

BUTTERWORTHS HONG KONG

**Conveyancing and Property Law**  
HANDBOOK

Sixth Edition (Volume 1)



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to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.  
(2)-(3) (Omitted as spent)

[cf. 1925 c. 20 s. 184 U.K.]

Editorial Note:

\* Commencement date: 1 November 1984.

### [11.01] England

cf, s 184 of the Law of Property Act 1925 (UK).

### [11.02] General note

At common law, it was necessary to prove that a beneficiary has survived the testator in order for a gift to take effect by testate or intestate succession. This evidentiary burden led to difficulties where the beneficiaries or the testator and beneficiaries had been killed in a common disaster, or where it was otherwise uncertain who had survived the other because the time of death of one was unknown. The problem was particularly acute where both of the deceased had left wills leaving their estates to each other with a gift over to a third person. In these circumstances, the ultimate beneficiary could not prove the operation of either gift over, although clearly he was intended to benefit.

This section introduces a clear, albeit somewhat arbitrary, solution by providing that in circumstances where it is uncertain who survived, the younger shall be deemed to have survived the elder. For an example of the application of this section, see *Hickman v Peacey* [1945] AC 304, [1945] 2 All ER 215 (HL), in which four persons, two of whom had made wills benefiting the others, had been killed by the explosion of a single bomb. There being no evidence to show whether any of the deceased had survived the others, the House of Lords held that in the administration of their estates an inference drawn from the facts that they had died simultaneously (which was not in any case justified on the particular facts) would not make this section inapplicable. However if it can be demonstrated, with evidence, a defined and warranted conclusion that the younger person had died before the older one, the presumption in s 11 will not apply (*Hickman v Peacey* [1945] AC 304 (HL) and *Re Bate, Chillingworth v Bate* [1947] 2 All ER 418, [1947] LJR 1409). The burden of proof is on the party asserting such position and the standard is on a balance of probabilities: *Re Phene's Trust* (1869-70) LR5 Ch App 139; *Hickman v Peacey* (above); and *Ting Kam Yuen v Cheung Wing Kit & Anor* (unreported, HCMP 2276/2010, 18 August 2011) (CFI).

For the construction of gifts in a will, which are to lapse in the event of the beneficiary's death preceding or coinciding with that of the testator see *Rowland, Smith v Russell* [1963] Ch 1 (CA, Eng); as for simultaneous deaths of the beneficiary and testator, see *Re Pringle, Baker v Matherson* [1946] Ch 124

Except for the purposes of s 4(11) of the Intestates' Estates Ordinance (Cap 73)

where an intestate spouse and their husband or wife have died in circumstances rendering it uncertain whether one of them, or which of them, had survived the other, the husband or wife is deemed not to have survived the intestate. In these circumstances, the succession passes to the intestate's next of kin, there being little prospect of benefiting the younger spouse. This exception applies only between spouses, or partners in a union of concubinage, and where one of them dies intestate.

### [11.04] Commencement of this section

The relevant commencement date here is 1 November 1984.

### [11.05] Persons

For meaning, see [2.32] above.

### [11.06] Die, deaths

In criminal law, the accepted test of a person's death is to see if that person's brain has died (ie 'brain death'). Accordingly, lack of breathing and heartbeat is not conclusive of death: *The Queen v Chan Yu-Keung* [1987] HKLR 276, [1987] HKCU 116 (CFI).

### [11.07] In circumstances rendering it uncertain ... survived the other

The presumption of survivorship is also applicable where the deaths appear to be simultaneous or when it cannot be proved that one person did in fact survive the other: see *Hickman v Peacey* [1945] AC 304, [1945] 2 All ER 215 (HL). The evidence must lead to a definite conclusion that one person died before the other to avoid the rule: see *Re Bate, Chillingworth v Bate* [1947] 2 All ER 418, [1947] LJR 1409. The rule may not be overridden by an order of the court: cf, the Law of Property Act 1925, s 184).

In the context of the Law of Property Act 1925 s 184, the term 'uncertain' is used in its ordinary acceptation as denoting a reasonable element of doubt: see *Hickman v Peacey* (above). See also *Re Bate, Chillingworth v Bate* (above); and *Re Comfort* [1947] VLR 237.

'Survive' imports that the person who is to survive must be living at the death of the person whom, or at the happening of the event which, he is to survive: see *Re Liddell (No 2)* (1866) LR 2 Eq 341; and *Re Allsop, Cardinal v Warr* [1968] AC 39 (CA, Eng).

**[11.08] For all purposes affecting the title to the property**

The presumption in the present section relates to the devolution of title to all property whether that devolution is by will or upon intestacy. For estate duty purposes (which no longer applies to estates of persons who died on or after 11 February 2016), the Estate Duty Ordinance (Cap 111), s 7A provides that in these circumstances neither party shall be deemed to have survived the other, so that a double charge to tax does not arise.

As to the meaning of 'affect' and 'property', see [3.19] and [10.04] above respectively.

**[11.09] Shall be ... presumed**

The presumption is a matter of substantive law, not of evidence: see *Re Cohn* [1945] Ch 5. To exclude the presumption under this section, there must be evidence leading to a definite and warranted conclusion that one person died before the other. The rule can be avoided by making a gift subject to a survivorship condition, eg. that a beneficiary shall take only if he survives the testator for a specified period, eg. one month.

**[11.10] Subsection (2): General note**

Section 4(11) of the Intestates' Estates Ordinance (Cap 73) was amended pursuant to this subsection, by repealing 'which of them' and substituting 'that one of them, or which of them'.

**[11.11] Subsection (3): General note**

Section 7A of the Estate Duty Ordinance (Cap 111) was amended pursuant to this subsection by adding, 'or which of them' immediately after 'one of them'. Estate duty has been completely abolished for estates of those persons who died on or after 11 February 2016.

**12. Application to court by vendor and purchaser**

- (1) A vendor or purchaser of land may apply by petition or by originating summons to the court in respect of any question arising out of or connected with any contract for the sale or exchange of land (not being a question affecting the existence or validity of the contract or relating to compensation payable by the Government or a public body), and the court may make such order upon the petition or originating summons and as to costs as to the court appears just. (61 of 1999 s. 3)
- (2) In this section, *court* (法院) means the Court of First Instance unless the vendor and purchaser submit to the jurisdiction of the District Court. (Amended 25 of 1998 s. 2)

[cf. 1925 c. 20 s. 49 U.K.]

**[12.01] Enactment history**

Subsection (1) was amended pursuant to s 105 of the Adaptation of Laws (No 24) Ordinance 1999 (61 of 1999) by repealing the word 'Crown' and substituting the word 'Government'.

Subsection (2) was amended pursuant to s 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance 1998 (25 of 1998) by repealing 'High Court' and substituting 'Court of First Instance'. Further, '地方法院' was repealed in the Chinese version and '區域法院' was substituted, but the corresponding term 'District Court' in the English version remains unchanged.

**[12.02] England**

s. 49(1) of the Law of Property Act 1925 (UK).

**[12.03] General note**

This section introduces what is commonly called a 'vendor and purchaser procedure' as a procedure by which a vendor or purchaser may cheaply and quickly obtain a judicial decision on disputes arising out of the performance of their obligations under a contract for the sale or exchange of land which will bind all parties before the court. The land can then be sold with the benefit or burden of such decision without the need to sue for specific performance or rescission. In Hong Kong the procedure has been extensively used to settle disputes regarding the title of the land to be sold.

The court has on occasions commented upon the failure of parties to utilise the procedures under this section, see for eg. *Au Wai Ming & Anor v Kam Tze Ming Alfred & Anor* [2009] 4 HKC 469, [2010] 1 HKLRD 198 (CA); *Ho Chung Yin Tin & Anor v Chung Wai Chun Susanna* [2008] HKCU 1384 (unreported, DCCJ 1066/2002, 3 September 2008) (DC). On the other hand, the Court has also criticised the improper use of the procedure: see *Guang Xin Enterprises Ltd v Leung Kwai Mui* [1996] 4 HKC 572 (CFI) (trivial matters raised) and *Cheng Sin Tin & Anor v Wong Kam Pui Dicky* [2015] 3 HKC 173 (CFI) (asking the Court to provide an advisory requirement).

The decision of the court will only bind the parties to the action and will have no effect upon third parties: *Wong Yiu (alias Wong Yiu Kwan) v Leung Sum* [1988] HKLY 567; *Lion Will Investment Ltd v Triple Will Ltd* [1992] 2 HKC 430 (CFI).

This section presupposes the existence of a dispute between the vendor and purchaser of a property. It is not open to an owner, without entering into any contract for sale, to invoke this section: see *Lam Ho Tak Douglas v Lam Shun* [1994] HKLY 711 (DC). Furthermore, the court will not entertain any proceedings in which an owner of property attempts, ex parte, to obtain a declaration in order to arm himself against some difficulty which may arise in the future. It is not the function of the court to settle the doubts of property owners about the state of

their title in the absence of any other party interested in the matter (*Re Estate of Yu Leung Fong* [1991] 1 HKC 494 (CFI)). Solicitors advising purchasers are required to give proper advice as to the title of the property. They must not treat the vendor and purchaser summons as a means of protecting themselves at their clients' expense: *Castle City Ltd v Choi Yue Development Ltd* [1995] 2 HKC 593 (CFI), at 597, per Keith J.

Once the parties have agreed to resolve the dispute by a vendor and purchaser summons and to delay completion pending the outcome of the court's decision, the purchaser may not then rescind the agreement on the grounds that the vendor has failed to show title by the contractual date of completion: *Kwong Kai Hong and Know Mei Yin v Chan Lik* [1995] HKCU 171 (unreported, MP No 1529/1995, 27 July 1995) (SC).

For examples of local decisions under this section, see [13.04] below.

The jurisdiction to hear a vendor and purchaser summons is confined to the High Court, notwithstanding that the claim or the rateable value of the premises may be within the jurisdiction of the District Court, unless the parties submit to such jurisdiction: see sub-s (2).

#### [12.04] Subsection (1): A vendor or purchaser of land

Both 'land' and 'sale' are defined widely in s 2 above, and thus this subsection has a potentially wide application.

In England, s 49(1) of the Law of Property Act 1925 (UK) has been applied to contracts for the lease of land and contracts supported only by nominal consideration, but not to purely voluntary arrangements (*Re Marquis of Salisbury* (1875) LR 20 Eq 527; *Re Anderton and Milner's Contract* (1890) 45 Ch D 476; *Re Lander and Bagley's Contract* [1892] 3 Ch 41). The procedure is not available to determine question relating to the sale of property other than land: *Talent Hope Ltd v Magnificent Estates Ltd* [1995] 3 HKC 593 (CFI).

Where the contract has been validly terminated there is no longer a contract upon which questions may be raised for the consideration of the court by a vendor and purchaser summons: *Hero Profit Enterprises Ltd v Kadesy Development Ltd & Ors* [1995] 3 HKC 193 (CFI).

#### [12.05] By petition

The section permits the initiation of proceedings by petition but does not set out any particular procedural rules for the presentation of the petition, unlike other legislation which specifies a petition as the mode of commencing proceedings, eg matrimonial, bankruptcy and winding-up proceedings. Thus, O 9 of The Rules of the High Court (Cap 4A), which sets out the general rules governing petitions, provides the only procedural guidelines if the action is initiated by petition.

#### [12.06] By originating summons

Applications under this section are usually made by originating summons. Unlike s 102 of the Law of Property Act 1925 (UK), the Conveyancing and Property Ordinance (Cap 219) does not stipulate any variation from The Rules of the High Court (Cap 4A) to govern the conduct of any summons under this section, the procedure for which is governed by O 7 of The Rules of the High Court.

The originating summons should be titled 'In the matter of the agreement (giving details of its date, the parties and the property), and in the matter of s 12 of the Conveyancing and Property Ordinance (Cap 219)'. The names of the vendor and purchaser should be included: *Wong Shui Yun Bernadette v Lai Wai Pui* [1987] 3 HKC 513 (CFI); *Wong Yiu (alias Wong Yiu Kwan) v Leung Sum* [1988] HKLY 807. In the body of the summons, reference should again be made to this section, under which the application is brought and all the issues clearly and succinctly identified (*Kwok Wai Fan v Tse Kin Chung* [1998] 2 HKC 105 (CFI)). Once the summons has been determined and the order of the court perfected, the court has no power to allow amendment of the summons to permit further issues to be raised and a party may be estopped from bringing fresh proceedings having failed to raise the issue when they initially had an opportunity to do so: *Rich Circle Co Ltd v Lucky Time Finance Co Ltd* [1993] 2 HKC 429 (CFI).

The ordinary form of originating summons, namely Form 8 of The Rules of the High Court, should be used. The expedited form of originating summons (ie, Form No 10 of The Rules of the High Court) should not be used — see *Hong Kong Ping Jeng Lau Co v Incorporated Owners of United Centre* [1990] 1 HKC 178 (CA) where an expedited form was used and *Hingold Investments Ltd v Kadesy Development Ltd* [1995] HKCU 148 (unreported, HCMP 1311/1995, 7 June 1995) (CA), where costs were awarded against the plaintiffs who had used the expedited form.

The summons must be heard in open court before a judge, not in chambers before a master (*Pak Lan Ching v Crown Great Co Ltd* [1988] HKC 784 (CFI); *In The Matter Of Kwun Tong Inland Lot No 386* [1989] 1 HKC 411 (CFI); *Cheung Kai Wei Sandra v Fuk Ka Pak & Anor (No 2)* [1990] 2 HKC 401, [1990] 2 HKLR 480 (CFI); *Very Cheer Development Ltd & Anor v Bring All Ltd* [1994] 1 HKC 796, [1995] 1 HKLR 213 (CFI)). Evidence may be submitted by affidavit without the directions of the judge: see also O 28 r 1A.

An application for abridgement of time so as to expedite the hearing will not be entertained unless compelling reasons for the application are shown. The burden on the party applying is very heavy and it is not enough to show that there is no prejudice to the other party: *Talent Hope Ltd v Magnificent Estates Ltd* [1995] 3 HKC 593 (CFI). The court should not help a party by providing any special inference, for instance by ordering an early trial (or other change of the normal timetable) where the purchaser in a falling market wishes to have a court ruling in his favour before completion date: see *Talent Hope Ltd v Magnificent Estates Ltd* (above), at 599.

An originating summons should not be used in ex parte proceedings (*In The Matter Of Kwun Tong Inland Lot No 386* (above); *Re estate of Yu Leung Fong* [1991] 1 HKC 494 (CFI)). Nor is the procedure suitable for collusive proceedings (*Xiamen International Finance Co Ltd v Tsui Tai Yan & Anor* [1987] 2 HKC 422, [1987]

HKLR 977 (CFI)), although the mere fact that both parties wish to achieve the same result is no bar to the use of the procedure (*Fung Kam Cheung v Kwok Yu Wing* [1991] 1 HKC 321 (CFI)).

### [12.07] Any question arising out of or connected with any contract for the sale or exchange of land

The procedure under this section is intended to be used as a convenient means to deal with isolated points of dispute between the parties, concerning the performance of their obligations under the contract, eg: (1) the vendor's obligation to answer a particular requisition (*Re Burroughs, Lynn and Sexton* (1877) 5 Ch D 601 (CA, Eng); *Dei Chuen Ho Industrial Ltd v Leung Yin Por* [1993] 2 HKC 495 (CA, Eng); *Very Cheer Development Ltd & Anor v Bring All Ltd* [1994] 1 HKC 796, [1995] 1 HKLR 213 (CFI)); (2) whether the vendor has shown good title (*Peking Fur Store Ltd v Bank of Communications* [1993] 1 HKC 625 (CFI); *Active Keen Industries Ltd v Fok Chi Keong* [1994] 2 HKC 67, [1994] 1 HKLR 396 (CA)); (3) the validity of a notice to rescind (*Re Jackson and Woodburn's Contract* (1888) 37 Ch D 44); (4) the form of assignment (*Re Hughes and Ashley's Contract* [1900] 2 Ch 595 (CA, Eng)) and; (5) claims for relief by the purchaser in respect of misstatements or misrepresentations by the vendor (*Re Farrcett and Holmes' Contract* (1885) 42 Ch D 150; *Wide Link Ltd v Tam Sing Cheong & Ors* [1999] 3 HKC 405 (CFI)).

Furthermore, the procedure is inappropriate to determine complex questions of fact as the summons is heard on affidavit evidence (*Re Burroughs, Lynn and Sexton* (1877) 5 Ch D 601 (CA, Eng); *Re Gray and Metropolitan Rly Co* (1881) 44 LT 567; see also *Ip Kam Wah v Fair City Group Ltd* [2005] 4 HKLRD 168, [2005] HKCU 128 (CFI)) or fraud (*Re Sandbach and Edmondson's Contract* [1891] 1 Ch 99 (CA, Eng)). Where questions of fact do arise which need to be resolved by oral evidence, the court will either order the deponent to attend to be cross-examined on his affidavit (see O 28 r 4(3) of The Rules of the High Court (Cap 4A)) or order that the proceedings continue as if commenced by writ under O 28 r 8 of The Rules of the High Court. For difficult or complicated issues of construction, the proper course is to issue a summons under O 5 r 4(2)(a) of The Rules of the High Court: see *Horton v Kurzke* [1971] 1 WLR 769.

There must be a present dispute between the parties and the procedure should not be used to resolve academic, hypothetical or future questions or where the parties' solicitor(s) wishes to protect themselves from liability. See, for example, *Cheng Sin Yau & Anor v Wong Kam Pui Dicky* [2015] 3 HKC 173 (CFI). Solicitors have been criticised for seeking the assistance of a vendor and purchaser in inappropriate circumstances see for instance *Castle City Ltd v Choi Yue Development Ltd* [1995] 2 HKC 593 (CFI); and *Guang Xin Enterprises Ltd v Leung Kwai Mui* [1996] 4 HKC 572 (CFI). Nor should the procedure be used where the parties are jointly represented and the solicitor is seeking to resolve an uncertainty as to title. If there is an uncertainty as to title the parties must be separately represented: see *Wong Yiu (alias Wong Yiu Kwan) v Leung Sum* [1988] HKLY 567 (above).

The jurisdiction of the court cannot be ousted in the contract: see *Re Spindler and Mear's Contract* [1901] 1 Ch 908.

As to the meaning of 'contract' and see 'affecting' see [3.09] and [3.19] above.

### [12.08] Not being a question affecting the existence or validity of the contract

The procedure under this section may not be available where the existence or validity of the contract is in issue. Although the parties do not have to admit the validity of the contract, the question must be one that the court would have to decide as if the contract were valid (*Re Hughes and Ashley's Contract* [1900] 2 Ch 595 (CA, Eng)). Nor is the procedure appropriate for seeking specific performance or rescission of the contract although the effect of a notice to rescind can be raised (*Re Wallis and Barnard's Contract* [1899] 2 Ch 515; *Re Jackson and Woodburn's Contract* (1888) 37 Ch D 44). Nonetheless, DHCJ Brian Gilchrist held in *Far North Ltd & Anor v Lo Ki Mou & Anor* [2017] HKCU 2639 (unreported, HCMP 2016, 19 October 2017) (CFI), that s 12 of the Conveyancing and Property Ordinance (Cap 219) empowers the court with a wide discretion and can cover issues related to validity of contract including misrepresentation and rescission. See also *Wide Link Ltd v Tam Sing Cheong & Ors* [1999] 3 HKC 405 (CFI).

As to the enforceability of contracts for the sale of land, see s 3 above.

### [12.09] Or relating to compensation payable by the Government or other public body

The procedure is also not available to determine cases involving compensation payable by the Government or a public body, for instance upon the resumption of land under s 6 of the Lands Resumption Ordinance (Cap 124).

As to the meaning of 'relating to', see [2.35] above.

As to the meaning of 'Government', see s 3 of the Interpretation and General Clauses Ordinance (Cap 1) and s 30 and Sch 8 to the Interpretation and General Clauses Ordinance, added pursuant to s 6 of the Hong Kong Reunification Ordinance (Cap A601). Since the Government acts through agents, the expression has also been held to cover all the government ministers, officers and servants who act on the Government's behalf (*Chan Po Kee v Financial Secretary Inc* [1988] HKC 52 (CA)) as well as government servants who have by statute been accorded the legal status of a corporation sole.

As to the meaning of 'public body', see s 3 of the Interpretation and General Clauses Ordinance (Cap 1) and s 22-28 of the Hong Kong Reunification Ordinance (Cap A601).

### [12.10] Make such order ... as to the court appears just

The court has power to grant declaratory relief, ie, a declaration which makes it clear which of the disputants is right. If the matter is not contested, the court would still need to consider the merits of the declaration sought, it would be slow to grant declaratory relief by consent: *PAC-Ocean Investment Ltd v Forband Development Ltd* [2007] HKCU 1578 (unreported, HCMP 1366/2007, 13 September 2007) (CFI). The power of the court is declaratory rather than curative, in that it confers on the court a power to declare whether or not good title has been shown, but does not confer on the court a power to hold a title to be good so as to remove the matter itself (*Lai Chung Yue v Chau Shing & Anor* [1987] 3 HKC 406 (CFI)). The

decision will only bind the parties to the action so that the rights of third parties are unaffected: *Re Naylor and Spendla's Contract* (1886) 34 Ch D 217 (CA, Eng.); *at 220; Re Osbourne's Contract* (1880) 13 Ch D 774; *Wong Yiu (alias Wong Yiu Kwan) v Leung Sum* [1988] HKLY 567; *Fung Kam Cheung v Kwok Yiu Wing* [1991] 1 HKC 321 (CFI).

The court may also order rescission and the return of the purchaser's deposit with interest together with the purchaser's costs of investigating title (*Wide Link Ltd v Tam Sing Cheong & Ors* [1999] 3 HKC 405 (CFI)). This section does not include a provision similar to s 49(2) of the Law of Property Act 1925 (UK), which enables a court to require repayment of a purchaser's deposit in cases where the vendor is not in breach of contract but the court has declined to order the purchaser to perform the contract (*Wu Wing Kuen v Leung Kwai Lin Cindy* [1999] 4 HKC 565, [1999] 3 HKLRD 738 (CA)). In Hong Kong, a purchaser will still be precluded from recovering his deposit in such circumstances unless the court thinks that it can do so by exercising its jurisdiction to make such order as appears just (*Re Scott and Alvarez's Contract* [1895] 1 Ch 596, [1895] 2 Ch 603 (CA, Eng.)). Although it is unusual for the court to award compensatory damages under a vendor and purchaser summons rather than in an action for breach of contract, there is nothing in the section to prevent the court from doing so: *Homyip Investments Ltd v Chu Kang Ming Trade Development Co Ltd* [1995] 2 HKC 458 (CFI); *Wong Bik Ching v Yu Hon Chung & Anor* [1997] 4 HKC 38 (CFI); *Cheng Cheuk Leung v Fong Shik Yee* [2008] HKCU 1847 (unreported, HCMP 1505/2007, 21 November 2008) (CFI).

Also, the court has jurisdiction to grant an order of specific performance in a vendor and purchaser summons: *Lai Ke Bin v Capital Project Development Ltd* [2009] 1 HKC 93, [2009] 2 HKLRD 49 (CFI).

An order for costs of the application may be made in favour of either party or the court may decide to make no order for costs. Generally, costs follow the event (*Guang Zhou Real Estate Development (HK) Co Ltd v Summit Elegance Ltd & Anor* [2000] 2 HKLRD 855, [2000] HKCU 621 (CFI); *Incorporated Owners of Cheong Wang and Cheong Wai Mansion v HKSAR* [2001] 1 HKC 57, [2001] 1 HKLRD 483 (CFI)). However, a purchaser's summons may be dismissed without awarding the vendor costs if the question is one that the purchaser is fairly entitled to present to the court (*Re Baker and Selmon's Contract* [1907] 1 Ch 238; *Lion Will Investment Ltd v Triple Will Ltd* [1992] 2 HKC 430 (CFI)). On the other hand, if the purchaser takes out a summons under this section when it is in fact unnecessary to do so, he will have to bear the costs of the summons (eg. *Silver Pioneer International Ltd v Good Onwards Co Ltd* [2004] 4 HKC 253 (CFI)) and if the summons has been taken out pursuant to his solicitors' advice, the solicitors may be ordered to bear the costs (*Castle City Ltd v Choi Yue Development Ltd* [1995] 2 HKC 593 (CFI)).

Costs are governed by O 62 of The Rules of the High Court (Cap 4A) and are defined in O 62 r 1(1) to include fees, charges, disbursements, expenses and remuneration.

### [12.11] Subsection (2): General note

Proceedings must be brought in the High Court unless the parties submit to the jurisdiction of the District Court, where the rateable value of the premises fall within the jurisdiction of that Court.

### [12.12] Court of First Instance

'Court of First Instance' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Court of First Instance of the High Court, which is established by s 3 of the High Court Ordinance (Cap 4).

### [12.13] District Court

'District Court' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the District Court of the Hong Kong Special Administrative Region.

### [12.14] Definitions

For 'land' and 'sale', see s 2 above.

## 12. Discharge of encumbrances by the court

(1) Where land is subject to any encumbrance, whether immediately realizable or payable or not, and the encumbrancer is out of the jurisdiction, cannot be found or is unknown, or if it is uncertain who the encumbrancer is, the court may, if it thinks fit, on the application of the party for the time being entitled to redeem the encumbrance, direct or allow payment into court of a sum of money sufficient to redeem the encumbrance and any interest thereon.

(2) Upon payment into court of the sum referred to in subsection (1), the court may, if it thinks fit, and either after or without any notice to the encumbrancer, as the court thinks fit, declare the land to be free from the encumbrance, and make any order for conveyance or vesting order as appropriate, and give directions for the retention and investment of the sum of money paid into court and for the payment or application of the income thereof, and for the payment of an amount certified by the court to be the reasonable costs of the applicant in making the application, such amount to be deducted from the sum of money paid into court.

(3) On application by the encumbrancer or any person entitled to the money or fund in court, the court may direct payment

into on or after 1 January 1970, a person has a right to a Government lease upon compliance with any conditions precedent, he shall be deemed, for the purposes of this section, to have complied with those conditions—

- (a) upon the issue by the Government of a certificate that those conditions have been complied with and the registration of that certificate in the Land Registry under the Land Registration Ordinance (Cap. 128); or
  - (b) upon the endorsement by the Government on the Government lease of a note to the effect that those conditions have been complied with and the registration of a copy of that endorsement in the Land Registry under the Land Registration Ordinance (Cap. 128); or
  - (c) upon the entry on the register kept in the Land Registry under the Land Registration Ordinance (Cap. 128) relating to the land of a note to the effect that those conditions have been complied with. (*Amended 31 of 1988 s. 7; 8 of 1993 s. 2*)
- (4) Where a person has a right to a Government lease of any land and that right is not subject to any conditions precedent—
- (a) the equitable interest under that right shall become a legal estate in that land as if held under a Government lease issued in accordance with that right; and
  - (b) for the purposes of section 42 and any other law, such a Government lease shall be deemed to have been issued on the commencement<sup>#</sup> of the Conveyancing and Property (Amendment) Ordinance 1988 (31 of 1988) or on the date of the grant of that right, whichever is the later. (*Added 31 of 1988 s. 7*)
- (5) Where a person has a right to a Government lease of any land and that land is partitioned by assignment or otherwise by deed, this section shall apply to each part of that land constituted by that partition, as it applies to the whole of that land, as if there were a right to a Government lease of each such part. (*Added 31 of 1988 s. 7*)
- (6) Where a person has a Government lease, or a right to a Government lease, of any land and additional land is granted to that person with the intent that he should hold it as part of the land leased, this section shall apply to that additional land

as if that additional land were part of the land originally leased and held subject to any further conditions precedent imposed when that additional land was granted. (*Added 31 of 1988 s. 7*)

(*Amended 29 of 1998 s. 105*)

Editorial Note:

<sup>#</sup>Commencement date: 1 November 1984.

<sup>\*</sup>Commencement date: 3 June 1988.

#### [14.01] Enactment history

Subsection (1)(a) was amended pursuant to s 7(a) of the Conveyancing and Property (Amendment) Ordinance 1988 (31 of 1988), commencing 3 June 1988, by repealing 'compliance' and substituting 'accordance'.

Subsection (3) was amended pursuant to s 7(b) of the Conveyancing and Property (Amendment) Ordinance 1988 (31 of 1988), commencing 3 June 1988, by repealing 'upon the issue by the Crown of a certificate that those conditions have been complied with and upon the registration of that certificate in the Land Office under the Land Registration Ordinance' and substituting paras (a)–(c).

Subsection (3) was further amended pursuant to s 2(1) of the Registrar General (Establishment) (Transfer of Functions and Repeal) Ordinance 1993 (8 of 1993) now the Registrar General (Establishment) (Transfer of Functions and Repeal) Ordinance (Cap 439), commencing 1 March 1993, by repealing 'Land Office' wherever it appeared and substituting 'Land Registry'.

Subsections (4)–(6) were added pursuant to s 7(c) of the Conveyancing and Property (Amendment) Ordinance 1988 (31 of 1988), commencing 3 June 1988.

The whole section was further amended pursuant to s 105 of the Adaptation of Laws (Crown Land) Ordinance 1998 (29 of 1998), commencing 1 July 1997, by repealing 'Crown' wherever it appeared and substituting 'Government'.

#### [14.02] England

This section does not have an equivalent in English legislation.

#### [14.03] Cross references

Sections 13, 42 and 46 of the Conveyancing and Property Ordinance (Cap 219).

See Law Society Circulars to Members Nos 151/1984, 178/1984 and 18/1985; and Land Office Circular Memorandum No 77/1985.

**[15.18] Failure**

'Fail' may have at least three possible meanings:

- (1) simply an omission to do a thing, irrespective of any reasons;
- (2) an omission by reason of some carelessness or delinquency, but not an omission caused by impossibility; and
- (3) an omission to do the thing, including by impossibility arising from some clause being included and others being excluded: see *Ingram v Ingram* (1938) 38 SR (NSW) 407, at 410, per Jordan CJ.

For other cases on the meaning of 'fail' and 'failure': *Re Wilson & Son & Eastern Counties Navigation & Transport Co Ltd* (1892) 8 TLR 264; *Loates v Maple* (1903) 88 LT 288; *Thomson's Trustees v Thomson* [1946] SLT 339; *Marcusson v Southern Shipping Co Ltd* [1962] ALR 758; *Transport Department v Taylor* [1971] NZLR 622; and *CBS Productions Pty Ltd v O'Neill* [1985] 1 NSWLR 601.

**[15.19] Court, court of competent jurisdiction**

As to the definition of 'court', see [3.23] above.

As to the meaning of 'court of competent jurisdiction': *Bednall v Bednall* 43 TLR 599; and *R v Garrett* [1907] 1 KB 881.

**[15.20] Government lease**

'Government lease' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean a lease of land granted by or on behalf of the Government, and includes:

- (1) an instrument whereby
  - (a) the term of the lease has been extended; or
  - (b) the provisions of the lease have been varied;
- (2) an agreement for such a lease; and
- (3) a Crown lease, Conditions, whether of Sale, Exchange, Grant, Regrant or Extension, as well as deeds of variation or letters of modification, as included in the definition of Government lease.

**[15.21] Crown lease**

Compare the definition of 'Crown lease' in s 3 of the Interpretation and General Clauses Ordinance (Cap 1), which is 'any lease granted by the Crown before 1 July 1997, any instrument whereby the term of a Crown lease may have been extended or the provisions thereof varied and any agreement for a Crown lease'.

**[15.22] General holiday, public holiday**

These terms are defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean any day which is a general holiday for the purposes of the General Holidays Ordinance (Cap 149). Under s 2 of the General Holidays Ordinance, 'general holiday' is defined to mean a day which, subject to the provision of ss 4 and 7 of that Ordinance, shall be kept as a holiday by all banks, educational establishments, public offices and Government departments.

The following days are 'general holidays' (see s 3 of and Schedule to the General Holidays Ordinance which provides that, subject to s 6 of that Ordinance under which Legislative Council may make certain alterations):

- (1) every Sunday;
- (2) the first day of January;
- (3) Lunar New Year's Day;
- (4) the second day of Lunar New Year;
- (5) the third day of Lunar New Year;
- (6) Ching Ming Festival;
- (7) Good Friday;
- (8) the day following Good Friday;
- (9) Easter Monday;
- (10) Labour Day, being the first day of May;
- (11) the Birthday of the Buddha, being the eighth day of the fourth lunar month;
- (12) Tuen Ng Festival;
- (13) Hong Kong Special Administrative Region Establishment Day, being the first day of July;
- (14) National Day, being the first day of October;
- (15) the day following the Chinese Mid-Autumn Festival (or if that day is a Sunday, then the day of that Festival) or such other day as the Chief Executive in Council may, by order in the Gazette, appoint in place of that day;
- (16) Chung Yeung Festival (or if that day is a Sunday, then the following day) or such other day as the Chief Executive in Council may, by order day;
- (17) Christmas Day (or if that day is a Sunday, then the second weekday after Christmas Day);
- (18) the first weekday after Christmas Day. If any of the day mentioned in (2), (6), (10), (11), (12), (13) or (14) above is a Sunday, then the following day will become a general holiday. If any of the day mentioned in (3), (4) or (5) above is a Sunday, then the day preceding Lunar New Year's Day will become a general holiday.

**[15.23] Document**

For the meaning of 'document', see [2.19] above. For meaning of 'instrument', see [2.18] above.

**[23A.01] Enactment history**

The section was added by s 9 of the Law Amendment and Reform (Miscellaneous Provisions) Ordinance 2003 (14 of 2003) which came into force on 9 May 2003.

**[23A.02] England**

This section does not have an equivalent in English legislation.

**[23A.03] Cross references**

Sections 3, 13, 20 and 23 above.

Sections 127–129 Companies Ordinance (Cap 622).

Section 9 of the Law Amendment and Reform (Miscellaneous Provisions) Ordinance 2003 (14 of 2003).

Law Society Circular to Members No 157/2003.

**[23A.04] General note**

The problems occasioned in the proof of title to land by the proof of due execution of title documents executed by a corporation, which were not addressed by s 20 or s 23 above, led to the introduction of this section by s 9 of the Law Amendment and Reform (Miscellaneous Provisions) Ordinance 2003 (14 of 2003) which came into force on 9 May 2003.

The section introduces two presumptions.

First, where the articles of association of the company authorise a person or persons to attest the affixing of the company seal, or permits such authorisation by another for instance the board of directors, the section raises a rebuttable presumption that the signatory or signatories attesting the affixing of the company seal were duly authorised, whether or not the fact of authorisation is apparent from the document of title: sub-s (1)(b). This first presumption only applies to deeds executed by corporations prior to the enactment of the section ie, 9 May 2003: see sub-s (1)(a) and Law Society Circular to Members No 157/2003. Deeds executed after 9 May 2003 need to comply with the requirements of due execution stipulated by the general law, although the proof of their due execution may be assisted by the presumptions raised by ss 20 and 23 above and by the second presumption.

Secondly, where proof of due execution of a document of title that is more than 15 years old cannot be established, the section raises a conclusive presumption of due execution which can operate both between the parties to the agreement for sale and purchase and between the purchaser and anyone else: sub-s (2). Accordingly, good title will be shown by the vendor to the purchaser and the purchaser's title to the land is not open to challenge on the basis of the company's defective execution of the title document in question. This second presumption may be raised whether the document was purported to be executed by the corporation before or after 9 May 2003. Thus, a document which is defectively executed in 2007 will be deemed, for the purposes of proof of title, to have been

deedly executed after 15 years has elapsed, ie, from 2022 onwards.

The operation of the section is limited to occasions where the due execution of a deed by a corporation needs to be established in the process of proof of title to land pursuant to a sale and purchase agreement entered into after the section came into effect on 9 May 2003: see sub-s (3) and *Silver Pioneer International Ltd v Good Onwards Co Ltd* [2004] 4 HKC 253 (CFI) where the sale and purchase agreement was entered into in April 2003.

**[23A.05] Deed**

As to meaning, see [19.05] above.

**[23A.06] Executed**

As to meaning, see [13.19] and [19.09] above.

**[23A.07] Prior to the commencement of section 9 of the Law Amendment and Reform (Miscellaneous Provisions) Ordinance 2003 (14 of 2003)**

The relevant commencement date is 9 May 2003.

**[23A.08] Attested**

As to the meaning, see [13.50] above.

**[23A.09] Corporation, corporation aggregate**

As to the meaning, see [20.06] above.

**[23A.10] Signatory, signatories**

As to the meaning, of 'sign', see [3.17] above.

**[23A.11] Proof of title to any land**

See s 13 above.

**[23A.12] Contract for sale of that/such land**

As to the meaning of 'sale' see [2.34] above; and for formalities governing contracts for the sale of land, see s 3 above.

23 April 2008) (CFI); cf, *The Incorporated Owners of Hong Kong House v Senfala Ltd* [2003] HKCU 1251 (unreported, CACV 117/2003, 12 November 2003) (CA), although in exercising that duty it has been held to be possible for the Incorporated Owners to enter into a compromise agreement to settle the dispute, provided that such an agreement is in the common interest of the buildings' co-owners (*Incorporated Owners of So Tao Centre v Lam Kong Wan* [2006] HKCU 2118 (unreported, DCMP 4250/2004, 20 December 2006) (DC)). The court will be slow also to find acquiescence by a private manager in the enforcement of a deed of mutual covenant on behalf of the owners: *Taikoo Shing (Management) Ltd v Trillion (HK) Ltd* [1997] 4 HKC 304 (LT); *Hong Yip Service Co Ltd v Candela Co Ltd* [1997] 1 HKC 273 (CFI).

#### [41.17] Including

As to meaning, see [2.05] above.

#### [41.18] Other equitable relief

Other equitable relief available for the enforcement of a covenant might include a declaration, or the specific performance of the covenant itself. As to the meaning of the covenant and the rights and obligations of the parties to the covenant or whether a particular activity or omission constitutes a breach of covenant, see generally, Betty M Ho, *Hong Kong Contract Law* (2nd Edn, Butterworths, 1994 Reissue), at pp 486–502 and (as to defences available in actions for equitable relief), pp 518–525.

#### [41.19] Action for money due

An action for money due will commonly lie for the recovery of unpaid management charges due under a Deed of Mutual Covenant. In addition, an Owner's Incorporation may levy distress for unpaid management fees under s 16 of the Building Management Ordinance (Cap 344) and it may be possible for the manager or Owner's Incorporation to register an equitable charge against the co-owner's undivided shares to secure the repayment of unpaid management fees. A manager may be empowered to do so by the terms of the Deed of Mutual Covenant (*Beacon Heights (Management) Ltd v Leung Ping-hung, Antonio* [1985] 1 HKLR 181, [1995] HKCU 331 (CFI), but see s 5 above) and an Owner's Incorporation will be empowered, upon incorporation, to exercise this power under s 19 of the Building Management Ordinance (Cap 344) (*Incorporated Owners of Kingsford Industrial Centre v Austria Property Management Ltd* [1997] 3 HKC 735 (LT)).

Unpaid management fees may also attract, under the terms of the Deed of Mutual Covenant, a collection charge and the payment of default interest. In either case, these charges must represent a genuine pre-estimation of loss if they are not to be struck down as a penalty, see, for eg, *Incorporated Owners of So Tao Centre v Lam Kong Wan* [2006] HKCU 2118 (unreported, DCMP 4250/2004, 20 December 2006) (DC) on appeal as to the question of laches.

#### [41.20] Action for damages

Damages may lie for breach of covenant, see, for example *So John v Lau Hon Man & Ors* [1993] 2 HKC 356 (CA); *Leung Yung Chun & Tsoi chik Lai v Chan Wing Sang, Lau Koon Cao & Tsang Sheung Ying* [2000] 1 HKLRD 456, [2000] HKCU 1103 (CFI) where damage was caused by leaking water. Damages may also be recoverable in the tort of negligence for personal injury or loss (eg *Wong Lai Kai v The Incorporated Owners of Lok Fu Building, Yuen Long & Ors* [2000] 3 HKC 633 (CA)) or of nuisance (eg, *Lo Yu Chu v Kam Fu Lai Development Co Ltd* [1994] 3 HKC 18 (CA); *Southern Ever Trading Ltd v The Incorporated Owners of Joy Garden* [2004] 4 HKC 134 (CA); *Leung Tsang Hung & Anor v The Incorporated Owners of Kwok Wing House* [2006] 4 HKLRD 714, [2006] HKCU 1701 (CA) on appeal to Court of Final Appeal).

#### [41.21] Ascertaining the existence, nature and effect of a covenant

To 'ascertain' is to 'make certain' (see *Sidebottom & Hulme v Sidebottom* (1872) LR 2 P & D 365) or 'make sure' (see *Laughton v Christchurch City* [1970] NZLR 1114).

#### [41.22] Court of competent jurisdiction

As to meaning, see [15.19] above.

#### [41.23] Declaration

By virtue of O 15 r 16 of The Rules of the High Court (Cap 4A), the Court 'may make binding declarations of right whether or not any consequential relief is or could be claimed'. This power, which is discretionary in nature (see *Russian Commercial & Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438, [1921] All ER Rep 329 (HL)), exists irrespective of whether there is a cause of action (*Dicks v Easy Finder Ltd* [1996] 3 HKC 65 (CFI). See also *A-G v George Tin & Ors* [1985] HKLR 87, [1985] HKCU 10 (CFI), at 92, per Roberts CJ).

A court may make a declaration whether or not they have declined to exercise their jurisdiction to grant an injunction (see for instance, *Guardian Property Management Ltd & Anor v Lui Man Ho* [1998] 2 HKC 244 (LT) and *The Incorporated Owners of Elite Garden v Profit More Co Ltd* [2002] 2 HKLRD 518, [2002] HKCU 697 (CA)).

#### [41.24] Subsection (5): General note

Under this subsection, a lessee or occupier of land will not be directly liable to the covenantor by virtue of this section for breach of a positive covenant contained in a deed of mutual covenant affecting the land: see *Discovery Bay Services Management Ltd v David Buxbaum* [1995] HKDCLR 7, [1995] HKCU 317 (DC).

However, a lessee's liability for positive covenants on other grounds is not affected. A lessee will be liable to his landlord, by privity of contract, and to an assignee of

**[48.02] England**

cf, s 111 of the Law of Property Act 1925 (UK).

**[48.03] General note**

In equity, there is a presumption that where two or more persons are advancing money, they do so as tenants in common. Even where two or more persons are expressed to be advancing money on a joint account, payment to the survivor required an inquiry into whether or not there had been a severance. This section deals with these two difficulties by, firstly, reversing the presumption, so that money advanced by more than one lender is deemed to be owed on a joint account, and, secondly, by providing that the receipt of the surviving lender is a complete discharge: see *The Hongkong and Shanghai Banking Corp v A-G* [2018] 1 HRC 305 (CA).

**[48.04] Any mortgage**

In view of the definition of 'mortgage' in s 2 above, this section is limited to advances made on the security of land.

**[48.05] Commencement of this section**

The relevant commencement date is 1 November 1984.

**[48.06] Persons**

As to meaning, see [2.32] above.

**[48.07] Joint, jointly**

As to meaning, see [35.27] above.

**[48.08] So far as**

The present section is subject to a contrary intention, but that intention must be expressed in the mortgage itself and cannot be implied from any subsequent severance.

As to the meaning of 'contrary intention', see [9.07] and [16.04] above.

**[48.09] As between them and the mortgagor**

This section does not affect the relationship between the co-mortgagees: see *Jackson* (1887) 34 Ch D 732.

**[48.10] Deemed to be owing**

As to meaning of 'owing', see [45.11] above.

**[48.11] Receipt of the survivors or the last survivor of them**

As to meaning of 'receipt', and 'survive' see [4.14] and [11.06]–[11.07] respectively above.

**[48.12] Personal representative**

As to meaning, see [4.08] above.

**[48.13] Discharge**

As to meaning, see [18.09] above.

**[48.14] Definitions**

For 'mortgage' and 'mortgagor', see s 2 above.

**49. Action for possession of land by mortgagor**

(1) A mortgagor under any mortgage (whether effected before or after the commencement of this section) entitled for the time being to the possession or receipt of the rents or profits of any land in respect of which no notice has been given by the mortgagee of his intention to take possession or to enter into the receipt of the rents and profits of that land may sue for such possession, or for the recovery of the rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relating to that land, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

(2) This section does not affect the power of the mortgagor, apart from this section, in right of the legal estate or otherwise, to take proceedings in his own name.

[cf. 1925 c. 20 s. 98(1) U.K.]

**[49.01] Enactment history**

This section is based on the now repealed s 4 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23).

rate, but it is required to have regard to the lowest deposit rate. The question before the Board concerns the extent of the fetter thus imposed on the tribunal when exercising its discretion.

In their Lordships' view, in requiring the tribunal to have regard to the lowest time deposit rate the legislative purpose must be that this should be the rate fixed by the tribunal unless in the particular case there is good reason for departing from it. The rate specified is a low one, but the legislature must be taken to have intended that ordinarily this should be adequate recompense to a claimant for being kept out of his money. This would not cover a case where one of the parties has behaved unreasonably, and by his conduct protracted the time taken in determining the claim. In a suitable case that could furnish good reason for the Tribunal fixing a higher or lower rate depending on who was at fault'. (Emphasis added).

[23] The Privy Council agreed with the court of appeal that the Tribunal had misdirected itself in fixing interest at Prime +1%. As for the rate of 7-days Call + 2% fixed by the court of appeal, Lord Nicholls remarked that as the court had not elaborated on the reasons for fixing that rate, and as there were unusual features in that case which was a complex one, it would not be justified to infer that the court of appeal had, in turn, misdirected itself. The rate awarded by the court of appeal was therefore allowed to stand.

[24] Pausing there, it would be noted that:

- (1) Lord Nicholls held that the words 'having regard to' imposed a fetter on the Tribunal's discretion; and
- (2) the discretion could be exercised by fixing a rate either higher or lower than the lowest time deposit rate (at that time, the savings rate might have been lower than the lowest time deposit rate).

[25] As I have mentioned earlier, the Tribunal in the present case decided that it should follow the approach in *Shun Fung*. That was notwithstanding the fact that the provision for interest was amended 6 years after the *Shun Fung* judgment by the Interest Rates (Miscellaneous Amendments) Ordinance 2001 (the Amendment Ordinance). It would be noted that in the present provision, the Tribunal is no longer enjoined to 'have regard to' the stated rate, and the stated rate is now a minimum rate. I shall for convenience refer to the interest provision before the amendment as the pre-amendment provision (reproduced at para 20 above) and that after the amendment as the post-amendment provision (reproduced at para 5 above).

[26] The Tribunal was aware of the amendment. In its Decision it referred to (amongst others) *Mingo Properties Ltd v Director of Lands* [2008] HKCU 45; (LCLR 6/2005, 9 Jan 2008, unreported), where the Tribunal (Member Lo) held that the amendment was 'never intended to alter the basis upon which the discretion was to be exercised by the Tribunal' (para 19).

[27] Adopting that approach, the Tribunal awarded the Claimant interest on the compensation for Extinguishment at the lowest 24-hours Call rate offered by the note-issuing banks. From 2007 onwards, this has dropped from 0.05% to 0.001%, rates which leading counsel for the Claimant has described as 'derisory'. At this stage, I should say no more than that to a land owner (or other claimant running a profitable business) who has through no fault of his own been deprived of property, and been kept out of his money for a substantial period of time, it would be difficult to see how that would accord with the principle of equivalence.

Leave to appeal the Tribunal's Decision on interest

[28] The Claimant sought leave to appeal the Tribunal's decision on the rate of interest. On 18 April 2012, the Tribunal gave leave to appeal 'limited to the challenge relating to the Tribunal's reliance on the decision in [*Shun Fung*]

[29] Put in shorthand, the issue before this court is whether the construction in *Shun Fung* of the 'pre-amendment provision' must be adopted for the 'post-amendment provision'.

Purpose

[38] As for the purpose of the statute, it is true that the explanatory memorandum referred to the re-definition of interest rates but the word 're-definition' is equivocal. Whilst the Bureaux' statements refer to the bill being necessitated by the deregulation of bank interest rates, there is no statement that that was the sole purpose of the provisions.

[39] The express wish to be as close as possible to the 'original formula' and 'existing arrangement' may refer simply to the decision to keep to the formula of calculating interest at rates set by banks – rather than by the government or other institutions – even though the deregulation of bank interest rates posed practical difficulties. Those statements were made as background to explain the need to amend the statutes, and should not be read as if they were themselves statutes, so as to straitjacket the wording of the amendment to only one interpretation – that there was to be no change at all, except to the stated rate.

[40] If that had been the intention, it would have been simple enough (indeed, it would have been simpler) for the draftsman to keep the original reference in the LRO that the Tribunal should award interest 'having regard to' the stated rate, only replacing the stated rate in the 'pre-amendment provision' with the stated rate in the 'post-amendment provision'. The draftsman must be presumed to know the significance of those words as interpreted in *Shun Fung*. However it is notable that those words were deleted in the amendment. Instead, a different form of words was used – clear words which Mr Ismail accepts in their ordinary and natural meaning gave the Tribunal a wider discretion and claimants a minimum rate

up its right to argue over the interest on the provisional payment and the tribunal has the jurisdiction to determine the interest of the provisional payment too. In addition, since there is no evidence in the provisional which could support a change from the conventional practice of awarding pre-judgment interest rate at prime rate plus 1%, I consider that the pre-judgment interest rate in the present case should be fixed at 1% above prime rate.

[24] There are currently two besting lending rates in Hong Kong, but the parties have not made any submissions in this regard. Anyway, since the HSBC best lending rate is the commonly adopted proxy for prime rate in the market and the judgments in both *Tadjudin Sunny* and *Waddington* also based on the HSBC best lending rate, I consider that it is appropriate to adopt the HSBC best lending rate as the prime rate in the present case.

And

- (3) *Eltron Development Ltd v Director of Lands* [2016] HKCU 1170 (unreported, LDLR 4/2013, 18 May 2016) (LT):

[32] Firstly, I would like to point out that when Mr Suen cited §55 of *Happy Dragon 2014*, he had taken out words out of the context. The last sentence of the paragraph states clearly that:

Using the 'broad brush' approach in the long established practice as discussed above, the interest rate of Prime + 1% does represent the theoretical cost to the applicant of borrowing the compensation money withheld by the respondent.

The word 'or' in front of 'suffer the loss of the return from the use of the money in making investments.....' refers to the consequence of not borrowing money from a bank rather than an alternative.

[33] On the other hand, 'the loss of the return from the use of the money in making investments' refers not to a single rate of return but a cost of capital, as it is sometimes called, which varies depending on the quality of the investment which comprises a function of a risk free opportunity cost, expected income and capital growth, liquidity, operating expenses, psychic income, risk and other factors pertaining to the investment. For instance, the higher the expectation of income and/or capital growth, the more an investor is prepared to pay for the investment, *ceteris paribus* and, as a consequence, the initial yield the investor is prepared to accept is lower. In any event, however, the investor would not commit to a

particular investment if his total expected return would not be higher than his cost of borrowing, ie the expected return, or cost of capital should be higher than the cost of borrowing.

#### [17.05] Subsection (6): 5 years

This term 'year' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean 'a year according to the Gregorian calendar'. This comprises the time between 1st January and 31st December.

#### 18. Payment when owner absent, etc.

When the owner of any land which has been resumed is absent from Hong Kong or cannot be found, or within 6 months from the date when the amount of compensation shall have been determined makes no claim to the same, or is in the opinion of the Chief Executive unable to give an effectual discharge for the same, the Chief Executive may direct payment of the compensation to be made to such other person on behalf of the owner as he shall think proper, subject to such conditions as he thinks fit, and the receipt of such person shall be a valid and effectual discharge for the same in the same manner as if payment had been made to the owner.

(18 of 1910 s. 7 incorporated. Amended 28 of 1911 s. 6(e); 50 of 1911; 1 of 1912 Schedule; 62 of 1985 s. 3; 3 of 2000 s. 3)

#### [18.01] Enactment history

ER 3 of 2018, with effect from 28 June 2018, amends the format, layout, printing style and other presentational aspects of the ordinance to bring it in with modern drafting.

#### [18.02] General note

This section provides that when compensation is to be paid but the owner does not come forward or fails within six months of the award to seek payment, or the Government considered that the owner is unable to give an effectual discharge, the money made is to be paid to a person on behalf of the owner. But the main purpose of the section is the obtaining by the Government of an effective discharge of its obligations to pay the compensation awarded.