solicitor is required to comply with Rule 5C of the Solicitors (Practice) Rules and other Practice Directions issued by the Law Society of Hong Kong and to use a standard form of Agreement for Sale and Purchase ("ASP") which closely follows that used in the Consent Scheme.

Glossary of terms

27. To help readers to understand the contents of this report, there follows a glossary of terms.

Glossary of Terms

Act of God

Something which is the result of uncontrollable natural forces, e.g. storms, floods, earthquakes.

Assignment

The legal document by which the vendor of a flat passes ownership of the flat to the purchaser. By taking the assignment, the purchaser will become the new owner of the flat.

Agreement for Sale and Purchase (ASP)

The legal document by which the vendor of a flat agrees to sell the flat to the purchaser for a stated price. It also spells out in detail the rights and obligations of the parties up to the date of its completion when it will be replaced by the Assignment. It is usually preceded by a preliminary agreement which sets out the salient points of the ASP. The ASP is sometimes called a "formal" agreement when compared with the preliminary agreement.

Authorized Person

The architect in charge of a development project. The Building Authority keeps a register of all persons who are qualified to be Authorized Persons pursuant to section 3 of the Buildings Ordinance (Cap. 123).

Buy-back Arrangement

Under such an arrangement, the developer will in the first instance allocate to property agents some of the flats reserved for internal sale. The property agent will in turn try to resell these allocated flats to the public at a profit. The developer will undertake under the arrangement to buy the flats back from the property agents if the latter cannot resell them to the public at a profit.

Certificate of Compliance

A certificate to the effect that certain conditions in the Government Lease or Conditions of Grant have been complied with.

Completion

It can mean both "Legal Completion" and "Construction Completion". See below for the meanings of these two terms.

Completion Certificate

A Completion Certificate is issued in place of an Occupation Permit for flats in the Housing Authority's Home Ownership Scheme.

Construction Completion

The completion of the construction of the flats in a development.

Confirmor

If an uncompleted flat is re-sold to sub-purchasers before the legal completion of the original sale, all sub-vendors will sign in the capacity as "confirmors" in the Assignment. The legal interests in the flat will pass from the developer direct to the sub-purchaser at the end of the chain.

Developer

An individual or company engaged in property development.

Deed of Mutual Covenant

The legal document which contains the agreement among the individual flat-owners relating to the use, maintenance, repair, insurance, payment of outgoings, management etc. of a building divided into flats.

Defect Liability Period

The period during which developers will make good any patent defects in the property and its installation. In the Consent Scheme, it usually lasts 6 months from the completion of sale and purchase, namely, execution of the Assignment.

Equitable Mortgage

Mortgages of uncompleted units take the form of an "equitable mortgage", because, by buying an uncompleted unit, a purchaser gets only an equitable interest. The purchaser will obtain the legal interest in the unit when the unit is completed and the Assignment is executed.

Exempted Houses

Houses which are exempted under the Buildings Ordinance (Application to the New Territories) Ordinance, (Cap. 121). Under section 5 of Cap. 121, exemption from the application of the Buildings Ordinance is granted in respect of building works in the New Territories for the erection of a building for non-industrial purposes, community use, or agricultural purposes, or for the replacement of a temporary structure.

Flats

See "Units".

Force Majeure

Compulsion; superior force; the spur of necessity.

Government Lease

Also known as "Land Lease" or "Crown Lease". This is the legal document by which the Government grants the use of land to others for a stated period in return for payment of premium and/or land rent.

Internal Sale

Internal sale means the sale of flats to private purchasers rather than the public. In the Consent Scheme, not more than 10 per cent of the flats in a development may be reserved for internal sale.

Legal Completion

The final stage of the conveyancing process at which the Assignment is executed by the parties, all the purchase moneys are paid, and the purchaser obtains the legal ownership and usually vacant possession of the property.

Memorandum for Sale

See "Preliminary Agreement".

Mortgage

To borrow money (usually from a bank) on the security of landed property. It takes the form of an "equitable mortgage" if the security is an uncompleted unit. Where the security is a completed unit, it will take the form of a "legal charge".

Occupation Permit

The permit issued by the Building Authority under section 21 of the Buildings Ordinance (Cap. 123) allowing the occupation of a newly-erected building.

Preliminary Agreement

This is also called "Provisional Agreement" or "Memorandum for Sale". It is usually the first agreement entered into between parties to a property transaction. Its main purpose is to spell out the salient points of the transaction in a preliminary way. It will be replaced by a formal Agreement for Sale and Purchase to be executed subsequently.

Provisional Agreement

See "Preliminary Agreement".

Public Sale

The sale of flats to members of the public. See also "Internal Sale".

Purchaser

In this report, "purchaser" means any buyer of an uncompleted unit. It covers the purchaser at the first sale of flats by a developer and also subsequent purchasers who buy the flats through sub-sales.

Rescind

To cancel a contract.

Rescission

The act of cancelling a contract.

Sales Brochure

Written publicity material issued by developers giving sales information about flats to be put up for sale. This report contains recommendations on the sales information that should be provided in a sales brochure.

Sales Literature

Any publicity material issued by developers giving sales information about flats to be put up for sale. It usually takes the form of sales brochures and price lists.

Units

This is used interchangeably with "flats" in this report. In a multi-storey building, the building is divided into a number of units which under the Deed of Mutual Covenant, each owns a specified number of the "undivided" shares of the land on which the development stands.

Uncompleted Units

Units for which the Occupation Permit has yet to be issued by the Building Authority.

CHAPTER 1

Measurement of Floor Area

Introduction

1.1 Accurate and adequate indication of the floor area of the unit is of paramount importance to purchasers. Without correct information on the floor area, purchasers cannot make a sound decision whether the unit will meet their specific needs and means.

1.2 At present there is no legal requirement that the floor areas of a unit be disclosed in the sales literature.

Gross floor area

1.3 Property developers invariably state in the sales literature the gross floor area of the units, yet there is no standard definition of gross floor area. The absence of a standardized method of measuring gross floor area makes possible arbitrary measurement methods which give misleading information to purchasers.

1.4 In Hong Kong purchasers are used to thinking in terms of gross floor area when they compare the prices of different properties. When people say a particular property costs so much per square foot, they usually refer to the gross floor area. A glance through the property pages of the major local newspapers will reveal that gross floor area is the measurement method commonly indicated by developers and private vendors.

1.5 Hence, as a comprehensive guide for home-buyers who are used to thinking in terms of gross floor area, we are of the view that there is merit in keeping the definition of the term gross floor area consistent throughout the property market. To achieve this aim the definition should be standard for all concerned parties, including developers, agencies, other professional organisations and government departments.

Two methods of measuring gross floor area

1.6 The gross floor area of a domestic unit commonly refers to the saleable area plus a share of the covered common areas. The confusion usually stems from the different ways in which common areas are defined.

1.7 We have considered two current methods of calculating the gross floor area. The first method is commonly used by developers and is more or less in line with the

definition suggested in the Consumer Council report.³ In that definition, "common area" includes all circulation areas and ancillary facilities such as pump rooms, transformer rooms and lift machine rooms.

1.8 A second method of measuring gross floor area is adopted by the Building Authority under the Buildings Ordinance (Cap. 123) in Reg. 23(3) of the Building (Planning) Regulations for approval of building plans for all building developments in Hong Kong.

1.9 Reg. 23(3) of the Building (Planning) Regulations provides that:

"(a) Subject to sub-paragraph (b), for the purposes of regulations 19, 20, 21 and 22, the gross floor area of a building shall be the area contained within the external walls of the building measured at each floor level (including any floor below the level of the ground), together with the area of each balcony in the building, which shall be calculated from the overall dimensions of the balcony (including the thickness of the sides thereof), and the thickness of the external walls of the building.

(b) In determining the gross floor area for the purposes of regulations 20, 21 and 22, the Building Authority may disregard any floor space that he is satisfied is constructed or intended to be used solely for parking motor vehicles, loading or unloading of motor vehicles or occupied solely by machinery or equipment for any lift, air-conditioning or heating system or any similar service."

1.10 In this Buildings Ordinance definition, reference is made only to those "common areas" usually known as circulation areas. The gross floor area calculation would exclude such common areas as air-conditioning and mechanical room, refuse chamber, pump room, transformer room, water tanks, lift machine room, lifts and staircases passing through carparking floors, but would include a clubhouse, management office, or caretaker room. Moreover, bay windows would be excluded from the calculation.

1.11 The gross floor area calculated under the Buildings Ordinance definition would be different from the common practice which usually includes such areas as lift/staircase cores passing through carparking floors and also ancillary facilities such as transformer rooms, generator room, air-conditioning and mechanical rooms. At present, different developers adopt different proportions of these areas in calculating gross floor area, thus leading to much confusion.

³ See pages 8 and 16 of the Consumer Council's mock-up sales brochure referred to in paragraph 14.17 of the Consumer Council report.

1.12 We are of the view that the Buildings Ordinance definition is clear and unambiguous and will leave no room for misunderstanding of the calculation of the gross floor area. Moreover, the gross floor area calculated under the Buildings Ordinance has the advantage that it will match the gross floor area shown on the approved building plans.

1.13 The public responses showed strong support for standardizing the definition of gross floor area. There were, however, divergent views on the choice of definitions. We have taken into account all suggestions and have taken the view that the Buildings Ordinance definition is the best choice.

1.14 Whilst we favour the Buildings Ordinance definition, some modifications need to be made in order to make it work in practice.

1.15 For example, a discretion is given to the Building Authority in reg. 23(3)(b) to disregard "any floor space that he is satisfied is constructed or intended to be used solely for parking motor vehicles, loading or unloading of motor vehicles or occupied solely by machinery or equipment for any lift, air-conditioning or heating system or any similar service." We consider that our definition should clearly deduct from the calculation the floor space referred to in reg. 23(3)(b).

1.16 The Building Ordinance definition only specifies what common areas are included in the calculation of gross floor area. It does not specify how the share of the common areas should be allocated to individual units. The method of apportionment of the share of common areas to individual units for the purpose of calculating the gross floor area should therefore, in our view, be clearly specified in the sales literature.

1.17 Likewise, if any facilities, not being part of the block of flats, are to be included in the calculation of the gross floor area, the method of pro-rata allocation of the share of the facilities to individual units should, in our opinion, be specified in the sales literature.

Our recommendations on gross floor area

1.18 **We recommend that the definition of the term gross floor area in sales literature of uncompleted units should be standardized by legislation. The gross floor area shown in sales brochures must equal the gross floor area shown on the approved plans. The method of apportionment of the share of common areas to individual units should be clearly specified in the sales literature.**

1.19 **To this end, we recommend that the definition of gross floor area in regulation 23(3) of the Building (Planning) Regulations (Cap. 123) subject to the modifications which we have mentioned in paragraph 1.14 above, should be adopted as the standard definition of gross floor area in sales literature of all uncompleted units. The definition of gross floor area**

should exclude such common areas as air-conditioning and mechanical rooms, refuse chambers, pump rooms, transformer rooms, water tanks, lift machine rooms, lifts and staircases passing through carparking floors, but include clubhouses, management offices and caretaker rooms.

1.20 **We further recommend that if any facilities, not being part of the block of flats, are to be included in the calculation of the gross floor area, the method of pro-rata allocation of the share of the facilities to individual units should be specified in the sales literature.**

Saleable area

1.21 Unlike gross floor area, there is an accepted method of measuring saleable area. In June 1993, the then Buildings and Land Department, in conjunction with the Law Society of Hong Kong, completed a review of the definition of saleable area for use in ASP's approved form under the Consent Scheme in future.

1.22 The review resulted in the adoption of a clear definition of saleable area with effect from 1 July 1993.⁴ Saleable area means:

- (1) in relation to a unit enclosed by walls, the floor area of such unit (which shall include the floor area of any balconies and verandahs), measured from the exterior of the enclosing walls of such unit except where such enclosing walls separate two adjoining units in which case the measurement shall be taken from the middle of those walls, and shall include the internal partitions and columns within such unit; but shall exclude the common parts outside the enclosing walls of such unit. Provided that if any of the enclosing walls abut onto a common area, then the whole thickness of the enclosing walls which so abut shall be included;
- (2) in relation to any cockloft, the floor area of such cockloft measured from the interior of the enclosing walls of such cockloft;
- (3) in relation to any bay window which does not extend to the floor level of a unit, the area of such bay window measured from the exterior of the enclosing walls or glass windows of such bay window and from the point where the bay window meets the wall dropping to the floor level of a unit but excluding the thickness of such wall;

⁴

See Legal Advisory and Conveyancing Office Circular Memorandum No. 1 dated 23 June 1993.

- (4) in relation to any carparking space, the area of such carparking space measured from the interior of its demarcating lines or enclosing walls, as the case may be;
- (5) in relation to any yard, terrace, garden, flat roof or roof, the area of such yard, terrace, garden, flat roof or roof measured from the interior of their boundary lines, and where the boundary consists of a wall, then it shall be measured from the interior of such wall.

Where the property consists of any of the above-mentioned items, the saleable area of each of such items must be specified and described separately in the ASP.

1.23 This definition of saleable area was formulated in consultation with various interested groups and adopted in all ASP's from 1 July 1993.⁵ We therefore take the view that this definition should be recognized in legislation as the standardized method to describe floor area in all sales literature of uncompleted buildings.

1.24 At present, only the sales brochures of Consent Scheme flats are required to state the saleable area.⁶ We take the view that sales literature should state the saleable area because it represents the actual floor space that purchasers can enjoy exclusively.

Our recommendations on saleable area

1.25 **We recommend:**

- (1) **that the definition of saleable area as promulgated in Legal Advisory and Conveyancing Office Circular Memorandum No. 1 dated 23 June 1993 for use in all new approved forms of ASP (as stated in paragraph 1.21 above) should be recognized in legislation as the standard method to describe saleable area in all sales literature;**
- (2) **that where the unit includes any incorporated item in the definition (such as cockloft, bay window, carparking space, yards, terrace, garden or flat roof), the saleable area of each of them should be specified and described separately in the sales literature; and**

⁵ According to Legal Advisory and Conveyancing Office Circular Memorandum No. 1, the parties consulted included the Real Estate Developers Association, the Consumer Council, the Hong Kong Institute of Surveyors, the Royal Institution of Chartered Surveyors (Hong Kong Branch) and the Hong Kong Institute of Architects.

⁶ Land Office Circular Memorandum No.101, at para. A.6. of Annex III.

- (3) that the inclusion of saleable areas in sales literature should be made mandatory by legislation.**

CHAPTER 2

Floor Plan

Introduction

2.1 Purchasers of uncompleted units have to place great reliance on the floor plan in the sales brochure. The floor plan is the predominant, if not the only, means by which the purchaser can make a rational decision in choosing a flat from among hundreds of units in an uncompleted building project or in making a choice between different building projects.

2.2 Yet sales brochures often contain floor plans which provide only scanty or even inaccurate information. What is more, dimensions of the rooms are not always provided.

2.3 Some common complaints in relation to floor plans are:

- (1) A floor plan may not include dimensions or internal partitionings. Thus, purchasers are unable to ascertain the size of the unit; or know how the unit will be partitioned or if partitions are to be provided at all.
- (2) A floor plan may state dimensions of the building site only. No dimensions of the individual units are provided.
- (3) A floor plan may only include overall external dimensions of a unit, i.e. the length and width between its farthest ends.
- (4) A floor plan may not be drawn to scale. There have been instances of the so-called "Shrunk Flat". The drawing in the sales brochure in such cases showed that the bedroom could accommodate a double bed, a side table and a wardrobe. In reality, however, the bedroom was found to be about 3 square metres only which was insufficient to fit a normal double bed.

Information in floor plans

2.4 Floor plans in sales brochures are important to purchasers. We think that a set of guidelines for providing clear and accurate information and dimensions of the unit should be laid down.

2.5 We consider that floor plans in sales brochures should contain information on the external dimensions of individual units. Such information is essential to purchasers in ascertaining the actual size of the units. Moreover, we think that the location, the number and the minimum dimensions of the car parking spaces should be provided.

2.6 The sub-committee had recommended in the Consultative Document that the internal dimensions of the individual units should also be shown in the floor plan. There were quite a number of public comments questioning the practicality of showing the internal dimensions of the individual units. It was pointed out that to include the internal dimensions together with the external dimensions would result in too detailed a plan. As the external dimensions are already shown and everything else in the floor plans is drawn to scale, we have concluded in the light of comments received that it is unnecessary to show the internal dimensions. We have therefore decided not to require the internal dimensions of units to be shown in floor plans.

2.7 The orientation and location of ingress and egress points for the development should, in our view, be clearly shown on the floor plans. The orientation of the development is of particular interest to purchasers in Hong Kong who usually have special preference for units facing the south and tend to avoid those which face the west. The location of ingress and egress points have bearing on traffic within and without the development.

2.8 To ensure floor plans are drawn to scale, we think that they should be presented in conventionally accepted scales. There should also be separate schedules listing the saleable areas, bay window areas, roof areas, flat roof areas, open yard areas, etc.

2.9 We consider that sales brochures should contain separate floor plans in respect of non-typical floors, the entrance floor and the roof. By including these floor plans in the sales brochure, purchasers will have a complete picture of the structure of the building as a whole.

2.10 Moreover, we think that certified true copies of the latest approved building plans should be made available by the developer for free inspection by purchasers at the sales office during normal office hours.

Internal areas of upper and lower floors

2.11 As the structural walls of the higher floors of a building may be thinner than those of the lower floors, the internal area of units on the upper floors may be slightly greater than the internal area of units on the lower floors. We therefore take the view that there should be a note in the sales brochure to that effect, if such is the case.

Usual term regarding variation of floor plans

2.12 It is a usual term in the ASP of units falling within the Consent and Non-consent Schemes that, if the building plans are altered and this results in variation of the saleable area of the unit, the purchase price shall be adjusted in proportion to the variation and that, if the variation shall exceed 5 per cent of the saleable area, a purchaser may rescind the agreement. Such a term is not always found in the ASP of developments not falling within the Consent Scheme or in the case of the Non-consent Scheme where there is separate legal representation. In the Non-consent Scheme, if the same solicitor acts for both the vendor and purchaser, the solicitor is required to use a standard form of ASP which closely follows that used in the Consent Scheme. But when there is separate legal representation in Non-consent Scheme cases, it is not compulsory to use the standard form of ASP and therefore the said term may not be found in the ASP.

2.13 Few purchasers are aware of their rights under this term. Therefore sales brochures should, in our view, carry a note informing purchasers of their rights where there is such a term in the ASP.

Legal obligation to inform purchasers of saleable area upon completion

2.14 One respondent to the Consultative Document suggested that there should be a legal obligation on the developer to inform purchasers of the saleable area upon completion (with architect's certification of the saleable area concerned) if there has been any material alteration in the building plans. This is a good suggestion but we take the view that such obligation should arise whether or not there has been any material alteration in the building plans. Purchasers will want to know whether there has been any alteration or at all in the saleable area and not just material alteration because even with a reduction of less than 5 per cent in the saleable area purchasers will be entitled to a corresponding reduction in the price.

Load bearing walls

2.15 It is common for purchasers in Hong Kong to knock down partition walls during renovation or internal decoration. We consider that load bearing walls should be clearly marked on the floor plans in the sales brochure to avoid purchasers unwittingly knocking them down and causing structural damage to the building.

Special features within units

2.16 We have considered the need for developers to disclose in the sales brochure any known features within the unit that would materially affect a reasonable purchaser's enjoyment of the property. An example of such special features are exposed pipes running through individual flats.

2.17 We understand that such special features may not be ascertained until the construction of the building is completed and so are unknown at the time of sale. However, we are of the view that it would not be too onerous to require developers to disclose such special features as are known to them at the time of sale. Exposed pipes are at present disclosed at the time of sale of HOS flats.

2.18 There were some public comments that the phrase “any known features” is too vague. We take the view that it is not possible to exhaustively list and anticipate all such features in this report and the phrase should be judged objectively and reasonably. In case of doubt, the developer would be well advised to disclose any feature he thought relevant.

Our recommendations on floor plans

2.19 We recommend that:

- (1) **the sales brochure should contain floor plans which:**
 - (a) **specify the external dimensions of individual units;**
 - (b) **are presented to conventionally accepted scales;**
 - (c) **show separately non-typical floors, the entrance floors, and the roof;**
 - (d) **show the location, the number and the minimum dimensions of the car parking spaces;**
 - (e) **show the orientation and location of ingress and egress points;**
 - (f) **show the load bearing walls; and**
 - (g) **show any known features within the unit that would materially affect a reasonable purchaser's enjoyment of the property, such as exposed pipes.**
- (2) **the sales brochure should contain:**
 - (a) **schedules listing saleable area of the unit and of any bay window areas, roof areas, flat roof areas, open yard areas, etc.;**

- (b) notes bringing to the purchaser's attention the usual term in the ASP concerning the adjustment in purchase price in proportion to variations in saleable area arising from amendment in the building plans and the purchaser's right to rescission for variation of 5 per cent or more, where there is such a term in the ASP; and
 - (c) a note that the internal area of units on the upper floors may be slightly greater than that of the lower floors, if such is the case.
- (3) certified copies of the latest approved building plans should be made available for free inspection at the sales office during normal office hours.

2.20 We recommend that there should be a legal obligation on the developer to inform purchasers of the saleable area upon completion (with architect's certification of the saleable areas concerned).

CHAPTER 3

Fittings and Finishes

Introduction

3.1 The quality of fittings and finishes of the individual unit and of the common parts of a building is of vital importance to purchasers. It has a direct bearing on their immediate living environment. Good quality fittings and finishes enhance the resale value of the property and mean that less has to be spent on maintenance and renovation.

3.2 Purchasers of uncompleted buildings cannot see for themselves the quality of fittings and finishes. Although some developers put up one or two sample units, purchasers cannot usually obtain all the information they require. There are, for example, no sample common parts. Moreover, the typical walls of sample units are not made of the actual building materials but are of wood and fabric for ease of dismantling. Very few small developers put up sample units.

3.3 Prospective purchasers are therefore likely to rely on descriptions contained in the sales brochures. But they do not contain uniform descriptions of fittings and finishes. Most sales brochures give a general description of the finishes of the walls of the individual units and the public areas, floors, windows, doors, kitchen, bathroom, electrical fittings, security system, gas supply, lift lobby, lifts and ground-floor entrance lobby, etc.

Problems with description of fittings and finishes

3.4 Descriptions are often vague and do not give a clear idea of the types of fittings and finishes used. There are, for example, such vague descriptions as "high class", "of internationally known manufacturers", "high quality", "imported" and "deluxe".

3.5 There may be discrepancies between descriptions in the Chinese and English versions. One purchaser complained that the bedroom and living room floors were not finished with teak flooring as specified in the Chinese version of the sales brochure. The developer relied on the English version which merely provided that the rooms would be finished with timber parquet flooring.

3.6 On the other hand, some sales brochures expressly provide that "all specifications etc. are for reference only and given without intending the same to be relied or acted upon and no representation can be taken or implied to be made by the vendor".

Land Office Circular Memorandum No. 101

3.7 Land Office Circular Memorandum No. 101 ("LOCM 101"), set out in Annex III of this report, was issued by the Registrar General on 21 February 1991. It applies to all Consent Scheme developments and provides that, in order to obtain consent for forward sale, the sales brochure must contain, *inter alia*, a list of all the fittings and finishes set out in Appendix 2 of the circular memorandum. LOCM 101 provides a good model for specifications of fittings and finishes in sales brochures and we think it should be extended to Non-Consent Scheme developments, subject to certain modifications discussed below.

3.8 The list of fittings and finishes in LOCM 101 is exhaustive. It covers various aspects and standards of fittings and finishes of external walls, windows, bay windows, planters, verandah/balcony, drying facilities for clothing, lobbies, internal walls and ceilings, floors, bathrooms, kitchens, doors, bedroom fittings, telephone and aerials, electricity, gas and water supplies, security facilities, lifts, letter boxes, refuse collection and water, electricity and gas meters.

3.9 We consider that air-conditioners should be added to the list because they are important fittings often provided by the developer. Moreover, we think that the sales brochure should provide descriptions, including the locations, of the air-conditioning plants.

3.10 The types of material used are specified in LOCM 101 but we believe these specifications are too general. Although they have the advantage of preventing purchasers from making legal claims against developers for small deviations from the specifications, they do not give consumers adequate protection.

3.11 Ideally, sales brochures should give detailed specifications of fittings and finishes including their dimensions, materials and countries of origin. But developers may not have detailed specifications at the time of the sales brochure and the specified materials may not be available later on. Nevertheless, there is no reason why fittings and finishes should not be specified in detail, bearing in mind their importance to purchasers.

3.12 We take the view that the specifications should contain at least the brands and countries of origin of the fittings and finishes. The concern about subsequent non-availability of specified materials can be dispelled by allowing the developer to use substitute materials provided that the Authorized Person of the development project certifies that in his professional opinion they are of comparable quality and standard to the materials stated in the sales brochure.

Supply of flush water/sewage treatment plant

3.13 There are some developments which do not have sea water for flushing. Sewage treatment systems are installed in such developments to recycle used flush water for continual use. Recycling of flush water should pose no health hazard if the treatment process operates well. There have however been complaints by residents that bugs, worms and bacteria appear in their toilet bowls. Sub-standard maintenance of the treatment plants may

be to blame. We therefore are of the view that the sales brochure should contain information on the flush water/sewage treatment plants where they are supplied.

Our recommendations on fittings and finishes

3.14 **We recommend that all sales brochures should at least contain details of the fittings and finishes as stated in Appendix 2 of LOCM 101.**

3.15 **We recommend that all sales brochures should also contain a description of air-conditioners where supplied and descriptions, such as locations, of air-conditioning plants.**

3.16 **We recommend that all sales brochures should also contain information on the flush water/sewage treatment plants where they are supplied. Such information should include the maintenance of the treatment plants.**

3.17 **We recommend that all sales brochures should state the brands and countries of origin of the fittings and finishes to be used. If the intended materials become unavailable, developers should be allowed to use substitute materials provided that the Authorized Person of the development project certifies that in his professional opinion the substitute materials are of comparable quality and standard to the intended materials. This right to use comparable substitute materials upon certification by the Authorized Person should be clearly stated in the sales brochure and the ASP.**

Discrepancies between languages

3.18 We have discussed the problem of occasional discrepancies between the descriptions contained in the Chinese and English versions of the sales brochure. The developer is, in our view, in a better position than the purchaser to check the accuracy of the different language versions. If there are discrepancies between the specifications contained in the Chinese and English versions of the sales brochure, we think that purchasers should be able to choose which one of the language versions they wish to rely on.

Our recommendation on language discrepancies

3.19 **We recommend that if there are discrepancies between the Chinese and English versions of the specifications of fittings and finishes in the sales brochure, purchasers can choose which of the language versions is applicable.**

Mock-up flats

3.20 Mock-up or sample flats are the best means of showing purchasers the quality of fittings and finishes. While major developers usually put up mock-up flats, developers of small projects seldom if ever provide them.

3.21 We have considered whether it is possible to strike a balance between giving the purchaser better sales descriptions through mock-up flats and protecting the interests of the small developers. One solution would be to require mock-up or sample flats in developments exceeding a specified number of flats. The disadvantage would be that any such number would be arbitrary.

3.22 In any event, we think it unreasonable to oblige developers to build mock-up flats. If developers choose to set up mock-up flats, however, they must accurately reflect the materials to be used. To ensure that they are accurate, the Authorized Person of the development project should be required to certify a schedule of the specifications of the mock-up flats.

3.23 There was a recommendation in the Consultative Document that if mock-up or sample flats are provided, they should be accurate. We received a comment that “should be accurate” should be replaced by “the actual units should be accurately representative of the mock-up in all aspects including quality and dimensions”. We agree with this suggestion but take the view that it is more appropriate to say “the mock-up should be accurately representative of the actual units in all aspects including quality and dimensions”. We have modified the original recommendation accordingly.

Our recommendations on mock-up flats

3.24 **We recommend that if mock-up or sample flats are provided, the mock-up should be accurately representative of the actual unit in all aspects including quality and dimensions and the Authorized Person of the development project should certify a schedule of the specifications of the mock-up flats. The developer should have a duty to keep a record of the certified schedule.**

CHAPTER 4

Location and Layout Plans (or Site and Development Plans)

Introduction

4.1 Information on the provision of communal facilities, the existing surroundings and future developments in the vicinity of the project is of vital concern to purchasers. These factors affect the future quality of living conditions and the value of the property.

4.2 Location plans and layout plans are the major sources of information of this sort. The Consumer Council report adopted the terminology of "site and development plans", but we prefer to adopt the terms "location plans" and "layout plans" which are used by the Registrar General in LOCM 101.

4.3 Although the sales brochure may provide a location plan or layout plan, some of these plans have been found to be sketchy and sometimes misleading. Most did not contain a written description of the facilities to be provided, nor was the intended usage of vacant sites indicated. Little information was given about the number, size and completion date of the communal facilities.

4.4 There have also been instances where developers have withheld vital information on the surroundings or future development of the property if there was a likelihood purchasers might consider them a nuisance.

LOCM 101

4.5 LOCM 101⁷ requires that the sales brochure of a Consent Scheme development should include:

- (i) a location plan "including up-dated information on prominent environmental features in the vicinity e.g. public park, swimming pool, refuse collection point etc., intended user of surrounding areas, if known"; and
- (ii) a layout plan drawn to scale "including communal facilities (and their completion dates if possible); undeveloped land and its intended use within the boundary of the development; the scale used".

⁷

See Appendix 1 of Land Office Circular Memorandum No.101, at paras. A 2 & 3.

4.6 We consider that LOCM 101 provides a good model for the provision of location and layout plans in sales brochures and can be adopted for all uncompleted units, whether in the Consent Scheme or otherwise, subject to our reservation over the suggestion that developers should be required to state the uses of land outside the boundaries of the development.

The Real Estate Developers Association

4.7 According to the Consumer Council Report, the Real Estate Developers Association ("REDA") has expressed disapproval of the suggestion that developers should disclose information about the environment and development plans of a project.

4.8 REDA argues that the outline zoning plan and the master layout plan are subject to frequent changes by the Government or by the developer in response to the market. The Association is concerned that the frequent changes to these plans will provide scope for litigation by fault-finding purchasers if disclosure based on these plans is made mandatory.⁸

Our views on REDA's objections

4.9 We believe that REDA's fear of litigation is unfounded if the date and correct reference number of the most recent issue of the outline zoning plan are specified in the sales brochure. Moreover, in order to protect the interests of purchasers and avoid litigation, a note can be put in the sales brochure to the effect that the outline zoning plans are subject to change.

4.10 We appreciate that for such large phased developments as Taikoo Shing or Whampoa Garden, development of the whole site may take many years and changes to the approved master layout plan are likely. There is, however, no reason why the latest approved master layout plan cannot be used as a basis for the layout plans in the sales brochure.

4.11 One suggestion made in response to the Consultative Document was that a copy of the latest outline zoning plan should be displayed at the sales office. We agree with this suggestion and have decided that there should be a note in the sales brochure to this effect.

Uses of land within the development and of adjoining land

⁸ Consumer Council report, at para. 10.9.

4.12 We have considered whether it is necessary to require developers to disclose in the sales brochure existing and intended uses of land within a development and of adjoining land.

4.13 If there are specific covenants in the Government Lease requiring specific use of land inside or outside the boundaries of the development, the developer should, in our opinion, disclose it in the sales literature. This is reasonable because the developer is in a better position than the purchaser to ascertain the existence of specific covenants in the Government Lease regarding land uses.

4.14 Moreover, we hold the view that the developer should also disclose anything which it knows at the date of the printing of the sales literature about the intended uses of the land within the boundaries of the development.

4.15 On the other hand, it would prove too onerous to require developers to disclose the intended uses of the land outside the boundaries of the development, except the specific uses required by the Government Lease. We consider that purchasers should ascertain the land uses for themselves from, say, the latest issue of the outline zoning plans. Although the developer has a duty to inform the purchaser of the uses of the land within the development, it would be unreasonable to extend the duty of disclosure to land beyond its boundaries.

4.16 If, however, the developer chooses to disclose in the sales literature any information about the uses of land outside the boundaries of the development, that information must be accurate.

4.17 It was recommended in the Consultative Document that the layout plans provided in sales brochures should be the latest approved ones. One comment made in response was that “the latest” should be qualified as being “the latest approved plans at the time of preparation of the brochure”. We agree with this comment and have modified the recommendation to refer to “the latest approved plans at the date of printing of the brochure” in line with our comments in paragraph 13.17.

4.18 There was another comment that the expected completion dates of those recreational facilities planned within the proposed development should be included in the layout plans of the sales brochure. We agree with this comment and have added it to our recommendations.

Our recommendations on location plans

4.19 **We recommend that, subject to paragraph 4.24 below, a location plan containing the details specified at paragraph A2 of Appendix 1 of LOCM 101 should be provided in all sales brochures.**

4.20 **We recommend that the date and the reference number of the latest outline zoning plans at the date of the printing of the sales brochure should be stated in all sales brochures with a note that outline zoning plans are subject to change and that the latest outline zoning plans at the date of the printing of the sales brochure are available for free inspection during normal office hours at the sales office.**

Our recommendations on layout plans

4.21 **We recommend that all sales brochures should provide layout plans which are drawn to scale and contain the details specified in paragraph A3 of Appendix 1 of LOCM 101. We recommend that the layout plans provided in sales brochures should be the latest approved plans at the date of printing of the sales brochure. We recommend that the expected completion dates of communal recreational facilities should be included in the layout plans.**

Our recommendations on uses of land

4.22 **We recommend that if there are specific covenants in the Government Lease requiring the developer to put land inside or outside the boundaries of the development to particular uses, the developer should state accurately those particular uses in the sales literature.**

4.23 **We recommend that developers should be required to state accurately in the sales brochure anything which they know at the date of the printing of the sales brochure about the intended uses of the land within the boundaries of the development.**

4.24 **We recommend that, except for specific uses mentioned in paragraph 4.22 required of developers by the terms of the Government Lease, developers should *not* be required to disclose the intended use of land outside the boundaries of the development.**

4.25 **We recommend that if the developer chooses to disclose in the sales literature any information about the use of land outside the boundaries of the development, the information so disclosed must be accurate.**

CHAPTER 5

Date of Completion

The importance of the date of completion

5.1 A reasonably accurate estimate of the date of completion of the construction of the units is of importance to the purchasers in a number of ways. In the first place, it helps the end-users to plan for their accommodation. There are, for example, people who want to switch to a bigger flat. The usual approach is to enter into an agreement to sell one's existing flat and to buy an uncompleted unit at more or less the same time. The date of the execution of the assignment or legal completion of the existing flat will be fixed at some time around the completion date of the new flat. An accurate estimate of the construction completion date is therefore of utmost importance.

5.2 On the other hand, purchasers of uncompleted units often have to choose between taking out an equitable mortgage or paying the purchase price by instalments. An equitable mortgage entails additional interest but the purchaser is often given a discount on the purchase price in return. The second payment method means that 10 per cent to 30 per cent of the purchase price is paid immediately and the balance is paid upon legal completion when a legal mortgage is taken out. The purchaser in this case will lose the benefit of a discount on the purchase price but is saved the interest on the equitable mortgage. In the end, a choice between the two payment methods means balancing the amount payable as interest on the equitable mortgage and the discount on the purchase price. A correct choice between the two payment methods depends very much on an accurate estimate of the construction completion date by the developer. The legal completion takes place usually 14 days after a notice is served by the developer following the issue of an Occupation Permit certifying completion of the construction. In the case of units subject to the Land Authority Consent Scheme, assignment and completion cannot normally take place until after compliance with all the lease conditions when a certificate of compliance is issued by the Director of Lands, except in a few cases where the developer may apply for consent to assign from the Land Authority prior to compliance with certain conditions.

Current problems with date of completion

5.3 Complaints by purchasers about delayed completion are not uncommon. In one typical example, construction was completed 10 months after the originally estimated date and the Certificate of Compliance was not issued for a further few months. Furthermore, many sales brochures do not contain a definite completion date.

The construction completion date as stated in the ASP

5.4 We consider that the sales brochure should state the contractual completion deadline fixed by the ASP.

5.5 There are two completion dates in the ASP, the construction completion date and the legal completion date. In the approved form of ASP, the construction completion date is expressed as a specific date on or before which the developer is obliged to complete the construction of the units subject to extensions of time by the Authorized Person. The usual circumstances permitting such extension include strike or lock-out of workmen, riots or civil commotion, force majeure or Act of God, fire or other accident beyond the vendor's control, war, or inclement weather. If the developer fails to complete construction of the units by the construction completion date and does not get any extensions of time, purchasers will be entitled under the terms of the ASP to rescission of the ASP and/or interest on the purchase money already paid.

5.6 In the latest approved form of ASP, the legal completion date is not fixed. The ASP only provides that the legal completion of the sale and purchase will take place within 14 days of the date of the purchaser being notified in writing that the vendor is ready to assign the property to the purchaser. Under the ASP, the vendor is obliged to give that written notice within one month of the issue of the Certificate of Compliance or the consent of the Director of Lands to assign, whichever shall first happen.

5.7 We think that the sales brochure should state the construction completion date. Unlike the legal completion date, the construction completion date is specific. Moreover, the construction completion date is contractually the deadline for the developer to complete the units, unless the delay is within the limited circumstances permitting extensions. Purchasers can therefore expect that in the normal course of events this is the latest time by which the construction of the unit will be completed and they can make their accommodation plans accordingly.

The expected dates of issue of the Occupation Permit and Certificate of Compliance

5.8 The sub-committee suggested that, in addition to the construction completion date, the sales brochure should also state the expected dates of issue of the Occupation Permit and the Certificate of Compliance, where applicable.

5.9 In our view, the general public is unlikely to know the legal or practical distinction between the issue of the Occupation Permit and that of the Certificate of Compliance. Indeed, whether the issue of the Occupation Permit or the Certificate of Compliance is of practical significance to the purchaser may depend on the type of development scheme. For example, in many cases the developer will endeavour to obtain a Consent to Assign rather than the Certificate of Compliance for the purpose of completing the sale and purchase so that the purchaser will be required to complete and pay the balance of the purchase price much earlier than the expected date of issue of the Certificate of Compliance. Moreover, under the Consent Scheme the issue of the Occupation Permit

pending issue of the Certificate of Compliance or the Consent to Assign will be of no practical significance to the purchaser unless in some exceptional cases the purchaser is allowed to enter into possession of the property as a licensee pending legal completion. We therefore think that it is inappropriate to require mandatory disclosure of those two technical dates and would *not* adopt the sub-committee's recommendation. Instead, we have recommended later in this chapter the disclosure of those two dates where they are relevant for payment of the purchase price.

The expected legal completion date and expected date of vacant possession

5.10 We think that what purchasers would want to know are the expected dates of legal completion and of vacant possession. These two dates are very often the same because the usual practice is for the purchaser to pay the balance of the purchase price and execute the assignment at legal completion and then for the developer to deliver vacant possession. However, as mentioned in the next paragraph, there may be cases where the purchaser is allowed to take vacant possession of the property pending legal completion. These two dates will give purchasers an idea as to when they are required to pay the balance of the purchase price and when they can take possession of the property. Purchasers can then make their accommodation and financial plans by reference to these two dates.

Expected dates of events which govern payment of purchase price

5.11 Purchasers of uncompleted units are often required to make full or partial payment of the purchase price by reference to the occurrence of certain events. For example, it is very common that full payment of the purchase price has to be made within 14 days of the issue of the Occupation Permit or of the Certificate of Compliance. On the other hand, in order to promote sales, some developers have recently introduced a new payment method. Under this new payment method, purchasers would be allowed to enter into possession of the units as licensees by payment of a certain percentage of the purchase price without the need to pay the full purchase price. The full purchase price will only be payable upon the execution of the assignment which will take place some months after purchasers have entered into possession as licensees. Under this payment method, payment of the purchase price is contingent upon the issue of the Occupation Permit as well as the execution of the assignment.

5.12 In order to assist purchasers in making their financial arrangements, we take the view that if any of the payment terms is dependent on the occurrence of a contingent event (such as issue of the Occupation Permit or the Certificate of Compliance, or execution of the assignment), the sales brochure or the price list should state the expected date of that event.

Our recommendations on dates of completion

5.13 We recommend that the following dates should be stated in all sales brochures:

- (1) the construction completion date as stated in the Agreement for Sale and Purchase;**
- (2) the expected date of legal completion;**
- (3) the expected date of vacant possession.**

5.14 We recommend that if any of the payment terms is dependent on the occurrence of a contingent event (such as issue of the Occupation Permit or the Certificate of Compliance, or execution of the assignment), the sales brochure or the price list should state the expected date of the happening of that event.

CHAPTER 6

Charges Levied on Transfer of Title to Sub-purchasers

Means of transfer to sub-purchasers

6.1 The required procedures and administration fees chargeable on the transfer of title from "first-hand" purchasers to sub-purchasers are seldom indicated clearly in the sales brochures.

6.2 An uncompleted unit can be transferred from a purchaser to a sub-purchaser in three different ways. Depending on the means of transfer adopted, the co-operation of the developer for the transfer may or may not be required.

6.3 The first means of transfer is by cancellation of the original ASP. The developer and the sub-purchaser will in turn enter into a fresh ASP. This transfer method obviously requires the developer's co-operation and the developer often imposes charges for the transfer.

6.4 Secondly, the transfer can take the form of substitution of the sub-purchaser's name for that of the original purchaser with the co-operation of the developer. The developer usually imposes charges in such cases.

6.5 Thirdly, the transfer can be made without the co-operation of the developer by means of a sub-sale agreement between the original purchaser and the sub-purchaser. Such a transfer is often made without notification to the developer. The developer will only be informed of the transfer nearer the time of legal completion when the sub-purchaser's solicitors request that the sub-purchaser take the assignment direct from the developer with the original purchaser signing as confirmor in the assignment. As the developer's consent is not required, no charges are imposed by the developer for the transfer.

Disclosure of charges on transfer

6.6 We take the view that whenever there are charges on transfer to sub-purchasers, the amount of the charges and the procedures for transfer should be disclosed in the sales brochure, to enable purchasers to foresee the costs of disposing of the units within the construction period.

The sale brochure or price list

6.7 We received public comments that our recommendations in this chapter should apply to the price list and not the sales brochure. We take the view that these

comments can be met by allowing the required information to appear in either the sales brochure or the price list whenever our recommendations are concerned with price or charges. We have made adjustments to our original recommendations accordingly in this and subsequent chapters.

The Government's Task Force on Land Supply and Property Prices

6.8 In June 1994, the Government introduced a package of measures to dampen property speculation. The measures, which were largely based on recommendations made by the Interdepartmental Task Force on Land Supply and Property Prices, were announced on 8 June 1994 and included the prohibition on resale of uncompleted flats before assignment. This prohibition only affects uncompleted flats in the Consent Scheme whose consent letter is issued after 8 June 1994. Details of the new measures are set out in Legal Advisory and Conveyancing Office Circular Memorandum No. 7 dated 17 June 1994, which is reproduced in Annex V.

Our recommendation on transfer to sub-purchasers

6.9 **We recommend that where charges are imposed by developers on transfer of title to sub-purchasers, the amount of such charges and the procedures for transfer should be specified clearly in the sales brochure or the price list.**

CHAPTER 7

Financing Arrangements

Information on mortgage facilities

7.1 Information about available finance is not always given in the sales literature. Even when it is, it usually consists only of a brief description of the maximum mortgage loan that can be obtained and the names of the few banks which offer such facilities. Full details of the financing schemes are seldom, if ever, given in the sales literature.

7.2 To assist purchasers to budget for their purchase, the sales brochure should, in our opinion, state whether banks and financial institutions can provide finance and should also give a general description of the available finance schemes and the interest rates. However, we think it should remain the purchasers' duty to find out for themselves full details about financing arrangements from the relevant banks or institutions.

Developers providing mortgage facilities

7.3 Some developers provide second mortgages to top up first mortgages granted by banks. Their interest rates are usually higher than those charged by banks. They may arrange with the banks to remortgage the properties so as to obtain more cash, incurring legal fees and sundry handling charges. At present, purchasers are not informed of the possibility of these additional charges on remortgaging being passed on to them.

7.4 We take the view that the sales brochure should provide details of such top-up facilities, including the interest rates charged by the developer. Furthermore, as any remortgaging is made for the sole benefit of the developer, we consider that it would only be fair that any costs incurred in the remortgage should be met by the developer alone and not by the purchaser. The fact is, however, that purchasers are often required to bear the costs of remortgage. In any event, we think that purchasers should be informed of the possibility of the costs of remortgaging which may be passed to them.

Interest rates per annum

7.5 One of those who commented on the Consultative Document suggested that the interest rate per annum should be given as some developers quote interest rates on a monthly basis. This is a valid suggestion as interest rates quoted on a monthly basis may give purchasers the false impression that the interest rates are low. We have modified the original recommendations accordingly.

Our recommendations on financing arrangements

7.6 **We recommend that the sales brochure or the price list should contain a general description of the finance schemes available from banks and other financial institutions and, where the interest is specified, it should be the rate per annum.**

7.7 **We recommend that, where the developer provides finance, whether solely or to top up other loans, details of such facilities and the interest rates per annum should be disclosed in the sales brochure or the price list.**

7.8 **We recommend that where the developer provides finance but later arranges for remortgage, purchasers should be informed in the sales brochure or price list of the possibility of the costs of remortgaging which may be passed to them.**

Interest chargeable for late payment of purchase price

7.9 There are invariably provisions in the ASP which give the developer the right to charge interest on any part of the purchase price not paid by the purchaser on its due date as set out in the agreement. For instance, the approved form of the ASP provides that the vendor can charge interest on any part of the purchase price which is due and unpaid at the rate of 2 per cent per annum above the prime rate. We take the view that purchasers should be told in the sales brochure about the rate of interest that will be chargeable under the ASP for late payment of any part of the purchase price.

Our recommendation on interest on late payments

7.10 **We recommend that the rate of interest per annum chargeable under the ASP for late payment of any part of the purchase price should be stated in the sales brochure or price list.**

CHAPTER 8

Preliminary Agreement for Sale and Purchase

Introduction

8.1 In Hong Kong, the usual procedure for the purchase of a flat in an uncompleted development commences with the developer and the purchaser entering into a preliminary agreement for sale and purchase (or a "Memorandum for Sale" as they are more frequently called) at the site office or the developer's office. The purchaser has to pay a deposit or reservation fee upon signing the preliminary agreement. The preliminary agreement will later be replaced by a formal ASP if the purchaser decides to go ahead with the deal.

Preliminary Agreement under the Consent Scheme

8.2 The essential elements of a preliminary agreement under the Consent Scheme are:⁹

- (1) purchasers cannot be bound to purchase;
- (2) a preliminary deposit must be paid by cashier's order of not less than 10 percent of the price;
- (3) a "reservation fee" must be handed over by the sales agent to the developer's solicitor as stakeholder within 4 days of receipt;
- (4) the agreement is non-assignable, i.e. the developer cannot sign a formal ASP with any other person but the one who has signed the preliminary agreement;
- (5) a person signing the preliminary agreement who does not wish to execute a formal ASP may withdraw and obtain a full refund of the preliminary deposit, less 5 per cent of the purchase price; and
- (6) the developer's entitlement to claim forfeiture of the 5 per cent of the purchase price must be prominently stated on the face of the preliminary agreement and in any sales brochure or price list.

⁹ See Legal Advisory and Conveyancing Office Circular Memorandum No. 7 dated 17 June 1994, which is reproduced in Annex V.

8.3 It was recommended in the Consultative Document that Consent Scheme sales brochures should state that the preliminary agreement or Memorandum for Sale is not a legally binding sale and purchase agreement. On second thoughts, we take the view that it is more appropriate to say that purchasers cannot be bound to purchase. Such words reflect the actual position under the Consent Scheme. They also give purchasers notice of their right to a cooling-off period under the Consent Scheme and can be evidence of the intention of developers that the preliminary agreement or Memorandum for Sale does not bind the purchaser to purchase.

8.4 Consent Scheme sales brochures should, in our view, also state the other requirements of the Consent Scheme, for instance, the non-assignability of the preliminary agreement and the penalty for non-execution of the formal agreement.

Our recommendations on Consent Scheme preliminary agreements

8.5 **We recommend that the sales brochures of uncompleted units of Consent Scheme developments should state that:**

- (1) purchasers cannot be bound to purchase by the preliminary agreement or Memorandum for Sale;**
- (2) the preliminary agreement or Memorandum for Sale is non-assignable and that the developer cannot sign a formal agreement with any other person but the one who signs the preliminary agreement or Memorandum for Sale;**
- (3) a person signing the preliminary agreement or Memorandum for Sale, who does not wish to execute a formal agreement, may withdraw and obtain a full refund of the preliminary deposit less a sum equal to a percentage of the purchase price specified by the Director of Lands under the Land Authority Consent Scheme.**

8.6 **We recommend that the right to withdraw from the transaction with the forfeiture of a specific percentage of the purchase price should be prominently stated on the face of the preliminary agreement or Memorandum for Sale and in any sales brochure and price list.**

Preliminary Agreements outside the Consent Scheme

8.7 There is no control over preliminary agreements outside the Consent Scheme as administered by the Law Society under Rule 5C of the Solicitors Practice Rules. There is, for example, no limit on the amount of the preliminary reservation fee. There is no specific requirement for any particular form of receipt or any requirement to state the terms on which the preliminary deposit is held.

8.8 The Law Society¹⁰ has previously expressed the view that whether a reservation fee/deposit was refundable should depend entirely on the terms of the provisional agreement. A typical Non-Consent Scheme preliminary agreement or Memorandum for Sale contains provisions that time should be of the essence for signing the formal agreement and that the vendor can re-sell the property and forfeit all deposits if the purchaser fails to sign the formal agreement.

8.9 Such a preliminary agreement is therefore binding and purchasers do not enjoy the benefit of a cooling-off period. The Law Society has expressed a reluctance to extend the scope of the Consent Scheme arrangements to such a preliminary agreement, either to provide better protection for purchasers or to require a 3 day cooling-off period.

8.10 The Law Society's view was that, as the preliminary agreements are drafted by the developer for use by its sales agents, who received initial deposits, and not by members of the Law Society, the Law Society could not police the use of such preliminary agreements and did not wish to have to monitor the actions of non-lawyers, whether developers or their agents.

8.11 We take the view that whatever terms are put into the preliminary agreement by developers, they should be disclosed to purchasers by exhibiting a specimen copy of the preliminary agreement in the sales brochure. Experience shows that purchasers often have to sign a preliminary agreement in great haste without sufficient time to read and understand its provisions, for example, where many purchasers are waiting to make their purchases. It is therefore of the utmost importance to acquaint purchasers with the terms of the preliminary ASP at an early stage by disclosing them in the sales brochure.

8.12 As the legal nature of the preliminary agreement is of great concern to purchasers, we consider that the sales brochure of Non-Consent Scheme developments should state whether or not the preliminary agreement is intended to be a binding sale and purchase agreement.

Our recommendations on preliminary agreements not governed by the Consent Scheme

8.13 **We recommend that the sales brochures of all developments not governed by the Consent Scheme should state whether or not the**

¹⁰ The Law Society's Circular to Members No. 134/85 dated 2 September 1985, which cited the case of *Lam Mean-scon v. Luk Fuk Enterprises Ltd*, (1981) HKLJ Vol. 11, 371.

preliminary agreement or Memorandum for Sale is intended to be a binding sale and purchase agreement and should include a specimen copy of the preliminary agreement or Memorandum for Sale.

CHAPTER 9

Right of Inspection Prior to Completion of Transaction and Defect Liability Period

The current practice

9.1 Purchasers of uncompleted flats in Hong Kong take the risk that they will not be able to inspect the flat until completion of the purchase. The current practice is that the purchaser can only inspect the unit after completion of the transaction by executing the assignment and paying all the purchase money to the developer.

9.2 The usual procedure is for the developer's solicitors to give the purchaser a letter addressed to the Management Office of the development project saying that the purchase has been completed and vacant possession should be given to the purchaser. The purchaser can then approach the Management Office for handover of the keys. The purchaser can then inspect the property.

Should there be a right of inspection prior to completion?

9.3 We have considered the advantages and disadvantages of giving purchasers the right to inspect the unit prior to legal completion to afford them protection against defects in the property and its installations.

The advantages

- (a) Purchasers may be able to discover material omissions or misrepresentations before payment of the balance of the purchase money to the developers.
- (b) Developers may be deterred from making misrepresentations in the sales brochure as they will not be able to obtain the balance of the purchase money if the purchaser discovers the misrepresentation during inspection before completion.
- (c) Purchasers can save the time and costs of future litigation in cases where material omission or misrepresentation is found after completion.

- (d) A higher quality of construction will be encouraged as purchasers can discover the defects in construction before completion of the purchase.

The disadvantages

- (a) It is a significant departure from existing practice.
- (b) As many units are likely to be completed at the same time, it would be difficult for the developer to arrange for a large number of purchasers to inspect their units at more or less the same time near completion.
- (c) Purchasers may suffer inconvenience because of delayed handing over of property arising from the developer's inability to deal with many demands for inspection at the same time.
- (d) Purchasers may take advantage of such a right to allege defects in the property in order to get out of the transaction.
- (e) Units may have changed hands many times before completion. As most sub-sales of uncompleted units are made by way of sub-sale agreements or confirmation of the sale, the developer cannot know the identity of the ultimate end-user until he or she takes up the assignment. This being the case, it is difficult, if not impossible, to arrange inspection before completion.
- (f) The purchaser already has a right to request the developer make good defects reported within the Defect Liability Period.

Conclusion

9.4 We have come to the view that giving the purchaser a right of inspection prior to completion would create too many practical difficulties. It must be borne in mind that nearer the time of completion and the handover of keys, there will still be workers on site and numerous sundry defects, such as broken windows.

9.5 On balance, we consider that due to its impracticality, the right of inspection prior to completion is *not* a workable suggestion.

Defect Liability Period

9.6 There are two Defect Liability Periods, namely, (i) that between the developer and his contractor and (ii) that between the developer and the purchaser. Within the Defect Liability Period (between the developer and purchasers) purchasers may request

developers to make good any defects in the property and its installations. Currently, for the Consent Scheme that Defect Liability Period is 6 months from the execution of the assignment. Hence, a purchaser who discovers any defects in the property must report them to the developer within 6 months of completion. However, very often the developer requests purchasers to report defects within 7 days of handing over possession.

9.7 On the other hand, the developer usually requires the purchasers to report, within a year of handing over possession, any defects not ascertainable when the units are handed over. Any such requirement, if stated in the ASP, can only limit the developer's contractual duty to remedy defects but does not affect the developer's separate liability in negligence to make good the defects.

9.8 The duration of the Defect Liability Period is clearly of great importance to the purchaser. We think that the sales brochure should therefore state the Defect Liability Period.

Our recommendation on Defect Liability Period

9.9 **We recommend that all sales brochures of uncompleted units should state the Defect Liability Period.**

CHAPTER 10

Deed of Mutual Covenant

Introduction

10.1 The Deed of Mutual Covenant ("DMC") is an important document which governs the maintenance and management of a multi-storey building and the respective rights and obligations of the owners among themselves. It provides, for example, for the management of the common parts of a building and the method of apportionment of the management charges among the owners.

10.2 Notwithstanding its importance to individual owners, the contents of the DMC are not often disclosed in a sales brochure. Some developers will state in the sales brochures the salient points of the DMC. But even these salient points are in English legal language which is unintelligible to ordinary purchasers. Chinese translation of these extracts of the DMC is not always provided.

Salient points

10.3 We consider that the following salient points of the DMC should be disclosed in the sales brochure:

- (1) the definition of common parts;
- (2) the number of undivided shares allocated to each unit and the method of apportionment of management charges;
- (3) the sum payable by the owners as deposit for the first year budgeted management expenses (to be expressed in terms of a specific number of months of management fee if the exact amount has not been yet worked out);
- (4) any restrictions imposed on owners in the use of the common parts;
- (5) interest and charges on owners who default in paying sums due under the DMC; and
- (6) the name of the first manager (if already decided) and the minimum period of its management.

Subsequent changes

10.4 We are concerned that the provisions of the DMC may subsequently change after their disclosure in the sales brochure. If they do, we think that purchasers should be notified of those changes. Likewise, the number of undivided shares may change after the sales brochure is published. We take the view that there should be a remark in the sales brochure that the number of undivided shares is subject to change.

Chinese translations

10.5 As the DMC affects the residents' enjoyment of their properties, we see no reason why developers should not be required to provide a Chinese translation of the whole text of the DMC for the benefit of the vast majority of purchasers who read and speak Chinese only. We understand that many Hong Kong Chinese residents have a reasonable command of the English language. However, it is difficult for anyone with English as a second language to read and comprehend the legal English in a DMC.

10.6 The main argument against the provision of Chinese DMCs is the difficulty of translation. The argument is that a DMC contains many legal terms which have no Chinese equivalents. We have sought expert linguistic advice and have been given Chinese equivalents of English legal terms and shown samples of Chinese DMCs which are easily comprehensible. On the other hand, it was argued by some of those who commented on the Consultative Document that small developers would not have the necessary resources to deal with the translation. We do not agree with this argument. In the first place, there is only one DMC for all units in a development. So, it would only be necessary to translate one DMC. Secondly, the costs of translation is a very insignificant amount in relation to the total purchase price of all the units in a development.

10.7 We take the view that the developer should deposit a copy of the English and Chinese versions of the full DMC for free inspection at either the sales office or the solicitors' office. The sales brochure should, in our view, state where and how prospective purchasers can inspect the English and Chinese versions of the DMC.

Private slope maintenance

10.8 The slope adjacent to a building is often owned by individual owners of the building under the terms of the Government Lease. The maintenance of such private slopes is the responsibility of the individual owners. Few owners are aware of that responsibility. The DMC may or may not contain provisions spelling out the owners' responsibility in this respect. However, even if a DMC fails to mention the obligation, the owners are still bound by the terms of the Government Lease.

10.9 The cost of maintaining and repairing private slopes can be great and the burden on individual owners heavy. As heavy rains are common every summer, private

slopes are liable to erosion and damage. Hence, we think that there should be simple words in the sales brochure warning purchasers of the potential responsibility for maintaining private slopes. Moreover, we consider that details of any known repair and maintenance works on the private slopes within a year from the printing of the sales brochure should be disclosed in the sales brochure. A period of one year is reasonable as repair and maintenance works are usually carried out annually.

Continuing financial obligations

10.10 There are various clauses in the DMC which impose continuing financial obligations. These clauses generally relate to the maintenance and repair of common parts.

10.11 We consider that purchasers should be alerted of these continuing financial obligations by a general notification in the sales brochure.

Replace “lawyers” by “professional advisers”

10.12 Some of those who responded to our Consultative Document commented on our recommendation that purchasers should be advised to consult their lawyers on matters relating to the DMC and the land lease. They pointed out that purchasers should not be advised to consult only their lawyers. It was suggested that the term “lawyer” should be replaced by “professional advisers”. These are valid comments as the people to be consulted could well be surveyors, engineers, builders, bankers and not lawyers alone. We have decided to make the change as suggested.

Our recommendations on DMC

10.13 **We recommend that the following provisions in the DMC should be disclosed in the sales brochure:**

- (1) the definition of common parts;**
- (2) the number of undivided shares allocated to each unit and the method of apportionment of management charges;**
- (3) the fact that the number of undivided shares is subject to change;**
- (4) the sum payable by the owners as deposit for the first year budgeted management expenses (to be expressed in terms of a specific number of months of management fee if the exact amount has not yet been worked out);**

- (5) any restrictions imposed on owners in the use of the common parts;**
- (6) interest and charges on owners who default in paying sums due under the DMC; and**
- (7) the name of the first manager (if already decided) and the minimum period of its management.**

10.14 We recommend that the developer should deposit copies of the English and Chinese versions of the full script of the DMC at either the sales office or the solicitors' office for free inspection during normal office hours.

10.15 We recommend that there should be a statement in the sales brochure to the effect:

- (i) that copies of the English and the Chinese versions of the DMC are available for free inspection during normal office hours at either the sales office or the solicitors' office; and**
- (ii) that, if there are subsequent changes to the provisions of the DMC after their disclosure in the sales brochure, purchasers will be notified of the changes.**

10.16 We recommend that the sales brochure should contain a general notification to purchasers that there are various financial obligations which will be imposed on them by the DMC and they are advised to consult their professional advisers on this.

10.17 We recommend that if there is actual or potential responsibility for maintaining private slopes, there should be clear notifications to purchasers in the sales brochure of that responsibility. Moreover, we recommend that details of any known repair and maintenance works on the private slopes within a year from the date of printing of the sales brochure should be disclosed in the sales brochure.

CHAPTER 11

Conditions of the Land Lease

Introduction

11.1 There are three main areas of concern in relation to the conditions of the land lease, namely, (i) user restrictions; (ii) duration; and (iii) special lease conditions.

User restrictions

11.2 Government leases and Conditions of Grant contain provisions which restrict the land to certain uses, the common ones being "commercial/residential", "non-industrial" and "industrial/godown". Compliance with the user restrictions is important as the government may re-enter and take back possession of the land if a condition governing the land use is breached. Moreover, if the land is put to more valuable uses than those specified, a premium has to be paid to the government. If, for example, an industrial use is converted to residential, a premium equal to the difference between the market value of the two uses will be payable.

11.3 The Consumer Council has received complaints from some purchasers that they were misled into acquiring commercial or factory units for residential purposes. They were so misled because the sales literature contained no indication of the restrictions on use of the property and the floor plans were so ambiguous as to give the false impression that the units were for residential use.¹¹

11.4 According to the Consumer Council, such cases are most likely to occur in combined residential/commercial buildings.¹² There are many buildings in which the lower floors are used for shops and offices whilst the upper floors are for domestic purposes.

11.5 A purchaser misled into buying commercial or factory units for residential purposes will be adversely affected in two ways. Firstly, the purchaser may not be able to use the property as a residence. Secondly, banks usually have more stringent mortgage policies for commercial or factory units than those for residential premises. The purchaser may then have to forfeit the deposit to the developer.

11.6 We therefore think that purchasers should therefore be informed in the sales brochure of the permitted uses of the individual units as stated in the approved building

¹¹ Consumer Council report, at para. 7.2.

¹² Consumer Council report, at para. 7.3.

plans, together with any restrictions on use contained in the land lease or Conditions of Grant of the land.

Duration of the land lease

11.7 The duration of the land lease and the unexpired term of the lease are of interest to purchasers because renewal of a land lease requires a substantial increase in the annual rent payable to the Government. The amount of land rent in some cases could be 3 per cent of the rateable value of the property¹³ and that can be a substantial sum. The burden of the additional annual rent will be passed on to individual owners.

11.8 To assist purchasers in assessing the likelihood of any increase in the land rent arising from future renewal of the land lease, the sales brochure should, in our view, state the original term of the land lease and its date of expiry. Moreover, we think that the sales brochure should also state land rent provisions in the relevant Government Lease and specify that the renewed land rent may be an apportioned amount of 3 per cent of the rateable value.

Special lease conditions

11.9 There are various special lease conditions which impose on a flat-buyer continuing financial obligations, including:

- (1) The construction and maintenance of pedestrian subways and footbridges;
- (2) The construction and maintenance of escalators, stairways and lifts for the disabled;
- (3) The maintenance of slopes, toe-walls and retaining walls; and
- (4) The maintenance of private open spaces and toilets;

¹³ For 75-year and 99-year renewable leases which have expired and are subject to the Crown Leases Ordinance (Cap. 40), the rent for the renewal period is 3 per cent of the rateable value of the original lot or section of a lot (s.9 of Cap. 40). However, for leases which have been renewed by virtue of the New Territories (Renewable Crown Leases) Ordinance (Cap. 152) with effect from 1 July 1973, the annual rent remains the same as it was on the original lot or section of a lot (s.4(3) of Cap.152). On the other hand, for every New Territories lease that expires before 30 June 1997 but is extended until 30 June 2047 by virtue of the New Territories Leases (Extension) Ordinance (Cap. 150), the annual rent of the extended period is 3 per cent of the rateable value of the land leased (s.8(1) of Cap. 150).

11.10 We take the view that purchasers should be informed of these potential financial obligations before they commit themselves to a purchase. We repeat our recommendation in paragraph 10.16 above.

11.11 However, we consider it impractical to require the developer to spell out all these special lease conditions in full in the sales literature. Special lease conditions vary from one land lease to another. It will be sufficient to have a general notification in the sales brochure informing purchasers that there are various financial obligations which will be imposed by the land lease and that purchasers are advised to consult their professional advisers accordingly.

Our recommendations on conditions of land lease

11.12 **We recommend that sales brochures should state the following:**

- (1) the permitted uses of the individual units as stated in the approved building plans, together with any restrictions on uses contained in the Government lease or Conditions of Grant of the land;**
- (2) the original term of the land lease and its date of expiry;**
- (3) the land rent provisions in the Government lease; and**
- (4) that the renewed land rent may be an apportioned amount of 3 per cent of the rateable value of the building.**

11.13 **We also recommend that the sales brochure should contain a general notification telling purchasers that there are various financial obligations which will be imposed on a purchaser by the Government lease and that purchasers are advised to consult their professional advisers accordingly.**

CHAPTER 12

Prices and Number of Units for Sale and Internal Sale

Prices

12.1 In their advertisements, property developers tend to quote the lowest price instead of the full range of prices of the units being put up for sale. There have been cases in which price lists have not been available at the registration stage. In such cases purchasers can only rely on the advertised price and may later find to their surprise that the units are put up for sale at prices substantially higher.

12.2 The Consumer Council expressed the view that developers should make available the price list of all units offered for sale no less than 3 days before the public sale.¹⁴ REDA, however, considered that the 3-day rule suggested by the Consumer Council should apply only to the first phase and not subsequent phases of sales in the same development as the developers might wish to offer additional units to the public to take advantage of unexpected high demand in the market.¹⁵

12.3 We are of the view that the 3-day rule would not cause great inconvenience to developers because they can register prospective purchasers and give them an appointment to return 3 days later. This is the practice under the current system of balloting for Consent Scheme flats.

12.4 It may be argued that the 3-day rule would limit developers' ability to adjust prices quickly in a buoyant property market. But this should be seen against the legitimate expectation of prospective purchasers to have a reasonable period in which to make such an important financial decision. On balance, we are of the view that the rule should apply to the sale of all uncompleted units.

12.5 The 3-day rule requires that a price list of all the units put up for sale should be made available at least 3 days before the commencement of "sale" to the public. We consider it necessary to define what constitutes "sale" for the purpose of the rule, as experience shows that there is confusion over the exact timing of the commencement of sale of uncompleted units. We understand that the point of commencement of "sale" means the day on which the registration for balloting is made. As this is the definition adopted in practice by the property sector, we think that it should be adopted for the purposes of the 3-day rule.

¹⁴ Consumer Council report, at para. 11.13.

¹⁵ Consumer Council report, at para. 11.15.

Our recommendations on price lists

12.6 We recommend that the price of all units put up for sale should be made available in price lists at least 3 days before the day of registration of prospective purchasers for balloting. We further recommend this requirement should apply to all phases of sales of flats in the same development.

Number of units offered for sale

12.7 In the Consent Scheme, prospective purchasers have to register for balloting. It often takes some time to register at the sales offices, especially in the case of large developments. Prospective purchasers have to pay a reservation fee which is refundable if they fail to buy a flat.

12.8 Prospective purchasers are therefore keen to know prior to registration the number of flats for sale, so that they can calculate their chances in the ballot. There were, however, complaints to the Consumer Council that, despite advertisements which implied the entire development was offered for sale, in some cases only a small number of units were available on the sales commencement date.¹⁶

12.9 To enable prospective purchasers to ascertain their chances of success in the ballot, we think that the number of units to be offered for sale should be announced in advance in the sales brochure or price list. LOCM 101 already requires developers of Consent Scheme flats to state in the price list the number of units available for sale.¹⁷ This requirement does not seem to have caused any practical difficulty and so there is no reason why it should not be extended to developments outside the Consent Scheme.

12.10 It will, however, be of little assistance to prospective purchasers if the number of units for sale announced in the sales literature deviates from the actual number put up for sale on the day of registration for balloting. Therefore, the number of units announced in the sales literature should, in our opinion, be the same as that available for sale on the day of registration of purchasers.

Internal sale through private placement

12.11 The Consumer Council has received complaints that Consent Scheme developers have retained 50 per cent of flats for internal sale through private placement.¹⁸

¹⁶ Consumer Council report, at para. 11.14.

¹⁷ Para. B.7 of Appendix 1 of Land Office Circular Memorandum No. 101

¹⁸ The quota for private sales of uncompleted flats in the Consent Scheme has been reduced from 50% to 10% with effect from 8 June 1994 as part of the Government's package of measures to dampen property speculation.

Such internal sales can create a false market. People will be led to think that the flats reserved for internal sale have been sold, thus giving the false impression of a buoyant market. To prevent market manipulation, we suggest that developers should be required to publish the number of flats reserved for internal sale and to state whether they are actually sold.

Buy-back arrangement

12.12 Under a "buy-back arrangement", the developer allocates some of the units reserved for internal sale to a property agent who tries to resell them to the public at a profit. The developer undertakes to buy unsold units back from the property agent.

12.13 The Consent Scheme forbids buy-back arrangements, which constitute a breach of the consent conditions. But, as such arrangements may be made informally between developers and property agents, the Director of Lands may have difficulty in policing such abuses. Moreover, there are no restrictions, statutory or otherwise, on buy-back arrangements in the case of flats not covered by the Consent Scheme.

12.14 We consider that developers should be required to disclose any buy-back arrangement where units reserved for internal sale are said to have been sold.

Our recommendations on number of units for sale and internal sale

12.15 **We recommend that the number of units available for sale should be stated in the sales brochure or price list and that there should be the same number of units available for sale on the day of registration of purchasers for balloting.**

12.16 **We recommend that if developers state in the sales literature that certain units are reserved for internal sale, they must also state in the sales literature whether the units are reserved for future sale or have been sold. If the units have been sold, any "buy-back arrangement" must be disclosed.**

CHAPTER 13

Miscellaneous Information

Introduction

13.1 In this chapter, we shall look at various categories of information the disclosure of which will be considered useful to purchasers. Such information includes the names of the contractors and Authorized Persons of the development, responsibility for transaction fees, the date of printing of the sales brochure and supplementary charges payable by purchasers on taking possession.

Name of contractors and authorized persons

13.2 The names of the contractors and architects of the project are of importance to purchasers. A reputable contractor and architect give purchasers confidence in the quality and workmanship of the completed units as well as their ability to complete the project on time.

13.3 Moreover, a reputable contractor is usually ready to remedy any defects in the property that may be found after purchasers have taken possession. In some cases, the contractors' representatives will accompany the owners to inspect the property when the owners take possession. Any defects found inside the property are recorded by the contractors' representatives and will be remedied afterwards.

13.4 Surveys conducted by the Consumer Council in 1986 and 1987 revealed that only a small number of sales brochures contained information on the identities of the contractors and Authorized Persons, although such information often appeared on the site.¹⁹

13.5 LOCM 101 requires the names of contractors and other Authorized Persons to be disclosed in sales brochures of Consent Scheme developments.²⁰

13.6 We take the view that the name of the main contractor for the project should be disclosed but there is no need to name sub-contractors. Development projects usually involve a main contractor and a large number of sub-contractors who are responsible for specific areas of construction work such as electricity, internal decoration and building construction. If the names of all sub-contractors had to be disclosed, the details in the sales

¹⁹ Consumer Council report, at para. 11.2.

²⁰ Para. A.13 of Appendix 1 of Land Office Circular Memorandum No. 101

brochure would confuse purchasers, who are rarely interested in the names of sub-contractors.

Our recommendation on names of contractors and Authorized Persons

13.7 We recommend that the names of the main contractor and Authorized Person of the project should be disclosed in the sales brochure.

Responsibility for transaction fee

13.8 Transaction fees, which refer to legal costs and stamp duties, are usually the responsibility of the purchaser. The responsibility for, and the amount of, legal costs and stamp duties are rarely indicated in the sales brochures.

13.9 LOCM 101 already requires Consent Scheme developers to state the responsibility for legal fees²¹ and to disclose, upon request, the charges for conveyancing and mortgage and stamp duties.²²

13.10 As the transaction fees are usually borne by purchasers, we consider that purchasers should be warned of them in the sales literature before they make a purchase decision. Similarly, if there is a clause in the Agreement for Sale and Purchase which imposes on the purchaser the responsibility for the developer's conveyancing costs, this should, in our view, be indicated in the sales brochure.

13.11 Since developers are more knowledgeable about the transaction costs than average purchasers, we think that developers should make available information on the legal costs and stamp duties if prospective purchasers ask for it.

13.12 Ideally, the developer should provide purchasers with a detailed breakdown of legal costs and stamp duties for individual units. That would, however, place considerable strain on the developer's staff resources, given the large number of units that may be put up for sale. As a practical alternative, information on the general scales of legal costs and stamp duties should, in our view, be disclosed to purchasers upon request, and there should be a note to this effect in the sales brochure.

Our recommendations on transaction fee

²¹ Para. B.4 of Appendix 1 of Land Office Circular Memorandum No. 101

²² Para. C.1 of Appendix 1 of Land Office Circular Memorandum No. 101

13.13 **We recommend that whenever the sales literature contains information about the prices of the units, it should also state with whom the responsibility for legal costs and stamp duties lies. Any clause in the Agreement for Sale and Purchase which imposes on purchasers responsibility for the developer's conveyancing costs should also be indicated.**

13.14 **We recommend that information on the scales of legal costs and stamp duties should be provided by developers to purchasers upon request and a note to this effect should appear in the price list or other sales literature containing information about the prices of the units.**

Date of printing of sales brochure

13.15 As there could be a time lapse between their preparation and publication, all sales brochures should, in our opinion, state their date of printing. Purchasers can then know how up-to-date the information in a sales brochure is.

13.16 Moreover, as plans are subject to change, we take the view that the sales brochure should contain the most up-to-date approved plans. We think that there should be a clause in the sales brochure stating that the information supplied corresponds with the up-to-date approved plans.

13.17 We note that some of the sub-committee's recommendations referred to "time of preparation" of the sales brochures whilst others referred to their "date of printing". We have decided to substitute "date of printing" for "time of preparation" of the sales brochures whenever the latter phrase appears in order to be consistent. The "date of printing" is, in our view, a more precise phrase when compared with "time of preparation" which could be a period of time rather than a point in time.

Our recommendations on date of sales brochure

13.18 **We recommend that the sales brochure should carry its date of printing and a clause declaring that the information supplied corresponds with the up-to-date approved plans which may be subject to change.**

Supplementary charges upon taking possession

13.19 Upon taking possession of the property, purchasers have to pay to the developer, the management company and/or the utilities companies various supplementary charges, including deposits for management fees, rates, water, electricity and gas supplies, contributions to the management fund and charges for the removal of debris. The debris

removal charges arise from the fact that many purchasers themselves wish to demolish and remove the internal partitions and substantially change the internal fittings or layout, decoration etc. of the flats. To avoid conflict, a standard debris removal charge is imposed on all purchasers.

13.20 As these supplementary charges are seldom stated in the sales brochure, purchasers cannot budget for them in advance. As purchasers are obliged to pay for these charges, we think that an itemized list should be provided in the sales brochure.

13.21 The exact amounts of some supplementary charges, such as water, electricity and gas deposits, may be unknown at the time of sale and therefore impossible to state in the sales brochure. We take the view that the developer should, however, disclose the purchasers' obligation to pay these charges even if their exact amounts are not yet known. LOCM 101 has imposed similar disclosure requirements on developers of Consent Scheme flats.²³

Our recommendations on supplementary charges

13.22 **We recommend that the sales brochure should provide an itemized list of supplementary charges payable by purchasers upon taking possession of their units. We recommend that if the exact amounts of such charges are unknown, the obligation to pay them should be disclosed in the sales brochure.**

Licence fee to Government and charges for right of way

13.23 Following a comment on the Consultative Document, we have decided that the sales brochure should give information on any way leave charges, licence fee or waiver fees payable to Government and any fees or charges payable to adjoining lot owners, if known.

Our recommendations on licence fee to Government and charges for right of way

13.24 **We recommend that where applicable, the sales brochure should state any way leave charges, licence fees or waiver fees payable to Government for water supply/drainage system going through Crown Land and/or pump room situated on Crown Land and any fees or charges payable to adjoining lot owners for right of way or easements. The amount of such charges or fees should also be stated, if known.**

²³

Para. A.11 of Appendix 1 of Land Office Circular Memorandum No. 101

Car park spaces

13.25 The availability of car park spaces in the development is likely to be of interest to most purchasers, whether they own a car or not, because they increase substantially the value of the flat. We take the view that the sales brochure should include a description of the car park spaces within the development.

13.26 It is not uncommon that car park spaces are not put up for sale at the same time as the flats in a development. Moreover, developers may reserve some or all of the car park spaces for rent. We therefore think that the description of car park spaces in the sales brochure should include their number, and whether they are for sale or rent. This will help purchasers to ascertain their chances of getting a car park space.

13.27 One area of abuse brought to our attention is that of visitors' car park spaces. In some developments, the management has gradually turned visitors' car park spaces over to other uses such as for rental purposes. We take the view that the sales brochure should also state the number of visitor car park spaces in the development. Providing that information will help to prevent subsequent change of uses and also assist prospective purchasers in making their choice among different developments.

13.28 Developers often have not yet decided, at the date of the printing of sales brochure, the future use of the car park spaces. We think that if the developer has not yet decided the use of the car park spaces, the sales brochure should make this clear. On the other hand, we consider that any descriptions of the car park spaces in the sales brochure should be binding on the developer.

Our recommendations on car park spaces

13.29 **We recommend that the sales brochure should contain a description of the car park spaces within the development, including their respective numbers for sale, for rent, and those for visitors. If the developer has not yet decided at the date of the printing of the sales brochure any of these matters, the sales brochure should clearly state this fact. Moreover, any descriptions of car park spaces in the sales brochure should be binding on the developer.**

CHAPTER 14

Availability of Sales Brochures

Introduction

14.1 Our terms of reference refer to "sales information and particulars". As we have already recommended a list of individual items to be specified in sales literature, there should be no problem over the meaning of "sales information and particulars". All those items that we recommend should be disclosed will fall within the definition of that term.

14.2 What may be more problematic is the medium through which such information is conveyed. Most of our recommendations have so far been made on the assumption that a sales brochure is available. It is therefore necessary to consider whether:

- (1) the availability of a sales brochure should be made mandatory;
- (2) the same guidelines applicable to a sales brochure should be applied to other means of advertising, e.g. the press, the electronic media, or even individual estate agents.

The availability of sales brochures

14.3 We have considered whether the requirement of a sales brochure should be confined to public sales of uncompleted units. We have come to the view that it is not feasible to confine the requirement to public sale. However, the developer may apply to the relevant authorities in certain circumstances for exemption from the requirement to produce a sales brochure. For instance, where a purchaser buys in bulk from the developer with no intention to re-sell any of those units to the public, there should not be any need for the developer to produce a sales brochure in respect of those units.

14.4 It was the sub-committee's recommendation that, except where exemption is granted, the developer should always produce an up-to-date sales brochure and keep at least one copy of it for public inspection until the occupation permit or, where applicable, the certificate of compliance is issued. The sub-committee also recommended that "up-to-date" in this sense should mean 3 to 6 months before the time the units are put up for sale.²⁴

²⁴ The sub-committee's interim recommendation was different from their final recommendation. Their interim recommendation, which made no reference to the 3-to-6 months period, reads (see para 14.11 of the Consultative Document):

14.5 We do not think it is appropriate to define “up-to-date” to mean 3 to 6 months before the time the units are put up for sale. To set the lower end at 3 months before sale would, in our view, unduly prohibit or discourage developers from producing a more up-to-date sales brochure, shortly before the time of sale. On the other hand, we consider that the upper end of 6 months is too long. In our view, instead of setting any such upper or lower end, it should be a requirement that all information in the sales brochure should be accurate at the time of first sale of units in a development. Moreover, we think that if there are any material changes in the information in the sales brochure between the date of its printing and the time of first sale, there should be a note to that effect attached to the sales brochure or the price list.

14.6 There may, however, be instances where a developer commences a project but later sells it to a third party who takes over the development and completion of the project. It would be unfair to expect the original developer, who no longer has control over the progress of the remaining building construction, to continue to provide a copy of the sales brochure for prospective purchasers and sub-purchasers. We take the view that the requirement of a sales brochure should in such circumstances fall on the party who takes over the development and completion of the project.

14.7 We have also considered whether the requirement of a sales brochure should be imposed on all types of internal or private sales to the developer's employees, associates etc. which have not been advertised to the public. There are two main types of such private or internal sales of uncompleted units. The first type is the sale of any single unit to a private purchaser ("the single unit purchaser"). The second type is the sale of 2 or more units to a private purchaser ("the multiple purchaser").

14.8 The single unit purchaser is usually a genuine end-user or investor. The multiple purchaser, on the other hand, may be a speculator or investor who buys a whole block of flats and subsequently, quite independently of the developer, puts them on the market for his own profit. It may be argued that whilst adequate sales information should be provided to the genuine end-user or investor by a sales brochure, the same protection need not be given to the multiple purchaser who may buy property for speculative purposes. However, a multiple purchaser is likely to sell the flats individually to members of the public. It is the public who require adequate sales information by way of an up-to-date sales brochure. Multiple purchasers should not be expected to produce sales brochures themselves as they have no control over completion of the units. There is thus no alternative to requiring developers to produce brochures for all internal or private sales. But if multiple purchasers impose different terms of payment in their subsequent sales to the public, we think that they should be required to state the terms clearly in a separate price list.

14.9 To protect the interests of subsequent purchasers, we think that they should have the right to inspect the copy of the sales brochure kept by the developer or the person

“...the developer should produce, for all sales, both private and public, an up-dated sales brochure and keep at least one updated copy of it until the occupation permit is issued...”

or company which has taken over the development and completion of the project. Such right of inspection should, in our view, be exercisable free of charge during normal office hours at either the sales office, the registered office of the developer or the person or company taking over the development and completion of the project, or the office of their solicitors.

Advertisements other than sales brochures

14.10 It is, in our view, not feasible to apply all the disclosure requirements which we have recommended for sales brochures to other means of advertising. For instance, it is unrealistic to require a radio or television commercial, which lasts for a few minutes or even seconds, to disclose all the sales information which we have recommended in this report.

14.11 To make sure purchasers do not rely on such limited sales information, we are of the view that any advertisement by developers for public sale or by property agents for private sale of flats should state that a sales brochure is available.

14.12 Although not all advertisements for sale of uncompleted flats need contain all the information recommended by us, whatever information is given in such advertisements must be consistent with the information given in the sales brochure.

Our recommendations on sales brochures and other forms of publicity

14.13 **We recommend that the developer should produce, for all sales, both private and public, a sales brochure and keep at least one copy of it for public inspection until the occupation permit or, where applicable, the certificate of compliance is issued. All information in the sales brochure should be accurate at the time of first sale of units in a development. If there have been any material changes in the information in the sales brochure between the date of its printing and the time of first sale, a note to that effect should be attached to the sales brochure or the price list.**

14.14 **We recommend that where a developer commences a project but later sells it to another person or company which takes over the development and completion of the project, the responsibility for keeping a sales brochure for public inspection should fall on the person or company taking over the project.**

14.15 **We recommend that the public inspection of the sales brochure so kept should be exercisable free of charge during normal office hours at either the sales office, the registered office of the developer or the person or company taking over the development and completion of the project, or the office of their solicitors.**

14.16 **We recommend that the developer may apply to the relevant authorities in certain circumstances for exemption from the requirement to produce a sales brochure. For instances, where a purchaser buys in bulk from the developer with no intention to re-sell any of those units to the public, there should not be any need for the developer to produce a sales brochure in respect of those units.**

14.17 **We recommend that where multiple purchasers in internal or private sales impose different terms of payment in their resale of the units to the public, they should be required to produce a separate price list stating the new terms of payment.**

14.18 **We recommend that whatever methods of advertisement (other than a sales brochure) are adopted by developers for the public sale of flats or by property agents for the private sale of flats, they must state that a sales brochure is available. Information given in advertisements for sale of uncompleted flats (other than in the sales brochure) must be consistent with the information given in the sales brochure.**

CHAPTER 15

Enforcement of the Recommendations

Means of enforcement

15.1 Having decided the measures for the protection of purchasers of uncompleted units, the next question is how to enforce them.

15.2 There are three means:

- (1) self-regulation;
- (2) administrative measures; and
- (3) legislation.

Self-regulation

15.3 This would require developers to observe the requirements voluntarily, probably on the basis of a "code of practice" issued by REDA. Such an approach has the advantage of being flexible and quick to implement. However, in our view, it would be difficult to control developers who choose to ignore the code.

Administrative measures

15.4 The Government could incorporate our recommendations in its consent conditions and issue an advisory note to developers in respect of Non-Consent Scheme cases. Again, this approach is flexible. However, developers of Non-Consent Scheme flats could ignore the advisory note as they do not need to obtain the Government's consent before selling their flats. Moreover, even in Consent Scheme cases, it is doubtful if the Legal Advisory and Conveyancing Office, which is responsible for administering the Consent Scheme, is the appropriate body to enforce the detailed provisions regarding sales information.

Legislation

15.5 Legislation is, in our view, the most effective way to bring about the intended results and ensure adherence to a uniform set of standards.

15.6 The public comments on the Consultative Document indicated general support for enforcing our recommendations by legislation. There were, however, some comments from those involved in the property development or agency trade which

expressed disapproval of enforcement by legislation. They held the view that legislation was too rigid and any future change would involve a lengthy legislative process. They would prefer administrative measures such as the Consent Scheme administered by the Legal Advisory and Conveyancing Office and practice directions issued by the Law Society. We have explained above why we do not think administrative measures are effective. We would add that practice directions issued by the Law Society only affect solicitors and have no binding effects on developers. As regards the argument that legislation is too rigid, we take the view that flexibility can be achieved by providing a basic Ordinance which is supported by a set of subsidiary regulations. The detailed recommendations can be put in the subsidiary regulations which can be readily amended from time to time.

Penalty

15.7 The usual forms of statutory sanctions consist of imprisonment and fines.

15.8 We consider that fines should be the usual form of sanction. The maximum fine for an offence under our proposed legislation has to be substantial enough to have sufficient deterrent effect. We prefer to leave it to the Government or the legislature to fix the level of maximum fines.

15.9 There may be unscrupulous developers for whom fines alone are not an adequate deterrent and imprisonment may be necessary. We therefore take the view that imprisonment should be available as a penalty where fines are not thought adequate in all the circumstances of the case.

15.10 However, before prison sentences are imposed, those prosecuted under the proposed legislation should, in our view, be able to invoke the "due diligence" defence if they can show that they have taken all reasonable steps and exercised all due diligence to avoid committing the offence. Moreover, we think that such a person may also invoke the "due diligence" defence by showing their reliance on information given by another, provided they can show that it was reasonable for them to have relied on the information.

15.11 There were some strong objections from the property development and agency trade and a business body to the use of imprisonment as a penalty in the proposed legislation. Despite these strong objections, we still hold the view that imprisonment should be available where a fine is not an adequate deterrent. Although it is unlikely the Court will impose a prison sentence in most cases, the mere fact that there is such a penalty available will serve as a deterrent.

Civil remedies

(a) Rescission

15.12 The sub-committee recommended that the proposed legislation should provide for civil remedies whereby purchasers could rescind the purchase agreement for a

material breach of a provision of the proposed legislation, which would be a statutory tort. We have considered this proposed remedy of rescission and have come to the conclusion that it is *not* workable for a number of reasons.

15.13 In the first place, any right of rescission should not in law survive completion of the sale and purchase. In other words, once the assignment is executed, purchasers should not be able to exercise their right to rescind the purchase agreement for a material breach of the proposed legislation. The proposed remedy of rescission will therefore be of little assistance to purchasers because in most cases they will not find out the inaccuracies in the sales particulars until they have executed the assignment and taken possession of the property. Otherwise, many conveyancing problems might arise. Title to the property could be destroyed after assignment. Banks might not be willing to grant mortgages.

15.14 Moreover, there is the question of a chain of purchasers and the remedies which would be available to the ultimate purchaser. Uncompleted residential properties are frequently resold many times before completion.²⁵ It is difficult to decide which one of the purchasers down the chain would have the rescission remedy against the developer. Fairness would require that all purchasers in the chain should have that remedy because everyone in the chain is a victim of the inaccurate sales information. The problem with that arrangement is that not all purchasers in the chain would wish to rescind the purchase agreement on the basis of inaccurate sales information. Where purchasers up the chain have made handsome profits upon sub-sale of the unit, for instance, they would prefer to retain their profits rather than to cancel the transaction.

15.15 Furthermore, purchasers usually would not want to rescind the purchase agreement except in a falling property market. In a rising property market, purchasers would want to keep the purchase agreement and to seek monetary compensation by way of damages. On the other hand, in a falling property market, rescission would give fault-finding purchasers and speculators the chance to rescind the transaction for inadequate reasons. The sub-committee's suggestion that rescission would only be available for "material" breach will not solve this problem. It may not always be easy to decide whether the breach is "material" or not.

(b) *Damages*

15.16 We have therefore decided *not* to adopt the sub-committee's suggestion to provide the remedy of rescission in the proposed legislation. In our view, in most cases, what the purchaser wants is not a right to rescind but a right to damages for breach of the proposed legislation. **Hence, we recommend that there should be civil remedies which enable purchasers to claim damages for loss suffered as a result of a breach of the proposed legislation. We further recommend that a breach of the proposed legislation should be a statutory tort.**

²⁵ With effect from 8 June 1994, a purchaser of an uncompleted unit in the Consent Scheme is prohibited from reselling the unit before the assignment is executed. This prohibition applies only to those developments whose consent is granted after 8 June 1994. See Legal Advisory and Conveyancing Office Circular Memorandum No. 7.

15.17 To avoid any possible argument that a potential purchaser has a right to claim against the developer by, say, arguing that he would not have done certain things (e.g. bought another property) but for, say, the omission of the developer to disclose certain mandatory information thereby opening a flood-gate of claims against the developer, **we also recommend that this remedy of damages for breach of the proposed legislation should only be available to purchasers and sub-purchasers but not potential purchasers**, who will, of course, normally have suffered no loss.

(c) *Features of the proposed statutory tort*

15.18 We would leave it to the Law Draftsman to decide the exact features of the proposed statutory tort. In creating the proposed statutory tort, the following questions, *inter alia*, need to be addressed:

- (1) At what point should the cause of action against developers/vendors crystallize?
- (2) How far and in what manner could developers/vendors put right matters stated in the sales literature which are later found to be inaccurate?
- (3) Should there be a statutory defence available to developers/vendors who promptly follow prescribed procedures to publicise and amend the inaccuracies in the sales literature?
- (4) How should loss be measured?
- (5) Should sub-purchasers have a direct cause of action against the developers/vendors?

Relationship between the proposed reform and the existing remedies under ASP

15.19 There is concern that the existing remedies under the ASP may be upset by our proposed remedies under the new legislation. We would make it clear that all our recommendations, including the new remedies under the proposed legislation, are *not* intended to disturb or reduce the existing remedies under the ASP. We only intend to give purchasers additional remedies for breach of the proposed legislation.

15.20 We see no great potential conflict between the proposed statutory remedies and the existing remedies under the ASP. The proposed legislation will require the sales literature to contain certain information such as the saleable area, floor plans, fittings and finishes, and specified provisions in the DMC. Although some of these items of sales information may also appear in the ASP, many of them do not. For example, the terms of

the DMC are not spelt out in the ASP. The ASP only requires the purchaser to enter into a DMC on completion of the sale and purchase.²⁶ Likewise, the Chinese version of the fittings and finishes are not specified in the ASP. Moreover, the developer may give inaccurate or misleading information in the sales literature but has the same corrected in the ASP. Hence, the proposed remedies will assist the purchaser to enforce his rights in respect of those inaccurate or misleading sales particulars.

15.21 However, in order to alleviate any concern over potential conflict between our recommendations and the existing remedies under the ASP, **we recommend that there should be clear provisions in the new legislation that nothing in the legislation will detract from the rights of the purchaser under the ASP, and that no clauses in the ASP will detract from the statutory remedies in the legislation.**

Definition of developer

15.22 As most of the recommendations in this report are aimed at the provision of sales particulars by developers, the sub-committee considered that there should be a clear definition of “developer” in the proposed legislation. The sub-committee took the view that the definition of “developer or his assignee” should be wide and include, for example, shareholders or beneficial owners of the developer. They thought that such a wide definition would be necessary to catch developers who try to use shell companies to evade penalties under the proposed legislation.

15.23 There were some public comments in response to the Consultative Document that the definition of the developer or his assignee should not be extended to cover shareholders or beneficial owners. We have carefully considered the sub-committee’s views and those of the public.

15.24 Those who favour such an extension of liability take the view that because of the widespread use of shell companies in property development, it is necessary to be able to impose a sanction on shareholders or beneficial owners in order to catch the real offender. Those of this view argue that the innocent shareholders who have nothing to do with the provision of inadequate or misleading sales information will not be affected as the court will not hold them liable unless there is clear evidence of culpability.

15.25 Those who hold the contrary view think that such an extension of liability is contrary to the general legal principle that shareholders are treated separate from the company by virtue of what is called “the veil of incorporation”. Moreover, it is argued that restricting liability to directors and controlling officers is sufficient. In this respect, those of this view consider that section 101E of the Criminal Procedure Ordinance (Cap. 221) (the re-enacted section 84 of the Interpretation and General Clauses Ordinance (Cap. 1))

²⁶ See clause 18 of the approved form of ASP.

would suffice to enable liability to be fixed on the director of a company, even after the company is wound up.

15.26 We think that the general legal principle that a company is in law treated separately from its shareholders is important for the smooth functioning of a commercial city like Hong Kong and as such, should be retained. We have therefore decided the liability of a “developer or his assignee” should *not* extend to shareholders or beneficial owners of the developer.

Our recommendations on means of enforcement

15.27 **We recommend that our recommendations should be enforced by legislation.**

15.28 **We recommend that the proposed legislation should have the following features:**

- (1) Fines should be sufficiently heavy to be an adequate deterrent;**
- (2) Imprisonment should be available where a fine is not an adequate deterrent (in which case the "due diligence" defence should be available);**
- (3) There should be civil remedies which enable purchasers to claim damages for loss suffered as a result of a breach of the proposed legislation. A breach of the proposed legislation should be a statutory tort. This remedy of damages for breach of the proposed legislation should only be available to purchasers and sub-purchasers but *not* potential purchasers.**

15.29 **We recommend that there should be clear provisions in the new legislation that nothing in the legislation will detract from the rights of the purchaser under the ASP, and that no clauses in the ASP will detract from the statutory remedies in the legislation.**

CHAPTER 16

Summary of Recommendations

16.1 In this penultimate chapter, we summarize all the recommendations. It must be emphasized that all our recommendations are intended to apply only to uncompleted residential property situated in Hong Kong.

Mock-up sales brochure and mock-up price list

16.2 We have recommended a number of matters which should be put into the sales literature, in particular the sales brochure. To facilitate a better understanding of our recommendations and to show that the recommendations are feasible, we have provided a Mock-up Sales Brochure (at Annex I) and a Mock-up Price List (at Annex II).

Summary of recommendations

16.3 Our recommendations are summarized below:

Definition of "uncompleted residential property"

16.4 "Uncompleted residential property" should refer to residential units for which the Occupation Permit has yet to be issued by the Building Authority under the Buildings Ordinance or, in the case of the Housing Authority's Home Ownership Scheme, the completion certificate has yet to be issued by the Director of Housing. This definition should be suitably modified in the case of exempted houses in the New Territories. (*Paragraph 22 of Introduction and Overview*)

Gross Floor Area

16.5 The definition of gross floor area in sales literature of uncompleted units should be standardized by legislation. The gross floor area shown in sales brochures must equal the gross floor area shown on the approved plans. The method of apportionment of the share of common areas to individual units should be clearly specified in the sales literature. (*Paragraph 1.18*)

16.6 The definition of the term gross floor area in regulation 23(3) of the Building (Planning) Regulations (Cap. 123) subject to the modifications which we have mentioned in paragraph 1.14 above, should be adopted as the standard definition of gross floor area in

sales literature of all uncompleted units. This definition should exclude such common areas as air-conditioning and mechanical rooms, refuse chambers, pump rooms, transformer rooms, water tanks, lift machine rooms, lifts and staircases passing through carparking floors, but include clubhouses, management offices and caretaker rooms. (*Paragraph 1.19*)

16.7 If any facilities, not being part of the block of flats, are to be included in the calculation of the gross floor area, the method of pro-rata allocation of the share of the facilities to individual units should be specified in the sales literature. (*Paragraph 1.20*)

Saleable Area

16.8 The definition of saleable area as promulgated in Legal Advisory and Conveyancing Office Circular Memorandum No. 1 dated 23 June 1993 for use in all new approved form of ASP (as stated in paragraph 1.21 above) should be recognized in legislation as the standard method to describe saleable area in all sales literature. (*Paragraph 1.25*)

16.9 Where the unit includes any incorporated item in the definition (such as cockloft, bay window, carparking space, yards, terrace, garden or flat roof), the saleable area of each of them should be specified and described separately in the sales literature. (*Paragraph 1.25*)

16.10 The inclusion of saleable area in sales literature should be made mandatory by legislation. (*Paragraph 1.25*)

Floor Plans

- 16.11 (1) the sales brochure should contain floor plans which:
- (a) specify the external dimensions of individual units;
 - (b) are presented to conventionally accepted scales;
 - (c) show separately non-typical floors, the entrance floors, and the roof;
 - (d) show the location, the number and the minimum dimensions of the car parking spaces;
 - (e) show the orientation and location of ingress and egress points;
 - (f) show the load bearing walls; and

- (g) show any known features within the unit that would materially affect a reasonable purchaser's enjoyment of the property, such as exposed pipes.
- (2) the sales brochure should contain:
- (a) schedules listing saleable area of the unit and of any bay window areas, roof areas, flat roof areas, open yard areas, etc.;
 - (b) notes bringing to the purchaser's attention the usual term in the ASP concerning the adjustment in purchase price in proportion to variations in saleable area arising from amendment in the building plans and the purchaser's right to rescission for variation of 5 per cent or more; where there is such a term in the ASP; and
 - (c) a note that the internal area of units on the upper floors may be slightly greater than that of the lower floors, if such is the case.
- (3) certified copies of the latest approved building plans should be made available for free inspection at the sales office during normal office hours.
(Paragraph 2.19)

16.12 There should be a legal obligation on the developer to inform purchasers of the saleable area upon completion (with architect's certification of the saleable areas concerned).
(Paragraph 2.20)

Fittings and Finishes

16.13 All sales brochures should at least contain details of the fittings and finishes as stated in Appendix 2 of LOCM 101. *(Paragraph 3.14)*

16.14 All sales brochures should also contain a description of air-conditioners where supplied and descriptions, such as locations, of air-conditioning plants. *(Paragraph 3.15)*

16.15 All sales brochures should also contain information on the flush water/sewage treatment plants where they are supplied. Such information should include the maintenance of the treatment plants. *(Paragraph 3.16)*

16.16 All sales brochures should state the brands and countries of origin of the fittings and finishes to be used. If the intended materials become unavailable, developers should be allowed to use substitute materials provided that the Authorized Person of the development project certifies that in his professional opinion the substitute materials are of comparable quality and standard to the intended materials. This right to use comparable substitute materials upon certification by the Authorized Person should be clearly stated in the sales brochure and the ASP. *(Paragraph 3.17)*

Language discrepancies in specifications of fittings and finishes

16.17 If there are discrepancies between the Chinese and English versions of the specifications of fittings and finishes in the sales brochure, purchasers can choose which of the language versions is applicable. *(Paragraph 3.19)*

Mock-up flats

16.18 If mock-up or sample flats are provided, the mock-up should be accurately representative of the actual unit in all aspects including quality and dimensions and the Authorized Person of the development project should certify a schedule of the specifications of the mock-up flats. The developer should have a duty to keep a record of the certified schedule. *(Paragraph 3.24)*

Location plans

16.19 Subject to our recommendation made in paragraph 16.24 below, a location plan containing the details specified at paragraph A2 of Appendix 1 of LOCM 101 should be provided in all sales brochures. *(Paragraph 4.19)*

16.20 The date and the reference number of the latest outline zoning plans at the date of the printing of the sales brochure should be stated in all sales brochures with a note that outline zoning plans are subject to change and that the latest outline zoning plans at the date of the printing of the sales brochure are available for free inspection during normal office hours at the sales office. *(Paragraph 4.20)*

Layout plans

16.21 All sales brochures should provide layout plans which are drawn to scale and contain the details specified in paragraph A3 of Appendix 1 of LOCM 101. The layout plans provided in sales brochures should be the latest approved plans at the date of printing of the sales brochure. The expected completion dates of communal recreational facilities should be included in the layout plans. *(Paragraph 4.21)*

Uses of land

16.22 If there are specific covenants in the Government Lease requiring the developer to put land inside or outside the boundaries of the development to particular uses, the developer should state accurately those particular uses in the sales literature. (*Paragraph 4.22*)

16.23 Developers should be required to state accurately in the sales brochure anything which they know at the date of the printing of the sales brochure about the intended uses of the land within the boundaries of the development. (*Paragraph 4.23*)

16.24 Except for specific uses required of developers by the terms of the Government Lease, developers should *not* be required to disclose the intended uses of land outside the boundaries of the development. (*Paragraph 4.24*)

16.25 If the developer chooses to disclose in the sales literature any information about the use of land outside the boundaries of the development, the information so disclosed must be accurate. (*Paragraph 4.25*)

Dates of completion

16.26 The following dates should be stated in all sales brochures:

- (1) the construction completion date as stated in the Agreement for Sale and Purchase;
- (2) the expected date of legal completion;
- (3) the expected date of vacant possession. (*Paragraph 5.13*)

16.27 If any of the payment terms is dependent on the occurrence of a contingent event (such as issue of the Occupation Permit or the Certificate of Compliance, or execution of the assignment), the sales brochure or the price list should state the expected date of the happening of that event. (*Paragraph 5.14*)

Transfer to sub-purchasers

16.28 Where charges are imposed by developers on transfer of title to sub-purchasers, the amount of such charges and the procedures for transfer should be specified clearly in the sales brochure or the price list. (*Paragraph 6.9*)

Financing arrangements

16.29 The sales brochure or the price list should contain a general description of the finance schemes available from banks and other financial institutions and, where the interest is specified, it should be the rate per annum. (*Paragraph 7.6*)

16.30 Where the developer provides finance, whether solely or to top up other loans, details of such facilities and the interest rates per annum should be disclosed in the sales brochure or the price list. (*Paragraph 7.7*)

16.31 Where the developer provides finance but later arranges for remortgage, purchasers should be informed in the sales brochure or price list of the possibility of the costs of remortgaging which may be passed to them. (*Paragraph 7.8*)

Interest on late payments

16.32 The rate of interest per annum chargeable under the ASP for late payment of any part of the purchase price should be stated in the sales brochure or price list. (*Paragraph 7.10*)

Consent Scheme preliminary agreements

16.33 The sales brochures of uncompleted units of Consent Scheme developments should state that:

- (1) purchasers cannot be bound to purchase by the preliminary agreement or Memorandum for Sale;
- (2) the preliminary agreement or Memorandum for Sale is non-assignable and that the developer cannot sign a formal agreement with any other person but the one who signs the preliminary agreement or Memorandum for Sale; and
- (3) a person signing the preliminary agreement or Memorandum for Sale, who does not wish to execute a formal agreement, may withdraw and obtain a full refund of the preliminary deposit less a sum equal to a percentage of the purchase price specified by the Director of Lands under the Land Authority Consent Scheme. (*Paragraph 8.5*)

16.34 The right to withdraw from the transaction with the forfeiture of a specific percentage of the purchase price should be prominently stated on the face of the preliminary agreement or Memorandum for Sale and in any sales brochure and price list. (*Paragraph 8.6*)

Preliminary agreements not governed by the Consent Scheme

16.35 The sales brochures of all developments not governed by the Consent Scheme should state whether or not the preliminary agreement or Memorandum for Sale is intended to be a binding sale and purchase agreement and should include a specimen copy of the preliminary agreement or Memorandum for Sale. (*Paragraph 8.13*)

Defect Liability Period

16.36 All sales brochures of uncompleted units should state the Defect Liability Period. (*Paragraph 9.9*)

Deed of Mutual Covenant

16.37 The following provisions in the DMC should be disclosed in the sales brochure:

- (1) the definition of common parts;
- (2) the number of undivided shares allocated to each unit and the method of apportionment of management charges;
- (3) the fact that the number of undivided shares is subject to change;
- (4) the sum payable by the owners as deposit for the first year budgeted management expenses (to be expressed in terms of a specific number of months of management fee if the exact amount has not yet been worked out);
- (5) any restrictions imposed on owners in the use of the common parts;
- (6) interest and charges on owners who default in paying sums due under the DMC; and
- (7) the name of the first manager (if already decided) and the minimum period of its management. (*Paragraph 10.13*)

16.38 The developer should deposit copies of the English and Chinese versions of the full script of the DMC at either the sales office or the solicitors' office for free inspection during normal office hours. (*Paragraph 10.14*)

16.39 There should be a statement in the sales brochure to the effect:

- (i) that copies of the English and the Chinese versions of the DMC are available for free inspection during normal office hours at either the sales office or the solicitors' office; and
- (ii) that, if there are subsequent changes to the provisions of the DMC after their disclosure in the sales brochure, purchasers will be notified of the changes. (*Paragraph 10.15*)

16.40 The sales brochure should contain a general notification to purchasers that there are various financial liabilities which will be imposed on them by the DMC and they are advised to consult their professional advisers on this. (*Paragraph 10.16*)

16.41 If there is actual or potential responsibility for maintaining private slopes, there should be clear notifications to purchasers in the sales brochure of that responsibility. Moreover, details of any known repair and maintenance works on the private slopes within a year from the date of printing of the sales brochure should be disclosed in the sales brochure. (*Paragraph 10.17*)

Conditions of land lease

16.42 All sales brochure should state the following:

- (1) the permitted uses of the individual units as stated in the approved building plans, together with any restrictions on uses contained in the Government lease or Conditions of Grant of the land;
- (2) the original term of the land lease and its date of expiry;
- (3) the land rent provisions in the Government lease; and
- (4) that the renewed land rent may be an apportioned amount of 3 per cent of the rateable value of the building. (*Paragraph 11.12*)

16.43 The sales brochure should contain a general notification telling purchasers that there are various financial obligations which will be imposed on a purchaser by the Government lease and that purchasers are advised to consult their professional advisers accordingly. (*Paragraph 11.13*)

Price lists

16.44 The price of all units put up for sale should be made available in price lists at least 3 days before the day of registration of prospective purchasers for balloting. This requirement should apply to all phases of sales of flats in the same development. (*Paragraph 12.6*)

Number of units for sale and internal sale

16.45 The number of units available for sale should be stated in the sales brochure or price list and that there should be the same number of units available for sale on the day of registration of purchasers for balloting. (*Paragraph 12.15*)

16.46 If developers state in the sales literature that certain units are reserved for internal sale, they must also state in the sales literature whether the units are reserved for future sale or have been sold. If the units have been sold, any "buy-back arrangement" must be disclosed. (*Paragraph 12.16*)

Names of contractors and authorized persons

16.47 The names of the main contractor and Authorized Person of the project should be disclosed in the sales brochure. (*Paragraph 13.7*)

Transaction fee

16.48 Whenever the sales literature contains information about the prices of the units, it should also state with whom the responsibility for legal costs and stamp duties lies. Any clause in the Agreement for Sale and Purchase which imposes on purchasers responsibility for the developer's conveyancing costs should also be indicated. (*Paragraph 13.13*)

16.49 Information on the scales of legal costs and stamp duties should be provided by developers to purchasers upon request and a note to this effect should appear in the price list or other sales literature containing information about the prices of the units. (*Paragraph 13.14*)

Date of sales brochure

16.50 The sales brochure should carry its date of printing and a clause declaring that the information supplied corresponds with the up-to-date approved plans which may be subject to change. (*Paragraph 13.18*)

Supplementary charges

16.51 The sales brochure should provide an itemized list of supplementary charges payable by purchasers upon taking possession of their units. If the exact amount of such charges are unknown, the obligation to pay them should be disclosed in the sales brochure. (*Paragraph 13.22*)

Licence fee to Government and charges for right of way

16.52 Where applicable, the sales brochure should state any way leave charges, licence fees or waiver fees payable to Government for water supply/drainage system going through Crown Land and/or pump room situated on Crown Land and any fees or charges payable to adjoining lot owners for right of way or easements. The amount of such charges or fees should also be stated, if known. (*Paragraph 13.24*)

Car Park Spaces

16.53 The sales brochure should contain a description of the car park spaces within the development, including their respective numbers for sale, for rent, and those for visitors. If the developer has not yet decided at the date of the printing of the sales brochure any of these matters, the sales brochure should clearly state this fact. Moreover, any descriptions of car park spaces in the sales brochure should be binding on the developer. (*Paragraph 13.29*)

Sales brochure and other forms of publicity

16.54 The developer should produce, for all sales, both private and public, a sales brochure and keep at least one copy of it for public inspection until the occupation permit or, where applicable, the certificate of compliance is issued. All information in the sales brochure should be accurate at the time of first sale of units in a development. If there have been any material changes in the information in the sales brochure between the date of its printing and the time of first sale, a note to that effect should be attached to the sales brochure or the price list. (*Paragraph 14.13*)

16.55 Where a developer commences a project but later sells it to another person or company which takes over the development and completion of the project, the responsibility for keeping a sales brochure for public inspection should fall on the person or company taking over the project. (*Paragraph 14.14*)

16.56 The public inspection of the sales brochure so kept should be exercisable free of charge during normal office hours at either the sales office, the registered office of the developer or the person or company taking over the development and completion of the project, or the office of their solicitors. (*Paragraph 14.15*)

16.57 The developer may apply to the relevant authorities in certain circumstances for exemption from the requirement to produce a sales brochure. For instances, where a purchaser buys in bulk from the developer with no intention to re-sell any of those units to the public, there should not be any need for the developer to produce a sales brochure in respect of those units. (*Paragraph 14.16*)

16.58 Where multiple purchasers in internal or private sales impose different terms of payment in their resale of the units to the public, they should be required to produce a separate price list stating the new terms of payment. (*Paragraph 14.17*)

16.59 Whatever methods of advertisement (other than a sales brochure) are adopted by developers for the public sale of flats or by property agents for the private sale of flats, they must state that a sales brochure is available. Information given in advertisements for sale of uncompleted flats (other than in the sales brochure) must be consistent with the information given in the sales brochure. (*Paragraph 14.18*)

Means of enforcement of recommendations

16.60 Our recommendations should be enforced by legislation. (*Paragraph 15.27*)

16.61 The proposed legislation should have the following features:

- (1) Fines should be sufficiently heavy to be an adequate deterrent;
- (2) Imprisonment should be available where a fine is not an adequate deterrent (in which case the "due diligence" defence should be available);
- (3) There should be civil remedies which enable purchasers to claim damages for loss suffered as a result of a breach of the proposed legislation. A breach of the proposed legislation should be a statutory tort. This remedy of damages for breach of the proposed legislation should only be available to purchasers and sub-purchasers but *not* potential purchasers. (*Paragraph 15.28*)

16.62 There should be clear provisions in the new legislation that nothing in the legislation will detract from the rights of the purchaser under the ASP, and that no clauses in the ASP will detract from the statutory remedies in the legislation. (*Paragraph 15.29*)

CHAPTER 17

Some Observations

17.1 In addition to the recommendations in the preceding chapters, we have made a number of observations during our deliberations which are set out below.

Non-Consent Scheme preliminary agreements

17.2 We wish to express *our observation* that the Non-Consent Scheme preliminary agreement (or Memorandum for Sale) should not be a binding sale and purchase agreement and there should also be a 3-day cooling-off period for such an agreement.

17.3 A cooling-off period enables the purchaser to reconsider the transaction, which is likely to be a significant financial commitment. On the other hand, if the preliminary agreement is a binding sale and purchase agreement, purchasers will be deprived of the protection afforded by the Approved Form of the formal ASP, because the terms of the formal ASP will be subject to the terms in the preliminary agreement.

Warranties made to the developer by the contractor

17.4 We are concerned that some developers may evade their liability to make good defects in the property by winding up after selling all flats in the development project. If the developer is wound up, purchasers lose the benefits of any Defect Liability Period, because any warranties are made by the contractors to the developer alone.

17.5 We would therefore like to express our observation that if the developer is wound up, the benefits of any warranties made to the developer by contractors should be passed on to the Owners' Corporation or the Manager of the development. We understand that Clause 28(3) of the new Consent Scheme approved form of ASP already contains a provision that, if the vendor is wound up, the benefits of all warranties relating to the construction of the development pass on to the Owners' Corporation or the Manager of the development.

17.6 A building contract entered into between the developer and the contractor may contain a term prohibiting assignment to a third party of the developer's rights against the contractor. In such circumstances, the purchasers cannot subsequently step into the developer's shoes to sue the contractor for defects in the units. Nor can the developer assist by suing the contractors on the purchasers' behalf because after the purchasers have entered into possession and paid the full purchase price, the developer itself will suffer no economic loss arising from the defects in the building.

17.7 We express *our observation* that notwithstanding any term in the building contract between the developer and the contractor prohibiting the assignment of the developer's rights against the contractor, the purchasers should have the right to take direct legal action against the contractor for any defects in the units.

Defect Liability Period

17.8 There are suggestions from some quarters, notably the Consumer Council, to lengthen the Defect Liability Period for defects to any period between 12 to 24 months. As our terms of reference are restricted to sales descriptions, we take the view that it should be left to the Law Society, the Consumer Council or other interested parties to make recommendations on the length of the Defect Liability Period. We understand that there is currently a separate group under the Consumer Council looking at this subject.

17.9 However, in the interests of providing better protection for purchasers, we express *our observation* that the Defect Liability Period and sinking fund for remedying defects are worthy of further examination. The Defect Liability Period cannot be considered in isolation without examining the sinking fund because the fund ensures that adequate money is set aside for remedying defects reported within the Defect Liability Period.

Private slope maintenance

17.10 We express *our observation* that a "Slope Maintenance" clause should be included in all future DMCs setting out the individual owners' liability to maintain private slopes owned by them collectively and the Manager's authority to engage suitably qualified personnel to carry out the maintenance work.

17.11 We understand that all DMCs of Consent Scheme developments are now required to include a Slope Maintenance clause.²⁷ We think that this requirement should be extended to developments outside the Consent Scheme.

Term in ASP regarding variation of floor plans

17.12 We mentioned in chapter 2 that it is a usual term in the ASP of units falling within the Consent and Non-consent Schemes that, if the building plans are altered, resulting in variation of the saleable area of the unit, the purchase price shall be adjusted in proportion to the variation and that, if the variation exceeds 5 per cent of the saleable area, a purchaser

²⁷ See Legal Advisory and Conveyancing Office Circular Memorandum No. 4, issued on 9 September 1993.

may rescind the agreement. Such a term is not invariably found in ASP of developments not falling within the Consent Scheme or in the case of the Non-consent Scheme, where there is separate legal representation because in the latter case, it is not compulsory to use the standard form of ASP. We wish to express *our observation* that such term should become a standard term in all ASP' s.

(This annex is not available here.)

ANNEX I

Mock-Up Sales Brochure

(This annex is not available here.)

ANNEX II

Mock-Up Price List

ANNEX III

Land Office Circular Memorandum No. 101

Ref: LO 13/953/56

Registrar General's Department
(Land Office)
Queensway Government Offices
19th Floor, 66 Queensway
Hong Kong

21 February 1991

LAND OFFICE CIRCULAR MEMORANDUM NO. 101

- (1) Mandatory disclosure of information in the Sale of Units in uncompleted developments
 - (2) Consent Scheme
-

After a study of the subject, and after consultation with the Real Estate Developers Association, the Institutes of Chartered Surveyors, the Law Society and relevant Government Departments; the Consumer Council has recommended that more information than is disclosed at present should be made available regarding uncompleted property developments, particularly residential, in which units are to be offered for sale to the public. This will enable prospective purchasers to make better informed decisions in the purchase of their units.

This recommendation has been accepted by the Government and will be implemented by way of the Consent Scheme which is administered by my Department.

Where consent to forward sales is necessary, developers will be required to make available to the public, at least one week prior to the commencement of the sale of the units, a sales brochure which will contain a list of all the fittings and finishes and other relevant information relating to the units being offered for sale, including the information set out in the Appendices hereto. Any disclaimer of the accuracy of any such information, whether made before or after consent has been given, will be considered to be a breach of the terms of the consent.

A statement that a sales brochure complying with this Circular Memorandum has been produced and made available to prospective purchasers, and that copies have been sent to the Land Office of my Department and the Consumer Council, must henceforth be included in the Statutory Declaration to be made by a partner of the solicitor's firm lodging the consent application.

The new disclosure requirements are designed basically for the sale of units in residential developments but will be applied also, with appropriate adaptation if necessary, to commercial and industrial developments.

signed

(Noel M. Gleeson)
Registrar General
(Land Officer)

To: All Solicitors

**MINIMUM INFORMATION TO BE PROVIDED TO
PROSPECTIVE PURCHASERS OF UNCOMPLETED UNITS**

A. Information to be Incorporated in a Sales Brochure

1. Introduction

General description of development; the identity of the intended manager, if known

2. Location Plan

Including up-dated information on prominent environmental features in the vicinity e.g. public park, swimming pool, refuse collection point etc., intended user of surrounding areas, if known

3. Layout Plan Drawn to Scale

Including communal facilities (and their completion dates if possible); undeveloped land and its intended use within the boundary of the development; the scale used

4. Salient Points of Government Lease

Including lot number; lease term; user restrictions on the lot; onerous lease conditions (if any) which would restrict purchasers' usual legal rights.

5. Detailed Plan of a Typical Floor

Showing all principal external dimensions of the unit; external dimensions of individual compartments in each unit; the scale used, a note informing prospective purchasers (i) that the internal areas of units on upper floors will generally be slightly larger than lower floors due to the reducing thickness of structural walls on upper levels (ii) if there are special fittings/features affecting the enjoyment of the owner of a unit (e.g. exposed pipes) (the location of such special fittings/features should be specified).

in case there is any non-typical floor, a separate floor plan should be shown.

6. Schedule of Flat Size

Indicating size of each unit in standard saleable area (as defined in Land Office Circular Memorandum No. 84), areas of bay windows, roofs, flat roofs and open yards (if any) should be specified separately

7. Fittings and Finishes

Refer to Appendix 2

8. Anticipated Completion Date of the Building

9. Salient Points of DMC

Including definition of common areas; terms of appointment of Manager; principle/basis of fixing management fee; management fee deposit; a note informing prospective purchasers that a full script of the DMC is available upon request

10. Carpark

Specify the location, number and the minimum dimensions of the carparks

11. Miscellaneous Payments upon Delivery of Unit

Including debris removal deposit, reimbursement to vendor for water/electricity/gas deposit (inform purchasers of the obligation to pay such fees even though the exact amount is unknown)

12. Date of Printing of Sales Brochure

13. Names of Contractors and other Authorized Persons

B. Information to be Incorporated in a Price List

1. Price of Individual units
2. Purchase procedure
3. Payment terms
4. Responsibility for legal fees
5. Administration charges for execution of any documents
6. Insurance payment methods and interest rates in case of restricted choice of mortgage

7. Number of units available for sale

C. Information to be Disclosed upon Request

1. Charges for conveyancing and mortgage, stamp duties
2. A complete set of updated master layout plans (if any) and building plans as approved by the Building Authority under the Buildings Ordinance
3. Full script of the form of Deed of Mutual Covenant as approved by the Registrar General (Land Officer)

A RECOMMENDED LIST OF
FITTINGS AND FINISHES IN A DEVELOPMENT

EXTERIOR

External Walls

The type of external finishes

Windows

The material of the frames and glass

Bay Windows

The material and windowsill finishes of the bay windows

Planter

The type of finishes of the planters

Verandah/Balcony

The type of finishes and whether the verandah/balcony is covered or not

Drying Facilities for Clothing

The type and material of the drying facilities for clothing

INTERIOR FINISHES

Lobbies

The type of wall, floor and ceiling finishes in the lobbies

Internal Walls and Ceilings

The type of bedroom and living/dining room wall and ceiling finishes

Floors

The material of the floor and skirting of the bedrooms and the

Bathroom

The type of wall, floor, and ceiling finishes and whether the wall finishes run up to the ceiling

Kitchen

The type of wall, floor, ceiling, and cooking bench finishes and whether the wall finishes run up to the ceiling

INTERIOR FITTINGS

Doors

The material, finishes and accessories of the doors. (especially the entrance door to each individual unit)

Bathroom

The type and material of the fittings and equipment in the bathroom; the water supply system; bathing facilities i.e. shower or bath tub and size of bath tub if applicable

Kitchen

The material of the sink unit; the water supply system; the material and finishes of the kitchen cabinets; the type of all other fittings and equipment in the kitchen

Bedroom

The type and material of all the fittings (such as wardrobes) in the bedroom

Telephone and Aerials

The locations and number of such utilities

Electricity

Details of the fittings including safety devices, concealed or exposed' conduits, the location and number of power points, sockets, air-conditioner points etc.

Gas/Electricity Supply

The type, system and location of the gas/electricity supply

Washing Machine Connection Point

The location and design of the washing machine connection point

Water Supply & Pipes

The material of the water pipes, whether exposed and whether hot water is available etc.

SECURITY FACILITIES

A description of security services including details of all built-in provisions and their locations

MISCELLANEOUS

Lifts

The country of origin/brand name of the lifts and whether the lifts serve all floors

Letter Box

The letter box material

Refuse Collection

The means of refuse collection, location of refuse room etc.

Water/Electricity/Gas Meters

The location of the meters and whether there are separate or communal meters for individual apartments

N.B.

- (1) if the country of origin/brand name is mentioned, the developer should undertake that materials of comparable quality will be used if the intended source becomes unavailable.

- (2) Mock-up units of accurate size and structural layout should be set up wherever possible.

ANNEX IV

List of Persons/Bodies Making Comments on the Consultative Document

Attorney General' s Chambers, Civil Division

Chartered Institute of Building Hong Kong Branch

Chartered Institute of Housing Hong Kong Branch

Chinese General Chamber of Commerce

Chinese University of Hong Kong, Faculty of Business Administration

Consumer Council

District Board, Central & Western

District Board, Sai Kung

District Board, Wong Tai Sin

A Tsuen Wan District Board Elected Member

Government Property Agency

Hampton, Winter and Glynn
(representing a number of property developers and property agents)

Hong Kong Association of Banks

Hong Kong Association of Property Management Co. Ltd.

Hong Kong Baptist University (formerly Hong Kong Baptist College),
Department of Accountancy and Law

Hong Kong Bar Association

Hong Kong Housing Authority

Hong Kong Housing Society

Hong Kong Institute of Architects

Hong Kong Institute of Company Secretaries Ltd.

Hong Kong Institution of Engineers

Hong Kong Polytechnic University (formerly Hong Kong Polytechnic),
Faculty of Construction and Land Use,
Department of Building and Real Estate

Housing Department

Law Society of Hong Kong

Society of Hong Kong Real Estate Administrators

Society of Hong Kong Real Estate Agents Ltd.

Swire Properties Limited.

ANNEX V

Legal Advisory and Conveyancing Office Circular Memorandum No.7

Lands Department
(Letterhead)

17 June 1994

Legal Advisory and Conveyancing Office
Circular Memorandum No. 7

Land Authority's Consent Scheme
Sale of Residential Units prior to Compliance

This circular memorandum sets out the measures that will be adopted in giving consent to applications under the Land Authority's Consent Scheme with effect from 8 June 1994. These measures will be applied to consent applications in respect of residential units only.

Set out in Annex I are the major new measures. They will be adopted together with the revised conditions of consent and the revised clauses of the Agreement for Sale and Purchase in respect of all consents in relation to residential units given on or after 8 June 1994. The new measures together with the revised conditions of consent and Agreement for Sale and Purchase will also be applied to any consent which has already been given prior to 8 June 1994 but in respect of which the developer makes an application for any amendment of the existing consent or the terms of the related documents in respect of residential units.

Copies of the revised form of Agreement for Sale and Purchase can be obtained from the Law Society either on disk or in hard copy.

For consent applications currently being processed by LACO, the time limit for issuing consents not more than 9 months prior to the estimated date of completion of the development will require that a revised AP's certificate specifying the estimated date of completion of the whole development of the lot in compliance with all the lease conditions shall be submitted to LACO. Please note that compliance with the conditions is a question of fact and is not necessarily the date by which the AP estimates that a certificate of

compliance letter will be issued by the District Lands Office, which may be some time after actual compliance. This date will be the date for contractual completion of the sale and purchase under Clause 4(1)(c) of the Agreement for Sale and Purchase.

In future no consent in relation to residential units will be issued until immediately before the 9 months from the AP's estimated completion of the development of the lot. Processing of consents in respect of residential units will be accorded higher top priority by LACO.

The new measures and the revised conditions of the consent will not apply to sales of residential units in PSPS. Hong Kong Housing Society (where there is a restriction on further sale) and in due course Sandwich Class Housing. All these are subject to specific restrictions on resale and therefore there can be no element of speculation.

signed

(T E Berry)
Principal Solicitor
for Director of Lands

To: All Solicitors

Measures effective from 8.6.94

1. The number of units that may be reserved to private purchasers sold by private sale is reduced from 50% to 10% of the total number of units. Purchasers through private sales will be required to pay a 10% deposit before the date of public sale and to sign the formal Agreement for Sale and Purchase within 5 working days thereafter.
2. A schedule setting out the identity of the proposed purchasers under private sale and the units the developer intends to sell to them shall be submitted to LACO for approval prior to the consent being issued, including any applications already pending at 8.6.94. Only individuals with Hong Kong Identity Numbers or Passport Numbers quoted will be approved for private sales and no company incorporated in any way whatsoever will be approved for this purpose.
3. Purchasers of presale units are restricted from any resale, subsale or transfer of the benefits of the Agreement for Sale and Purchase before completion of the sale and purchase by execution of the Assignment.
4. Presale consents will be given not more than 9 months before the AP's estimated date of completion of the development by compliance with the conditions of grant.
5. Initial deposit is fixed at 10% of the purchase price.
6. The amount of forfeiture in the event that a purchaser who has entered into a preliminary agreement fails to sign the Agreement for Sale and Purchase, is increased from 3 % to 5 % of the purchase price.
7. Purchasers of presale units may with the agreement of the developer cancel the Agreement for Sale and Purchase in which event the developer shall refund to him the amount of purchase price already paid by him less an amount of 5 % of the purchase price of the unit.
8. Any unit, having been sold by the developer but the relevant Agreement for Sale and Purchase of which is subsequently cancelled shall only be offered to the unsuccessful applicants either strictly in accordance with the priority of the waiting list or may be included in a subsequent public sale by ballot of any Units remaining unsold.
9. Sales brochures and price lists are made available to prospective purchasers not less than 7 working days before the first registration day for the ballot.

10. Residential car parks shall not be sold except together with a residential unit and a maximum of 2 car parking spaces may be purchased with each residential unit.
11. The completion date of the development as set out in the Agreement for Sale and Purchase, instead of referring to the estimated date of issue of Occupation Permit under the Buildings Ordinance, shall be amended to mean the AP's estimated date of completion of the development in compliance with the lease conditions. Furthermore, this completion date is not to be later than 3 months after the expiry of the Building Covenant period.
12. The Agreement for Sale and Purchase must be executed within 3 working days of the signing of a preliminary agreement for sale and purchase.
13. Any preliminary deposit paid to the developer shall be handed over to the stakeholder within 3 working days of the receipt thereof.
14. If more than 40 % of the units the subject of a ballot are not taken up by the successful applicants, any unsold units may only be offered to the unsuccessful applicants strictly in accordance with the priority of the waiting list.
15. An independent audited report shall be submitted to LACO/HQ for inspection within 1 month of the selection of units. Such report should cover inter alia the total number of units put into the ballot and the number of units taken up by successful applicants.
16. Land Office Circular Memorandum No. 83 dated 27.2.86 is hereby cancelled.