

# When to Be or Not to Be That's no longer a question: a look at Hong Kong's Home Ownership Scheme

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Our community had many debates over the last few years as to whether or not the Home Ownership Scheme (HOS) should be revived. The CE, in his last Policy Speech, ended the debate by formally announcing its revival. The major proposed revision to the scheme, as reported by the press, is that an HOS flat owner would be required to pay a premium equal to the subsidy he received upon his acquisition of the property to convert his flat from one in the secondary market to a primary market property. This article intends to focus on this proposed change.

Under the current practice, an HOS flat owner was required to pay a full premium upon converting his flat from a secondary market property to a primary market one. The following example illustrates how it currently works.

In 1980, an owner acquired an HOS flat valued at \$1,000,000. Because he was granted a subsidy in the form of a 40% discount, he actually paid \$600,000. In 2012, he wants to dispose of his property. He has two options: 1) sell it to another buyer who is qualified under HOS criteria in the secondary market or 2) sell it in the primary market by paying back the subsidy he had received to the government at the current value. In this particular case, if the market value of his HOS flat is currently \$3,000,000 in the primary market, then he has to pay back \$1,200,000 (i.e., \$3,000,000 x 40%) to the government. Fewer than 25% of HOS flat owners have opted for this course since the inception of the Scheme. Some economists attribute this to the high premium in the conversion and have called for the revision so that an owner would only be required to pay back the original discount subsidy in the new HOS. However, the community has reacted differently to this proposition, as the new rule will not apply to current HOS flats.

Speaking from experience, I do not think that it is a good idea, as it lacks flexibility in a falling market, which, in my view, is a fundamental issue. Let me illustrate the problem with the following example. If a new owner buys an HOS flat for \$4,000,000, for which he receives a 40% discount of \$1,600,000, he would have to pay back that amount when he disposes of it later, even if the value of the property falls by 50% to \$2,000,000. Under the current HOS rule, he would only be required to pay back \$800,000 (i.e.,

\$2,000,000x40%). This scenario is not out of the question because no one can foretell the cyclical movements of a property market.

The second fundamental issue is that the major revision will encourage speculation during a property boom and defeat the original purpose of the Scheme, which is to provide stability in the sense that an HOS owner is expected to hold on to his property for some time. I tend to agree with this argument, but would suggest that an HOS flat owner be awarded for holding the property that increases by 1/50 of the discount for every year he keeps the flat up to 50 years, after which he is free to dispose of his flat without having to pay any premium. The following table demonstrates how it would work using the above example of an owner acquiring an HOS flat at \$4,000,000, and he later considers disposing of it at the end of Year 1, Year 49, and Year 25, assuming that the price has remained unchanged over the 50 years (Scenario 1), while it has doubled by Year25 and tripled by Year 49 (Scenario 2).

	Premium	
	Scenario 1	Scenario 2
Year 1	$\$4,000,000 \times 40\% \times 49/50 = \$1,568,000$	
Year 49	$\$4,000,000 \times 40\% \times 1/50 = \$32,000$	$\$12,000,000 \times 40\% \times 1/50 = \$96,000$
Year 25	$\$4,000,000 \times 40\% \times 25/50 = \$800,000$	$\$8,000,000 \times 40\% \times 25/50 = \$1,600,000$

The above proposal is a modification of the existing HOS practice and should address the two fundamental issues identified above. The ultimate goal is that under this mechanism, the HOS flat will return to the primary market without the original owner having to pay a premium for selling it beyond 50 years after its construction.

The policy should apply across the board, be it current HOS or new HOS flats. This could mean that a substantial portion of current HOS owners will be free to dispose of their flats without having to pay a premium.

I welcome fellow members' comments on the above food for thought. 🍷

# Diagnosis and Repair of Water Seepage (Part 1 of 3)

## Selection of Moisture Meters



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### BACKGROUND

One of the expert skills a Building Surveyor should possess is the ability to diagnose the source of water seepage. To achieve accurate results from the diagnosis, a reliable moisture meter is indispensable (工欲善其事，必先利其器). For over two decades, a diagnosis has been assisted by a conductance (resistance) type pin-mode moisture meter. However, pin-mode moisture meters are not suitable for measurement in some situations, such as for hard objects (e.g. marble and fair-faced concrete).

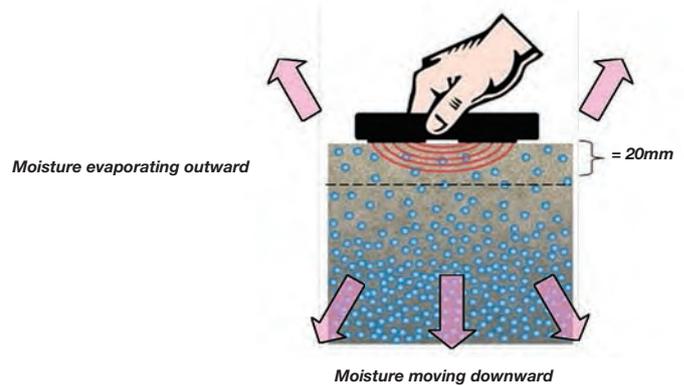
Some modern dielectric (capacitance) type moisture meters have emerged in the market in recent years. These meters operate on search (non-pin) mode, which does not puncture the material surface and the electromagnetic field of which can usually penetrate some 20-30mm of the measured material. Hence, they can measure moisture to a greater depth than the pin-mode moisture meters. There are various types of non-pin mode moisture meters in the market. Their cost difference is not great, but their performance gap could be crucial. It is of paramount importance to select a moisture meter that produces more accurate moisture measurements with meaningful results.

### TWO-STAGE EVALUATION STRATEGY

Upon evaluating and calibrating moisture meters, one should adopt a two-stage evaluation process as follows:

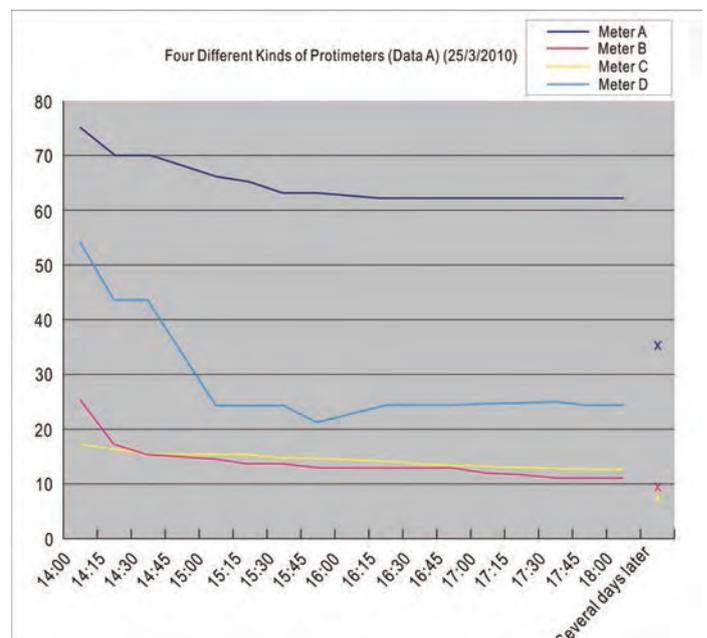
#### 1st Stage Evaluation by the "Natural Drying Process"

- Moisture readings are taken from a brick and a concrete block sample and conducted in air-conditioned premises.
- Measured points are marked on the surface of the block samples.
- The two samples are wetted thoroughly; excess water that remains on the surface of the samples is removed.
- Measurements of the marked points by each meter are, in turn, taken at 15-minute intervals.
- The readings are expected to drop gradually/steadily due to evaporation in an air-conditioned environment and the further movement of moisture down to the lower portion of the samples by gravity.



A steady decrease in measured dampness value over time is expected

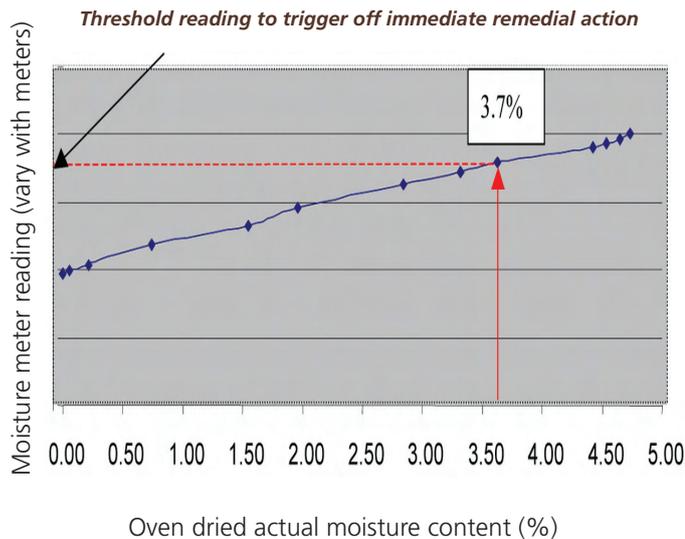
- The meters are placed against the surface of the samples in accordance with the manufacturer's instructions.
- The readings from the meters are recorded when the display becomes stable.
- The measurements should continue until the end of a day or more.
- The measurement results are represented by the following graphs, which show the readings of the various meters taken from one of the block samples:



A meter that generates a steady downward trend is the more convincing one.

### 2nd Stage Evaluation by the "Oven Drying Process"

- Circular concrete samples of various thicknesses (a diameter of at least 100mm and a grade of 30/20) are used. The thickness should preferably be 40mm or more.
- They are immersed in water for one day before the evaluation.
- The moisture data of the samples are measured by each moisture meter. Then the weights of the samples are measured by a balance. After that, the samples are put into an oven set at 100°C.
- Initially, the data are recorded at intervals of one hour. After three hours of measurements, the data are recorded at intervals that vary from four hours to 15 hours.
- The samples, after 99 hours of oven-drying, are assumed to be completely dried.
- A sample graph showing the absolute moisture content (in terms of the % in the concrete sample by weight relative to the moisture reading) is shown below:



Obviously, a meter with a proportional measurement against the moisture content % will be more reliable. In addition, the calibration graph shows that the reading of the moisture meter corresponds to a moisture content of 3.7% in concrete, which, according to Concrete Society (2000), is a threshold value that, if exceeded, would lead to a high risk of re-bar corrosion. Hence, waterproofing repairs must be carried out if the moisture reading shows a moisture content of over 3.7%.

### FACTORS LIKELY AFFECTING THE MEASURED READINGS

There are several factors that may affect the measured readings by moisture meters.

- Weather conditions (esp. very high R.H.)
- The re-bar inside the concrete slab (esp. where the concrete cover is thin)
- Unevenness of the surface material (avoid measuring at undulating points of the surface)
- The density variation of a specific material
- Surface dampness
- Thickness of the material (esp. concrete slabs thinner than 40mm)
- Quality of the calibration procedure
- Nature of the water soluble electrolytes in the material
- The chemical properties of the concrete
- Hand-holding position (for specific meter brands only)

Different types of meters will be affected to different degrees by these factors.

### CONCLUSION

According to our evaluation, various types of moisture meters have significant performance gaps. Choosing suitable products is an important first step to diagnosing water seepage sources. Suppliers may not provide information on threshold values when seepage actually occurs in concrete. Even when information is given, it is recommended to conduct plenty of field measurements to identify the accuracy and suitability of the given threshold value. The measured data should be interpreted with care due to the abovementioned factors, which can affect the readings. Other supporting evidence, like visual dampness signs and special circumstances at the time of measurement (like weather conditions), should be taken into account before drawing conclusions.

Reference: Concrete Society (2000) Diagnosis of deterioration in concrete structures, Concrete Society, Berkshire, U.K. ■

# Expert Opinion – an Independent or Biased View ? (Part 1)



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## Roles and Responsibilities of Expert Witnesses

S.58(1) of the Evidence Ordinance (Cap. 8) states that "where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence". The trial judge must satisfy him/herself that the expert evidence: (1) is relevant to an issue in the proceedings (S.58(3) EO); (2) has a high probative value in relation to it such as there being issues in the case that require a specialist's knowledge or experience to resolve (e.g. the explanation of foreign law); and (3) needs to be adduced (RHC O.38, r36) before the expert evidence is admitted.

The overriding duty of an expert witness is to give independent, unbiased, and relevant opinions to the Court on matters within his/her expertise so that the Court would be able to understand the implications of the essential facts and matters of an issue and, thus, be better equipped to arrive at a just decision. An expert witness should not act as an advocate for his/her client or be a partisan champion of the client's case.

In relation to the admission criteria, judges would allow a small degree of tolerance to determine the admission of expert evidence, if necessary. In Whitehouse v Jordan [1981] 1 WLR 246, Lord Wilberforce said that in relation to providing independent view, the Court considered it proper for the experts to have some degree of consultation with their legal advisors so long as the expert evidence presented to the Court was an independent and uninfluenced product of the expert.

In Cala Homes v Alfred McAlpine (East), Ltd. (No.2) [1996] F.S.R. 36, Laddie J said:

The Court is aware that a party is likely to choose [as] its expert someone whose view is most sympathetic to its position. Subject to that caveat, the Court would assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder to shoulder through thick and thin with the side which is paying his bill.

Cresswell J summarized the roles and responsibilities of expert witnesses in the leading case of National Justice

Compania Naviera SA v Prudential Assurance Co, Ltd. (The Ikarian Reefer) [1993] 2 Lloyd's Rep 38, CILL 838, below:

- (a) the report must be an independent product of the expert;
- (b) the expert witness should provide objective and unbiased opinions in matters within his/her expertise and should not assume the role of an advocate;
- (c) must include all relevant facts or assumptions upon which his/her opinion is based;
- (d) an expert witness should admit the limits of his/her expertise;
- (e) qualifications in regards to the expert report must be stated;
- (f) any change of view must be properly communicated to other side without delay and when appropriate to the Court; and
- (g) all relevant materials must be included in the report, such as photographs, plans, calculations, analyses, measurements, survey reports, and other similar documents.

The Hong Kong Courts applied the criteria of Ikarian Reefer. Examples are the High Court case of Chan Kwok Ming v Hitachi Electrical Service (HK), Ltd. (Unreported, HCPI 322/2002), and District Court case of Chan Wai Ying v Sin Kit Sang [2007] HKCU 1145.

## Problem of Bias

The lack of objectivity in expert evidence has been criticized by judges for many years. In Lord Arbinger v Ashton [1873] 17 LR Eq 358 at 374, Sir George Jessel said:

It is a natural bias for a man to do something serviceable for someone who employ and adequately pay him. However, it is so effectual that we constantly see persons considering themselves as the paid agents of the person who employs them rather than considering themselves as witnesses.

Collectively, these people are called "hired guns" whose opinions are not independent and impartial, but are designed to suit the party that pays for their services. Their evidence has no or low probative value.

The editor of a UK magazine, the Counsel Magazine, severely criticized hired guns as people whose main

purpose is to produce reports that conceal anything that is disadvantageous to their clients. The disclosure of those expert reports has degenerated into a costly second tier of written advocacy<sup>1</sup>. A great deal of judicial time had been wasted by studying expert evidence that was often of a theoretical nature to one's preferred choice and was based on assumptions rather than proven facts<sup>2</sup>.

There are numerous factors contributing to the problem of bias: short term or long term monetary incentives, lawyer's pressure, experts' egos, professional rapport and solidarity, peer group pressure due to the expert's personal professional experience, and his/her style of presentation. In most cases, a combination of these factors would generate a biased opinion by the expert witness. Bias can be broadly grouped under three major categories: (1) deliberate advocacy, (2) unconscious partisanship, and (3) selection bias. Deliberate advocacy is when the expert intentionally tailors his/her evidence to support a client's case. Unconscious partisanship is unintentional and usually results from situational factors or biases that cause the expert to provide evidence to advocate his/her client's positions. Selection bias is a result of a trial lawyer selecting an expert witness with similar views to support his/her case. Biased evidence is not welcomed by the Court, as it has a very low probative value and does not carry any significant weight.

### What has been done to tie up the loose ends?

In UK, the Civil Procedural Rules 1998 ("CPR") came into force on 26 April 1999. Hong Kong's Civil Justice Reform ("CJR") was implemented on 2 April 2009 with tighter controls on expert evidence through the revised Rules of the High Court ("RHC") and the Practice Directions ("PD"). On 20 July 2011, The Federal Court of Australia promulgated the Federal Court Rules 2011 ("FCR") with Practice Note CM7, which was issued specifically to deal with expert witnesses.

The common major changes were:

- (1) The granting of greater power to the Court to restrict adducible expert evidence. No expert evidence may be adduced in Hong Kong except with the leave of the Court or when all parties agree to it (HK: RHC, O.38, r.36; UK: CPR, r.35.4). There is no similar provision in Australia's FCR.
- (2) To emphasize the overriding duty of an expert witness to the Court on matters within his/her expertise and that such a duty overrides any obligation to the person from whom s/he has received instructions or payment (HK: RHC, O.38, r.35A; UK: CPR, r.35.3; and Aus: FCR, PN-CM7, Para.1).
- (3) To require the expert witness to make a declaration that: (a) s/he has read the Code of Conduct for expert

witnesses and agrees to be bound by it; (b) s/he understands his/her duty to the Court; and (c) s/he has and will continue to comply with that duty (HK: RHC, O.38, r.37C; UK: CPR, r.35.10(2); Aus: FCR, PN-CM7, para.2.1(b)).

- (4) To require the expert witness to verify his/her expert report with a statement of truth (HK: RHC, O.38, r.37A; UK: CPR-PD 35, paras. 1.3 & 1.4; Aus: FCR, PN-CM7, Para.2.3). If the expert witness fails to verify his/her report with such a statement of truth, the expert report will not be admissible as evidence except with the leave of the Court (RHC, O.41A, r.7). Under CPR, r.32.14, proceedings for a contempt of Court may be brought against a person who makes or causes to be made a false statement in a document verified by a statement of truth without an honest belief in its truth.
- (5) To give directions on what is to be covered in the expert reports, including the qualifications of the expert; the facts, matters, and assumptions on which the opinions in the report are based; and the reasons for each opinion expressed (HK: RHC, App.D; UK: CPR, r.35.10; Aus: FCR, PN-CM7, para.2).
- (6) To give directions for experts conferences (HK: RHC, App. D/12 & 13; UK: CPR, r.35.12; Aus: FCR, PN-CM7, para. 3).

The UK provisions also allow each party to put forth written questions to which experts on the other side are expected to reply (CPR, r.35.6). The Court also has the power to require that evidence be given by a single joint expert and can set out guidelines on how the parties should instruct a single joint expert (CPR, r.35.7 & 35.8). The expert also has the right to ask the court for guidance if needed (CPR, r.35.14).

In Hong Kong, the Court has the power to order the parties to appoint a single joint expert (RHC, O.38, r.4A(1)). This is not compulsory under the new rules, but the Court encourages it for cases of low value, low complexity or those in which the issues fall within an established area of knowledge. However, highly contentious cases are unlikely to be dealt with by a single joint expert because it may be more advantageous for the Court to hear a range of opinions before it arrives at a decision. ■

1 *Counsel Magazine*, November/December 1994, p. 183.

2 Derbyshire, D. Science Correspondence, *The Daily Telegraph*, 29th January 2004.

# Plan Ahead or Botch the Conservation



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The concept of “collective memories” is a relatively new one in the territory, and it has fueled much attention on the need for conservation in Hong Kong. It is now also the foremost reason against tearing down older buildings for urban renewal. Thus, it is of utmost importance that the criteria for preserving a building should be compared against its cost to society in order to have a meaningful discussion of how and to what extent we should retain a piece of Hong Kong’s heritage.

Keeping a building for its historical significance or artistic merits is only the start of a long process, and without the relevant amenities, the results can be far from optimal. Take Western Market in Sheung Wan, for example. This early 20th Century construction with its brick walls and granite arch-doors is an exquisite example of an Edwardian building, yet the lack of space outside, the clutter of tram tracks, and other traffic are prevention enough against meaningful inspection by both passers-by and serious admirers. Consequently, the full economic potential of the rejuvenated market building cannot be realized. This is a classic example of wasting precious resources to formulate half thought-out conservation plans.

Another brick structure at 8 Waterloo Road in Yau Ma Tei is even more revealing in demonstrating a glaring absence of foresight in preservation. It was originally a compound of three buildings built in 1895, but two were later torn down to make room for a refuse collection point. The lone surviving building went through various transformations after the Second World War – from government offices to a shelter for drug addicts. It was only in 2000 that the authorities suddenly realized the historic value of this desolate structure. The subsequent change of urban renewal plans has left this beautiful house literally huddling under a high-rise residential block as only a ghostly existence with no sense of beauty or dignity. There is little, if any, economic worth in the final project, and it will always be a sore reminder of the government’s piecemeal approach to preserving our cultural heritage.

The government’s oversight is bad enough for public buildings, whereas for private property, its process of conservation has taken an even more nightmarish turn. Anyone passing by the junction of Lai Chi Kok Road and Tong Mei Road cannot fail to notice the corner building, “Lui Seng Chun”. Built in 1931, the owners of this four-storey structure generously approached the government and donated the deed to their property. But the building has loomed eerily empty since the 1980s, and one cannot help but wonder if its renovation would have made a

smaller dent in the public coffers if the government had taken the initiative to subsidize its maintenance. How much of the \$28 million bill could have been saved after a two-decade wait is anybody’s guess, but it is certainly a revealing hint of other less unfortunate cases. Even so, this is one of the very few happy exceptions to the long history of conflict, all due to the absence of a coordinated and long-term strategy.

To the owner of a valuable piece of land, the thought of losing one’s right to redevelop one’s own property because of a sudden declaration of Historical Heritage status is reason enough to hasten the building’s demise, and it is extremely unfair to blame the owner’s “selfishness”. A case in point is King Yin Lane. Its owners had proposed a land swap with the government and received no answer before they sold the land. The closure of the sale still did not prompt the government’s action, and only after a partial demolition was carried out, which led to a public outcry, was the site declared a monument. It may cost taxpayers more money for the government to negotiate a new deal, and parts of the building and its interior were already torn down, making their restoration impossible.

By the same token, the conservation of Ho Tung Gardens also sent a chill down the spines of prospective monument owners. The government refused point blank to negotiate a remedy favorable to all parties concerned and turned a blind eye to a “Murray House” style donation of architecture to be re-erected elsewhere. An owner of a private property that is worth billions certainly has no obligation or inclination to surrender it in the name of conservation, and the plight of Sir Hotung’s estate teaches a valuable lesson: the worse shape a property is in, the less chance it has of losing its economic potential. This would run contrary to the public’s wish to preserve a piece of Hong Kong’s history.

Should the government be serious about conserving cultural and historical buildings, it should not react belatedly after citizens voice their concerns. It should start canvassing the streets of Hong Kong, compiling a list of potential monuments, and contacting owners to negotiate a maintenance and compensation package for their properties. Only by planning and acting ahead of time can the authorities fully evaluate the historical value of a potentially valuable structure against its cost of preservation and come up with the best plan to conserve and rejuvenate it. Scrambling for a quick and harebrained “plan” after pressure from conservationists is not the way to meaningfully protect Hong Kong’s past and future. ■