



In Perspective – Further Submissions on the Special Stamp Duty

[2011] HKIEA P1-A

18 March 2011

Your ref. : CB(1) 1672/10-11(03)

Clerk to the Bills Committee on Stamp Duty (Amendment) (No. 2) Bill 2010
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Hong Kong.
(Attn. Mrs. Mary Tang)

By email : mpoon@legco.gov.hk

Dear Sirs,

**Re : Bills Committee on Stamp Duty (Amendment) (No. 2) Bill 2010 –
Further submissions on the SSD**

Thank you for your invitation for submissions of 10th March 2011.

Given that when implemented liability for SSD will likely be a piece of advice that a vendor or purchaser may seek from his/her estate agent, we have begun preparing training material for our members and students, see draft at the Annex¹. In the course of our preparation we come across problems arising directly from (or issues as yet unnoticed but unearthed by) the SSD. We therefore wish to make the following submissions (in English only) from an estate agency practitioner's perspective.

Submission 1 – that the date of instrument of a registered PASP or FASP should be treated as the date of acquisition until proved otherwise

As illustrated in Part I of our draft quiz, in the normal case where a formal agreement for sale and purchase ('FASP') is executed (and duly stamped and registered), the provisional agreement for sale and purchase ('PASP') merges with it and the PASP is simply filed away by the purchaser's solicitors whether or not the PASP itself is a *chargeable agreement for sale* under the *Inland Revenue Ordinance*. It will place an enormous burden on the estate agent to ascertain the true date of acquisition, i.e. the date that equitable interest passed, by checking the alternative performance clauses in the PASP (which might not be easy to come by after two years).

¹ [] denotes the page number in the Green manual of our Property Practice Training Course
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As the Land Registry is a prescribed source of information under the Estate Agents Ordinance Cap. 511, we propose to add a clarification at appropriate places of the Administration's following draft amendment :

In the proposed section 29DA(7), by deleting everything after "First Schedule," and substituting—

"the transferor acquired the residential property on—

- (a) subject to subsections (7A), (8), (9A) and (9B)—
 - (i) the date on which the transferor made a chargeable agreement for sale (other than an instrument referred to in paragraph (b) of the definition of *agreement for sale* in section 29A(1)) for the purchase of the property; or
 - (ii) (if the chargeable agreement for sale consisted of 2 or more instruments) the date on which the first of those instrument was made; or

(add clarification) ... where a chargeable agreement for sale is registered, the date of instrument shown on the land register is deemed to be the date that the transferor acquired the residential property. Where more than one chargeable agreement for sale has been registered, the date of instrument of the first such registered agreement shall be deemed the date of acquisition.

The transferor/transferee's interest will not be affected because if desired (s)he can prove that the property was acquired earlier than the date of instrument (if that is the case) by showing the relevant PASP to the Commissioner, but the estate agent (or solicitor) will be relieved from the duty to check the by now elusive and spent PASP.

Submission 2 – consequential amendments

As illustrated in Part II of our draft quiz, the 'no binding agreement no agency commission' requirement of the prescribed estate agency agreements² has so far escaped the attention of practitioners (and the legal representatives of their clients) because few seem to realize that the alternative performance clauses may undermine the binding effect of the PASP and in turn the agent's entitlement to agency commission.

It is only to be expected that some time in the future a client renegeing on a PASP will

² See the commission schedule of Form 3 and 4, Schedule to the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation, Cap. 511

try to make use of the Form 3/4 agency commission clauses to evade payment of agency commission.

Human nature being what it is, and as it is up to each estate agent to prepare his own PASP, a natural corollary might be that sooner or later (to protect the estate agent's own self interest) the alternative performance clauses will disappear from all PASPs altogether. The client will then be deprived of the 'cooling off' effect of the common PASP which (s)he has enjoyed for decades. It is unlikely that any client will be smart enough to demand the reinstatement of the alternative performance clauses, or to remove other abusive clauses³, when told by his estate agent to sign the agent's PASP. The *inherent conflict of interests* between the principal and agent is apparent here.

Legco, Government and regulators have up till now appear to adopt a disjoint approach to the regulation of the property sector. It is hoped that our submissions can contribute in however a small way to furthering the interests of practitioners and also protecting the welfare of homeowners – seemingly a contradiction - and we accept that this Bills Committee may not be the most appropriate forum to address the issue.

Yours sincerely,
Stanley To
Honorary Researcher

Important notice:

In Perspective is to share thoughts with students and practitioners of estate agency practice and to elicit alternative view points. It may not necessarily reflect the stand of the Institute, if indeed there is any stand. Opinion expressed should **under no circumstances be taken as legal advice** as only the court or EAA can interpret the law or enforcement policies. Please consult your solicitor or EAA on questions of law or policy. Comments welcome: research@hkiaea.hk.

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³ See the paper 'The Tripartite Provisional Agreement for Sale and Purchase – R I P' annexed to our earlier submissions ref. : CB(I) 1063 (10-11) 01, or go to www.hkiaea.hk > Practitioners page

Quiz on Special Stamp Duty ('SSD') - DRAFT

Background

Government announced the introduction of the SSD from 20.11.2010. SSD is not yet in force as certain amendments to the *Inland Revenue Ordinance* Cap. 112 are now being debated before Legco. However the contentions mainly revolve around whether exemptions from SSD should be granted when an owner is forced to dispose of his property due to, say, personal hardship, and not about the main object of SSD as an anti-speculation measure. This quiz therefore focuses on the less controversial features of the SSD as set out in the EAA article '*Introduction to the Special Stamp Duty (SSD)*'⁴, in particular the following points (see [336A]⁵):

Question 6 says that for the purpose of counting the 6-month, 12-month and 24-month holding period (explained in **Question 8**), the date of acquisition/disposal is the day that equitable interest in the property is acquired/disposed of. This legal principle itself is non-controversial (see [162]).

Question 7 says '*If it is provided in the provisional agreement that the buyer has the right to claim for specific performance of the contract in the event of defaults by the seller, the equitable ownership of the property passes to the buyer under the agreement.*' In other words if the 'alternative performance' clauses are deleted, equitable interest passes on the date the provisional agreement is signed. (see [358])

Examples 9, 10, and 11 explains Question 7 by illustrating the circumstances under which the date of the provisional agreement or formal agreement may be taken as the date of acquisition/disposal.

Quiz – Part I

Owner signed two PAsPs (of the common form) on 20.11.2010, one to purchase Property A and another Property B. The alternative performance clauses in PAsP A were deleted but not for PAsP B. Both PAsPs were signed 14 days later on 4.12.2010.

Now, two years later, Owner has to sell at least one of the two properties urgently. On 15.11.2012 he signs two estate agency agreements (Form 3) to appoint an estate

⁴ Said to be based on information from the Inland Revenue Department
http://www.eaa.org.hk/SSD_2010-12-20_eng.pdf

⁵ [] denotes the page number in the Green manual of our Property Practice Training Course

agent (EA 1) as his agent for a term of three months. Purchaser X shows interest but the market situation is such that there could be no deal if the SSD has to be factored into the property price. Purchaser X cannot wait too long and Owner asks EA 1 which, if any, of Property A or B can be sold free from SSD in November 2012.

Both FASPs were chargeable agreements for sale and therefore duly stamped and registered. Owner has no clue where the PASPs were as they would serve no purpose after the FASPs were signed. After studying the land search EA 1 advises Owner that he 'acquired' both of them on 4.12.2010 so in November 2012 both properties are still subject to SSD.

Disappointed, Purchaser X buys another property on 30.11.2012 which but for the SSD he would have bought either Property A or B instead. On learning of the true SSD-free position for Property A Owner complains to EAA that he suffers loss as a result of being misled by EA 1.

Please discuss :

- (a) if SSD were payable on the properties in November 2012, what would be the rate – 15%, 10% or 5%?
- (b) regarding Owner's complaint, which EAA *Code of Ethics* might be in issue?
- (c) what might be EA 1's defence.

The following passage from a Government response to the SSD debate may provide some background information :⁶

11. The Government does not have comprehensive information on the total number of Preliminary Agreements for Sale and Purchase (PASPs) signed on and before 19 November 2010. This is because not each and every PASP is stamped with IRD and registered with the Land Registry. Under the Stamp Duty Ordinance (SDO), when an Agreement for Sale and Purchase (ASP) is signed within 14 days after the signing of the PASP, the ASP rather than the PASP should be submitted to IRD for stamping. It is only when an ASP is signed 14 days or more after the signing of the PASP will the PASP be submitted to IRD for stamping first, to be followed by the stamping of the ASP when ready. Given that the common market practice is

⁶ <http://www.legco.gov.hk/yr10-11/english/bc/bc02/papers/bc020223cb1-1371-2-e.pdf>

that an ASP is usually executed within 14 days from the signing of the PASP to get the benefit of an extended period for stamping the ad valorem stamp duty, the number of PASPs stamped by IRD and registered with the Land Registry is not representative of the total number of PASPs signed.

Quiz – Part II

On EA 1 agreeing to do all he could to find a purchaser, Owner drops the complaint. On 5.12.2012 Owner agrees to sell Property A to Purchaser Y and a PASP is signed. The alternative performance clauses are not deleted.

Shortly afterwards EA 2 introduces Purchaser Z to Owner. On 12.12.2012 Purchaser Z agrees to buy Property A at 20% above Purchaser Y's price. Owner refunds the 3% initial deposit and pays an extra 3% to Purchaser Y to cancel the 5.12.2012 PASP.

Owner refuses to pay EA 1 agency commission for the 5.12.2012 deal alleging that EA 1 has not fulfill the conditions for payment stipulated in Clause 1, Schedule 2 of the estate agency agreement (Form 3) which says :

'... if during the Validity Period the Vendor through the Agent enters into a binding agreement for sale and purchase with a purchaser in respect of the Property then the Vendor is liable to pay the Agent commission...'. (emphasis added)

Owner recalls EA 1 advising him three weeks earlier during negotiation with Purchaser X that a contract not specifically enforceable is not binding, and that is exactly the case for the 5.12.2012 PASP.

Please discuss :

- (d) Do you agree with Owner's interpretation of the Form 3 agency commission clause?
- (e) **But for the *fiduciary duty* owed the client**, what might EA 1 do in future in respect of the PASP so as not to jeopardize his own entitlement to agency commission?
- (f) Has EA 2 breached any Code of Ethics or other laws or regulations by introducing Purchaser Z to Owner after the 5.12.2012 PASP is signed?

(3/2011)