force. A substantially amended version is to be introduced into the Legislative Council, possibly in 2007. If enacted, and brought into force, the new system will be that of a registration of title system.

6. *Leasehold Terms*

By 1898, there were a variety of leasehold terms under which land was held in the Colony of Hong Kong. On Hong Kong Island, there remained some 999-year leases, many 75-year leases, some of which were renewable for a further term of 75 years, and others which were non-renewable. On parts of the Kowloon Peninsula, south of Boundary Street, there were some 999-year leases although the majority of landholdings were for 75 years. In each area, there were also leases of lesser terms, most of which had expired by the turn of the century. In the New Territories, leases of 99 years less three days dated from 1 July 1898 were the norm although there were some leases of 75 years with a right to renew for 24 years less three days also.

Renewal of renewable leases, and from 1972 of certain non-renewable leases, is provided for in several Ordinances.[13] In general, a new lease will be granted on payment of a sum assessed at 3% of the rateable value. The lease is subject to termination on re-entry where there has been a breach of the covenants in the Government lease: *Government Rights (Re-entry and Vesting Remedies) Ordinance* (Cap 126). In addition, the Government has a right to resume the land for public purposes:[14] *Government Lands Resumption Ordinance*.

It is possible to obtain a title by adverse possession against the Government or against a Government lessee. However, under the *Limitation Ordinance* (Cap 347), adverse occupation of 12 years is required to be proved against the Government lessee, and 60 years against the Government. Title against the Government would be a rare thing in Hong Kong, apart perhaps for possessory rights claimed in respect of some New Territories lands: *Man Kam-Tong v Man Li-Tai* [1984] HKLR 181 and *Lai Chung Yue v Chau Shing* (1987) MP No 2206.

The duration of a Government lease is now subject to the terms of Article 120 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* which provides for the

13 See, for example, Government Leases Ordinance (Cap 40); New Territories (Renewable Government Leases) Ordinance (Cap 152); Government Rent and Premium (Apportionment) Ordinance (Cap 125).

14 The right is different from that in other jurisdictions where land is held on freehold. In such cases, the Government will buy back the land for compensation. In the case of Hong Kong land, the Government is simply re-entering under the Government lease either for compensation as provided for in the *Lands Resumption Ordinance* (Cap 124) or as provided for in the Government lease.

automatic termination of all Government leases on 30 June 2047 if not before.

C. Sources of Hong Kong Land Law

1. *Sources of Land Law*

By and large the historical sources of Hong Kong land law have been preserved since 1 July 1997. Article 8 of *The Basic Law of the Hong Kong Special Administrative Region* (Cap 2101) ('the Basic law') provides that the law of Hong Kong, since then has been:

(a) the common law of England was received into Hong Kong from 5 April 1843 being of general application to the then Colony, and as it was amended by the Courts of Hong Kong since then. Section 3 of the *Supreme Court Ordinance* No 15 of 1844) provided that:

> the law of England shall be in full force in the said Colony of Hong Kong, except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants.

Some principles of common law which were of general application, or specifically applied, were made applicable by Order in Council or by the relevant Imperial Act itself: on this, see section 3 of the *Application of English Law Ordinance* (Cap 88) ('the AELO') where the Schedule to the Ordinance contained a list of Imperial legislation which was to, or already did have, effect in Hong Kong. In 1997, it was considered that if the AELO remained in force, it would contravene the *Basic Law*; consequently it was not adopted as part of the law of the Hong Kong Special Administrative Region ('the HKSAR'); and accordingly ceased to operate after 30 June 1997.

Some traditional English law principles have been applied in Hong Kong despite apparent inconsistency between the two systems.

One such area has been that of adverse possession. The general common law principle is that the barring of recovery of possession by the true owner applies only in respect of freehold land: *Lau Wing Hong & Ors v Wong Wor Hung & Anor* [2006] 4 HKC 221. In any case, there is currently a difference in the general principles applicable to establishing adverse possession in England, from those applicable in Hong Kong. Following the decision *in JA Pye (Oxford) Ltd v United Kingdom* (2006) ECHR 104, the adverse possessor in England can be liable to compensate the true owner where the land taken is registered land under the *Land Registration Act* 2002 (Eng). This is because, under sections 96 to 98 of that Act, adverse possession of registered land is now subject to the *European Convention on the Protection of Human Rights and Fundamental*

The building up of a title by adverse possession requires continuous possession of a particular type for a particular time. So long as there is no break in that possession, it is irrelevant who obtains the title. If the original adverse possessor, prior to completion of the limitation period, passes his accruing rights to another, then the third party can claim the title if ultimately he remains in adverse possession for the balance of the limitation period.

Where the adverse possessor puts in a tenant, he thereby indicates his dominion over the land, and it is as if the adverse possessor himself has been in possession.

Animus possidendi

The possessor in *Chan King Tong v Henry Francis Lue & Ors* (2002) CACV No 942/2001 sought declarations that the registered owners and their personal representatives had lost the right to bring an action for the recovery of the premises on the ground that their rights had been extinguished by adverse possession. Accordingly, the claimant sought to have the property vested in him, and his name to be registered as owner in the Land Registry. However, the Court of Appeal upheld the trial court's decision that the claimant did not have any possessory right to the land. In fact, the owners of the land, on which were several flats, lived in Jamaica and had appointed a third party to act as attorney. The owners had said that the claimant was entitled to use the rent from the properties for his own use, to live in one flat for life but that the claimant could not seek ownership rights over the land. The Court of Appeal held that the claimant was a licensee who had no possessory rights in his favour.

The claimaint in *Wu Yee Pak v Un Fong Leung & Ors* (2002) HCMP No 3773/1998 was unsuccessful because although he had occupied and had farmed the land from 1934 to 1997 when it was resumed, the court could find no animus possidendi. In fact, the claimant's wife had regularly visited the paper title owner with payment of money and farm produce in return for the right to occupy the land. Further, when the land was resumed the claimant had not contested the payment of compensation to the paper title owner. On appeal, the Court of Appeal ((2002) CACV No 172/2002) agreed with the decision of the trial court confirming that the squatter had not obtained a possessory title. The fact that the squatter made a payment of money and farm produce for a licence to remain on the land was inconsistent with the licensee's claim to possession. Rogers VP said that the 'exact basis of the licence' did not matter, nor was it necessary to 'precisely define' the terms of that licence 'if the person in possession did not purport to do so adversely to the owner' (paragraph 8). Stone J stressed that regular monetary payments 'plainly are inconsistent with establishment of the necessary animus possidendi' (paragraph 13).

In *Wan Kai Wah v Leung Man Fai* (2002) HCA No 10622/1994 the court referred to the difficulty in proving evidence of physical control over vacant or open land. The squatter in that case had built wooden structures on part of the land and occupied them with his wife and family. Market gardens were maintained on the remainder of the land. No one had challenged the squatter's possession over the years and only did so when the squatter took action to prove the possessory title. In deciding that the squatter had obtained a possessory title, Poon DHCtJ described animus possidendi as 'the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow' (at paragraph 10).

Animus possidendi may have been proven in *Yu Yuk Ying v The Hong Kong Tin Tak Shing Kau Chung Woo Ching Sai Association Ltd* (2003) HCA No 3021/2000 but it was shown that the squatter had not entered the land as a squatter but with permission of the owner. It seems that this state of affairs had previously been accepted by the family of the squatter. One of the members of the family had applied for a public housing flat and had been required to make a statutory declaration. That declaration said that the family lived on land belonging to a Taoist religious t'ong 'which allows us to live there without collecting the land rent'. Accordingly, even though there may have been animus and sufficient time for the passing of the limitation period, yet the initial entry being with permission prevented time running at all.

Series of squatters

The period of adverse possession does not have to be that of one squatter, or even of a series of successive squatters claiming from each predecessor. It is enough that the last in time is able to claim title, even though he did not obtain his possessory rights from the last squatter, but so long as the adverse possession was continuous without a break in which it could be said that the true owner's right had not been barred: *Ng Lai Sim v Lam Yip Shing & Anor* (2000) CFI No A2963/98.

Effect of adverse possession

Adverse possession has a purely negative effect in that it disentitles the dispossessed from asserting his title and recovering possession from the dispossessor or squatter: *Marquis Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1, 37 ER 527 and *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510. Ultimately, the squatter will gain title by merely exercising such right by selling as a possessory owner, or by seeking a declaration from the court of his rights as an owner of the land based on the adverse possession: *Mok Ching Ha v Wong Yik Lung* (1998) HCMP No 426/1997. The passing of the title does not automatically effect a

The Court of Appeal, however, disagreed with the conclusion of Findlay J. Although the court did not consider in any detail the meaning of 'industrial user', Godfrey JA held that, notwithstanding the fact that the manufacture of pagers complied with the terms of the Conditions, the use of the paging service operation was a discrete use which was not ancillary to the manufacture of the pagers. The use of the premises for the purpose of the paging operation services could not be described as use of the premises as a factory nor for industrial purposes. Rogers JA, concurring, added that the argument that the function of providing a paging service could be equated to a manufacturing process in that the end result was the production of a stream of electrons was wrong. If it were right, the same argument could be applied to any office using word processors.

The Court of Final Appeal upheld the decision of the Court of Appeal. As to the meaning to be attached to the word 'industrial', Bokhary PJ pointed out that the meaning of the word could not be divorced from the context in which it was used. In this case the word 'industrial' was used in the context of the plaintiff being forbidden to erect any building other than a factory on the lot. The definition of a factory in the *Factories and Industrial Undertakings Ordinance* (Cap 59), whilst not strictly relevant to the case, provided, inter alia, that a factory meant any premises in which articles were manufactured, altered, cleansed, repaired, ornamented, finished, adapted for sale, broken up or demolished or in which materials were transformed. The paging service was clearly not one falling within this definition. The learned judge concluded that the user was not industrial. Nor did the provision of a paging service constitute the final stage of the manufacturing process of the pagers. The final issue was whether the provision of a paging service was ancillary to their manufacture. Although the design and testing prior to the manufacture of goods and the packing and dispatch from the factory of goods subsequent to their manufacture might properly be considered to be ancillary to their manufacture, the provision of a paging service was not ancillary to the manufacture of the pagers. The appeal was dismissed.

Prohibition on noisy trade, business or activity which may constitute a nuisance or annoyance

There may also be a restrictive covenant prohibiting 'noisy trades, businesses or activities which might cause a nuisance or annoyance to others' such as neighbours. As we will see below, the offensive trades clause contains a prohibition on any noisy or noisome trade or business. The effect of this prohibition in an offensive trades clause was considered in *Niceboard Ltd v China Light and Power Co Ltd* [1994] DCLR 69, LT, where the Lands Tribunal held, on the facts, that the construction and running of a concrete batching plant did not offend the prohibition.

A provision in a deed of mutual covenant prohibiting 'any trade or business which is noisy, noisome or offensive or which may constitute a nuisance or annoyance to other occupiers of the estate' was construed in *Lam Pui v Incorporated Owners of Beverly Garden* (2006) LDBM No 360/2005. The applicant owned a shop in a multi-storey building in respect of which the deed of mutual covenant contained the prohibition set out above. The deed of mutual covenant also required any decoration of shops on the estate to be approved by the manager. The applicant let his shop to a tenant who intended to use the shop as an internet bar, but his application for approval of the necessary decoration work was not approved by the manager on the ground that a shop of this nature would cause nuisance and annoyance to other occupiers. The tenant thereupon cancelled the tenancy agreement and the applicant applied for a declaration that the purported use of the shop as an internet bar did not contravene the terms of the deed of mutual covenant. In support of the manager's decision the incorporated owners as respondents contended that earlier incident reports showed that the customers of internet bars tended to be unruly, noisy and had little regard for the occupiers of other shops. In support of their argument they cited *Wauton v Coppard* [1899] 1 Ch 92 (a case in which the court held that the running of a school was capable of amounting to a nuisance) and *Tod-Heatly v Benham* (1889) 40 Ch 80 (where the establishment of a hospital for the treatment of outpatients was held likely to bring annoyance to the inhabitants of neighbouring houses). In the Lands Tribunal Deputy Judge Wong first distinguished the two authorities cited. In *Wauton v Coppard* the presence of the school would generate the inherent problem of noise such as bell-ringing and boys shouting when they were let out of school; in *Tod-Heatly v Benham* there might well be a reasonable apprehension of infection to neighbours. He went on to conclude that there was insufficient evidence to establish that the normal use of customers of an internet bar would cause any nuisance to other occupiers of the estate and granted the declaration sought that the intended user did not breach the deed of mutual covenant.

Offensive (or Noxious) Trades Clause

In older Government leases there is usually an offensive trades clause (sometimes called a noxious trades clause) which prohibits the lessee from carrying out certain trades which are designated in the Government lease as offensive. A typical offensive trades clause reads:

> any person shall not, during the continuance of this demise, use, exercise or follow, in or upon the said premises or any part thereof, the trade or business of a Brazier, Slaughterman, Soap-maker, Sugar-baker, Fellmonger, Melter of Tallow, Oilman, Butcher, Distiller, Victualler, or Tavern-keeper, Blacksmith,

upon a conspicuous part of the lot itself; and (ii) to be published in not less than one Chinese language newspaper and one English language newspaper circulating generally in Hong Kong.[106]

When hearing an application for sale, the Lands Tribunal must in certain circumstances determine the value of the property owned by minority owners and may then make an order that all the undivided shares in the lot be sold.[107] The Lands Tribunal must not make an order for sale unless, after hearing the objections, if any, of the minority owners, it is satisfied that (a) the redevelopment of the lot is justified due to the age or state of repair of the existing building; and (b) that the majority owners have taken reasonable steps to acquire all the undivided shares in the lot (including in the case of a minority owner whose whereabouts are known, negotiating for the purchase of such of those shares as are owned by that minority owner on terms that are fair and reasonable).[108]

When the Tribunal makes an order for sale, it must appoint trustees, who are satisfactory to the Tribunal and who have been nominated by the majority owners, whose function is to conduct the sale and comply with any other duties imposed upon them by the Ordinance.[109] The Lands Tribunal may order that compensation be paid to a tenant upon the determination of his tenancy and may give directions as to (i) the sale and purchase of the lot including settling the particulars and conditions of sale; (ii) the termination of tenancies; and (iii) the application of the proceeds of sale.[110]

The purchaser of the lot must, not later than 14 days after he became an owner of the lot, notify the Director of Lands in writing that he became such an owner.[111] Once an order for sale has been made, it will be deemed a condition of the Government lease that the lot is redeveloped and made fit for occupation within a period being not less than six years from the date on which the purchaser of the lot became the owner of the lot or such longer period as the Lands Tribunal may allow.[112] A breach of this condition will entitle the Government to re-enter the lot under the *Government Rights (Re-entry and Vesting Remedies) Ordinance*.[113]

106 Ibid, s 3(3)(a)–(c).
107 Ibid, s 4(1)(b). The order must be registered in the Land Registry against the lot to which the order relates: ibid, s 7(1).
108 Ibid, s 4(2)(a), (b). The provisions in the *Landlord and Tenant (Consolidation) Ordinance* are not to be taken into account when determining the merits of the application, except for the purpose of assessing compensation to tenants: ibid, s 4(3).
109 Ibid, s 4(1)(c)(i). The trustees may be authorised to charge such remuneration as the Tribunal thinks fit: ibid, s 4(1)(c)(ii). A copy of the order appointing the trustees must be registered in the Land Registry: ibid, s 7(2).
110 Ibid, s 4(6)(a)(i)–(iii).
111 Ibid, s 7(6).
112 Ibid, Schedule 3.
113 Ibid, s 9.

An interesting case illustrating the application of the Ordinance is *Capital Well Ltd v Bond Star Development Ltd* [2005] 4 HKLRD 363, CFA. The respondent was a property developer who in 1993, with the intention of redeveloping several plots, set about acquiring units in multi-ownership in five contiguous tenement buildings occupying six separate lots in North Point. In the middle of this row of properties was the lot in question, which was divided into six undivided shares with one share allocated to each of six premises in the building. The premises concerned were on the third floor. In 1993 the respondent acquired the owner's half interest and, having, as it thought, acquired all the plots in their entirety, demolished all the buildings. However, the acquisition of the final share was subsequently set aside by the court on the grounds that it was an unconscionable agreement (see *Lo Wo v Cheung Chan Ka* [2000] 2 HKLRD 370). In June 2001 the respondent made an offer for the purchase of the remaining unit for HK$2.5 million, but the owner asked for HK$15 million. The respondent then applied under the Ordinance for sale of the building and such an order was made by the Court of Appeal. The appellant appealed on the grounds, first, that the buildings had all been demolished and the Ordinance did not apply to vacant land and, secondly, that the offer made by the respondent had not been reasonable so as to comply with the preconditions for sale laid down in the Ordinance. Giving the judgment of the court, Ribeiro PJ first rejected the contention that the Ordinance did not apply to vacant land (here a cleared site). The appellant had in particular maintained that the Ordinance did not apply to a vacant plot since section 4(2)(a)(i) required the Tribunal to be satisfied that 'the redevelopment of the lot is justified … due to the age or state of repair of the existing development on the lot'. The learned judge, however, pointed out that, when section 4(2)(a)(i) spoke of the 'existing development', it was contrasting the existing building with the proposed building which was not yet in existence. It did not matter whether or not the original building was still standing at the date of the application. The fact that it might already have been demolished was catered for in the definition of 'redevelopment', which stated that, when used in relation to a lot, the word 'redevelopment' meant 'the replacement of a building on (or formerly on) the lot'. There was no conceivable policy reason to exclude a developer from the provisions of the Ordinance who had achieved the 90% qualifying interest only after the building had been demolished. As regards the reasonableness of the offer, the Tribunal was not conducting a valuation exercise and it did not need to adjudicate upon any disputes as to the correct valuation principles to be applied. It did not need itself to arrive at any conclusion as to what figure represented the correct valuation. It merely needed to be satisfied that, on the evidence available, the offer fell within the range of what might broadly be regarded as fair and reasonable compensation for the interest in question. If duly satisfied that the rejected offer was fair and reasonable, the Tribunal might make the order, leaving the value and

usual two being the payment of the premium and the construction of a building in accordance with the provisions of the *Buildings Ordinance* (Cap 123) and the *Town Planning Ordinance* (Cap 131) as appropriate. The exclusion order and the order made under the *Demolished Buildings (Re-development of Sites) Ordinance* would subject the land and hence the Government lease to a building covenant in most cases. This building covenant would usually provide that no unit could be sold until the building covenant had been completed. On default of observance of the covenants on the part of the purchaser, the Government could re-enter and resume the land.

Before 1961, many Government leases were subject to building covenants which contained a proscription against the 'owner' entering into any type of contract involving the land, before the fulfillment of the building covenant. There was one exception, namely, the building mortgage.

In cases of recent alienation, the purchaser had to receive immediate possession to enable timely observance of the building covenant. On default of the covenants, the Government could re-enter and resume the land. Additionally, land other than that referred to above was used for the construction of such buildings. In some cases, the ownership of pre-existing buildings was converted to the new system.

By the late 1950s, the pace of building meant that this covenant was often breached with the result that there were many problems in respect of the security of title of the purchasers. One such problem occurred with the Peony House West Block Ltd.

The Peony House problem was referred to by the Registrar-General in the *Annual Report of the Registrar-General 1960–1961* where he noted that:

> … where the developing company was unable to complete the building, and the purchasers had to contribute a further 30% of the agreed purchase price to complete the building and save their original investment. This case, however, did not give more than a temporary jolt to the confidence of flat purchasers, and the practice of buying and paying substantial deposits on flats in the air soon revived in full vigour. So long as boom conditions prevail and the demand for flats remain strong, cases like Peony House West Block will be rare, but the dangers inherent in the situation are obvious … [T]he Government … has set up a Working Party … to study this and other problems relating to large blocks of flats.

As a consequence, a clause was inserted into all Conditions of Sale of new lots from 20 December 1961 and the same clause was inserted into all exclusion orders. This clause prohibited the entry into a contract of sale for the units built on the land, without the prior consent of the Registrar-General. The necessity to obtain such approval became known as the Consent Scheme. The Law Society in 1980 introduced the Non-Consent Scheme in cases where the same solicitor acted on the sale of

units in uncompleted residential premises, in respect of land not covered by the Consent Scheme.

Almost universally, a DMC (more correctly Deed of Mutual Covenant) was entered into by the developer, the manager[2] and the first person to purchase a unit to regulate the management of the building and to provide for the duties and powers of the management corporation. As the number of developments increased, the registration of the DMC in the Land Registry resulted in overloading the system then in use and a Sub-Division Register for folios in respect of undivided part or shares of the Government lease was introduced.

Some developments have never been regulated by a DMC. In others, on subdivision of an original unit a subdeed of mutual covenant is considered necessary and, in others, changes in the ownership necessitate a redrafting of the original deed of mutual covenant and its replacement. If no change has been made to the DMC in line with structural alterations, the failure to show the current allocation of shares may be an encumbrance on title enabling a purchaser to avoid the contract if there is no other source of information to indicate the share: *Yip Ngan Yee & Anor v Chan Tsz Yam & Anor* [2001] 2 HKC 81. See also *Wu Turhan v Taiwan Yiji Trading (HK) Ltd* [1995] 2 HKC 481 where the defendant unsuccessfully sought to show that the information in the unofficial Control Cards was adequate. The Control Cards are a set of records complied and kept by the Land Registrar for its own administrative purposes. A Control Card is not a document of title; where the information on the Control Card is not inconsistent with anything in the documents forming the chain of title, that information may be relied upon: *Hinex Universal Design Constultants Co Ltd v Chan Lai Hing* [1998] 1 HKC 317.

All of these problems have been dealt with by the courts. For example, where there is no deed of mutual covenant, it has been held that:

> The law will provide, as and when necessary, for what is to be done when any problem arises as between the co-owners: *Goodtex Land Co Ltd v Lung Kwong Emporium Co Ltd* [1993] 1 HKC 645 (Godfrey J at p 648).

Where there is a small number of co-owners, it might be possible for them to regulate the management of the building without dispute and to appeal to the court only in rare cases. In a large development, however, this solution would be impracticable. One suspects that by the time matters of administration reach the court they will be beyond the control of the owners. Indeed in *Greatek Investments Ltd v Lam Kit Sum & Ors* [2000] 4 HKC 761, the DMC was held to be defective in that it did not show the allocation of shares. As there was no other information available to indicate the shareholding, the court held that the vendor's title was

2 The term 'manager' refers to the management corporation. However, for simplicity the terms 'manager' and 'it' will be used hereafter.

Le Pichon JA considered that section 19(2) of the Law Amendment and Reform (Consolidation) Ordinance which provided that contribution should be 'just and equitable having regard to the extent of that person's responsibility for the damage' supported the view that solvent defendants should bear the burden of an insolvent defendant's contribution in proportion to the solvent defendants' respective shares of liability. Her Ladyship then added that section 17 does enable an order to be made against 'selected individual owners'(paragraph 22). However, the Court of Appeal did not accept that the appellant should not be liable to contribute to the costs of the Owners' Incorporation:

> This is because his liability to contribute is an internal matter affecting those who constitute the owners whose duties and obligations *inter se* under and are governed by the deed of mutual covenant of Albert House … I am therefore driven to conclude that the costs order made below lacked a legal basis. Whilst I fully recognise that the order made by the judge accords with my own sense of the justice of the case, I am unable to uphold that order. [para 24]

Criminal liability

Although conviction for the offences referred to in *HKSAR v The Incorporated Owners of No 10 Bonham Strand & Anor* (2004) HCMA No 239/2004 resulted from the breach of an administrative order, the convictions were upheld against the owners incorporated as well as against the owner of one unit. The offence was the failure to comply with directions issued by the Director of the Fire Services Department to, inter alia, incorporate a sprinkler system into the building.

In the event, the sentences of the owners incorporated and the individual owner were upheld. On conviction the defendants were each fined $2,500 plus a daily fine of $250 up to the date of conviction. The defendants had sought to reduce each fine by 50%. However, as the magistrate had fined each defendant only approximately 1/10th of the maximum penalty, the court found that the fines were not excessive and dismissed the appeal against sentence.

Termination, Variation, or Change in Effect, of DMC

Introduction

The DMC, being a contract, is capable of being varied, and certain terms are capable of being waived, pursuant to general contract principles. There are several circumstances in which variation or termination can occur. Some of these are associated with the fact that the DMC is a

contract, but several are more general in their application. The seven methods are: first, the change in the neighbourhood which affects the enforcement of certain covenants, second, the termination of the Government lease, third the winding up of the owners' incorporation, fourth partition, fifth by a court determination of rights, sixth by variation under general contract principles, and seventh by incorporation.

1. Change in Neighbourhood

The first of these methods concerns the application of the principle that a change in the neighbourhood may permit alteration of the DMC to avoid those covenants which are then no longer effective. In *Hang Yuan Management Ltd v Kishinchand Chellaram (Hong Kong) Ltd* [1987] 2 HKC 257, the defendant was seeking to avoid an injunction which would have required him to remove air-conditioners installed contrary to the terms of the DMC. In part, his defence was that some terms of the DMC were no longer effective because there had been a change in the neighbourhood resulting in a change in the enforceability of those covenants. This was occasioned, he said, because of the 70 flats in the building, the owners of 54 had breached this and similar covenants. However, at first instance the judge had said that:

> Whatever the breaches which had occurred the Defendants must show so complete a change in the character of the property as to render the covenants valueless – see *Chatsworth Estates v Fewell* [1933] 1 Ch 224.

On appeal, the bland statement was that:

> This present case is not one where there can be any question of a change of the character of the neighbourhood. [at 258]

It is unfortunate that nothing further was said. This is so especially in view of the fact that some of the covenants in the DMC must reflect those of the Government lease.

In *Attorney General v Fairfax Ltd* [1997] 1 HKC 17 the Privy Council said that in view of substantial breaches over the years, and changes in the neighbourhood, all of which had been known to the Government, the Government was to be taken to have abandoned its right to enforce certain covenants in the Government lease. Abandonment rarely arises in the case of breaches of the covenants in the Government lease in respect of a multi-storey building. However, if the covenant in the DMC mirrors that in the Government lease, and the Government knowing about the breach does nothing despite such a change that the building no longer 'bears … resemblance to … what the original lease must have contemplated' [at 20], this would seem to weaken the manager's right to pursue enforcement of the DMC covenant and might lead to the conclusion that the covenant had been abandoned. This abandonment may have resulted from a substantial change in the neighbourhood

1989 and he also failed to carry out the required remedial works. The Building Authority, acting in accordance with its powers under section 27A(3) of the *Buildings Ordinance*, eventually carried out the remedial works to the retaining wall itself during 1991. In May 1992, the defendant entered into a sale and purchase agreement in respect of the property with the plaintiff, the agreement providing that the plaintiff would raise no requisitions as to the existence of any notice or order from the Government or other competent authority regarding demolition or repair works to be carried out. The defendant, however, agreed to give and show good title. The property was assigned to the plaintiff in June 1992 and the plaintiff further sold the property to Portwealth Properties Ltd in November 1992. In December 1992, the Building Authority demanded payment from the defendant. A certificate issued in March 1993 under section 33(1) of the *Buildings Ordinance* as to the sum payable was registered in May 1993. According to section 33(9) of the *Buildings Ordinance*, the effect of the registration of the certificate is two-fold. First, under section 33(9)(a) the cost provided for in the certificate will be recoverable from the registered owner of the property; secondly, under section 33(9)(b) the cost will constitute a first charge on the property. A proviso to section 33(9)(b), however, provides that the charge will be void as against a bona fide purchaser or mortgagee of the land for valuable consideration who, subsequent to the completion of the works and before the registration of the certificate, has acquired and registered an interest in the land to be charged. At the time the certificate was registered, the property was owned by Portwealth Properties, who became liable to pay the costs under section 33(9)(a) of the *Buildings Ordinance*, although Portwealth would not have been affected by the charge being a bona fide purchaser of the property before the registration of the certificate. Portwealth now called upon the plaintiff to settle the debt. The plaintiff thereupon commenced a suit against the defendant for an order that the defendant was liable for this sum, having failed to give good title to the plaintiff in breach of the covenants for title on the grounds that at the time of the sale to the plaintiff, the defendant knew that remedial works had been carried out by the Building Authority although, at that point in time, no certificate as to the costs payable had as yet been registered. Two issues fell to be decided by Deputy Judge Cheung. The first was whether, at the time when the defendant had assigned the property to the plaintiff, the property was unencumbered; if it were encumbered, there would be a breach of the covenants for title in the assignment. Counsel for the defendant contended that, since the certificate of costs had not been registered against the land at the date of the assignment and the certificate was only registered subsequent to the assignment, the defendant took free of any charge created by the registration of the certificate under the proviso to section 33(9)(b) of the *Buildings Ordinance* and the property was unencumbered at the date of the assignment. The second issue was whether the clause prohibiting the

plaintiff from raising any requisitions on title as to the existence of any notice to carry out remedial works was effective to exclude liability. The learned judge held first that, although the certificate as to the sum due was only registered after the assignment of the property to the plaintiff, at the time of the sale the property was encumbered, since there was a potential liability falling upon a subsequent owner of the property as a result of the order to carry out remedial works and by virtue of the failure of the owner/vendor to carry out those works. The defendant's title was not, therefore, unencumbered at the time of sale and there had been a breach of the covenant for title to give good title. Secondly, the limiting clause prohibiting the purchaser/plaintiff from raising any requisitions on title was only effective if the vendor made full and frank disclosure of any defects in title of which he was aware or ought to be aware at the time of the sale.[75] The vendor should have disclosed that the remedial works had not been carried out in accordance with the order from the Building Authority. As a consequence, the vendor/defendant had failed to give good title to the property and could not rely upon the limiting clause. The defendant was ordered to pay the costs of the remedial works as provided for in the certificate so as to remove the encumbrance.

As a result of the decision of the Court of Final Appeal in *Chi Kit Co Ltd v Lucky Health International Enterprise Ltd* [2000] 2 HKLRD 503; [2000] 3 HKC 143 (CFA), it is suggested that a potential liability under a notice or order of the Government or other competent authority will only constitute an encumbrance over the title where the potential liability is of such a magnitude that it would exceed anything that a reasonable purchaser would have in contemplation when agreeing to purchase the property.

Potential Liability of Owner of Flat under Action Pending Against Owner or Against Incorporated Owners of Multi-storey Building

Clearly where a lis pendens has been properly registered against an owner's title, that title will be encumbered. For a lis pendens to be properly registered against a title, however, that lis must affect the land against which it is registered. Where, therefore, an action has been commenced against an owner of land, but that action is unrelated to that land, no lis can properly be registered and the owner's title is

75 Following *Rignall Development Ltd v Halil* [1987] 3 All ER 170. For a detailed discussion of this point, see pp 251–254.

granted a Crown Land Permit which, in return for a fee, entitled him to occupy the land 'for a temporary period'. The Permit was renewed until 1988 when the Government wrote to the defendant informing him that the Permit was cancelled since the Government had discovered that the land was in private ownership. It was only some two years later that the plaintiff discovered that the land was his. The question for the court was whether, as a result of the grant of the Crown Land Permit, the land ceased to be in adverse possession for the period during which it was occupied under the Permit. Their Lordships held that, as from 1961 when the Permit was granted, possession was in the Government which possessed it through its licensee, the defendant. Such possession by the Government was adverse to the plaintiff. The fact that the Government was grantor of the lease under which the plaintiff was entitled was irrelevant. The defendant had been continuously in adverse possession since 1955 and the plaintiff's title was extinguished in about 1975. At the time the proceedings had been commenced in 1990, the defendant had been in possession on his own account for only two years but this did not matter. The *Limitation Ordinance* was not concerned with whether the defendant had acquired a title but with whether the plaintiff's right of action had been barred. For this purpose, all that mattered was that there should have been continuous adverse possession for the period of limitation. The rights inter se of the successive persons who might have been in possession adversely to the plaintiff since he had been dispossessed were, for this purpose, irrelevant.

That one person holding by way of adverse possession can add his period of adverse possession to a predecessor who also held by way of adverse possession was confirmed in *Ng Lai Sim v Lam Kin Shing* (1999) HCA No 2963 of 1998. From 1977 the plaintiff's father-in-law together with the plaintiff occupied a building initially as a shelter for cattle and later for the storage of tools. The plaintiff had carried out repairs to the building and had ensured that it was locked. When the plaintiff's father-in-law died in 1995 the house collapsed and the plaintiff paid to have the land cleared. The plaintiff brought an action claiming a good holding title to the land by way of adverse possession. Cheung J held that the fact that the plaintiff and her father-in-law had locked the property was clear evidence that they intended to possess the property to the exclusion of all others. So was the repairing of the building and removal of the collapsed building. The father-in-law had been in adverse possession since 1977 until his death in 1995 and the plaintiff could add her period of adverse possession to that of her father-in-law. A declaration that the plaintiff had acquired a good holding title was granted.

The issue of successive adverse possessors also arose in *Kwan Kwai Ching v Personal Representatives of Tang Yi Heng, deceased* (2000) HCMP No 2842 of 1998. The plaintiff sought a declaration that she had acquired good possessory title to certain land at Tung Chung in Lantau. She claimed that before 1960 her husband had been living on the land

and that in 1960 she married her husband and since that time they had both been farming and living on the land. In 1992 the husband had died. Throughout these years government rent had been paid by the plaintiff or her husband. Chu J held that it appeared that the plaintiff had been a licensee of the land from 1960 until her husband's death in 1992 and had only herself entered into possession after his death. The learned judge concluded that the owners had been dispossessed from at least 1960 onwards and upon the husband's death the plaintiff had been in possession. Since a possessory title could be acquired even by a succession of persons not claiming under one another, provided that possession was adverse, and since the possession in this case had been adverse, the owner's title had been extinguished. The declaration was accordingly granted.

Effect of Squatter Granting Tenancy During His Period of Adverse Possession

To obtain a good holding title, the squatter must be in continuous adverse possession for the required period of time. What is the position where a squatter, being in adverse possession but not yet having obtained a good holding title, leases the land to another? Does this lease have the effect of terminating the squatter's period of adverse possession? The answer is no. This conclusion had been reached by Barnett J in *Wong Luen Chun v Secretary for Justice* [1998] 4 HKC 122 and has now been confirmed by the Court of Final Appeal in *Cheung Yat Fuk v Tang Tak Hong* [2004] 2 HKLRD 86, CFA. Upholding the conclusion reached by the Court of Appeal, the Court of Final Appeal first noted that it had been well established that a squatter could grant a lease or tenancy of land of which he was a squatter: *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406, 415, HL. There were several compelling authorities for the proposition that a squatter could remain in adverse possession through a tenant: see *AG Securities v Vaughan* [1990] 1 AC 417, HL, *Nesbitt v Mablethorpe Urban District Council* [1918] 2 KB 1, CA, *Bligh v Martin* [1968] 1 WLR 804. The same had been held in the decision of the Court of Appeal of New South Wales in *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464. In particular, Bokhary PJ cited with approval the words of Goh Joon Deng J in the Singapore Court of Appeal in *Soon Peng Yam v Maimon bte Ahmad* [1996] 2 SLR 609:

> It is clear to us that a possessor need not personally be in occupation of the land to be in factual possession or to have the requisite animus possidendi. As Slade J said in *Powell v McFarlane* (1979) 38 P & Cr 452 at pp 470-471, factual possession is constituted by a possessor 'dealing with the land in question as an occupying owner might have been expected to deal with it'. This clearly contemplates physical possession but it certainly encompasses much more. It is the exercise of acts of ownership which is crucial. Receipt of

the New Territories which he had purchased from Mr Lee. This unit in the small house had been sold by Mr Lee to the plaintiff through Mr Lee's attorney (the attorney). The formal sale and purchase agreement had been executed on 24 March 2000 and registered on 6 May 2000 and the assignment had been executed on 18 April 2000 and registered on 30 May 2000. The defendant Madam Law filed a writ in an action against Mr Lee and the attorney on 17 April 2000 alleging that the attorney, acting on behalf of Mr Lee, had agreed to sell the unit to her in September 1997 and Madam Law had paid a deposit of $570,000 in pursuance of this agreement. The agreement had not been registered, however. When the agreement was not been carried through, Madam Law had demanded the return of her deposit. The deposit had not been repaid and Madam Law had instituted the proceedings by way of writ to recover this deposit. Madam Law had obtained a default judgment in May 2004. The writ had been registered in the Land Registry on 18 April 2000 and the default judgment registered on 2 April 2005. As a result of the judgment Madam Law claimed to have an equitable lien over the unit in respect of her unpaid deposit. The plaintiff now applied to the court for the registration of the writ and default judgment to be discharged. He contended that Madam Law was not entitled to an equitable lien, first because the original agreement between herself and Mr Lee (through his attorney) had been tainted with illegality since the sale had been carried out in breach of the building licence under which the land for the small house had been granted to Mr Lee. Secondly, the plaintiff contended that the lien was void as against the plaintiff who was a bona fide purchaser of the unit since the sale and purchase agreement between Madam Law and Mr Lee had not been not registered. Dpty Judge Muttrie first held that a purchaser acquired a lien over property in respect of which he had paid the whole or part of the purchase price. Here Madam Law held an equitable lien over the unit to the extent of her unpaid deposit: see *Rose v Watson* (1864) 10 HL Cas 672, HL, *Whitbread v Watt* [1901] 1 Ch 911, *Li Sze Fat v Chen Ka Leung Tommy* [2000] 3 HKC 224 at 232. As regards the plaintiff's contention that the agreement between Mr Lee and Madam Law was tainted with illegality since the sale had been in breach of the terms of the building licence granted by the Government by agreeing to sell it on without first paying the required premium, the Court of Appeal had held in *Li Pui Wan v Wong Mei Yin* [1998] I HKLRD 84, CA, that, although the sale had been carried out in breach of the Conditions of Grant, there was inadequate evidence to show that the Government's grant of land to the male descendents of indigenous villagers was a matter of public policy and, secondly, the parties had intended subsequently to complete the requirements in the building licence, including the payment of the premium, and this had simply been a case of the parties 'jumping the gun'. The agreement to sell the unit to Madam Law was not, therefore, tainted with illegality so as to render the lien unenforceable. As regards the non-registration of the sale and purchase

agreement to Madam Law, it was correct that the agreement was void as against the plaintiff as a bona fide purchaser. However Madam Law had registered her writ as a lis pendens. The writ had been registered on 18 April 2000 and took effect, according to section 5A of the *Land Registration Ordinance*, on the day after its registration ie 19 April 2000. The plaintiff's sale and purchase agreement was only registered on 6 May 2000 and, since it had been registered more than one month after its date of execution (24 March 2000) the plaintiff could not take advantage of the backdating provisions in section 5 of the *Land Registration Ordinance*. Madam Law's lis pendens therefore, took priority. The lis pendens provided notice of Madam Law's claim to an equitable lien and, once judgment had been given in favour of Madam Law on 5 May 2004, that judgment merged with the writ so that it took priority over the formal sale and purchase agreement. The plaintiff took his title, therefore, subject to Madam Law's claim to an equitable lien and his property was encumbered by that lien. The plaintiff's application for the discharge of the registration of the writ and judgment was accordingly dismissed.

An application may be made to the court to vacate a lis pendens where the litigation which is sought to be protected by the lis pendens has not been prosecuted *bona fide* or for other good cause.[32]

Foreign Judgments or Orders Affecting Land in Hong Kong

A foreign judgment or order affecting land cannot be registered as a lis pendens under the *Land Registration Ordinance* nor can it be registered under the *Foreign Judgments (Reciprocal Enforcement) Ordinance* (Cap 139). The claim underlying the judgment or order may, however, constitute a blot on the vendor's title on the grounds that the purchaser may be at risk of the successful assertion against him of the claim which led to the making of the judgment or order. Such was the conclusion reached by Sakhrani J in *Cova Enterprises Ltd v Tjanaka* [2004] 1 HKC 94, [2004] 1 HKLRD 199. A head vendor living in Singapore agreed to

32 According to s 19 of the *Land Registration Ordinance*, the court or judge before whom any property is sought to be bound in litigation, may on the determination of the lis pendens, or during the pendency thereof, where the said court or judge is satisfied that the litigation is not prosecuted *bona fide*, or for other good cause shown, make an order for the vacating of the registration in the Land Registry of such lis pendens. In this case, the discharge is entered on the register – s 21 of the *Land Registration Ordinance*. The Land Registrar should be prepared to vacate an entry of a lis pendens in the Register if the parties concerned – ie the party who registered the lis pendens and the owner of the land – consent to his doing so and application to the court in this case should be unnecessary – per Godfrey J in *Kent Reginald Albert v Mak Kit Man* (1993) MP No 4098 of/1993. See also *Fung Kan Wai v Leung Shui Fat* [1998] 2 HKC 115 where the vendor failed to persuade the court that a lis pendens, registered by way of protecting an action by a purchaser to recover his deposit, should be vacated either because the litigation had not been prosecuted bona fide or for other good cause shown.

procedure here, I find it difficult to say that a purchaser has not used diligence as he is merely following the usual procedure.

The learned judge concluded on the facts that the purchaser had not waived his right to object to the vendor's title.

Receipt of Title Deeds by Purchaser Just Before Completion Date

A problem arises for the purchaser if he only receives the title documents a few days before the date fixed for completion where the time within which requisitions may be raised has already expired. Of course, a prudent purchaser will avoid this problem at the outset by specifying a date by which title must be shown. If he fails to protect himself in this way, all may not be lost. A similar problem arose in *Yeung Sun Chuen Sammy v Chung Chun Ting* (1993) MP No 4080 of 1992, where the vendor agreed to sell a property to the purchaser, the date for completion being fixed as at 31 December 1992. There was a term in the sale and purchase agreement that the purchaser had to raise requisitions within seven days of the receipt of the title deeds. The purchaser raised a requisition in July 1992 asking to be provided with copies of certain documents of title which the vendor was required to supply by way of his obligation to show title and the copies were eventually produced to the purchaser two days before the date fixed for completion. The purchaser failed to complete on the day fixed and the vendor treated this as repudiation by the purchaser. The court held that the purchaser's solicitors were entitled to a period of seven days from the receipt of the copies of the documents of title in which to consider those documents and the vendors had, therefore, themselves repudiated the contract and were in breach. It was necessary for the vendor to provide copies of the title deeds sufficiently long in advance of the date fixed for completion to give the purchaser's solicitors a proper opportunity to consider the title documents and raise any requisition thereon. This had not been done. If, therefore, there is a provision in the sale and purchase agreement requiring a purchaser to raise requisitions a fixed number of days before completion but the vendor only supplies the title deeds after that date, it may be that the vendor has himself repudiated the contract.

Waiver by Purchaser of Right to Raise Requisitions

Notwithstanding that the vendor only has or has only shown a defective title, a purchaser may expressly or impliedly waive his right to raise requisitions and object to the vendor's title. Express waiver may occur where the purchaser agrees in the sale and purchase agreement that he will refrain from raising requisitions on a particular aspect of the vendor's title. When the vendor knows that he only has a defective title to sell, it is prudent for him to insist upon such a term in the sale and purchase agreement. Waiver may also be implied from the purchaser's

conduct. For example, the courts have held that implied waiver has occurred by reason of the purchaser submitting a draft assignment to the vendor for the latter's execution: see *Tread East Ltd v Hillier Development Ltd* [1993] 1 HKC 285 (CA), *Lai Chi On v Strong Sing Development Ltd* [1994] 3 HKC 568 and *Chan Kam Hung v Light Ltd* (1993) DCA No 16919 of 1992.[177]

The issue of waiver by a purchaser in respect of a requisition going to the root of title was considered in *Chan Kin Leung v Lok Kar Cheong* (1998) MP No 3993 of 1997. The plaintiff agreed to purchase a flat in Tsuen Wan from the vendor and the vendor agreed to show good title. Pursuant to the sale and purchase agreement, the vendor sent some of the title deeds to the purchaser on 26 September 1997. On 3 October, the purchaser asked for other title deeds including a certified copy of the New Grant, which constituted the ultimate root of title document. On 9 October, the defendant's solicitor replied enclosing a plain copy of the New Grant together with other title documents and on 13 October, the vendor sent to the purchaser a copy of the entry in the District Register. It was noted by a chop in the District Register that the original copy of the New Grant was lost and untraceable. On 14 October, the purchaser's solicitor raised a new requisition asking for proof of permission to build a house on the lot, reserving the right to raise new requisitions. Further requisitions followed in respect of a missing Building Licence, again the purchaser reserving the right to raise further requisitions. A plain copy of the Building Licence was eventually produced by the vendor on 30 October and a certified copy on 4 November. By letter of 7 November, the purchaser insisted that he be supplied with the full text of the New Grant. The vendor contended that the purchaser had waived the right to object to the title on the ground of the absence of the original or a certified copy of the New Grant.

Yam J held that the correspondence between the two firms between 3 October and 7 November constituted a clear waiver of the right on the part of the purchaser to require production of the original or a certified copy of the New Grant. The purchaser was aware from the Register that it was lost and untraceable. The request for its production was not pursued until 7 November and the vendor had been led to believe from the correspondence that only the existence of the Building Licence was in issue. The purchaser had not insisted in proper time upon the production of the New Grant and had waived his entitlement to production of the New Grant.

The question whether a purchaser had waived his right to raise requisitions on title was again considered in *Regent Summit (Hong Kong) Ltd v Smart Business (Asia) Ltd* (1998) Civ App No 138 of 1998. The purchaser agreed to purchase a semi-detached house in Shatin from the

177 For a more detailed consideration of these cases, see chap 5 pp 418–419.

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

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

(a) undue influence where the influencing party is not a party to a contract, but is related to the inferior party, and usually solely receives the benefit of a loan. The other party to the contract is then held to take with constructive, if not actual, notice of the undue influence to prevent enforcement of the contract unless the inferior party obtained independent legal advice: *Barclays Bank plc v O'Brien* [1993] 4 All ER 417; *Garcia v National Bank of Australia* [1998] HCA 48;
(b) restitution for recovery of money paid under a mistake of law: *Daly Securities v CBA* (1992) 62 ALJR 768; *Kleinwort Benson v Lincoln CC* [1998] 3 WLR 1095;
(c) unconscionability combining with 'legitimate expectation': *Kwai Hung Realty Co Ltd v Kung Mo Ng* [1998] 1 HKC 345; *Polorace Investments Ltd v Director of Lands* [1997] 3 HKC 373;
(d) the imposition of liability, even where there was no privity, because to fail to do so would be unconscionable: *Banque Financierie de la Cite v Parc (Battersea) Ltd* [1998] 1 All ER 737;
(e) the artificial enforcement of an otherwise illegal contract on the basis that the plaintiff could rely on contribution and occupation: *Tinsley v Milligan* [1993] 3 All ER 65. Had the contract not been enforced, the defendant would have obtained a windfall;
(f) the broadening of the existence of the 'fiduciary' obligation, including overruling *Lister v Stubbs* by *AG v Reid* [1994] 1 All ER 1;
(g) re-examination of the principles of knowing assistance in the breach of a trust to impose elements of dishonesty; *Royal Brunei Airlines v Tan* [1995] 2 HKC 409;
(h) a re-examination of tracing, including a hint that there should be no difference between legal and equitable tracing: *Foskett v McKeown* [2000] 3 All ER 97, [2001] 1 AC 102; and
(i) negative estoppel as found in *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd* [1997] 3 HKC 440 where the basis of the estoppel was not a representation but a failure to undeceive the

plaintiff; this was not acquiescence but required the exercise of active communication when the defendant thought the plaintiff was unsure of its rights.

Estoppel

The role of estoppel in contracts has been converted, from its principal role as a 'shield not a sword' being the equivalent to consideration on the variation or waiver of a pre-existing contractual obligation, into a sword as well as a shield in the formation of contract, and as a general ground for equitable relief where one party to a contract has behaved badly or unconscionably. The result is that estoppel, as an alternative to consideration for the forbearance of existing contractual obligations in the modern form established in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, has been altered radically.

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

Representational estoppel combined:

(a) a *representation* which the representor intended the representee to act upon;
(b) the representee acted in *reliance* of that representation; and
(c) the representee could not resume his former position, or he suffered a '*detriment*' in so acting;

with the consequence that the representor could not go back on his word: *Polorace Investments Ltd v Director of Lands* [1997] 1 HKC 373.

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

Formerly the three forms of estoppel were discrete; thus:

(a) Legal estoppel by representation required a representation of fact by the defendant which was relied upon by the plaintiff, and for which there was consideration. Thus in *Jorden v Money* (1854) 10 ER 868 an assurance, that a creditor would not take action against her debtor, was relied upon by the debtor; when the creditor later sued, her claim was upheld because it was said that there had not been a representation of *fact*, but merely of intention or motive.
(b) Proprietary estoppel, equitable but not legal, is founded on equity's jurisdiction to prevent unconscionable insistence on strict rights by a landowner: *Wong Shui Sang v Kung Kwok Wai David* (1997) CA No 227 of 1996. The three elements of representation, reliance and detriment, are necessary; and as a result the landowner was unable to rely on his strict legal rights to property. Proprietary estoppel, either

In the event, the correct remedy was damages. As the option had been converted into a mere personal interest, the initial registration of the transaction was no longer sustainable.

However, one would assume that the registration of the lis pendens was not automatically to be vacated merely because the transaction was not a land contract. There is no inherent requirement that registration of a lis pendens must be linked to the nature of the contract under which the action is proceeding.

What is the effect of a failure to register the option? In *Markfaith Investment Ltd v Chiap Hua Flashlights Ltd* [1990] 2 HKLR 84, it has been held that an option in a lease for a term not exceeding three years must be registered to be effective against a subsequent bona fide purchaser or mortgagee for value, even though that lease itself is not registrable. It seems that that failure cannot be rectified by inserting a clause in a contract between the offeror of the option and a third party whereby the third party agrees to be bound by the option. In *Chan Yiu Tong v Wellmake Investments Ltd* [1996] 1 HKC 528, the unregistered offeree of the option sought to enforce an option to renew against the purchaser of the land on the basis that that purchaser had agreed to 'recognise and be bound by' the option. The court refused to impose a constructive trust on a third party saying that something more than a mere reference to the option was needed; perhaps an express covenant to be bound would have be adequate.

Registration of Pre-emption under Land Registration Ordinance

A written pre-emption is unregistrable; an unwritten pre-emption is incapable of protection under general law principles of priority and the subsequent purchaser can take free from the grantee's interest.

Further, subject to the proviso that the pre-emption would not be registrable in the first place under the *Land Registration Ordinance*, the *Pritchard* result would have much the same effect in Hong Kong. Registration, even if effected, would be ineffectual to bind third parties because registration under the Ordinance requires the presence of a written document, and, more importantly in this context, the claim to an interest in land: section 2 of the *Land Registration Ordinance* and *Financial and Investment Services for Asia Ltd v Baik Wha Trading Co Ltd* [1985] HKLR 103. As a pre-emption does not create any interest in land, it would be unregistrable. Further, the unwritten pre-emption would not be protected by common law priority principles.

It is only when the pre-emption is treated as an equitable interest in circumstances where the vendor has offered the property to a third party, ignoring thereby the interest of the holder of the pre-emption, that the pre-emption is then registrable. By that time it is probably too late to be

protected against the third party due to the terms of section 4 of the *Land Registration Ordinance*. If the third party does not immediately register the Sale and Purchase Agreement, the pre-emption holder may well then have a chance to obtain priority by registering.

Remedies for Breach

Where the offeror fails to observe his obligations under the option, either by selling to a third party adverse to the option, or by placing an unrealistic price on the property to inhibit its exercise, the offeree has a remedy which is usually granted against the land. Specific performance might not be granted where no price has been set in the option unless there is a formula and machinery for assessing such price, thereby enabling the court to require the offeree to pay that price in return for an order of specific performance against the offeror. Obviously, specific performance will not be granted where the offeror has sold the land to a third party where prior to that the offeree had failed to take any steps to protect his priority. The only available remedy would then be damages.

What is the quantum of those damages? In *Cottrill v Steyning and Littlehampton Building Society* [1966] 2 All ER 290, an option was granted to purchase a house under which the purchaser was to apply for modification of a tree preservation order and for planning permission to permit alteration of the house and development of the land. The purchaser took steps to obtain the permission and the modification order. The purchaser was absent from England for a short time and the vendor claimed this represented a repudiation of the contract and resold the property.

The court said that the damages awarded should be assessed by reference to the first purchaser's expected profits on the basis that the vendor was aware of the purchaser's development plans. In his judgment, Elwes J said that:

> It is clear, in my opinion, that, if the defendants are shown to have known that the plaintiff intended to develop the land for profit, the special circumstances are established which entitle the plaintiff to have the damages assessed by reference to the profits which both parties contemplated that he would make. There cannot be the slightest doubt here that the defendants knew what the plaintiff's intentions were, and knew exactly how he intended to pursue them. Subject to one other matter, I hold that the assessment of damages here should proceed on that basis. [at 298]

This would also seem to be a clear case of damages under the second leg of *Hadley v Baxendale* (1854) 9 Ex 341.

Corporations

Transactions Effected Prior to 10 February 1997

Prior to 10 February 1997, the question of the execution of a document by a company in relation to a dealing in land raised three main questions, namely:

(a) did the company have a power to deal with land by reference to its memorandum and articles of association or by statute, and in particular whether it had a power to effect the particular transaction?

To ascertain these powers, it was necessary for the other party to the transaction, often called the 'outside party', to examine the memorandum and the articles which had been deposited with the Registrar of Companies, or which were exhibited by the officers of the company to the outside party.

On the point of powers generally, section 17(1) of the *Companies Ordinance* provides that:

> Every company incorporated under this Ordinance shall have power to acquire, hold and dispose of land.

The question of the power of the officers of the company to effect that particular transaction required an examination of the objects of the company: *AG v Great Eastern Rly Co* (1880) 5 App Cas 473, *Cotman v Brougham* [1918] AC 514, *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1985] 3 All ER 52 and *Re Introductions Ltd, Introductions Ltd v National Provincial Bank Ltd* [1969] 1 All ER 887;

(b) if the answers to the questions in paragraph (a) were positive, then the next inquiry could be: did the officers of the company, in exercising those powers, do so properly?

In other words, this was the ultra vires test as illustrated in *Royal British Bank v Turquand* (1856) 119 ER 886, to the effect that an outsider, who is bona fide and gives value, is entitled to assume that the powers have been exercised properly, and that outsider will not be put on notice to inquire about their exercise if he has no notice of any irregularity. The outsider is entitled to enforce the transaction on the basis that any irregularity is a matter of internal management for which the officers of the company are responsible to the shareholders. On this, see *Mahoney v East Holyford Mining Co* (1875) LR 8 HL 869, *Northside Developments Pty Ltd v Registrar-General* (1989–1990) 170 CLR 146, *TCB Ltd v Grey* [1986] 1 Ch 621, *European Asian Bank v Reicar Investments Ltd* [1988] 1 HKLR 45 and *Rolled Steel Products (holdings) Ltd v British Steel Corp* [1986] Ch 246.

A variation of ultra vires is that even though the transaction may have been within the powers of the company it was beyond the actual

authority of the directors: *Ashbury Railway Carriage and Iron Co v Richie* (1875) LR 7 HL 653; and

(c) if the answers to the questions in paragraphs (a) and (b) were positive, then the next question would be: had the documentation been correctly executed?

On this point sections 20 and 23 of the *Conveyancing and Property Ordinance* provided some protection to the outsider.

These questions concerned in particular:

(a) the effect of the document on the other party to the transaction and his rights against the company or the officers concerned; and

(b) the effect of the transaction, and documentation, on the shareholders of the company and their rights against the officer of the company who had acted improperly.

Inquiries

In respect of a transaction effected prior to 10 February 1997, the outsider is still concerned to make these inquiries.

First, in looking to see whether the company has a power to enter into the transaction dealing with land, the outside party must ascertain what powers were given to the officers of the company expressly in the memorandum or articles of association to enable the company to deal in land and to effect the particular transaction; failing express powers, is there any reason why the company cannot rely on section 17 of the *Companies Ordinance*? Generally, the effect of section 17 means that the company will be able to 'hold, acquire and dispose of' land: *European Asian Bank v Reicar Investments Ltd* [1988] 1 HKLR 45 and *Man Kou Tan v Timewin Development Ltd* [1987] 3 HKC 504.

In respect of company documents executed under a power of attorney, *Excelling Profit Investments Ltd v Sera Ltd* [1992] 2 HKC 262 held that if the presumption of due execution, referred to in sections 20 and 23 of the *Conveyancing and Property Ordinance* has not been rebutted, an outside party is entitled to rely on the documents as having been duly executed.

Second, having ascertained that the company has a power to effect the particular transaction, the question of ultra vires, as explained in *Royal British Bank v Turquand* (1856) 119 ER 886, has to be considered. In that case it was said that:

> persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.

The *Turquand* rule is referred to as the 'internal or indoor management' rule which enables an outside party who deals in good faith to assume that the officers of the company have acted within their powers: *Mahoney v East Holyford Mining Co* (1875) LR 8 HL 869. The outside party does

> with by the acts of the lessor or those lawfully claiming under him The covenant is prospective in its nature It is a covenant that the tenant's lawful possession will not be interfered with by the landlord or anyone claiming under him. The covenant does not apply to things done before the grant of the tenancy, even though they may have continuing consequences for the tenant.

In this case the claimants alleged that their landlords, the local council, had committed a breach of the covenant for quiet enjoyment, since the walls of the flat that they had rented from the council had been constructed in such a poor manner that considerable noise from the adjacent flats was audible and this interfered with their enjoyment of the property. The House of Lords held that, because the defects in the physical condition of the building existed at the date of the entry into the tenancy agreement and since this was the date on which the covenant for quiet enjoyment had been given, the physical defect in the construction of the building (not being prospective) could not give rise to a breach of the covenant for quiet enjoyment.

The covenant for quiet enjoyment involves the right of the lessee to be put into possession of the whole of the land demised[83] and freedom from physical interference with the tenant's enjoyment of the land. The covenant will be breached, for example, if the lessor uses threats to drive out the lessee – *Kenny v Preen* [1963] 1 QB 499, causes him disturbance by cutting off his electricity supply – *Perera v Vandiyar* [1953] 1 WLR 672, prevents the tenant's access to the property – *Owen v Gadd* [1956] 2 QB 99[84] or demolishes his bedroom wall and replaces it with floor to ceiling glass rendering the bedroom unusable as such – *Yeung Wah James v Alfa Sea Ltd* (1993) HCA No A426 of 1992.

It used to be the case that the ambit of the covenant for quiet enjoyment was restricted to the absence of physical disturbance and did not extend to freedom of disturbance by noise. In support of this view, Kekewich J in *Jenkins v Jackson* (1888) 40 Ch D 71 said at 74:

> When a man is quietly in possession it has nothing whatever to do with noise 'peaceably and quietly' means without interference; without interruption of the possession.

This view has now been held to be wrong by the House of Lords in its joint judgment in *Southwark London Borough Council v Tanner* and *Baxter v Camden London Borough Council* [1999] 3 WLR 939, HL. In both cases the tenants of flats had complained of the

83 *Miller v Emcer Products Ltd* [1956] Ch 304.

84 In this case, the court made it clear that whether there had been a breach of the covenant of quiet enjoyment was a question of fact; here, the erection of scaffolding outside the demised shop premises constituted an interference with the quiet enjoyment of the premises.

ineffective nature of the insulation in their flats against noise generated by neighbours in the ordinary user of their premises. Their Lordships held that the covenant for quiet enjoyment was to be construed as a covenant that the tenant's lawful possession of the land would not be substantially interfered with by acts of the lessor or those claiming under him. Although regular excessive noise was capable of amounting to a substantial interference with the enjoyment of the premises, the covenant was prospective in nature and did not extend to interference consequent upon the condition of the premises before the grant of the tenancy or from uses which the parties must have contemplated would be made of the parts retained by the landlord. On the facts the noise complained of was due to structural defects inherent when the properties were let to them and resulted from activities within their contemplation. The landlord had not, therefore, breached the covenant for quiet enjoyment.

For the covenantor to be in breach, however, he must have actively participated in the interference – *Malzy v Eichholz* [1916] 2 KB 308 at 315. Damages for mental distress will not be awarded for breach of this covenant – *Branchett v Beaney* [1992] The Times 14 February.

(c) That all such lawful acts, assurances and things for further or more perfectly assuring the land and every part thereof to the purchaser and to those deriving title under the purchaser shall, from time to time and at all times at the request and cost of the purchaser and any person deriving title under him, be executed and done (subject to the manner in which the assignment is expressed to be made) as by the purchaser or any such person may be reasonably required.

A clear situation where the covenant for further assurance would be of assistance would be where the vendor has failed to discharge a mortgage which is outstanding and which he has agreed to discharge. An illustration of a successful action on this covenant is *Sun Kan Biu Nina v Fook Gee Trading Co Ltd* (1993) MP No 378 of 1993, where a developer defectively executed assignments to all purchasers of flats in a development by only affixing the company's seal in the presence of one director. The relief by way of an order for further assurance was granted and the developer was ordered to pay the costs of the further assurance. A further illustration is provided by *Goldsteady Investment Ltd v Fatima Estates Ltd* (1995) MP No 2943 of 1995. A vendor had assigned property to a purchaser by way of a power of attorney but the power of attorney had not been executed in accordance with the articles of association of the vendor because it had only been signed by one director. The purchaser called upon the vendor for further assurance and the court held that the purchaser was entitled to the relief sought. A confirmatory assignment was clearly required. Since, however, the defendant could no longer be traced at its registered office, the court ordered that the Registrar of the High

charges under the Ordinance in view of the disposal of the residue of any sale pursuant to the terms of section 54.

Variation of Priority

There is no reason why mortgagees holding mortgages over the same property cannot vary the priority of their own mortgages so long as this does not enhance the liability of the mortgagor. The rationale is that the mortgagor's concern is simply to discharge the encumbrance of the charge by repayment. It is not of concern to him how his various mortgagees arrange that discharge so long as his obligations have not been enhanced. There may be problems with the enforcement or implementation of any scheme of variation as between the mortgagees, especially it one becomes insolvent: *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1998] 1 All ER 737, *National Westminster Bank plc v Halesowen Presswork* [1972] AC 785 and *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270. Thus, in *Cheah Theam Swee v Equiticorp Finance Group Ltd* [1992] 2 WLR 108, a mortgagor entered into two mortgages with different mortgagees. Later, the first mortgagee bought out the second mortgagee, and obtained judgment against the mortgagor in respect of the first mortgage. He did not exercise his power of sale in respect of this judgment, but did exercise the power in respect of the second mortgage. He applied the proceeds of sale to repayment of the second mortgage. The mortgagor claimed that the proceeds should have been applied to the reduction of the first mortgage. The Privy Council queried whether the mortgagees could vary their priority without the consent of the mortgagor. The answer to this question was yes because the mortgagor is required to satisfy all secured debts before recovering the property so that he could not insist on the mortgagees pursuing a particular remedy; that choice was up to the mortgagees themselves. Because of the nature of a hypothecation, and apart from contractual restrictions, the charge lends itself to facilitate the creation of second and subsequent charges. Nothing is assigned to the chargee, even under the legal charge, for the charge is simply an encumbrance. Thus, any number of charges can be created so long as the preceding charge does not contractually forbid subsequent charges and so long as a lender is prepared to take his place in line after preceding charges. Of course, it is possible for the chargees to re-arrange their priorities between themselves so long as this does not alter the obligations of the chargor to his detriment: *Cheah Theam Swee v Equiticorp Finance Group Ltd* [1992] 1 AC 472.

It is in the interests of the first chargee to either proscribe the creation of subsequent charges or at least to retain some control by making his consent a pre-requisite for the subsequent charge. Unless the chargees alter the order of priority or the preceding chargee fails to register in time,

the first chargee will have the first right to exercise the remedies. This right may well be enhanced by tacking. However, the presence of numerous charges can inhibit the ability of the chargor to repay, at least in times of high interest rates.

As the charge does not involve the transfer of the property or possession thereof, it is sometimes thought that it does not create any proprietary interest in the chargee. However, it may be that the charge does create an equitable or proprietary interest in the chargee. This occurs because in entering into the charge, the borrower does derogate from his title – or does split that title – by removing his right to deal with the property absolutely, during the currency of the charge. This right attaches to the chargee in the form of a proprietary interest, limited perhaps to giving the chargee standing to seek injunctive relief against the chargor who intends to deal with the land adversely to the interests of the chargee. The applicant for such relief must show some proprietary interest: *Re Hamilton Young & Co* [1905] 2 KB 772. The chargee's interest, ie the extent of the diminution of the chargor's right to deal absolutely with title during the currency of the charge, is probably 'proprietary' enough for this purpose.

Clogs on Equity of Redemption

Introduction

The traditional rule is that the right of redemption is an inseparable incident of a mortgage and cannot be controlled or defeated by any agreement between the parties. The rule was developed as one of the equitable means around the penal bond, that iniquitous transaction devised by lenders to avoid the prohibition on usury. However, the rule has developed somewhat over the centuries, and now has been modified especially in relation to commercial transactions. Thus, in *Kreglinger v New Patagonia Meat* [1914] AC 25, it was stated that there is no rule in equity which precludes a mortgagee from stipulating for a collateral advantage provided such collateral advantage is not either unfair or unconscionable, in the nature of a penalty clogging the equity of redemption, or inconsistent with the right to redeem. Obviously the rule is a rule relevant to the common law mortgage involving the assignment of the legal estate and the creation of the equity of redemption.

The effect of a clog was to bar redemption absolutely or restrictively so that the mortgagor was prevented from getting back his property on payment, or getting it back timeously, or getting it back in the same form. Equity intervened on the basis that 'one a mortgage always a mortgage' so that under a security transaction, redemption was protected even beyond the termination of the contractual due date for payment. Anything