

expressly in the body of the assignment: see Law Society Circulars to Members Nos 106/1984 and 178/1984.

Land will also be sold subject to the exceptions and reservations invariably made in favour of the Government in Government leases. Rights expressed to be reserved to the developer or managers in the deed of mutual covenant of a multi-unit development should not be referred to under this paragraph, because, although they are in the nature of exceptions and reservations and often referred to as such, these rights are in fact covenants (*Chiu Shu Choi v Merrilong Dyeing Works Ltd* [1984] HKC 535, [1990] 1 HKLR 385, [1983-85] CPR 31, *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707, *Kung Ming Tak Tong Co Ltd v Park Solid Enterprises Ltd* [2007] 3 HKC 206).

As to the meaning of 'reservations', see [CP24.03] above.

[CPS3(1).18] Sub-para 1(d): Easements and other appurtenant rights

Existing easements and other rights should be referred to although they will pass under the provisions of section 16 above. Any new easements and rights must be expressly granted in the body of the assignment: see Law Society Circulars to Members Nos 106/1984 and 178/1984.

Co-owners of a multi-storey building cannot enjoy easements inter se, since they are tenants in common of the same property and there are no dominant and servient tenements. Their rights inter se are governed by the terms of the deed of mutual covenant rather than being based upon implied easements (*Chiu Shu Choi v Merrilong Dyeing Works Ltd* [1984] HKC 535, [1990] 1 HKLR 385, [1983-85] CPR 31, *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707, *Kung Ming Tak Tong Co Ltd v Park Solid Enterprises Ltd* [2007] 3 HKC 206).

As to the meaning of 'easements' and 'appurtenances', see [CP2.24] and [CP16.06] above, respectively.

[CPS3(1).19] Schedule para 2: Government lease

Where the Government grant is made under Conditions, rather than a formal Government lease made by deed, it is established practice to identify the Conditions by their Grant number in addition to their date and the parties.

Any variation, modification or extension to the Government lease should be referred to.

The term of the Government lease should be stated in paragraph 2(c) including any right of renewal. If the original term has been renewed or extended by legislation (eg, by the Government Leases Ordinance (Cap 40) or the New Territories Leases (Extension) Ordinance (Cap 150)), the period of renewal or extension should be stated – see Law Society Circular to Members No 57/1988).

[CPS3(1).20] Signed Sealed and Delivered etc

See s 19 above, as to execution by an individual; and s 20 above, as to

execution by a corporation and as to the statutory presumptions as to execution see ss 23 and 23A above.

For registration purposes, every assignment must contain, where practicable, the identification numbers of the parties executing the assignment: see reg 9 of the Land Registration Regulations (Cap 128A).

According to the Practice Directions L1, execution of the assignment by an individual should be attested (as opposed to verified) by a solicitor or his appointed clerk, and in the latter case the signature of the appointed clerk should be verified by a solicitor with the following clause:

'I hereby verify the signature of [name of appointed clerk]
[signed] Solicitor, Hong Kong SAR'

Where the assignment is executed by a limited company, the signatures of directors, officers or attorneys appearing on the document may be verified by a solicitor if such signatures are known to the solicitor. One of the following execution clauses should be used:

'Sealed with the Common Seal of [...] Ltd
and signed by [...] director(s)/officer(s)
[in the presence of/whose signatures are verified by]
[signed] Solicitor, Hong Kong SAR'

or:

'Signed, sealed and delivered by [...] lawful attorney(s) for [...] Ltd
[in the presence of/whose signatures are verified by]
[signed] Solicitor, Hong Kong SAR'

Solicitors and their clerks whose signatures appear on the assignment should have their names and firm names typed or printed in full, immediately after their signatures, unless their names and firm names appear elsewhere in the same document: see the Practice Directions L1.

[CPS3(1).21] Definitions

For 'assignment' and 'land', see s 2 above; for 'registered' and 'signed', see s 15 above.

FORM 2

Agreement for Sale of a Residential, Commercial, Industrial or Other Unit in a Completed Building

THIS AGREEMENT is made the day of 19

Between

(1) ("the Vendor") and ("the Purchaser").

- 1. The Vendor sells and the Purchaser purchases the land described in the Schedule hereto ("the Property") for the residue of the term of years created by the [Government] lease referred to in the Schedule.
2. The purchase price is the sum of \$
3. A deposit of \$ shall be paid by the Purchaser to [the Vendor's solicitors, Messrs, as stakeholders] on the signing of this Agreement and the balance of the purchase price shall be paid on completion. The deposit shall be paid to the Vendor on completion.
4. Completion shall take place at the offices of the Vendor's solicitors at , or as they may direct, on the day of 19
5. [Vacant possession of the Property shall be given to the Purchaser on completion].
6. [Time shall in every respect be of the essence of this Agreement].
7. The Vendor shall assign the Property as [].
8. The title shall commence with the Government lease and [].
9. The Property is sold subject to and with the benefit of
10. There are incorporated into this Agreement as if they were herein written the conditions respectively on the part of the Vendor and the Purchaser set out in Part A of the Second Schedule to the Conveyancing and Property Ordinance.
11. The stamp duty and land registration fees payable on the assignment made pursuant to this Agreement shall be borne by [].

SCHEDULE

- 1. The Property-
(a) Description and address;
(b) Lot number, sections, undivided shares etc;
(c) Exceptions and reservations etc;
(d) Easements and other appurtenant rights, if any;
2. The Government Lease-
(a) Date;
(b) Parties;
(c) Term;
(d) Lot number;

Signed etc

RECEIVED the day and year first above written of and from the Purchaser the above mentioned deposit of \$

[Messrs as stakeholders]

[CPS3(2).01] Enactment history

This Form was amended pursuant to s 105 of the Adaptation of Laws (Crown Land) Ordinance 1998 (29 of 1998) by repealing 'Crown' wherever it appeared and substituting 'Government'.

Paragraph 2(d) of the Schedule was amended pursuant to s 28(b) of the Conveyancing and Property (Amendment) Ordinance 1988 (31 of 1988), commencing 3 June 1988, by repealing 'Property' and substituting 'Lot number'.

[CPS3(2).02] Cross references

See s 37 and Sch 2 Pt A above and Law Society Circulars to Members Nos 84/81, 18/82, 106/1984, 56/1987, 178/1984, 15/1989, 127/92, 199/1996, 97/1997 and 187/1999.

[CPS3(2).03] General note

Section 37 above, introduces standard forms for common conveyancing transactions. Form 2 contains a standard form of agreement for the sale and purchase of the residue of a Government lease of vacant land or a completed building. It is intended to be used as a precedent and is not mandatory. For instance, additional terms are necessary to cater for completion by undertaking and to incorporate the information required by s 29B of the Stamp Duty Ordinance. Furthermore, additional terms may be desirable in the light of the particular circumstances of the sale for instance warranties by the vendor concerning the lack of occupiers (see Law Society Circular No 125 of 1992) or the lack of illegal structures or the lack of any notices that adversely affecting the property from the Government of other competent authorities or from the co-owners or the managers of the building of which the property to be sold forms part (see Cheung Kai Wei Sandra v Fuk Ka Pak (No 2) [1990] 2 HKC 401, [1990] 2 HKLR 480).

Clause 10 of this standard form provides that the conditions set out in Schedule 2 Part A above shall be incorporated into the agreement. For a list of those conditions, see [CPS2(A).03] above.

This Form is not appropriate for the sale of uncompleted buildings, which is governed by the Consent Scheme and the Non-consent Scheme (see [CPS2(A).03] above).

It is common practice in Hong Kong for the vendor and purchaser to initially enter into a binding provisional agreement which is often prepared by the estate agents involved in the sale. A provisional agreement will usually provide that the parties will subsequently enter into a formal sale and purchase agreement which more clearly articulates the parties' respective rights and obligations in terms which are the same as, or similar to, those contained in this form. The status of provisional agreements and their relationship with the formal sale and purchase agreement is considered in more detail in [CP3.10] above.

[CPS3(2).04] Agreement

The legal formalities that are required for an agreement for the sale and purchase of land to be enforceable are set out in s 3 above.

[CPS3(2).05] Date of agreement

It is usual practice for the sale and purchase agreement to be prepared in two identical parts with the vendor signing one part and the purchaser the other part and for the two parts to be exchanged with the vendor holding the part signed by the purchaser and the purchaser the part signed by the vendor. Alternatively, the agreements may be prepared in duplicate with both parties signing each part and each party retaining one duly signed part. Each party should have a part of the contract (Law Society Circular to Members No 56 of 1987).

Exchange of contracts may be effected in person, by post, by telephone or by other electronic means. Where exchange is to be effected otherwise than in person, the parties should make clear the mechanism and, in particular the time, at which exchange is to take place to avoid the risks and difficulties alluded to by the courts in *Brinkibon Ltd v Stahag Stahl GmbH* [1982] 2 WLR 265 and *Domb v Isoz* [1980] 1 All ER 942. Where exchange is to be effected by post the difficulties presented by the postal rule will have to be overcome. Where exchange is effected by telephone or other electronic means, the usual process that is adopted is for the parts of contracts to be forwarded in escrow to their appropriate destination to be held until released by permission given by the chosen method.

Section 9 of the Stamp Duty Ordinance (Cap 117) governs stamp duty payable on a sale and purchase agreement of residential property. Under the section stamp duty must be paid within 30 days of entry into the contract, or, where a formal agreement for sale and purchase is executed within 14 days of the provisional agreement, within 30 days from the execution of that formal agreement (see, in this connection, s 29B of that Ordinance). To take advantage of that provision, the provisional agreement usually provides that the formal agreement shall be signed and further deposit paid within 14 days from the date of the agreement.

As to the dating of documents see [CPS3(1).05] above.

[CPS3(2).06] Vendor and Purchaser

The vendor and purchaser should both be made parties to the agreement and sign the agreement to be bound by the obligations they undertake under the agreement including on behalf of the vendor to give, show and pass good title and, on behalf of the purchaser, to pay the purchase price in the manner set out of the agreement.

Generally the particular identity of the purchaser is not of fundamental importance to the vendor (*Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475, [1985] 1 WLR 435). It is only where the vendor has made clear that either he will only sell to a particular purchaser or will refuse to sell to a particular purchaser will the identity of the purchaser be a material factor affecting the formation of the contract (*Centaline Property Agency Ltd v Lai Yuk Chun* [2002] 2 HKLRD 241).

As to the means of identification of the parties see [CPS3(1).06] above.

If any other person than the vendor has an interest in the property then consideration should be given to making them parties to the agreement, or consenting to its terms, so that it is evident that the vendor will be able to pass good title on completion. For instance, where the vendor holds the property on trust under which he has no express duty or power to sell, the beneficiaries should consent to the agreement to show that they are willing to release their interest or join in the assignment to pass their equitable estate – see Law Society Circular to Members No 125 of 1992.

Where the vendor is a company in liquidation or receivership, title remains in the company and thus it is the company, whether through their liquidator or receiver, who can enter into the agreement. Nevertheless it is considered good practice for the liquidator, although not for a receiver, to join in the agreement (*Chan Pak Ho v Standard Chartered Asia Ltd* [1988] 1 HKLR 216, [1987] 3 HKC 241, [1986-88] CPR 488, HC, and *Man Kou Tan v Timewin Development Ltd* [1987] 3 HKC 504, HC). Where an individual has been adjudged bankrupt, all his property vests in his trustee in bankruptcy, and hence the agreement should be made by his trustee in bankruptcy.

[CPS3(2).07] Clause 1: General note

This clause states the parties' respective intentions, namely that the vendor agrees to sell to the purchaser and the purchaser agrees to buy from the vendor the property which is further described in the schedule. A failure to make clear that the parties intend to be immediately bound is fatal (*Yeung Siu Hong v Chan Sia Mee Sandie* [1992] 2 HKC 599).

As to the meaning of 'sale', see [CP2.34] above.

[CPS3(2).08] The residue of the term of years created by the Government lease

The agreement should contain details of the legal interest in the property that is to be sold by the vendor, in the absence of express provision the assignment will operate to pass the vendor's entire interest – see s 17 above.

This form of wording is appropriate where the vendor holds the legal estate under a Government lease which has been or is deemed to have been granted under the provisions of s 14 above. Where the Government lease has not been issued and the land continues to be held under the agreement to grant the Government lease contained in the Conditions, it is the benefit of this agreement, and not the residue of the Government lease that is being sold. See [CPS3(1).11] above. It should be noted however that most Conditions will contain a restriction on alienation without the consent of the Government prior to the issue of the Government lease under s 14. That consent will invariably only be given under the terms of the Consent Scheme under which (inter alia) an approved form of agreement must be used.

As to meaning of 'Government lease', and 'term of years' see [CP2.07] and [CP2.27] above.

[CPS3(2).09] Clause 2: General note

The purchase price must be stated or be capable of being ascertained – see [CP3.14] above. A failure to adequately define the price will render the agreement void for uncertainty.

[CPS3(2).10] Clause 3: General note

A deposit is earnest money for the purchaser's performance of the agreement and will be forfeited if the purchaser fails to perform the agreement even though the vendor may have suffered no loss (see *Hinton v Sparkes* (1868) LR 3 CP 161, *Soper v Arnold* (1889) 1 App Cas 429 at 435).

The vendor's right to forfeit the deposit is considered further in [CPS2(A).68] above.

It is normal practice in Hong Kong for a purchaser to pay an initial deposit upon signing of the preliminary agreement and a further deposit within 14 days with the balance of the purchase money being paid on completion and there is nothing to prevent a deposit being paid in more than one payment (*Ng Chek Kok v Kiu Wai Ming* [1992] 1 HKLR 5, CA, *Wan Moon Ling Wandy v Sino Gain Investment Ltd* [1997] 2 HKC 592).

It is unclear whether the payment of the deposit by the purchaser is a condition precedent to the making of the contract or whether it is a condition subsequent to completion of the contract the breach of which will entitle the vendor to pursue his contractual remedies, including suing for the deposit. Although there has been some support for the former view (see *Myton Ltd v Schwab Morris* [1974] 1 All ER 326), the latter view is preferred (*Millichamp v Jones* [1983] 1 All ER 326, *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475, [1985] 1 WLR 435, *Wesco China Ltd v Liu Fu Tien* [2007] 1 HKC 576).

The deposit may be paid to the vendor directly or to his solicitors either as an agent for the vendor or a stakeholder for both parties. Where the deposit is paid to the vendor's solicitors as agent for the vendor they are free to pay over the same to their principal, the vendor. However, where the vendor's solicitors hold the deposit as stakeholder they may not release the deposit to the vendor until the vendor has performed their obligations under the agreement. The stakeholder must otherwise deal only with the deposit in accordance with the instructions of both parties, and will be liable for any loss incurred by the party whose instructions he fails to comply with or obtain. The position of a stakeholder was articulated in *Rockeagle Ltd v Alsop Wilkinson* [1991] 3 WLR 573 at in the following terms "... 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."

If the agreement fails to identify the capacity in which the deposit is held by a third party, the deposit is deemed to be held as agent for the vendor (*Ellis v Goulton* [1893] 1 QB 350), except in the case of an auctioneer, who is deemed to hold as stakeholder (*Furtado v Lumley* (1890) 54 JP 407). Thus, in the absence of an express provision in the preliminary agreement to such effect, the purchaser may not insist that the further deposit be held by the vendor's solicitors as stakeholder in the formal agreement (*Chu Wing Ning v Ngan Hing Cheung* [1992] HKCU 283, HC).

If a third party to whom the deposit is paid misappropriates the deposit, the vendor will be liable for the loss where the deposit was paid to the third party as his agent, or where it is paid as stakeholder if the vendor has nominated that stakeholder (*Annesley v Muggridge* (1816) 1 Madd 593, *Rowe v May* (1854) 18 Beav 613).

The method of payment of the deposit is not stipulated. A deposit will usually be paid either by bank draft or cheque. Where the deposit is paid by a cheque which is subsequently countermanded by the purchaser, the vendor may recover the value of the cheque, and the repudiation by a vendor of the underlying contract does not bring about a total failure of consideration (*Chui Hon Kay v Chow Tak Yan* [1995] 2 HKLR 171, CA, *Hoven International Ltd v Mass Resources Development Ltd* [1997] 1 HKC 38, *Yuen Chak Construction Ltd v Tak San Construction Ltd* [1997] 3 HKC 294, *Wesco China Ltd v Liu Fu Tien* [2007] 1 HKC 576). A cheque is an unconditional promise to pay and thus it is not possible to impose a condition which must be fulfilled before a deposit cheque can be presented for payment. However, it is possible for the cheque to be delivered in escrow and not for the purpose of passing the property in it (*Wesco China Ltd v Liu Fu Tien* above).

As to meaning of 'paid', see [CP18.07] above.

[CPS3(2).11] The balance of the purchase price shall be paid on completion

Terms governing the payment of the purchase price are for the parties to agree but the usual practice is for the balance to be paid on completion. In certain market conditions or where completion is to take place sometime after exchange the parties may agree for the price to be paid in installments. In the absence of an express or implied term to the contrary, the payment of the purchase price and perfection of title by the delivery of an executed assignment and (where appropriate) a discharge of an outstanding mortgage(s) are simultaneous (*Palmer v Lark* [1945] Ch 182, *Edward Wong Finance Co Ltd v Johnson Stokes & Master (a firm)* [1984] AC 296, [1984] 2 WLR 1, PC, *Chong Kai Tai Ringo v Lee Gee Kee* [1997] 1 HKC 359, [1997] HKLRD 461, PC).

Payment of the purchase price is due to the vendor, although payment may be made to the duly authorized agent of the vendor (*Edward Wong Finance Co Ltd v Johnson Stokes & Master (a firm)* above). It is usual practice for payment to be made to the vendor's solicitor as his duly authorized agent either by an express term of the agreement – see Sch 2 Pt A Condition 13(2) – or as a result of statutory implication where the vendor's solicitor is able to produce a duly executed assignment – see s 18(2) above.

The manner in which the purchaser is to be make payment should be specified, otherwise payment in cash might be required (*Blumberg v Life Interests and Reversionary Securities Corporation* [1897] 1 Ch 171, [1898] 1 Ch 27, *Johnston v Boyes* [1899] 2 Ch 73). The vendor is not obliged to accept the personal cheque of the purchaser although the vendor should be alert to ensuring that he does not mislead the purchaser into believing that their personal cheque is acceptable (*Canberra Investments Ltd v Chan Wai Tak* [1989] 1 HKLR 568, CA, *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd* [1997] 3 HKC 440). The usual practice is to require the purchaser to present a bankers draft or cheque drawn on a solicitor's account and endorsed good for payment.

To ensure that the purchaser will receive a title free from the mortgage where

[1923] All ER Rep 595, [1923] 2 Ch 347, *Wanglee v Choi Mei Poi* [1946-1972] HKC 666, *Sun Hing Chuen v Cheng Tsui* [1977-1979] HKC 560, *Chinachem Investment Co Ltd v Chung Wah Weaving and Dyeing Factory Ltd* [1978] HKCU 14, [1978] HKLR 83, *Great Mace Trading Co Ltd v Liu Ying Wah* [1987] 1 HKC 167, *Fairfax Ltd v A-G* [1995] 2 HKC 401, *Real Honest Investment Ltd v A-G* [1997] 2 HKC 436, PC, *Powerful Dragon Ltd v Windsor Sauna Co Ltd* [2004] 2 HKC 105). A demand or acceptance of rent after the service of a notice under s 58(1) of this ordinance or of a writ for possession will not act as a waiver as the landlord is already deemed to have re-entered (*Mixwell Properties Ltd v Lee Wan Yuen* [1997] 1 HKC 465, *Wong Wan Leung v Secretary for Transport* [2001] 2 HKC 257, CFA, *Profitex Development Ltd v Tarxen Promotion Co Ltd* [1999] 3 HKC 257).

In England, s 148 of the Law of Property Act 1925, UK preserves the effect of a right of re-entry where a breach has been merely waived as opposed to its being expressly permitted or authorized. Whether subs (2) will be similarly construed is dependent upon the term 'waived' standing independently and thus unqualified by the word 'specifically'.

[CP29.14] Subsection (3): Lease

As to meaning, see [CP2.09] above.

[CP29.15] Subletting, underlet

A covenant against sub-letting does not cover sub-letting of part of the premises (*Cook v Shoemith* [1951] 1 KB 752; cf *Esdaile v Lewis* [1956] 2 All ER 357, [1956] 1 WLR 709).

As to what constitutes under-letting, see *Greenaway v Adams* (1806) 12 Ves 395; *Timms v Baker* (1883) 49 LT 106; *Horse Estate Ltd v Steiger* [1898] 2 QB 79, [1895-99] All ER Rep 515; and *Re Doyle and O'Hara's Contract* [1899] 1 IR 113.

[CP29.16] Interest in the land

As to meaning, see [CP2.15] above.

[CP29.17] Subsection (4): Commencement of this section

The section has retrospective effect being the re-enactment of earlier legislation.

[CP29.18] Subsection (5): Affect

As to meaning, see [CP3.19] above.

[CP29.19] The Government Rights (Re-entry and Vesting Remedies) Ordinance

The Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap 126) provides the Government with a streamlined procedure for the forfeiture of Government leases and their vesting in the Financial Secretary Incorporated. For instance it is expressly provided that the acceptance of rent does not operate as a waiver of a breach of covenant in a Government lease (see s 6).

[CP29.20] Definition

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

30. Apportionment of conditions on severance

(1) Notwithstanding the severance by assignment or otherwise of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the terms whereon each severed part is reversionary, or the term in the part of the land as to which the term has not been surrendered, or has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2) In this section "right of re-entry" (重收權) includes a right to determine the lease by notice to quit or otherwise or to give notice or make an application under any law which may result in the determination of the lease or the grant of a new lease; but where the notice or application is served by a person entitled to a severed part of the reversion so that it extends to part only of the land demised, the lessee may within one month determine the lease in regard to the rest of the land by giving to the owner of the reversionary estate therein a counter notice effective at the same time as the notice or application served by the person entitled to the severed part of the reversion is effective to determine the lease of that part.

(3) This section applies to leases made before or after the commencement of this section and whether the severance of the reversionary estate or the partial avoidance or cesser of the term was effected before or after such commencement.

[cf. 1925 c. 20 s. 140 U.K.]

[CP30.01] Enactment history

This section replaces s 4 of the Law of Property Amendment Ordinance (Cap 24) (now repealed), with substantial changes.

[CP30.02] England

Cf s 140 of the Law of Property Act 1925, UK.

[CP30.03] General note

At common law, even though it is possible to apportion the effect of covenants when part of the reversion is assigned, it is not possible to apportion conditions or rights of re-entry; (*Winter's Case* (1572) 3 Dyer 308b; and *Doe d De Rutzen v Lewis* (1836) 5 Ad & El 277). This section resolves the problem

by providing for the apportionment of all conditions and rights of re-entry to each portion of the reversion, so that an assignee landlord of part of the land contained in a lease, may rely upon a right of re-entry to forfeit the lease in respect of that part of the land of which he is the landlord. In addition, this provision enables two landlords to have the rent apportioned in consequence of a severance of the reversion (*Pang Yiu Chang John v Winster Development Co* [1993] 1 HKC 95, [1992-93] CPR 177, CA).

By virtue of subs (2), this section extends the definition of re-entry to include notices to quit, which at common law cannot be given in respect of only part of the premises comprised in a lease, and to statutory notices to determine a tenancy or to apply for a new tenancy under Pt IV of the Landlord and Tenant (Consolidation) Ordinance (Cap 7) (see *Dodson Bull Carpet Co Ltd v City of London Corp* [1975] 2 All ER 497, [1975] 1 WLR 781, a decision based on Pt II the Landlord and Tenant Act 1954). On receipt of a notice to quit or of termination given by an assignee landlord of part of the premises, the tenant may determine his tenancy of the whole premises by serving a counter notice which expires at the same time as the notice to quit or of termination.

The section is retrospective in effect, and applies regardless of when the lease was made, the reversion severed or the right of re-entry exercised: see subs (3).

[CP30.04] Severance ... of the reversionary estate in any land comprised in a lease

A leasehold reversion is the undisposed of interest in land which reverts to the grantor after the exhaustion of the leasehold term (*Throckmerton v Tracy* [1558-1774] All ER Rep 168, (1555) 1 Plowd 145, 160a).

Severance of the reversionary estate will occur where the reversion to part of the land is held under one lease, or by one landlord, and the reversion to the remaining part of the land is held under another lease, or by another landlord. The severance may be effected not only by assignment, but also by surrender of part of the demised premises by the tenant or by operation of law (*Persey v Bazley* (1984) 47 P & CR 37, *William Skelton & Son Ltd v Harrison & Pinder Ltd* [1975] 1 All ER 182, [1975] QB 361, *Pang Yiu Chang John v Winster Developments Co* [1993] 1 HKC 95, CA).

The apportionment of covenants and conditions is relevant only to a severance as to the land. The running of covenants and conditions where there is severance as to the estate is governed by s 31 below.

[CP30.05] Lease(s)

As to meaning, see [CP2.09] above.

[CP30.06] Term(s) granted by the lease

As to meaning, see [CP2.27] above.

[CP30.07] Subsection (1): Comprised in, comprised therein

'Comprised in' means 'comprehended in', ie 'being an item in': see *Knox v Gye* (1872) LR 5HL 656, 42 LJ Ch 234.

[CP30.08] Condition

As to meaning, see [CP14A.08] above.

[CP30.09] Surrendered

As to meaning, see [CP2.10] and [CP4.10] above.

[CP30.10] In like manner as if the land ... had alone originally been comprised in the lease

The severance of the reversion does not create two separate leases but rather leads to two landlords (*Jelley v Buckman* [1973] 3 All ER 853, [1974] QB 488, *Lester v Ridd* [1989] 1 All ER 1111, [1990] 2 QB 430, *Pang Yiu Chang John v Winster Developments Co* [1993] 1 HKC 95, CA).

[CP30.11] Subsection (2): Includes

As to meaning, see [CP2.05] above.

[CP30.12] Determine, determination

'Determine' here means 'put an end to by one of the parties' (*Town v Stevens* (1899) 17 NZLR 828 at 829 per Williams J).

[CP30.13] Notice to quit

A notice to quit includes a notice served by virtue of an express term of the tenancy and a notice to determine a periodic tenancy (*Persey v Bazley* (1984) 47 P & CR 37).

See also s 62 below and the notes thereto.

[CP30.14] Person

As to meaning, see [CP2.32] above.

[CP30.15] Extends to part only of the land demised

At common law, a notice to deliver up part of a tenancy was bad (*Prince v Evans* (1874) 29 LT 835). Similarly, where purchasers of a property (sold in lots) which was let to a single tenant, each gave notice to quit to the tenant who had not recognized the division of the tenancy, it was held that the notices were bad (*Re Bebington's Tenancy, Bebington v Wildman* [1921] 1 Ch 559). This subsection changes the common law position (*Smith v Kinsey* [1936] 3 All ER 73).

[CP30.16] Month

'Month' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean calendar month. As to the reckoning of 'calendar month', see *Migotti v Colvill* (1879) 4 CPD 233; and *Swordland Ltd v Wharf Properties Ltd* [1994] 2 HKC 223, [1994-95] CPR 171, CA.

[CP30.17] Subsection (3): Commencement of this section

This section is retrospective in effect.

[CP30.18] Definitions

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

31. Rent and benefit of lessee's covenants to run with the reversion

Remarks:

Adaptation amendments retroactively made - see 29 of 1998 s. 54

(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and without prejudice to any liability affecting a covenantor or his estate.

(2) Any rent, covenant or provision mentioned in subsection (1) shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term granted by the lease, to the income of the whole or any part, as the case may require, of the land leased.

(3) Where the person mentioned in subsection (2) becomes entitled as mentioned in that subsection by assignment or otherwise, the rent, covenant or provision mentioned in subsection (1) may be recovered, received, enforced or taken advantage of by him notwithstanding that he becomes so entitled after the condition of re-entry or forfeiture has become enforceable, but this subsection does not render enforceable any condition of re-entry or other condition waived or released before such person becomes entitled as aforesaid.

(4) This section applies to leases made before or after the commencement of this section, but does not affect the operation of—

(a) any severance of the reversionary estate; or

(b) any acquisition by assignment or otherwise of the right to receive or enforce any rent covenant or provision,

effected before the commencement of this section.

(5) Nothing in this section shall affect the provisions of the Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap 126). (Amended 29 of 1998 s. 54)

[cf. 1925 c. 20 s. 141 U.K.]

[CP31.01] Enactment history

Section 141 of the Law of Property Act 1925, UK, from which this section was taken, was an updated version of a similar provision in Grantees of Reversions Act 1540, UK (now repealed), s 10 of the Conveyancing Act 1881, UK (now repealed), and s 2 of the Conveyancing Act 1911 (now repealed).

The 1540 Act was once incorporated into Hong Kong law by the Application of English Law Ordinance (Cap 88).

Subsection (5) was amended pursuant to s 54 of the Adaptation of Laws (Crown Land) Ordinance 1998 (29 of 1998) by repealing 'Crown Rights (Re-entry and Vesting Remedies) Ordinance' and substituting 'Government Rights (Re-entry and Vesting Remedies) Ordinance'.

[CP31.02] England

Cf s 141 of the Law of Property Act 1925, UK. See also Landlord & Tenants (Covenants) Act 1995.

[CP31.03] Cross reference

See Law Society Circular to Members No 11/1988.

[CP31.04] General note

At common law, the benefit of express covenants (other than a covenant to pay rent) did not run with the reversion (*Wedd v Porter* [1916-17] All ER Rep 803, [1916] 2 KB 91 at 100 per Swinfen Eady LJ). A landlord's assignee could only sue upon the implied covenants, being those arising directly from the demise. By virtue of the Grantees of Reversions Act 1540, UK, which was incorporated into Hong Kong law by the Application of English Law Ordinance (Cap 88), the right of a landlord's assignee to sue was extended to all the lessee's covenants and he was able to rely upon a right to forfeit contained in the lease. This section replaces the Grantee of Reversions Act 1540 UK with this updated provision based upon s 141 of the Law of Property Act 1925, UK.

By virtue of subs (1), an assignee landlord can sue a tenant for breach of covenants, including recovery of arrears of rent accruing before he acquired the reversion. Subsection (2) overcomes a procedural problem to enable a person who is solely entitled to the income of the land, but is not the holder of the legal reversion, to sue in his own name on the leasehold covenants to enforce a right of re-entry. Subsection (3) permits an assignee landlord, or other person entitled to sue for rent or to take action upon a covenant by virtue of subs (2), to enforce a right of re-entry or forfeiture based upon a breach of covenant that occurred before he acquired the reversion, provided that the right has not been waived.

This section is operative in respect of all leases, but it affects only the right to take action on a covenant following an assignment or severance of the reversion taking place after 1 November 1984: see subs (4).

This section does not affect the operation of the Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap 126), which provides the Government with a streamlined procedure for the forfeiture of Government leases and their vesting in the Financial Secretary Incorporated.

[CP31.05] Rent

The benefit of a covenant to pay rent or render services in the nature of rent runs at common law (*Vyvyan v Arthur* (1823) 1 B & C 410, [1814-23] All ER