

Mr. Rimsky Yuen, SC, JP,
Secretary for Justice
5/F, Main Wing,
Justice Place, 18 Lower Albert Road,
Central, Hong Kong.

17th May 2017

Dear Secretary,

Re : Miscarriage of Justice – Defendant Leung Hong 梁康 (HCMA 398/2016)
ss. 16(1)(a), 55(1)(b) and 55(3)(b) Estate Agents Ordinance Cap. 511

1. It has come to our notice that Mr. Leung has been convicted of the captioned offence, and that his appeal against conviction has been dismissed. He was accused of carrying out estate agency work as a salesperson without a licence in marketing the estate called 東環 II/Century Link II which is a first-sale development and therefore should be regulated under the *Residential Properties (First-hand Sales) Ordinance Cap. 621*, not the Estate Agents Ordinance, Cap. 511 ('EAO'). There is no requirement under Cap. 621 to obtain a licence to do marketing for first-sale. His conviction was unlawful.
2. Mr. Leung is not our member and we have not had any communication with him. We write with a view to righting a miscarriage of justice. We state below the reasons why we think Mr. Leung was unlawfully convicted.

A. The scope of the EAO

3. The EAO was enacted in 1997 and in the main came into force on 1st January 1999. A licence (estate agent or salesperson) is required to carry out estate agency work from that day. Estate agency work means :

... subject to subsection (3), means any work done in the course of business for a client—

*(a) being work done in relation to **the introduction to the client of a third person** who wishes to acquire or dispose of a property, or to the negotiation for the acquisition or disposition of a property by the client;*
or...

(b) ...

4. The *Estate Agents Practice (General Duties & Hong Kong Residential Properties) Regulation* ('PR') came into force on 1st November 1999 to regulate the sale of residential properties, mainly through prescribing the use of standard estate agency agreements (Forms 3 - 6) and mandating disclosure of material property information through the Property Information Form (Forms 1 - 2).
5. It was recognized at the very early stage that first-hand sales need be regulated different from second-hand sales, and so first-sale vendors/developers are treated differently from vendors of second-hand sales (PR section 7).

B. The Steering Committee

6. Due to public outcry over rampant and persistent abuse by unscrupulous developers, the *Steering Committee on Regulation of Sale of First-hand Residential Properties by Legislation* ('the **Committee**') was set up in 2010 to study and propose solutions to the problem.
7. It released its report in November 2011 ('**the Report**'), and the following are the key recommendations in so far as they relate to the issue at hand :
 - (i) A ***new and dedicated enforcement agency is to be established*** to regulate first-hand sales (para. 15.1), instead of enlarging the jurisdiction of the Estate Agents Authority ('EAA') (para. 2.9 – 2.11);
 - (ii) The key functions of the new agency are to handle complaints, undertake investigation and issue practice guidelines etc. (para. 15.2)
 - (iii) The regulatory regime is ***not premised on a licensing system***, and is to be ***fully funded by Government*** (para. 15.6);
 - (iv) The new enforcement agency is to come under the Transport and Housing Bureau, with a view to transforming it into a statutory body at an appropriate time (para. 15.7).

(C) Residential Properties (First-hand Sales) Ordinance Cap. 621

8. Following a period of consultation, Cap. 621 was enacted and came into force in 2013. Its long title reads :

An Ordinance to regulate the provision of sales brochures and price lists and the use of show flats in connection with the sale of residential properties in respect of which *neither a preliminary agreement for sale and purchase nor an agreement for sale and purchase has ever been entered into and in respect of which no assignment has ever been made*, to regulate the viewing of such properties before sale, to regulate the publication of sale arrangements and the execution of agreements for sale and purchase in connection with such properties, to provide for registers of transactions in connection with such properties, to regulate advertisements promoting the sale of such properties, to provide for offences in connection with misrepresentations and dissemination of false or misleading information, and to provide for incidental and connected matters.

9. Just as recommended in the Report, Cap. 621 does not impose any licensing requirement. That first-hand sales and second-hand sales are hence to be regulated by the Residential Properties (First-hand Sales) Authority ('SRPA') and the EAA respectively and independently is clearly the legislative intent.
10. From then onwards the troika of property sales regulators are as follows:
 - a. First-hand sales – SPRA;
 - b. Second-hand sales – EAA;
 - c. Properties constituting a collective investment scheme ('CIS') – the Securities and Futures Commission ('SFC').

(D) Estate agency work, or sale by vendor?

11. 'Vendor' under section 7, Cap. 621, means the owner and any person who is engaged by the owner to co-ordinate and supervise the process of designing, planning, constructing, fitting out, completing and *marketing* the development.
12. Para. 8 of the HCMA 398/2016 judgment outlines the case as follows :

“3. 在案發當天，控方第一證人須到涉案商場與商場方面開會，當控方第一證人走過涉案商場的一店鋪時，上訴人走向他，並向控方第一證人展示其名片及一樓盤的宣傳單張。其後，上訴人帶領控方第一證人排隊乘電梯到售樓處。另外，上訴人告知控方第一證人有三幢樓宇將開

售，而其中一單位的售價只是港幣 4,000,000 元。上訴人進一步問控方第一證人他欲購買單位作自用或投資。在控方第一證人告之上訴人其購買目的為自用後，上訴人在宣傳單張圈出一些座數。

4. 及後，上訴人的一名朱姓的同事向控方第一證人作進一步的詢問。當控方第一證人告知朱他須考慮是否「入票」後，朱便離開。其後控方第一證人問上訴人怎樣「入票」，於是上訴人便向控方第一證人講解「入票」的方式。

5. 在離開售樓處後，控方第一證人向上訴人表露身分。上訴人承認他是沒有牌照和他向控方第一證人介紹樓盤」。

13. The handing out of sales brochures, telling the witness the flats available for sale and their prices, and marking on the brochures the units that suit the witness's self-use purpose etc are all acts of marketing for the developer. Mr. Leung therefore was a *vendor* for the purposes of Cap. 621. That 'honour' came at a price - if he made a fraudulent misrepresentation or disseminated false/misleading information to a purchaser, he might be ***convicted as a vendor*** and be liable for 7 years imprisonment and a fine of \$5 million.
14. That being the case, it would seem absurd that a vendor under Cap. 621 could further be convicted under the EAO as an unlicensed estate agent/salesperson. The Report has recommended that the regulation of first-hand sales was ***NOT to be premised on a licensing regime.***
15. In the same vein as illustrated by the 2013 Apex Horizon saga, the sale of properties constituting a collective investment scheme is regulated under the *Securities and Futures Ordinance* and does not require any EAO licence.
16. There is no '***third person***' in first-hand sales. There are only two parties - the purchaser on the one side, and the developer and everyone else acting for it are the 'vendor'. The prosecution simply cannot prove the most basic elements of the offence against Mr. Leung - the ***introduction to the client of a third person.*** There was no ***third person*** and no ***client*** (Mr. Leung was a vendor), and therefore no 'estate agency work'. It was ***vendor to purchaser introduction.***

(E) EAA acting *ultra vires*

17. In a series of liaison meetings with EAA in 2013, we pointed out that EAA acted *ultra vires* when purporting to take enforcement action over first-hand sales. EAA apparently disagreed, see the annexes. We maintain our stand for the further reasons below.

(i) EAA has no concurrent jurisdiction with the SRPA

18. It is the job of the SRPA to regulate first-hand sales. Whatever former role EAA had, if any, was impliedly repealed when Cap. 621 came into force. The drafting of the *Competition Ordinance* Cap. 619, a contemporary to Cap. 621, clearly illustrates this point.

19. Section 159 of the *Competition Ordinance* reads :

Concurrent jurisdiction with Communications Authority

(1) The Communications Authority may perform the functions of the Commission under this Ordinance, in so far as they relate to the conduct of undertakings that are—

(a) licensees under the Telecommunications Ordinance (Cap. 106) or the Broadcasting Ordinance (Cap. 562);

(b) persons who, although not such licensees, are persons whose activities require them to be licensed under the Telecommunications Ordinance (Cap. 106) or the Broadcasting Ordinance (Cap. 562)...

20. Once the *Competition Ordinance* was enacted whatever former powers the Communications Authority had over competition matters would have been impliedly repealed, but for Section 159 of the *Competition Ordinance* reserving limited concurrent jurisdiction to the Communications Authority.

21. Cap. 621 was drafted around the time the *Competition Bill* was drafted, and there is NO reservation in Cap. 621 of any concurrent jurisdiction to any institution, be it EAA or any other institution. That further supports our view that there is no role for EAA in first-hand sales.

(ii) Funding of SRPA

22. The SRPA is to be funded out of government revenue, as the Report says:

Source of Funding

15.6 Since the proposed regulatory regime for the sale of first-hand

*residential properties is not premised on a licensing system and will not provide income-generating services, the Steering Committee recommends that the new enforcement agency be **fully funded** by Government revenue.*

23. EAA on the other hand is solely funded from licence fees. Worse still, first-hand sales is privy to only a few oligarchic estate agencies. The majority of licensees do not benefit from the current much heated first-hand sales market, yet part of their diminishing income is spent by EAA on taking enforcement action that should be funded by Government. That rubs salt into wound.

(F) Justice to be done

24. Apparently the above matters were not presented to the magistrate or the judge at the respective hearing, and injustice resulted. There may also be victims other than Mr. Leung.

25. In a criminal trial, the accused has the right to a fair hearing. Both the prosecution and the enforcement agencies owe the court a duty of disclosure. It seems that this has not been done.

26. We trust that you will do justice to Mr. Leung and the other victims, if any. We also welcome paperless communication via our email : research@hkica.hk.

Yours faithfully,



Stanley To

Honorary Researcher

c.c. Mr. Keith Yeung, SC, JP, Director of Public Prosecutions

List of annexes: (see '@@@' mark in right-hand margin)

- A. 24.4.2013 - Notes of EAA liaison meeting
- B. 6.11.2013 - HKIEA comments on the 24.4.2013 meeting notes
- C. 13.11.2013 - Notes of EAA liaison meeting
- D. 17.6.2014 - HKIEA comments on the 13.11.2013 meeting notes (less annex)