

## CHAPTER 2

### Sale of Land

Land may be disposed of inter vivos by sale or as a gift or as part of a family settlement.<sup>1</sup> It may also be passed on to a person by will or, if the owner dies intestate, to those persons entitled under the intestacy rules. This chapter only deals with the disposition of land by sale, as it is by far the most common and significant form of disposition in practice. It is beyond the scope of this book to examine the details of land transfer, and reference to specialist conveyancing books should be made.<sup>2</sup> Some basic knowledge of disposition by sale is, however, essential for a better understanding of the remaining chapters, particularly those on the protection of legal estates and fragmented equitable interests under a system of deeds registration.<sup>3</sup>

The process of land transfer by sale involves invariably two main transactions: the contract and the completion (ie the conveyance or assignment).<sup>4</sup> There are however various things a buyer and a seller, or more usually their solicitors, have to do before and after the signing of the contract and before and after the completion. There are therefore five stages in the conveyancing or assignment of land by sale.

#### 1 Stage One: Pre-formal Contract

##### (a) Subject to contract or preliminary agreement<sup>5</sup>

At pre-formal contract stage, the buyer and the seller are simply negotiating. They may, however, 'agree' on the sale 'subject to contract', and until a contract is signed and exchanged in the usual way, they are not contractually bound.<sup>6</sup> However, in Hong Kong if the service of an estate agent is used

<sup>1</sup> For settlements, see Ch 11.

<sup>2</sup> See Judith Sihombing and Michael Wilkinson, *Hong Kong Conveyancing Law and Practice* (Hong Kong: Butterworths Asia (looseleaf)), Vol 1.

<sup>3</sup> See Ch 6.

<sup>4</sup> Other forms of transfer, eg as a gift or by will, etc, are not normally preceded by a contract.

<sup>5</sup> For a discussion on preliminary agreements, see Helen Yee-Fong Chung, 'Conveyancing: Preliminary Agreements and Escape Clauses' (1993) 23 HKLJ 282.

<sup>6</sup> *A-G v Humphreys Estate (Queen's Gardens) Ltd* [1986] 1 HKC 592, [1987] HKLR 427, [1987] AC 114, [1987] 2 WLR 343, PC; *Spottiswoode, Ballantyne & Co Ltd v Doreen Appliances Ltd* [1942] 2 KB 32 at 35; *Keppel v Wheeler* [1927] 1 KB 577 at 584. For commentary on the effectiveness or otherwise of the phrase 'subject to contract' in England, see [2001] Conv 86 and 499.

by the seller to sell his flat, a 'provisional' or 'preliminary' agreement is usually drafted by the estate agent on behalf of both the seller and the buyer.<sup>7</sup> Such a provisional or preliminary agreement, when signed by the seller and the buyer,<sup>8</sup> is usually binding on the parties because it indicates the parties' intention to be bound.<sup>9</sup> The practice of using the words 'subject to contract' subsequently by the buyer's solicitor in his letter to the seller's solicitor does not change the binding effect of the provisional agreement.<sup>10</sup> If the intention was that the provisional agreement should not be binding, clear terms to that effect must be used in the provisional agreement itself, as in *Grand Subject Investment Ltd v Mable Road Co Ltd & Anor*,<sup>11</sup> where an 'offer letter' was headed 'without prejudice and subject to contract' and clearly provided that neither the offer nor the acceptance of it by the recipient was to constitute a binding obligation on the part of the sender. In coming to the conclusion that there was not yet any binding contract between the parties, Godfrey J, as he then was, referred to what Sir Garfield Barwick said in *Daiman Development Sdn Bhd v Mathew Lui Chin Teck*:

The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other, considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. *Where they have expressed themselves in writing, the proper construction of the writing against that background will answer the question.* The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangements might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement. The

- 7 Estate agents are now regulated by the Estate Agents Ordinance (Cap 511).
- 8 The estate agent will also sign the agreement as a party to it to ensure that he will receive his commission from both the seller and the buyer.
- 9 See *Man Sun Finance (International) Corp v Lee Ming Ching Stephen* [1993] 1 HKC 113 at 124C-E, where Godfrey J said 'the signing of the form brings into existence an immediately binding agreement, it does so on the terms on which it expressly contains ... From the moment the ink is dry on the parties' signatures, all references to the formal sale and purchase agreement are illusory'. This was cited with approval in *Luxebond Investment Ltd v Super Asian Investment Ltd* [1998] 2 HKC 308. Cf *Yeung Siu Hong v Chan Siu Mee Sandie* [1992] 2 HKC 559, [1992-93] CPR 317 (an agreement to agree and what was to happen if no such agreement was concluded); *Yu Tai Hing Land Agency Ltd v Leung Wing Yin* [1986] 1 HKC 574, [1986-88] CPR 255. However, if the provisional agreement does not contain all the material terms, or is itself 'subject to contract', it may not be binding: *Winn v Bull* (1877) 7 Ch D 29.
- 10 See *Au Wing Cheung v Roseric Ltd* [1992] 1 HKC 149, [1992-93] CPR 368; *Lam Tam Yi & Anor v Chak Wai Man* [1993] 1 HKC 537, [1992-93] CPR 377; *Hong Kong Housing Authority v Hung Pui & Anor* [1987] 3 HKC 495, [1986-88] CPR 221. 'That a provisional agreement calls for a formal agreement that will supersede it, is not inconsistent with the former being a binding agreement': *Fong Yee Lan v Yiu Yau Ling* [1992] 2 HKLR 167 at 174, per Nazareth JA.
- 11 [1993] 1 HKC 499, [1992-93] CPR 382.

question is one  
absence of any

It is plain that w  
is a matter to b  
v *Hong Kong I*  
defendant) and  
terms such as  
charges. Upon  
defendant sent (1  
1997), which pi  
three years 'cor  
occupation perf  
Lessor to the Int  
The draft letter  
were 'subject to  
gave the plaint  
commence fitti  
plaintiffs, but r  
the return of th  
held that the pa  
The judge's dec  
turn reversed by  
of Appeal may  
their *subjective*  
correct approach  
the contempora  
had uncondition  
the contract.<sup>17</sup> T  
usually include  
etc. On signing  
to pay a depos  
usually contain  
by paying min

- 12 [1981] 1 M
- 13 *World Foo*  
387, [2007]  
*Siu Man v*
- 14 *World Foo*  
(11 Noven
- 15 *World Foo*  
594, CA.
- 16 *World Foo*  
387, [2007]
- 17 *Ibid* at par

question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words.<sup>12</sup>

It is plain that whether the parties intended to enter into a concluded contract is a matter to be looked at objectively.<sup>13</sup> In *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd*, the owner of a shopping mall (the defendant) and potential tenants (the plaintiffs) orally agreed on certain terms such as the monthly rent, management fees and air-conditioning charges. Upon receipt of a cheque for \$200,000 as 'initial deposit', the defendant sent the second plaintiff a draft letter of intent (dated 1 February 1997), which proposed, inter alia, that the tenancy should be for a term of three years 'commencing 8 March 1997 tentatively (subject to issuance of occupation permit) and a prior 7 days written notice will be served by the Lessor to the Intended Lessee for the actual date of commencement of Lease'. The draft letter of intent also provided that all the terms contained therein were 'subject to the formal Lease Agreement'. After that, the defendant gave the plaintiffs access to the premises to enable their contractors to commence fitting out works. Substantial expenses were incurred by the plaintiffs, but no formal agreement was signed. The plaintiffs' claim for the return of the deposit and damages was dismissed by the judge, who held that the parties had not proceeded beyond the stage of negotiation.<sup>14</sup> The judge's decision was reversed by the Court of Appeal,<sup>15</sup> which was in turn reversed by the Court of Final Appeal. As Ribeiro PJ put it, 'the Court of Appeal may have given undue weight to what [the witnesses] said were their *subjective* intentions as telling against the defendant's case'.<sup>16</sup> The correct approach should be to assess the evidence of the witnesses against the contemporaneous documents to decide whether objectively the parties had unconditionally reached final agreement on all the intended terms of the contract.<sup>17</sup> The standard preliminary agreement used by the estate agent usually includes the description of the property, the price and the parties, etc. On signing the provisional agreement, the buyer is usually required to pay a deposit of 1% of the purchase price. The provisional agreement usually contains terms which allow the seller to resile from the agreement by paying minimal damages only, which is often the loss of the initial

<sup>12</sup> [1981] 1 MLJ 56 at 58 (emphasis added by Godfrey J.).

<sup>13</sup> *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd* [2007] 1 HKC 387, [2007] 1 HKLRD 498, (2006) 9 HKCFAR 735, CFA, at para 35, citing *Kwan Shi Man v Yaacov Ozer* (1997-98) 1 HKCFAR 343 at 354.

<sup>14</sup> *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd*, HCA 4602/2000 (11 November 2003, Deputy Judge Carlson).

<sup>15</sup> *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd* [2005] 1 HKC 594, CA.

<sup>16</sup> *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd* [2007] 1 HKC 387, [2007] 1 HKLRD 498, (2006) 9 HKCFAR 735, at para 35 (emphasis original).

<sup>17</sup> *Ibid* at para 38.

deposit of 1% of the purchase price plus the same as liquidated damages.<sup>18</sup> It often also requires the buyer to pay the deposit on the day the preliminary contract is signed and the balance of the purchase price the day after.<sup>19</sup> Such an absurdity, caused by the mindless use of a standard form of contract has caused concern among the profession and consumers, and the Consumer Council and the Law Society of Hong Kong are investigating ways of regulating the industry.

Where the buyer buys the property from the developer, whether completed units or units in an unfinished development, the buyer is usually required to sign a binding memorandum for sale with the developer and to pay a deposit of 5% of the purchase price. The buyer and the developer are often jointly represented by the developer's solicitor, although the buyer is entitled to appoint his own solicitor. The sale and purchase agreement will usually be signed by the buyer in the presence of the solicitor within three working days of the signing of the memorandum for sale and the agreement is usually in the standard form contract containing standard terms under the Consent Scheme or mandatory terms under the Non-Consent Scheme.<sup>20</sup>

#### (b) Searches, enquiries and inspections

As in many other contracts, the basic rule in a contract for the sale of land is *caveat emptor* (let the buyer beware). It is therefore important for the buyer (or his solicitor if he instructs a solicitor before he enters into any agreement to buy the land) to carry out searches, enquiries and inspections to find out more about the condition of the property to be transferred before he signs any agreement. Where an estate agent is engaged by the buyer, such searches are usually done by the agent as he is required to provide the buyer with certain prescribed information including particulars of current ownership and subsisting encumbrances in respect of the property, the total or entire area comprised in the property, the year in which construction of the property was completed, any restrictions on the user of the property, the unexpired term of the Government leases, etc.<sup>21</sup> The buyer should still make enquiries and inspections of the property and should seek legal advice on how to conduct enquiries and inspections. This, however, does not appear to be the case in practice in Hong Kong. All too often eager buyers who

18 The validity of this practice was recognised in *Kentex Investment Ltd v Hui Lap Ping Sam* (1992) MP No 3447/91 at 7, per Godfrey J. His Lordship, however, did not discuss the relationship between such practice and the principle of bare trusteeship under the rule in *Lake v Bayliss* [1974] 2 All ER 1114, nor did he explain whether the stipulated damages (double the deposit of 1% of the purchase price) might be void as a penalty. In *Workers Trust & Merchant Bank Ltd v Dajop Investments Ltd* [1993] 2 All ER 370, the Privy Council held that a deposit of 25% can only be a genuine deposit if special circumstances justified it.

19 This practice has been criticised as absurd by Godfrey J in *Tsing Lung Investment Co Ltd v Yu Sai Kin* [1989] 1 HKC 513 at 515, [1989-91] CPR 377.

20 For details on Consent and Non-Consent Schemes, see Sihombing and Wilkinson, *op cit*, Vol 1, Ch IV, paras 33-75.

21 See Estate Agents Ordinance (Cap 511) s 36(1) and (2).

are unfair  
estate ag  
buyers li  
by the es  
which, as  
even sign  
out to a t  
of them  
the case  
even get  
for sale  
sale broc  
developer  
the buyer  
within th  
therefore

While  
can with  
these sea  
legal prot

The cr  
under a di  
provide a  
sale and p  
express p

Latent  
a prospec  
of the pr  
served by  
covenants  
the tenant  
the seller,  
as there is  
any visibl  
property i  
and maint

22 A de  
thes  
title  
(eg)  
Gov  
23 For  
[195  
Inc

are unfamiliar with legal minefield of conveyancing matters will go to an estate agent whose staff will bring them to view the property and if the buyers like the property they will sign the provisional agreement prepared by the estate agent or the memorandum for sale prepared by the developer which, as mentioned earlier, is often binding. In some cases, a buyer will even sign a preliminary agreement without viewing the property as it is let out to a tenant. The buyers do not have the opportunity and indeed some of them do not see the need to make such enquiries and inspections. In the case of a first-hand purchase from a developer, often a buyer does not even get to inspect the actual unit he is buying before the memorandum for sale is signed. The buyer will usually have to rely on the floor plan, the sale brochure, the architectural model of the development displayed at the developer's sales office, the show flats and his imagination. Furthermore, the buyer is often required to sign the formal sale and purchase agreement within three days of the signing of the memorandum for sale. There is therefore little time for any searches and enquiries to be made.

While it is true that where the seller guarantees good title<sup>22</sup> and the buyer can withdraw if the seller cannot give good title later, it may be wise to do these searches before any agreement is signed in order to avoid potential legal problems.

The caveat emptor rule does not apply to latent defects, so the seller is under a duty to disclose any latent defects in his title; it is the seller's duty to provide a good title unless the provisional agreement, if any, or the formal sale and purchase agreement if no provisional agreement is signed, contains express provisions to limit the title to be given.

Latent defects are encumbrances and any other adverse interests which a prospective buyer cannot discover for himself by a reasonable inspection of the property and cover estate contracts, unwritten equities,<sup>23</sup> notices served by the Building Authority or Highways Department, restrictive covenants, certain easements such as underground pipelines, leases where the tenant is not in possession, etc. Patent defects need not be disclosed by the seller, although it is not entirely clear what amounts to patent defects as there is very little Hong Kong authority on this subject. Matters such as any visible breach of covenants in the Deed of Mutual Covenant where the property is a unit in a multi-storey building, any rights of way, ownership and maintenance of the driveway, planning matters and possibly any illegal

22 A defective or defeasible title is not a good title. A defective title is either a title which the seller does not have or a title which is subject to existing encumbrances. A defeasible title is a title which can be avoided either because of the circumstances of the transfer (eg fraudulent conveyance or preference) or because of breach of the conditions in the Government lease or the Building Ordinance or the Building Regulations.

23 For example, *Hillier Development Ltd v Tread East Ltd* [1993] 1 HKC 285; [1992-93] CPR 416; *Financial and Investment Services for Asia Ltd v Baik Wha International Trading Co Ltd* [1985] HKLR 103.

structures,<sup>24</sup> any breach of the covenants in the Government lease, etc may well be patent defects.

Apart from disclosing any latent defects where the seller agrees to give good title, the seller does not have to volunteer any information. Even where matters may well be patent defects, the prudent buyer should make standard enquiries of them. This exercise can be the biggest hazard for prospective buyers who have to incur considerable time and effort to gather information which may already be possessed by the seller.<sup>25</sup> When questions are asked about the property, the answers the seller gives must be accurate to the best of his knowledge. If the buyer enters into the contract as a result of certain misrepresentations on the part of the seller, he may rescind the contract and/or sue for damages.<sup>26</sup>

#### (i) Land Registry searches

As will be seen, all deeds, conveyances and other instruments in writing must be registered at the Land Registry in order to obtain priority against any subsequently registered deeds, conveyances or instruments in writing.<sup>27</sup> A search at the Land Registry will therefore reveal the registered encumbrances on the property. The buyer can then make an informed decision as to whether to buy the property. An estate agent is required to provide his client with this information before a preliminary agreement is signed.

#### (ii) Companies Registry searches

If the seller is a company registered under the Companies Ordinance (Cap 32), it is necessary to undertake a companies register search. This is to discover any fixed charge or floating charge over the land owned by the company and the company's capacity for execution. These charges will normally be registered at the Land Registry.

24 But see *Giant River Ltd v Asie Marketing Ltd* [1990] 1 HKLR 297; [1986-88] CPR 543.

25 In England, an attempt to solve this problem was made by the Law Society in 1990 by introducing a 'National Protocol' as a result of the recommendations by the Law Commission's Conveyancing Standing Committee in 1989: 'Let the buyer be well informed' (Reports of Conveyancing Standing Committee, December 1989) at para 33. The National Protocol is intended to be used in all domestic conveyancing transactions. Under the National Protocol, a seller is required to provide certain standard information including a series of questionnaires contained in the 'Property Information Form' and a 'Fixtures, Fittings and Contents Form' and to provide local searches. For an examination of the National Protocol, see [1990] Conv 137 (HW Wilkinson). It should be noted that the Protocol is only a time-saving device and does not change the caveat emptor rule: it is still the buyer's responsibility to find out any other information not covered by the Protocol. Furthermore the Protocol is only voluntary rather than compulsory.

26 Misrepresentation Ordinance (Cap 284) s 3(1).

27 See Land Registration Ordinance (Cap 128) ss 2-5.

**(iii) Inspection of property**

The buyer should also inspect the property carefully to find out if anyone other than the seller is in occupation and if so whether they have an interest in the property. Enquiry must be made of the persons in occupation themselves and not just the seller.<sup>28</sup> If the buyer fails to make enquiry of any occupier other than the seller who has an unwritten equity or who has an oral lease for less than three years, he will be bound by the occupier's interest. While unwritten equity is a latent defect, and the seller will be in breach of his duty for not disclosing it to the buyer, if the buyer discovers the undisclosed equity at this stage, he can avoid a law suit. The buyer should also look out for any patent defects in the title which are unregistrable, such as a neighbour's right to walk across the garden, etc. (It seems that illegal structures in breach of the Government lease may be treated as latent defects,<sup>29</sup> particularly if a building order has been made by the Building Authority for its removal.<sup>30</sup>) The seller is not obliged to disclose these patent defects to the buyer. Inspections of property are normally carried out by the buyer himself with perhaps some advice from his solicitor, if he has instructed one, on the matters to look out for.

**(c) Survey**

It is also advisable for the buyer to commission a structural survey of the property to be bought to check for physical defects or illegal structures or any differences from the Government lease. In practice, many house purchases are financed by lending institutions which will instruct a surveyor to assess whether the security offered is sound. This will have to be paid for by the buyer and the buyer will usually be reluctant to commission his own additional survey. If the surveyor is negligent in his assessment and report made to the lending institution which helps finance the purchase, and the buyer subsequently suffers loss, the surveyor can be liable to the buyer.<sup>31</sup>

**(d) Drafting and approving of contract and checking evidence of title**

Having made all the relevant searches, enquiries and inspections, if the buyer is happy with the property on offer and agrees to purchase it, the estate agent will draft the preliminary or provisional contract. (If the buyer has signed a provisional agreement before any searches etc, which is often the case, then such searches, etc mentioned above and any requisitions are normally carried out after a formal sale and purchase agreement is

- 28 *Wong Chim Ying v Cheng Kam Wing* [1991] 2 HKLR 253, CA; *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408; *Hodgson v Marks* [1971] Ch 892 at 932, per Russell LJ applied; *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783 at 794.
- 29 See *Giant River Ltd v Asia Marketing Ltd* [1990] 1 HKLR 297, [1986-88] CPR 543.
- 30 But see *But Chung Yin v Billion Extension Development Ltd & Anor* [1997] 1 HKC 531. Knowledge of an illegal structure does not ipso facto constitute waiver or give rise to estoppel: *ibid*.
- 31 *Yanni v Edwin Evans & Sons* [1982] QB 438, *Smith v Eric Bush* [1990] 1 AC 831.

signed.<sup>32</sup>) The estate agent usually acts on behalf of both the seller and the buyer, especially in the sale of first-hand property where the seller is the developer. The estate agent normally drafts a provisional or preliminary agreement in his own standard form. A prudent buyer should not sign the agreement before seeking advice from his own solicitors. However, in Hong Kong, the buyer often signs the provisional agreement before instructing a solicitor to handle the formal sale and purchase agreement and assignment. As mentioned earlier, such a provisional agreement tends to be binding as it contains terms which indicate a clear intention to be bound.<sup>33</sup> If the buyer signs the provisional agreement, the seller's solicitors will draft the sale and purchase agreement along the lines of the provisional agreement. The buyer's solicitors will request from the seller's solicitors the draft formal sale and purchase agreement together with the title deeds<sup>34</sup> or a certified true copy of them.<sup>35</sup> The sale and purchase agreement must reflect the terms of the provisional agreement and it is obviously important for the buyer's solicitors to ensure that this is the case. But if the sale and purchase agreement is inconsistent with the provisional agreement, the usual contractual principles on variation and waiver would apply.<sup>36</sup>

If the buyer does not sign the provisional agreement, the seller's solicitors may draft the sale and purchase agreement in their standard form contract, or in a formal contract containing the requisite terms under the Consent or Non-Consent Scheme, or in the form of Form 2 in the Third Schedule to the Conveyancing and Property Ordinance (Cap 219) containing the conditions in Part A of the Second Schedule to the Conveyancing and Property Ordinance (see the end of this chapter), or a combination of these, or in an open contract.<sup>37</sup> As will be seen, the contract, whether provisional or the formal sale and purchase agreement, must comply with certain formalities. The buyer's solicitors should check the draft contract and make further enquiries concerning the draft contract or suggestions for any amendment. The seller's solicitors will then reply to the enquiries and submit two copies of the amended draft contract. If the buyer is now happy with the seller's

32 The buyer's solicitors may do a simple search at the Land Registry just to confirm that the seller is indeed the legal owner.

33 This is so even if the provisional agreement calls for a formal agreement to supersede it: *Yiu Yau Ping v Fong Yee Lan* [1992] 2 HKLR 167 at 174, CA; *Chan Yock Kwong v Wong Hee Mao* [1962] HKLR 480 at 487-492; *Branca v Cobarro* [1947] 1 KB 854 followed.

34 *Lee Kenny & Anor v Wong Kwok Yan* [1994] 2 HKC 309.

35 Unless the contrary intention is expressed, a buyer of land shall be entitled to require the seller to deliver to him, for the purpose of giving title to that land, the original of (a) the Government lease that relates exclusively to the land, if there is one; and (b) any document that relates exclusively to the land and is required to be produced by the seller as proof of title to that land under s 13(1)(a) and (c): Conveyancing and Property Ordinance s 13A (added in 2008).

36 See, eg *Keung Shiu Tang v DH Shuttlecocks Ltd* [1994] 1 HKC 286, [1994-1995] CPR 335. For more details on variation and waiver, see GH Treitel, *The Law of Contract* (10th Ed, London: Sweet & Maxwell 1999) at pp 97-113.

37 In England, it is a common practice for the parties to adopt the Standard Conditions of Sale (3rd Ed, 1995) with perhaps some modifications.