

Chapter 1

Land Tenure in Hong Kong

(Including the sources of the law, and the New Territories)

A. Introduction

1.01 This chapter concerns the history of land dealings in Hong Kong from 1843 onwards. It also deals with the law relating to land tenure throughout Hong Kong, with special reference to the rural areas of the New Territories because of the application of Chinese custom and customary law there.

1.02 At no point of time was land alienated by way of freehold tenure, except for the land on which St John's Cathedral stands. Instead, alienation by way of leasehold, originally for varying terms, was the norm. So from the early years of the settlement of the colony in 1843, and up to the latter part of the twentieth century, land was alienated by way of a Crown (after 1997 referred to as a 'Government') Lease. Some of these leases were expressed to be 'renewable'. Terms varied from twenty years up to 999 years, although eventually a 75-year lease became common. Since the end of the 1960s, land has been alienated under Conditions of Sale when the Government ceased issuing a formal Government Lease. After 1898, when a 99-year lease of the New Territories was granted by the Government of China to Britain, land in that area was often leased under a Block Crown Lease. Some of these leases were for 75 years, and others were for 75 years with a right of renewal for a further 24 years less the last three days.

B. Background

1. Early Days

1.03 The areas which form Hong Kong, namely, the island, the waters, Kowloon and the New Territories, came under the general colony of Hong Kong at different times from 1841 onwards. The

distinction, made in this Chapter between Hong Kong, Kowloon, and the New Territories reflects the historical divisions between these areas, from the beginnings of 'Hong Kong' up to 30 June 1997. The land and sea which has formed the Hong Kong Special Administrative Region of the People's Republic of China since 1 July 1997 are defined in Schedules 2 to 5A of the Interpretation and General Clauses Ordinance (Cap 1). Special attention will be paid to the New Territories in this Chapter because Chinese custom and customary law were relevant in 1898 and remain so today. The area known as the New Territories (being that north of Boundary Street to the Sham Chun River and 235 islands) was leased to Britain in 1898 by the Second Convention of Peking. The area known as the Walled City, which was the main urban district on the Peninsula at that time, was not included in the lease, and continued to remain within the sovereignty of China until it was demolished by order of the Executive Council in 1986. Many aspects of Chinese custom which had previously been in force prior to 1898, continued thereafter and most of these affect land.

1.04 On 20 January 1841, Hong Kong Island had been ceded to Great Britain by the Convention of Chuenpi although the treaty was not later ratified. The Royal Navy landed on the island six days later. By a proclamation issued from Macau on 2 February 1841, Captain Charles Elliot referred to the cession of the territory and the need to 'provide for the government thereof'. Pending further instructions from London, the proclamation also declared that:

'the government of the said island shall devolve upon, and be exercised by the person filling the office of Chief Superintendent of the Trade of British Subjects in China for the time being.'

1.05 There were a few Chinese settlements on the island at that time, mostly on the south side. A larger number of people lived on boats. It was estimated the then population varied between 2,500 to 7,500. British and foreign settlers, mostly merchants who were then living in Macau, arrived soon after to inspect the land with the intention of constructing buildings to facilitate their trading, especially in China. Some merchants entered into agreements to buy land from the local residents; other settlers simply took possession of uncultivated and unoccupied land.

1.06 From Macau on 1 May 1841, Captain Charles Elliot issued a Public Notice and Declaration advising that land auctions would take place in Hong Kong. The land sold was to be subject to a building condition and to a reservation of the Government's rights.

However, the British Government had failed to consider the type of tenure, and the notice added:

'Pending Her Majesty's further pleasure, the lands will be allotted according to the principles and practice of British law, upon the tenure of quit rent to the Crown.'

1.07 The notice went on to warn settlers:

'All arrangements with natives for the cession of lands in cultivation, or substantially built upon, to be made only through an officer deputed by the Government of the island; and no title will be valid and no occupancy respected, unless the person claiming shall hold under an instrument granted by the Government of the island, of which due registry must be made in the government office. It is distinctly to be understood, that all natives in the actual occupancy of lands in cultivation or substantially built upon, will be constrained to establish their rights to the satisfaction of the land officer, and to take out titles, and have the same duly registered.'

1.08 The impression of the early settlers was that freehold titles would be granted subject to a well-ordered system for the collection of land revenue. The collection of land revenue, immediately on acquisition of a colony, was a common feature of British colonial rule. However, inaction by the Government in London produced great confusion and opportunities for fraud. Purchasers, mainly merchants, urged the Government to grant freehold titles; the government procrastinated, and then when the decision to grant leasehold titles was made, further confusion resulted from this decision because there was no uniformity in the duration of the Government lease with terms of 20, 99, and 999 years being variously granted.

2. The First Land Sales

1.09 The first land sales took place in 1841 (although in Macau rather than in Hong Kong) and a Land Officer was appointed in that year to deal with these sales. It had been planned to sell 100 lots. However, only 50 marine lots were prepared for sale.

1.10 Sir Henry Pottinger, who had been appointed Governor of Hong Kong on 15 March 1841, issued a Notification on 22 March 1842 advising that a Land Committee had been established whose first task was to demarcate lots. The question of the type of tenure remained undecided. The Committee did not function as planned. No document of titles had been issued because of these title uncertainties. The only formal acknowledgment of alienation or dealings with alienated land was in the form of entries in the Land Officer's book. On 2 May 1842, the Land Officer noted that

thereafter, all dealings with alienated land were to be registered in the Land Office. However, on 16 May 1842, the office of the Land Officer was abolished. On 27 May 1842, a Land and Road Inspector was appointed. His duties included registration of all sales and transfers of land. Although there was still no clarification from London of the form of title, it was accepted that perhaps a leasehold title only would be granted.

3. *The Forms of Leases*

Hong Kong Island

1.11 By 1843, the form of tenure for alienated land on Hong Kong Island was still undecided. New sales granted titles for no greater time 'than may be necessary to induce and enable the tenants to erect substantial buildings'.¹ Early purchasers claimed to have equitable rights in the land but were unsure of what the legal estate would be. A committee was established, mainly to determine whether titles should be in perpetuity or leasehold. Its decision was in favour of leasehold. However the land on which St John's Cathedral is built is held under freehold tenure;² this land remains the only freehold title to alienated land in Hong Kong. Leases which were subject to a building covenant, were to be granted for 75 years, whilst others were to be for a maximum of 21 years only. Renewal was at the discretion of the Government. Later leases were granted for varied terms: some for 999 years, some 99 years, some 75 years, and some 14 years.³ By 1898, the practice of granting 999-year leases was halted. Terms for 75 years became the norm. Complaints about the brevity of this lease resulted in the Government granting 75-year leases with an option to renew for a further 75 years.

Kowloon Peninsula

1.12 Perpetual leases of the Kowloon Peninsula up to Boundary Street and of Stonecutter's Island were granted to Britain by China on the cessation of the Second Anglo-Chinese War (1856–1858). By the Convention of Peking in 1860, these were ceded outright. On the Peninsula, there were few landholders in the new areas held by the

British; most inhabitants lived within the Walled City (just north of the new leases), where Chinese authority continued to be in force until 1986. A Land Commission was established to determine the compensation payable to those Chinese owners who sought to sell their lands outside the Walled City. The Commission also had to deal with applications for Government leases by those Chinese owners who remained in possession of their land; it was assumed that this land had been within the domain of China, probably through the Canton Magistracy. Leases of 999 years were granted to the latter group on the same rent as formerly paid to the Chinese authorities in Canton. However, new leases were to be for terms only sufficient to induce owners to erect substantial buildings. Most of these were for 75 years.

4. *Pre-1898 Landholding and Chinese Custom and Customary Law in the New Territories*

1.13 The area known as the 'New Territories' (being that land north of Boundary Street on the Kowloon Peninsula to the Sham Chun River and 235 islands surrounding the Island of Hong Kong and the Kowloon Peninsula) was leased to Britain in 1898 by the Second Convention of Peking; not included was the area known as the Walled City. Many aspects of Chinese custom and customary law which had previously been in force prior to 1898 continued thereafter.

1.14 For centuries prior to 1898, large tracts of land in the New Territories had been occupied by Chinese farmers who held their titles from the Emperor. The usual form of title was referred to as common tenure, whereby the occupier, on payment of land tax and performance of labour services to the Emperor (or his representatives), received a title in perpetuity which was heritable and assignable but which was not subject to any building restrictions. The performance of labour service was eventually changed to a tax payment. The question of the absence of regulation of buildings later caused problems. Title to waste land could also be acquired by occupation, cultivation, and by keeping it in cultivation. Title to land could also be obtained by purchase or by inheritance. However, only males could take on succession. There was no concept of wills under Chinese customary law with the result that females were excluded from succession to land. After 1898 it was possible to devise land to females but this practice was uncommon in the New Territories and because the law

1 Government Notification of 21 August 1843.

2 See now the Church of England Trust Ordinance (Cap 1014).

3 See *Report of the Hong Kong Land Commission of 1886–1887* (Noronha Co, 1887).

recognised custom on intestate succession females continued to be excluded. It was not until the enactment of New Territories Land (Exemption) Ordinance 1994 that the law on intestate succession in respect of rural land ownership was changed to comply with the general law of intestacy in Hong Kong.

- 1.15 Land dealings had been registrable in the Canton Magistracy. Deeds used in conveyancing were referred to either as red deeds (those bearing an official red seal) or white deeds (bearing no official red seal). A purchaser receiving a white deed from the vendor had the right to register his purchase and obtain a red deed. The Chinese Government recognised only red deeds. Rent was collected in accordance with the details on the red deeds only. This meant that if the land owner had dealt informally with his land, he remained liable for Government rent. In such a case, he entered into an agreement with the purchaser to pay the amount due. This would lead to a succession of informal, unregistered, white deed agreements as the land was passed from one to another. However, it was thought that not a great number of dealings were effected with the land, so that it remained in the ownership of the same families or clans for generations. This ownership was referred to as either a t'ong or a t'so as ancestral lands held for the purpose of ancestral devotion. This was because clan land could only be sold out of the clan when no clan member was interested in buying it.⁴
- 1.16 Under Chinese customary law, freehold land could be owned by families or clans, or by individuals. The owner could deal with the land in the usual way, i.e. by sale or mortgage, unless the land was held for specific trusts, such as by way of ancestral land, temple land, or land held by associations. Temple land was that devoted to the support and upkeep of a temple for a particular idol through profits realised in renting the land. Those providing funds for the purchase of the land acted as trustees. Land could be held by associations having various objects. Temple land was purchased with subscriptions from those interested and the profits were used in accordance with the expressed objects, such as the assistance of the emigration of members of the association. Ancestral land is that set aside for ancestral worship. Rents of this land go towards the upkeep of the ancestral temple, education of members of the clan, worship rites, charity to clan members in need and similar expenses. The land is held in the name of the ancestor. It cannot be alienated without the consent of the representatives of the clan.

4 *Beautiglory Investment Ltd v Tang Yet Tai Tong* [1993] 2 HKC 591.

- 1.17 The traditional Ch'ng system of ancestral landholding for the benefit of the male members of the family or clan continues. The manager is required to be registered as such in the Land Office: *Tang Kai Chung & Anor v Tang Chik-Shang & Ors*,⁵ and *Lai Chi Kok Amusement Park Co Ltd (No 2) v Tsang Tin-Sun*.⁶

5. Land Registration Ordinance

- 1.18 What then is the system which was introduced in 1841? The first land sales were to be held on 7 June 1841 with 100 sea frontage, and 100 town or suburban, lots to be put up for auction. Due to lack of roads, water and other services but especially a lack of qualified surveyors or demarcators, the sale on 14 June 1841 offered only 50 sea frontage lots for sale. The purchasers were obliged to pay rent for the first year immediately and the title was subject to a building covenant. Captain Elliot indicated that he intended to ask the British Government to 'pass the lands in fee simple for one or two years purchase at the late rates, or to charge them in future at no more than a nominal quit rent, if that tenure continues to obtain'. It was not until 1843 that the British Government decided on leasehold as the form of alienation.
- 1.19 The efforts in 1842 of the Land Officer in obtaining registration of details of all dealings with alienated land quickly pointed to the need for a formalised system of registration. The system chosen was that of a registration of deeds whereby the registration acted as a record of the transaction and as a priority against later transactions. In 1844, Ordinance No 3 of 1844, now the Land Registration Ordinance (Cap 128), was enacted; it remains, the oldest surviving, largely unamended piece of legislation, in force. Although the system is that of the registration of deeds, and not of title, the land registers which were opened in 1844 show in a clear and accurate manner the devolution of title to each lot or section of a lot and details of all encumbrances thereon. The result is that in practice the system is regarded as virtually equivalent to registration of title.⁷
- 1.20 Universal use of the register is now the norm with the result that registration of memorials evidencing dealings has become, in

5 [1970] HKLR 276, [1970] HKCU 25.

6 [1966] HKLR 124, [1966] HKCU 11.

7 *Report of the Registrar General 1955-1956*, para 4, and see *Wong Wai Ming v Tang Tat Chi* [1993] 1 HKC 341.

Chapter 7

Property Investigation

A. Solicitor's Duty to Carry out Checks on Condition and Enjoyment Potential of Property

7.01 Not only should the solicitor representing the purchaser carry out a meticulous check on the *title to the property* that his client is intending to purchase, but he should also ensure that a check on *the property itself* is conducted. He will want to make sure that the property answers the needs of the client and is physically sound. The solicitor should, for example, check, either personally or by way of an expert, the physical condition of the property, that there is adequate access, that no unauthorised building works have been carried out, what fixtures and fittings will be included in the sale, that there are adequate management facilities available, that proper arrangements have been made for the insurance of the property, that the Government does not intend to resume the property or is about to re-enter, that no notices have been received from the Building Authority affecting the enjoyment or value of the property, that there are no intended road works in the vicinity and that there are no disputes concerning the property with adjoining owners.

7.02 Other investigations of a rather unusual nature should also be carried out. The fact that there has been an accident, suicide or murder committed on the premises might affect its value. It would appear that an incident of this nature does not go to title (in which case there would be an obligation upon the vendor to make disclosure), but rather should be treated as affecting the condition of the property and the purchaser's solicitor has a duty, therefore, to make appropriate inquiries. Such a situation arose in *Jopard Holdings Ltd v Ladefaith Ltd & Anor.*¹ The owner of the plaintiff company visited a flat in Kowloon with a view to purchasing it. Unknown to the purchaser the vendor's four-year-old son had some

¹ [2005] 1 HKLRD 317, [2004] HKCU 1316.

months earlier fallen from a balcony in the flat and had later died in hospital as a result of the fall. An estate agent had been retained by both the vendor and purchaser to conduct the sale transaction and had been asked by the purchaser before the provisional sale and purchase agreement was signed whether there was 'anything weird or unusual' about the property. The estate agent responded that there was not. The purchaser then proceeded to sign the provisional sale and purchase agreement. The purchaser before completion was informed about the child's death by a third party and sought rescission of the agreement on the grounds of misrepresentation by the vendor's agent. Expert evidence was called to show that the value of the property would have been reduced by the unfortunate incident.² The parties agreed that there had been no duty upon the vendor to make prior disclosure of the accident.³ Recorder Yu, SC, first found that the estate agent had, as a matter of fact, represented to the purchaser that there was nothing weird or unusual about the property; secondly, that representation had been false as the tragic accident was certainly something unusual. The estate agent's agreement had expressly authorised the agent to market the property, but it had not given him express authority to make representations about the property nor had it clothed the estate agent with ostensible authority to make such representations. It was more likely that the estate agent had been acting as agent for the purchaser when making the statement. The vendor had not, therefore, been guilty of misrepresentation and the purchaser was not entitled to rescind the agreement. The learned Recorder then addressed the issue whether the estate agent had been guilty of negligence with regard to his duties to his client the purchaser. He held that, if the estate agent knew or ought reasonably to have known about the accident, he had a duty to inform his client of that fact. Although there was no such evidence that he did have or ought to have had such knowledge, he should have made reasonable inquiries before answering the question from his client and he failed in his duty to

2 The expert stated that the property value would have been reduced by 7.5% by reason of the accident; in the case of a suicide or murder having occurred on the premises the value could be reduced by as much as 25%–30%.

3 See *Sykes v Rose* [2004] EWCA Civ 299. In this case the vendor sold property on which, to his knowledge, a horrendous murder had occurred about 20 years before. The Court of Appeal held that the vendor had no duty to disclose defects in the quality or expected enjoyment of the land or which might affect the value of the land to be sold. In particular the vendor had no duty to disclose his knowledge that the murder had taken place, even though it was proved that the value of the property had been significantly diminished by reason of that event.

his client by assuring him that there was nothing unusual about the property without having made such reasonable inquiries. He was, therefore, in breach of his duty to his client the purchaser both in contract and tort and damages were awarded accordingly.

7.03 Similarly, the American case of *Stambovsky v Ackley*⁴ suggests that the fact that a house is haunted would be a matter going to the condition of the property. To carry out such investigations properly, it is essential that full instructions are taken from the client on these matters. This check should ideally be carried out before the client has entered into a binding agreement, although this will be impossible if the purchaser has already signed a binding preliminary agreement. If the client is not already bound but he insists that a binding agreement is signed before the solicitor is due to investigate the condition of the property, the solicitor acting for the purchaser should either:

- a) insist upon the inclusion of appropriate terms in the sale and purchase agreement to permit the purchaser to rescind in the event that certain specified conditions are not met; or
- b) prevail upon the vendor to warrant the existence of the desired conditions.

7.04 Of course, if the purchaser is already bound by a preliminary agreement, he will have to obtain the consent of the vendor for the inclusion of such terms.⁵

B. General Principle – Caveat Emptor

7.05 As a general principle, unless it is otherwise provided in the contract of sale and purchase, a vendor has no duty to disclose to the purchaser any defects in the property (as distinct from the title to the property), which is the subject of the sale and purchase

4 169 AD2d 254, 572 NYS2d 672. In this case, the court, although acknowledging that the principle of caveat emptor applied, refused to order specific performance of the contract of sale, since the vendor knew of the fact that the house was haunted and had made money out of the fact and the purchaser, living far from the vicinity, could not reasonably have been expected to discover the fact. For the full judgment in this case, see 'Poltergeist Visitation as a Defect in Title in the USA' [1992] Conv 8.

5 See *Mak Lai Man v Lam Siu Yui Peter* [1993] 1 HKC 452 (HC). The same principles apply to the insertion of a fresh term by the vendor: *Chu Wing Ning v Ngan Hing Cheung, Siu Pik Ying* [1992] HKCU 283 (HCA 9409/1991, 6 November 1992, unreported); and *Keung Shiu Tang v DH Shuttlecocks Ltd* [1994] 1 HKC 286.

agreement. As the court pointed out in *Bell v Lever Brothers Ltd*:⁶ 'The failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract.' The same principle applies as between a lessor and lessee in respect of leased premises.⁷

- 7.06 It is as a result of the caveat emptor principle and the fact that the vendor has no duty to disclose defects in the condition of the property before sale that a prudent purchaser should carry out his own investigations and, where necessary, protect himself by way of appropriate warranties in the sale and purchase agreement.

C. Cases where Caveat Emptor Principle is Inapplicable or is Overridden

- 7.07 The caveat emptor principle does not apply or will be overridden, however, where (a) the vendor contracts expressly or impliedly as to the condition of the premises; (b) there is a collateral contract affecting the condition of the premises; or (c) before completion, the vendor misdescribes or misrepresents the true state of the premises. There may also be cases where the purchaser will have an action in tort against the builder, Building Authority or architect. These situations will all be considered below.

1. Action Against Vendor for Breach of Express or Implied Contractual Term in respect of Condition of Property

- 7.08 The principle of caveat emptor and the absence of a duty on the vendor to make disclosure will, of course, be ousted by an express

6 [1932] AC 161 (HL) at 227. Lord Atkin gave as an illustration the case where a purchaser buys a garage business from a vendor where the vendor knows, but the purchaser does not, that work has already started on a by-pass which will seriously reduce the business for the garage. Lord Atkin was of the view that the purchaser would generally have no remedy unless a relevant term was inserted in the contract. He said: 'It is of paramount importance that contracts should be observed and that if parties honestly comply with the essentials of the formation of contracts, i.e. agree in the same terms on the same subject matter, they are bound, and must rely on the stipulations of the contract for protection from the effects of the facts unknown to them.'

7 See *Hill v Harris* [1965] 2 QB 601.

term in the sale and purchase agreement to the contrary. A purchaser is well advised to try to insist that a warranty be inserted into the formal sale and purchase agreement whereby the vendor warrants that the premises are in good and sound condition. If a purchaser is successful in having such a warranty inserted in the formal sale and purchase agreement, it is important that the term is expressly stated to survive completion so as to exclude the effects of the doctrine of merger consequent upon the execution of the assignment. For a clause of this nature in favour of a purchaser to be inserted in the agreement is, however, relatively rare and it is more common, particularly in a rising market, to find a clause in favour of the vendor. One common example of the latter is condition 3 of Part A of the Second Schedule of the Conveyancing and Property Ordinance (Cap 219) (terms which may be incorporated by reference which provides:

'CONDITION OF PROPERTY

The purchaser purchases with full knowledge of the condition of the property and takes it as it stands.'

Subject to what is said below concerning the construction of exclusion clauses, the effect of such a clause as is set out above will be to reinforce the common law position. If the vendor agrees to warrant the condition of the property, an express term should, accordingly, be inserted in the sale and purchase agreement whereby the vendor warrants that the property will answer a particular description or standard and breach of such a term will, according to normal contractual principles, be actionable. For example, in *Batty v Metropolitan Property Realizations Ltd*⁸ developers sold a newly constructed house to the plaintiff purchasers and the contract of sale contained a warranty that the house had been built in an efficient and workmanlike manner so as to be fit for habitation. Soon after a 999-year lease had been granted, there was a landslip on adjoining land which caused damage to part of the plaintiff's garden. The Court of Appeal held that the warranty was breached, since the house was unfit for habitation by reason of defective support from the adjoining land which a suitably qualified expert could have discovered before the building of the house was undertaken.

- 7.10 The inclusion of an express term might, however, have the effect of excluding an implied term to the detriment of the purchaser. A clear illustration of this principle is *Lynch v Thorne*⁹ where the

8 [1978] 2 All ER 445.

9 [1956] 1 WLR 303.

inclusion of the required specific dimensions of the width of the brick outer walls was held to preclude any implied warranty of fitness for human habitation.

7.11 A further illustration of this principle is *Chan Yeuk Yu & Anor v Church Body of the Hong Kong Sheng Kung Hui & Anor*,¹⁰ where the vendor/developer agreed to sell to the purchaser an expensive residential house containing a spiral staircase leading to the roof. The purchaser contended that the vendor had breached an implied term in the agreement that the staircase would be reasonably fit for use as it did not comply with the 'British Standards' laid down for the construction of such staircases. It was agreed that the British Standards were not binding in Hong Kong and that the Building Authority had approved the building. By an express term in the building contract the developer had agreed, inter alia, to sell the property to the purchaser and to complete the development in accordance with the Conditions of Grant and the building plans. The spiral staircases had been constructed in accordance with the approved building plans. Burrell J held, applying *Lynch v Thorne* (see above), that the vendor had complied with the building plans and the court would not imply a term into the agreement which was inconsistent with an express provision in the agreement. Such a term as contended for by the purchaser could not be implied into the agreement.

7.12 The purchaser may, for example, prudently press for the inclusion of the following express terms in the sale and purchase agreement that:

- (a) there are no unauthorised structures or building works in or on the premises and that any structure in or on the building has been erected in compliance with the provisions of the Buildings Ordinance (Cap 123) and regulations made thereunder;
- (b) the vendor has received no notice from any competent authority requiring him to demolish or reinstate the building;
- (c) the vendor has received no notice from the co-owners of the building to carry out repairs or improvements of a substantial nature to the common parts of the building;
- (d) the vendor has received no notices under the Lands Resumption Ordinance (Cap 124) or any notice of a similar nature relating to the resumption of the property;

¹⁰ [2001] 1 HKC 621.

- (e) the fixtures and fittings are the unencumbered property of the vendor; and
- (f) the premises are in a good state of repair.

D. Terms Implied into Sale and Purchase Agreements Relating to the Condition of the Property

7.13 In every purchase of a new property from the builder whom the purchaser has instructed to build the property, several terms will be implied by the common law. Thus it has been held in *Hancock v BW Brazier (Anerley) Ltd*¹¹ that, where a purchaser buys a house from a builder who has contracted to build it, three warranties are implied; first, that the builder will perform his work in a good and workmanlike manner; secondly, that he will supply good and proper materials and, thirdly, that the house will be reasonably fit for human habitation.¹² It has been further held in *King v Victor Parsons & Co*¹³ that, in a contract for the sale of land and erection of a house thereon, there is an implied term that the foundations will be reasonably fit to support the house.

7.14 The implied warranty that a new house will be reasonably fit for human habitation was considered by Chung J in *Lam Man Fung Mamie v Active Benefit Ltd*.¹⁴ A purchaser bought a new (and still uncompleted) flat in Peng Chau, a resort area of Hong Kong, with the right of exclusive use of the fourth floor and flat roof. In fact the roof could only be accessed by a heavy trap-door and there was no fencing around the roof to make it safe for use since the height restriction upon the building prevented any further erections such as fencing on the roof area. The learned judge took judicial notice of the fact that ordinary Hong Kong people use roof tops for a number of domestic purposes including growing plants, having social conversations and holding barbecue parties. These activities all fell within the normal range of habitation of a roof. Since it would be dangerous to use the roof for these purposes, he held that the vendor developer had breached the implied warranty that

¹¹ [1966] 2 All ER 901.

¹² See also *Lawrence v Cassel* [1930] 2 KB 83 and *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113 (KB).

¹³ [1973] 1 All ER 206, [1973] 1 WLR 29.

¹⁴ (HCA 11556/1997, 17 March 2000, unreported).

Chapter 15

Remedies for Breach of Contract for Sale of Land

A. Contracts for Sale of Land

1. Introduction

- 15.01 Particularly in the 1980s and the 1990s up to 1997, the prevalence of the use of the provisional agreement ('PA') prepared by an estate agent in secondary sales of land in Hong Kong meant that in many contracts, the purchaser will have foregone many of his remedial rights because the terms of that agreement, drafted with the vendor's interests in mind, reflect the fact that the vendor wishes to be able to avoid the contract if a purchaser paying more comes along.
- 15.02 In more recent years, the trend has altered: see in particular the Estate Agents Ordinance (Cap 511) and the requirements on the sale of residential property. The estate agent is agent for both purchaser and vendor. However, often the PA will give the vendor, on the purchaser's default, the right to forfeit the deposit and to sue for any loss. The clauses following have been common in PAs, although there has been some modification in the last few years. The estate agent is agent for both parties.
- 15.03 Common clauses have included: (a) an escape clause allowing the vendor to withdraw by paying 'double' the initial deposit as 'liquidated damages': or (b) limiting the right of the purchaser to seek additional relief on the vendor's breach.¹ Such clauses have included:
- (a) 'If the purchaser shall fail to comply with any of the terms of this Agreement the deposit money paid hereunder shall

¹ See for example, *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707 (CFA); *Wise Think Global Ltd v Finance Worldwide Ltd* [2013] 2 HKC 30 (CA); *Yuen Pok International Enterprise Ltd v Valle* [2012] 3 HKC 314 (CA).

be absolutely forfeited as liquidated damages (and not as penalty) to the Vendor who shall be at liberty if the Vendor sees fit without being obliged to tender to the purchaser an assignment to rescind the sale and to retain the said premises ... and to resell the same ... as the vendor may think fit.'; and 'Any deficiency in price arising from such resale shall be made good and paid by the purchaser as liquidated damages and any increase in price realised by any such resale shall belong to the vendor'; and 'This clause shall not preclude ... the vendor from taking other steps or remedies to enforce the vendor's rights hereunder or otherwise.' [*Ng Chek-Kok v Kiu Wai-Ming*];²

- (b) 'Should the purchaser fail to complete the purchase in the manner herein contained the deposit shall be forfeited to the vendor and the vendor shall then be entitled as [sic] his absolute discretion to sell the said premises ... and the vendor shall not sue the purchaser for any liabilities and/damages caused by the purchaser's default of this agreement.';
- (c) 'Should the vendor after receiving the initial deposit hereunder fail to complete the sale in the manner herein contained the vendor shall immediately compensate the purchaser with a sum equivalent to the amount of the initial deposit as liquidated damages together with the refund of the initial deposit and the Purchaser shall not take any further action to claim damages or to enforce specific performance.'; and
- (d) 'If in any case either the Vendor or Purchaser fails to complete the sale and purchase in manner herein contained the defaulting party shall compensate at once the agent \$86,400 as liquidated damages.' [*Yiu Yau-ping v Fong Yee-lan*]³

15.04 In *Man Sun Finance (International) Corp Ltd v Lee Ming Ching Stephen*,⁴ Godfrey JA, in considering clauses such as these, noted:

'How are the parties to have their cake and eat it? How are they to achieve an immediately binding agreement which nevertheless gives each of them an opportunity to call the whole thing off if he repents of his bargain and decides not to go ahead?

The Hong Kong answer is this. Just provide, in the case of the vendor, that, if he decides not to sign the formal sale and purchase agreement on or before a specified date, he is to be free from his obligation to assign the property to the

purchaser, but assumes instead an obligation to pay money to the purchaser. ... This obligation is conventionally quantified at twice the amount of the purchaser's preliminary deposit ... And provide, in the case of the purchaser, that if he decides not to sign the formal sale and purchase agreement ... he is to forfeit his preliminary deposit to the vendor.

If, however, the purchaser fails to sign ... is the vendor entitled ... to insist on specific performance?

If the vendor fails to sign ... is the purchaser entitled ... to insist on specific performance? ...

If the relevant provision takes away the innocent party's right to specific performance but only on terms that the defaulting party ... performs some alternative obligation instead, then the defaulting party ... must perform that alternative obligation strictly in accordance with its terms in order to take the benefit of the provision.⁵

15.05 In his judgment, Sears J said that:

'Although the English of the document is in places ungrammatical, the court is obliged to construe it in accordance with the standard principles of construction. I have read the draft judgment of Godfrey J who has set out the commercial reasoning underlying this type of agreement, and it would appear to me that commercial reality therefore dictates a degree of certainty into the parties' actions and reactions.'⁶

15.06 The purchaser will not have received legal advice prior to signing the PA. Despite this, the general approach is that, so long as the clause is clear, and unless the purchaser can rely on a vitiating factor, he will be bound: *Wong Lai-Fan v Lee Ha*.⁷

15.07 The fact that the purchaser had had legal advice in negotiating the terms of the contract is one factor the court considered relevant in favouring the vendor in *First Shanghai Enterprises Ltd v Dahlia Properties Pte Ltd*.⁸

15.08 In dealing with actions on breach or suspected breach of contract, amongst the matters the courts will consider are the following.

2. The Terms of the Contract

15.09 The PA sets out the basic requirements of parties, property, price and completion date; in addition if there are special terms they should be included. The Sale and Purchase Agreement ('SPA') is drafted by the vendor's solicitor, after negotiation with the purchaser's solicitor.

At 19–20.

At 13.

[1992] 1 HKLR 125, [1992] HKCU 420.

[2002] 3 HKLRD 461.

2 [1992] 1 HKLR 5, [1992] HKCU 356.

3 [1992] 2 HKLR 167, [1992] HKCU 424.

4 [1993] 1 HKC 113.

Miscellaneous Matters

- 15.10 Matters considered here can include the deliberate damage of the property by the vendor prior to completion: misrepresentation or misdescription by the vendor as to the subject matter of the contract where the actual available area is less than promised due to the presence of an illegal structure which, although removed prior to completion, results in the purchaser not receiving the area expected.

Traditional Remedies

- 15.11 These include specific performance and common law damages, and damages in equity in lieu of or in addition to specific performance. In certain cases the injunction will be used as the main remedy: for example on breach of a covenant in the DMC.

Newer Remedies

- 15.12 These remedies are new versions of common law damages (by merging the first and second legs of *Hadley v Baxendale*), and new equitable relief either as restitution, estoppel and generally seeking to prevent one party gaining a windfall to which he is not entitled. Another remedy is that of account of profits referred to as common law damages; although only available in rare cases, it is a development which seems to overturn traditional boundaries between law and equity. These remedies extend from changes to *Hadley v Baxendale*, to restitution, equitable compensation, and the power to obtain an interest under an illegal contract in certain cases.

Pure Contractual Matters

- 15.13 These include substantial performance (a defence often used by the vendor), frustration (rare but a land contract is not 'immune' from frustration), rectification, the venue for relief – court or arbitration and the forms of rescission and their availability. Finally, vitiating factors are relevant. The open contract and its contents are also relevant to relief: *Kwan Siu Man Joshua v Yaacov Ozer*⁹ and *Lobley Co Ltd & Anor v Tsang Fuk Kiu*.¹⁰

⁹ [1999] 1 HKLRD 216, [1999] 1 HKC 150.

¹⁰ [1997] 1 HKLRD 863, [1997] 2 HKC 442.

3. Range of Relief

- 15.14 In the absence of contractual restrictions, a full range of relief is available. Breach of a contract for the sale of land can lead to:
- (a) action for specific performance by either the purchaser or vendor;
 - (b) action for common law damages by either the vendor or purchaser;
 - (c) rescission *ab initio* by either party;
 - (d) discharge, and the award of damages to either party;
 - (e) action by the vendor for recovery of the unpaid deposit, or purchase price, or for any instalments thereof;
 - (f) action by the purchaser for waste and rent;
 - (g) under section 12 of the Conveyancing and Property Ordinance (Cap 219) ('CPO'), the taking out of a vendor and purchaser summons by either party. Often the result of a vendor-purchaser summons acts as a declaration of the rights of the parties. In fewer cases the initial action is taken under Order 15 rule 16 of the Rules of the High Court for a declaration;
 - (h) newer forms of equitable relief based on estoppel and restitution; and
 - (i) action for a vesting order under section 58(4) of the CPO: see *Ambridge Investments Ltd v Lexon Investment Ltd and Gold Wise (Hong Kong) Ltd*.¹¹

- 15.15 These various remedies will be discussed individually below.

4. Certainty of Terms and Rectification

- 15.16 The contract must be scrutinised to ensure that it is certain enough to be enforced. Generally this would be relevant only in the case of a provisional sale and purchase agreement.
- 15.17 In other cases, the problem is merely to classify a binding agreement because essential terms, such as the completion date, are missing; this may be especially important in an open contract where such date cannot be established by implication: *Kwan Siu Man Joshua v Yaacov Ozer*¹² (an open contract which provided for parties, property and price but did not provide any date for completion)

¹¹ [2001] HKCU 904 (HCA 9743/2000, 30 July 2001, unreported).

¹² [1999] 1 HKLRD 216, [1999] 1 HKC 150.

and *Cheung Bing Sum Juana v Lee Leo*¹³ (a contract for the sale and purchase of land, rather than a loan transaction): *Lobley Co Ltd & Anor v Tsang Yuk Kiu*¹⁴ (an invitation to treat, and a promise to contract with the highest bidder, resulted in a binding contract).

- 15.18 In *Tsing Lung Investment Co Ltd v Yu Sai Kin*,¹⁵ Godfrey J (as he then was) said:

'It is to be noted that, on the face of it, the parties have solemnly provided for the payment of 10% of the purchase price on the date the contract was made: and then for payment of the balance the day afterwards. This absurdity is, I suspect, caused by the mindless use of a standard form of contract in prolix and confusing terms, a form which is desperately in need of revision. ... But such contracts in Hong Kong are all too often framed in terms so convoluted that even the solicitors who use them clearly do not understand what they are doing. This is just the sort of thing which gives the law, and lawyers, a bad name.'¹⁶

- 15.19 Action for rectification is not common. As rectification is discretionary, the plaintiff must prove that 'the parties were in complete agreement on the terms of their contract, but by error wrote them down wrongly'.¹⁷
- 15.20 The written contract is then interpreted as if it had been in the form as rectified; this often leads onto specific performance of the rectified agreement. Rectification does not rewrite the parties' bargain, but merely corrects something in the written document which was incorrectly recorded. An inherent barrier to rectification is that it is available only where there is in existence a legally enforceable contract antecedent to the defective instrument. In other cases, the court merely looks for a 'common intention continuing down to execution of the contract' as being enough for rectification: *Joscelyne v Nissen*¹⁸ and *Maralinga Pty Ltd v Major Enterprises Pty Ltd*.¹⁹
- 15.21 Rectification is rare in cases of unilateral mistake: but see *Citilite Properties Ltd v Innovative Development Co Ltd*²⁰ (upheld on appeal);²¹ and see *Chan Tan v Tong Hoi, Lo*.²²

13 [1997] 1 HKLRD 138, [1996] 4 HKC 130.

14 [1997] 1 HKLRD 863, [1997] 2 HKC 442.

15 [1989] 1 HKC 513 (HC).

16 *Ibid.*, at 517.

17 *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450 Lord Denning LJ at 461.

18 [1970] 2 QB 86, [1970] 1 All ER 1213.

19 (1973) 128 CLR 336.

20 [1997] 1 HKLRD 311, [1997] 2 HKC 74 (HC).

21 [1998] 2 HKLRD 705, [1998] 4 HKC 62.

22 [1997] HKCU 356 (CACV 151/1997, 13 November 1997, unreported).

5. Relief for the Defaulting Purchaser

- 15.22 In the past, some courts in Hong Kong were prepared to rely on unconscionability as evidenced by unfair or sharp practices, to grant relief to the repudiating purchaser. This was so even in cases where the purchaser would have been denied traditional equitable relief because of his failure to be 'ready willing and able' to perform his own obligations timeously: *Health Link Investment Ltd v Pacific Hawk Investment Ltd*,²³ *Keung Shiu Tang v DH Shuttlecocks Ltd*,²⁴ *Cheung Yun-ho & Anor v Wong Kwan-cheung & Anor*,²⁵ *China Pride Investment Ltd v Silverpole Ltd*,²⁶ cf *World Ford Development Ltd v Ip Ming Wai*.²⁷ The inherent obligation of the court to 'do justice' outweighed the procedural barrier of discretionary bars. That was so until the Privy Council decided the case of *Union Eagle Ltd v Golden Achievement Ltd*²⁸ where it was said that unconscionability was not the correct ground for relief; instead, it suggested that the courts in Hong Kong should only grant relief on the basis of estoppel or restitution.

- 15.23 In *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd*,²⁹ the Court of Appeal relied on 'estoppel' as a ground of relief rather than unconscionability, even though as Nazareth VP observed:

'The conduct of the vendor and its solicitors cannot ... be other than unconscionable. ... [It was an example of] sharp practice. [T]he system in Hong Kong of binding provisional agreements ... produces a constant flow of litigation in which the ingenuity of parties and range of circumstances may well require resort to unconscionable conduct not amounting to a representation to provide the basis for equitable relief that justice may demand.'³⁰

- 15.24 The Court of Appeal (2:1) granted specific performance to the purchaser because the conduct of the vendor's solicitors had 'deluded' (Godfrey JA at 447) the purchaser's solicitors. His Lordship added that:

'What the vendor's solicitors thought they were playing at I do not know; but in the absence of any explanation otherwise, it seems to me that the only possible inference to be drawn from their conduct is that they deliberately set up the purchaser's solicitors, with a view to enabling the vendor to call off the

23 [1995] 1 HKC 249.

24 [1994] 1 HKC 286.

25 [1995] 2 HKLR 90, [1995] HKCU 292.

26 [1995] 1 HKLR 48, [1994] 2 HKC 341.

27 [1994] 2 HKLR 1, [1993] 1 HKC 98.

28 [1997] 1 HKLRD 366, [1997] 1 HKC 173.

29 [1997] 3 HKC 440.

30 *Ibid.*, at 451.