

public works.⁷⁸ The grant of new leases to expire after 30 June 1997 has been recognised under Article 120 of the Basic Law.

9.4.3 Grant of New Leases after 1 July 1997

[2-54] As from 1 July 1997, the land and natural resources within the Hong Kong Special Administrative Region became State property⁷⁹ and the Government of the HKSAR has been given responsibility for their management, use and development and for their leasing to individuals, legal persons or organisations for use or development.⁸⁰ The Chief Executive has been empowered, on behalf of the Government of the HKSAR, to lease or grant land and natural resources within the HKSAR which are State property.⁸¹ Where leases of land without a right of renewal expire after 1 July 1997, they must be dealt with in accordance with laws and policies formulated by the HKSAR.⁸² By way of a press release on 16 July 1997, the Executive Council announced the manner in which it intended to deal with the granting of new leases after 1 July 1997. New leases would be granted for a term of 50 years from the date of grant at a premium. This means that a lease granted in the future by the HKSAR may extend beyond the year 2047.⁸³ Such new leases would be subject to the payment of an annual rent equivalent to 3% of the rateable value of the property adjusted from time to time in step with any changes in the rateable value of the property. As an exception, leases for special purposes, recreational purposes and petrol filling stations would be for 21 years only. Special purposes leases covered by franchises or operating licences would normally be for the term of the franchise or licence. Short-term tenancies would normally be for not more than seven years.

9.4.4 Extension of non-renewable leases expiring before 1 July 1997

[2-55] The question of the extension of non-renewable leases expiring before 1 July 1997 has also been dealt with by the Joint Declaration and the Basic Law. Before the Joint Declaration, on the expiration of a non-renewable lease, it was the practice of the Government, in respect of land outside the New Territories, to grant an extension of the lease for a term of 75 years on payment of a premium calculated on current land values. According to the Joint Declaration, all leases not containing a right of renewal expiring before midnight on 30 June 1997, with the exception of short-term tenancies and leases for special purposes,⁸⁴ may be extended

78 Para 6, *ibid.*

79 Art 7, Basic Law.

80 *Ibid.*

81 Section 32, Hong Kong Reunification Ordinance.

82 Art 123, Basic Law.

83 The power of the HKSAR to grant leases extending beyond 2047 is considered in detail by Alice Lee in 'Leases beyond 2047', Law Lectures for Practitioners, 1998, pp 177-186. The implications for holders of leases that extend beyond the period of the guaranteed capitalist system in Hong Kong are considered in 'Why 2047 Matters Even Now', SCMP, 18 July 1997.

84 A lease for special purposes is defined in s 3 of the New Territories Leases (Extension) Ordinance.

without payment of a premium for a period not extending beyond 30 June 2047 at an annual rental of 3% of the rateable value adjustable from time to time in step with adjustments in the rateable value. In respect of such extensions, s 42(3) of the Conveyancing and Property Ordinance provides that all covenants relating to that land will, unless the contrary intention is expressed, continue to have effect.

[2-56] We have already seen that those Government leases in the New Territories, which were expressed to expire on 30 June 1973 with a right of renewal for 24 years less three days, were automatically renewed by the New Territories (Renewable Government Leases) Ordinance until mid-1997. Government leases granted latterly were expressly stated to expire on 27 June 1997. The result is that all leases in the New Territories were due to expire on 27 June 1997. Their extensions have been dealt with by specific legislation. Section 6 of the New Territories Leases (Extension) Ordinance (Cap 150) provided that the term of all leases in the New Territories that would expire before 30 June 1997, other than short-term tenancies and leases for special purposes,⁸⁵ would, unless the lessee opted against such extension⁸⁶ be extended until 30 June 2047 without payment of an additional premium. The extended lease would be subject to all covenants,⁸⁷ encumbrances and burdens etc as applied immediately before the period of extension.⁸⁸ The new Government rent is 3% of the rateable value of the land from time to time and detailed provisions for the calculation of the new Government rent are found in the Ordinance.⁸⁹

[2-57] Extensions of non-renewable leases granted before 1 July 1997 have been recognised by the Basic Law.⁹⁰ As we have seen above, very many New Territories Leases are due to expire on 30 June 2047. The HKSAR Government has the

85 A note must be made in the Land Registry of all special purposes leases: s 4, New Territories Leases (Extension) Ordinance.

86 Section 5, New Territories Leases (Extension) Ordinance.

87 See also s 42(3), Conveyancing and Property Ordinance.

88 Section 7(1), New Territories Leases (Extension) Ordinance. The effect of the New Territories Leases (Extension) Ordinance on easements granted before that Ordinance was enacted was considered in *Lam Pau Ho v Cheung Kam Ming* [1997] 4 HKC 139. This case involved an easement granted in 1980 which was stated in the grant to continue for the residue of the renewed term of 24 years (ie until 27 June 1997). The issue was whether the easement continued to affect the land after the lease had been extended until 2047. Le Pichon J held that it could not have been the intention of the parties when the easement had been granted that, even if an extension of the respective leases was granted, nonetheless the easement would expire on 30 June 1997. In such a case, the owners of the dominant tenement would have been forced to accept whatever terms the owners of the servient tenement saw fit to impose upon them. The intention of the parties had been to grant the right of way for any period that the leases of the two properties still had to run, which included any period of extension. Since there was no contrary intention in the instrument of grant, the servient tenement remained subject to the easement until 2047.

89 New Territories Leases (Extension) Ordinance, s 8.

90 Art 121, Basic Law provides that 'as regards all leases ... renewed where the original lease contains no right of renewal during the period from 27 May 1985 to 30 June 1997, which extend beyond 30 June 1997 and expire not later than 30 June 2047, the lessee is not required to pay an additional premium as from 1 July 1997, but an

authority to renew them under Article 123 of the Basic Law and, presumably, they will be renewed well before that date to ensure stability in the property market.

9.4.5 Extension of non-renewable leases expiring after 1 July 1997

[2-58] Where leases of land without a right of renewal expire after 1 July 1997, they must be dealt with according to the laws and policies formulated by the HKSAR.⁹¹ By way of a press release on 16 July 1997 the Executive Council announced the manner in which it intended to deal with the renewal of non-renewable leases. Non-renewable leases would, upon expiry and at the Government's sole discretion, be extended for a term of 50 years without payment of an additional premium. However, an annual Government rent of 3% of the rateable value would be charged from the date of extension to be adjusted in the step with changes in the rateable value.

9.4.6 Extension of leases held by tenants in common

[2-59] Special considerations apply where the lease which is to be extended is held by tenants in common since some co-owners might wish to extend the lease whilst others might not. In all cases involving multi-ownership, an extension of the lease is granted to the Financial Secretary Incorporated for a term expiring on 30 June 2047. The Financial Secretary Incorporated then assigns the undivided shares together with the right to exclusive possession of a particular flat to each co-owner who wishes to take an extension of the lease at the premium offered. The assignment will be made subject to a new deed of mutual covenant which will be drawn up by solicitors acting for the Financial Secretary Incorporated along similar lines to the existing deed of mutual covenant.

9.4.7 Renewal of renewable Government leases outside the New Territories

[2-60] Part II of the Government Leases Ordinance (Cap 40), which governs renewable Government leases outside the New Territories, provides that, in respect of renewable leases that had expired before 1973, the right of renewal will be deemed to have been exercised immediately before the expiration of the lease and a new Government lease of the lot will be deemed to have been granted. Where the land has been sectioned, a separate new Government lease will be deemed to have been granted in respect of each section of the land.⁹²

[2-61] In respect of renewable leases expiring after 1973, if the right of renewal has not already been exercised, the right will be deemed to have been exercised and a new Government lease deemed to have been granted from the date of expiry

annual rental equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with any changes in the rateable value thereafter, shall be charged'.

91 Para 2 of Annex III of the Joint Declaration and Art 123, Basic Law.

92 Section 4(1) and (2), Government Leases Ordinance.

of the lease. If the lot has been sectioned, a new separate Government lease will be deemed to have been granted similarly to the holder of each section.⁹³

[2-62] Since no Government lease is actually issued, the terms of the new lease are supplied by the Government Leases Ordinance. The lease is deemed to have been issued for the term specified in the proviso for renewal⁹⁴ and will contain a reservation of the new Government rent – fixed at 3% of the rateable value of the lot or section as at the relevant day⁹⁵ – and a covenant to pay that rent in the same manner and on the dates fixed in the renewable Government lease.⁹⁶ The same covenants,⁹⁷ exceptions, reservations, stipulations, provisos etc as are in the renewable Government lease will be deemed to be contained in the new Government lease without, of course, the proviso for renewal⁹⁸ and the new Government lease will be subject to those encumbrances to which it was subject before the expiry date.⁹⁹ The registration in the Land Registry of the new Government rent payable will be conclusive evidence of the grant of the new Government lease.¹⁰⁰ A renewal for a period extending beyond 30 June 1997 will be recognised according to paragraph 1 of Annex III of the Joint Declaration and Article 120 of the Basic Law. Any breaches of covenants in a renewable Government lease occurring immediately before its expiration will be deemed to constitute a breach of the new Government lease and should be remedied; otherwise, the Government may exercise its right of re-entry¹⁰¹ and the issue of a new Government lease does not constitute a waiver of such prior breaches.¹⁰²

[2-63] As we have seen above, similar provisions in respect of the renewal of Government leases in the New Territories leases are found in the New Territories (Renewable Government Leases) Ordinance (Cap 152), which provides that in respect of all New Territories leases under which land has been demised for 75 years from 1 July 1898 and which contain a right of renewal for a further term of 24 years, the right is deemed to have been exercised and a new Government lease deemed to have been granted.

93 Ibid, s 5(1) and (2).

94 Ibid, s 7(a).

95 Ibid, s 9. 'Relevant day' is defined in s 2 as being '1 July 1973 or the day immediately following the day of expiration of the Government lease, whichever is the later'.

96 Ibid, s 8. Provision for collection and recovery of the new Government rent is found in ss 13 and 14 of the Ordinance.

97 In further support of this principle, s 42(3), Conveyancing and Property Ordinance provides that, where a Government lease expires and is either renewed or replaced by a new Government lease relating to the same land, any covenant relating to that land shall, unless the contrary intention is expressed, continue to have effect.

98 Section 8, Government Leases Ordinance.

99 Ibid, s 15.

100 Ibid, s 12.

101 Ibid, s 23(2).

102 Ibid, s 23(1).

9.5 Premium

9.5.1 Imposition and calculation

[2-64] A land premium,¹⁰³ which may be of a very substantial sum, is generally imposed by the Government when land is first alienated by the Government, a regrant is made consequent upon the extension of a non-renewable Government lease or a modification of the terms of the lease is granted. No premium is generally payable where the grant is made for educational, medical, religious and other charitable purposes, and concessionary rates may be applied in respect of other dispositions by the Government, such as land granted for housing schemes. The premium charged is normally payable in one lump sum but may be made payable by instalments in respect of industrial sites, regrants and private grants.¹⁰⁴

9.5.2 Apportionment of premium

[2-65] The primary liability to pay the premium falls upon the Government lessee and the lease may be subject to forfeiture if default is made in payment. Problems may arise as to who should be responsible for the payment of the premium where the land is sectioned or held by tenants in common holding undivided shares and these problems have been resolved by the Government Rent and Premium (Apportionment) Ordinance (Cap 125) enacted in 1970.

[2-66] Where the land has been sectioned, the Land Officer¹⁰⁵ may, if he thinks fit, either of his own motion or on the application of the owner, determine the premium

103 'Premium' is defined in s 2, Government Rent and Premium (Apportionment) Ordinance as any sum, other than Government rent, required to be paid to the Government as a condition or in consideration of: (a) the grant, renewal or continuance of a Government lease; (b) consent to the assignment of a Government lease or of any rights under a Government lease; or (c) the extension or variation of a Government lease. The meaning of the word 'premium' was discussed by the Privy Council in *Chang Lan-sheng v Attorney General* [1970] HKLR 483, [1970] HKCU 20, where the court said, following the description of Warrington LJ in *King v Earl Cadogan* [1915] 3 KB 485 at 492, that what is called a premium is merely a description and a reflection of the fact that the rent payable by the lessee is less than the market, or full or fair, rent for the property. The court further pointed out that the consideration payable for a lease of any property may be expressed, in varying proportions in terms of a capital sum, called a premium, and an annual sum called a rent, according to the spectrum from a peppercorn rent plus a large capital sum to a rack rent plus a nominal or zero capital sum.

104 The Government has, as a matter of policy, shown its preference for collecting its revenue by way of a substantial premium supplemented by a modest annual Government rent. The premium is payable upon initial grant, regrant or modification of the Government lease. The premium is generally calculated as being the full market value of the land (exclusive of the building thereon), its calculation being dependent upon the location, permitted user, restrictions upon use and length of the term granted.

105 Apportionment is effected by the Legal Advisory and Conveyancing Office in the Lands Department.

payable in respect of each section¹⁰⁶ and a new Government lease will be deemed to have been issued in respect of each section containing, inter alia, a covenant to pay the new apportioned premium.¹⁰⁷ Problems may arise in respect of regrants of non-renewable leases where the land is owned by several owners as tenants in common. It might be, for example, that not all the co-owners wish to participate in the regrant. A procedure was introduced in 1972 whereby, on the termination of the Government lease in the case of the owners failing to reach unanimous agreement in favour of a regrant, a new Government lease will be granted to The Financial Secretary Incorporated, who will negotiate with the previous co-owners as to whether they wish to have a regrant. As regards the payment of the premium, before 1970, problems had arisen but the position was resolved by the enactment of the Government Rent and Premium (Apportionment) Ordinance, which contains a provision for the premium being apportioned between the co-owners (Part III of the Ordinance).

9.6 Government rent

9.6.1 Leases granted before 1 July 1997

[2-67] The Government rent (formerly known as Crown rent) – that is the rental payment made by the lessee to the Government – has historically been only a modest sum and was often payable half-yearly. The Government rent as fixed in the Government lease or Conditions will continue to be payable in respect of all Government leases save those specified below.

9.6.2 Certain leases granted after 1 July 1997

[2-68] The provisions of the Joint Declaration and the Basic Law provide that, subject to certain exceptions, the Government rent for new grants of leases, including the renewal of non-renewable leases, will be 3% of the rateable value as it changes from time to time.¹⁰⁸

[2-69] Government leases which were automatically renewed under the Government Leases Ordinance, however, contain a reservation of new Government rent fixed at 3% of the rateable value of the lot or section¹⁰⁹ as at the relevant day.¹¹⁰

[2-70] The fixing of Government rent in respect of new leases and the extension of certain non-renewable leases by way of re-grants is now governed by the Government Rent (Assessment and Collection) Ordinance (Cap 515). A further change brought about by the new legislation is that undeveloped land, that is land owned by a developer for development purposes but which has not yet

106 Section 5, Government Rent and Premium (Apportionment) Ordinance. The method of ascertaining the apportionment of the premium is laid down by s 6, *ibid*.

107 *Ibid*, s 8.

108 As was pointed out in SCMP of 298 October 1992, this will involve a substantial increase in rental payments and, in the estimate of the author, will increase land revenues to the HKSAR to \$5.5b annually from the present \$300m.

109 Section 9, Government Leases Ordinance.

110 Relevant day means 1 July 1973 or the day immediately following the day of expiration of the Government lease, whichever is the later.

been developed, will be subject to Government rent assessed at 3% of the land's rateable value. This was challenged in *Commissioner of Rating and Valuation v Agrila Ltd*,¹¹¹ as being in contravention of the Basic Law, but the Court of Final Appeal upheld the assessment.¹¹²

9.6.3 Apportionment of Government rent

[2-71] As in the case of the premium, problems had arisen where land had been sectioned or was held by tenants in common holding undivided shares and these problems were resolved by the enactment of the Government Rent and Premium (Apportionment) Ordinance, which provided for the apportionment of the Government rent between the owners.¹¹³ In respect of those leases which fall within the ambit of the Government Rent (Assessment and Collection) Ordinance (Cap 515),¹¹⁴ the Government Rent and Premium (Apportionment) Ordinance does not apply and the Commissioner is empowered to apportion the rateable values under the Ordinance.¹¹⁵

10. USER RESTRICTIONS IN GOVERNMENT LEASES AND CONDITIONS OF GRANT

10.1 Types of user restrictions

[2-72] It is common to have a restriction on user in Government leases, which restricts use of the property to, for example, residential, commercial or industrial purposes. Whereas most older Government leases contain only a user restriction and an 'offensive trades clause',¹¹⁶ in modern Conditions of Grant there are many more detailed restrictions upon user which serve a vital planning function by restricting leases granted in certain areas to certain uses etc. Attention should also be paid to the wide-ranging provisions of the Summary Offences Ordinance (Cap 228), which render criminal such acts as neglecting to repair buildings, playing games to the annoyance of passers-by, causing an obstruction by having extensions from one's building and dropping or allowing objects to fall from a building.¹¹⁷

111 (2001) 4 HKCFAR 83, [2001] HKCU 175.

112 As for the method of assessment of Government rent on undeveloped land, see *Best Origin Ltd v Commissioner of Rating and Valuation* [2013] 4 HKC 324 (CFA).

113 The method of apportionment is set out in ss 5, 6 and Part III of the Government Rent and Premium (Apportionment) Ordinance. Apportionment is effected by the Legal Advisory and Conveyancing Office in the Lands Department.

114 See above.

115 Section 7(1), Government Rent (Assessment and Collection) Ordinance.

116 For the content of and construction of an 'offensive trades clause', see paras [2-106] et seq below. Breach of the provisions of the offensive trades clause may evoke criminal sanctions: see s 4(25), Summary Offences Ordinance (Cap 228).

117 For an illustration of the civil liability in negligence in respect of a window frame falling from a flat, see *Wong Yiu Ming v To Chark Wah & Anor* [1993] 1 HKC 510.

10.1.1 User restrictions in Block Government leases

[2-73] It used to be thought that there were two restrictive covenants in all Block Government leases. In fact, there is only one.

10.2 Restriction on building covenant; the 'Watford' restrictive covenant prohibiting building on land delineated as agricultural or garden land

[2-74] In all Block Government leases there is a restrictive covenant that prohibits the lessee from converting land delineated as agricultural or garden ground¹¹⁸ into use for building purposes without the licence of the Crown (now the Government) in writing.

[2-75] This covenant was held to be effective by the Court of Appeal in *Watford Construction Co Ltd v Secretary for New Territories*.¹¹⁹ In this case the Block Crown lease provided in the Schedule to the lease a description of the lot as 'Agricultural'. A covenant in the lease provided that any land 'hereby expressed to be demised as agricultural or garden ground' should not be converted into use for building purposes. The court held that, although the words 'demised as agricultural or garden land' were merely descriptive, when read together with the covenant prohibiting building on land described as agricultural or garden, the land could not be used for building purposes without government permission. The 'Watford' covenant was, therefore, enforceable as a restrictive covenant.

10.3 Description in the schedule to the Block Government lease of the use of the land when first demised: The decision in *Melhado*

[2-76] The second supposed covenant was, unfortunately, not. In the Schedule to old Block Government leases there is a description of the use that the lot was put to at the time of the grant of the lease; for example, 'padi', 'waste', 'grave', 'house', 'threshing floor' or 'dry cultivation'.

[2-77] In *Attorney General v Melhado Investment Ltd*¹²⁰ the Government argued that this description limited the use to which the land could be put. It was also contended that there was an implied covenant in the lease that the land could not be used for any purpose other than that for which it was used at the time of the block grant. The Court of Appeal held, however, that the use of the land as listed in the Schedule was descriptive only for the purpose of identifying the land and was not restrictive of use. This had to be the case since one lot identified in a Block

118 This must mean delineated in the Schedule to the Block Government lease. Where land is described in the Schedule as 'padi' or 'dry cultivation', it is suggested that the land is delineated as agricultural or garden land. Indeed, such delineation is by far the most common in the old Schedule Block Government leases.

119 [1978] HKLR 410, [1978] HKCU 66.

120 [1983] 2 HKLR 327, [1983] 2 HKC 211.

Crown lease exhibited to the court described the land as 'broken latrine'. Clearly this could not be a restrictive covenant; otherwise the broken latrine could not be repaired! The court held further that no such implied term as had been contended by the Government could be implied.

[2-78] The decision in *Melhado* has had a considerably adverse effect, at least from the aesthetic aspect, upon the nature of use of land in the New Territories. It followed from the decision that land in the New Territories demised as agricultural or garden land could be used for storage of containers, dumping of scrapped cars and storage of building materials. In the words of His Honour Judge Cruden in *Niceboard Development Ltd v China Light and Power Ltd*:¹²¹

[T]he decision in *Melhado* sounded the death knell of control by the terms of the Block Government lease.

[2-79] He also commented that *Melhado* had led to the 'rape of the New Territories'! Belatedly, to combat this lack of control, the Government introduced Development Permission Areas by the Town Planning (Amendment) Ordinance 1991.¹²² These have now been largely replaced by Outline Zoning Plans.

[2-80] The decision in *Melhado* was distinguished in *Splendid Resources Inc v Secretary for Justice*¹²³ where the court concluded that the terms of the New Grant restricted the permitted use of the plot of land in the New Territories to agricultural use.

10.4 Offensive trades clause in Block Government leases

[2-81] Block Government leases conventionally contain an offensive trades clause but this clause differs in content from offensive trades clauses contained in Government leases¹²⁴ in that it does not identify what trades are considered offensive but merely prohibited the carrying out of any 'noisy, noisome or offensive trade or business' on the land.

[2-82] Whether such an offensive trades clause had been breached by use of land as a columbarium was at issue in *Uni-Creation Investments Ltd v Secretary for Justice*.¹²⁵ In this case the plaintiff was the owner of certain parcels of land in Nim Yuen Village near Tung Chung and sought a declaration that the use of the land as a columbarium did not breach the offensive trades clause in the Block Government lease. The defendant counterclaimed, contending that such use did breach the offensive trades clause. The columbarium consisted of 8 'small' houses which had originally been constructed for residential use. The houses were in a remote and secluded village which had earlier been abandoned. The next village was, however,

121 [1994] 2 HKDCLR 69, [1994] HKCU 342.

122 See Chapter 3 Planning Considerations, paras [3-63] et seq.

123 [2017] 2 HKLRD 421, [2017] 2 HKC 570. This case is discussed in greater detail at [2-98].

124 For the offensive trades clause in Government leases see [2-105] et seq.

125 (unreported, HCMP 2166/2015, 28 February 2017).

inhabited by a small number of residents. Expert evidence showed that, at the time it had first been used as a columbarium, the land had not been subject to any statutory plan and no permission from the Town Planning Board had been required for the construction and operation of the columbarium. The only issue was whether this use breached the offensive trades clause in the Block Government lease. Dty Judge Burrell first noted that the offensive trades clause prohibited the carrying out of any 'noisy, noisome or offensive trade or business' on the land. The word 'noisy' referred to a particular physical sensation which was not alleged to have been breached in this case. The word 'noisome', however, had a wider meaning and might include anything unpleasant or disagreeable and, for all practical intents and purposes, anything that was offensive would include anything that was noisome. The question, therefore, was whether the use of the land as a columbarium was 'offensive'. Context was clearly important and the adequacy of evidence to establish that the trade was offensive was clearly crucial. There had to be relevant credible evidence that, given: (a) the nature of the business; (b) the locality of the business; (c) the nature of its operation; and (d) the effect on the neighbourhood, people in the locality found the use as a columbarium offensive. In the instant case there had been very little credible evidence to this effect. In conclusion the defendant had not proved that the use of the land as a columbarium was offensive to those in the locality and the declaration sought by the plaintiff would be granted.

10.5 Construction of user restrictions in Government leases and Conditions of Grant

[2-83] There is considerable case law as to the construction of user restrictions in Government leases and Conditions of Grant (and also deeds of mutual covenant). For example, conditions in a development lease may well provide for the type, or the nature of the use, of the building to be constructed.

10.5.1 Types of building to be constructed

[2-84] It is common for the Government lease or Conditions of Grant to designate the type of building to be constructed on the site by the developer and such a designation will constitute a restrictive covenant. Many different designations have been used and, inter alia, the following expressions have been construed by the court 'residential premises of a European type', 'house', 'private dwelling house' and 'villa'.¹²⁶ We will now consider how the courts have construed such covenants, of course in context.

[2-85] In *Wong Bei Nei v Attorney General*,¹²⁷ Conditions of Sale provided that the purchaser might only erect on the plot detached or semi-detached residential premises of European type, which building was not to be used other than as a private dwelling house. When the purchaser applied for a declaration that he was entitled to erect a block of flats on the plot, Trainor J ruled that a building containing a

126 In *Pandix Ltd v Hui Kam Kwei* [2010] HKCU 2202 (unreported, LDOS 4000/2009, 14 October 2010), HH Dty Judge Lui observed that the words 'private dwelling house', 'residential use' and 'domestic use' carried the same meaning.

127 [1973] HKLR 582, [1973] HKCU 50.

number of flats would be in breach of the condition that no building should be used otherwise than as a private dwelling house, since to permit the house to be used as of right by several persons in different tenements would put an end to the condition of privacy.¹²⁸ Similarly, in *Loi Po Investment Co Ltd v Real Reach Co Ltd*,¹²⁹ the court held that, where the Government lessee had covenanted not to erect more than one residence on the land, the erection of a six-storey block of flats would amount to a breach of the covenant on the grounds that a block of flats includes more than one residence.¹³⁰ To similar effect in *Jasmin Enterprises Ltd v Chan Yuk Hon*,¹³¹ Sakhani J held that a restrictive covenant in a Government lease which stipulated that 'no building should be erected other than two houses of a European type' had been breached where one 22-storey building had been erected on the site.

[2-86] The Court of Final Appeal was called upon in *Fully Profit (Asia) Ltd v Secretary for Justice*¹³² to construe the meaning of the word 'house' in a restrictive covenant in a Crown lease which required the owner 'not to erect more than one house' on a plot. The Court of Appeal had ruled that the developer was not prohibited from building a multi-storey building on the lot. On further appeal, Ma CJ first noted that the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society*¹³³ and the Court of Final Appeal in *Jumbo King Ltd v Faithful Properties Ltd*¹³⁴ had emphasised the importance of context when construing contractual terms. It was particularly helpful to refer to the 'ordinary and natural meaning' of the words used and the word 'house' was a good example where there was no ordinary and natural meaning. The court had already said in *Wah Yick Enterprises Co Ltd v Building Authority*¹³⁵ that 'a search for a free-standing meaning of the word "house" valid for all times and in all

128 See also *Rogers v Hosegood* [1900] 2 Ch 388 (the restrictive covenant provided that 'no more than one dwelling house ... should at one time be erected ... and that such message should be adapted for and used as and for a private residence only'; the court held that a large building to be used as 30 or 40 dwellings could not be used as a private dwelling house and breached the terms of the restrictive covenant); *Incorporated Owners of Hamilton Mansion v Yu Kiem Chiu* [1998] 1 HKLRD 62, [1998] 1 HKC 112 (the user covenant in deed of mutual covenant prohibited use of the flats for any purpose other than private residential purposes. Two flats were operated as guesthouses and one as a photographer's studio in which a member of the photographer's staff resided; incorporated owners sought an injunction; the court held that the test of whether a dwelling was being used as a private residence was whether it could be described as a private residence of someone who resided there. In applying this test the use of the whole flat must be considered: *C & G Homes v Secretary of State for Health* [1991] Ch 365. The meaning of 'house' in the context of construing the Outline Zoning Plans was considered in *Wah Yick Enterprises Co Ltd v Building Authority* (1999) 2 HKCFAR 170, [1999] 1 HKC 580 (see Ch 3 at para [3-30]).

129 [1986] 4 HKLR 643, [1986] HKCU 197.

130 In *Hang Wah Chong Investment Co Ltd v Attorney General* Civ App No 84/1978, Huggins J ruled that a block of flats was not a detached or semi-detached dwelling.

131 [1998] 4 HKC 224.

132 (2013) 16 HKCFAR 351.

133 [1998] 1 WLR 896 (HL) at 912-913.

134 (1999) 2 HKCFAR 279, [1999] 3 HKLRD 757.

135 (1999) 2 HKCFAR 170, [1998] 2 HKC 125, per Litton PJ.

circumstances was fruitless'. Similarly, in *Annicola Investments Ltd v Minister for Housing and Local Government*¹³⁶ Lawrence J had said at 640 that the word had a 'distinct fluidity of meaning and that it is best construed in relation to the context in which it is found'. In context it was clear that the word 'house' as used in the Government lease had to have reference to the characteristics of those houses which were actually standing at the time the Government leases were granted and it was clear from the context that the building proposed to be built was not a 'house' for the purpose of the restrictive covenants.¹³⁷

[2-87] The court was called upon to construe the word 'villa' in *TS Cheng & Sons Ltd v Attorney General*,¹³⁸ where the Crown lease required the owner to build 'one or more villa residences only' on the land demised. Macdougall J held that a multi-storey block of flats was not a villa, although acknowledging that many multi-storey developments in Hong Kong were given the name 'Villa'.¹³⁹

[2-88] The Government lease might also lay down restrictions governing such matters as height. For example, in *Kwong Lin v Chan Kam Ming*,¹⁴⁰ the Government lease restricted the building to be erected to 'three storeys' and the court held that a car-port above ground constituted a storey.

10.5.2 Number of buildings permitted to be constructed on lot

[2-89] The courts have also been called upon to construe restrictive covenants in order to decide whether they limit the number of houses that can be constructed on a plot of land. In *Crest Nicholson Residential (South) Ltd v McAllister*¹⁴¹ a restrictive covenant provided that the purchaser 'shall not use the premises for any purposes

136 [1968] 1 QB 631.

137 This judgment caused concern amongst developers and owners who had respectively constructed and owned units in high-rise buildings which had apparently been constructed in breach of the interpretation of the 'house' restriction enunciated by the Court of Final Appeal. The Lands Department has assured developers and owners that the Department will only apply the judgment to future developments. Subsequently, the Lands Department issued Practice Note No 3/2000A which applies where the Government lease or Conditions of Grant contain a 'house' restrictive covenant. The Note first points out that the Court of Final Appeal had ruled in its judgment that the meaning of the word 'house' had to be taken to mean the type and characteristics of any house existing on the lot concerned at the time the Government lease was entered into. Therefore, when considering building plans submissions where a house had existed on the lot at the time when the Government lease had been granted, the Lands Department would make reference to the type and characteristics of this house and any building proposal not in accordance with the type and characteristics of such a house, particularly as to height, would not be permitted under the 'house' restriction and a lease modification would be required.

138 [1986] HKC 607.

139 The court also rejected the developer's argument that once a villa had been erected within one year from the date of grant, the covenant had been fulfilled and was spent of effect.

140 [1959] 2 HKLR 133, [1959] HKCU 20.

141 [2002] EWHC 2443, [2003] 1 All ER 46 (Ch).

other than those of or in connection with a private dwelling house'. Neuberger J held that only one private dwelling house could be erected on the site. On appeal (see [2004] EWCA Civ 410, [2004] 2 All ER 991) the Court of Appeal did not find it necessary to address the construction of the restrictive covenant, since they held that the benefit of the covenant had not been annexed to the land. In *Martin v David Wilson Homes Ltd*¹⁴² however, the Court of Appeal disagreed, saying that Neuberger J had been wrong. In the latter case a restrictive covenant required the owner 'not to use or permit or suffer any buildings to be erected thereon or on any part thereof to be used for any purpose than as a private dwelling house'. A developer acquired the plot and began the construction of 24 dwelling houses on the land. At first instance the court held that the words 'a private dwelling house' meant no more than one building could be constructed on the plot. The Court of Appeal disagreed holding that the indefinite article 'a' restricted the manner of use, not the number of buildings. The indefinite article in this context did not carry the necessary connotation of singularity. The view of Neuberger J in *Crest Nicholson Residential (South) Ltd v McAllister* (see above) that the indefinite article 'a' connoted some form of singularity could not be accepted in the context in which it had been used.

10.5.3 Restrictive covenant not 'spent' when building constructed in compliance with covenant

[2-90] It is clear that a restrictive covenant will not be 'spent' when a building has been constructed in compliance with the covenant. This topic is dealt with in greater detail below.¹⁴³

10.5.4 Nature of use of premises

[2-91] Alternatively, the Government lease provisions might contain a condition as to the nature of the use of the premises.

10.5.5 'Residential' use

[2-92] In *Donald W Shields (No 2) v Mary Chan*,¹⁴⁴ where the Government lease contained a term that the premises were to be used as private and domestic premises only, the tenant used one room of the premises as an office for Oxfam and the landlord contended that this was a breach of the user restriction. The Full Court held that the occasional use of one room in the premises for dealing with correspondence in connection with the tenant's employment did not destroy the residential character of the premises and did not amount to a breach of covenant in the Government lease. By contrast in *Attorney General v Lo Hoi-ming*,¹⁴⁵ where the Government lease provided that the premises were only to be used for private residential purposes and the tenant used the basement floors as a commercial car park for the parking and storage of vehicles as part of the tenant's business

¹⁴² [2004] EWCA Civ 1027.

¹⁴³ At [2-115] et seq.

¹⁴⁴ [1972] HKLR 121, [1972] HKCU 10.

¹⁴⁵ [1965] 4 HKLR 1152, [1965] HKCU 104. See also [1965] HKLR 270, [1965] HKCU 29.

enterprises, the court held that such was a breach of the covenant as to private¹⁴⁶ residential user. Specific restrictions on type of residential use.

[2-93] The Government lease or Conditions might include a more specific restriction on the type of permitted user by prohibiting certain types of user. For example, in *The World Apartments v Lai Bun*¹⁴⁷ the Conditions prohibited the use of premises as a boarding house and the court held that the provision of food and accommodation on the premises would breach this restrictive covenant. 'User' may also be restricted to that of a 'dwelling house.' In *Park Kit Investment Ltd v Cheung Wan Ping*¹⁴⁸ Sakhrani J was called upon to decide whether the use of premises restricted to a dwelling house was breached when the premises were used as a care home for the elderly. The learned judge concluded that the restrictive covenant had been breached since food was provided to the residents. Similarly, in *Aberdeen Shopping Plaza Ltd v Incorporated Owners of Aberdeen Ka Ning Mansion*,¹⁴⁹ where the use of premises as a boarding house was prohibited, Suffiad J held that use of the premises as an old age home constituted a breach. Use of premises as a nursing home was also held to constitute a breach of a restrictive covenant prohibiting the premises being used as a boarding house in *Winland Finance Ltd v Profit Fine Ltd & Anor*.¹⁵⁰ An unusual user restriction was construed by the court in *La Salle Court Co-operative Building Society Ltd v HA Stewart*,¹⁵¹ where the Government lease provided that the land conveyed could not be used for any purpose other than the erection of flats for local civil servants and provided for re-entry by the Government on the breach of this condition. The defendant, who was a civil servant, became a tenant but subsequently resigned from Government service. The owner requested him to move but he refused on the grounds that there was no such condition in his tenancy agreement. The court held, inter alia, that the tenancy agreement must be read as including, by necessary implication, a provision that on ceasing to be a civil servant, the defendant would give up possession of the premises.

10.5.6 'Industrial or Godown' use

[2-94] Many Government leases restrict the use of land to industrial or godown purposes. A godown is a building used for storage of goods in transit by road, rail,

¹⁴⁶ As to the meaning of 'private' purposes, see the decision of the Court of Appeal in *C & G Homes v Secretary of State for Health* [1991] 2 WLR 715 – use of premises as residence for mental patients held not to be private user. A consistent conclusion was reached by the English Court of Appeal in *Caradon District Council v Paton*, The Times, 17 May 2000. A restrictive covenant provided that property was not to be used 'otherwise than as a private dwelling house' and the Court held that the occupation of the property by paying tenants for short periods by way of holiday lettings breached the covenant. Latham LJ said that what was required to amount to use of property as a private dwelling house was any degree of permanence together with an intention that it should be a home, albeit for a relatively short period and not just for the purposes of a holiday.

¹⁴⁷ [1962] HKDCLR 97.

¹⁴⁸ [1998] HKCU 2101 (unreported, HCA 5349/1998, 23 November 1998).

¹⁴⁹ [2003] HKCU 533 (unreported, HCA 9319/2000, 13 May 2003).

¹⁵⁰ [2006] 1 HKC 582.

¹⁵¹ [1966] HKLR 449, [1966] HKCU 45.

air or sea. The meaning of the term 'industrial purposes' was considered in *Mexx Consolidated (Far East) Ltd v Attorney General*,¹⁵² where the leaseholder had used the premises for research, design, development, testing and manufacture of sample clothing, although the majority of garments were manufactured elsewhere. The Government alleged the premises were being used not for industrial but for commercial purposes and demanded a forbearance fee in respect of the alleged breach. The court held that the appropriate test was whether, taking an overall view of the processes carried out at the premises, the primary use of the premises was industrial. It was clear that the research, design and testing functions were merely successive stages in one continuous industrial process and the covenant had not been breached.

[2-95] The same restriction was considered in *Cavendish Property Development Ltd v Attorney General*,¹⁵³ where Liu J held that the use of 'industrial premises' as a data processing centre for banking constituted a breach of the Government lease.

[2-96] The scope of industrial user was considered by the Court of Final Appeal in *Raider Ltd v Secretary for Justice*.¹⁵⁴ The plaintiff owned property in Kowloon whose use was restricted in the Conditions of Sale to industrial purposes. The Conditions further provided that no building could be erected on the lot except a factory and ancillary offices. The plaintiff was involved in the telecommunications industry designing, manufacturing and selling paging devices. Part of the premises was used as a paging centre for the transmission of public and private information and office services in connection with the manufacture and use of the pagers and the Government insisted upon a waiver fee on the grounds that these were not industrial uses. On application to the court by the plaintiff for a declaration that the use of the premises did not breach the designated industrial user, the Court of Final Appeal rejected the application. As to the meaning to be attached to the word 'industrial', Bokhary PJ pointed out that the meaning of the word could not be divorced from the context in which it was used. In this case the word 'industrial' was used in the context of the plaintiff being forbidden to erect any building other than a factory on the lot. The definition of a factory in the Factories and Industrial Undertakings Ordinance (Cap 59), whilst not strictly relevant to the case, provided, inter alia, that a factory meant any premises in which articles were manufactured, altered, cleansed, repaired, ornamented, finished, adapted for sale, broken up or demolished or in which materials were transformed. The paging service was clearly not one falling within this definition. The learned judge concluded that the user was not industrial. Nor did the provision of a paging service constitute the final stage of the manufacturing process of the pagers. The final issue was whether the provision of a paging service was ancillary to their manufacture. Although the design and testing prior to the manufacture of goods and the packing and dispatch from the factory of goods subsequent to their manufacture might properly be considered to be ancillary to their manufacture, the provision of a paging service was not ancillary to the manufacture of the pagers.¹⁵⁵

152 [1987] 6 HKLR 1210, [1987] HKCU 252.

153 (unreported, HCMP 762/1987, 6 August 1988) (HC).

154 [2000] 3 HKLRD 300, [2000] 4 HKC 25 (CFA).

155 A breach of a covenant restricting user of premises to industrial use was also found in *Incorporated Owners of Wing Ming Industrial Centre v Mantex Supplies Co Ltd & Ors* [2007] HKCU 1658 (unreported, HCA 1505/2007, 3 October 2007) where

[2-97] Rather unusual issues had to be resolved in the context of a covenant restricting use to industrial purposes by Deputy Judge Carlson in *Regency Power Enterprises Ltd v SCS Express International Ltd*.¹⁵⁶ The plaintiff was the owner of a building in Kowloon in respect of which the Government lease included a restrictive covenant requiring the premises to be used only for industrial purposes. The plaintiff let the premises to the defendant on a three-year lease which contained a provision that the tenant would abide by the terms of the Government lease and deed of mutual covenant. The premises had been used by the previous tenant for his logistics business and this was the intended user of the defendant. This fact was known to the plaintiff at the time the parties entered into the lease. It was agreed by the parties that a logistics business constituted commercial rather than industrial use. The tenant moved in and commenced operating his logistics business from the premises, but the District Lands Officer, having inspected the premises, wrote to the plaintiff threatening to re-enter the premises unless the offending user were terminated. Faced with this threat of re-entry, the plaintiff applied for an interlocutory injunction to restrain the defendant from continuing to use the premises for a commercial purpose. The defendant contended that the plaintiff should not be granted the injunction sought (it was not just and convenient to do so) since the plaintiff knew of the intended user of the defendant at the time the parties had entered into the lease and the rent payable reflected the commercial rental value of the premises rather than the industrial rental value. The learned judge held that, although he felt considerable sympathy for the defendant, the court could not just stand by and permit the continuing breach of a Government lease. There had been fault on both sides, although the greater fault rested with the plaintiff. He knew of the restriction in the Government lease and yet willingly entered into the lease with the defendant knowing that such intended use would breach the Government lease. The defendant, however, also knew of the restriction (or should have known of it since the Government lease was a public document) and signed a lease agreement containing an express provision that he would comply with the Government lease. The injunction would, accordingly, be granted.

10.5.7 Agricultural user

[2-98] Whether the terms of a New Grant restricted the permitted use of land in the New Territories to agricultural use was at issue in *Splendid Resources Inc v Secretary for Justice*.¹⁵⁷ More specifically the question for determination was whether concrete slabs under which were subterranean chambers for use as a columbarium could be constructed on two plots of land on Po Toi Island. Land A had been advertised for sale by public auction 'as an agricultural lot' and had been assigned by way of a New Grant to the original grantee in 1932. The New Grant prohibited the construction of 'any building or structure of any description on the premises without approval'. There was also a positive requirement in special condition 1(b) which imposed on the grantee a duty 'to actively cultivate the land'. Land B was held under a Block Government lease

Chu J held that the use of the premises by a tenant as a Chinese Medical Clinic and a showroom for babies' clothing breached the restrictive covenant.

156 [2010] 3 HKC 262.

157 [2017] 2 HKLRD 421, [2017] 2 HKC 570.

4.2 Sale and purchase agreement may be silent as to title

[5-19] Where the contract is silent on the point of title, there is no doubt that the vendor is likewise contractually obliged to give a good title and it has long been recognised that such an obligation arises by way of an implied term in the sale and purchase agreement.¹⁶ Litton PJ supported this view in *De Monsa Investments Ltd v Whole Win Management Fund Ltd*¹⁷ when he said:

[The sale and purchase agreement] says nothing about giving good title to the buyer at completion. But, to make the contract work, that is an obligation which is necessarily implied.

4.3 Sale and purchase agreement might expressly exclude or limit vendor's obligations in relation to giving of title

[5-20] Subject to what is said below about the position where the purchaser has already entered into a binding preliminary agreement, the vendor is at liberty to incorporate into the formal sale and purchase agreement a special term precluding any objection by the purchaser to a particular defect and, provided such term is not misleading, and subject to what is said below about the construction of limiting clauses, the purchaser will be bound by such a term. As Simonds J has said in *Re Holmes (W & R) and Cosmopolitan Press Ltd's Contract*:¹⁸

The vendor can, by appropriate provisions in a contract, enormously safeguard himself against any undue trouble to which he might be put by inquiries about facts which took place some time ago.

[5-21] The right to limit the title to be given is a most important option available to the vendor which, it is suggested, is not adequately utilised in Hong Kong. Indeed, the proper use of appropriate clauses in the sale and purchase agreement could in many cases have avoided the unnecessary and costly resort to litigation by way of the vendor/purchaser summons. For its proper use, it is essential that the vendor's solicitor checks the title of his client thoroughly before a binding contract is entered into, although this is, of course, impossible where the client has already entered into a binding provisional agreement before he seeks legal assistance (see below). In the words of Godfrey J in *Active Keen Industries Ltd v Fok Chi Keong*:¹⁹

It would make the practice of conveyancing much easier in Hong Kong if those instructed to act for vendors could be brought to realise that it is in their own interests, and their clients' interests, to consider for themselves, as soon as

16 In the words of Romer LJ in *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110, 132: 'If no interest is mentioned [in the memorandum of agreement], then prima facie an unencumbered freehold interest will be implied.'

17 [2013] 5 HKC 350 (CFA).

18 [1944] Ch 53, 57.

19 (unreported, HCMP 3761/1992, 31 December 1992) (HC).

they are instructed, what matters may come to the notice of a purchaser when his solicitors investigate the title. ... Forewarned is forearmed. If the vendor's solicitor investigates his client's title with the same care that he would adopt if he were investigating the title on behalf of the purchaser, many if not most of the problems which arise in these vendor and purchaser summonses could easily be avoided.

[5-22] It is essential, therefore, that this evaluation is carried out before a binding agreement is entered into. If the vendor's solicitor finds that his client's title is defective, the appropriate solution is to insert a suitably drafted provision in the sale and purchase agreement bringing the defect to the attention of the purchaser and providing that the purchaser accepts the title notwithstanding the defect.

4.4 Position where parties are already bound by preliminary sale and purchase agreement

[5-23] What is the position where the vendor has already entered into a binding preliminary sale and purchase agreement before consulting his solicitor? In such a case, where the vendor has in the preliminary agreement – assuming it to be binding – agreed to give good title or, indeed, where that agreement is silent on title, the insertion of such an excluding or limiting provision will only be possible where the purchaser consents to its inclusion in the formal agreement.²⁰ Of course, the purchaser is entitled to make his consent conditional upon a renegotiation of the price in his favour. This was made clear by Deputy Judge Ribeiro in *Chu Wing Ning v Ngan Hing Cheung*²¹ where he concluded, following *Link Brain v Fujian Finance Co Ltd*,²² that, if the purchaser refuses to agree to the insertion of such a limiting provision, the parties continue to be bound by the provisional agreement which can be enforced as an open contract. Further, as Deputy Judge Ribeiro pointed out, to press such a term on an unwilling purchaser might constitute repudiation of the contract by the vendor.

[5-24] A clear illustration of this principle is found in *DH Shuttlecocks Ltd v Keung Shiu Tang*,²³ where a vendor entered into a binding provisional agreement with the purchaser, agreeing therein to give good title to the property. The vendor subsequently inserted into the draft formal sale and purchase agreement a clause which provided that the purchaser should raise no objection or requisition as to a power of attorney under which the vendor stated he was selling the property. The purchaser refused to agree to the amendment being made and, when the vendor insisted, refused to sign the sale and purchase agreement. The vendor wrote to the effect that he treated this as repudiation of the provisional agreement and the purchaser sued for specific performance of the provisional agreement. Rhind J concluded that, had the purchaser's solicitors agreed to this amendment, this could have been highly prejudicial to their client in the event of the revocation of the

20 The same principle applies to the insertion of a fresh term by the purchaser – see, for example, *Mak Lai Man v Lam Siu Yiu Peter* [1993] 1 HKC 452.

21 [1992] HKCU 283 (unreported, HCA A9409/1991, 6 November 1992).

22 [1990] 2 HKLR 353, [1990] 1 HKC 46.

23 [1994] 1 HKC 286.

power of attorney. Insistence by the vendor on the inclusion of this new provision constituted a breach of the conditions implied by the Conveyancing and Property Ordinance whereby the vendor had agreed to show a good title. The vendors had wrongfully attempted to rescind the provisional agreement and judgment was entered for the purchaser. Rhind J's decision was upheld by the Court of Appeal. Godfrey JA made it clear that a party will not be construed as repudiating a contract by strictly insisting upon the terms of the provisional agreement. In this case, the purchaser had simply insisted upon his rights under the provisional sale and purchase agreement and the agreement had been repudiated, not by the purchaser, but by the vendor.

4.5 Construction of excluding or limiting provisions

[5-25] It will be a matter of construction whether a particular exclusion or limiting clause will be binding on a purchaser. There are two distinct, but inter-related, issues here. First, to be effective the exclusion or limiting clause must be drafted with sufficient width and clarity to limit the title that the vendor is required to show and give. Secondly, the courts may decide that the exclusion or limiting clause does not, as a matter of construction, extend to protect the vendor, notwithstanding the ambit of the words used, on the grounds that the purchaser has been misled. Where, for example, the vendor has knowledge of a defect in title,²⁴ but the purchaser does not share such knowledge, the courts are unlikely to conclude that the limiting clause is effective as against the purchaser. This means that, where a vendor has actual knowledge of a defect in his title, he is well advised to ensure that the defect is brought to the attention of the purchaser either in the sale and purchase agreement or before the agreement is concluded.

[5-26] The leading authority on the effect of clauses of this nature is that of the Court of Final Appeal in *Jumbo King Ltd v Faithful Properties Ltd*,²⁵ which confirmed the importance of properly construing limiting clauses. Of greater significance, perhaps, is that the decision makes it clear that it is not in every case that a purchaser can ignore a limiting clause on the grounds that the vendor has not made full disclosure of all title defects. The court held that, whether a purchaser can rescind on the grounds of an unauthorised structure or other title defect notwithstanding a limiting clause in the sale and purchase agreement, will depend upon the particular circumstances of the case. In *Jumbo King* the limiting clause had been drafted in very wide terms providing that the vendor did not warrant or represent that each and every structure was erected in all respects in compliance with the Buildings Ordinance (Cap 123) or its subsidiary legislation and the vendor would be under no liability whatsoever if it were discovered at any time (whether before or after completion) that there was any structure in contravention of the Buildings Ordinance or subsidiary legislation. Nor would the vendor be held responsible for the demolition or removal of any structure or the costs or expenses incidental thereto, whether such works were required by the

24 Knowledge may extend to constructive knowledge – ie defects of which the vendor should have been aware: *Becker v Partridge* [1966] 2 QB 155.

25 (1999) 2 HKCFAR 279, [1999] 3 HKLRD 757, [1999] 4 HKC 707.

Building Authority or otherwise. Nor would the purchaser be entitled to raise any requisition or objection in respect of any unauthorised structure or to rescind or annul the sale or to claim compensation or damages from the vendor by reason of any such contravention. Further, the purchaser was deemed to have inspected the property and he declared that he was purchasing the property in its present state. Finally, no warranty was given in respect of the property, which was sold on an 'as is' basis. There were some allegedly unauthorised structures (cocklofts) on the premises and the purchaser, on this ground, rescinded the contract. The purchaser then commenced suit for the return of its deposit. The Court of Final Appeal held first that the limiting clause was sufficiently wide in its ambit to preclude the purchaser from objecting to the vendor's title. Secondly, the Court held that, since both the vendor and purchaser must have been well aware of the possibility that some or all of the cocklofts were unauthorised structures, the purchaser had not been misled and had no grounds for objection. Counsel for the purchaser had contended that the vendor could not rely upon the limiting clause in the sale and purchase agreement because the unauthorised structure had not been expressly brought to the purchaser's attention before the contract had been concluded. In answer to this contention Lord Hoffmann elucidated the proper approach of the courts to limiting clauses of this nature:

[Counsel for the purchaser] submitted that there was a rule of equity which prevented a vendor, as a matter of law, from relying on such clauses in a case in which he knows or ought to know of a defect in title. I think that is putting the matter far too broadly. Contracts for the sale of land are not exceptions to the principle that parties have freedom of contract and may agree to whatever terms they like. What the cases show is that the courts will be very reluctant to construe such a term as enabling the vendor to mislead the purchaser. As stated in *Farrand, Contract and Conveyance* (4th Ed) 93, such conditions are 'subject to the overpowering principle that the vendor must not mislead the purchaser in any way; this means that a sufficient indication of the risk must be given before the contract is made'. This may be said to leave it unclear whether the 'overpowering principle' is an aid to construction of the contract or something which operates outside the contract. It probably does not matter, although for my part I think it is better regarded as a matter of construction. Thus it is inconceivable that a term will be construed as enabling a vendor to impose upon a purchaser a serious defect in title of which he actually knew. No purchaser would sign a contract which was bare-faced enough to stipulate expressly that the vendor need not disclose serious defects in title of which he had actual knowledge and, even if there was no objection on grounds of public policy, nothing less than the most express language would do. On the other hand, the position is different if the vendor did not actually know of the defect but had the means of knowledge, or if the matter was technically a defect in title but something which a purchaser might reasonably be prepared to accept. Prima facie, it is the duty of the vendor to deduce and then convey a good title and if he relies upon the terms of the contract to shift the risk of any defect in title to the purchaser, the language must clearly do so. As Farrand says, the question is whether the purchaser would have been aware of the risk he was being asked to take. So, for example, general words which did not identify any specific defect in title have been held inadequate to protect the vendor against liability for a serious defect which he could easily have discovered: *Becker v Partridge* [1966] 2 QB 155. In the present case, however, the language [of the limiting clause] was entirely apt to cover the cocklofts.

No one who had read the clause and saw the cocklofts could have failed to appreciate that he was being asked to bear the risk that they were unauthorised structures. The language seems to me perfectly clear. And therefore, in the absence of any evidence that the vendor actually knew that they were unauthorised, the purchaser was in my opinion bound by the clause.²⁶

[5-27] Litton PJ agreed, saying:

There are undoubtedly cases in the books where a clause restricting inquiries into the title offered by the vendor was held not to be a bar to rescission when the purchaser discovered from other sources that the proffered title was worthless; *Becker v Partridge* [1966] 2 QB 155 ... was such a case. Whether the court gives relief to the purchaser in such circumstances is a matter of the proper construction of the contract – reading into the contract an implication that in such extreme circumstances the restriction was not meant to apply – or whether it is the application of some principle of equity which empowers the court to moderate the harsh terms of the contract: these are interesting points but academic in this case ... [the limiting clause] is clear. Nothing said by counsel for the purchaser persuades me that the lower courts were wrong in concluding that it applied to make the objections raised by the purchaser ineffective.²⁷

[5-28] It is clear, therefore, that, in order for the vendor to be able to rely upon a limiting clause in the sale and purchase agreement, he must not mislead the purchaser. This means that he is well advised to disclose to the purchaser any defect in title of which he is aware and of which the purchaser is unaware, either actually or constructively.²⁸ In applying this principle, the knowledge of the vendor's solicitor will be imputed to the vendor.²⁹

[5-29] Chung J has made it clear in *Billion Profit Enterprises Ltd v Global Fly Development Ltd*³⁰ that the rule of equity in which a limiting provision in a sale and purchase agreement cannot be relied upon in the absence of full disclosure of defects by the vendor only applies where those defects are either actually unknown to the purchaser or are of such a nature that the purchaser would not have been aware of their existence. There is no duty of disclosure, however, where the defects are of such a nature that the purchaser ought, by the exercise of due diligence, to have been aware of their existence. In that case the plaintiff agreed to sell property

26 [1999] 3 HKLRD 757, 776, [1999] 4 HKC 707.

27 [1999] 3 HKLRD 757, 772, [1999] 4 HKC 707.

28 See further *Nottingham Patent Tile and Brick Co v Butler* (1885) 15 QBD 261, (1886) 16 QBD 778 (a limiting clause does not relieve the vendor from the necessity of disclosing any encumbrance or liability of which he is aware, but simply protects him if it should afterwards turn out that the property was subject to some burden or right in favour of third parties of which he was unaware); *Rignall Developments Ltd v Halil* [1988] 1 Ch 190, [1987] 3 All ER 170 (vendor aware of defect which he had failed to disclose to purchaser); *Wah Ying Properties Ltd v Sound Cash Ltd* [1994] 1 HKC 786 (vendor had failed to draw attention of purchaser to potential liability of which vendor was aware); *Modern Sino Ltd v Art Fair Co Ltd* [1999] 3 HKLRD 847, [1999] HKCU 1770 (vendor must have been aware of the unauthorised structures; see further discussion of this case at [5-229] below).

29 *Rignall Developments Ltd v Halil* [1988] 1 Ch 190, [1987] 3 All ER 170.

30 (unreported, HCA 712/1999, 4 August 1999).

to the defendant. The occupation permit prescribed 'office use' for the building but two floors of the building were used as a karaoke bar and night club. There were limiting clauses in the sale and purchase agreement whereby, inter alia, the vendor was exempted from liability if it were discovered after completion that the use of the building was a non-permitted user; further the agreement stated that the purchaser purchased with full knowledge of the physical condition of the property. It was also stated that the purchaser should rely upon his own inspection and survey and would not be entitled to rescind on the ground of any unauthorised alteration or illegal structure. The purchaser contended that, according to a line of authority which included *Rignall Developments Ltd v Halil*³¹ and *Becker v Partridge*,³² the limiting clause could not be relied upon by the vendor unless he had made full disclosure of all latent defects. Chung J held that the carrying on of the karaoke business was not a latent defect. The change of use ought to have been reasonably obvious to anyone who had inspected the premises; a purchaser could not allege non-disclosure where he ought reasonably to have been alerted as to a defect such as a material change of user by exercising due diligence. In this case the existence of the limiting provisions in the sale and purchase agreement ought to have put the purchaser on notice regarding the change of user. For both these two reasons the vendor was entitled to judgment against the purchaser who had refused to complete.

[5-30] More recently, Godfrey Lam J identified the relevant test and applied it in *Long Life Chinese Health Food Ltd v Luen Fat Air Condition (HK) Trading & Engineering Co Ltd*.³³ In this case the vendor had agreed in 2012 to sell its ground floor property to the purchaser. The provisional sale and purchase agreement contained, inter alia, clause number 2E which provided: 'The purchaser and its legal representatives shall not raise any requisition on title ... by reason of the existing state of the property ...'. Further clause 7 provided: 'Subject to the other conditions contained in this Agreement, the vendor shall give good title to the Property ...'. At issue was a notice from the Building Authority dated 2007 requiring a frame supporting a cooling tower to be demolished within 30 days. The notice had been registered in the Land Registry. The purchaser raised a requisition as to whether this notice had been complied with, but the vendor responded that, relying upon clause 2E of the agreement, it was not obliged to answer the requisition. The learned judge first noted that the notice constituted an encumbrance on the property. He then considered the relevant case law including *Rignall Developments Ltd v Halil*,³⁴ *Wah Ying Properties Ltd v Sound Cash Ltd*³⁵ and *Jumbo King Ltd v Faithful Properties Ltd*.³⁶ He also noted that the Court of Final Appeal had said of similar exclusion clauses in *Chi Kit Co Ltd v Lucky Health Enterprise Ltd*.³⁷

31 [1988] 1 Ch 190, [1987] 3 All ER 170.

32 [1966] 2 QB 155.

33 [2015] 3 HKLRD 511, [2015] HKCU 1379.

34 [1988] 1 Ch 190, [1987] 3 All ER 170.

35 [1994] 1 HKC 786.

36 (1999) 2 HKCFAR 279, [1999] 3 HKLRD 757, [1999] 4 HKC 707.

37 (2000) 3 HKCFAR 268, [2000] 4 HKC 143.

Clauses of this kind have not been regarded as compelling a purchaser to accept a defective title where the vendor has failed to disclose defects of which he was aware (*Becker v Partridge*³⁸). This result has been attributed to a rule of law which overrides the contractual provision. But the preferable view expressed by Lord Hoffman NPJ (with whom Li CJ and Nazareth NPJ concurred) in *Jumbo King Ltd v Faithful Properties Ltd*³⁹ is that the question is one of construction of the relevant contractual provision.

[5-31] The matter would, accordingly, be approached as a matter of construction of the exclusion clause. Authorities showed that, in construing a sale and purchase agreement, the court should lean heavily against an interpretation that would enable the vendor to mislead the purchaser or would impose a defect in title on the purchaser of which the vendor was aware but which he failed to disclose. There was no evidence that the purchaser knew of the demolition order and the fact that the order had been registered which might, therefore, give constructive notice to the purchaser had not been pursued. As a matter of construction, the plaintiff was, accordingly, not precluded from raising the requisition which had to be answered by the vendor.

[5-32] More illustrations of the application of these principles in the context of unauthorised structural building works are set out below.

4.5.1 Limiting clauses in respect of unauthorised building works

[5-33] The principles set out above may be usefully illustrated further by considering their effectiveness in the context of unauthorised building works. Vendors frequently insert limiting clauses into their sale and purchase agreements seeking to exclude or restrict their liability in the event of an unauthorised structure being found on the property. Of course, the exact wording of these clauses differs from case to case. A common clause inserted into sale and purchase agreements in relation to unauthorised structures on the premises to be sold is that the purchaser has inspected the property and accepts the existing physical state and condition of the property and will not raise any objection or requisition in connection therewith. Of course, if the vendor has actual knowledge that there is an unauthorised structure on the premises to be sold, he should identify the unauthorised structure either in the sale and purchase agreement or before the agreement is entered into.

[5-34] As we have seen above, the leading authority on the effect of clauses of this nature is that of the Court of Final Appeal in *Jumbo King Ltd v Faithful Properties Ltd*.⁴⁰ A clear example of the proper approach to limiting clauses in this context is the decision in *Modern Sino Ltd v Art Fair Co Ltd*.⁴¹ In this case there was an unauthorised structure on the vendor's premises and the limiting clause in the sale and purchase agreement provided that the purchaser had inspected the property and was fully satisfied with and accepted in all respects the existing

38 [1966] 2 QB 155 at 171, per Dankwerts LJ.

39 (1999) 2 HKCFAR 279 at 299, [1999] 4 HKC 707.

40 [1999] 3 HKLRD 757, [1999] 4 HKC 707.

41 [1999] 3 HKLRD 847, [1999] HKCU 1770.

physical state, condition and finishes of the property and would not make any objection or requisition thereto or in connection therewith. Further no warranty was given in respect of the physical state and condition of the property and the manner of construction of the building. Yuen J held first that the clause had not been drafted sufficiently widely to preclude the purchaser from objecting to the title on the grounds of the presence of the unauthorised structure. Secondly, concluding that the vendor must have been aware that there were unauthorised building works on the property, the learned judge held that the vendor could not rely upon such a limiting clause without having first disclosed to the purchaser the fact that there were unauthorised building works on the property.

[5-35] One significant factor in deciding whether or not the exclusion or limiting clause will be effective is the degree of expertise or sophistication expected of the purchaser. A sophisticated property speculator will be expected to be much more aware of likely unauthorised structural building works than a first-time flat purchaser. This principle is clearly illustrated in *Ip Kam Wah v Fair City Group Ltd*.⁴² A purchaser, who was acting for a professional speculator, entered into several provisional sale and purchase agreements to buy houses in Hong Lok Yuen. The agreements contained no express term that the vendor would give and show good title. In respect of several, but not all, of these properties the parties executed at the same time as the provisional sale and purchase agreements a separate document ('the collateral agreement') which stated:

The property shall be sold at its 'as is condition'. The vendor gives no warranty that there is no unauthorised structure or addition to or alteration to or appertaining to the Property. The purchaser confirms that he has inspected or has been afforded the opportunity to inspect the Property prior to the entering into of this agreement and shall make no objection to title and refuse to complete the purchase or otherwise make any claim for compensation in the event that there is any unauthorised or illegal addition or alteration to or structure or appertaining to the Property.

[5-36] Subsequently the purchaser's solicitor raised requisitions in respect of an unauthorised structure covering the terrace on the first floor of the property. The vendor's solicitors replied that they were not obliged to answer the requisition, but confirmed that no building approval had been obtained for the structure in question. The purchasers failed to pay the residue of the deposit. The vendor then took out a vendor and purchaser summons seeking a declaration that the purchaser had repudiated the provisional sale and purchase agreement. The purchaser argued, inter alia, that the collateral agreement was not binding as a matter of law and that he was, therefore, entitled to raise the requisition in question. One argument put forward was that the vendor was contractually bound to give and show good title and could not, therefore, rely upon a collateral agreement that contradicted this duty. The authority for this proposition was *Empire Trend Enterprises Ltd v Double Mind Co Ltd*.⁴³ Deputy Judge To distinguished *Empire Trend* on the grounds that, in that case, there had been a formal sale and purchase agreement containing an express term that the vendor would give and show

42 [2005] 4 HKLRD 168, [2005] HKCU 128.

43 [2001] 1 HKC 302.

good title. In this case there was no formal agreement and no express term. Nor could there be an implied term in the provisional agreement since the parties had made it clear in the collateral agreement, which had been entered into at the same time as the provisional agreement, that no warranty was being given in respect of any unauthorised structures. Accordingly, the collateral agreement was not inconsistent with the main agreement and did not cease to be binding for that reason. The learned judge then went on to consider whether, as a matter of construction, the limiting clause would be binding on the purchaser. The purchaser argued that it was not binding because the vendor had not made full disclosure of the unauthorised structures. The learned judge held that, although it would be good practice for a vendor to make a full list of all possible offending structures and defects in order to rely upon a limiting clause, as a matter of conveyancing law there was nothing to prevent the parties from agreeing to the sale and purchase of property with a defective or imperfect title or to agree to waive any right to raise a requisition in respect of any unauthorised works. This had been laid down by the Court of Final Appeal in *Jumbo King Ltd v Faithful Properties Ltd*.⁴⁴ What was important was that the vendor must not mislead the purchaser as to those defects since, in such circumstances, the courts would be very reluctant to enforce the limiting clause. It was, however, only a rule of construction that the courts would avoid construing a contract in such a way as to enable a vendor to mislead a purchaser. The duty to make disclosure had to be read in this light. In this case the words used in the limiting clause clearly covered the unauthorised structure on the first floor of the building. The purchaser was not a mere consumer, but an experienced dealer in real property transactions. The unauthorised structure was conspicuous on the front of the property and could not have escaped the notice of the purchaser. The purchaser had inspected the property prior to purchase and there was nothing to show that he had in any way been misled. The purchaser had, therefore, assumed the risk and had waived its rights to raise a requisition as to the structure. A declaration should, accordingly, be granted that the purchaser had repudiated the contract.⁴⁵

4.6 Common limiting provisions

[5-37] Four common categories of limiting provisions can readily be identified.

4.6.1 Purchaser's acceptance of vendor's title

[5-38] A common and effective clause would be that 'the vendor's title shall be accepted by the purchaser, who shall raise no requisition or objection thereon'. This clause does not, however, absolve the vendor from his obligation to disclose defects of which he knows or ought to know.⁴⁶ A similar condition was construed

44 (1999) 2 HKCFAR 279, [1999] 3 HKLRD 231, [1999] 2 HKC 507.

45 *Yet of Kamos Ltd v Chan Chun Chung Howard* [2005] HKCU 25 (unreported, HCA 9184/2000, 30 December 2004) where Reyes J upheld the limiting clause on the grounds that the purchaser was a 'capable adult'. The author must confess to some concern over the use of this very liberal test.

46 *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666.

more recently by the courts in *Becker v Partridge*,⁴⁷ where the court held that, in view of the vendor's constructive knowledge of defects in his title which had not been disclosed, the vendor was unable to secure specific performance of the contract and the purchaser was entitled to rescind.

4.6.2 Restriction on purchaser's right to inquire about defects

[5-39] An alternative clause to like effect would be that the purchaser is precluded from inquiring about a defect in title before a specified date, but a clause of this nature must be carefully drafted. A provision that merely restricts the purchaser's right to raise requisitions on the title deduced, does not, however, inhibit the purchaser from objecting that the title is bad if he discovers from other sources that the title is defective. Thus, he can object to a defect discovered on examination of the title deeds.⁴⁸ Again, this clause suffers from the limitation that it does not prevent a purchaser from objecting to the title on the ground of undisclosed encumbrances of which the vendor knows.⁴⁹

[5-40] A good illustration of this principle is provided in *Wah Ying Properties Ltd v Sound Cash Ltd*.⁵⁰ The vendor agreed to sell property to the purchaser inserting a limiting clause to the effect that:

the purchaser shall not raise any requisition as to the existence of any notice or order from any Government or other competent authority requiring the vendor to demolish the property or requiring repair work to be carried out in respect of the property or any part of the building ... under the provisions of the Buildings Ordinance.⁵¹

[5-41] In fact, the Building Authority had issued and registered an order requiring remedial work to be carried out to the property and the court held that the limiting clause was ineffective since the vendor had not drawn the attention of the purchaser to this potential liability of which the vendor was aware.

4.6.3 Vendor contracts to sell only such title as he holds

[5-42] The effect of this limitation was reviewed by the court in *Goold v Birmingham, Dudley and District Bank*,⁵² where the vendor had contracted to sell only such right or interest, if any, as he had, and the court held that the vendor was, nonetheless, bound to convey such interest free from any undisclosed encumbrance of which he had notice. A further illustration is *Nottingham Patent Tile and Brick Co v Butler*,⁵³ where a condition in the sale and purchase agreement provided that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. Wills J ruled that such a condition did not

47 [1966] 2 QB 155.

48 *Smith v Robinson* (1879) 13 Ch D 148.

49 See, for example, *Becker v Partridge* [1966] 2 QB 155.

50 [1994] 1 HKC 786.

51 [1994] 1 HKC 786, 788.

52 (1888) 58 LT 560.

53 (1885) 15 QBD 261, (1886) 16 QBD 778.

relieve the vendor from the necessity of disclosing any encumbrance or liability of which he was aware but simply protected him if it should afterwards turn out that the property was subject to some burden or right in favour of third parties of which he was unaware.

4.6.4 Purchaser required to make assumptions

[5-43] One of the more recent examples of a clause of this nature being construed by the court is *Rignall Developments Ltd v Halil*.⁵⁴ In the contract of sale, it was expressly provided that the purchaser was deemed to buy with full knowledge of all matters which might be disclosed by search and inquiries and the purchaser was further disentitled to raise any requisition on the title. The vendor knew that the property was subject to an encumbrance, which he did not disclose, and the court held that the vendor had failed to show a good title, as the sale was subject to the rule that, if there was a defect in the title of which the vendor was aware, he could not rely upon exempting conditions, unless he made a full and frank disclosure of the existence of the title defect.

4.6.5 Sale on an 'as is' basis; 'as is' clause does not have effect as a limiting clause

[5-44] Where a vendor agrees to sell property on an 'as is' basis, the court has ruled that this provision is for the benefit of the vendor in that the vendor will have no obligation to improve the property prior to completion.⁵⁵ It cannot, therefore, be relied upon by a purchaser to prevent a vendor from demolishing unauthorised structures prior to completion.⁵⁶ Further, such a provision will not operate as an exclusion clause in respect of any unauthorised structure on the premises,⁵⁷ since the clause only extends to the physical condition of the premises and not matters of title. The same conclusion was reached in *Poon Mee Kuen v Chan Kara Tim*.⁵⁸

4.6.6 Drafting limiting clauses

[5-45] In summary, therefore, a term in the sale and purchase agreement, whatever its wording, will only be effective to limit the duty of the vendor, provided that the vendor has not misled the purchaser in any way and has disclosed any defects in the title of which the vendor is aware but the purchaser is unaware or should not be aware. Further, any such limiting provision must be clearly and unambiguously drafted since, as it curtails the purchaser's rights, it will be construed *contra proferentem* – ie against the vendor.

54 [1988] 1 Ch 190, [1987] 3 All ER 170. Cited with approval in *Giant River Ltd v Asia Marketing Ltd* [1988] 1 HKLR 297.

55 *Leung Wing Fai v Onlink Investments Ltd* [2000] 1 HKLRD 725, [1999] HKCU 1184.

56 *Summit Link Ltd v Sunlink Group (Hong Kong) Co Ltd* [2000] 2 HKLRD 724, [2000] HKCU 549; *Chan Choi Fung v Huge Base Investment Ltd* [2009] 5 HKC 380.

57 *All Ports Holdings Ltd v Grandfix Ltd* [2001] 2 HKLRD 630.

58 [2005] HKCU 78 (unreported, HCMP 1431/2004, 18 January 2005) (HC).

4.6.7 Amending covenants for title

[5-46] It will also be necessary to vary the covenants for title in the assignment in an appropriate case. For example, let us assume that the property to be sold has an unauthorised structure on the roof, which might render the title defeasible. Not only should this defect – unless perhaps patent – ideally be brought to the attention of the purchaser before the contract is executed but the covenants for title in the assignment (assuming the vendor assigns 'as beneficial owner') must also be amended, since, in such a case, the vendor covenants that he has observed the land covenants in the Government lease and deed of mutual covenant and has given an unencumbered title.

[5-47] A clear illustration of the dangers that can befall a vendor whose solicitor fails to amend the covenants for title is *Butler v Mountview Estates Ltd*.⁵⁹ The vendor entered into an agreement to sell his residual term in the lease of a house, having failed to comply with repairing covenants. The court held that the vendor was in breach of his implied covenant that all covenants contained in the lease had been observed and performed up to the date of the conveyance and that, although the landlord had waived the right of re-entry by virtue of his receiving rental payments, the purchaser was still entitled to an award of damages.

4.7 Significance of vendor's knowledge of defect in his title

[5-48] There is no implied term in sale and purchase agreements that, where a vendor expressly or impliedly agrees to give good title, he must make full and frank disclosure of all latent defects in title. Such was made clear by Chow J in *Join Union Investment Ltd v China Tree Investment Ltd*.⁶⁰ In this case the vendor had agreed to give good title to his shop but the purchaser had raised requisitions in respect of the unauthorised partitioning of the shop into four separate shops and the construction of an unauthorised cockloft. Counsel for the purchaser contended that a vendor had an implied contractual obligation to make full and frank disclosure to the purchaser of any defect in title of which the vendor was aware. In support of his contention counsel cited the words of Poon J in *Goldenwick Ltd v Standard Chartered Bank (Hong Kong) Ltd*.⁶¹

A contract for sale of land is not a contract of the utmost good faith in which there is an absolute duty upon each party to make full disclosure to the other of all material facts of which he has full knowledge. However, a vendor of land has a duty to disclose to a prospective purchaser any latent defects in title. These are encumbrances and other adverse matters of title which the purchaser could not discover for himself by inspecting the property with reasonable care; discovery

59 [1951] 2 KB 563.

60 [2016] 2 HKLRD 901, [2016] HKCU 775.

61 [2008] 3 HKLRD 266, [2008] HKCU 463.

is reasonably possible, and defects patent, only where there is some visible indication on the property of the existence of third party rights: see *Farrand on Contract and Conveyance*, 4th Edn, at p 63.91. In *Faruqi v English Real Estates Ltd* [1979] 1 WLR 963 Walton J had this to say about the duty of disclosure at p 967C-D: 'It has for a long time been the view of equity that if there is a defect in the title and the vendor knows that there is a defect ... then it is the duty of the vendor to disclose the same fully and frankly in the particulars or in the conditions, or at rate in some place where the purchaser's attention will be drawn to it.' And the test of adequate disclosure is whether an ordinary purchaser would understand what the difficulty is when reading the particulars or conditions: at pp 967D-977E

[5-49] Chow J first observed that the comment by Poon J in *Goldenwick Ltd v Standard Chartered Bank (Hong Kong) Ltd* regarding the duty of a vendor to disclose to the purchaser any latent defects in title was in the context of a vendor seeking to rely on a contractual provision limiting the title to be proved or given. The same applied to *Faruqi v English Real Estates Ltd*.⁶² In the context of a simple contract for the sale and purchase of land in Hong Kong, the vendor's duty, in general, was to prove and give a good title and it was not a defence for the vendor to say that he did not have knowledge of any defects in title at the time of the making of the contract. The issue of knowledge became relevant, however, when the vendor sought to rely on a contractual provision limiting the title to be proved or given. In such a case, the proper inquiry was whether, upon the true construction of the limitation provision, it was intended to apply to the relevant defect in title notwithstanding the vendor's knowledge of it at the time of the making of the contract: see the judgment of Lord Hoffmann in *Jumbo King Ltd v Faithful Properties Ltd*.⁶³

[5-50] The conclusion appears to be:

- (a) There is no implied term in sale and purchase agreements that, where a vendor expressly or impliedly agrees to give good title, he must make full and frank disclosure of all latent defects in title.
- (b) Where a vendor agrees to give good title, it is not a defence for the vendor to say that he did not have knowledge of any defects in title at the time of the making of the contract.
- (c) Where, however, a vendor wishes to rely upon an exclusion of limiting provision in the sale and purchase agreement, his knowledge (actual and perhaps constructive) of defects in that title may affect whether he can rely upon such an exclusion or limiting clause.
- (d) Of course, if the vendor chooses to remain silent as to a defect in his title and the purchaser discovers the defect prior to completion, the purchaser may be entitled to rescind. To this extent, the vendor takes a risk in not disclosing any defects in title of which he is aware.

⁶² [1979] 1 WLR 963.

⁶³ (1999) 2 HKCFAR 279 at 299, [1999] 4 HKC 707.

5. WAIVER BY PURCHASER OF OBJECTIONS TO DEFECTIVE TITLE

5.1 The doctrine of waiver

[5-51] Notwithstanding the fact that the vendor has only shown a defective title, the purchaser may waive any objection to such defect. Waiver has been described by Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* as:

a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him.⁶⁴

[5-52] The waiver may be express, deemed or implied. Express waiver is rare in practice and waiver will more frequently be deemed as where, for example, the purchaser agrees, as a term in the contract of sale, that he will be deemed to have accepted the vendor's title after the expiry of a stated period for raising requisitions or objections. Waiver may be implied from the conduct of the purchaser and a common example of waiver by conduct would arise where he takes possession of the property before completion with knowledge of the defects in title. As to this situation, Fry J in *Re Gloag and Miller's Contract*⁶⁵ ruled that, if the contract contains no stipulation as to possession being taken before completion, and the purchaser takes early possession with knowledge that there are defects in the title which the vendor cannot remove, the taking of possession amounts to a waiver of the purchaser's rights to require the removal of the defects or to rescind the contract.⁶⁶ By contrast, if the defects are removable,⁶⁷ the taking of possession does not amount to a waiver. Where, however, there is an express provision permitting early possession being taken, no acceptance of the title will thereby be inferred.⁶⁸

[5-53] As to whether there is an implied waiver will depend upon whether such an intention can be inferred from the purchaser's conduct. The essential preconditions that must exist before waiver can be implied were analysed by the Court of Appeal in *Peyman v Lanjani*,⁶⁹ where the court, following *Leathley v John Fowler & Co Ltd*,⁷⁰ held that, where a party was faced with a choice of whether to affirm or rescind a contract, before a purchaser's acts could amount to an irrevocable election to affirm the contract, the purchaser must, first, have had knowledge of all the facts which might give rise to the election and, secondly, must have appreciated that the law gave him the right to affirm or rescind the contract. The purchaser must, therefore, have both factual and legal knowledge before the

⁶⁴ [1971] AC 850, 882 (HL).

⁶⁵ (1883) 23 Ch D 320.

⁶⁶ Cf *Wong Kam Lan v Well Win Investment Ltd* [1995] 3 HKC 381 where Leonard J held on the facts that the taking of early possession was not conclusive evidence of acceptance of the title.

⁶⁷ Such as a mortgage entered into by the vendor.

⁶⁸ *Bolton v London School Board* (1878) 7 Ch D 766.

⁶⁹ [1985] Ch 457.

⁷⁰ [1946] KB 579.

waiver will be effective. Further, a person cannot be treated as having elected to affirm a contract, unless he has unequivocally demonstrated to the other party that he intends to proceed with it. The issue of election is, therefore, a question of fact to be decided upon the circumstances of each case.⁷¹

[5-54] The question of waiver came before the Court of Appeal in *Hillier Development Ltd v Tread East Ltd*.⁷² The vendor had agreed to sell a property to the purchaser, requisitions to be raised within five days of the purchaser receiving the title deeds. The title deeds were received by the purchaser's solicitors on 8 May and three requisitions were raised, which were answered by the vendor's solicitors on 30 May. There was no reply from the purchaser's solicitors who, on 24 July, forwarded a draft deed of assignment to the vendor's solicitors together with a letter asking in whose favour the cheque for the purchase money was to be made out. There was no mention of any unanswered requisitions. Penlington JA quoted at length from the 4th edition of *Farrand's Contract and Conveyance*, where the author said at p 130:

An implied acceptance of title depends on whether it appeared from the purchaser's conduct that he intended to waive any objections. This is a question of fact only to be determined in the light of the whole of the circumstances of the case' conduct implying acceptance of the title may take many forms (eg payment of the purchase price), two only of which are worthy of special mention. First, the submission of a draft conveyance for approval by or on behalf of the vendor is significant if not conclusive (see per Plumer MR in *Burroughs v Oakley* (1819) 3 Swanst 159, at p 171; the circumstances there were that questions arising on the title had still to be discussed; see also *Sweet v Meredith* (1862) 8 Jur (NS) 637). In practice, however, the draft conveyance very often accompanies the purchaser's requisitions, the covering letter stating that it is submitted subject to the answers being satisfactory. This time-saving device should never imply acceptance of title.

[5-55] Since, on the present facts, there was no such covering letter rendering the submission of the draft assignment conditional upon satisfactory answers being received to outstanding requisitions, the Court of Appeal concluded that any objections to the vendor's title had been waived by the purchaser.⁷³ A further illustration of waiver is *Chan Kam Hung v Light Ltd*,⁷⁴ where the court held that the submission by the purchaser of the engrossment of the assignment constituted acceptance of the title offered by the vendor. By contrast, Deputy Judge Chu held in *Guang Zhou Real Estate Development (Hong Kong) Co Ltd v Summit Elegance Ltd*⁷⁵ that the act of advertising the property for sale by the intending purchaser did not constitute a waiver of his right to object to the vendor's title since it was not uncommon in Hong Kong for purchasers to offer to re-sell properties before even any formal sale and purchase agreement had been signed and before any title documents had been delivered.

71 This test was applied in *Giant River Ltd v Asie Marketing Ltd* [1990] 1 HKLR 297, [1990] HKCU 267.

72 [1993] 1 HKC 285.

73 The same conclusion was reached in *Lai Chi On v Strong Sing Development Ltd* [1994] 3 HKC 568 (draft assignment sent to vendor for approval).

74 [1993] 2 HKDCLR 137, [1993] HKCU 658.

75 [2000] 2 HKLRD 855, [2000] HKCU 621.

5.2 Waiver in context of unauthorised building works

[5-56] There have been several cases where it has been argued that a purchaser has waived his right to object to unauthorised building works in or on the premises agreed to be sold. For example, a vendor might argue that the purchaser has waived his right to object to the vendor's title on the grounds of the existence of unauthorised building works where the purchaser knew by virtue of his inspection of the property, or ought to have known (by virtue of his right of inspection), of such works and their effect on the vendor's title before entering into the sale and purchase agreement. Similarly, in a case where the purchaser only discovered the unauthorised building works after the parties had signed the sale and purchase agreement, the vendor might still contend that the purchaser has waived his right to object by unequivocally accepting the defective title.

[5-57] The first issue to address is whether it can be inferred from the failure of a purchaser to raise a requisition as to the existence of an unauthorised structure about which he harbours suspicion that he has waived his right to object to the vendor's title. The answer is generally 'No'. It was argued in *Strong & Associates Ltd v Flywin Co Ltd*⁷⁶ that the purchaser had waived his right to object to the defect in the vendor's title because he had failed to raise a requisition as to the existence of unauthorised building works within a reasonable time. In the Court of Appeal this argument was firmly rejected by Le Pichon JA. The learned judge first pointed out that she did not agree that there was an obligation upon the purchaser to raise a requisition simply upon being informed that some building works might have been unauthorised. Any suggestion that the purchaser had a positive duty to ascertain whether or not unauthorised structures existed in the premises was wrong. The legal burden rested upon the vendor to give good title and to hold that the purchaser had an obligation to raise requisitions would effectively reverse such burden. To gain protection the vendor would have to insert a special clause in the sale and purchase agreement. On further appeal, the Court of Final Appeal agreed, holding that the purchaser had not waived its right to object to the vendor's title. Bokhary PJ pointed out that the purchaser had rejected the vendor's attempts to introduce into the formal agreement clauses which would have precluded any objection to the unauthorised structures. Further, very shortly after the architect's report on the unauthorised extensions and a month after the completion date the purchaser had raised requisitions on title by reference to the unauthorised extensions on which the architect had reported. So far as the purchaser's offer to extend the completion date by two months for the vendor to seek authorisation for the extensions, it was plain that this did not involve waiving its right to object to the unauthorised extensions. There was nothing shown which would entitle the court to conclude that the purchaser had accepted an encumbered title or had waived its right to object to the encumbrances or affirmed the contract. The appeal was, accordingly, dismissed.

76 [2002] 2 HKLRD 485, [2002] HKCU 629.

[5-58] It was similarly argued in *Billion Best (Hong Kong) Ltd v Amity Investment Co Ltd*⁷⁷ that the purchaser had waived the right to object to the vendor's title on the grounds of unauthorised building works by his failure to raise a *timely* requisition. In this case there was a clause in the sale and purchase agreement which precluded the raising of requisitions later than seven days from the date of receipt of the title deeds by the purchaser. The vendor argued that the purchaser had failed to raise any requisition as to the unauthorised building works within that seven-day period and must, therefore, be taken to have waived his right to object to the title. Deputy Judge Woolley noted that, were he to give effect to this argument, it would have the effect of shifting the risk of a defective title through the presence of unauthorised building works from the vendor onto the purchaser. This could not be the proper construction of the agreement. It would have been unconscionable for a vendor to rely upon such a clause to make a purchaser accept a title with a defect of which the vendor was aware but of which the purchaser had no knowledge. The courts would, therefore, refuse to give effect to such a provision applying the dictum of Lord Hoffman in *Jumbo King Ltd v Faithful Properties Ltd*.⁷⁸ The learned judge concluded that the purchaser had not waived his right to object to the vendor's title.

[5-59] The principles governing implied waiver were further considered in *Regent Summit (Hong Kong) Ltd v Smart Business (Asia) Ltd*.⁷⁹ The purchaser agreed to purchase a semi-detached house in Shatin from the vendor and the vendor agreed to show and give good title to the property. Special Condition 7 of the New Grant specified the permitted maximum plot ratio. Prior to signing the provisional agreement, the purchaser had inspected the property and extensions to the property had been drawn to his attention. The sale and purchase agreement provided for completion on 30 July 1997. It also provided that requisitions could only be raised within seven days after receipt of the title deeds. The title deeds were delivered to the purchaser about six weeks before the completion date. The mortgagee bank arranged for a valuation report, which identified several apparently unauthorised extensions to the front and rear of the building and the purchaser was made aware of the contents of the report four days before completion. The purchaser demanded proof that the Building Authority had approved the extensions. On 29 July, the vendor's solicitors denied that the extensions were unauthorised and contended that, even if they were, there was only a minor risk of enforcement action by the Building Authority. A further report by a surveyor was obtained by the purchaser on the completion date identifying the extensions and stating that they were not in accordance with the building plans. On the completion date, the purchasers again asserted that the extensions contravened Special Condition 7 of the New Grant. The vendor, however, maintained that the extensions were not unauthorised. On the day after that set for completion, the purchaser's solicitors wrote saying that, as the vendor had failed to show good title, they were terminating the agreement and demanded the return of the deposit. At the hearing of a vendor and purchaser summons, the vendor argued that the purchaser had waived the right to raise requisitions by inspecting the property in knowledge of

77 [2002] 1 HKLRD 392, [2001] HKCU 1192.

78 (1999) 2 HKCFAR 279, [1999] 3 HKLRD 757, [1999] 4 HKCU 707.

79 (unreported, CACV 138/1998, 1998).

the extensions and subsequently entering into the provisional agreement. At first instance⁸⁰ Yuen J held that, to waive the right to raise a requisition, the purchaser must not only know of the alleged facts which might give rise to that requisition but must also know of the legal consequences of those facts. The learned judge, distinguishing *Hillier Development Ltd v Tread East Ltd*⁸¹ and *Lai Chi On v Strong Sing Development Ltd*⁸² on the grounds that, in both those cases, the purchasers were found to have waived their right to raise requisitions by performing acts (in both cases sending a draft assignment to the vendors) which a prudent purchaser would not perform until title had been accepted, held that, in the present case, the purchaser did not yet know the legal consequences of the extensions. Entry into the provisional sale and purchase agreement could not, therefore, be regarded as a waiver of the purchaser's right to raise requisitions in respect of the extensions. The vendor appealed to the Court of Appeal against the decision that the vendor had waived its right to refuse to answer the requisition on the grounds that it had been raised out of time. The Court of Appeal held that it was not merely the correspondence which had demonstrated an intention on the part of the vendor to waive the lateness point, but more particularly the vendor's suggestion that the matter should be referred to the court by way of a vendor and purchaser summons and the vendor's offer to supply a surveyor's report. These actions on the part of the vendor were only referable to an attempt to answer the requisition rather than rely upon the point of its lateness. The appeal was, accordingly, dismissed.

[5-60] The nature of waiver in this context was again considered by Yuen JA in *Large Land Investments Ltd v Cheung Siu Kwai Pansy*.⁸³ The purchaser had agreed to purchase a shop in Kowloon from the vendor, but this shop contained a cockloft which, as the court found, constituted an unauthorised structure which rendered the vendor's title defective. At first instance the court found that the purchaser had waived its right to object to the vendor's title, but the Court of Appeal disagreed. Yuen JA first set out the principles governing waiver by election drawing upon the judgment of the House of Lords in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp'n of India ('The Kanchenjunga')*.⁸⁴

- (a) A waiver by election occurs when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called an election.
- (b) It is a prerequisite of election that the party making the election must first be aware of the facts which have given rise to the existence of the right.
- (c) It may be that a party must also be aware of his legal right of affirming or rescinding the contract when there has been repudiation by the other party: *Peyman v Lanjani* [1985] 1 Ch 457.

80 See [1998] 2 HKC 718.

81 [1993] 1 HKC 285.

82 [1994] 3 HKC 568.

83 [2003] 1 HKLRD 313, [2002] 4 HKC 652.

84 [1990] 1 Lloyd's Rep 391, 397-399 (HL) per Lord Goff.

- (d) Since a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms.

[5-61] On the facts the purchaser had failed to communicate any election to affirm the contract when it became entitled to rescind it due to the defect in title and there had been no effective waiver. The vendor had, therefore, failed to give good title and the purchaser was entitled to recover its deposit.⁸⁵

[5-62] The principles laid down in *Regent Summit* (above) that a purchaser would not be held to have waived his right to object to a defective title unless he was both aware of the defect and of the legal consequences that flowed from the defect were applied by Sakhrani J in *Poon Mee Kuen v Luk Yuk Chun*.⁸⁶

[5-63] A different conclusion was reached, however, by Chung J in *Kensel Ltd v Charmfast Investment Ltd*.⁸⁷ Unusually, the title documents had been delivered to the purchaser before the execution of the sale and purchase agreement, but requisitions as to the existence of unauthorised building works within the premises (in particular the conversion of a light well into the structure of the building) had only been raised by the purchaser four months after receipt of the title deeds despite a clause in the agreement providing that requisitions had to be raised within seven days of receipt of the title deeds. The vendor contended that, by failing to raise a requisition within the time provided for, the purchaser should be deemed to have accepted the vendor's title or to have waived its right to object to the title. Chung J held that the unauthorised structures were obvious to anyone comparing the plans to the physical layout of the property and were thus patent. There was, therefore, no obligation for the vendor to bring them to the attention of the purchaser and the purchaser had waived any objection to the title or would be deemed to have accepted the title when it failed to raise any requisition relating to the unauthorised structures within the time prescribed.

[5-64] The conclusion to be drawn from the case law considered above is that a purchaser will have waived his right to object to the vendor's title on the grounds of the existence of an unauthorised structure where it can be established that:

- (a) he knew of the existence of the unauthorised structure before entering into the sale and purchase agreement (or even afterwards);
- (b) at the same time he appreciated the legal consequences of the existence of such structure on the vendor's title; and
- (c) he took no action to object to the title within a reasonable (or the contractually agreed) time or committed other acts which unequivocally showed that he accepted the vendor's title notwithstanding the defect in title.

85 [2003] 1 HKLRD 313, 317-318, [2002] 4 HKC 652.

86 [2005] HKCU 78 (unreported, HCMP 1431/2004, 18 January 2005) (HC).

87 [2001] HKCU 880 (unreported, HCMP 6890/1999, 22 September 2001).

6. FACTORS WHICH MAY AFFECT GOOD TITLE: DEFECTS IN TITLE

[5-65] Clearly, a list of title imperfections would be endless but it may be helpful to categorise common defects under several heads. First, the title must be in the vendor; secondly, the vendor must be able to convey the whole interest unencumbered by third party interests; thirdly the vendor must be entitled to assign the property without any necessary consent of a third person and, finally, the title of the vendor must be indefeasible. We shall finally consider matters of mere conveyance, which will not render a title defective. It might be helpful first, however, to consider the difference between defective and defeasible titles.

6.1 Defective titles; difference between encumbered and defeasible titles

[5-66] There is a clear conceptual distinction between a title that is encumbered and one that is defeasible. A title is defeasible if the owner is liable to have his title defeated or taken away from him;⁸⁸ such is the case, for example, where there is a real risk that the Government will re-enter (for breach of the Government lease or Conditions of grant) or resume the land or that the Building Authority will take enforcement action leading, possibly, to the sale of the property. A further illustration of defeasibility would be where the owner's title could be set aside as a fraudulent conveyance or an unfair preference. Similarly, in a case where the owners' corporation or manager of a multi-storey building are empowered under the terms of the applicable deed of mutual covenant to have the property charged and eventually sold, the title of the owner of the flat affected may also be rendered defeasible.

[5-67] By contrast, an encumbered title is a title that cannot be taken away from the owner but, by virtue of the encumbrance, will not be a good title and will probably be worth less because of the encumbrance. Such would be the case, for example, where a third person holds an equitable interest in the property by way of resulting or constructive trust or there is an uncompleted sale and purchase agreement registered against the title. So also would be a property subject to an easement or restrictive covenant.

[5-68] Both encumbered and defeasible titles may properly be referred to as defective titles.

[5-69] A purchaser who is entitled to receive a good title may, in an appropriate case, rescind if offered either an encumbered or defeasible title.

88 The author has been unable to find a clear judicial definition of 'indefeasibility'. It is defined in the *Oxford English Dictionary* as 'not liable to be defeated, made void or done away with'. In *Black's Law Dictionary* the definition is 'that which cannot be defeated' and in *Jowitt's Law Dictionary* 'not to be made void'.

6.2 Title must be in vendor

[5-70] Title must be vested in the vendor or some other person whom the vendor can compel, by legal action if necessary, to convey that title to him. The first branch of the principle is illustrated by *Enway Development Ltd v Light Ocean Investments Ltd*.⁸⁹ The vendor agreed to sell certain plots of land in the New Territories to the purchaser, the completion date being set for 29 March 1993. The agreement also provided that the vendor would assign other land (the relevant land) to the purchaser and the vendor warranted that he would be able to enter into a binding agreement for sub-sale and purchase with the purchaser of the relevant land by the completion date. Time was to be of the essence. The whole transaction involved a considerable area of land and the relevant land was, at the date of the sale and purchase agreement, still to be acquired by the vendor from its present owners, who were a t'so. Although managers of the t'so had been appointed on 22 March and an agreement to sell the relevant land to the vendor had been entered into on 28 March by the managers, these managers had not yet been registered, nor had the consent of the Land Officer to the sale been obtained as required by s 15 of the New Territories Ordinance (Cap 97). The managers were in fact registered on 1 April and on 19 July (ie well after the completion date) were granted the Land Officer's consent to sell the land. The purchaser terminated the agreement on the ground that the vendor was not able to enter into a binding sale and purchase agreement for sub-sale of the relevant land as at the completion date. The Court of Appeal, upholding the decision of Godfrey J at first instance, concluded in favour of the purchaser on the grounds that, as at the completion date, the vendor was unable to show he had a legal and equitable right to the relevant land and to compel an assignment of such land to the purchaser. As Litton JA pointed out, the parties were free to enter into a conditional agreement which would become unconditional upon the registration of the managers and the obtaining of the consent of the Land Officer to the sale. Since they had not done so, the purchaser had the right to rescind the agreement.

[5-71] *Harold Elliott and H Elliott (Builders) Ltd v Pierson*⁹⁰ serves as a further useful illustration of the latter branch of this rule. A company owned property which it leased to Mr Elliott, its sole director. Elliott purported to sell the property to a purchaser, but the purchaser repudiated the contract on the ground that Elliott, being a mere leaseholder, had no title to the freehold. The court held that Elliott, being in sole and absolute control of the company, could compel the company to convey the freehold to the purchaser and granted the vendor specific performance.

[5-72] An unusual illustration of the principle can be found in *Incorporated Owners of Chungking Mansions v Shamdassani, Murli Pessumal*,⁹¹ a case involving a multi-storey building which had been divided into 920 equal undivided shares. A number of additional units had been illegitimately created within the common parts, being carved out of the corridors and lift lobbies. These units did not have allocated to them any undivided shares, although the occupiers had been assessed

89 [1994] 3 HKC 31.

90 [1948] Ch 452.

91 [1991] 2 HKC 342.

for rates and management charges in respect of the units. Jerome Chan J made it clear that such units could not be properly assigned by the occupant, since the title to the common parts vested in all the co-owners of the building. The vendor had no title to the units which he could assign.⁹²

6.3 Vendor must be able to convey property unencumbered by third party interests

[5-73] As a general principle, a vendor must be in a position to convey the property contracted to be sold free from all encumbrances.⁹³ Indeed, where an assignor or mortgagor assigns or charges the property 'as beneficial owner', a covenant for title will be incorporated to the effect that the vendor/mortgagor now has the good right and title to assign or charge the land free from encumbrances save as specified in the assignment or charge and subject to the manner in which the assignment or charge is expressed to be made.⁹⁴ It has been held in *Page v Midland Railway*⁹⁵ that this covenant will bind the covenantor, even though the covenantee has knowledge of the existence of the encumbrance at the time of the assignment. If the property is in fact encumbered, the vendor should, therefore, amend the covenant for title in an appropriate manner.

6.4 Exceptions to principle that vendor must convey title free from all encumbrances

[5-74] There are, however, three important exceptions to the general principle that the vendor must convey the property free from all encumbrances.

92 This decision was not upset by the Court of Appeal (unreported, CACV 199/1991, 26 February 1993), which rejected an argument as to estoppel.

93 For the vendor to be in breach of the obligation to convey the property free from encumbrances, there must be an encumbrance over the property which on the facts constitutes a blot on the title of the vendor and encumbrances which do not amount to a blot on the title may be disregarded. For example, in *Re Heaysman's and Tweedy's Contract* (1893) 69 LT 89, where no evidence could be adduced to show that an equitable mortgage by way of deposit of a lease made 15 years previously had been discharged, the court held that since the equitable mortgagee had never made any claim and the supposed blot was purely theoretical, good title had been shown. Similarly, in *MEPC v Christian-Edwards* [1981] AC 205 (HL) a contract entered into to sell the property in 1912, which had apparently been suspended but could not be traced, was held not to be a blot on the title when the vendor contracted to sell the property in 1973. The House of Lords concluded beyond reasonable doubt that the purchaser would not be at risk of the successful assertion against him of the encumbrance.

94 See Parts II and V of the First Schedule to the Conveyancing and Property Ordinance (Cap 219).

95 [1894] 1 Ch 11.

Appeal on a question of great or general importance. However the judgment was upheld against the trustee.

[8-117] If one party does not exhibit 'good faith' in his dealings with the other party, the latter may have no remedy. For example, unless there is a separate binding obligation to negotiate in good faith, no liability can result from one party's failure to do so. The courts have long been unwilling to imply obligations of good faith into a contract. This has been overcome now to some extent where the court can find unconscionability, even in a commercial contract, requiring a court of equity to do 'equity': see for example *Yam Seng Pte Ltd v International Trade Corpn Ltd*.¹³³

[8-118] Once binding contractual obligations have been effected, there is a contractual obligation to act in good faith in the performance of those obligations. Such an obligation will not necessarily be tested by reference to the contract, unless the contract itself makes express (or nowadays perhaps implied) provision for the requirement of good faith.

[8-119] In land transactions, 'good faith' has two exemplars: it is part of the 'bona fide' purchaser rule (but see the terms of s 3 of the LRO for interests in land which are evidenced in writing, and see *Wong Chim Ying v Cheng Kam-wing*).¹³⁴

9.2 Tort of inducing breach of contract and good faith

[8-120] The tort of 'inducing a breach of contract' which is said to be available generally to any plaintiff where the defendant, actually knowingly and deliberately, has caused a contracting party to breach his contract, developed from the tort of inducing a breach of contract of employment which later included elements of the tort of conspiracy, especially in situations involving labour and union rights.

[8-121] In *OBG & Ors v Allan & Ors*,¹³⁵ the House of Lords held that there were two forms of action for this tort. The first is that of inducing a breach of contract; this requires a breach by a party of the contract but where that party is not sued by the innocent party. Instead the plaintiff sues a third party in tort where that third party, knowing of the contract, has induced the contract-breaker to breach the contract. This is secondary liability for the breach. The second form of the action is that of causing loss by unlawful means; this is closer to the origins of the tort. This creates primary liability and does not require that there be a breach of a contract between the plaintiff and a third party. The effect of the defendant's action could, although not necessarily did so in fact, lead to a breach of a contract between the plaintiff and another. This form of the action requires the defendant to know about the contract and to act in an unlawful manner reckless as to whether or not his actions will cause loss:

¹³³ [2013] EWHC 111.

¹³⁴ [1991] 2 HKLRD 253 (CA).

¹³⁵ [2008] 1 AC 1.

that what is done is unlawful by reason of some prior unlawfulness seems to me to be neither here nor there. Two wrongs do not make a right. For my own part I would respectfully accept and adopt the proposition of Lord Macnaghten in *Quinn v Leathem*¹³⁶ that unjustified 'violation of a legal right committed knowingly is a case of action'.

[8-122] So in *OBG*, it was said that in inducing a breach of contract:

the person procuring the breach of contract was held liable as accessory to the liability of the contracting party. Liability depended upon the contracting party having committed an actionable wrong.

[8-123] Interference with contractual relations on the other hand involves 'intentional harm effected by unlawful means'.

10. PROMISSORY ESTOPPEL

10.1 Developments

[8-124] The role of equity in contract law, especially in relation to remedies and formation of contract, has been enhanced in recent years by stress being given to unconscionability, a general principle of estoppel, and to restitution. This new equity takes various forms but all reflect the inherent role of a Court of Equity to do justice and to prevent equitable fraud which is the core of the judgment in *Earl of Chesterfield v Janssen*. The term 'equitable fraud' is vague, and sometimes depends on 'knowing receipt of trust property', or acting 'irrationally' or 'recklessly' in disregarding the rights of another: see for example *Akai Holdings (In Liq) Ltd v Kasikhornbank*.¹³⁷ One common situation in which the court will react against equitable fraud is when a party has notice of a prior interest and acts to take priority; that notice results in the party being treated as a constructive trustee.

[8-125] There are no clear rules as to what decisions require this relief, and the form of the relief. But these equitable factors represent the trigger for relief. They include estoppel in its modern form, unconscionability, and restitution. In providing relief, certain fundamental changes have been made to the factor of estoppel in particular.

[8-126] Estoppel, originally promissory estoppel, has expanded from being the equivalent of consideration in the waiver or variation of existing contractual obligations, to a factor, probably in the form of intention, in the formation of a contract where it estops a party denying the existence of the contract: *Walton's Stores (Interstate) Ltd v Maher*,¹³⁸ and *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd*.¹³⁹ For a time, unconscionability was used as the basis of relief against the forfeiture of money, not merely of a proprietary interest; but the decision of the Privy Council in *Union Eagle Ltd v Golden Achievement Ltd* replaced unconscionability with estoppel or restitution as the justification for

¹³⁶ [1901] AC 495, 520.

¹³⁷ [2009] 5 HKC 218 (CFA).

¹³⁸ (1988) 164 CLR 387, 76 ALR 513, 62 ALJR 110.

¹³⁹ [1997] 1 HKLRD 1238, [1997] 3 HKC 440.

equitable relief, even though the underlying reason may still be unconscionable behaviour. The Australian courts, which lead the way in developing new forms of equity, continue to rely on unconscionability as the broad background for relief.

[8-127] It is not easy to identify the nature of the 'new equity', the DNA of equitable relief is granted in a variety of forms. The triggers have been identified but there is no precision in establishing the substance of these factors. But it would seem to be clear that there are three illustrations of the new equity: estoppel, unconscionability, and restitution. It does not seem to matter as to whether these represent the nominate cause of the action, or the elements which must be proved for relief. Examples of a new approach to relief have been found in various ways, including:

- (a) undue influence where the influencing party is not a party to a contract, but is related to the inferior party, and usually solely receives the benefit of a loan. The other party to the contract is then held to take with constructive, if not actual, notice of the undue influence to prevent enforcement of the contract unless the inferior party obtained independent legal advice: *Barclays Bank plc v O'Brien*¹⁴⁰ (as modified by *Royal Bank of Scotland v Etridge (No 2)*¹⁴¹) *Garcia v National Bank of Australia*,¹⁴²
- (b) restitution for recovery of money paid under a mistake of law: *David Securities v CBA*,¹⁴³ *Kleinwort Benson v Lincoln CC*,¹⁴⁴
- (c) unconscionability combining with 'legitimate expectation': *Kwai Hung Realty Co Ltd v Kung Mo Ng & Ors*,¹⁴⁵ *Polorace Investments Ltd v Director of Lands*,¹⁴⁶
- (d) the imposition of liability, even where there was no privity, because to fail to do so would be unconscionable: *Banque Financiere de la Cite v Parc (Battersea) Ltd*,¹⁴⁷
- (e) the artificial enforcement of an otherwise illegal contract on the basis that the plaintiff could rely on contribution and occupation: *Tinsley v Milligan*.¹⁴⁸ Had the contract not been enforced, the defendant would have obtained a windfall;
- (f) the broadening of the existence of the 'fiduciary' obligation, including overruling *Lister v Stubbs*¹⁴⁹ by *AG v Reid*,¹⁵⁰
- (g) re-examination of the principles of knowing assistance in the breach of a trust to impose elements of dishonesty; *Royal Brunei*

140 [1993] 4 All ER 417.

141 [2001] 4 All ER 449.

142 [1998] HCA 48.

143 (1992) 175 CLR 353.

144 [1993] 1 HKC 649 (HC).

145 [1998] 1 HKC 145.

146 [1997] 1 HKC 373.

147 [1999] 1 AC 221, [1998] 1 All ER 737.

148 [1995] ANZ ConvR 420, [1994] 1 AC 340, [1993] 3 All ER 65 (HL).

149 (1890) 45 Ch D 1.

150 [1994] 1 AC 324, [1994] 1 All ER 1.

*Airlines v Tan Kok Ming*¹⁵¹ wherein dishonesty was re-defined in *National Westminster Bank plc v Spectrum Plus Ltd*,¹⁵² and re-re-interpreted by the Privy Council in *Barlow Clowes Ltd (In Liq) & Ors v Eurotrust International Ltd & Ors*,¹⁵³ and see *Akai Holdings (In Liq) v Kasikhornbank*,¹⁵⁴

- (h) a re-examination of tracing, including a hint that there should be no difference between legal and equitable tracing: *Foskett v McKeown*,¹⁵⁵ and
- (i) negative estoppel as found in *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd*¹⁵⁶ where the basis of the estoppel was not a representation but a failure to undeceive the plaintiff; this was not acquiescence but required the exercise of active communication when the defendant thought the plaintiff was unsure of its rights.

10.2 Estoppel

[8-128] The role of promissory estoppel in contracts has been converted into estoppel, from its principal role as a 'shield not a sword' being the equivalent to consideration on the variation or waiver of a pre-existing contractual obligation, into a sword as well as a shield in the formation of contract, and as a general ground for equitable relief where one party to a contract has behaved badly or unconscionably. The result is that estoppel, as an alternative to consideration for the forbearance of existing contractual obligations in the modern form established in *Central London Property Trust Ltd v High Trees House Ltd*,¹⁵⁷ has been altered radically.

[8-129] In contract law especially, the term 'promissory estoppel' has largely been replaced by the term 'estoppel'; this estoppel combines representational estoppels, namely, promissory, proprietary, and legal estoppel, in which the three basic elements are less clear than that established previously.

[8-130] Representational estoppel combined:

- (a) a representation which the representor intended the representee to act upon;
- (b) the representee acted in reliance of that representation;
- (c) the representee could not resume his former position, or he suffered a 'detriment' in so acting; and
- (d) with the consequence that the representor could not go back on his word.

151 [1995] 2 HKC 409 (PC).

152 [2005] 2 Lloyd's Rep 275, [2005] UKHL 41, [2005] 2 AC 680, [2005] 4 All ER 209 (HL).

153 [2005] UKPC 37, [2006] 1 All ER 333 (PC).

154 [2009] 5 HKC 218 (CFA).

155 [2001] 1 AC 102, [2000] 3 All ER 97 (HL).

156 [1997] 1 HKLRD 1238, [1997] 3 HKC 440.

157 [1947] KB 130.

[8-131] In some cases, acquiescence was an alternative to representational estoppel; acquiescence involves standing back whilst another acts to his detriment believing he has the right to do so.

[8-132] Formerly the three forms of estoppel were discrete; thus:

- (a) Legal estoppel by representation required a representation of fact by the defendant which was relied upon by the plaintiff, and for which there was consideration. Thus in *Jorden v Money*¹⁵⁸ an assurance, that a creditor would not take action against her debtor, was relied upon by the debtor; when the creditor later sued, her claim was upheld because it was said that there had not been a representation of fact, but merely of intention or motive.
- (b) Proprietary estoppel, equitable but not legal, is founded on equity's jurisdiction to prevent unconscionable insistence on strict rights by a landowner: *Wong Shui Sang Chu Yee Wong v Kung Kwok Wai David*.¹⁵⁹ The three elements of representation, reliance and detriment, are necessary; and as a result the landowner was unable to rely on his strict legal rights to property. Proprietary estoppel, either in the form of estoppel or acquiescence, could be a shield as well as a sword. Further, it applied to representations of existing fact, as well as to representations of conduct or intention.

There were originally two forms of proprietary estoppel. The first group was contract-based. Thus in *Dillwyn v Llewellyn*,¹⁶⁰ it was said that if A puts B in possession of land and tells him he may build a house, and so B with A's knowledge and approval builds, then B has a right to compel A to complete the contract and to perfect the imperfect gift. The second group was fraud-based. Thus in *Ramsden v Dyson*,¹⁶¹ it was said that if B improves A's land under the belief that he has some rights, and A, knowing of B's mistaken assumption and of the work on his land, stands by and allows B to improve the land, this amounts to equitable fraud or estoppel by acquiescence: see *Thorner v Major*.¹⁶²

The two strands merge in *Plimmer v Mayor of Wellington*¹⁶³ as proprietary estoppel: *Inwards v Baker*¹⁶⁴ and *Crabb v Arun District Council*.¹⁶⁵ *Willmont v Barber*¹⁶⁶ identified five factors relevant to proprietary estoppel; in *Kung Wong Sau Hin & Anor v Sze To Chun Keung & Ors*¹⁶⁷ these were treated as a guide to establishing

unconscionability; and see *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd*.¹⁶⁸

- (c) Promissory estoppel, which was equitable, acted as an alternative to consideration on the waiver or variation of a pre-existing contractual obligation; in other words, it supported forbearance to sue: *Central London Trust v High Trees House*.¹⁶⁹ This estoppel was contract-based.

[8-133] These discrete estoppels have now merged into estoppel: *Taylor's Fashions v Liverpool*,¹⁷⁰ *AG v Humphrey's Estates*¹⁷¹ (and unsuccessful attempt to rely on estoppel to form a contract: the negotiations were expressed to be 'subject to contract' and these words inhibited the formation of the contract) and *Walton's Stores (Interstate) Ltd v Maher*.¹⁷²

[8-134] The new estoppel is based on the need to grant relief against unconscionable behaviour rather than to make good representations or acquiescence.

[8-135] The factors that enable a Court to grant equitable relief, under the new principles adopted largely by the High Court of Australia in *Commercial Bank of Australia v Amadio*¹⁷³ which bypassed undue influence in favour of an 'unconscionable bargain', influenced perhaps by the earlier signs of expanding equity in cases such as *Yerkey v Jones*¹⁷⁴ which had put married women in a position of 'special tenderness' when they entered into third party mortgages for the benefit of their husbands. A brief excursion into expansion was also found in the decision of *Latec v Hotel Terrigal*¹⁷⁵ which converted an erstwhile mere equity [to set aside for fraud] into an equitable interest for the purposes of examining priorities.

[8-136] Then came the decision of the High Court of Australia in *Pavey & Matthews Pty Ltd v Paul*¹⁷⁶ where the court found itself able to combine common law's quantum meruit with equity's unjust enrichment to create 'restitution' and on the way to leave aside the traditional burden that quantum meruit could only be granted where there was an implied promise. Then came *David Securities v CBA*¹⁷⁷ which eliminated the distinction between fact and law in relation to recovery of money paid under mistake; this transition took the English courts another six years to accept: *Kleinwort Benson v Lincoln CC*.¹⁷⁸ Then came *Walton's Stores (Interstate) Ltd v Maher*¹⁷⁹ which managed to combine promissory estoppel with

158 [1843-60] All ER Rep 350, (1854) 10 ER 868.

159 [1997] HKCU 742 (unreported, CA 227/1996, 27 Feb 1997) (CA).

160 (1862) 4 De GF & J 517.

161 (1886) LR 1 HL 129.

162 [2009] UKHL 18, [2009] 3 All ER 945 (HL).

163 (1884) 9 App Cas 699.

164 [1965] 2 QB 29, [1965] 1 All ER 446.

165 [1976] Ch 179, [1975] 3 All ER 865 (EWCA Civ).

166 (1880) 15 Ch D 96.

167 [1996] 3 HKC 292.

168 [2007] 1 HKLRD 498, [2007] 1 HKC 387.

169 [1947] KB 130.

170 [1982] QB 133.

171 [1987] AC 114, [1987] All ER 387, [1986] HKC 592 (PC).

172 (1988) 76 ALR 513 (HCA).

173 (1983) 151 CLR 447.

174 (1930) 63 CLR 649.

175 (1965) 113 CLR 265.

176 (1987) 162 CLR 221.

177 (1992) 62 ALJR 768.

178 [1998] 3 WLR 1038.

179 (1988) 76 ALR 513.

proprietary estoppel and with legal estoppel to produce 'estoppel' or 'equitable estoppel' and build on *Central London Property Trust Ltd v High Trees House Ltd*.¹⁸⁰ It converted what had been promissory estoppel in *High Trees* (where it had acted as the equivalent to consideration in the waiver of pre-existing contractual rights) into an estoppel which was now a sword as well as a shield, had little to do with consideration, was used to support intention to be legally bound, to avoid the consequences of failure to observe the equivalent of s 3(1) of the CPO, and thereby to produce a contract negatively by preventing the right of the defendant from denying the existence of the contract. This of course was what had been tried unsuccessfully in *Attorney-General v Humphries Estate*¹⁸¹ where the Privy Council treated the claimed estoppel as one essentially within the mould of *High Trees* and finding it defective, refused relief.

[8-137] These factors are: unconscionability, estoppel (as an amalgam of promissory estoppel, legal estoppel, estoppel by convention and any other form of traditional estoppel), and restitution (as an amalgam of traditional legal quantum meruit and traditional equitable unjust enrichment). These three are the nominate causes of action, or sometimes defences, which have been prominent in the last decade or so. But they are not alone. There are many other examples. See for example 'modern' undue influence in *Barclays Bank plc v O'Brien*¹⁸² (following the decision of the High Court of Australia in *Yerkey v Jones*);¹⁸³ *Garcia v National Bank of Australia*;¹⁸⁴ *Kleinwort Benson v Lincoln CC*;¹⁸⁵ *Kwai Hung Realty Co Ltd v Kung Mo Ng*;¹⁸⁶ and *Banque Financiere de la Cite v Parc (Battersea) Ltd*.¹⁸⁷

[8-138] 'Estoppel' has expanded into administrative law by reference to the principle of 'legitimate expectation'; *Hang Wah Chong Investment Co Ltd v AG*;¹⁸⁸ *Polarace Investments Ltd v Director of Lands*.¹⁸⁹ It is used extensively in commercial law thereby rendering otiose the two basic principles of that field of law: first, that because the parties to a commercial transaction were of equal bargaining power, equity had no role in company activities such as assisting in the avoidance of contracts, and, secondly, that the parties were thus free to contract on whatever terms they wished. The court would intervene only at the level of remedy where one party had failed to perform his obligations. These principles have been overcome by decisions on: (a) fiduciary obligations of directors to creditors, and fiduciary obligations generally: *Warman International Ltd v Dwyer*;¹⁹⁰ *Canson Enterprises*

180 [1947] 1 KB 130.

181 [1987] 2 WLR 343.

182 [1993] 4 All ER 417.

183 (1930) 63 CLR 649.

184 [1998] HCA 48.

185 [1998] 3 WLR 1035.

186 [1998] 1 HKC 145.

187 [1998] 1 All ER 476.

188 [1981] HKLR 336.

189 [1997] 3 HKC 373.

190 (1995) 182 CLR 544.

Ltd v Boughton & Co;¹⁹¹ and *Brady v Brady*;¹⁹² and (b) the use of the constructive trust in a variety of ways: *Barclays Bank Ltd v Quistclose Investments Ltd*.¹⁹³

[8-139] Although it could be thought that the new estoppel developed from promissory estoppel, the Australian courts in interpreting the 'new estoppel' were not hamstrung by questions of representation, reliance and detriment. This is clearly because the estoppel was initiated by the presence of unconscionability; see, for example, how estoppel was built up in *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd*¹⁹⁴ from a base of unconscionability. The new estoppel is often negative, denying the defendant the right to rely on his strict legal rights because he failed to act, rather than positive as was required in *High Trees* with a representation which had to be relied upon. Other changes have made the estoppel not only a shield but more usually a sword, and no longer merely suspensive but now permanent. Further, the remedies now go beyond excusing non-performance and extend to the grant of specific performance.

[8-140] In *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd & Anor*,¹⁹⁵ Nettle J in the High Court of Australia set out the requirements for promissory estoppel to the effect that:

[T]he representation must be clear. However, it is not necessary that the representation has contractual certainty or that it is objectively unambiguous. In cases of promissory estoppel what is determinative is whether the party sought to be estopped has played such a part in creating an assumption or expectation in the mind of a claimant, in reliance on which the claimant has acted to the claimant's detriment, that it would be unconscionable for the estopped party to depart from the assumption or expectation before allowing the claimant reasonable time in which to revert to the *status quo ante* or at all.

[8-141] Particularly, in Australian overseas conveyancing, early was made of the new forms of equitable relief to allow a plaintiff to seek recovery of a forfeited deposit despite the fact that the plaintiff has been treated as having repudiated the contract and was not ready, willing and able to perform his part of the bargain in accordance with the terms of the contract: *Legione v Hately*¹⁹⁶ (where relief by way of estoppel was denied even though the court was still caught in the promissory estoppel mould. This estoppel could be used as a sword as well as the traditional use as a shield; *Waltons Stores (Interstate) Pty Ltd v Maher*;¹⁹⁷ then relying unconscionability; *Stern v McArthur*;¹⁹⁸ and *Foran v Wight*¹⁹⁹ (breach of an express time stipulation).

191 (1991) 3 SCR 534.

192 [1988] 2 All ER 617.

193 [1968] 3 All ER 651.

194 [1997] 3 HKC 440.

195 (2016) 333 ALR 384.

196 (1983) 152 CLR 406.

197 (1988) 164 ALR 387.

198 (1989) 88 ALR 413.

199 (1989) 64 ALJR 1.

provision in negotiations that any agreement was to be 'subject to contract': cf *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd*.²¹⁶

- (c) Where there is a pre-existing contract, a form of estoppel, said to be promissory, arises based not on an express or positive representation but on a negative representation. In *Foran v Wight*,²¹⁷ a vendor advised the purchaser that the former would not be in a position to complete the contract for the sale of land on the due date. The purchaser failed to obtain the finance which he needed to complete. The vendor then said he was ready to complete and on the purchaser's failure to do so, the vendor sold the land to a third party, and forfeited the deposit. The purchaser sought a declaration that he had validly terminated the contract on the acceptance of the vendor's anticipatory breach, with the result that he was entitled to a refund of the deposit. By a cross-summons, the vendor claimed entitlement to the deposit on the basis of the purchaser's non-completion. However, despite concern as to whether the purchaser had been able to show that he would have been ready and willing to complete but for the vendor's breach, the majority in the High Court allowed the purchaser to recover the deposit.

Estoppel here was to support a claim for equitable relief – in the form of relief against the forfeiture of the deposit. As such, it was functioning as a remedial device.

[8-149] Brennan J in *Stern v McArthur*²¹⁸ did say that 'the concept of unconscionability is not a charter for judicial reformation of contracts', perhaps there hoping this admonition would have slowed down the impact of equity, but that has proved groundless in Australia.²¹⁹ However, in Hong Kong, the Privy Council, in *Union Eagle Ltd v Golden Achievement Ltd*,²²⁰ did not approve of the new reliance on unconscionability and preferred to allow equitable relief to be founded on estoppel or restitution. In practice, these two concepts are often the nominate remedy where there has been unconscionable behaviour.²²¹

11. PROCEDURE FOR A SALE AND PURCHASE OF LAND

[8-150] Ideally, the process of entering into a contract for the sale and purchase of land in Hong Kong should observe the following procedures which is set out in very broad terms (subject to any provisions to the contrary in the contract):

216 [1997] 1 HKLRD 1238, [1997] 3 HKC 440.

217 (1989) 168 CLR 385.

218 (1988) 81 ALR 463 at 472.

219 *FAC v Makucha Developments* (1993) 115 ALR 679.

220 [1997] 1 HKLRD 366, [1997] 1 HKC 173 (PC).

221 *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd* [1997] 1 HKLRD 1238, [1997] 3 HKC 440.

- (a) the PA, prepared by the estate agent is signed by the V and P and the P pays the initial deposit (1 to 3% of the purchase price). At this point of time it is assumed the P has inspected the property;
- (b) The V should instruct his solicitor to prepare the draft SPA either in the solicitor's own standard form, or in that of Form 2 of the Third Schedule to the CPO incorporating the conditions set out in Part A of Schedule 2 to the CPO, or a combination of these. In so doing, the solicitor should make inquiries and carry out certain searches, for example, at the Land Registry, and at the Companies Registry (where appropriate): *Lau Sik Ching Peggy v Ma Hing Lam & Ors*,²²²
- (c) The V's solicitor will send the draft SPA to the P's solicitor, for comment, and ultimate execution by the P. This gives the P's solicitor an opportunity to seek to insert any special conditions for the benefit of the purchaser into the contract. Obviously, such terms will be conditional on the V's consent.

The P's solicitor will have carried out necessary searches such as at the companies' registry and the Land Registry and the High Court to ascertain whether the V is about to be made a bankrupt, or is insolvent. He will also have made appropriate inquiries as to the length of term remaining of the Government lease, whether there are any illegal structures or unauthorised building works, and whether there has been a breach of any covenants in the Government lease. Any requisitions on title will be served on the V's solicitor.

The title deeds, or certified copies of them, will be sent to the P's solicitor before, or with, the draft SPA;

- (d) Where the property is a unit in a MSB, the P's solicitor will have inspected the DMC, and sought confirmation that the vendor is not in breach of any of the covenants thereunder: see Law Society Circular No 40 of 1986;
- (e) The P's solicitor will send the copy SPA executed by the P together with the deposit to the V's solicitor, who will then forward to the P's solicitor a corresponding copy signed by the V. The P should then register a memorial at the Land Registry to obtain priority against subsequent competing interests;
- (f) A memorial of the SPA should then be registered at the Land Office. The P's solicitor will submit requisitions on title, within the time limit set out in the SPA. The V's solicitor will answer those requisitions in a timely manner. Requisitions on title may be made up to the time of completion;
- (g) The P's solicitor prepares the draft assignment and memorial, and the completion undertaking (if applicable) and forwards them to the V's solicitor for approval. The assignment should then be executed by the P and forwarded to the V's solicitor for execution by the V pending completion. The P's solicitor should again search the

222 [2010] 4 HKC 215 (CFA).

Land Registry to ensure that there have been no competing interests registered in the interim;

- (h) Settlement can be effected in person or by way of completion by undertaking whereby the purchaser forwards the purchase money remaining due to the V's solicitor who gives an undertaking to forward necessary documents within a specified time to the P's solicitor; and
- (i) where there is an occupier of the premises who is not the owner, a tenant or a lessee, obtain a statutory declaration that the occupier will claim no interest in the land which would adversely affect the P.

12. FORM

[8-151] Since the Statute of Frauds (29 Car II c 3) in 1677, a contract for the sale of land or an interest in land must be in writing: s 3(1) of the CPO which provides:

(1) No action shall be brought upon any contract for the sale or other disposition of land unless the agreement upon which such an action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorised by him for that purpose.

[8-152] Failure to comply with s 3(1) does not prevent enforcement of a valid contract of sale because the parties can proceed to execute an Assignment with the result that the informal contract merges into the assignment which transfers the legal estate in the land: s 4. Section 3(1) simply provides that under a contract by which a person is obliged to acquire or to part with some interest in land, the contract is unenforceable at common law.

[8-153] The subsection is procedural in preventing action on the oral contract without denying its existence. It is complemented by the parol evidence rule which applies to exclude oral evidence being given to add to, contradict or subtract from the terms of a written, contractual document. There are several exceptions to the rule, such as where the written document does not contain the complete written contract. Another operates where the written contract has already been amended by an enforceable collateral contract.

[8-154] It is up to the defendant to plead that the agreement has not been complied with. On the other hand, the plaintiff does not have to show the agreement is within s 3(1). If the defendant does not raise the absence of writing, then this factor is no bar to the plaintiff's action.

[8-155] Non-compliance with the subsection will not affect the validity of the contract. Instead, it prevents 'actual prosecution of claims in the law courts which are not supported by written evidence at the trial'. Thus, it procedurally inhibits resort to the agreement.

[8-156] Whilst the common law will not tolerate an unwritten contract for the sale of land or an interest in land, equity will grant relief, usually as specific performance, where the oral or open contract, has been accompanied by 'sufficient

acts of part performance': s 3(2) CPO. Equitable relief is discretionary so the plaintiff will need to show he acted properly, for example he has 'clean hands'.

[8-157] The Assignment of the legal estate required a document under seal, that is it is by deed: s 4(1) of the CPO. Without a deed, the Assignment can take effect only in equity; the result can be to make the V a trustee for the P pending completion of a satisfactory deed.

12.1 Section 3(1) of the CPO

[8-158] Section 3(1) of the CPO clearly applies to contracts for the sale or disposition of an interest in land. Land in this context includes fixtures, unless they are severable from the land. Not only contracts for the sale of land are included within its ambit but also contracts for leases, charges, mortgages and any other land transaction. Obviously, agreements for licences and pre-emptions are not included as these are merely personal interests.

[8-159] Under s 6 of the CPO, a tenancy for a term less than three years, which takes effect in possession at the best rent available without payment of a fine, is not within s 3(1). In addition, the interest receives statutory protection under s 4, and also under s 3 of the LRO.

[8-160] The courts generously interpret the requirements for the note or memorandum. Thus, a series of pieces of writing or printing may function as the note or memorandum so long as there is something linking the last document to all others. The document(s) relied upon as a note or memorandum does not have to be a contract. In *JN Roland Deneault v Yangtzekiang Garment Manufacturing Co Ltd*,²²³ it was held that pleadings in a discontinued action would satisfy the requirements of s 3(1). This was so where those pleadings evidenced the existence of a concluded agreement. In that case, action was taken on an oral agreement concerning land. The action was discontinued. The plaintiff then used the pleadings from the discontinued action, in which the defendant had acknowledged the existence of the agreement, as the basis of his claim. In his judgment, Huggins J (at 346) said that the legislation was not designed to defeat the plaintiff who had entered into an agreement but was merely to protect defendants who had not entered into agreements allegedly made by them.

[8-161] The note or memorandum does not have to be made at the time of concluding the binding contract but it must be in existence before court action is taken. Similarly, the note or memorandum cannot be in existence before the contract is made, unless the terms of the offer reflect the writing and the offeree expressly adopts that writing as evidence of the contract.

[8-162] To function as a note or memorandum for the purposes of the subsection, it is necessary that it contains at least details of the parties, property, and price, and that a concluded agreement has been made. Any special terms must also be included. Where the oral agreement contained special terms which are not present in the note or memorandum, the plaintiff can waive their operation if they are

²²³ [1977] HKLR 320.

wholly in the plaintiff's favour and severable from the concluded agreement. Similarly, if they favour the defendant but are not incorporated, the plaintiff may offer to perform them to ensure that the written part of the contract is enforced.

[8-163] The parties must be named and described so that their identities are clear. For example, it is sufficient to describe the V as 'owner' rather than by name where his identity can be established with certainty. However, it is not sufficient to describe him as V for this requires use of parol evidence to establish his identity. In such cases, there is no justification for resort to any of the exceptions to the parol evidence rule. However, where it is unclear which party is the V and which is the P, parol evidence can be used on the ground that there is a latent ambiguity in the document which requires external clarification.

[8-164] Where one party makes use of an agent whose identity rather than the principal's is disclosed, the subsection will be satisfied in certain cases. There are two steps in satisfying the requirement of 'parties': first the note or memorandum must contain details of two parties who are named or otherwise identified and, secondly, they must have agreed to be bound. The agent will be liable personally, and where he is authorised his principal may also be liable. Where one of those parties is the agent for an unnamed party but where the other party knows about the agency, then the subsection has been satisfied if the agent had authority to contract on behalf of his principal. Both of these elements were referred to in *Davies v Sweet*,²²⁴ where it was said that agency to enter into and sign a contract on behalf of the principal 'may be conferred upon an estate agent expressly or may be inferred from the circumstances of the case'. Lord Evershed MR also added that the agent would:

render himself liable upon the contract and nonetheless so though it may be established that he was in fact acting as agent for another who may also be liable under the contract.

[8-165] However, in the absence of one or both of these elements, the note or memorandum would not satisfy the subsection.

12.2 Price

[8-166] The general principle is that the price for the land or the interest in land being disposed of must be stated with certainty, ie the specific amount must be referred to. However, where no specific amount is given, the note or memorandum can still satisfy the subsection where a formula and machinery for using that formula is contained therein. The machinery can be extra-judicial or it can be the court itself. There is no uniformity in decisions. Although it would seem apparent that the courts are more prepared to salvage agreements rather than not, equally clear there would also seem to be one area in which the courts are not prepared to imply terms.

12.3 Signed by party to be charged

[8-167] The defendant must have signed the note or memorandum. Otherwise, it is incomplete and the court will not enforce it. It is unnecessary for the plaintiff

²²⁴ [1962] 1 All ER 92.

to sign. The note or memorandum can consist of a series of documents. In such a case, the subsection will be satisfied if, although not referring to each other, the document which is signed expressly or impliedly refers to the others.

[8-168] In *AG v Tong Yu & Anor*,²²⁵ the Government, having sold land, sought payment of an instalment of the premium then due. The Government lessee who was in financial difficulties said the two relevant documents did not constitute evidence of a binding agreement and so he could withdraw from the transaction. The two documents were the Conditions of Sale and a memorandum signed by the defendant. The court held that the defendant, on signing the memorandum, acquired an immediate right of possession prior to the completion of the conditions in the Conditions of Sale. The two documents illustrated a binding agreement which the Government was entitled to enforce.

[8-169] Where the defendant has not signed but an agent has done so for him, the agent must be properly authorised. Such authority will include subsequent ratification by the principal, as well as agency by estoppel where the principal is estopped from denying the agent's authority. As the note or memorandum functions in place of a written contract, there is no need for the authority to be by deed, as with a power of attorney, though it must be in writing. However, if the agent is also to execute the assignment on behalf of his principal, then the principal must execute a valid power and that power must be registered under the Powers of Attorney Ordinance (Cap 31).

[8-170] A solicitor does not automatically have implied authority to sign a contract on behalf of his client; see however *Wise Think Global Ltd v Finance Worldwide Ltd*.²²⁶ This requires express, written authority. In *Daniels v Trefusis*,²²⁷ the defendant's solicitor was authorised to sign certain letters on behalf of the purchaser. Some letters constituted, when read together, sufficient details to satisfy the subsection. Thus, the purchaser was bound. Although the solicitor had not been authorised to sign a contract, but because he had a general authority to sign letters, his client was bound. This meant that the note or memorandum could comprise a series of documents which referred to each other and which read together contained all of the relevant details. The requirement for the agent to be authorised by deed was a later development in the law.

[8-171] There was no real indication that the parties had intended to be bound by the correspondence. *Daniels* was decided at a time when the note or memorandum did not need to evidence a concluded agreement and so the decision should be looked at as one on the particular facts of that case. However, the implicit warning is that although a solicitor will not be able to bind a client without authority, the absence of authority might be irrelevant where the fact situation matches the *Daniels* and where the court establishes an intention on the part of the client to be bound.

²²⁵ [1968] HKLR 903.

²²⁶ [2014] 4 HKC 167 (CFA).

²²⁷ [1914] 1 Ch 788.

[8-172] The signature can take any recognised form. Thus, it can be a signature, a chop, a mark, initials and even a printed sign. However, in all cases, it must be clear that the signer intended to sign and to be bound. The signature must also identify the signer adequately. Thus, references to 'your mum' or 'your uncle' may be insufficient for although they might satisfy the element of 'parties', yet such a signature is not a clear, identifying one. Where a printed signature is used, then clear evidence is required that the named party adopted it.

[8-173] Does the mere signing mean the signer is bound or does the subsection require delivery of the signed document as well? The court determines liability on this in the same way as where the signed note or memorandum is handed over. The test is that of intention. If the signed document is handed over but the signer does not intend to be bound, the document does not satisfy the subsection. If the document is not handed over and the signer does intend to be bound, the document does satisfy. This interpretation lays stress on the need to have a concluded agreement, for without this the writing is useless.

13. PART PERFORMANCE

[8-174] The effect of s 3(1) of the CPO is simply to make the agreement unenforceable at law, due to the absence of writing; but the agreement is not void. Where s 3(1) is not complied with, it is possible for the plaintiff who had performed sufficient acts of part performance, to seek equitable relief on the basis of that performance. Section 3(2) provides that:

- (2) Nothing in subsection (1) shall affect the law relating to part performance or sales by the court.

[8-175] Part performance involves one party performing certain acts which are referable to the contract he claims is in existence and for which he seeks equitable relief in the form of specific performance. Specific performance is the usual remedy for breach of a contract for the sale or disposition of land. Part performance is distinguished from 'partial performance', which is a factor in deciding whether a party to a contract has performed sufficiently to enable him to be discharged therefrom without liability for any minor non-performance.

[8-176] In *Lam Ngok Ching & Anor v Lam Tse Choi & Ors*,²²⁸ the relevant factors relating to part performance were described by Suffiad J, at paragraphs 36 to 38, as:

- (a) part performance is really evidence to show or prove the existence of the contract;
- (b) the proper view is that without acts of part performance, the court will not even commence to consider the question of specific performance; and
- (c) if sufficient acts of part performance can be shown, the court may consider the question of specific performance; relief will be granted only if the court is satisfied that in all the circumstances that remedy should be granted.

228 [2006] HKCU 932.

[8-177] The defendant had sought to defend his occupation of land, claiming to be entitled to specific performance of two agreements, but at the same time maintaining an alternate claim based on adverse possession. Suffiad J observed the claims were inconsistent and noted that:

he could only ask for specific performance ... if the Agreements are still on foot, but if they are still on foot, and until there is repudiation of the Agreements, the defendant's occupation of the Property could not be adverse.

[8-178] The defendant had not paid the purchase price.

[8-179] The court held that he had gone into possession under a licence granted by the agreements. He had remained in possession for more than 20 years without being asked to leave. At one point he acknowledged the title of the plaintiff. He only sought specific performance, and the possessory title, when he had been asked to leave. The court decided that the plaintiff was entitled to possession and mesne profits. As there was no evidence presented by the plaintiff as to the value of the property, the mesne profits were set at the nominal amount of \$1.

[8-180] The consequence of the court accepting that there was part performance is **not** to enforce defective contract. The result of part performance is that the court in its equitable jurisdiction (subject always to the fact that equitable relief is discretionary) will treat the defendant as the recipient of a *benefit from the performance*, and as such would be acting unconscionably to deny relief to the plaintiff. So, the court in its equitable jurisdiction will **never** circumvent the Statute of Frauds (ie in Hong Kong, s 3(1)) by enforcing the unenforceable contract. Instead it is preventing the actions of the defendant amounting to equitable fraud.

[8-181] The acts required as sufficient acts of part performance were described in the House of Lords in *Steadman v Steadman*,²²⁹ as:

If a party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn round and assert that the agreement is unenforceable. Using fraud in its older and less precise sense, that would be fraudulent on his part and it has become proverbial that courts of equity will not permit the statute to be made an instrument of fraud.

[U]nless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not.

[8-182] However, there was no clear decision on whether the contract had to be a contract affecting land or whether any type of contract would do. In Hong Kong, only part of s 4 of the Statute of Frauds survives in Hong Kong; and that as s 3(1). In *Cheang Kwok Sam v Chui Kin Wing & Anor*,²³⁰ it was said that:

One must not first look at the oral contract to see whether the alleged acts of part performance were consistent with it but that one must first look at the alleged acts of part performance to see whether they proved that there must be a contract. It is only if they do so prove that one can bring in the oral contract.

229 [1976] AC 536.

230 [1995] 1 HKC 637.

[8-183] The plaintiff, seeking to rely on those acts, must have performed them. They should be referable to the contract involving land, they must be unequivocal and the oral agreement must contain sufficient terms for the court to order specific performance. In *Chan Yat v Fung Keong Manufacturing Factory*,²³¹ both parties had carried out acts of part performance, so that either party could have relied on this equitable relief. However, in the events that occurred there, the lessor was more concerned with obtaining damages for breach and for that he had to rely on s 3(1). Among the acts performed by the lessor were those whereby:

- (a) he no longer sought a lessee for the property;
- (b) he told all who inquired that the property was let;
- (c) he wrote to the neighbouring owner to convey a complaint of the lessee; and
- (d) he completed the building and allowed the lessee to install machinery there before the due date for possession by the lessee.

[8-184] Amongst those performed by the lessee company were:

- (a) it made complaints about neighbouring owners which the lessor conveyed to them;
- (b) it paid part of the cost of the electricity installation; and
- (c) it paid a deposit for the rent.

[8-185] Had the common law remedy failed, the lessor would have been able to seek specific performance based on his acts. Alternatively, had the lessor refused to continue, the lessee would have had his choice of remedies also.

14. EXCHANGE

14.1 Where there is provisional agreement

[8-186] All too frequently in Hong Kong, neither V nor P instructs a solicitor until they have signed a binding PA prepared by the V's estate agent. Generally, the formal SPA prepared by the V's solicitor which both parties then sign and exchange at a later date does alter the terms appearing in the pre-existing binding agreement. It is usual for both documents to follow Form 2 of Schedule 3 and insert conditions from Part A of Schedule 2 although in the PA these terms are often unrecognisable.

[8-187] The timing of the exchange, and of the payment of the balance of the purchase money will be set out in the PA. It is to be remembered that time is of the essence for the contract, unless the parties have otherwise agreed.

14.2 Where there is no binding PA

[8-188] Where the parties are not already bound by a PA, the contract in duplicate is prepared by the V's solicitor having received full instructions from the V and after the solicitor has made certain inquiries. The two legal representatives

231 [1967] HKLRD 364.

then negotiate the terms of the SPA. Inquiries made by the P's solicitor relate to the V's title and capacity to sell includes the following:

- (a) inquiries in connection with the V being able to deduce good title, dependent always on what his obligations in respect of the title will be under the contract. To ensure that the V will meet his obligations, it will usually be necessary to carry out a search the Land Registry and the Companies Registry (where appropriate), and to inspect the property to see whether there are any illegal structures or unauthorised building works, or to view the car parking facilities and similar factors; and
- (b) inquiries from the V as to any representations he may have made to the purchaser which he may be unable to maintain. These representations can take effect as collateral contracts. The purchaser may also have a remedy under s 3(1) of the Misrepresentation Ordinance (Cap 284) under which the measure of damages is that of the tortious action for deceit, including in recent decisions, the right to potential profits. See *East v Maurer*,²³² and *Long Year Development v Tse Fok Man Norman*.²³³

[8-189] At the same time, the P's solicitor will be making similar searches and inquiries at the Land Registry, the Companies Registry and inspecting the physical state of the land.

[8-190] One part or copy of the draft contract is then forwarded to the P's solicitor together with the title documents or certified copies thereof. The title deeds or the copies will be held by the P's solicitor on an undertaking to return them to the V's solicitor when so requested. This step in the transaction is the same where there is a PA, but by that time the P is usually bound by an enforceable contract.

[8-191] The P's solicitor is entitled to seek amendment to the draft. Prior to signing, the P's solicitor will investigate the title and other relevant matters in light of the documents forwarded with the draft contract, and prepare to make requisitions: see however the timing problems in *First Shanghai Enterprises Ltd v Dahlia Properties Pte Ltd*.²³⁴

[8-192] Once the draft has been accepted, it should be signed by the P whose solicitor will forward it to the V's solicitor together with the deposit, and the V's solicitor will forward a copy signed by the V to the P's solicitor.

[8-193] The process referred to above represents the ideal but there are variations of this in practice. The contract for the sale of land is effected by each party signing one part of a formal sale and purchase agreement and those parts being exchanged. Generally, until the exchange, there is no binding contract although the parties can provide otherwise. Ideally, all terms on which the parties agree to be bound should be settled before the signing and exchange of the parts.

232 [1991] 2 All ER 733.

233 [1991] 2 HKC 393.

234 [2002] HKCU 1521.

14.3 Exchange in escrow

[8-194] An exchange in escrow is a conditional exchange pending the completion of a condition precedent or some other similar factor; the purpose is to seek to ensure the P is not in breach of his obligations under the PA or some other agreement with the V but that he is not irrevocably bound until the factor in escrow has been settled. Generally, an escrow agency is used in relation to payments under a commercial transaction, and the agency agreement expressly provides that the escrow agent has no right to any interest payable on the escrow money whilst in his care. He has fiduciary duties to the person entitled to the money, and must act in accordance with his agency

[8-195] Where the exchange is expressed to be in escrow, there is doubt as to the date when the deed takes effect. There are two views. One view is that the parties are bound conditionally on the delivery of the deed but that on the successful happening of the named event, the deed takes effect from the date of delivery when it then binds the grantor absolutely: *Alan Estates Ltd v WG Stores Ltd*.²³⁵ From the related back date, the deed then binds the parties *vis-à-vis* third parties. The other view is that the parties are not bound in any way until the event occurs and on that date the deed becomes binding without relation back: *Beesly v Hallwood Estates Ltd*, and *Terrapin International Ltd v Inland Revenue Commissioners*.²³⁶

[8-196] The *Alan* decision treats the parties, prior to the deed becoming absolute, as bound by the terms of the underlying contract. Lord Denning MR in that case mentioned that pending this, the grantor would not be able to dispose of the property contrary to the interests of the grantee. The grantor was bound to give the grantee a reasonable time to perform and only if the condition was unfulfilled could the grantor deal with the land. This seems to make the grantor some sort of trustee for the benefit of the grantee. Once the condition has been performed, the parties to the deed can then bind third parties in respect of the property.

[8-197] It would seem that the *Alan* decision is the preferable one, especially in view of the need to register for priority purposes under the LRO. Whilst registration does not create or effect any interest in land, it does offer protection to those claims to interests in land which are evidenced in writing sufficient to be detailed in a memorial which is then registered under the Ordinance. Thus, where the deed has some effect as between the parties thereto prior to the fulfilment of the condition, the grantee is in a position to claim an interest in land, potential though it be. Under the opposing view, it would be difficult for the grantee to substantiate a claim prior to the fulfilment of the conditions and so would not be in a position to defend an action by the grantor seeking the vacation of any registration under the Ordinance.

²³⁵ [1981] 3 WLR 892.

²³⁶ [1976] 2 All ER 491.

15. STAKEHOLDER

[8-198] Often, the V's solicitor will act as a stakeholder whereby he holds the deposit or the balance of the purchase money in some type of relationship which sometimes seems akin to a fiduciary capacity: see *Wise Think Global Ltd v Finance Worldwide Ltd*.²³⁷

[8-199] The role of the stakeholder generally was described by Farquharson LJ in *Rockeagle Ltd v Alsop Wilkinson*,²³⁸ as:

the duties and authority of a stakeholder lie in contract or quasi-contract and not as trustee. The task of a stakeholder, when paid a deposit by the parties to a contract of sale of a property or as may be, is to hold the stake upon the happening of the events that are specified in the contract. Thus, if in due course the sale of the property is completed or for any reason the deposit is forfeited, it would be his duty to pay over that money to the vendor.

Alternatively, if for any other reason the sale is not proceeded with, he must pay the money to the original depositor, that is to say the purchaser.

The problem arises whether there is a right on the part of the contracting parties to require the surrender of the stake from the stakeholder and to terminate that authority before either of those specified events take place. ...

There must be an implied term in the contract made between the original parties and the stakeholder that they can, should they so desire, withdraw that authority and direct him to apply the money in the way both agree.

[8-200] In *Edward Wong Finance Co Ltd v Johnson, Stokes & Master*,²³⁹ the Privy Council added a necessary protection to the purchaser by noting that where the purchaser pays money to the vendor's solicitor under the terms of the contract and that solicitor holds it as stakeholder, then it is received as agent of the vendor. On the vendor's default, the purchaser can seek specific performance on the basis that the money was received by his agent. This applies even though the solicitor may have acted as stakeholder for both parties.

[8-201] In *Fulltrend Co Ltd v Longer Year Development Ltd & Anor*,²⁴⁰ the V's solicitor acting as stakeholder released the purchase money to the V; the P objected on the ground that the P's objections on title had not been satisfactorily dealt with. Two adjoining pieces of land had been sold to two persons who later incorporated. The two Ps were the directors of the new company (DC) and they nominated the company as the ultimate P As directors, they then conveyed the land to a third party (RDM). Several transactions later, the present owner (JIL) sought to sell to the first defendant, who then entered into a sub-sale with the plaintiff. The plaintiff sought to object to the title on the grounds that DC had purported to assign to RDM as 'beneficial owner' whereas it would seem that the two original Ps were beneficially entitled by way of trust. However, the court held that the objection was not well-founded and was misconceived for the two original purchasers had executed the assignment as directors without any reservations of their personal interests. In the event, the solicitor had properly released the money to the vendor.

²³⁷ [2014] 4 HKC 167 (CFA).

²³⁸ [1991] 3 WLR 573.

²³⁹ [1984] AC 296.

²⁴⁰ [1990] 1 HKC 452.